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REFLECTIONS ON THE AFRICAN UNION’S RIGHT TO INTERVENE

Ntombizozuko Dyani-Mhango*

INTRODUCTION

The African Union (“AU”) has reserved for itself a right to intervene in cases of crimes against humanity, war crimes, and genocide.1 This Article reflects on the AU’s right to intervention in order to ascertain what this right entails and also, how the AU has dealt with it so far. The AU law requires, and international law allows, for the AU to exercise its right to intervene in a member state where international crimes are being committed. In short, the AU has a legal duty to intervene, evidenced by the codification of this duty in the AU’s Constitutive Act and by the establishment of organs that play crucial roles in allowing the AU to exercise this right.

However, the AU still needs to resolve some impediments that may bar it from exercising its right to intervene in a member state in whose territory crimes against humanity, war crimes, and genocide are being committed. Among the impediments that need to be resolved is the need to clarify the meaning of the right to intervene, which is not currently defined anywhere in the AU treaties, decisions, or resolutions. Further, the AU may also be barred from exercising this right as it appears that the principles of sovereignty, non-interference, and territorial integrity of the AU member states are interpreted restrictively. The AU must deal with these issues before an attempt to exercise the right to intervene is made.

Part I of this Article explains the background to the formation of the AU and how international and African communities have addressed atrocities in Africa in the past. Part II discusses the meaning of the AU’s right to intervene, and examines the relationship between the AU and the United Nations Security Council with regard to the issues of peace and security in the African region. Part III then describes the interventions exercised by the AU so far.

I. BACKGROUND TO THE AU

The current African regional system began with the establishment of the Organization of African Unity (“OAU”). The OAU was established by the OAU Charter in May 1963.² Although the OAU Charter refers to the Universal Declaration of Human Rights in its preamble and in a provision outlining the purposes of the OAU, the priorities of the OAU Heads of State and Government (“OAU Assembly”) were not human rights.³

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(a) To promote the unity and solidarity of the African States;
(b) To co-ordinate and intensify their cooperation and effort to achieve a better life for the peoples of Africa;
(c) To defend their sovereign, their territorial integrity and independence;
(d) To eradicate all forms of colonialism from Africa; and
Instead, the OAU Assembly was “[d]etermined to safeguard and consolidate the hard-won independence, as well as the sovereignty and territorial integrity of our states, and fight against neo-colonialism in all its forms.” Therefore, the OAU Charter emphasized the sovereignty and territorial integrity of its member states, and enjoined those members from interfering in the internal affairs of other states. The following three over-riding principles guided the OAU for thirty-nine years:

First, all states were sovereign equals. Each state would have an equal say, with no greater weight given to larger or more powerful states. Second, states agreed not to interfere in the domestic affairs of fellow members. Third, territorial borders were sacrosanct, with no room for alteration in the status quo. Adoption of these principles reflected a bitter colonial experience. No longer did states want to be dominated by outsiders or risk border changes that would unleash ethnic rivalries and invite outside intervention.

(e) To promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.


4. Id. at 70.


5. See OAU Charter art. 3 (including “peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration;” “unreserved condemnation . . . of political assassination;” “absolute dedication to the total emancipation of the African territories which are still dependent;” and “affirmation of a policy of non-alignment with regard to all blocs,” as its principles). For a discussion of the principles of the OAU, see generally T.O. ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW (Richard Akinjide ed., 2d rev. ed. 1988).


7. Id. See also Naldi, supra note 3, at 2 (noting that “[a]ccount must also be taken of the fact that the States of Africa, most newly independent, jealously guarded their freedom and deeply resented any measures which hinted at external interference with their internal affairs.”); John Okpari, Policing and Preventing Human Rights Abuses in Africa: The OAU, the AU & the NEPAD Peer Review, 32 INT’L J. LEGAL INFO. 461, 462 (2004) (arguing that the OAU was formed primarily to secure “accelerated decolonization of the continent and the preservation of the territorial integrity” of the newly
Based on these principles, “heads of state avoided criticizing each other” during the OAU Assembly sessions, “which led not only to disappointment but to accusations of the OAU Assembly [as merely] a ‘Heads of State Club,’” instead of being leaders concerned with the human rights violations that were being committed in some of their territories.\(^8\) It is in this regard that the OAU was accused of being unable to curb conflicts escalating in the continent.\(^9\)

The OAU leaders have been criticized for the dismal record of African states regarding the protection of human rights.\(^10\) Even after the adoption of the African Charter on Human and Peoples’ Rights (“African Charter”)\(^11\) and the subsequent estab-


\(^9\) See P. Mweti Munya, *The Organization of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, 19 B.C. THIRD WORLD L. J. 537, 538 (1998–1999) (noting the lack of success from the OAU’s historical record in conflict resolution, and arguing: “The ink had not even dried on the [OAU] Charter before the continent was plagued by conflicts, civil wars and a myriad of other problems. The celebrated organization that many had hoped would consolidate continental security and nurture peace and stability had failed to do so.”) However, Musifiki Mwasali, *From Non-Interference to Non-Indifference: The Emerging Doctrine of Conflict Prevention in Africa*, in *THE AFRICAN UNION AND ITS INSTITUTIONS* 41, 46 (John Akokpari, Angela Ndinga-Mavumba & Tim Murithi eds., 2008), notes that “The OAU is . . . recognized for its efforts to prevent inter-state conflicts, including the Algeria-Morocco border war of 1963, the Ethiopia-Somalia border dispute of the 1970s, and the crisis in the Comoros in the late 1990s and early 2000.”

\(^10\) See, e.g., Nsonguru J. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM. U. INT’L L. REV. 1177, 1211 (2002) (noting that during the OAU era “African leaders fiddled while the edifice called ‘Africa’ was engulfed in conflagrations. Increasing political repression, denial of political choice, restrictions on freedom of association, and other human rights violations met with rare murmurs of dissent from the OAU.”); see also Nmehielle, *supra* note 1, at 412 (noting that many African states were “engaged in outrageous human rights violations under the not so watchful eyes of the [OAU]”).

\(^11\) African Charter on Human and Peoples’ Rights,
ishment of the African Commission on Human and Peoples’ Rights (“ACHPR”),12 OAU member states carried on with gross human rights violations that can often constitute international crimes. They also seemingly ignored the provisions of the African Charter and the ACHPR’s pronouncements on human rights abuses without any apparent fear of repercussions from the OAU because they perceived that the mechanisms established under the Charter were weak.13 The OAU was still occupied with addressing racism and apartheid in Southern Africa, so it was not truly concerned with the human rights violations in the territories of its member states.14 Indeed, one legal scholar argues that the African Charter was adopted as a result of the pressure from the West. 15 The only instances where the OAU was concerned with the internal affairs of the member states was when the issue pertained to colonialism, domination, and apartheid in South Africa and Southern Rhodesia (Zimbabwe).16 It is in these instances that the OAU Assembly


14. See FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA, 163 (2007) (noting that the OAU “turned a blind eye” when it came to human rights violations in member states because of the principle of “non-interference”); see also notes 16 and 17 infra discussing the OAU resolutions and decisions when it came to racism and apartheid in Southern Africa, i.e., South Africa and Zimbabwe.


16. U. Oji Umozurike, The Domestic Jurisdiction Clause in the OAU Charter, 78 AFR. AFF. 197, 202 (1979) (noting that the only two exceptions to non-interference are when questions of colonialism or apartheid arose).
was proactive and passed resolutions that expressly rejected colonialism, domination, and similar practices, and even called on its member states to assist in the liberation movements.¹⁷ One can argue that the rationale for the OAU’s behavior in these specific cases stemmed from the OAU Charter, which clearly stated that the purposes of the OAU were to fight colonization and the dominance of the colonizers.¹⁸

The African states began to realize that there was a need to respond effectively to conflicts as there was a worldwide change in the early 1990s.¹⁹ One factor that led to this change of heart

¹⁷. See, e.g., OAU, Resolutions Adopted by First Conference of Independent African Heads of State and Government Held in Addis Ababa, Ethiopia, O.A.U. Doc. CIAS/PLEN.2/REV.2 (May 22–25, 1963) (agenda items including decolonization, apartheid, and racial discrimination); see also OAU, Apartheid and Racial Discrimination, O.A.U. Doc. AHG/Res. 6(I) (July 17–21, 1964) (“[n]oting with grave concern the consistent refusal of the Government of South Africa to give consideration to appeals by every sector of world opinion and in particular the resolutions of the [U.N.] Security Council and General Assembly.”); OAU, Apartheid and Racial Discrimination in the Republic of South Africa, ¶¶ 4, 10, O.A.U. Doc. AHG/Res. 34 (II) (Oct. 21–26, 1965) (“call[ing] on all states to institute a strict embargo on the supply of arms and ammunition and other material for use by military and police forces in South Africa,” and inviting “the South African liberation movements to concert their policies and actions and intensify the struggle for full equality, and appeals to all States to lend moral and material assistance to the liberation movements in their struggle.”); OAU, Southern Rhodesia, ¶ 1, O.A.U. Doc. AHG/Res. 8(I) (July 17–24, 1964) (requesting the “African States to take a vigorous stand against a Declaration of Independence of Southern Rhodesia by a European minority government and to pledge themselves to take appropriate measures, including the recognition and support of an African nationalist government-in-exile should such an eventuality arise.”); OAU, Southern Rhodesia, ¶ 6, O.A.U. Doc. AHG/Res 25 (II) (Oct. 21–25, 1965) (resolving “to use all possible means including force to oppose a unilateral declaration of independence,” and “to give immediate assistance to the people of Zimbabwe with a view to establishing a majority government in the country.”); OAU, Territories Under Portuguese Domination, ¶ 1, O.A.U. Doc. AHG/Res 9(I) (“condemning Portugal for its persistent refusal to recognize the right of the peoples under its domination to self-determination and independence.”).

¹⁸. See OAU Charter art. 2(1)(d) (noting that one of the purposes of the OAU is “[t]o eradicate all forms of colonialism); id. art. 3(6) (including one of the principles of the OAU: “[a]bsolute dedication to the total emancipation of the African territories which are still dependent.”).

¹⁹. SAMUEL M. MAKINDA & F. WAFULA OKUMU, THE AFRICAN UNION: CHALLENGES OF GLOBALIZATION, SECURITY, AND GOVERNANCE 29 (2008) (noting that “by the early 1990s, globalization and the end of the Cold War had compelled African states to recognize the structural weakness that had prevented the OAU from responding effectively to conflicts.”).
was that “it was becoming evident that the West and the [U.N.] Security Council were not responding promptly to African problems, particularly security matters.”20 The U.N. missions in Angola21 and in Somalia,22 for example, failed to restore peace in the countries.23 As a result, it was argued that the failure of these missions led to an unwillingness on the part of the U.N. to become involved in African conflicts in general.24 One significant consequence of this reluctance by the U.N. is the failure of the international community to provide adequate troops or sufficient mandate to the U.N. Mission in Rwanda (“UNAMIR”), which was on the ground as early as 1994.25 Had the international community acted in time, the genocide and massive sexual violence against women in Rwanda would not have occurred.

Therefore, during the Ouagadougou OAU Summit in 1998, South Africa’s then President Nelson Mandela told his fellow leaders that

we must all accept that we cannot abuse the concept of national sovereignty to deny the rest of the continent the right

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20. Id.
24. Id.
and duty to intervene when behind those sovereign boundaries, people are being slaughtered to protect tyranny.  

This speech is remarkable as former President Mandela specifically defended the right to intervene in member states in the name of protecting human rights. Soon after this speech, the OAU Assembly adopted the Constitutive Act, which established the AU.  

The process leading to the adoption of the Constitutive Act and the subsequent establishment of the AU began at the Algiers Summit in 1999. At this Summit, the AU Assembly was “deeply convinced the [OAU] ha[d] played an irreplaceable role in the affirmation of political identity and the realization of the unity of our continent.” The Algiers Summit further identified new challenges for the future and urged that the continent “enter the Third Millennium with a genuine spirit of cooperation with restored human dignity and a common hope in an interdependent future for mankind.” Then came the Sirte Declaration, which was adopted during the OAU’s extraordinary summit, convened at Libya’s request, “[to deliberate] extensively on ways and means of making the OAU effective so as to keep pace with the political and economic development taking place in the world and the preparation required of Africa within the context of globalization so as to preserve its social, economic and political potentials.”

27. See Maluwa, supra note 1, at 157, (noting that the Constitutive Act was adopted by the OAU on July 11, 2000, almost two years before the inauguration of the AU). It is the author’s assumption that it was “soon after” the speech of former President Mandela that the Constitutive Act was adopted. This is based on the fact that the Constitutive Act in art. 4(h) included the right to intervene.
29. Id. ¶ 3.
30. Id. ¶ 8.
The OAU Assembly declared that it was also “determined to eliminate the scourge of conflicts, which constitutes a major impediment into the implementation of our development and integration agenda.” Thus, the pertinent part of the Sirte Declaration provides as follows:

8. Having discussed frankly and extensively on how to proceed with the strengthening of the unity of our continent and its peoples, in the light of those proposals, and bearing in mind the current situation on the continent, we DECIDE TO:

(i) Establish an African Union, in conformity with the ultimate objectives of the Charter of our continental Organization and the provisions of the Treaty Establishing the African Economic Community.

(ii) Accelerate the process of implementing the Treaty Establishing the African Economic Community, in particular:

Shorten the implementation periods of the Abuja Treaty,

Ensure the speedy establishment of all the institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice and, in particular, the Pan-African Parliament . . .

Strengthening and consolidating the Regional Economic Communities as the pillars for achieving the objectives of the African Economic Community and realizing the envisaged Union . . . .

The AU “was officially launched in Durban, South Africa and effectively replaced the OAU” on July 10–12, 2002. During the inauguration of the AU, former President Thabo Mbeki of South Africa declared the following:

Together we must work for peace, security and stability for the people of this continent. We must end the senseless conflicts and wars on our continent which have caused so much
pain and suffering to our people and turned many of them into refugees and displaced and forced others into exile.\textsuperscript{36}

This brought “hope . . . for a better future for the peoples of Africa.”\textsuperscript{37} The move from OAU to AU has been argued to be the first step for Africa to demonstrate its seriousness about protecting human rights and to maintain peace, security, and stability in Africa.\textsuperscript{38} However, not everyone saw this move as a promise by the African leaders to the Africans that the AU will take human rights seriously.\textsuperscript{39} As such, the AU was seen as “an old wine in a new wine skin.”\textsuperscript{40}

However, the Constitutive Act of the AU has provisions that clearly refer to human rights and armed conflicts in Africa. For example, the preamble stipulates that African leaders are “conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda.”\textsuperscript{41} Consequently, they are “determined to promote and protect human and peoples’ rights . . . and to ensure good governance and the rule of law.”\textsuperscript{42} Further, the Constitutive Act provides that its objectives include “promoting and protecting human and peoples’ rights in accordance with the [African Charter] and other human rights instruments.”\textsuperscript{43}

\begin{footnotesize}
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\item \textsuperscript{36} Thabo Mbeki, Chairperson of the African Union, Launch of the African Union (July 9, 2002) (transcript available at http://www.africaunion.org/official_documents/Speeches_&_Statements/HE_Thabo_Mbeki/LAUNCH%20of%20the%20African%20Union,%20July%202002.htm).
\item \textsuperscript{37} Id.
\item \textsuperscript{39} Udombana, \textit{supra} note 10, at 1258, 1259 (arguing that the AU “is not likely to take human rights seriously—even though that is greatly desired” and that the “adoption of the [Constitutive Act] has more to do with the hysteria of globalization than the euphoria of unity, or for that matter, human rights.”).
\item \textsuperscript{40} Id., at 1258.
\item \textsuperscript{41} \textit{See} Constitutive Act, at 35.
\item \textsuperscript{42} \textit{See} id.
\item \textsuperscript{43} Id. art. 3(h).
\end{itemize}
\end{footnotesize}
Like the OAU Charter, the Constitutive Act also prioritizes the principles of state sovereignty, territorial integrity, and non-interference as the Constitutive Act defends these principles as “a core objective of the [AU]”\(^{44}\) and that the AU will function in accordance with the principle “of non-interference by any Member State in the internal affairs of another.”\(^{45}\) On the other hand, unlike the OAU Charter, the Constitutive Act places limitations on state sovereignty by defining sovereignty in terms of a state’s willingness and capacity to provide protection to its nationals.\(^{46}\) Further, the end of the Cold War presented African leaders with a set of new challenges, which included the “rethinking of the principle of non-interference” in the internal affairs of another state.\(^{47}\) The African leaders’ efforts to deal with these challenges required innovation and creativity.\(^{48}\) Thus, it is not surprising that, through the Constitutive Act, the AU has reserved for itself a right to intervene in cases of crimes against humanity, war crimes, and genocide. The question remains: What does this right to intervene mean?

II. THE AU’S RIGHT TO INTERVENE, SOME POSITIVE OUTCOMES, AND SOME IMPEDIMENTS

The AU also refers to the right to intervene in the yet-to-come-into-force Kampala Convention on the protection and assistance of internally displaced persons\(^{49}\) and in decisions made

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44. See id. art. 3(b).
46. See A. Abass & M. Baderin, Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union, 49 NETH. INT’L L. REV. 1, 19 (2002). Abass and Baderin argue that: “What the AU members contracted out of by giving their consent to intervention by AU is the principle of ‘non-intervention’ . . . .” Further, “[b]y ratifying the AU Act, African states must be understood to have agreed that the AU can intervene in their affairs accordingly. In empowering the [AU] to that effect under Article 4(h), the states must be taken to have conceded a quantum of their legal and political sovereignty to the [AU].” Id.
48. See generally id. (describing challenges that African nations faced during the post-Cold War era).
49. See AU, Convention on the Protection and Assistance of the Internally Displaced Persons [hereinafter Kampala Convention], at 1–2, Oct. 23, 2009,
by the AU Assembly, which is the supreme organ of the AU.\textsuperscript{50} However, neither these treaties (the Constitutive Act and the Kampala Convention) nor the AU Assembly decisions define this right.\textsuperscript{51} As a result, some legal scholars have correctly assumed that the right to intervene confers the right to use of force and equates to the controversial humanitarian intervention (“HMI”).\textsuperscript{52} A few scholars even argue that it is preferable to insist that the AU has a duty to intervene rather than a “right,” as a “right” implies that the AU does not have to intervene when circumstances that pertain to crimes against humanity, war crimes, and genocide occur.\textsuperscript{53} A legal duty, on the
other hand, may create legal consequences for the AU if it fails to execute its obligation to intervene as compared to a discretionary "right to intervene." 54 It is important to examine the content of this right to ascertain its meaning.

According to the Constitutive Act, the criterion for the exercise of intervention by the AU is twofold: first, it may be exercised only in cases of international crimes, such as crimes against humanity, war crimes, and genocide; and second, assuming that the AU has the necessary resources (financial or otherwise) to intervene if international crimes are committed in the territory of a member state, the implication is that the AU will be willing to exercise the right to intervene. 55 The Constitutive Act does not define crimes against humanity, war crimes, and genocide as its drafters presumed that there was no need to do so, these crimes being already defined in the Rome Statute and the statutes of the international criminal tribunals for the former Yugoslavia and for Rwanda. 56 Indeed,
Professor Maluwa, the AU’s counsel at the time the Constitutive Act was drafted, explains that

[the original proposal to incorporate the right of intervention in article 4(h) of the Constitutive Act was heavily debated during the ministerial meetings that examined the draft texts in 2000. The limitation of the grounds for intervention to war crimes, genocide and crimes against humanity was predicated on the understanding that these acts are now generally recognized as violations of international law, as evidenced in the statutes of the international tribunals for Rwanda and the Former Yugoslavia, and most recently the Rome Statute of the International Criminal Court. As it presently stands, therefore, Article 4(h) is in line with current international law.]

The Rome Statute outlines a specific procedure that is to be followed before an indictment for international crimes may be issued against a perpetrator. This includes the collection and an examination of evidence and the questioning of individuals, including any victims, by the prosecution team. This process also requires the International Criminal Court (“ICC”) Pre-Trial Chamber to decide if the issuance of an arrest warrant is necessary for a particular situation.

However, for the intervention envisaged in terms of Article 4(h), the Constitutive Act does not provide a procedure to follow. It is unclear whether the AU Assembly may first conduct an investigation before determining if an intervention is necessary.

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59. See id. arts. 51, 54.

60. See id. arts. 53–58.

61. Alex J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* 78 (2009) (arguing that “the AU remains unclear about both the procedural and substantive conditions” under which the intervention would be exercised).
sary, or whether it needs to first decide to intervene before finding out if indeed international crimes were committed in a member state. Article 4(h) requires that there must be a commission of an international crime to necessitate an intervention. Also, the AU has created organs specifically for the purpose of going on fact-finding missions, enabling the AU Assembly to decide on whether to take action. Therefore, it makes sense to establish the commission of the international crime prior to intervention.

There is no institution operational yet to interpret Article 4(h) of the Constitutive Act or the AU Assembly’s decision to intervene or not to intervene. The African Court of Justice, which is one of the AU institutions, is not yet operational even though the Protocol that establishes it has been in force since 2009. Instead, the AU has decided to adopt a Protocol on

62. Dan Kuwali, The Conundrum of Conditions for Intervention Under Article 4(h) of the African Union Act, 17 AFR. SECURITY REV. 90, 93 (2008) (arguing that the Constitutive Act is “silent on how to intervene” and is “incomplete on how to decide when to intervene”). Kuwali also argues that “[a]lthough the [AU Assembly] can decide on intervention on its own initiative or at the request of a member state pursuant to article 4(j), the provision does not spell out a clear cut threshold that would warrant intervention.” Id.

63. Constitutive Act art. 4(h).

64. In particular, the AU created the Panel of the Wise, which has already conducted fact-finding missions in places such as Libya and the Darfur, and the Democratic Republic of Congo. See Dealing with Africa’s Human Rights Problems, supra note 53, at 15–16 (discussing the institutional organs of the AU relevant to the exercise of the right to intervene); see also infra Part III.B (discussing the institutional organs of the AU relevant to the exercise of the right to intervene).

65. Constitutive Act art. 5(1)(d). The AU Assembly has not appointed judges to the African Court of Justice even though the Protocol establishing the Court has reached the necessary ratifications needed in order to come into force. See note 68 infra. Instead, the AU Assembly has recently requested the AU Commission and the AfCHPR “to prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction of the [AfCHPR] and submit the study along with the Draft Protocol on the Amendments to the Protocol to the Statute of the African Court of Justice and Human Rights for consideration at the next summit slated for January 2013.” See AU, Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, ¶ 2, A.U. Doc. Assembly/AU/Dec.427 (XIX) (July 15–16, 2012).

66. The Protocol of the Court of Justice of the AU came into force on Feb. 11, 2009 after acquiring fifteen ratifications. See List of Countries Which Have Signed, Ratified/Acceded to the Protocol of the Court of Justice of the
the Statute of the African Court of Justice and Human Rights to merge the African Court on Human and Peoples’ Rights (“AfCHPR”) and the African Court of Justice into one.\(^67\) This Protocol will replace the prior protocols that established the AfCHPR and the African Court of Justice.\(^68\) The existing Protocol of the African Court of Justice provides that the African Court of Justice is the AU’s “principal judicial organ,”\(^69\) which will “function in accordance with the provisions of the [Constitution] Act and this Protocol.”\(^70\) Article 18 of the Protocol of the African Court of Justice establishes personal jurisdiction of the African Court of Justice, which includes state parties to the Protocol, the AU Assembly, and other organs of the AU as authorized by the AU Assembly.\(^71\)

The African Court of Justice has subject matter jurisdiction over the interpretation and application of the Constitutive Act;\(^72\) any question of international law;\(^73\) all acts, decisions, regulations, and directives of AU organs;\(^74\) and circumstances that would constitute a breach of an obligation owed to a state party or the AU.\(^75\) Thus, the African Court of Justice will be helpful in interpreting Article 4(h) to ascertain the meaning of intervention. However, the Constitutive Act provides that if the


\(^{68}\) Protocol of the Statute of African Court arts. 1, 2.


\(^{70}\) Id. art. 2(1).

\(^{71}\) Id. art. 18(1)(a)–(b).

\(^{72}\) Id. art. 19(1)(a).

\(^{73}\) Id. art. 19(1)(c).

\(^{74}\) Id. art. 19(1)(d).

\(^{75}\) Id. art. 19(1)(f).
organ responsible for its interpretation is not operational, the AU Assembly can assume such function as long as the decision reaches a two-thirds majority.\textsuperscript{76} This may be problematic, especially when it comes to deciding on the meaning of the right to intervene, as the AU Assembly may be embroiled in disagreements. It is therefore necessary to have an impartial body to interpret this right. However, the correct assumption has been that the AU’s right to intervene can be equated to the use of force.\textsuperscript{77} This assumption is based on the fact that, in order to exercise this right, the AU has made provisions for the establishment of an armed force whose responsibility includes intervention as contemplated in the Constitutive Act.\textsuperscript{78} Less intrusive means of intervention are listed outside this right.\textsuperscript{79}

There has not been an instance where the meaning of the AU’s right to intervention has been questioned in practical terms. One hopes that when that time comes the African Court of Justice will be fully operational.

\textit{A. The Relationship Between the AU and the Security Council on the AU’s Right to Intervene}

As mentioned above, the AU has reserved for itself a right to intervene in a member state where international crimes are being committed.\textsuperscript{80} Intervention by use of force triggers the application of the United Nations Charter.\textsuperscript{81} The U.N. Charter provides that “[a]ll Members [of the U.N.] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”\textsuperscript{82} The International Court of Justice (“ICJ”) made clear in \textit{Nicaragua v. United States} that prohibiting the

\textsuperscript{76} Constitutive Act art. 26.
\textsuperscript{77} Legal scholars have assumed that the AU’s right to intervene can mean the use of force. See \textit{When Neutrality is a Sin}, supra note 52, at 1156–57; \textit{Dealing with Africa’s Human Rights Problems}, supra note 52, at 25.
\textsuperscript{78} See, e.g., PSC Protocol art. 13(1) (establishing the African Standby Force in order to “enable the Peace and Security Council perform its responsibilities with respect to . . . intervention pursuant to [A]rticle 4(h) . . . of the Constitutive Act”).
\textsuperscript{79} See Constitutive Act art. 23(2) (providing sanctions against member states that fail to comply with the AU decisions).
\textsuperscript{80} See \textit{id.} art. 4(h), (j).
\textsuperscript{81} U.N. Charter art. 2, para. 4.
\textsuperscript{82} \textit{Id.}
use of force is a part of customary international law. 83 On the other hand, the principle of non-intervention does not apply against the U.N. Security Council when it takes enforcement measures under Chapter VII of the U.N. Charter. 84 The Security Council may, in appropriate circumstances, recommend intervention by U.N. forces or by individual states. 85 The aim of the drafters of the U.N. Charter was not only to prohibit the use of force by states under Article 2(4), but also to centralize control of the use of force in the Security Council under Chapter VII of the U.N. Charter. 86 The Security Council therefore has the primary responsibility to decide on the use of force, though that power may be delegated to regional organizations. 87

The Constitutive Act strongly implies that the AU, not the Security Council, may assume primary responsibility in cases of crimes against humanity, war crimes, and genocide in Africa. In fact, there is nothing in the AU Constitutive Act or in the


84. Article 39 of the U.N. Charter provides that “[t]he Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security.” U.N. Charter art. 39.

85. See Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects, 10 EUR. J. INT’L L. 1, 4 (1999), (“According to [the U.N. Charter] provisions, the Security Council, after having determined that a threat to the peace, breach of the peace, or act of aggression has occurred, may, if necessary, take military enforcement action involving the armed forces of the Member States. In actual UN practice, it is now common for such enforcement action to be carried out on the basis of a mandate to, or more frequently of an authorisation of, states which are willing to participate either individually or in ad hoc coalitions or acting through regional or other international organizations . . . ”); see also Richard A. Falk, Toward Authoritativeness: The ICJ Ruling on Israel’s Security Wall, 99 AM. J. INT’L L. 42, 46 (2005) (arguing that the U.N. Charter does not preclude intervention “provided it is mandated by the Security Council”).


87. See U.N. Charter arts. 52–53.
Peace and Security Council ("PSC") Protocol\textsuperscript{88} that expressly requires the AU to seek prior authorization from the U.N. Security Council before authorizing or exercising intervention. Instead, the PSC Protocol entrusts to itself the "primary responsibility for promoting peace, security and stability in Africa."\textsuperscript{89} This is in contrast with the U.N. Charter, which provides,

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.\textsuperscript{90}

On the other hand, the PSC Protocol provides as follows:

In the fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa the Peace and Security Council shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security. The Peace and Security Council shall also cooperate and work closely with other relevant UN Agencies in the promotion of peace, security and stability in Africa.

Where necessary, recourse will be made to the [U.N.] to provide the necessary financial, logistical and military support for the [AU]'s activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the [U.N. Charter] on the role of Regional Organizations in the maintenance of international peace and security.\textsuperscript{91}

These texts suggest that the AU is willing to assume the primary role when it comes to the conflicts in Africa. Only


\textsuperscript{89} PSC Protocol art. 16.

\textsuperscript{90} U.N. Charter art. 24, para. 1.

\textsuperscript{91} PSC Protocol art. 17.
when it is necessary, especially when the AU is in dire need of financial support, the AU will consider the role of the Security Council.92 African legal scholars justify this AU power by pointing to the Rwandan genocide, which “remains . . . ‘a deplorable example of [the] international community’s disinterest in the African continent,’”93 where “an estimated 800,000 Tutsis were killed in Rwanda in 1994.”94 Professor Udombana pointed out that “[t]ragically, the international community failed to forestall the genocide, despite the wide publicity given to it in the world’s media, prior to and during the pogrom.”95 He maintained that, as a result, “Africa’s desire to take urgent actions to stop massacres or serious fighting in the immediate future may trump any commitment to cooperate with the [Security Council].”96 Ben Kioko, the AU’s Legal Advisor, explained that “when questions were raised as to whether the [AU] could possibly have an inherent right to intervene other than through the Security Council, they were dismissed out of hand.”97 He argued that this decision reflects a sense of frustration with the slow pace of reform of the international community and the

92. See Kwesi Aning & Samuel Atuobi, Responsibility to Protect in Africa: An Analysis of the African Union’s Peace and Security Architecture, 1 GLOBAL RESP. PROTECT 90, 103–04 (2009) (“It is clear from the proactive interventionist language in both the Constitutive Act and the PSC Protocol that while the [AU recognizes the Security Council’s] primacy in maintaining international peace and security, . . . the AU has also reserved for itself an interventionist role that reverts to the Security Council only when the AU deems necessary.”); see also Jeremy L. Levitt, The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, in THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY, REALITY—A NEED FOR CHANGE? 213, 229–30 (Niels Blokker & Nico Schrijver eds., 2005). Levitt contends that read together, the relevant provisions of the AU Constitutive Act Articles 4(h) and (j) and the PSC Protocol Articles 4(j) and (k), 6(d), 7(e)–(g), 16(1), and 17(1) and (2) “reveal that while the AU acknowledges the ‘primary’ role of the Security Council in maintaining international peace and security, particularly in Africa, it reserves the right to authorize intervention in Africa, seeking UN involvement ‘where necessary.’” Id. (quoting PSC Protocol, supra note 45, arts. 17(1)–(2)).


94. Id.

95. Id.

96. Id. at 1176.

97. See Kioko, supra note 8, at 821.
tendency to focus attention on other parts of the world at the expense of more pressing problems in Africa. In addition, Ambassador Sam Ibok, the Director of the Peace and Security Department of the AU, stated the following:

We [the AU] are not an arm of the United Nations. We accept the UN’s global authority, but we will not wait for the UN to authorize an action that we intend to take . . . . [W]e are in tacit agreement with the [U.N.] on this and there is an understanding to that effect.

These statements show the African community’s frustration over the Security Council and the international community’s past failures to act against the atrocities committed during armed conflict in Africa. On the other hand, some scholars have argued that the provisions of the Constitutive Act and the PSC Protocol regarding the AU’s right to intervene violate Article 103 of the U.N. Charter.

The High Level Panel on Threats, Challenges, and Change (“the Ezulwini Consensus”), which was adopted by the AU in
2005, presents another perspective through “The Common African Position on the Proposed Reform of the [U.N.]” It states in clear terms the position of the AU on its relationship with the Security Council on one hand, and Article 4(h) of the AU Act vis-à-vis the U.N. Charter law on intervention on the other:

Since the General Assembly and the Security Council are often far from the scenes of the conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development conflict situations, it is imperative that Regional Organizations, in areas of proximity to conflicts are empowered to take actions in this regard. The [AU] agrees with the Panel that the intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted “after the fact” in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations . . . .

With regard to the use of force, it is important to comply scrupulously with the provisions of Article 51 of the UN Charter, which authorize the use of force only in cases of legitimate self-defense. In addition, the Constitutive Act of the African Union, in its Article 4(h), authorizes intervention in grave circumstances such as genocide, war crimes and crimes against humanity. Consequently, any recourse to force outside the framework of Article 51 of the UN Charter and Article 4(h) of the AU Constitutive Act should be prohibited.

The AU’s position implies two things. First, it shows an insistence by the AU that “even if regional organizations may decide to intervene . . . regional deliberations must take precedence

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2004) (by Anand Panyarachun et al.). The Panel affirmed that “[t]here is a growing recognition that the issue . . . [does not surround] ‘the right to intervene’ of any State, but the ‘responsibility to protect’; every state bears this right ‘when it comes to people suffering from avoidable catastrophe[s]—mass murder and rape, ethnic cleansing by forcible expulsion and terror, deliberate starvation, and exposure to disease.’” Id. ¶ 201. The Panel also recognized that “while sovereign governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so, that responsibility should be taken by the wider international community . . . .” Id.


103. The Ezulwini Consensus, supra note 102, at 6.
over global deliberations, even when relevant regional bodies decide not to act or are incapable of acting effectively.” 104 Second, this position implies that “until the Security Council has taken the measures necessary to maintain international peace and security,”105 the AU is willing to take the primary responsibility without prior authorization from the Security Council. For example, in the Darfur case, the AU played a primary role in resolving the internal armed conflict.106 It is reported that when discussing how best to respond to the crisis in Darfur, especially in the event the Sudanese government continues fail, the Security Council members from the United States, United Kingdom, Germany, Chile, and Spain referred to the AU as “bearing the primary responsibility.”107 Francis Deng “argued that since the Sudanese government had declared its hostility to U.N. intervention, the best way forward was to encourage the AU to establish a presence in Darfur with the Sudanese government’s consent.”108 Although the AU’s regional mechanism was used to block collective action through the Security Council, Deng’s viewpoint was “supported by . . . African states primarily concerned with averting [unsolicited] international intervention.”109 This episode reveals that the international community has acknowledged and recognized that the AU has taken the primary responsibility to deal with issues of peace and security in the region.

104. BELLAMY, supra note 61, at 80.
105. See U.N. Charter, art. 51.
107. See BELLAMY, supra note 61, at 79; see also S.C. Res. 1556, ¶ 2, U.N. Doc. S/RES/1556 (July 30, 2004) (The Security Council “[e]ndorses the deployment of international monitors, including the protection force envisioned by the African Union, to the Darfur region of Sudan under the leadership of the African Union and urges the international community to support these efforts . . . .”)(emphasis added).
109. See BELLAMY, supra note 61, at 79–80; see also AU, Decision on Darfur, ¶ 4, A.U. Doc. Assembly/AU/Dec.54(III) Rev.1 (July 6–8, 2004) (The Assembly “[s]tress[ing] that the [AU] should continue to lead these efforts to address the crisis in Darfur and that the International Community should continue to support these efforts [sic].”).
The relationship between the AU and the Security Council remains speculative with regard to the AU’s right to intervene. Nevertheless, as the recent history has shown, the AU has reserved for itself the primary responsibility to deal with war crimes, crimes against humanity, and genocide, which threaten peace and security in the African region. This is evident in the codification of the right to intervene in the Constitutive Act of the AU—the very instrument that created the AU. Additionally, the AU is in close proximity with the internal armed conflicts in Africa. Thus, the AU has a greater claim than the Security Council on the issues of international crimes that are committed in the territory of the AU member states and that threaten the regional peace and security.

B. The Institutional Organs of the AU Put in Place for the Exercise of the AU’s Right to Intervene

This section describes the institutional organs of the AU that are structured toward realizing the AU’s duty to intervene. Several new organs were established to enable the AU to meet these new objectives and to strengthen what others have termed a “very ambitious experiment based on the [European Union] model.” The description of the organs of the AU will show that the AU as a whole has been structured toward intervention.

Consistent with the sovereign equality principle, the annual Assembly of Heads of State and Government (“AU Assembly”) is the supreme organ that debates and decides issues, and adopts resolutions, just as it had under the OAU. It is this

110. Constitutive Act art. 4(h), (j).
111. Art. 2 of the Constitutive Act states that “[t]he [AU] is hereby established in accordance with the provisions of this Act.” Constitutive Act art. 2; see also Bryan D. Kreykes, Toward a Model of Humanitarian Intervention: The Legality of Armed Intervention to Address Zimbabwe’s Operation Murambatsvina, 32 Loy. L.A. Int’l & Comp. L. Rev. 335, 346 (2010).
112. See Constitutive Act art. 5 (listing the organs of the AU).
113. KARNS & MINGST, supra note 6, at 205.
114. See Constitutive Act art. 6; see also OAU Charter art. 8. Article 8 of the OAU Charter states that “[t]he [OAU Assembly] shall be the supreme organ of the Organization. It shall, subject to the provision of this Charter, discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization. It may in addition review the structure, functions and acts of all the organs and any specialized agencies which may be created in accordance with the present Charter.” Id.
body that must approve calls for AU intervention and give directions to the relevant organs established to deal with peace and security in Africa. To implement its decisions, the Constitutive Act allows the AU Assembly to delegate its powers to any of its organs\(^{115}\) and to establish any other organs not listed in the Constitutive Act.\(^{116}\) It is on this basis that the PSC\(^{117}\) was established. The PSC is required to work with many organs within the AU, which are in turn designed to support the PSC in playing its role of preventing conflicts and international crimes. These are organs are discussed below in this section.

The PSC is the primary decision-making organ established to prevent, manage, and resolve conflicts in Africa.\(^ {118}\) Its “collective security and early-warning arrangements facilitate [a] timely and efficient response to conflict” situations.\(^ {119}\) The AU Assembly established the PSC because of the concerns “that conflicts have forced millions of our people, including women and children, into a drifting life as refugees and internal displaced persons, deprived of their means and livelihood, human dignity and hope.”\(^ {120}\) Therefore, the PSC Protocol gives broad powers to the PSC in comparison to the Central Organ of the OAU,\(^ {121}\) which was the predecessor of the PSC.\(^ {122}\) These powers include making recommendations to the AU Assembly “pursuant to article 4(h) of the Constitutive Act, and intervention on behalf of the [AU], in a Member State in respect of grave cir-

\(^{115}\) See Constitutive Act art. 9(2).

\(^{116}\) Id. art. 5(2).

\(^{117}\) The PSC Protocol is rooted in Art. 5(2) of the AU Constitutive Act and determines that the PSC shall be “a collective security and early warning arrangement to facilitate timely and efficient response to conflict situation in Africa.” PSC Protocol art. 2(1). The PSC is therefore the primary organ of the AU tasked with conflict resolution and prevention on the continent. See id.; see also Hennie Strydom, Peace and Security under the African Union, 28 S. Afr. Y.B. Int’l L. 59, 62 (2003).

\(^{118}\) PSC Protocol art. 2(1).

\(^{119}\) Id. See Strydom, supra note 117, at 62.

\(^{120}\) PSC Protocol pmbl.

\(^{121}\) See PSC Protocol art. 3 (listing the objectives of the PSC). The Central Organ was established by the OAU Declaration on a Mechanism for Conflict Prevention, Management and Resolution (“Cairo Declaration”). See OAU, Declaration of the Assembly of Heads of State and Government on the Establishment Within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, ¶ 17, O.A.U. Doc. AHG/DECL.3 (XXIX) (June 28-30, 1993).

\(^{122}\) PSC Protocol pmbl.
cumstances, namely war crimes, genocide and crimes against humanity as defined in international conventions and instruments.”123 The AU Assembly recognizes that the “observance of human rights” and “the rule of law” are essential for the prevention of conflicts.124 In achieving its objectives, the PSC seeks guidance from the Constitutive Act, the U.N. Charter, and the Universal Declaration of Human Rights.125 The PSC Protocol also gives the PSC a wide variety of functions in a wide range of areas, including the promotion of peace and stability in Africa and intervention pursuant to the Constitutive Act.126

The PSC acts on behalf of the AU member states that are parties to the PSC Protocol.127 The PSC is composed of fifteen members, ten of which are elected for a term of two years, while the remaining five members are elected for a term of three years.128 The members are elected by the Assembly according to specifically defined criteria.129 The criteria consider moral obligations, which include the history of a particular state in curtailing the effects of conflict on the continent, the states’ own histories that relate to peace and security, and the commitment to the principles of the AU, as contained in the Constitutive Act.130

Another organ instrumental in the exercise of the AU’s right to intervene is the Panel of the Wise, which was established to support and to advise the PSC and the Chairperson of the AU Commission in their efforts in the areas of conflict prevention and in “the promotion and maintenance of peace, security, and stability in Africa.”131 The Panel of the Wise is composed of “five highly respected African personalities from various segments of society who have made outstanding contribution to the cause of peace, security and development on the conti-

123. See id. art. 7(e).
124. See id. at 3.
125. See id. art. 4.
126. Id. art. 6.
127. See id. art. 7(2).
128. Id. art. 5(1).
129. Id. art. 5(2).
130. See id. art. 5(2)(a)–(e).
131. See id. art. 11(3); see also Ademola Jegede, The African Union Peace and Security Architecture: Can the Panel of the Wise Make a Difference?, 9 AFT. HUM. RTS. L.J. 409, 409 (2009) (examining the necessity to have the Panel of the Wise in the AU peace and security architecture).
of the AU Commission to bring to the attention of the PSC any matter that “may threaten peace, security, and stability in the continent.” The AU Commission is the secretariat of the AU whose structures, functions, and regulations are determined by the AU Assembly. It is composed of the Chairperson, the deputy to the Chairperson, and various commissioners. The AU Assembly has decided that the AU Commission must be transformed into the AU Authority “to strengthen the institutional framework of the AU and to accelerate the economic and political integration of the continent.” This transformation is yet to come because the AU Assembly must still decide on the progress made by the AU Commission in dealing with this matter so far. To this end, the Chairperson of the Commission may use his or her office to “prevent potential conflicts.”

The Chairperson of the Commission also works closely with the Panel of the Wise and the regional mechanisms to prevent conflicts. The role of the Chairperson of the AU Commission with regard to peace and security matters is defined in the PSC Protocol. In this regard, the Chairperson of the AU Commission is required to “take all initiatives deemed appropriate to

132. PSC Protocol art. 11(2).
133. See Jegede, supra note 131, at 419; see also PSC Protocl art. 11(6).
134. See Jegede, supra note 131, at 419; see also PSC Protocol art. 11(4).
135. See Jegede, supra note 131, at 419.
136. PSC Protocol art. 10(2)(a).
137. Constitutive Act art. 20.
138. Id. art. 20(2).
141. PSC Protocol art. 10(2)(c).
142. Id.
143. See id. arts. 7, 10.
prevent, manage, and resolve conflicts” under the authority of
the PSC and in consultation with all the parties involved.144
Additionally, the Chairperson may bring to the Panel of the
Wise any matter he or she deems that deserve the attention of
the Panel.145 The Chairperson’s function regarding matters of
peace and security also includes implementing and following
up on the decisions of the PSC and those decisions taken by the
AU Assembly in terms of Articles 4(h) and (j) of the Constitu-
tive Act.146

The PSC Protocol also established the Continental Early
Warning System (“Early Warning System”) to “facilitate the
anticipation and prevention of conflicts.”147 The Early Warning
System includes “the Situation Room,” which is “responsible for
data collection and analysis on the basis of an appropriate ear-
ly warning indicator module” and for the “observation and
monitoring units of the Regional Mechanisms to be linked di-
rectly through appropriate means of communications to the
Situation Room . . . .148 The Chairperson of the Commission is
expected to use “the information gathered through the Early
Warning System timeously to advise the [PSC] on potential
conflicts and threats to peace and security in Africa and [to]
recommend the best course of action.”149

C. The Impediments That May Bar the AU from Exercising the
Right to Intervene

The AU functions on the basis of sovereignty, territorial in-
tegrity, and non-interference, and intervention may not occur
as easily as it sounds on paper. In this regard, a collective deci-
sion on the part of a two-thirds majority of the Assembly of the
AU is required for an intervention.150 To ascertain the chal-
lenges faced by the AU in the exercise of its right to intervene,
one must examine the relevant decisions and resolution adopt-
ed by the AU Assembly since the AU’s inception. At the same
time, these resolutions and decisions also show the positions
that the AU has taken to date when it comes to internal con-

144. Id. art. 10(1).
145. Id. art. 10(2)(b).
146. Id. art. 10(3).
147. Id. art. 12(1).
148. Id. art. 12(2).
149. Id. art. 12(5).
150. See Constitutive Act art. 7(1).
flicts in Africa. It must be recalled that the AU was established with a view to eradicate all forms of human rights violations as the African leaders recognized that there can be no peace without ensuring that human rights are protected. From this examination of the AU resolutions and decisions, the following observations can be made: First, the AU Assembly does not tolerate internal conflicts arising from unconstitutional changes of governments. This is reflected in the AU Assembly decision concerning Chad, where the AU Assembly “re-call[ed] its rejection of any unconstitutional change in accordance with the principles enshrined in the Constitutive Act of the [AU] . . . and stress[ed] that no authority that comes to power by force will be recognized by the AU.” As a result, the AU Assembly “[s]trongly condemn[ed] the attacks perpetrated by armed groups against the Chadian government and demand[ed] an immediate end to [the] attacks . . . resulting [in] bloodshed.” The language used here by the AU Assembly is clear and leaves no doubt in the minds of the parties involved as to its position. The AU may even issue sanctions against a state that does not abide by the decisions and principles of the AU. For example, sanctions were passed on the Ivory Coast during the dispute over the results of the November 2010 presidential elections. Consequently, the Ivory Coast was sus- pended from participation in the activities of the AU “until such a time the democratically elected President effectively assumes State Power.” Further, although the language was not

151. See id. at 35 (stating that the OAU Heads of State and Government were “[c]onscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the . . . need to promote peace, security and stability . . .”).
153. Id. ¶ 1 (emphasis added).
156. Id. This PSC decision was endorsed by the AU Assembly. See AU, Decision on the Report of the Peace and Security Council on its Activities and the State of Peace and Sec. in Africa, ¶ 22, A.U. Doc. Assembly/AU/Dec.338 (XVI)
as strong as in the situations in Chad and Ivory Coast, the AU Assembly did stress “the need for those involved in [human rights] violations to be held accountable” following the violence caused by the dispute of the presidential elections results in Kenya.\textsuperscript{157}

Second, the decisions adopted by the AU Assembly also demonstrate that the heads of state still have not relinquished their fear of criticizing each other, and that their reaction depends on a state involved in particular conflicts and also on the nature of the conflict.\textsuperscript{158} This is evident in the crisis in Sudan and the way the AU handled the situation.\textsuperscript{159} The language used in the decisions of the AU Assembly pertaining to the crisis in Darfur is lax compared to that of the decisions stated for the situations in Chad and Ivory Coast.\textsuperscript{160} Here, the AU Assembly “[r]eiterat[ed] its serious concern over the prevailing situation in the Darfur Region”\textsuperscript{161} and “welcome[d] the measures taken by the [Government of Sudan] to protect the civilian populations, facilitate the work of the humanitarian agencies and NGOs and provide them with unrestricted access (Jan. 31, 2011). The AU Assembly made the following decision with regard to the situation in Ivory Coast: The AU Assembly “[expresses] its deep concern at the prevailing crisis in Cote d’Ivoire following the 2\textsuperscript{nd} round of the presidential elections held on 28 November 2010, [endorse]s the PSC Communiqués and [commends] ECOWAS, the AU Commission and all the African and international leaders involved in the search for a peaceful solution to the crisis. The Assembly [encourages] the AU Commission and ECOWAS to continue with their efforts to find, as soon as possible, a solution that respects democracy and the will of the people as expressed on 28 November 2010 and preserves peace in the country.” Id.


\textsuperscript{158} See AU, Decision on Darfur, ¶ 2, A.U. Doc. Assembly/AU/Dec.54 (III) (July 6–8, 2004) (noting that “even though the humanitarian situation in Darfur is serious, it cannot be defined as genocide”) [hereinafter Decision on Darfur].

\textsuperscript{159} Id.

\textsuperscript{160} See notes 156 and 157 supra, where the language used by the AU Assembly against Chad is strong as compared to the language used against Sudan. The inference therefore is that because the Chad situation involved an armed group against the government as compared to the situation in Sudan where it is the government of Sudan at the forefront of the conflict. Id.

\textsuperscript{161} Decision on Darfur, supra note 158, ¶ 1.
to the affected populations.”162 This is in contrast with reports that the Sudanese government did not want to cooperate and that it was one of the parties that targeted civilians in this conflict.163 While the AU sent the AU Mission in Darfur164 to participate in peacekeeping, it avoided criticizing President Al Bashir or the way he dealt with the conflict as the leader.165

Third, when the international community has intervened on African issues to protect the nationals, the AU has shown dissatisfaction. For example, when the ICC issued arrest warrants against President Al Bashir, the AU Assembly adopted several decisions requesting that AU member states should not cooperate with the ICC.166 The AU even went as far as examining the

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162. Id. ¶ 3.
165. There is no resolution or decision of the AU criticizing Sudan’s handling of the situation.
posibility of the AfCHPR having the jurisdiction to deal with international crimes. This is significant because the AU Assembly has never taken any adverse decisions against the member states that referred the situations to the ICC to prosecute the opposition parties. It is therefore questionable that the AU would claim that the ICC is targeting Africans. This is also reflected by the AU Assembly’s decision to target the Lord’s Resistance Army, which is alleged to have committed atrocities in the Great Lakes Region, particularly in the Democratic Republic of Congo (“DRC”), the Central African Republic, and Southern Sudan. This decision should be commended for


168. There are no decisions or resolutions adopted by the AU that condemn the DRC and Uganda for referring the situations in their respective territories to the ICC for investigations and prosecutions.


dealing with human rights atrocities that include the use of child soldiers and sexual slavery, even if the motivation remains questionable due to its exclusive focus on crimes committed by the opposition group. Therefore, although the AU still adheres to the principles of non-interference, sovereignty, and territorial integrity with regard to its leaders—"brother leaders,"\textsuperscript{171} depending on the situation—it still passes resolutions to condemn human rights violations. Moreover, the AU has, in some instances, intervened in the territory of some member states even though the intervention was not based on the right to intervene as contemplated in the Constitutive Act.\textsuperscript{172}

III. THE AU INTERVENTIONS

The AU has not conducted extensive interventions on the continent despite the significant need for intervention. Nevertheless, it has intervened in Burundi to build peace, intervened in Darfur to enable the establishment of a more robust U.N. peace operation and to monitor the humanitarian crisis effectively, and intervened in Somalia to coordinate efforts to advance the cause of peace.\textsuperscript{173} Although these interventions are evidence of the AU’s ambition to handle issues that threaten peace and security, and to halt gross human rights violations in the continent, the AU is faced with challenges that include lack of funds and an unwillingness of states to deploy troops in areas that are deemed too dangerous.\textsuperscript{174} Further, the interventions are exercised with the state’s consent as opposed to the right to intervene without state consent.\textsuperscript{175}


\textsuperscript{171} This term is used by the AU Assembly to refer to the late Colonel Gaddafi, and the same term was also used during the OAU era to refer to the African heads of state.

\textsuperscript{172} \textit{See infra} Part IV.

\textsuperscript{173} \textit{See infra} Part IV.A–C.

\textsuperscript{174} \textit{See infra} Part IV.A–C.

\textsuperscript{175} \textit{See} Lieblich, \textit{supra} note 1, at 370–71 (arguing that the AU exercises its right to intervene in terms of Art. 4(h) of the Constitutive Act against the will of its member states).
A. AU Mission in Burundi

Like its neighboring state Rwanda, Burundi has a population made up of Hutus (85%) and Tutsis (14%), and the power struggle between these groups of people has been the same since the country’s independence. The current conflict in Burundi began in the latter half of 1993, when President Melchior Ndadaye, a Hutu, was assassinated by “soldiers from the Tutsi-dominated government army.” Mediation initiatives by former presidents Julius Nyerere (Tanzania) and Nelson Mandela (South Africa) resulted in the Arusha Peace and Reconciliation Agreement for Burundi, which was signed by the parties involved, including the Burundi government and representatives of the principal Hutu and Tutsi political parties. The agreement provided for power sharing and for a transitional period of thirty-six months, during which national assembly and presidential elections were to take place. Ceasefire agreements were signed between the transition government of Burundi and two Hutu rebel groups. However, despite the progress that had been made, one rebel group refused to engage in the peace process and continued its attacks against government forces.

During this time, the PSC was not yet operational. As a result, the OAU Central Organ approved the deployment of the

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179. Id. at 1.
181. Stef Vandeginste, Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error, 3 AFRICA SPECTRUM 63, 72 (2009).
183. The PSC was inaugurated in 2004. See U.N. Secretary-General’s, Secretary-General’s Message to the Inauguration of the Peace and Security Council of the African Union (May 25, 2004), http://www.un.org/sg/statements/index.asp?nid=943 (congratulating “the
African Mission in Burundi (“AMIB”) to support its peace process on February 3, 2003.\textsuperscript{184} AMIB “was the first operation wholly initiated, planned, and executed by the AU.”\textsuperscript{185} One of AMIB’s tasks was to protect returning politicians who would take part in the transitional government.\textsuperscript{186} AMIB was also involved in creating conditions that would allow internally displaced persons and refugees living in the eight Burundian provinces and three refugee camps in Tanzania to return to their homes.\textsuperscript{187} The objectives of the mission also included overseeing the implementation of the Ceasefire Agreements and implementing conditions that would be favorable for the establishment of a U.N. peacekeeping mission.\textsuperscript{188} South Africa, Mozambique, and Ethiopia pledged to send their troops for AMIB,\textsuperscript{189} with South Africa as the Lead Nation.\textsuperscript{190}

It is argued that despite challenges faced by AMIB during its operation, it eventually “succeeded in de-escalating a potentially volatile situation, which would likely have escalated to a violent conflict in its absence.”\textsuperscript{191} It is in this regard that “AMIB showed that the AU could play a significant role in stabilizing situations on the ground prior to U.N. deployment.”\textsuperscript{192} But, despite its relative success, AMIB faced financial constraints in its mission.\textsuperscript{193} As a result, the AU “decided that troop-contributing [states] would be responsible for the first two months of deployment, pending AU reimbursement, with the AU assuming the financial responsibility at the end of this period.”\textsuperscript{194} Thus, during the launch of the mission, only South Af-

\begin{footnotesize}
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\item[184.] AU Conflict Prevention VII, \textit{supra} note 182, ¶ 2.
\item[185.] Murithi, \textit{supra} note 177, 75.
\item[187.] \textit{Id}.
\item[188.] \textit{Id}. ¶ 5(ii).
\item[189.] \textit{Id}. ¶ 3.
\item[190.] \textit{Id}. ¶ 2.
\item[191.] Murithi \textit{supra} note 177, 75.
\item[192.] \textit{Id}.
\item[194.] \textit{Id}.
\end{itemize}
\end{footnotesize}
rica was deployed in Burundi even though Ethiopia and Mozambique had also given their commitment to send their troops. It was only after the United States and the United Kingdom contributed funds to Ethiopia and Mozambique that they were able to deploy their forces.

AMIB fulfilled “its primary objective” in March 2004. The Security Council authorized the deployment of the U.N. Operation in Burundi (“ONUB”) in May 2004. The former AMIB troops were also incorporated into ONUB, and “during the mission, the Burundi government’s transitional process was successfully concluded in September 2005, after democratic elections for the National Assembly and the Presidency, and [also] after the installation of a government in line with the power-sharing agreements outlined in the Arusha Agreement.” By December 2006, ONUB had completed its mission.

B. AU Mission in Darfur

It is argued that the armed conflict in Darfur became the “AU’s most significant test to date.” Following the escalation of the armed conflict, the Chadian government mediated between the Sudanese government and the two rebel groups: Sudan Liberation Movement (“SLM”) and Justice and Equality Movement (“JEM”). The mediation process led to the signing of a Humanitarian Ceasefire Agreement (“N’djamena Agreement”) in April 2004 between the Sudanese government, the SLM, and the JEM. The N’djamena Agreement provided for,

195. Id.
196. Id.
197. See Id. at 47 (“In March 2004, the PSC stated that AMIB had fulfilled its primary objective—the creation of a ‘conducive environment’ for the deployment of a UN peacekeeping mission—and requested the UN to take over.”); see also Murithi supra note 177, 75 (“AMIB’s crucial role in this case was to create conditions through which peace, albeit fragile, could be built in the country. By the end of its mission AMIB had succeeded in establishing relative peace to most provinces in Burundi . . . ”).
199. See Murithi, supra note 177, 76.
200. Omorogbe, supra note 23, at 47.
201. Id.
202. Murithi, supra note 177, 76.
203. See AU, Report of the Chairperson of the Commission on the Situation in Sudan (Crisis in Darfur), ¶ 18, A.U. Doc. PSC/PR/2(V) (Apr. 13, 2004); see
among other provisions, the establishment of a Ceasefire Commission composed of two high-ranking officers from the parties, the Chadian mediation, and the involvement of the international community in the mediation process.\footnote{Agreement on Humanitarian Ceasefire on the Conflict in Darfur art. 3, Apr. 8, 2004, available at http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docid=14149.}

On May 28, 2004, under the backing of the AU, the parties concluded an “Agreement on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in Darfur.”\footnote{See AU, Agreement on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in Darfur, May 28, 2004, available at http://www.iss.co.za/af/profiles/sudan/darfur/cfc/agreement.pdf.} In short, this agreement held that in order to implement the provisions in the N’Djamena Agreement, an AU Monitoring Mission composed of observers from the parties, the Chadian mediation, AU member states, and other representatives of the International Community would be the operational arm of the Ceasefire Commission.\footnote{PSC, AU, Communiqué of the Solemn Launching of the Peace and Security Council, § A(6), A.U. Doc. PSC/AHG/Comm. (X) (May 25, 2004) [hereinafter PSC Communiqué X].} This resulted in AU’s decision to establish an AU Observer Mission (“AMIS I”), the purpose of which was to protect civilian population and to monitor compliance with the ceasefire agreement.\footnote{See S.C. Res. 1556, supra note 107, ¶ 2.} The U.N. Security Council gave its support to the AU’s active and lead role in Darfur and to the deployment of AU monitors, including a protection force.\footnote{Omorogbe, supra note 23, at 49; see Protocol Between the Government of the Sudan (Gos), the Sudan Liberation Movement/Army (SLM/A) and the Justice Equality Movement (JEM) on the Enhancement of the Humanitarian Situation in Darfur in Accordance with the N’Djamena Agreement, Nov. 9, 2004, available at.} The government of Sudan, “the SLM and the JEM also signed the Abuja Protocol on Humanitarian and Security Issues” (“Abuja Protocols”) on November 9, 2004.\footnote{Omorogbe, supra note 23, at 49; see Protocol Between the Government of the Sudan (Gos), the Sudan Liberation Movement/Army (SLM/A) and the Justice Equality Movement (JEM) on the Enhancement of the Humanitarian Situation in Darfur in Accordance with the N’Djamena Agreement, Nov. 9, 2004, available at.} In
the Protocols, “the parties requested the ‘AU to urgently take
the necessary steps to strengthen AMIS I on the ground, with
the requisite mandate to ensure more effective monitoring of
the commitments . . . .”210

On May 25, 2004, the PSC approved AMIS I,211 and
“[i]nitially, AMIS I had sixty military observers (“MILOBs”) and
300 MILOB protectors.”212 Commentators have observed
that the small size of AMIS I was insufficient because it failed
to provide the “full coverage of the Darfur region,” resulting in
“ceasefire violations on all sides” and the deterioration of the
security situation.213 In response, the PSC decided to create an
enhanced mission, which became known as AMIS II. At this
time, AMIS II’s mandate and resources were strengthened
from those of its predecessor, and the PSC expanded the size of
AMIS II.214 The Security Council also supported the increased
mandate of AMIS II.215 In addition to monitoring compliance
with ceasefire agreements, AMIS II was mandated “to contrib-
ute to a secure environment for the delivery of humanitarian
relief and . . . the return of [internally displaced persons] and
refugees to their homes . . . .”216 Further, AMIS II could
“[p]rotect civilians whom it encounters under imminent threat
and in the immediate vicinity . . . .”217

Despite the commendable changes made to the AMIS II,
commentators have noted that the AU’s lack of resources pre-
vented the AMIS II from effectively carrying out its reinforced
mandate.218 Because of the challenges arising from the lack of


211. Omorogbe, supra note 23, at 49; see PSC Communiqué X, supra note 208, ¶ A(6).


213. Omorogbe, supra note 23, at 49; Zwanenburg, supra note 203, at 495.

214. See PSC, AU, Communiqué, ¶ 7, A.U. Doc. PSC/PR/Comm. (XVII) (Oct. 20, 2004) [hereinafter PSC Communiqué XVII]; see also PSC, AU, Communi-


216. PSC Communiqué XVII, supra note 214, ¶ 4.

217. Id. ¶ 6.

218. See Omorogbe, supra note 23, at 49, 53; Zwanenburg, supra note 203, at 495.
resources in early 2006, the PSC agreed to a transition from an AU to a U.N. force.219 This led to a number of resolutions that established the AU/U.N. hybrid operation in Darfur (“UNAMID”) as a joint peace support mission with a mandate to protect civilians derived from Chapter VII of the U.N. Charter.220 UNAMID assumed the mandate from AMIS II on December 31, 2007.221 This meant that the U.N. also assumed financial responsibility for the cost of AMIS forces, operating now under the single command of the U.N.222 There are differing opinions about the effectiveness of AU and U.N. efforts through UNAMID.223 One commentator has noted that the situation in Darfur will ultimately depend on the ability of the parties to reach a political settlement.224 UNAMID was extended for one year until July 31, 2012, while welcoming the intention of the Secretary-General and the AU to review the number of uniformed personnel required for effectiveness.225 The Security

219. See Omorogbe, supra note 23, at 50 (noting that the PSC supported the transition to a U.N. force as a result of “uncertainties regarding the financial stability” in the AU); see also, PSC, AU, Communiqué, ¶¶ 2–5, A.U. Doc. PSC/PR/Comm. (XLV) (Jan. 12, 2006); PSC, AU, Communiqué, ¶¶ 5–6, A.U. Doc. PSC/MIN/Comm. (XLVI) (Mar. 10, 2006).


222. Id; S.C. Res. 1769, supra note 220, ¶¶ 6–8. For a discussion of the cost of the UNAMID resources, see Omorogbe, supra note 23, at 51–52.

223. See Murithi, supra note 177, 79 (questioning this “new relationship” between the UN and the AU in this regard (UNAMID), arguing that “[i]t is too early to pass a definitive judgment on this emerging hybrid partnership,” and noting that “[t]he AU has to remain vigilant to ensure that it does not descend into a relationship of hybrid paternalism”); Tom Kabau, The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union’s Interventions, 4 GOETTINGEN J. INT’L L. 49, 67 (2012) (arguing that UNAMID “was more than a larger peacekeeping force, and not a robust enforcement force despite previous unsuccessful peacekeeping, continued civil war and mass atrocities”). Kabau attributes this to the fact that both the AU and the U.N. focused “on Sudan to consent to the deployment of troops and military equipment . . . .” Id. at 68. This was done despite the resolutions of the Security Council passed under Chapter VII of the U.N. Charter that permitted enforcement action (which did not sought consent from Sudan). Id.


Council has now decided to extend the UNAMID mandate “for a further 12 months” to July 31, 2013.226

C. AU Mission in Somalia

Since the collapse of the Somali state in 1991, various attempts have been made by both regional and international actors to find ways to resolve the armed conflict in Somalia.227 Mark Malan, writing in the late 1990s, noted that prior international interventions in Somalia failed to produce desired results and have instead created reluctance on the part of the U.N. and the international community to become involved in African conflicts generally.228 This is due to the fact that international efforts have proven to be counterproductive because of the continuous instability in Somalia.229 In 2002, the Somali National Reconciliation Process took place “under the patronage of . . . Inter-Governmental Authority on Development” (“IGAD”) with the support of the U.N., AU, European Union (“EU”), and United States.230 This process is argued to have been successful since over twenty major Somali stakeholders signed “a statement on the Cessation of Hostilities and the Structures and Principles of the Somalia National Reconcilia-

227. See Peter Pham, Somalia: Where a State Isn’t a State, 35 FLETCHER F. WORLD AFF. 133, 137 (2011) (“Since the fall of President Siyad Barre and the coterminous collapse of the Somali state in 1991, regional and international actors have tried repeatedly to find ways to resolve the armed conflict in Somalia by sponsoring extensive international peace processes, with the intention of instituting a functioning government in Mogadishu, Somalia.”). Pham also discusses the role played by the sub-regional organization Inter-Governmental Authority on Development (“IGAD”) supported by the European Union and the United States in an attempt to solve the Somali conflict. Id.; see also, Mark Malan, The Crisis in External Response, in PEACE, PROFIT OR PLUNDER: THE PRIVATIZATION OF SECURITY IN WAR-TORN AFRICAN SOCIETIES 37, 42–43 (Jakkie Cilliers & Peggy Mason eds., 1999) (discussing various international responses to the Somali situation since 1991).
228. See Malan, supra note 227, at 43 (describing the events that occurred in Somalia, including the “humiliating scenes” of the bodies of the US soldiers being subjected to public acts of outrage, and arguing that “Somalia was thus a turning point at which international community lost all desire to experiment further with ‘middle ground’ operations in Africa”).
229. See Pham, supra note 227, at 138–41 (discussing the reasons for Somalia’s failure to find peace).
230. See Id. at 137; see also Omorogbe supra note 23, at 54 (describing the “Somalia National Reconciliation Process” that took place under IGAD).
tion Process on October 27, 2002.” This led to the adoption of a Transitional Federal Charter by the Transitional Federal Government (“TFG”) in February 2004.

While the TFG had found international acclaim, it found it difficult to operate within Mogadishu. The TFG was therefore “ provisionally located in Baidoa, 250 kilometers northwest of Mogadishu.” The TFG lost its control of Somalia to the Union of Islamic Courts (“UIC”), and “[i]n June 2006, the UIC seized control of Mogadishu, and began to extend its authority over a large part of Southern Somalia.” Also during that month, the UIC established the “Supreme Council of Islamic [C]ourts, with an executive and legislative authority.” TFG and UIC agreed to engage in dialogue, but armed conflict resumed the following month, resulting in the UIC’s capture of parts of TFG’s areas of control. By September 2006, the UIC had also taken control of Kismayo, the largest city in the southern region of Somalia.

The TFG received support from Ethiopia, while UIC also enjoyed foreign support. The intensification of the armed conflict in 2006 and the participation of foreign actors increased the risk of a broader regional armed conflict. This led

234. See Omorogbe, supra note 23, at 55.
235. Pham, supra note 227, at 138.
236. Omorogbe, supra note 23, at 55; see Pham, supra note 227, at 138.
238. See id.
242. Id. ¶¶ 4, 5.
to the Security Council establishing the IGAD Mission in Somalia ("IGASOM"). According to Eki Yemisi Omorogbe, the IGASOM project was overtaken by events of December 20, 2006 when a conflict broke out again between the TFG, assisted by Ethiopian troops, and the UIC. Omorogbe also stated that “[a]lthough the TFG and Ethiopian troops forced the UIC to retreat, the TFG was not able to institute an effective authority” in Somalia. The TFG’s reliance on the presence of Ethiopian forces raised issues regarding its legitimacy in the eyes of the civilian population and their endorsement of the UIC. In addition, the UIC still posed a serious threat to TFG through Shabaab, its well-armed and well-trained elite force.

The African Union Mission in Somalia ("AMISOM") was eventually authorized by the PSC with the aim to support the TFG. The AMISOM’s mandate included support to the TFG institutions and the facilitation of the provisions of humanitarian assistance to create conditions conducive for the long-term stabilization and reconstruction of Somalia. The AMISOM received support from the Security Council. The Security Council provided AMISOM with a mandate under Chapter VII of the U.N. Charter “to take all necessary measures as appro-


244. Omorogbe, supra note 23, at 55–56.

245. Id. at 55.

246. Id. at 55–56.


249. Id. ¶¶ 5, 8.

250. S.C. Res. 1744, ¶ 4, U.N. Doc. S/RES/1744 (Feb. 21, 2007) (The Security Council decided to “authorize member States of the [AU] to establish for a period of six months a mission in Somalia,” and authorized them “to take all necessary measures as appropriate to carry out the following mandate.”).
appropriate” to support dialogue and reconciliation, to offer protection to the TFG, and to contribute to the creation of security for humanitarian assistance. However, as in Darfur, commentators have noted that the AU and U.N. efforts in Somalia have been ineffective. Much of the difficulties have to do with the lack of financial resources by the AU and of commitment from the international community. Some of the difficulties faced by the AU are also caused by member states’ reluctance to contribute their troops to a place such as Somalia, which is considered to be very dangerous.

However, the AU still continues to intervene in Somalia. Analysts are reported to have acknowledged that “the [AU] has done a better job of pacifying Mogadishu . . . than any other outside force, including 25,000 American troops in 1990s.” Further, the AU has recently received some assistance from member states such as Kenya, Ethiopia, and Sierra Leone. If the AMISOM succeeds, this may be a huge boost to the AU, as the internal armed conflict in Somalia has been ongoing for over twenty years.

D. Assessment

Interventions by the AU in the cases described above are conducted at the invitation or through the consent of the member states pursuant to Article 4(j) of the Constitutive Act. This

251. See id.


253. Omorogbe, supra note 23, at 61 (concluding that “the recent intervention in Somalia shows that the AU is unable to undertake complex peacekeeping functions without calling for UN and international assistance”).

254. Id. (citing Williams, supra note 252, at 515, 527).


256. Id.


means that the AU has not yet exercised its right to intervene as envisaged in Article 4(h) of the Constitutive Act, which does not require the consent of member states.259 This can be attributed to the fact that under the Constitutive Act, a collective decision on the part of a two-thirds majority of the AU Assembly is required for intervention purposes,260 and the AU only meets twice a year.261 Thus, intervention is not expected to take place if the two-thirds majority of the AU Assembly has not been reached, irrespective of whether international crimes mentioned in the Constitutive Act are being committed. Furthermore, “given the continent’s traditional reluctance to endorse interventionism . . . the likelihood of securing a two-thirds majority in the face of a hostile host must be considered slim at best.”262 Therefore, invoking Article 4(h) authority in order to intervene in member states could only be “time-consuming and fraught with political obstacles.”263

It appears, then, that intervention may not happen at all or may happen too late, as was the case with Rwanda,264 Darfur,265 and in Libya recently.266 On February 15, 2011, the

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260. Constitutive Act art. 7(1).
261. Id. art. 6(3) states that the Assembly meets once a year. The same provision also states that the Assembly can meet on extraordinary session requested by a member state and on approval by a two-thirds majority of the Assembly. Id. However, due to its “increasing responsibilities . . . in addressing the challenges facing the Continent,” the Assembly has decided to meet twice a year. See AU, Decision on the Periodicity of the Ordinary Sessions of the Assembly, ¶¶ 3, 4, A.U. Doc. Assembly/AU/Dec.53 (III) Rev.1 (July 6–8, 2004).
262. BELLAMY, supra note 61, 78–79.
263. Id. at 78.
264. See Alison Des Forges & Timothy Longman, Legal Responses to Genocide in Rwanda, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 49, 51 (Eric Stover & Harvey M. Weinstein eds., 2004) (observing that while genocide was being committed in Rwanda, the international community, including the OAU, continued to receive representatives of the Rwandan government committing genocide to sit in at the U.N. Security Council and OAU summit meetings).
265. The PSC formed AU High-Level Panel on Darfur to submit recommendations on “accountability and combating impunity, on the one hand, and reconciliation and healing on the other” a week after the ICC prosecutor applied for an arrest warrant against President Al Bashir and five years after the Darfur conflict broke. See PSC, AU, Communiqué of the 142d Meeting of the Peace and Security Council, ¶ 11, A.U. Doc. PSC/MIN/Comm(CXLII) Rev.1 (July 21, 2008); see also Situation in Darfur, Sudan: Prosecutor v.
masses of Libya decided to hold a peaceful demonstration seeking a regime change. The Gadhafi government responded through the use of force, leading to deaths and internal displacement of Libyan civilians. The AU formed a panel to look into the situation in Libya only a week before the Security Council passed a resolution that authorized a no-fly zone over Libya. An inference can be drawn that as a result of this delay, NATO took over the situation. This raises concerns as
to whether the AU Assembly has, in fact, changed its stance of non-intervention in internal armed conflicts.

Lack of financial resources and unwillingness by member states to contribute finances and troops hamper the work of the AU. Without proper funding, the AU will fail in its missions. Indeed, the “lack of funding for AU operations” and many member states defaulting on their annual contributions are huge obstacles to the AU’s efficient operation.\(^{272}\) It is crucial that the member states make their annual contributions to the AU’s budget, and the AU Assembly takes it seriously when the member states default on their contributions. In this regard, the Constitutive Act gives the AU Assembly the power to issue sanctions against the defaulting states.\(^{273}\) The sanctions include the “denial of the right to speak at meetings, to vote, to present candidates for any position or post within the [AU] or to benefit from any activity or commitments” within the AU.\(^{274}\) Furthermore, the missions were authorized and mandated by the Security Council.\(^{275}\) Therefore, it seems that, at least for the time being, the AU will have to rely on the U.N. assistance to carry out its mandates effectively.

CONCLUSION

The following observations can be made regarding the AU’s right to intervention: First, this discussion is evidence that Africa is making progress in dealing with international crimes that are committed during armed conflict by reserving for itself the right to intervene in a member states where such crimes are being committed. This is further evidenced by the creation of organs that aim to enable the AU to deal with international


\(^{273}\) Constitutive Act art. 23(1).

\(^{274}\) Id.

\(^{275}\) See Dealing with Africa’s Human Rights Problems, supra note 53, at 24 (discussing the AU missions authorized by the Security Council).
crimes within the region. However, this does not mean that the African community can solve these problems in isolation from the international community as a whole, as there is nothing in the U.N. Charter that states a regional organization has priority over the Security Council and that the Security Council must step aside when the regional organization decides to act locally to stop atrocities.

Second, the fact that the AU has not exercised its right to intervene pursuant to Article 4(h) of the Constitutive Act—which does not require the consent of states—shows that the AU has not completely rid itself of the impediments brought about by the principles of sovereignty which have largely crippled the OAU in the past. Thabo Mbeki, the former AU Chairperson and former President of South Africa, has said:

[We] have to agree that we cannot be ruled by a doctrine of absolute sovereignty. We should not allow the fact of the independence of each one of our countries to turn us into spectators when crimes against the people are being committed . . . . As independent states we have developed in the context of a largely unbridled respect for the notion of the national sovereignty. We must therefore foresee somewhat of a struggle to ensure that the approach adopted by the [AU] . . . wins the day.276

Thirdly, the financial situation within the AU also hinders the AU from exercising its duties, including exercising the right to intervene. Fourth and most importantly, the AU still needs to clarify what the right to intervene means. In order to do so, there is an urgent need for the AU to ensure that the African Court of Justice or the African Court of Justice and Human Rights becomes operational in order to interpret the provisions of the Constitutive Act on intervention. Once these courts are fully established, one should hope that nothing will hinder the AU from exercising its right to intervene because Africa needs the AU leaders’ guarantees that they will promptly deal with any international crimes committed in the territory of member states during armed conflict.

However, concerns about the AU’s ability to intervene come to the surface when recognizing the fact that the only time the AU is willing to act is (1) when there is an unconstitutional change in government and (2) when the international community threatens to take over the situation. Therefore, while the AU has reserved for itself a legal duty to intervene, its attitude toward such a duty raises concerns because of its apparent adherence to the principles of non-interference and territorial integrity. Simultaneously, one may also argue that unless the AU has a clear view of the meaning of the right to intervene in terms of Article 4(h), it will be hard to exercise this right.

Despite the challenges outlined above, the AU has demonstrated that it is willing to intervene in cases where internal armed conflicts threaten peace and security in Africa, as evidenced by its missions in Burundi, Sudan, and Somalia. Although the missions have either been passed to the U.N. or are still ongoing, the initial decision by the AU to undertake them demonstrate the willingness to take the primary responsibility for crimes against humanity, war crimes, and genocide committed in the African region. There is hope that in time, and through trials and tribulations, the AU may have a strong chance of dealing with those international crimes that may adversely impact the peace and security of Africa.
THE “AMERICANIZATION” OF LEGAL EDUCATION IN SOUTH KOREA: CHALLENGES AND OPPORTUNITIES

Rosa Kim

INTRODUCTION

In 2007, the South Korean government voted to adopt an American style three-year law school system and effected a radical change in the legal education process. The event marked the end of decades of debate about how best to transform a national bar exam system that averaged below a 5 percent passage rate, yielding too few practitioners to provide affordable legal services and failing to produce professionally skilled lawyers who could be competitive in the global market. For a country that currently vies for the title of “most wired” in the universe and figures prominently as a major player in the world economy, the legal education system established during the Japanese colonial period had fallen far behind these other economic and societal advances. Like other countries that have engaged in legal education reform in recent times, Korea recognized that the global legal market is headed toward standardization based on the U.S. model of legal education and training. Though ostensibly “American” in terms of style, the
newly created Korean legal education system is the culmination of much national debate and compromise, reflecting the realities of Korean politics and economics, rather than a literal duplication of a foreign system.\textsuperscript{7}

While this wholesale transformation of legal education from an “exam system” to an “education system”\textsuperscript{8} holds much promise for the future of Korean law, it is already facing serious challenges in the transition. In February 2012, the first class of graduates from the new three-year law schools entered the marketplace.\textsuperscript{9} The most immediate hurdle for the new graduates is facing a legal job market that has not yet been diversified and expanded enough to accommodate the sudden rise in the number of job seekers in the legal field, even with a quota in the number of students permitted to pass the new bar exam.\textsuperscript{10} Another major challenge of the transition is determining how best to adopt a new curricular and pedagogical approach to law teaching that may not be compatible with Korean culture. Moreover, since the old system is being phased out as the new system is being phased in, the tension between the existing bar and the new law schools and their proponents has persisted and threatens to erode public confidence in the new system.\textsuperscript{11}

As with any radical change on a big social scale, successful transformation of the legal education system in Korea will require models, especially from Europe, heavily influenced the United States, the United States has now become an exporter of legal models due to its predominance in the world economy and foreign lawyers’ interest in engaging in graduate legal studies in the United States. \textit{Id.}

\textsuperscript{7} See Tom Ginsburg, \textit{Transforming Legal Education in Japan and Korea}, 22 PENN. ST. INT’L L. REV. 433, 439 (2004). The use of quotes in the title of this Article acknowledges the reality that Korea’s reform in fact cannot be summed up in the word “Americanization” alone.


quire overcoming these and other challenges and setbacks. As difficult as the transition might be, that it is occurring at a time when American law schools are engaging in their own self-assessment and discussing possible significant changes to their system12 creates a unique opportunity for Korea to learn from the American experience and “get it right” from the outset. By taking advantage of this opportunity and integrating key lessons from American legal education, Korea can develop a new legal education model that best suits its needs.

Part I of this Article will provide background on the history of legal education in Korea to give some context for understanding the magnitude of the reform. Part II will examine the law instituting the reform, its stated mission, and key provisions. Part III will discuss the economic, cultural, and pedagogical challenges of adopting an American-style three-year law school system. Part IV will explore the opportunities afforded by Korea’s large-scale reform to fashion a new forward-looking legal education model and will then be followed by some brief concluding remarks.

I. HISTORY OF LEGAL EDUCATION IN KOREA

Understanding the historical context of legal education in Korea is essential to appreciate the magnitude of the 2007 reform. It also offers perspective regarding the difficulty of the transition that is currently taking place.

A. The Pre-Reform Model

The pre-reform legal education model in Korea, which is still in place as the new system is being phased in, consists of an undergraduate education with a law concentration,13 “cram school” to prepare for the national bar exam,14 and two years of government-sponsored training for the small number of individuals who pass the bar so that they can become judges, prosecutors, and private practitioners.15 Considered the most difficult standardized exam one can take in Korea, the national bar exam has held an “open” process, in that an undergraduate ed-

12. See infra note 138.
13. YOON, supra note 2, at 141.
14. See description of “cram schools” infra note 34 and accompanying text.
ucation is not a requirement to take the exam, though the single-digit passage rate makes it a risky career choice.16

The small minority who pass the bar exam complete a two-year apprenticeship and training at the Judiciary Research and Training Institute (“JRTI”) run by the Korean Supreme Court.17 Graduates of the JRTI receive bar licenses and are qualified to be judges, prosecutors, and private practitioners.18 The JRTI has historically emphasized training and education for judges and prosecutors, with only limited courses available for private practitioners, as the JRTI’s original purpose was to train future judges and prosecutors.19 In effect, the bar exam operates as an entrance exam for the JRTI.20 Training at the JRTI is primarily under the instruction of experienced judges, prosecutors, or private practitioners; teaching by university professors is minimal.21 In recent years, the gradual increase in the number of JRTI entrants, due to a quota increase in the number of bar passers, has changed the composition of the trainees such that the majority of JRTI graduates are now becoming private attorneys, and a minority, approximately one-fifth, judges or prosecutors.22 Thus, the JRTI’s focus on education and training for judges and prosecutors has increasingly been misplaced.23

Due to a quota system for bar passage that has strictly controlled the number of lawyers in Korea since 1949, there are relatively few lawyers per capita in Korea.24 As compared to the United States, where the ratio is 1 to 300, Korea has a ratio

16. See Jasper Kim, Socrates v. Confucius: An Analysis of South Korea’s Implementation of the American Law School Model, 10 ASIAN-PAC. L. & POL’Y J. 322, 326–27 (2009) [hereinafter Kim, Socrates v. Confucius]. In 2000, the total number of bar takers was 23,249, with 801 passing, indicating a 3% passage rate. Id. at 337.
17. See Yoon, supra note 2, at 136–37.
20. Id.
21. See Yoon, supra note 18, at 43.
22. Id. at 40.
23. See id. at 44.
of approximately 1 to 5000. In 2008, the total number of lawyers in Korea was only 10,000, with women accounting for approximately 10 percent. “The small size of the [legal] profession adds to its prestige and makes lawyers the most privileged class in Korean society.” The limited supply of lawyers, however, also means that ordinary citizens sometimes do not have access to legal services due to high fees. The elitist nature of the profession is further magnified by the reality that the Korean bar tends to be dominated by graduates of the top universities in Korea, especially Seoul National. Thus, historically, practicing lawyers in Korea have formed a “virtual oligarchic monopoly.”

To some, however, the national bar exam has served as a symbol of fairness and opportunity to achieve the career dream without formal education, as historically none was required to take the exam. There has also been no limitation on the number of times applicants can take the exam. In fact, many peo-

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25. See id.
27. Kim, Ideal and Reality, supra note 26, at 47.
28. YOON, supra note 2, at 135.
29. Yun Suh-Young, supra note 9.
30. YOON, supra note 2, at 135.
31. Ahn, supra note 15, at 227. Most famously, former President Roh Tae Woo had no college education when he successfully passed the exam and became a symbol of achieving the Korean dream. See id. Beginning in 2006, however, the Supreme Court imposed a new requirement that only those who took more than thirty-five credits of law-related college-level classes were eligible to apply for the exam. See Chang Rok Kim, The National Bar Examination in Korea, 24 WIS. INT’L L.J. 243, 245 (2006) [hereinafter Kim, National Bar Examination].
32. Kim, National Bar Examination, supra note 31, at 245.
people devote years to attempting to pass the bar because of the no-limit policy and low passage rate.33

A related criticism of the bar exam system in Korea is the presence and success of bar preparation or “cram” schools.34 A majority of Korean students studying for the bar spend time and money at these cram schools.35 Many perceive university-level study on legal subjects as inadequate preparation for the exam, and cram schools also provide much-coveted shortcuts and test-taking techniques.36 About 90 percent of successful bar exam takers attend cram schools.37

Another major problem with the national bar exam system is the disconnect between the undergraduate-level legal education and the content of the exam itself.38 Because the exam is designed to test legal theory and doctrine, which can be memorized, rather than to measure practical knowledge and professional technique, formal education is not required.39 The lack of

33. Id. at 247. Between 1983 and 2005, the average age for exam passers was around 29, indicating that the majority of passers were not first time takers. Id.

34. Wilson, supra note 24, at 337. Cram schools are a way of life in Korea. There are cram schools for all levels, even at kindergarten. See Ahn, supra note 15, at 225. Cram schools have spawned an industry that is based on the huge numbers of students studying for the national bar examination, including book stores, private libraries, and housing. See Dai-Kwon Choi, Proposed Legal Education Reform in Korea: Toward Professional Model, 18 RITSUMEIKAN L. REV. 93, 98 (2001). These bar prep “villages” are found near the country’s top universities. Id. Cram school for the bar exam has been de rigueur for the majority of applicants for the bar due to the perception that university studies failed to prepare them adequately and to the pressure created by the very quota for passage. See Mark E. Steiner, Cram Schooled, 24 WIS. INT’L L.J. 377, 381 (2006). The successful bar taker may have studied at a cram school for eighteen months or longer. Id. at 392. There are reportedly six major cram schools, each with between thirty to forty teachers, which charge a monthly tuition rate of about 300,000 won, or about US$270. See Kim, National Bar Examination, supra note 31, at 246 n.22. For those students who come from outside of Seoul and require housing and board, the monthly cost is about 900,000 won, or about US$800. See id.

35. Wilson, supra note 24, at 337.

36. Id.

37. Id.

38. YOON, supra note 2, at 135.

39. Id. The exam has three components: first, multiple choice; second, essay; and third, interview. Kim, Socrates v. Confucius, supra note 16, at 336. One must pass the first component to move on to the second, and then must pass the second component to move on to the third. Id. at n. 77. The multiple
a real link between institutional legal education and the judicial exam results in the primary focus of undergraduate legal education being on theoretical subjects that help students pass the exam, rather than on any practical education that prepares them for practice. With its emphasis on memorization rather than problem-solving, the bar exam, according to some, has not helped prepare Korean lawyers to serve as legal professionals in complex and diversified settings, including international transactions.

It is interesting to note that the vast majority of students who graduate from pre-reform undergraduate legal programs offered by many Korean universities do not enter law practice. Because the passage rate for the bar exam is so low, many choose to forego pursuing a legal career in favor of non-legal careers in corporations or government. Those who aspire to become university law professors typically pursue graduate studies, often abroad, rather than prepare for the bar exam, so only a minority of professors are admitted to practice, and there is relatively little exchange between the practicing bar and academia. The ironic result, then, is that few law professors are licensed as lawyers, yet they are responsible for teaching and preparing students for careers practicing law. Unlike the United States, only a small number of graduate students in Korea pursue careers as scholars; in fact, some male students

choice component covers constitutional law, civil law, administrative law, one elective subject, and competency in English; the essay component tests the same subjects as covered by the multiple choice component, plus commercial law, civil procedure, criminal law, and criminal procedure; the interview component includes the areas of ethics, specialized knowledge and ability to apply it, communication skills, manner and attitude, and creativity and perseverance. See Kim, National Bar Examination, supra note 31, at 244.

40. Yoon, supra note 18, at 40–41. The United States is also subject to the same critique, as noted in the Carnegie Report. See infra Part IV.

41. Yoon, supra note 2, at 136.

42. See Setsuo Miyazawa et al., The Reform of Legal Education in East Asia, 4 ANN. REV. L. & SOC. SCI. 333, 352 (2008).

43. See id.

44. See id.

45. Ahn, supra note 15, at 240. This issue has been addressed by the law creating the new law school system through a provision requiring that 20% of the law school faculty have five or more years of practical experience. See Beophak jeonmun daehakwon seolchi unyeong-e gwanhan beo-pryul [Graduate Law School Act], Act No. 8544, July 27, 2007, amended by Act No. 8852, Feb. 29, 2008, art. 16(4) (S. Kor.).
use graduate law programs as a means to defer military service until they pass the bar exam.\textsuperscript{46}

\textbf{B. The Push for Reform}

In 1987, the Korean government instituted a new Constitution, marking the beginning of a transition from an authoritarian style of government to a democratic system.\textsuperscript{47} Democratization meant that the judiciary, the branch responsible for administering the national bar exam, would have to undergo significant reform and establish itself as an entity independent of undue influence from the executive branch.\textsuperscript{48} Interestingly, the push for judicial reform came from the executive office, with the first push coming in 1995 from President Kim Young Sam, who advocated the adoption of a U.S.-style law school system to create more globally competitive legal professionals.\textsuperscript{49} While this first proposal met with opposition and failed to materialize, President Kim did successfully institute a more open approach to the bar passage quota by gradually increasing the annual cap from 300 in 1995 to 1000 in 2002.\textsuperscript{50} The quota increases began the trend that inevitably led to full-scale reform.\textsuperscript{51}

In 2003, President Roh Moo-Hyun began his term with firm initiatives to reform the judicial system to ensure that its democratization process occurred in a manner parallel to the reforms that were taking place in government.\textsuperscript{52} The Judicial Reform Committee (“Committee”) was created with a stated mission “to improve the judicial system, which . . . enhances democratic legitimacy and public trust, provides easy access to jus-


\textsuperscript{47} Yoon, \textit{supra} note 2, at 119.

\textsuperscript{48} See \textit{id.} at 121.

\textsuperscript{49} \textit{Id.} at 126, 138.

\textsuperscript{50} \textit{Id.} at 127. While the actual numbers of bar passers increased, the percentage of takers to passers remained low during this period, at about 3 percent, due to the related increase in the number of takers. Yoon, \textit{supra} note 18, at 39–40.

\textsuperscript{51} See Choi, \textit{supra} note 34, at 101. A second attempt to establish graduate law schools, in 1998 to 1999, also failed. See \textit{id.}

\textsuperscript{52} Yoon, \textit{supra} note 2, at 127–28.
tice . . . and produces qualitative and globally competitive legal professionals,” among others. The proposal to create an American-style law school system again generated a great deal of public debate, with opponents emphasizing the “American” aspect of the reform, suggesting that Korea was compromising its national character to pursue a popular international trend. Despite opposition, the Committee’s proposals led to several reforms of the judicial system, culminating in the adoption of the new law school system in 2007.

Opposition to legal education reform originated from the existing bar and a minority of law professors who had every incentive to retain the status quo, as they enjoyed the social privileges and benefits of being part of the most elite social group in Korean society. These opponents argued that the new system would devalue the bar exam and create a rapid rise in the number of lawyers, both consequences that held little advantage for existing lawyers. Moreover, the reform would necessitate a shift in the power and influence over training new law students, from the Supreme Court, which has historically run the two-year mandatory training for bar passers, to professors and universities.

There was additional opposition to the reform from judges and practicing attorneys who argued that abolishing the JRTI and dramatically increasing the size of the practicing bar, thus creating more competition, would lower the quality of legal practice. Underlying the debate was also the tension between academics, many of whom did not take or pass the bar, and

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53. Id. at 128.
54. See Wilson, supra note 24, at 338. The need for a more globalized legal industry in Korea and more access to legal services for Koreans were part of the basis for the proposal. See id. at 336–37.
56. See Choi, supra note 34, at 109.
57. See YOON, supra note 2, at 134–35, 138.
58. Id. at 136–37. The majority of law professors in Korea are not licensed to practice law and are not among the bar passers. See Kim, Socrates v. Confucius, supra note 16, at 341, n.3. For example, even at Korea’s top university, Seoul National University, only about 41% of the faculty have passed the bar exam. Id.
59. See Miyazawa et al., supra note 42, at 353.
those who passed the bar exam and were trained at the JRTI, highlighting the disparate interests between the two constituencies.60 Perhaps a more compelling argument against reform was that the new system would discriminate against those who could not afford the cost of education in the new law schools;61 however, some proponents of the law pointed to the cost associated with cram schools and the opportunity cost of the time spent—often years—on bar preparation to rebut this notion.62 Moreover, opponents also argued that the new system would go against the notion of fairness that the bar exam symbolized, in that anyone, despite long odds of passage, was eligible to take it.63 These concerns, while still voiced by some members of the Korean bar, gave way to the momentum of the pro-reform movement that ultimately resulted in the 2007 legislation outlining a new U.S.-influenced legal education model.

II. THE NEW “AMERICAN-STYLE” SYSTEM

In adopting an American-style law school system, Korea has resolved to establish a radically different model for educating and creating lawyers. Under the U.S. system, law schools are graduate-level schools responsible for training legal professionals, and the bar exam is a means to confirm and validate the mastery of law school curricula—a system that is the opposite of the pre-reform Korean system.64 The objective of this major overhaul of the legal education system has been to address the need for professional legal education and legal specialists, in addition to concerns regarding professional ethics and the relatively small size of the legal profession.65 Thus, the transition will shift Korean legal education away from high-status-but-generalist training to specialized, professional education aimed at producing lawyers ready for practice.66

60. See id.
62. See discussion supra note 34.
63. See Miyazawa et al., supra note 42, at 353.
64. Yoon, supra note 2, at 139.
66. Ginsburg, supra note 7, at 434–45.
In July 2007, the legislature passed the Graduate Law School Act ("GLSA"), a bill governing the creation and operation of new law schools. The GLSA mandated the creation of new, three-year graduate law programs at a maximum of twenty-five universities throughout Korea to be chosen through a competitive selection process. A total of forty-one schools participated. The application and selection process involved many interested schools, each frantically preparing for site visits and vying to be chosen. In January 2008, the Legal Education Committee selected the twenty-five schools that would be permitted to establish a three-year law school: fifteen universities in Seoul and ten universities in other provinces were selected in an effort to promote regional representation. The Ministry of Education set a nationwide quota of 2000 students per class, with each school assigned a maximum number of 40 to 150 students per class, depending on the size and resources of the school. The chosen universities were required to close their existing law colleges or departments, while those not chosen kept their existing law departments. The new schools may recruit only students who have completed a four-year undergraduate program, and at least one-third of the new recruits must be non-law majors to ensure diversity among the students within the programs. There is also an emphasis on English language skills for admission to the new law schools, indicating the importance of the ability to work and communicate in a global context.

68. Miyazawa et al., supra note 42, at 353–54.
70. Miyazawa, supra note 42, at 353.
71. Id.
72. Id. at 354.
73. Beophak jeonmun daehakwon seolchi unyeong-e gwanhan beo-pruyl [Graduate Law School Act], Act No. 8544, July 27, 2007, amended by Act No. 8852, Feb. 29, 2008, art. 8 (S. Kor.) There are questions regarding the future of existing undergraduate law programs, from their role in legal education overall, to the utility of a four-year undergraduate legal program that does not qualify students to sit for the bar. See Ahn, supra note 15, at 238–39.
74. Graduate Law School Act arts. 22, 26.
75. Wilson, supra note 24, at 339.
To regulate entrance into these new schools, a Korean version of the American Law School Admissions Test ("LSAT") was created, called the Legal Education Eligibility Test ("LEET"), which was administered for the first time in August 2008. As with the LSAT in the United States, students in Korea are required to take the LEET to apply to one of the new law schools. A new bar examination ("Revised Bar Exam") was also created for the first graduating class in 2012 and is expected to replace the old state bar exam in 2018. By then, it is expected that most of the role of the JRTI will shift to the new law schools. In contrast to the old exam, law school attendance is a prerequisite for sitting for the new bar exam, and the number of attempts to pass is limited to three within five years.

Similar to the bar passage rate in the United States, the passage rate under the new system was expected to be 70–80%, with those who successfully complete law school having little difficulty passing the exam. To codify this expectation, the Ministry of Justice established a passage quota of 75% in 2010, amid protests from current law school students who ad-

76. Yoon, supra note 2, at 141.
77. Wilson, supra note 24, at 339–40.
78. Kim, Socrates v. Confucius, supra note 16, at 324; Sarah Kim, First Law School Grads Face Trial over Jobs, Kor. Joongang Daily (Jan. 11, 2012), http://koreajoongangdaily.joinsmsn.com/news/article/html/913/2946913.html [hereinafter Kim, Grads Face Trial]. The first Revised Bar Exam was administered in January of 2012, id., two years after the Justice Department administered a mock version of the new bar exam. See Jeong, supra note 69, at 191. It is anticipated that the old bar exam will be replaced by 2018, and the old system completely phased out by 2020. See Kim, Grads Face Trial, supra.
79. Wilson, supra note 24, at 340.
80. Bar Examination Act [byeonhosa siheom-beop] (Law No. 9747, May 28, 2009), article 7(1).
81. Wilson, supra note 24, at 343.
82. Yoon, supra note 2, at 142. In raw numbers, this passage rate is expected to yield 1500–2000 students each year, starting in 2012. Wilson, supra note 24, at 340. Of the 1998 students that entered the new schools in 2009, 1698 students took the new exam, the rest opting to take civil service exams or choosing to forego a legal career altogether. Kim, Grads Face Trial, supra note 78.
83. Kim, Grads Face Trial, supra note 78. The 75% quota on passage of the new exam, while dramatically higher than the old state bar exam, has had a sobering effect on the prospect of obtaining legal jobs after graduation. Id.
vocated for a higher quota, for instance between 80 and 90%. The view prevailed during reform discussions that limiting enrollment numbers would enable a high bar pass rate and minimize the reliance on cram schools. The hope was that, with the bar exam taking on less importance relative to the old system, students would be able to focus more on their coursework and pursue a more diversified curriculum and practical learning opportunities, allowing for a more globally competitive legal workforce.

To achieve the ideals of the GLSA, both the content of the curriculum and the pedagogical method employed at law schools must be altered. In particular, the curriculum needs to become more globalized and diversified, offering courses taught in English and covering foreign legal systems and international law. The new emphasis on coverage of international law reflects the understanding that Korea needs to produce lawyers who have the skills necessary to deal with a globalized economic and legal community. A more diversified curriculum will allow graduates to work in a wide range of sectors, including international organizations and NGOs. There also

84. See Park Si-soo, Law School Students Threaten to Quit, KOR. TIMES (Dec. 6, 2010), http://www.koreatimes.co.kr/www/news/include/print.asp?newsIdx=77563 [hereinafter Park, Threaten to Quit].
85. See Peter A. Joy et al., Building Clinical Legal Education Programs in a Country Without a Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study, 13 CLINICAL L. REV. 417, 457 (2006). The prediction was that smaller student bodies at the new law schools would also allow the development of curricula that include lawyering skills courses and clinical education. Id.
87. Id.
88. Article 2 provides the following language: “to cultivate lawyers . . . possessing knowledge and capabilities that enable professional and efficient settlement of complicated legal disputes, with the objective of providing good legal services that meet the diverse expectations and demands of people.” Beophak jeomun daehakwon seolchi unyeong-e gwanhan beo-pryul [Graduate Law School Act], Act No. 8544, July 27, 2007, amended by Act No. 8852, Feb. 29, 2008, art. 2 (S. Kor.)
89. See Wilson, supra note 24, at 340–41.
90. Id. at 341.
91. See Jeong, supra note 69, at 177.
92. Id. at 178.
needs to be a pedagogical transition from the lecture format, with its emphasis on memorization, to more interactive teaching, including some use of the Socratic method. A main objective of the new system is to emulate what U.S. law schools typically explain as their goal in educating students: “to think like a lawyer,” which means learning skills such as research and writing, analysis, and use of hypotheticals.

The new curriculum also needs to be more practice and skills oriented. A clear statement of this intent is the provision of the GLSA requiring that at least 20% of all faculty at the new law schools have at least five years of practical experience. The GLSA also requires the new schools to provide professional training and integrate theory and practice. Specifically, they must provide the following courses: professional responsibility, legal research, legal writing, moot court, and a practical internship. Most schools will offer skills courses that cover civil, criminal, constitutional, and tax litigation, while some plan to offer clinical courses and courses in contract drafting, negotiations, and tax planning. Training lawyers to be professionals, rather than “functional bureaucrats,” requires emphasis on ethics and practical skills, hence the requirement of practical courses at the new law schools.

Finally, the reform will also address what its proponents have referred to as a problem with legal ethics. Allegations of unethical practices among judges and prosecutors, including preferential treatment to recently retired judges who represent private parties in the court where they used to sit, have fueled the demand for an emphasis on ethics and professional responsibility in legal education.

In addition to instituting a new curriculum and pedagogical approach, legal education reform also forces Korea to face the

93. Wilson, supra note 24, at 340.
94. See Kim, Socrates v. Confucius, supra note 16, at 327.
95. See id. at 327–28.
97. Wilson, supra note 24, at 341.
98. Id.
99. Id.
100. Jeong, supra note 69, at 176.
101. Miyazawa et al., supra note 42, at 352.
102. Id.
economic challenge of employing more than double the number of new lawyers each year at a time when the nature of legal employment in Korea is already changing due to the opening of its legal market to foreign businesses. Underlying these many layers of challenges is the question of cultural compatibility between the American and Korean legal systems and the best way to ensure that any clashes do not impede the success of the reform. Consequently, the reform will test Korea's ability to adapt and modify not only the way lawyers are educated and employed, but also the role they play in Korean society.

III. CHALLENGES POSED BY THE REFORM

Korea’s adoption of an American-style legal education system will no doubt run into various short and long term challenges—economic, cultural, and pedagogical. While these challenges have already begun to test Korea’s will to persevere with the reform, they are only natural, given the scale of systemic change that is being instituted. Staying committed to the reform’s goals and being open to finding effective ways to resolve these challenges will be essential in the transition.

A. Economic Challenges

The immediate problem facing the first class of graduates seems to be economic, as legal job seekers, in their increased numbers, are already facing heightened competition for jobs, and tension between the interests of traditional JRTI students and new law school students is growing. Understandably,

103. Wilson, supra note 24, at 344.
104. See, e.g., Law Loses Luster as New Attorneys Face Unemployment, CHOSUN ILBO (Aug. 28, 2009), http://english.chosun.com/site/data/html_dir/2009/08/28/20090828000354.html (reporting that more JRTI graduates have had difficulty finding employment as of 2009; starting in 2012, about 2000 graduates from the new law schools will join 1000 JRTI graduates in vying for legal jobs); Na Jeong-ju, Law School Graduates Face Grim Reality, KOR. TIMES (Aug. 1, 2011), http://www.koreatimes.co.kr/www/news/include/print.asp?newsIdx=91997 (the 2000 or so graduates from the new law schools entering the work force will face fierce competition for a limited number of jobs); Park Si-soo, Dispute Deepening over Recruitment of Prosecutors, KOREA TIMES (Mar. 2, 2011), http://koreatimes.co.kr/www/news/include/print.asp?newsIdx=82368 (JRTI trainees protested against government plans to hire prosecutors from the top students at the new law schools by boycotting the opening ceremony of the JRTI); Park, Threaten to Quit, supra note 84 (current law students rally in
those who became lawyers under the old system might feel territorial and even resentful of those who took the “easier” route and are now competing for the same positions. However, once the old bar exam and the JRTI are completely phased out, these tensions should subside. The greater challenge is to normalize the marketplace quickly to accommodate the higher number of professionally trained lawyers. The more efficiently this process can occur, the greater the likelihood that the new system will take hold and preserve the public confidence.

Arguably, the single most powerful incentive for Korean policymakers to take on legal reform has been the globalizing trends in the marketplace and the recognition that Korean lawyers are not properly trained to handle international business transactions. Just as other countries responded to economic and cultural globalization by reforming their legal education systems, Korea is also dealing with the reality of the growing number of transnational law firms in Seoul, as well as global NGOs. Under the 2007 Free Trade Agreement between Korea and the United States, the Korean legal services market began a three-stage process of liberalization in 2008. Part of the challenge for the new schools is to provide effective training for lawyers to function and compete against non-Korean legal...

105. Japan undertook a legal education reform based on the three-year graduate law school in 2004. Wilson, supra note 24, at 319. See David S. Clark, American Law Schools in the Age of Globalization: A Comparative Perspective, 61 RUTGERS L. REV. 1037, 1073–74 (2009). While Korea was the first to raise the idea to emulate the American-style system in 1995, the reform stalled because of political opposition there, and Japan was able to implement a similar reform first. Ginsburg, supra note 7, at 437. In Japan, the substantial gap between the number of law school graduates and those permitted to pass the national bar exam threatened to endanger many of the sixty-six new law schools. Id. Because Korea and Japan have had similar legal education systems, Korea can learn from the specific challenges Japan faced in its experience with legal education reform. See Wilson, supra note 24, at 341. Australia, Hong Kong, Taiwan, and the Philippines have also embarked on legal education reform towards an American-style system. Id. at 298 n.2.

106. Clark, supra note 105, at 1074.

Prior to the reform, some changes were already underway in anticipation of the market opening. For example, “since 2000, Korean law faculties have increasingly adopted certain American law school elements, such as clinics, legal ethics, and specialized courses on subjects such as international business transactions.” Also, in 2004, English became “a required subject on the Korean bar exam and the JRTI added international contracts and other international subjects to its curriculum.”

One way to achieve a synergy between the education framework and the Korean market forces would be to diversify the legal market through expanding the realm of legal employment beyond the traditional areas of criminal and civil litigation. Legal jobs must take root in sectors previously unoccupied by lawyers in Korea, such as in government and corporations. Moreover, while the newly opened Korean legal market promises to create more jobs for new graduates, an infrastructure for hiring and facilitating these placements must be prioritized. These initiatives should stem increasingly from a combined effort between law schools and prospective employers in both the private and public sectors, rather than from the Ministry of Justice. Ultimately, Korean lawyers need to be able to work in a variety of sectors, serving many different functions, rather than be limited to the three traditional types of legal jobs—judge, prosecutor, or private practitioner. Thus, achieving diversification of legal jobs to support the new legal educa-

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109. Clark, supra note 105, at 1074–75.

110. Id. Prior to 2004, applicants chose one of several language tests, namely English, French, German, Japanese, Chinese, and Spanish. Soogeun Oh, Globalization in Legal Education of Korea, 55 J. LEGAL EDUC. 525, 526 (2005).


112. See Suh-young, supra note 9. The first class of graduates from the new schools seem to be facing a job market that is unprepared to deal with the influx of a greater number of graduates. Both companies hiring in-house counsel and government departments need to develop legal positions and recruiting mechanisms to facilitate the hiring process. See id.
tion system seems critical for the Korean bar to flourish in its new form.

B. Cultural Challenges

A key issue in adopting an American-style legal education system is reconciling the institutional and cultural differences between the two countries. U.S.-educated Korean lawyers and law educators have had a considerable influence on the trend towards adopting an American-style system. An increasing number of Korean lawyers, including judges, prosecutors, academics, and practitioners, have been coming to the United States in recent years for advanced law degrees or visiting scholar positions. The heavy influence of U.S. law on Korean law—particularly in the areas of corporate, international trade, bankruptcy, maritime and insurance, intellectual property, banking and securities, and antitrust law—has propelled the increase in Korean law students studying at U.S. law schools. The Korean government and private sector employers commonly provide “one or two-year expense-paid sabbaticals for study abroad for judges, prosecutors, government bureaucrats, and corporate employees.” Most large law firms also allow associates the opportunity to study in the United States and obtain practical training in a U.S. law firm. Many Korean students acquire an LLM in American Law degree and sit for a state bar, most notably the New York bar, as a means of gaining important experience and knowledge of U.S. law and adding prestige to their resumes. For most Korean students, their experience at U.S. law schools is the first time they are

113. For example, at Seoul National University, the most competitive school in Korea whose graduates are prevalent among the bar passers, more than one-third of the law faculty have an American J.D. or LLM. See Information: Faculty Members, Seoul Nat’l U. Sch. Law, http://law.snu.ac.kr/eng/Information/01Faculty_Members.asp (last visited Oct. 24, 2012).


115. Id.

116. Id.

introduced to the Socratic method. Thus, by sheer exposure, U.S.-educated Korean law students and professors have gained a “broader and deeper global outlook and technical knowledge” of U.S.-style legal analysis.

Achieving cultural compatibility between the Korean and U.S. legal systems will require bridging the gap between the two educational systems and the cultures they reflect. The problem is one of reconciling the cultural differences between a civil law system based on Confucian values that emphasize hierarchy and inequality, and a common-law system based on a fundamental belief in social equality. For instance, in the law school context, Confucian values translate to a highly unequal relationship between professor and student, arguably making the lecture method, not the Socratic or interactive methods, the natural format for teaching. Resistance to a new, more “horizontal” relationship between professor and student can be expected in the short term, but over time, it will likely become normalized.

Moreover, the Korean legal system has a code-based civil law system, which was instituted under Japanese colonial rule and based on the German system. Given the basic differences between the two systems, one critique of the reform has been that emulating the American common law system is ill-advised because the lecture-style method is the only way to learn the large body of code-based law required by Korean law, and the differences in legal culture will make it impossible to make the transition to Socratic or other interactive methods. While some observers argue that civil law systems generally require more lecture-based courses to enable teaching a greater quanti-

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118. See Song, supra note 114, at 468.
119. See id. at 469.
120. See Chan Jin Kim, Korean Attitudes Towards Law, 10 Pac. Rim L. & Pol’y J. 1, 10–11 (2000) [hereinafter Kim, Korean Attitudes]. However, rapid “industrialization and economic development have expedited the democratization process by making the [social] structure . . . more horizontal through the emergence of the new middle class.” Id. at 20. As a result, the rule of law is becoming more integrated into daily life, and the gap between the values is narrowing. Id.
121. Kim, Socrates v. Confucius, supra note 16, at 347; see also Wilson, supra note 24, at 344–45, 348.
122. Wilson, supra note 24, at 344; Kim, Korean Attitudes, supra note 120, at 7.
123. Wilson, supra note 24, at 344.
ty of substantive law, others maintain that the overall quantity of content taught is comparable between the two systems and that there is an increasing trend of each method being integrated into the other.\textsuperscript{124}

Proponents of reform in Korea maintain that U.S. law influences international transactions related to Korean businesses, that the methodologies used in American law schools are transferable, and that common law is as broad and diverse as the law in Korea and other civil law countries.\textsuperscript{125} There is also active discussion regarding moving towards an integrated approach to teaching, so that doctrine, theory, and skills co-exist in a single course to more accurately reflect what it means to be a good lawyer.\textsuperscript{126} While ultimately a type of civil law-common law hybrid legal education system may be the most fruitful consequence of Korea’s adoption of the American system, to make the three-year law school model work in Korea there must be a willingness to adopt the broader legal culture, not just the educational framework.

\textbf{C. Pedagogical Concerns}

The cultural dissimilarities will also be evident in the differences in pedagogical approach between Korean and U.S. law teaching. A practical challenge for implementing the GLSA’s new curricular mandates is to identify educators who have the ability to put these changes into practice. For example, there will be difficulty finding full-time faculty who can teach skills-oriented courses, as full-time professors are barred from practicing law under the GLSA and practicing attorneys may not have the necessary teaching skills.\textsuperscript{127} Some have suggested that faculty at Korean law schools need to become more diversified

by hiring more foreign professors. 128 Moreover, forging closer ties with foreign law schools through exchange programs would allow students to understand legal issues in a global context, making them better able to serve those needs. 129 Greater presence of foreign professors will be helpful early in the transition, but in the long term, Korean educators must be the ones to teach the skills-oriented and specialized courses, and these courses must be integrated fully within the curriculum. To this end, it may be beneficial to provide systematic training for Korean law professors and hire additional faculty members who are practitioners. One method of gaining expertise on subjects that are new to the curriculum, such as first-year legal writing, is to have American professors teach workshops to train their Korean counterparts. 130

Korean law schools can learn from the experience and research already performed in the United States to implement curricular strategies that will produce lawyers who are more practice-ready. For example, integrating skills into traditional “doctrinal” courses across the curriculum, an idea that U.S. law schools are currently considering and implementing, 131 can be a priority from the outset, thus establishing a new “norm” for law school curricula. While Korea has the seemingly daunting dual task of transforming both the content and method of teaching law, it is in a unique position to build the curriculum “from scratch” and find the best path for meeting these goals by utilizing the research and studies that the United States has already produced. With the new law schools in operation since 2009, Korea should seize the opportunity at this early stage of the transition to integrate the skills and values U.S. educators have previously identified as being essential for good lawyering.

128. See id. at 187–88.
129. See id. at 194.
130. For an example of a U.S. faculty-led workshop on legal writing at Seoul National University, see Jo Ellen D. Lewis, Developing and Implementing Effective Legal Writing Programs in Korean Law Schools, 9 J. KOREAN L. 125, 125–26 (2009). It is important for foreign legal educators teaching U.S. methods and curricula to appreciate the existing cultural context, rather than assume that the U.S. model must fit everywhere. See James E. Moliterno, Exporting American Legal Education, 58 J. LEGAL EDUC. 274, 278 (2008).
131. Wilson, supra note 24, at 353.
IV. OPPORTUNITIES TO INTEGRATE KEY SKILLS AND VALUES

A major overhaul of the legal education system in Korea has created major challenges, but it has also created a unique opportunity for Korean law schools to define and integrate the skills and values desired in a law school graduate. Furthermore, it affords the chance to address problem areas that the United States has identified in its own legal education system.132 The mission and goal provisions of the new law make clear that the reform is designed not only to emulate the American structure of law schools, but also the underlying skills and values.133 Undertaking legal education reform at a time when the model American system itself is re-evaluating the direction of law school curricula presents an opportunity to develop and modify some of the existing aspects of the U.S. system. Korean law schools should target three specific areas for consideration: (1) greater emphasis on skills and their integration throughout the law school curriculum; (2) modified application of the case method and Socratic teaching; and (3) expansion of assessment methods to include more formative assessments.

A. Skills Integration

The American Bar Association has described fundamental lawyering skills as follows: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation, alternative dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.134 These are skills that are common to all lawyers, regardless of the particular legal tradition of their respective countries.135 Because of their importance, the recommendation of the ABA Task Force on Law Schools and the Profession is to have full-time faculty teach skills and values, because they have the time and expertise to devote to teaching and developing new pedagogical

133. Wilson, supra note 24, at 340.
methods, while maintaining the use of skilled practitioners as adjunct faculty.  

As discussed in the previous section, the GLSA mandates that the law school curriculum include skills courses in recognition of their importance in training law students as professionals. This has been a fundamental aspect of U.S. law training and central to the U.S. curriculum, but the challenge for both U.S. and Korean law schools now is to discover the best ways to integrate more skills into the law school curriculum to better train students for practice. Many U.S. law schools are currently trying to institute this integrative model based on the recommendations of a 2007 Carnegie Report. One option is to introduce skills earlier in the curriculum to encourage student engagement through greater classroom rigor. Furthermore, skills can be integrated into the curriculum such that both theory and practice are taught in the same course in recognition that skills and doctrine are not, and should not be, treated as separate or mutually exclusive.

Korean schools can also look toward including experiential learning through internships and externships at private law firms, governmental agencies, and judicial clerkships. More applied practice skills such as contract drafting and negotiations should also have a place in the curriculum. Instituting clinical programs would also greatly enhance practice skills, as they have in U.S. law programs, though there would have to be a change in the current rules under the GLSA barring faculty members from practicing law. Just as U.S. schools are looking to remedy the lack of skills integration in their own curriculum, Korean law schools can both integrate skills into the curriculum, by weaving them into doctrinal courses and offering

136. See MacCrate Report, supra note 134, at 245.
137. See supra pp. 18–19.
139. Irish, supra note 124, at 8. Early introduction of skills is contrary to the pre-reform system in Korea, where undergraduate and cram school studies focused primarily on theory and practical skills were only introduced once a student gained entry into the JRTI. See id. at 7.
140. See id. at 11.
141. See Jeong, supra note 69, at 183.
142. Id. at 188.
143. See id. at 182, 184.
specific skills classes throughout the three-year curriculum, and hold them to the same importance and status as doctrinal courses.

B. Modifying the Case Method

The second area Korean law schools should consider as they establish their new pedagogical norm is to shift the teaching methodology from lectures delivering a large quantity of substantive information to one that is aimed at engaging students in an interactive and academically rigorous environment.\textsuperscript{144} The American case-dialogue method, with a focus on teaching students how to “think like a lawyer,” stresses a way of thinking rather than a kind of knowledge and is designed to actively engage the student.\textsuperscript{145} It teaches students to theorize from natural contexts based on a defined set of facts, apply specified rules and procedures, and then draw conclusions.\textsuperscript{146} One critique of this method is the absence of a connection to actual situations that involve real people and matters of social need, justice, and morality.\textsuperscript{147} Further, the case-dialogue method limits the ability to teach “how to use legal thinking in the complexity of actual law practice” and also fails to place sufficient emphasis on “the ethical and social dimensions of the profession.”\textsuperscript{148} The value of this method, however, in actively engaging students in the classroom, is one that Korean law schools should adopt.

Even if it could be established that civil law based on codes requires teaching a greater quantity of substantive law, this would not preclude using Socratic or interactive components in classroom instruction. The exclusive use of the Socratic method in U.S. law teaching has been criticized as being overused and ineffective in cases where other teaching methods would expose students more effectively to the practice of law.\textsuperscript{149} For Korean law schools, the Socratic method, and other interactive and engaging methods, could be employed as a component of the overall methodology, rather than supplanting the lecture format.

\textsuperscript{144} Wilson, \textit{supra} note 24, at 348.
\textsuperscript{145} See Carnegie Report, \textit{supra} note 138, at 50–51.
\textsuperscript{146} See \textit{id.} at 187.
\textsuperscript{147} See \textit{id.}
\textsuperscript{148} See \textit{id.} at 188.
\textsuperscript{149} Wilson, \textit{supra} note 24, at 352–53.
entirely. Korean law educators, for example, should take an expansive approach to the traditional case method by integrating doctrine and skills to reflect the civil law system and its particular characteristics and to incorporate more practical, real-world applications.

C. Formative Assessments

The third area of focus for Korean law schools in drawing from the American experience should be the methodology for assessment in the classroom. The Carnegie Report takes to task the notion of summative assessment, namely the end-of-semester final exam, as the primary mode of assessing law students’ performance.\textsuperscript{150} Formative assessment, the converse of the summative assessment, offers opportunities to improve learning as the course proceeds and allows the instructor to make adjustments in teaching based on the results.\textsuperscript{151} If, according to the Carnegie Report, assessment is a tool to make students aware of what it requires to become competent in their field,\textsuperscript{152} this is an area that Korean schools should consider carefully, since historically the basic method of testing has been overwhelmingly of the summative type.\textsuperscript{153} Assessing students on their practical skills as well as their mastery of legal doctrine should also promote classroom engagement. Moreover, assessing students on the full breadth of their knowledge and skills on the new bar exam would help enhance the connection between law school education and the bar exam.

In striving to filter out the weaker aspects of American law school education, Korean law educators and administrators should be mindful of the issues that have dominated the conversation on legal education reform in the United States and find ways to bypass them. The effectiveness of legal education generally, and legal reform in Korea specifically, will depend on whether the new system can honor and implement these skills and values of good lawyering in a meaningful way that reflects

\textsuperscript{150} See Carnegie Report, supra note 138, at 164.
\textsuperscript{151} Id. Student feedback about the final exam model was that the nature of their studying was unrelated to their performance on the final exam. Id. at 165. Further, they reported that there was no opportunity to practice what was going to be tested, and they were not able to gauge how they were doing in the course without feedback. Id.
\textsuperscript{152} Id. at 173.
\textsuperscript{153} Wilson, supra note 24, at 350–52.
the realities of Korean law. The risk attendant to a country with a distinct history and culture adopting a new method and system of teaching law should not be underestimated. The real challenge for Korea is to incorporate the aspects of the American system that best suit its needs and recognize the cultural limitations of employing new pedagogical methods.

CONCLUSION

Korea’s legal education system has a deeply rooted history that should inform the current adoption of an American-style three-year graduate school system. A radical change in the process of educating law students will necessarily involve the types of economic, cultural, and pedagogical challenges Korea is currently beginning to face. While evidence of the difficulties of the transition fuels the national debate about the wisdom of taking on the reform in the first place, the motivation to reform should remain undeterred.

The assumption that the American three-year graduate school model is the “gold standard” as far as its ability to produce effective lawyers\textsuperscript{154} has been the foundation of Korea’s legal education reform. Ironically, Korea’s overhaul of its legal education process is occurring at a time when American law schools are reassessing their system and revamping their curricula to meet the demands of the current marketplace and create more practice-ready lawyers. Going forward, Korean educators and administrators should recognize the unique opportunities afforded by the timing of the reform. Specifically, Korea should take advantage of the knowledge gained by the U.S. legal education community’s current self-assessment to identify aspects of its own system that need improvement and modification. In this regard, Korea can incorporate the improvements and modifications from the outset and create a more effective legal education model that will yield a greater number of well-trained lawyers.

A bigger supply of qualified lawyers able to compete with their U.S. and other foreign counterparts will help Korea meet the demands of an increasingly globalized legal community, as all signs indicate that lawyers everywhere should have practical training and professional skills to bring to the table. Beyond

\textsuperscript{154} See Robert J. Rhee, On Legal Education and Reform: One View Formed from Diverse Perspectives, 70 Md. L. Rev. 310, 314 (2011).
meeting the demands of a more globalized world, legal education reform should be motivated by the desire to produce lawyers who can simply provide competent legal representation to every client.\textsuperscript{155} If Korea can keep its resolve to achieve both of these goals, its legal education reform will prove to be a major achievement in its modern history.

\textsuperscript{155} See Stuckey, supra note 135, at 675.
INTRODUCTION

Today the presence of an American lawyer in mainland China is a commonplace characteristic of contemporary Sino-American relations. In fact, as China has become an increasingly critical part of American foreign affairs, judgments

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1. See generally STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 5 (1999); RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 564 (2002).
of Chinese law are routinely cited in American commentary.\textsuperscript{2} Especially in recent decades, evaluating the role of law in China’s potential liberalization is a staple of American popular and public debates.\textsuperscript{3} Although American lawyers lament perceived deficiencies in Chinese law, they also eagerly engage the opportunities presented by China’s modern legal development. In both criticism and engagement, American lawyers express a desire or assumption that their efforts will help shape Chinese law along American lines. However, this impact is expressed with a confidence contradicted by more sober evaluations of China’s current legal reforms and the limits of American influence therein.\textsuperscript{4}

While much has been written in recent years exploring contemporary developments in Sino-American legal relations, it is quite remarkable how much has already been lost concerning America’s earlier legal history with China. It has almost been completely forgotten that, prior to 1949, China was often held out as America’s most promising foreign site for the export of American legal influence.\textsuperscript{5} This idea grew out of the larger notion that American law represented something new and vibrant to be shared with the world, a notion which had excitedly possessed the early twentieth century American legal community.\textsuperscript{6} Even amidst often contentious domestic debates on legal reform, at the turn of the century American law began to be imagined as something not only exceptional, but reducible to an identifiable set of institutions and values capable of being exported across the globe.\textsuperscript{7}

In fact, many of the challenges and debates wrestled with by contemporary American lawyers in regard to China were fore-

\begin{footnotesize}
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\item See Kroncke, supra note 3, at 509.
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grounded in key developments already well underway during the early twentieth century internationalization of American law. The Janus-faced visage of Chinese law as both an exciting new frontier and a recalcitrant challenge for the American lawyer has roots that go far deeper than China’s post-1978 reopening to global society. One vein of this deeper history, and perhaps the most striking precedent lost from this era, is the telling experience of the most famous American lawyer to serve as a legal reformer in China, namely one-time Harvard Law School Dean, and preeminent legal scholar, Roscoe Pound.

Once a great comparativist who championed American engagement with, and learning from, foreign legal experience, Pound, by the end of his career, became a parochial exporter of American law and a fervent believer in American legal exceptionalism—conceived as the idea that American law was the most advanced in the world and thus standing outside and above international legal development.8 Abandoning his early trenchant critiques of American law that employed foreign examples, Pound was swept up in the spirit of the day, which in the international arena set aside the complexities of American law for an often idealized vision of American law ready for export abroad. Pound’s tenure in China thus serves as a cautionary tale for the liabilities that such belief holds for contemporary Sino-American affairs, and America’s current relationship to foreign legal experience more broadly.

Consider then that in the summer of 1946, Pound found himself far removed from the familiar life to which he had grown

accustomed during his long tenure as one of Harvard Law School’s most prominent faculty members. In contrast to Cambridge’s summer lull, Pound was settled into a bustling expatriate neighborhood outside of Beijing, China. Much like it is today, Pound’s Beijing was awhirl, not with the rapid transformations of modern globalization, but with the intensifying Chinese Civil War that had grown out of China’s thirty years of instability after the fall of the Qing Dynasty in 1911.

As the ever-ambitious Pound had come to China in his late seventies, this new, and often chaotic, setting tried and tested his fortitude. Yet even though he was far removed from his routine academic comforts, Pound’s mind was more alive than it had been in years. With great excitement, he believed he was living out what many Americans had come to imagine for decades—China’s Americanization.9

For decades, Pound, as with the vast majority of Americans, had been informed about China’s development through contacts in the religious missionary movement. Long inundated with tales of his great fame in China by his missionary-affiliated interlocutors, Pound readily accepted the invitation of the Guomindang Party (“GMD”), then in power throughout China’s urban centers, to serve as the highest-profile legal adviser the Chinese government had employed in decades.10 Pound’s appointment represented the most heralded individual effort to date among the growing ranks of American lawyers who had begun to travel abroad as reformers with increasing frequency during the early twentieth century.11 Public officials and private citizens on both sides of the Pacific lauded his appointment with grand language. This rhetoric was particularly grandiose in America, where great fascination had been aroused concerning China’s political fate since the Chinese Republic was first announced in 1911.


10. During the 1910s, famed Progressive scholar Frank Goodnow had served as an adviser to Yuan Shikai, China’s first president after the fall of the Qing Dynasty in 1911. See Noel Pugach, Embarrassed Monarchist: Frank J. Goodnow and Constitutional Development in China, 1913–1915, 42 Pac. Hist. Rev. 499, 500–01 (1973); Kroncke, supra note 6, at 553.

Yet for all the fanfare and high expectations that this 7000 mile trek inspired in his contemporaries, Pound’s time in China is the least studied episode of his otherwise well-studied life.\footnote{Even after three major biographies and numerous close studies, scholars are continuously able to uncover new aspects of Pound’s life. See, e.g., John Fabian Witt, Patriots and Cosmopolitans: Hidden Histories of American Law 211 (2007).} In recent decades—even with American legal reformers returning to China with new vigor—Pound’s experience in China has lived on primarily as a historical curiosity, interred within an occasional academic footnote.

In theory, this forgetting could simply be the result of Pound’s ultimate failure in China. By most any measurement, Pound had little impact on Chinese law prior to the GMD’s defeat by the Chinese Communist Party (“CCP”) in 1949. But, in reality, the roots of this forgetting are more complex. They reach beyond the details of Pound’s personal efforts in China to how his reform work reflected the assumptions of the modern form of American legal exceptionalism. Pound was no longer the firebrand comparativist using foreign legal experience to improve American law; rather, he had become a putative beacon for the export of American law. The great irony of Pound’s personal failures in China is that, while they were forgotten, this export view of American law abroad was nevertheless progressively normalized throughout American legal culture.

Thus, to evaluate this forgetting one must understand that American perspectives on Pound’s appointment as a legal adviser to China reflected and informed these historic shifts concerning how American legal culture should and could relate to foreign law. Pound went to China with the expectation, shared by the larger American legal community, that as a legal adviser he could help transform the Chinese legal system, and thus Chinese society more broadly, along American lines.

In fact, Pound’s experience in China highlights how the Sino-American relationship in the early- to mid-twentieth century was an opening chapter of what is today called “law and development,” previously thought to have originated in Latin America during the 1950s and 1960s.\footnote{See David M. Trubek & Mark Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, 1974 Wis. L. Rev. 1062, 1063–66 (1974).} Moreover, Pound’s story clarifies how American legal exceptionalism shifted from its more...
rhetorical status in the eighteenth and nineteenth centuries to a set of concrete practices that directly impacted our relationship with foreign legal systems and undermined the domestic status of American comparative law.

Thus, Pound's ultimate rejection of legal cosmopolitanism expressed a very different view of the relationship of American law to foreign legal systems than had previously been the norm in American history.14 Americans had long given law a prominent place within their national identity, and exceptionalist visions of American law were at the heart of the Revolutionary spirit.15 However, the nature of Pound's particular transformative aspiration in China signaled a different manifestation of this vision where American legal institutions could be transplanted abroad to Americanize the development of foreign legal systems.16

By contrast, Pound had been educated within cosmopolitan intellectual currents prevalent in American law just decades prior to his time in China. At the beginning of his career, he had trumpeted America's embrace of an inward-looking comparative law as a key element of its dynamic capacity for legal innovation. However, when Pound came to China, he was unconcerned with what American law could learn from its Chinese counterpart. Even though Pound draped himself in rhetoric that claimed to value diverse legal traditions, his mission in China was focused on the export of his ideal version of American law.17

Pound's writings on China and his work as adviser exemplify how this new version of American legal exceptionalism grew out of the interaction between ideas about legal evolution and legal science. In popular and academic legal writing of the era,

16. See Kroncke, supra note 6, at 543–44.
American law was commonly identified as the apogee of evolutionary legal development.\(^{18}\) Further, Pound and others believed that modern American law had become so advanced because the scientific study of law, known as “legal science,” provided a methodological basis through which legal progress could be achieved using apolitical legal expertise. The fusion of the evolutionary and scientific views of law allowed Pound to make universalist claims about the methods upon which his foreign reform agenda was based, while in substance always promoting his version of American law as the normatively desirable outcome. Thus, American legal culture could be removed from the co-evolution of international legal debate and instead recast as a universal stimulus to legal development abroad.

The specific story of Pound’s time in China, as with the general story of Sino-American relations in twentieth century American legal internationalism, was obscured when the victory of the CCP in 1949 folded China into the larger framework of the Cold War. However, recovering and interpreting Pound’s time in China is important because it serves as an influential and illuminating precedent for the pitfalls of the export-driven view of American law that has become normalized today. Not only did Pound struggle, and ultimately fail, in his efforts to shape Chinese law, but he did so while grappling with the same difficulties modern American lawyers abroad recurrently face. Although his good intentions were part of the high spirit of the day, Pound influenced and echoed the marginalization of comparative law, which was in time replaced by the consistently disappointing export-driven agenda of today’s “law and development.”\(^{19}\) At the same time, Pound’s inversion of his own original openness to international legal cooperation and exchange concurrently helped popularize the transformation of American legal exceptionalism from exemplification to export.

It is important to understand that, whatever personal criticisms will be made in this Article, Pound’s time in China

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19. See Kroncke, supra note 6, at 535.
should be read primarily as a story of tragedy. Although the GMD rejected his reform agenda in total, Pound’s attachment to the project of exporting American law led him to promote a rosy picture of his work in China. Unfortunately, this distortion only fostered and helped legitimate a set of critical misjudgments about the nature of Chinese legal developments that were too readily adopted stateside. Pound’s inability to face his own failures not only misled domestic audiences about Chinese legal developments during his tenure as adviser, but rebounded into a virulent anti-Communism after 1949 that blamed America’s failure in China not on the export project itself, but on insufficient domestic support for such efforts. Ironically, Pound’s failure in China helped usher in an era where overseas legal reform efforts were woven into the basic fabric of America’s Cold War foreign policy.

To substantiate and elaborate upon this broader narrative, this Article presents the details and context of Pound’s career in Sino-American affairs. Part I outlines Pound’s early career and how he came to know and comprehend China through the missionary infrastructure that shaped Sino-American affairs of the era. Part II details his exploits during his formal tenure as legal adviser to the GMD, when he set aside his commitment to comparative law and embraced the new export-oriented view of American law abroad. Part III demonstrates how Pound’s stateside propaganda work for the GMD distorted American understandings of Chinese legal developments and their relationship to Chinese politics. Part IV reveals how Pound reacted to the events of 1949 by becoming a crusading anti-Communist who helped transform Chinese law from a vessel for American- ization to being denounced as “Communist law.” This Article concludes with the lessons that Pound’s failure hold for America’s contemporary relationship with the Chinese legal system as tied to the modern form of American legal exceptionalism and the concurrent enervation of American comparative law in American legal culture.
A. Pound’s Introduction to Chinese Law

As the oft-recounted story opens, Roscoe Pound was born in 1870 to a prominent frontier lawyer. His first love in life was natural science, and he earned a PhD in Botany from the University of Nebraska. He turned to law after only one year of study at Harvard. In 1895, following several unpleasant years in practice, he started teaching at Nebraska’s law school. During this period, Pound developed a robust critique of formal legal rights and American jurisprudence, derived mainly from his early contact with Edward Ross and a host of other Progressive thinkers, including Lester Ward, Richard Ely, and John Commons.

By 1903, Pound had risen to the deanship of the law school at the University of Nebraska. His rise to national fame followed shortly thereafter, notably after his 1906 speech to the American Bar Association (“ABA”) titled “The Causes of Popular Dissatisfaction with the Administration of Justice.” In this speech, he boldly declared that the American judiciary was in a state of marked decay—anachronistic in both its structure and its jurisprudential practices. Further, he stated that American courts were maladapted to the rapidly shifting contours of American society.

Pound was sharply critical of contemporary common law judges’ use of abstract analogical reasoning to preserve existing doctrine in the face of countervailing social change, the product of which was Pound’s jurisprudential villain, the legal fiction. This criticism framed his famous critique of the U.S. Supreme Court’s decision in *Lochner v. New York*, which rested upon liberty of contract theory and natural law. Pound’s solution to the pathologies of the American legal system was a new theory of judicial practice which he dubbed “sociological jurisprudence.”

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Pound grounded much of his early work in the aggressive championing of comparative law, and in 1908, he served as one of the first editors of the Annual Bulletin, a publication by the Comparative Law Bureau of the ABA. In doing this work, Pound asserted that America's legal experience was but one of many internationally, and as such, foreign legal traditions were a critical source of reflection for American legal reform.

At this time, Pound's star shone brightly and he was soon offered a position at Northwestern University, where his work was marked by both the reformist zeal of the day and the use of empirical social science to reform law. It was during his tenure in Chicago that Pound articulated the core aspect of his theory of sociological jurisprudence, namely that studying law as a social science could yield a consistent and coherent system of rules that should replace traditional doctrine.

In 1910, the ever-increasing popularity of Pound's work earned him another call, this time to teach at Harvard Law School. After just five colorful years in the classroom, he became Dean. His initial writings at Harvard expanded upon his critique of the American judiciary and openly expressed great faith in legal reform's ability to achieve "a continually more efficacious social engineering." During the first decades of his meteoric rise, he continued to promote his particular interests in Roman legal history and Continental legal theory, and spoke glowingly about the need to understand foreign legal history and comparative law in order to promote American legal innovation.

There is no direct evidence that Pound had any specific awareness of China during this phase of his professional life.

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23. See generally Roscoe Pound, Common Law and Legislation, 21 Harv. L. Rev. 383 (1908) (arguing that statutory law should be entitled to as much respect as common law due to statutory law's accuracy as an expression of the general will).


However, it is hard to imagine that he was wholly insulated from the popular and academic images of China which had proliferated in America in the early twentieth century, especially as he arrived in Cambridge during then Harvard President Charles Eliot’s widely touted trip to study China. The singular mention of China in Pound’s early writings is found in an article on procedural reform, in which he compares American with British consular courts in China to characteristically argue that the American courts were too formalistic and thus unresponsive to their foreign social contexts.

What is readily clear is that China’s increasingly internationalized legal elite knew of Pound. While at Harvard, he taught many students from China. These students were part of the first wave of foreign nationals to come to American for legal study. They eagerly encouraged him to visit and lecture in their home country. Pound’s most prominent early Chinese contact was John Wu, who was soon to become China’s preeminent international legal scholar. Wu’s tutelage under Pound at Harvard led to a lifelong correspondence.

Wu’s letters to Pound were full of grandiose flattery, and he told Pound that Pound’s influence and fame in China were great. For example, Wu wrote: “There is no telling how many adherents you, beloved Master, have won among the Orientals. I have heard some scholars of the younger generation say that what China needs is neither individualism nor communism but sociological jurisprudence.” Wu’s letters contained little in-
formation about China itself, and Pound seemed generally in
curious about Chinese law.\footnote{In 1928, when Pound published the fourth edition of his course outline on jurisprudence, Wu’s work on Chinese legal history was the only selection of Chinese law. See \textit{Roscoe Pound, Outlines of Lectures on Jurisprudence} 155 (4th ed. 1928).} In fact, Wu more frequently men
tioned Christianity, as he had been a product of China’s first American missionary law school, the Comparative School at Soochow.\footnote{See William P. Alford & Shen Yuanyuan, “Law Is My Idol”: John C.H. Wu and the Role of Legality and Spirituality in the Effort to Modernize China, \textit{in Essays in Honour of Wang Tieya} 43, 44 (Ronald St. John Macdonald ed., 1994). The school is sometimes referred to as Dongwu Faxueyuan or other variants reflecting institutional reorganizations and inconsistent translations from the era.}

It was not until the 1930s that Pound took a more active in
terest in China. Like most Americans during this time, he per
donally came to learn about China through his relationships with missionaries who comprised the first genuinely interna
tionalized aspect of modern American society.\footnote{Foreign reform efforts were thus closely related in concept to the broader Progressive project of engineered legal change, and also exhibited the same consonance with the secular aspects of the Social Gospel. See \textit{Jerry Israel, Progressivism and the Open Door: America and China, 1905–1921}, at 15–22 (1971).} Pound came to understand Chinese affairs, as had America, through the pub
clic relations infrastructure of the missionary movement, an infra
cstructure that predated the formal American diplomatic service or other systemic institutional presence of Americans abroad.\footnote{See Margaret B. Denning, \textit{The American Missionary and U.S. China Policy During World War II}, \textit{in United States Attitudes and Policies Towards China: The Impact of American Missionaries} 211, 211 (Patricia Neils ed., 1990).} Not coincidentally, American missionaries, many trained as both lawyers and theologians, had been some of the first to argue for the catalytic power of transplanting American legal institutions abroad.\footnote{These missionaries believed the placement of American legal institutions abroad might allow America to distinguish its international influence from that of the European colonial powers, particularly the British. See \textit{generally Amy Kaplan, The Anarchy of Empire in the Making of U.S. Culture}}
idea more focused than on China, the centerpiece of American missionary prestige and fundraising campaigns.\footnote{35 See, e.g., KENNETH SCOTT LATOURETTE, A HISTORY OF CHRISTIAN MISSIONS IN CHINA 744 (1932) (describing “unprecedented levels” of American missionaries in China after the end of World War I).}

More specifically, since the early 1930s, Pound had been on various missionary mailing lists focused on China. In 1932, he was asked by W.G. Cram, General Secretary of the Methodist Episcopal Board of Missions, to act as a trustee of the Comparative School at Soochow, a post which he quickly accepted.\footnote{36 POUND PAPERS, supra note 28, at Part 3, Reel 22, 880, 888.} Cram told Pound about the school’s project: spreading “Christian influence” in China through legal reform.\footnote{37 “It is intended to organize such an appeal among the Christian lawyers in America in order that they may, as a gesture of international goodwill, give this Comparative Law School to our sister Republic of China.” Id. at Part 3, Reel 22, 880.}

Pound’s relationship with Soochow set the stage for his first two trips to China in 1935 and 1937.\footnote{38 Alison W. Conner, The Comparative Law School of China, in UNDERSTANDING CHINA’S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 210, 238 (C. Stephen Hsu ed., 2003); POUND PAPERS, supra note 28, at Part 3, Reel 99, 815. See also Anna Ginsbourg, Roscoe Pound—An Appreciation and a Tribute, CHINA WKLY. REV., Apr. 24, 1937, at 12.} In the early 1940s, Pound maintained his missionary connections, most notably when he accepted an advisory position with Harvard’s sister university in China, the missionary-funded and administered Yenching University.\footnote{39 The first record of Pound’s missionary correspondence was from Charles Ernst Scott of the North China Theological Seminary. POUND PAPERS, supra note 28, at Part 3, Reel 90, 729; Id. at Part 3, Reel 100, 738.} This background reveals that Pound’s invitation to serve as legal adviser to the GMD had a much more developed foundation than has been generally acknowledged.

In the same way that his time in China has been given short shrift by his biographers, Pound’s strong personal beliefs about the relationship between American law and religion have also
gone largely unexamined. The relationship of early twentieth century social-scientific thought to religion was a complicated affair that found diverse resolutions for even the most committed champions of scientific reason. The link between Progressivism and the Social Gospel movement championed by mainstream Protestant churches has a long scholarly pedigree, with both of these early twentieth century American social movements tied to a common faith in human progress.

It is noteworthy that in his early work Pound made scant mention of neither Christianity specifically nor religion more generally. It was not until later in his career that he clarified his belief in the connection between Christianity and American law, even calling for a revival to reinvest American law with religious morality. Tying religion to his own theories of legal change, he further claimed that the influence of Christianity was central to the evolutionary progress of modern society. He ultimately cited the centrality of religion to the legal order as the “acid test” of a society’s quest for longevity.

40. Michael Willrich claims that Pound saw a great deal of his reform work as necessary because the state had taken over broad responsibility for regulating society in lieu of Christian institutions. See WILLRICH, supra note 22, at 112–13.


42. In brief, the Social Gospel was a U.S. movement that emphasized social activism and reform work as a key expression of religious faith and as an important modern means of evangelical proselytization.

43. The specific relationship between American legal development and religious ideas, however, remains generally understudied. But see HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 31 (1983) (“It was the American and French revolutions that set the stage for the new secular religions—that is, for pouring into secular political and social movements the religious psychology as well as many of the religious ideas that had previously been expressed in various forms of Catholicism and Protestantism.”); HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 16 (2003) (describing American law as a combination of “two conflicting belief systems—Puritanism, traditionalism, and communitarianism versus Deism, rationalism, and individualism . . . .”).


45. Id. at 170 (“[R]eligion and morals and law [have] harnessed human nature to make it a servant of civilization.”).

Deeper investigation reveals that Pound had been well immersed in the idea that America’s divine purpose was to improve the world in its own image. Further, the secular application of religious purpose was a central tenet of the modern Freemason movement in America, of which Pound was an active member. Pound served as Master of his Lodge in Lincoln, and later founded Harvard’s chapter. Pound clearly articulated his Freemason beliefs in a series of lectures delivered in 1915, in which he emphasized the importance of the inspired individual acting out the divine will by helping societies progress evolutionarily. Pound continued to lecture on Freemasonry throughout his legal career.

That such sentiments were submerged in Pound’s general writings, and have not been recognized as part of his intellectual legacy. But more concretely, this missionary influence helps contextualize one important vector of how Pound was pulled into an export mentality. Pound, along with his missionary interlocutors, wedded altruism to the practice of modern science. And like even the most open-minded missionary, Pound was ultimately involved abroad with a predetermined endpoint—the export of his area of passion and expertise.

B. Pound’s Arrival in China

Pound was seventy-seven years old when he retired from Harvard in 1946, ending nearly fifty years of teaching. Weary from his battles with Karl Llewellyn over the rise of Legal Realism, Pound was quite unsentimental about his retirement. At the same time, China was wracked by political instability, as the GMD faced increasing pressure from the rural support of

47. Roscoe Pound, Contemporary Juristic Theory 2–3 (1940) (recounting a story from Pound’s childhood about America’s divine mission in the world).
49. See Roscoe Pound, Lectures on the Philosophy of Freemasonry 73–88 (1915). Any serious attempt to evaluate Pound’s intellectual history ought to delve into the significance of this consistent belief in Pound’s life. It is sufficient to note that Pound saw himself as part of Freemasonry’s larger mission as “[A]n organization of human effort along the universal lines on which all may agree in order to realize our faith in the efficacy of conscious effort in preserving and promoting civilization.” Id. at 86.
the CCP. In the years prior to Pound’s retirement, the GMD had begun to face increasing American criticism for its legal and political practices, which had initially formed the very basis of America’s broad faith in China’s commitment to Americanization.

The extant GMD legal system reflected the Qing dynasty’s decision to primarily follow civil law models, explicitly infused with Leninist influences. As with Soviet law more generally, the GMD’s constitution and legal system placed few restrictions on executive or prosecutorial power. The GMD leadership came to use this freedom quite often to exert dictatorial authority over its subjects. As a result, in the post-World War II era, many American observers in China began to question the GMD’s commitment to American liberal legalism, and consequently the utility of continued American support for the GMD.

Concurrently, Pound had not only maintained his interest in China but had become a strong critic of Progressive legal thought, casting it as at odds with the common law tradition he had grown famous for criticizing. He still favored social science, but felt that the work of legal scholars was to provide empirical facts and social theories for common law judges to use in specific cases and not to replace judicial work in total. Current studies of Pound are generally compelled to ascertain whether this change was in fact a great reversal and to divine some version of Pound’s true intellectual commitments. A pop-

51. “That an engineering interpretation might be put to ill use I shall not deny. But for a season the dangers are in another direction.” ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 164 (1923) [hereinafter POUND, INTERPRETATIONS]. “We must not allow our faith in the efficacy of effort to blind us to the limitations upon the efficacy of conscious effort in shaping the law so as to do the whole work of social control.” ROSCOE POUND, THE TASK OF LAW 89 (1944). See also George B. Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 NW. U. L. REV. 1557, 1590–93 (1996) (describing Pound’s attacks on the New Deal agencies and the connection he drew between such Progressivism and communist thought).

52. It was Pound’s emphasis on judicial decision-making that specifically placed him at odds with Progressives, who often saw judges primarily as obstacles to the implementation of progressive legislation and the smooth functioning of administrative governance. See generally HULL, supra note 20 (providing an overview of Pound’s sociological jurisprudence and its relationship with Progressivism).
ular theme in these evaluations dwells on Pound’s thirst for the spotlight and his constant need for personal affirmation. By contrast, others have focused on various periods of Pound’s life as different expressions of his ever unresolved intellectual contradictions.

Thus, while most biographers discuss Pound’s trip to China in passing, they often do so only as a fleeting return to a lost enthusiasm for the social engineering of his early career. To some degree this is true, since Pound saw in China a new laboratory and proving ground for his vision of an ideal legal system. Given Pound’s dissatisfaction with the trajectory of legal theory at his retirement, China held out the promise of being far removed from the frustrations he encountered in the American legal academy. Yet few have highlighted the fact that Pound saw his early trips to China as a global expression of his new agitation against the rise of centralized legislative and administrative power in the New Deal. Although his international expertise was minimal, Pound had clearly been concerned with global affairs at least a decade prior to his China

53. Once Progressivism became the norm, so the interpretation goes, Pound was no longer the center of controversy, and had to find new ground from which to draw public attention. This was a central thrust of Natalie Hull’s analysis, and John Fabian Witt summarizes and updates this position in his work.

54. For example, David Wigdor identifies what would be considered conservative sentiments early on in Pound’s work and what he calls a persistent dualism between Pound’s organicism and instrumentalism. Wigdor, supra note 22, at 228–31. In addition, Willrich sees Pound’s work as grappling with a struggle to balance his more generalized view of the rule of law with his particularized conception of justice. See Willrich, supra note 22, at 316.

55. See Hull, supra note 20, at 257 (describing Pound as having “retired [from Harvard] under fire”).


57. Dan Ernst has described how, at one point in the 1930s, Pound planned to conduct a comparative study of all the common law countries worldwide as an expansive statement of “the future of our common-law doctrine of supremacy of law in relationship to the development of administrative agencies.” Dan Ernst, Pound Under Pressure, LEGAL HIST. BLOG (Sept. 29, 2008, 1:00 AM), http://legalhistoryblog.blogspot.com/2008/09/pound-under-pressure.html. The purpose of this project was to resist “the general march of absolutism all over the world.” Id.
tenure, a mission that he saw as part of his general concern with the spread of socialism.\(^\text{58}\)

It was in October of 1945 that Pound's ennui and new politics meshed with the GMD's growing public relations crisis. GMD Minister of Justice Hsieh Kwan-Sheng wrote to Pound, asking him to serve indefinitely as China's main legal adviser.\(^\text{59}\) Although Hsieh described Pound's duties as an adviser in quite modest terms, Pound quickly accepted.\(^\text{60}\) His appointment satisfied the GMD's desire to improve its international reputation, but it was also part of China's liberal legal reformers' struggle for political capital against the dominant authoritarian elements in the GMD. This confluence of goals also exploited Pound's ability to act as a conduit for enhancing the international status of Chinese officials and his potential as a public relations agent to promote the general nationalistic sentiment to the world that, as expressed in the words of one law professor, “the Chinese have law.”\(^\text{61}\)

Following his acceptance, Pound sailed to China in 1946 to take up his new duties. He departed after spending the summer in China, though he would return in late 1947 for a longer stint that lasted through the summer of 1948. However, he would in fact spend the majority of his years as the GMD's legal adviser in residence at Harvard. He had planned several return trips after 1948, but these plans were upended by the GMD's displacement by the CCP in 1949.

Before Pound left for China in 1946, he had already begun to correspond with his first biographer, Paul Sayre, who claimed that “[Pound’s] work on the Chinese law generally was so vast


\(^{59}\) Hsieh claimed that the GMD had in fact long wanted Pound to come to China, but were prevented by the Japanese invasion during World War II. Pound Papers, supra note 28, at Part 3, Reel 68, 247.

\(^{60}\) “Your work as adviser to the [Ministry of Justice (“MOJ”)] will consist mainly in giving advices and supplying materials on matters of judicial reform and other matters within the jurisdiction of the Ministry.” Id. at Part 3, Reel 68, 247.

\(^{61}\) Id. at Part 1, Reel 49, 0547.
that it would take the rest of his life.”62 Further, Pound saw his role as going beyond the reformation of Chinese institutions. As the challenges which China faced were so urgent, he could not simply set the institutional stage for educating the younger Chinese generations. He had to reshape the minds of those currently in power, and quickly.

Pound’s appointment as adviser was received publicly and privately with great enthusiasm on both sides of the Pacific. One American newspaper editorial captured this spirit in the competitive Cold War terms that would come to define Pound’s China legacy: “In view of the fact that the Chinese will be powerfully propagandized by the Russians, [Pound’s] presence in China and the influence [Pound] will be able to have in perhaps bringing the Chinese a juridical system somewhat in line with our own Anglo-Saxon tradition will be invaluable.”63 Most of these articles saw Pound’s work as an extension of America’s continued support of Chiang Kai-shek, the GMD’s leader and presumed Christian modernizer. Consequently, Pound was quickly approached by many popular publications for his comments on Chinese legal reform.64 Expatriate newspapers in China posted similar articles and would periodically reprint his comments on Chinese law.65 Not surprisingly, his appointment resonated with the religious missionary infrastructure that had first involved him in Chinese affairs.66

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62. SAYRE, supra note 20, at 384.
64. War in China Greatly Exaggerated Ex-Dean Pound Tells Reporter Here, PORTLAND PRESS HERALD, July 19, 1947 [hereinafter War in China]. In like vein, Lee Brisol, President of the China-American Council of Commerce and Industry wrote to Pound to offer the organization’s aid. POUND PAPERS, supra note 28, at Part 3, Reel 68, 192.
66. Charles Ransom, the first Dean of Soochow, telegrammed Pound his congratulations on “your proffered appointment for great service in China.” POUND PAPERS, supra note 28, at Part 3, Reel 68, 180. Pound would receive several letters from Marguerite Atterbury, a teacher and missionary at Yenching. Id. at Part 3, Reel 62, 300, 302 (stating that “your article on Chinese Government is being eagerly read by church, professional and student groups”).
Pound came to China high on the new confidence of the post-World War II American legal community. The status of American law had risen astronomically alongside American international influence and was buoyed by confident self-assessments about the export of American law in Japan and Germany through the Marshall Plan. Legal periodicals and publications replicated the popular praise for Pound’s appointment, never questioning the terms or prospects for Pound’s eventual success. In the *Annual Survey of American Law*, Pound was described matter-of-factly as being “charged with the task of rewriting the nation’s laws.” In one of his last articles for the *ABA Journal* written before his 1947 China trip, Pound’s efforts were given an enthusiastic editorial introduction: “[t]he hopes and prayers of American lawyers are with him in his valiant efforts.”67 He also received a great deal of private support from members of the legal community, including ranking members of the judiciary.68 His colleague at Harvard, Warren Seavey, who had worked in China decades earlier, told Pound that “it is the most important job you ever had and that you can affect the destiny of the world by your work.”69 Carl Rix, then President of the ABA, praised Pound’s appointment as part of America’s destiny in the Far East.70

For all this grandiose language describing his appointment, Pound’s correspondence indicates that his time in China was primarily spent dealing with the mundane concerns of living in a foreign city and partaking in the many social opportunities his fame and status enabled. Not surprisingly, Pound’s life while in China was heavily reliant on local intermediaries, as he led a fairly typical, sheltered expatriate life. Crucially, he

68. ABA President Carl Rix told Pound that “it is a great task and one of tremendous importance to the world, and particularly to the United States. If you have laid a foundation for a new China, it will have a profound influence on the economic life of the United States.” POUND PAPERS, supra note 28, at Part 1, Reel 69, 93.
69. *Id.* at Part 3, Reel 90, 853. This letter was addressed to “Poonds Koo Wen, Lauyeh,” the only hint that Pound or Seavey used pidgin Chinese. Pound told Sayre of his wide-ranging ambitions and that he was confident that “those who count here are with me and it looks as if I can succeed.” SAYRE, supra note 20, at 384–85.
came to understand his relationship to China in profoundly personal terms.\(^71\) In particular, he mirrored America’s love affair with Chiang, even though Pound appears to have rarely consulted with Chiang about his official reform work.\(^72\)

Nevertheless, despite his formal retirement, he viewed his duties with great ambition. In the coming years, he penned numerous articles on Chinese law and the GMD, secured a secondary appointment as an assistant to the Ministry of Education, lectured widely, drafted a robust range of reports for the Ministry of Justice, and prepared an empirical survey of Chinese judicial practice.

Pound’s first act as legal adviser before traveling to China was to submit a bibliography for the creation of a law library in Beijing.\(^73\) Once in China, he compiled comments on China’s constitution and developed a draft proposal for a juristic research center.\(^74\) It is noteworthy that even at this early point, he had already gone far beyond the initial advisory scope of Hsieh’s description of his duties in China.

In 1947, Pound wrote a personal report to Chiang in which he mentioned for the first time that he planned to write a completely new corpus of doctrinal treatises which he called the *Institutes of Chinese Law*.\(^75\) After his first summer in China, he wanted to stay stateside indefinitely to compile the materials for this project, which he felt only the libraries at Harvard could supply. In his letter to Chiang, Pound reported to the GMD about the many speaking engagements he had undertaken in America on their behalf and argued that being stateside would best allow him to continue his public relations work.\(^76\)

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\(^{71}\) Pound even took a personal interest in Chinese juvenile justice, as he had early in his domestic career. [POUND PAPERS, *supra* note 28, at Part 3, Reel 62, 193.]

\(^{72}\) There is significant evidence that Pound and Chiang’s personal relationship was mediated by Madame CKS, who wrote a series of letters to Pound thanking him for attending social engagements and for his various pro-GMD articles in the American press. See, e.g., *id.* at Part 3, Reel 62, 227.

\(^{73}\) Pound’s formal activities are directly recounted in a series of reports that he wrote to the GMD leadership about his work. The first report was written in May of 1946. See *id.* at Part 3, Reel 62, 10.

\(^{74}\) See *id.* at Part 3, Reel 62, 234.

\(^{75}\) This is the only extant evidence of any direct communication between the two men outside of formal social settings. *Id.* at Part 3, Reel 68, 272.

\(^{76}\) *Id.* This work initially included distributing reprints of his academic articles on China and copies of the Chinese Constitutions.
He spent only a brief time in China during 1947, although he produced a large volume of material for the GMD during this time, including a new curriculum for Chinese legal education, statutory analysis for the Ministry of Justice, and numerous academic articles for American law reviews.77

During these short stints in China, Pound continued to spend most of his time engaged in a mix of social and professional activities.78 He maintained his involvement with Soochow, and accordingly, delivered their graduation speech in the summer of 1946.79 He was also asked to give a series of lectures at the Jesuit Aurora Law School in Shanghai and at the National Chengchi University in Nanjing.80

These engagements allowed Pound to build a network of elite Chinese contacts, both in China and at Harvard.81 He retained a number of papers and manuscripts by Chinese authors in his collection and claimed to have attempted to get some of them published in the United States.82 The transnational character of this interaction is quite evident in his personal correspondence, and in one letter, a professor at Soochow asked Pound to

77. See id. at Part 3, Reel 62, 559; Id. at Part 3, Reel 68, 275.
78. Wherever Pound was in China, he was a popular speaker and his personal archive is full of dozens of invitations and thank-you cards in English and Chinese. Pound naturally gave speeches at the Harvard Club and a range of expatriate organizations. See, e.g., id. at Part 3, Reel 62, 65.
79. Conner, supra note 38, at 238.
80. See ROSCOE POUND, ROMAN LAW IN CHINA 441 (1953) [hereinafter POUND, ROMAN LAW]; POUND PAPERS, supra note 28, at Part 3, Reel 68, 172. These early lectures were republished in ROSCOE POUND, LAW AND THE ADMINISTRATION OF JUSTICE (1947) [hereinafter POUND, ADMINISTRATION OF JUSTICE].
81. In one instance an official, the President of the Shanghai Supreme Court, had received permission to go abroad from the Ministry of Foreign Affairs but was denied funding by Ministry of Finance. So he turned to Pound who then said he would try to secure visiting teaching position at HLS. POUND PAPERS, supra note 28, at Part 3, Reel 68, 142, 168.
82. See, e.g., id. at Part 3, Reel 62, 648; Id. at Part 3, Reel 78, 140. Most of this personal correspondence echoed the same flattering tones as Pound’s early China correspondence. The President of the High Court in Shanghai sent Pound an article in early 1949 citing Pound’s praise of the President, and he thanked Pound quite profusely. Id. at Part 3, Reel 78, 145. Obviously, Pound anticipated a level of reciprocity from these arrangements as he wrote to the President of the Shanghai High Court asking him to talk to Hsieh on his behalf in respect to certain documents written for an IRS audit which Pound hoped would contain very specific characterizations of his work for the GMD. Id. at Part 3, Reel 78, 152.
lobby the ABA to let Chinese practitioners with foreign law degrees join American firms.83 However, by the summer of 1947, Pound was concentrating all of his efforts on his planned treatises. He asked the GMD to create a committee to assist his scholarly efforts.84 Finally, true to his commitment to legal empiricism, he returned to China in the summer of 1948 to carry out the fieldwork he believed necessary for his doctrinal work. He visited a range of different Chinese cities and collected the results of his empirical survey.85

II. POUND AS FOREIGN LEGAL REFORMER

A. Pound’s Evolutionary Legal Science

The content of Pound’s public writings on Chinese law during his tenure as legal adviser reveals a great deal about how American lawyers were coming to understand their participation in foreign reform projects. Pound did not come to China to merely serve as a learned guide to America’s own remarkable but thoroughly contested legal history. Instead, he was to transplant aspects of American law as the apogee of international legal development. To this end, in his academic writings, Pound constructed a specific vision of Chinese law that allowed Americans to both presume China’s legal inferiority but also justify high hopes for its Americanization. Animating Pound’s work was the expectation that the application of his legal expertise would lead to the positive development of China’s political and economic life, which would emulate America’s while retaining some vague Chinese distinctiveness. He routinely managed to praise the GMD as willing and eager recipients of American legal knowledge, while making sure that he never let

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83. Id. at Part 3, Reel 78, 142.
84. There is no evidence this ever actually happened. See id. at Part 3, Reel 62, 567.
85. See id. at Part 3, Reel 62, 277. Among these short trips were visits to Nanjing’s courts and the city prison, another to Shanghai to visit the High Court, and a trip to Hangzhou to conduct more on-site inspections and give a variety of lectures. These various day trips took Pound around China for most of the summer, ending in mid-August after ten weeks. There are few records left from the surveys Pound collected at the time, but he did plan to continue such work when he next returned to China.
such praise undermine the necessity of his involvement in Chinese legal development.

Pound’s move from comparativist to exporter comes across immediately in his writings on Chinese law. By the time Pound arrived in China, his own statements about the value of comparative law had become simply rhetorical, seeing China as solely a canvas on which to project American law, though always threaded with gestures of cultural sensitivity.

Pound did emphasize that the GMD’s legal administration he observed was modern in its practice and formulation. The distinction of “modern” was important because everything about his work on China was aimed to promote his views on sociological jurisprudence—the evolutionary endpoint of his narrative of common law historical development.

Within this framework, Pound was always careful in his writings to assert that his expertise on Chinese law followed the basic empirical tenets of sociological jurisprudence. He at different points claimed to have made a careful academic study of Chinese legal institutions and legal history, although there is little evidence as to what constituted this background study. He consistently grounded his authority in three avenues of empirical investigation: “thorough inspections,” “attending conferences,” and “carefully prepared [judicial] questionnaires.”

Pound routinely claimed that the cities he had visited constituted a representative sample of legal practice under the GMD.

At the same time, it was this asserted empirical expertise that Pound felt positioned him to be an informed cultural relativist. He went out of his way in his public writings to validate the positive characteristics of Chinese culture in an effort to offset claims of cultural incommensurability. Pound often con-

89. See Pound, supra note 87, at 359.
90. See, e.g., Roscoe Pound, The Law in China as Seen by Roscoe Pound, in The Law in China As Seen by Roscoe Pound 1, 16 (Tsao Wen-yen ed., 1953) (“The Chinese are a patient, diligent, intelligent, idealistic people, filled with determination to set up and maintain a modern, democratic progressive poli-
trasted himself with an unnamed former adviser who gave up on “Chinese justice” by claiming that Chinese culture and language had no real “idea of justice.”91 If Chinese culture was too alien, then Americanization would seem doubtful. As such, Chinese law had to be deficient in comparison to American law but it could not be wholly foreign.

This praise of China also fit into Pound’s own public assertions that he was not promoting the crude transplantation of American law into China. At every turn, he denied that transplantation was an effective methodology for legal reform. He noted that in their conferences, Chinese legal reformers did not debate best practices for “some abstract country,” but rather faced the particular difficulties of modern China.92 Thus, he felt that his empiricism demonstrated that he was not engaged in unreflective transplantation or blatant parochialism.93

Yet whatever commitment Pound had to cultural sensitivity in abstract rhetorical terms, he was operationally wedded to the evolutionary assumptions that undergirded the new export-driven view of American law. Pound himself had long been very clear in his belief that law was central to a civilization’s identity and progress.94 He believed that “law is not only a means toward civilization, it is a product of civilization.”95 He also claimed that law was central to the “agency of civilization” and the order provided by law clearly evidenced the greatness of a society.96

81. Id. at 3; Pound, supra note 87, at 349–50.
83. See, e.g., Pound, supra note 90, at 15.
85. Pound, Interpretations, supra note 51, at 143.
86. See Roscoe Pound, Some Problems of the Administration of Justice in China 17 (1948). Thus, the longevity of a given civilization was dependent on a functioning legal system. See id. (“Stability is maintained by adjusting relations and ordering conduct by a systematic and orderly application of the force of politically organized society . . . . [As well as] by legislation, by legal reasoning, by technique of interpretation and application, and by interpreting and applying legal precepts . . . .”). Pound also echoed Weberian sentiments about the relationship of law to economic growth, claiming that “[w]here law is feebly developed, there is a feeble economic order.” Id. at 65.
As such, when Pound developed his theory of legal evolution, it was in practice simply a reiteration of his version of common law legal history, which culminated in the “greatness” of contemporary American law. He detailed his version of common law history through a four-staged evolutionary process which he called “The Socialization of Law.” The teleological view of social change inherent in Pound’s legal evolution showed that he remained optimistic about legal reform even after he had rejected the New Deal.

It became clear in his duties as legal adviser that Pound’s firm belief in legal evolution came into conflict with his prior commitment to comparative law. As mentioned earlier, Pound had been critical early in his life of the neglect of comparative law in America, a position he had reasserted as late as the mid-1930s. In his writings for the GMD, however, Pound’s invocation of comparative law was in practice hollow. The content of the comparative knowledge he invoked in his work as legal

97. It is not coincidental that the specific writings in which Pound articulated his theory of legal evolution were refined during his time as legal adviser.

98. POUND PAPERS, supra note 28, at Part 3, Reel 61, 704. Pound saw himself as providing a more relevant series of progressions than the then popular six-fold articulation of Vinogradoff. For Pound, each “stage of legal development” reflected progress towards his goal of harmonizing formal law with the actual conditions of social life. Archaic law, the first stage, focused on securing peace through mediation when other, more prevalent, informal forms of social control failed. The next stage, strict law, was concerned with providing a system of remedies for harms: it had no concept of legal rights and placed strict mechanical restrictions on judicial decision-making. The third stage, equity, represented the move of Western legal system towards reconciling law with morality, matching intertwined advances in “moral ideas” with “economic development and the growth of trade and commerce.” The great contribution of this stage was making the legal system cognitively open to social conditions through precedent. The last stage, where Pound saw his contribution, was “mature law.” Here analytical judges restrain unprincipled articulations of equity and natural law through a scientific juristic practice. Id. at Part 3, Reel 61, 725.

99. Id. at Part 2, Reel 12, 1014. Pound had already presented a judicial-centric view of the mechanism of legal history, with the same Whigish faith in teleology, including claims about “primitive law-givers,” self-help, and many of the popular evolutionary anecdotes redolent in common law doctrines. See generally ROSCOE POUND, THE HISTORY AND SYSTEM OF THE COMMON LAW (1939).

adviser was almost completely dominated by his early exposure
to Roman law through German legal studies, and was peppered
with very little analysis of contemporary foreign practices.\textsuperscript{101}

Pound’s move away from comparative law to this form of ex-
port work illustrates how the marriage of legal science and evo-
lution could sustain both highly universalist and parochial el-
ements.\textsuperscript{102} While he situated his claims about law within a uni-
versal methodology, he had a predetermined assumption that
the results of such inquiry would inexorably lead to the evolu-
tionary developments which were typified in his view of the
American common law.

This implicit parochialism was made clear when Pound
demonstrated no qualms about his belief that Chinese legal re-
formers did not need to be exposed to, and in turn contemplate,
the controversies and shortcomings of American law. Here
Pound’s thinking, like American legal thought more broadly,
had stepped away from a dialogue with foreign legal experi-
ence.\textsuperscript{103} Pound positioned America as an evolutionary apogee,
and seemed much less concerned with how this state was pur-
portedly achieved than simply assuming it to be so.\textsuperscript{104} The only
dialogic element in his work was his attempt to use his work in
China to bolster the legitimacy of his own theories of American
law stateside, and not to present a critical engagement with
Chinese legal scholars over American legal experience.\textsuperscript{105}

But in practical terms, and despite his own presumptions,
Pound was confronted with a GMD legal system that had done
little to mimic American law. Chinese legal reforms, beginning

\textsuperscript{101} See Arthur Taylor Von Mehren, Roscoe Pound and Comparative Law,
13 AM. J. COMP. L. 507, 507–08 (1964). Pound would come to claim that com-
parative law should consist solely of a functional comparison of judicial tech-
niques, while producing no such study himself. See Pound, \textit{supra} note 100, at
59.

\textsuperscript{102} In the most general terms, he had come to only champion comparative
law when it promised to support his existing intention to promote his legal
science, not when it included dejudicialization or the welfare state—both con-
cepts with which comparative law became associated after the New Deal.

\textsuperscript{103} See HULL, \textit{supra} note 20, at 282–83. This also helps contextualize
Witt’s study of Pound and Melvin Belli, as Pound frequently cast his advoca-
cy for the plaintiff’s bar as an act of legal nationalism against foreign influ-
cees.

\textsuperscript{104} See Pound, \textit{supra} note 100, at 57.

\textsuperscript{105} This foreshadows the recurrent critiques of contemporary law and de-
velopment efforts. See generally Kroncke, \textit{supra} note 3.
in the early twentieth century, had explicitly rejected many of the juris-centric common law characteristics that he placed at the center of his own evolutionary theory. Most critically, in the 1920s, the GMD had adopted a range of Soviet legal institutions, especially in its criminal justice system. These institutions not only focused a great deal of power and discretion on state agents, but emphasized prosecutorial, rather than judicial, supervision of state power.

Thus, Pound had to overcome a central and persistent challenge to his reform work: determining the place of the common law in China’s reforms. As Pound saw his trip to China as being in combat with absolutism, he had to represent his reform work as not promoting the Continental theories of law which his domestic politics had come to virulently oppose. Furthermore, he publicly stated that the common law, by contrast, had a salutary effect all over the globe, and that its influence should be further intensified.106 But in China, Pound confronted a legal system that in many ways was far more genuinely reflective of “absolutism” and the civil law than could ever be claimed about the New Deal.

Pound’s solution to this problem, at least theoretically, was to continuously project China’s Americanization, and thus the influence of the common law, into the future. At times he argued that the common law was too complex to transplant to China in a short period of time107 and that “Roman law” could be a stop-gap model for China.108 He also recognized that China’s legal elite had been educated under an equally diverse range of traditions. Therefore, he reiterated that China needed first to have a unified theory of law guiding the operation of its institutions and a unified doctrinal synthesis of its various codes before it could transition to common law legal institutions.109

Pound’s long-term solution to the conundrum of China’s civil law structure was to base China’s future Americanization on Chinese judges retrained as vanguards of his judicial tech-

109. See Pound, supra note 90, at 10–11.
Pound based his projection on the work of Chinese judges whom he believed would serve as the primary vehicle to adapt whatever law existed to social conditions on the ground. Again, this would happen assuming that they would properly follow Pound’s own ideal common law technique. However, he clearly elided the fact that China’s civil law influence did not embrace common law precedential authority or reasoning, even though so much of what he himself wrote about Chinese legal reform had to be functionally predicated on the structural importance of precedent.

Pound in effect ignored the existing structural realities of Chinese law and, perhaps sensing the inchoate sequence of this asserted legal transformation, often felt compelled to identify “common law influences” in the GMD legal system when actual common law institutions were absent. Pound thus sometimes cast his work as allowing the GMD to follow through on their desire to Americanize by “adapt[ing] provisions borrowed from Anglo-American law to a Continental legal system.” But, in the end, Pound would always retreat to arguing that whatever transplantation his reform agenda required would be indigenized purely through judicial decision-making, rather than constitutional or legislative process. Yet even these subtleties were often lost when interpreted by stateside audiences who simply accepted Pound’s characterization that China has already adopted the common law.

Pound’s contorted effort to represent Chinese law as amenable to legal Americanization was also manifested by his circular treatment of Chinese legal history. To conform to his presumption that China needed American law, he had to believe, fundamentally, that China had a “backward legal order.” How-

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110. See id. at 3.
111. Id. at 1.
113. See Roscoe Pound, Introduction to Chen Li-Fu, Philosophy of Life 1, 7–8 (Jen Tai trans., 1948) [hereinafter Pound, Introduction] (examining the debate as to whether there is value in historical Chinese ideas about law and government); Pound, supra note 96, at 18. It is also true that, in many ways,
ever, to sustain his self-perception as a legal scientist and not an imperialist, Pound had to give some general validation to Chinese legal history. Thus, in public, he was always quick to turn his very general praise of Chinese culture into an open challenge to those who argued that there was little value in Chinese legal history for China’s contemporary reform.114

This led quite naturally, then, to the question of what Chinese legal history was for Pound, and what practical impact it should have on Chinese legal reform. He made it quite clear that when he said “history” he did not mean it in the same sense as it would apply in the West.115 He recognized that there had been dynastic codes, but claimed that they were only sets of ethical precepts whose lack of institutionalization led to there being “no model for the historical Chinese system.”116 When he mentioned “Chinese legal history” what he really meant was recent twentieth century history, and predominantly the GMD experience after the Japanese invasion in the 1930s.117

Here, his arguments for standardization in American law slipped effortlessly into the standardization implicit in his role as modernizer. He could claim that “traditional ethical custom and traditional legal institutions are not to be ignored,” but, in deciding what was proper for China, he could state that such traditions “should not be made to introduce a discordant element into the codes and thus lead to inconsistencies and anomalies.”118 Pound then pushed this universalizing observation

GMD legal elites themselves aggressively embraced this evolutionary judgment.

114. See POUND, supra note 96, at 13.

115. “China did not and, indeed, could not build her codes upon a preceding juristic development of her own . . . .” Id. at 27.

116. Id. at 5–6; Pound, supra note 107, at 277. Pound did have the opportunity to learn about traditional Chinese juristic practice as for many years he was in possession of a massive multi-volume manuscript on dynastic law. POUND PAPERS, supra note 28, at Part 4, Reel 6, 147.

117. “For China, legal history must also be what the Germans call the international history of the present law of China . . . .” POUND, ROMAN LAW, supra note 80, at 444. This narrow scope led Pound to claim that it “can be understood why there has been no more than a beginning of a Chinese legal literature.” Pound, supra note 90, at 5. The same was true of Chinese legal language. Id. at 3 (“Another difficulty . . . . is lack of a fully developed Chinese juristic and legal terminology.”).

118. POUND, supra note 96, at 11.
further by claiming that “[m]odern law is not so much a product of the life of each particular people as a product of the experience of civilized life and the reason of many peoples.”119 And this experience, in due course, always led to his version of modern American common law.

Pound was again confronted by the dissonance between his abstract methodological commitments and his role as an exporter. A robust valuation of Chinese legal history would have required him to acquire far more particular knowledge about Chinese law and then to interpretively reconcile the ways in which this tradition might conflict with what he deemed to be legal modernity.120 Even before his tenure as adviser, Pound’s valuation of existing Chinese law was presaged by Sayre as functionally irrelevant to the application of his own transformative expertise.121 Sayre wrote that, “Pound sees the merits of the Chinese legal order and of the whole Chinese governmental structure, but as an educator, and as a jurist, he has been assigned one of the greatest tasks ever given to any man in cultural history . . . .”122

Just as Pound’s views on Chinese legal history proved functionally peripheral, “comparative law” had only a minimal impact on his work in China. Pound had always rejected historical jurisprudence’s focus on law as a cultural epiphenomenon, especially as the historicist view of law had, from Montesquieu onwards, long argued that the world’s legal traditions were incommensurable. Pound instead had to presume that legal knowledge could transcend cultural differences, a presumption necessary not only for top-down, state-driven legal reform, but


120. This impossibility is clear when Pound discussed the import of the jury system into China. See id. at 752–53 (“There is nothing in Chinese institutions or ethical customs which can be developed into the Anglo-American jury system. So far as China is concerned it will have to find a basis in reason or in imitation, not in experience.”).

121. See SAYRE, supra note 20, at 382.

122. Id. “The present Chinese code he thinks excellent but single-handedly he has set himself to do for the Chinese law somewhat the same task that the entire American Law Institute [“ALI”] with all its experts has nearly done in the restatement of the law for our legal system in the United States.” Id. at 384 (comparing Pound’s work to that of the ALI).
also his own cross-cultural legal expertise. Yet he epitomized what comparative law had been moving towards for most of the American legal community—a process of implicit comparison mired in evolutionary trajectories. The implicit comparative dynamic involved solely contrasting China’s legal deficiencies to the assumed superiority of American law, or in this case, Pound’s own version of American legal history. To the extent that China itself engaged in comparative law, this was proper, not as a general scholarly practice per se, but in recognition of its current backwardness. Thus, Pound’s comments on comparative law during this time pulled him increasingly towards universalism, but only within the strictures of exporting a depoliticized view of American law.

A telling example of how Pound’s early comparative commitments were undermined by his export work was that, while Pound expressed his desire to carry out empirical analysis of China’s existing legal system, his voluminous writings on Chinese legal reform were produced well before he had actually completed any of his initial surveys. This was true despite the fact that he had easy access to formal Chinese legal documents in translation.

Pound thus resorted to a formalistic analysis of such documents to justify specific claims he made about law under the GMD, even though he repeated in his writings the antiformalist presumptions of sociological jurisprudence. He compared these documents with existing Western materials, with the primary aim of simply affirming their aspirations towards modern law. On the subject of whether these documents actually reflected Chinese legal practice and general social conditions, he retreated to vague empirical claims that, in the

123. Pound invoked the popular interpretation of Japanese reform as empirical proof that Asian legal modernization was possible. See Pound, supra note 107, at 277–78.
124. See Pound, supra note 96, at 22; Pound, Roman Law, supra note 80, at 442.
125. See Pound, supra note 119, at 758–59.
126. Pound began publishing articles on Chinese law early in 1947. His first round of surveys was completed in the summer of 1948. The level of cooperation with the survey is also unclear, as none of the survey materials survive in any known archive.
127. See, e.g., Pound, supra note 119, at 749–50.
Chinese context, the foreign-inspired codes were not a barrier to their implementation, citing his personal observations.128

For example, several of Pound’s articles began, somewhere in the initial paragraph, with the statement “China has excellent codes.”129 He made sure that it was known that his basis of comparison for this praise was modern law.130 At the same time, his writings on the codes rarely contained specific information about their substance, but rather emphasized the nature of their construction and local authenticity.131 He also had to recognize that the codes’ content was primarily of foreign origin.132 Pound could not pretend that the codes were a reflection of common law influences, and at times he again declared it acceptable that China temporarily looked for inspiration in the civil law. Nonetheless, he routinely supplemented these observations with almost spontaneous claims of how important core American legal institutions and ideas, such as the independence of the judiciary, the jury system, judicial review, and adversarial procedure, would be to China’s current and future reforms.133

Pound’s early restriction to formal legal documents also moved him, in what would soon be well-established Western practice, to focus attention on the written Chinese Constitution which, like its codes, he praised in relatively unrestrained terms. At first, he compared the Chinese Constitution to those of other countries, even once acknowledging the GMD’s Soviet influences. Yet his writing on the Chinese Constitution again revealed the dissonance between his compulsion to imbue Chinese law with the common law, and the actual structure of the GMD system.134

Essentially, Pound argued that China’s constitution followed the American tradition: a justiciable legal document which ar-

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128. “[E]nough has been disclosed to show that the Chinese Civil Code in action is serving well.” Pound, supra note 107, at 291.
129. See, e.g., Pound, Roman Law, supra note 80, at 443.
130. See Pound, supra note 90, at 9 (“They will compare with the best of the recent codes which have been framed and enacted since 1896.”). Pound’s focus on the codes resonated with his general preference for standardization and distrust of localized “anomalies.”
131. See, e.g., Pound, supra note 107, at 288–91.
132. See Pound, supra note 119, at 758.
133. See, e.g., Pound, Administration of Justice, supra note 80, at 43–74.
134. See Pound, supra note 87, at 348.
articulated specific rights and enabled strong judicial review of legislation. This claim was based purely on assertion and speculation about future trends. He acknowledged the clear language in the Chinese Constitution that rights were limited by legislation and that, far from exclusively following the American emphasis on negative rights, “it is true some provisions in the Chinese bill of rights are hortatory.”

Retreating from the text of the document itself, Pound developed a theory of how Chinese judicial review would proceed by focusing on the work of famed Chinese political thinker Sun Yat-sen. In this analysis, “Chinese” became Pound’s interpretation of Sun’s personal writings and an interpretation where Sun was transformed from a national socialist into a liberal capitalist.

135. See Pound, supra note 86, at 4.

The Bill of Rights in the Chinese Constitution is not a mere preaching. It is safeguarded by an independent Judicial Yuan—an independent coordinate department of government—in which the Grand Justices have the ultimate power of interpreting the Constitution and are authorized to enforce the express provisions of the Constitution that executive acts and ordinances and legislative acts in contravention of the Constitution are null and void.

Id.


137. Pound repeatedly claimed that for the Constitution, “interpretation and application of their provisions are to be molded to Chinese institutions and ethical customs and to the Chinese people’s convictions of right.” Pound, supra note 96, at 5.

138. For example, in his main article on the Constitution, Pound discussed the passage in Article One invoking Sun’s famous “Three People’s Principles,” which Pound interpreted as “nationalism, democracy and socialism.” See Roscoe Pound, Development of a Chinese Constitutional Law, 23 N.Y.U. L.Q. Rev. 375, 383 (1948). Interpretation of these principles has always been contested in China, in large part because the Communists also claimed Sun as an inspiration for their movement. See id. (referring to Dr. Carsun Chang, the initial leader of the China Democratic Socialist Party). A great deal of this disagreement centered on the third principle (“minsheng”), which is translates literally as “people’s life” and more technically as “people’s welfare.” Pound noted that “[nationalism and socialism are] capable of sinister interpretation.” Id. To cast Sun’s principles in a favorable light and show that they were compatible with the American constitutional tradition required that Pound make several analytic contortions to discount fears that Sun’s work, and thus by proxy Chinese constitutionalism and judicial review, represented Continental influence. Pound conjured up the claim that Sun viewed twenti-
It is critical to understand Pound’s treatment of Sun as it paralleled how Americans had come to interpret Chinese politics through the assumption that China was Americanizing. Pound asserted repeatedly that Sun was not only thoroughly Americanized but also an ardent proponent of judicial review. Viewing the Chinese Constitution as a product of Sun’s Americanized political philosophy allowed Pound to support his rhetorical claim that the Chinese Constitution was adapted to Chinese conditions, and was not an idealized document copied from abroad or constructed from “pure reason.”139 Through a strange sort of alchemy, Pound’s invocation of Sun allowed him to simultaneously claim that the Chinese Constitution was both American and authentically Chinese.140

This formalistic and stylized analysis reveals the extent to which Pound’s invocations of local sensitivity were, in fact, functionally marginal in his scholarly work. Even at the level of comparative formalism, his export commitments strained the coherence of his analysis. Pound cast his mission as culturally neutral by claiming that his work was not “American” but based on his own theory of legal science. The empirical ambiguity that existed about Chinese law in America at the time allowed him to claim that sociological jurisprudence was feasible without anyone rising to challenge his claim on empirical grounds. Therefore, he could make strong relativistic statements about the importance of Chinese conditions without ever claiming, or needing, any particular knowledge of what this

140. In fact, Pound’s entire understanding of Chinese constitutional interpretation flowed from his particular valorization of Sun. Pound claimed that Sun’s political theory was a true indigenization of Western legal tradition and compared Sun’s writings to the Federalist Papers. See id. at 194–232; Pound, supra note 92, at 273. Pound seemed to have drawn a great deal of his understanding of Sun’s work not from Sun’s actual writings but from a paper he read that enthusiastically compared Sun to the socially minded French administrative legal scholar Leon Duguit. POUND PAPERS, supra note 28, at Part 3, Reel 61, 291.
would, in substantive terms, dispositively mean. It was sufficient that he simply legitimize his work through association with things categorically Chinese, regardless of what analytical sleight of hand was required to align them with his objectives.

Thus, through his writings on Chinese law, Pound was able to successfully set himself up stateside as a crucial intermediary who possessed the method and knowledge to make accurate claims about Chinese law and qualify himself as a forecaster of the consequences of Chinese legal reform. Reciprocally, he was able to do so in a manner that validated his personal theories of law while affirming American hopes for China’s Americanization. If one assumed that it was an unassailable fact that the GMD were liberalizers, then one also had to accept that Chinese legal reforms were in consonance with American values. Thus, Pound’s participation in this process counter-intuitively gave him the benefit of casting his views as genuinely “American” by virtue of being involved overseas in the GMD’s reforms.141 Even though he had by this time rejected the Progressive project, Pound could cite with approval China’s lack of a liberty of contract regime and use this claim to buttress the claim that his original critique of the liberty of contract was not an endorsement of socialism. For it was self-evident that Chiang, as America’s proper current liberal prodigy, was not a socialist.142 Like many who would later follow in his wake, Pound’s actual frustrations as a reformer were tangential to how his work was received at home, and did little to undermine the intellectual and political capital his work was able to garner.143

Summarily, it was unnecessary that anything in China alter or enrich Pound’s preexisting ideas on law. Ultimately, for Pound, Chinese law was what it had to be to sustain his project: an object to be transformed in the image of the world’s

141. See, e.g., Pound, supra note 139, at 225–26 (discussing the Examining Yuan and how it might alleviate the American problem of civil service being adversely affected by partisan politics).
142. See id. at 230.
most advanced legal system, American law. Whatever Chinese law was, or wherever it might be going, it was not the proper subject of any genuine comparative analysis.

B. Pound’s Frustrations and Growing Ambitions

It is revealing then to compare Pound’s academic writings on Chinese law with the materials he prepared privately for the GMD. Early on, he did not openly discuss his project in such grandiose terms with his Chinese interlocutors. He could not have been oblivious to Chinese nationalism, even with the stream of flattery that preceded his appointment. When accepting his appointment, he denied to various Chinese officials that he had come to bring the common law to China. Yet, in the actual materials he produced for the GMD, he was in fact far less restrained in the scope of his ambitions than his initial disclaimers would have suggested. As noted, he generated a rather substantial body of material for the GMD over the course of just a few years. A great deal of these materials were simply rehashings of his earlier work, but they do show that he only grew more convinced over time about the need for him to shape every aspect of the GMD legal system.

Still, Pound was careful to lace his reports for the GMD with repeated claims to cultural sensitivity and criticisms of a singular notion of “modernity.” He also expressed openness-mindedness toward the GMD’s choice to produce a hybridized legal structure based on non-common law traditions. Of

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144. POUND PAPERS, supra note 28, at Part 3, Reel 68, 233.

I may say to you, however, that I doubt very much whether in any large degree our system is applicable in China . . . our Anglo-American criminal law and procedures are made for countries with the historical English legal traditions. I doubt whether the system could be impelled effectively upon a country without that background . . . . [I] cannot but feel that what is needed in China is not to go to the right about in the matter of criminal procedure by adopting a radically different system, but to go ahead making the best that can be made practical of the produce which you have.

Id.
145. See id. at Part 3, Reel 61, 190.
146. “A Constitutional government must be a gradual growth, arising out of the institutions, customs, and ideals of people, not something borrowed and transplanted full-grown to which the people are expected to adjust them-
course, he placed all of these statements within the context of the GMD’s expressed aspiration to become “modern,” and their bringing him to China to use his particular expertise to assist them in this process.\textsuperscript{147} He expressly claimed that the Chinese should feel no pressure to harmonize all of their legal doctrines with American common law and that he was in China to assist in Chinese legal reform rather than to transplant the American legal system.\textsuperscript{148} His reports to the GMD did criticize aspects of American legal practice, but only those that reflected his own existing critiques.\textsuperscript{149} For example, the one way in which Pound claimed that China had surpassed America was by creating a Ministry of Justice, an institution he had long argued for in America.\textsuperscript{150} Yet, as mentioned in the prior section, China’s preexisting legal traditions and characteristics had little practical impact on Pound’s actual recommendations to the GMD.

Further, Pound’s reports to the GMD contained a range of documents presenting his earlier scholarship on American law as the definitive interpretation on which the GMD should base their understanding of legal reform and legal education. These included reports as broadly titled as “Rights” and “Law and Morals,” as well as specific commentaries covering sociological jurisprudence, the rise of bar associations, and recent developments in American legal education.\textsuperscript{151} Notably, following his general treatment of Chinese legal history, there was only one paragraph in all of Pound’s reports that concerned what he

\textsuperscript{147} “In China of today, after centuries of isolation from the institutional development of the western world, you have a laudable desire to be thoroughly modern—to have a political and legal system abreast of the highest achievements of progress in the West.” \textit{Id.} at Part 3, Reel 61, 152.

\textsuperscript{148} See \textit{id.} at Part 3, Reel 61, 186, 240.

\textsuperscript{149} These included Pound’s critique of prosecutorial discretion—“The American district attorney, too often deep in politics, is not a model for China to follow”—and judicial elections, where “experience has shown that the system has no advantages to compensate for the bad effects it has had.” \textit{Id.} at Part 3, Reel 61, 523.

\textsuperscript{150} \textit{Id.} at Part 3, Reel 61, 190, 121. Pound cites Cardozo’s support specifically.

\textsuperscript{151} \textit{Id.} at Part 3, Reel 61, 725, 755.
thought China should retain from his truncated view of its legal history.\textsuperscript{152}

Throughout these reports, Pound also repeatedly mentioned the importance of legal reform and the value of legal expertise to modern civilization.\textsuperscript{153} He glorified the role of lawyers and judges in American history, both of which were central to his version of common law history.\textsuperscript{154} Here he clearly replicated the American focus on private lawyers as the public/private mediators of American democracy, and assumed that lawyers would come to dominate Chinese politics.\textsuperscript{155}

As such, in his reports, Pound cast the GMD’s support of his legal work as key to their historical greatness. In one report he asserted that “the Chinese judge has an opportunity which has not been afforded any body of judges outside of the English speaking world.”\textsuperscript{156} He did not neglect the role of the law professor, whom he described as possessing an opportunity for a grandiose legacy.\textsuperscript{157} Moreover, it would be law professors and judges working hand-in-hand that would allow his sociological jurisprudence to flower.\textsuperscript{158}

\begin{itemize}
  \item \textsuperscript{152} See id. at Part 3, Reel 61, 184–85 (citing no felony-misdemeanor distinction, a unification of civil and commercial law, and no law-equity divide).
  \item \textsuperscript{153} See id. at Part 3, Reel 61, 125.
  \item \textsuperscript{154} Id. at Part 3, Reel 61, 569.
  \item \textsuperscript{155} “In a constitutional democracy lawyers have always taken a leading part in public life.” Id. at Part 3, Reel 61, 569.
  \item \textsuperscript{156} “The course of judicial decision will determine how far the codes can be adapted to the life of the Chinese people and so how far a stable social and economic order be built upon them. The judges in China have an opportunity which they may well be envied.” Id. at Part 3, Reel 61, 558, 568. Also see “Problems of a Modern Judiciary,” “The Judicial Office in China,” and “The Training, Mode of Choice and Tenure of Judges.” Id. at Part 3, Reel 61, 150, 521, 637.
  \item \textsuperscript{157} See id. at Part 3, Reel 61, 568.
  \item \textsuperscript{158} See id. at Part 3, Reel 61, 101, 129, 142.
\end{itemize}
As a result, he restated these claims in his plans for revamping China’s system of legal education. Here he presented a variation of Langdell’s post-graduate model as a universal evolutionary advancement, neglecting any mention of alternative forms still prevalent in the United States, nor taking notice of Chinese citizens’ still limited access to undergraduate education.

Pound also routinely argued for supplementary research institutions like those he had championed in America, including the American Law Institute, private research agencies, and social science-driven government agencies. Not surprisingly, such work would require the cooperation and support of the entirety of the Chinese legal profession with his vision.

Yet for all of Pound’s initial vigor as a newly appointed adviser, he quickly found that the GMD would not instantly embrace these sweeping reforms, if ever. His repeated assertion that his time would be more productively spent in the Harvard Law School library grew out of his early frustration with the reception of his reform proposals. His requests for support from the GMD repeatedly went unanswered, and there is little evidence that any of his suggested reforms were ever introduced in the legislature or even reviewed by the Ministry of Justice.

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159. Pound did believe that Chinese elites should go abroad for “cultural education.” Yet, he also felt that the current diversity in the training hindered the development of coherent legal doctrines and the common technique with which he hoped to imprint Chinese judicial science. Id. at Part 3, Reel 61, 138.

160. The post-graduate model of legal education Pound oversaw at Harvard was still far from consolidated in the United States at the time he went to China, but Pound quite clearly stated, in a report entitled “History and Standards of the Legal Profession,” that because of the development of the post-graduate, professional model of legal education “the level of general and professional education of American lawyers has been raised everywhere.” Id. at Part 3, Reel 61, 351, 366. See generally William R. Johnson, Schooled Lawyers: A Study in the Clash of Professional Cultures (1978); William P. Lapiana, Logic and Experience: The Origins of Modern American Legal Education (1994), for an overview of Langdell’s model of legal education and the rise of post-graduate legal education in the United States.

161. See, e.g., Pound Papers, supra note 28, at Part 3, Reel 61, 123, 147.

162. See id. at Part 3, Reel 61, 173.

163. From all of Pound’s record there are one official and two private indications that anyone read and gave him feedback on his reports. Id. at Part 3, Reel 68, 172, 220, 220A.
Some of his multiple frustrations found their way into his academic writings, especially his view of the GMD leadership’s disposition to place political strategy above fidelity to legal principles.164 Moreover, he also wrote of his difficulty in teaching Chinese students and leaders the concept of rights and justice as an individual virtue and other Western legal concepts.165 But, in his public comments, he always softened any such criticisms with the assurance that his work would quickly cure the defect.166

Pound’s turn to writing Institutes of Chinese Law was thus a tactic to bypass his slow and unresponsive sponsors.167 His public claims notwithstanding, he had no prospects for changing the Chinese codes or Constitution. Yet, after finishing plans for reorganizing almost every aspect of the Chinese legal infrastructure, he became determined to develop this full corpus of doctrinal treatises through which Chinese law would be progressively reborn.168 While there is also no evidence that the GMD was supportive of this turn in his work, the project offered Pound the benefit of removing himself from China and its political vexations, while still maintaining his personal commitment to the GMD. The project promised a finished product that could simply be bequeathed to China after its completion.

Pound only completed the first section of Institutes of Chinese Law before his position as adviser to the GMD ended in 1949—Volume I. Chapter 1, “Introduction to the Science of Law.”169 Here he laid out a sweeping interpretation of Western legal history and thought, beginning with law in the Roman era and including every major school of legal theory developed subsequently.170 In total, the completed introductory volume was expected to reach 1,530 to 2,150 pages, despite the fact that his

164. See Pound, supra note 90, at 6.
165. See Pound, supra note 87, at 349–50.
166. In regard to the politicization of legal questions, Pound wrote: “Here is something which the commission to write the Institutes of Chinese Law, which I am proposing, might well begin work upon immediately.” Pound, supra note 138, at 390.
167. His records show various outlines of the proposed Institutes of Chinese Law and the expansion of their scope in subsequent drafts. See POUND PAPERS, supra note 28, at Part 3, Reel 62, 1.
168. “The surest and soonest way to bring this about seems to me to be an institutional book covering the whole law.” Id. at Part 3, Reel 61, 139.
169. Id. at Part 3, Reel 61, 984.
170. See id. at Part 3, Reel 61, 185.
“Historical Introduction of Chinese Law” would begin only in the twentieth century.171

The escalating scope of Pound’s work as legal adviser, even in the face of negative feedback, demonstrates that his belief in apolitical, culturally-neutral, expert legal knowledge provided no self-limiting principles for legal intervention. Whatever gestures he otherwise made, the agency of Chinese culture or even Chinese legal elites was a secondary concern to the achievement of the transformation he envisioned and his capacity to carry it out. Pound had to realize that there was resistance to his ideas, but in his role as adviser, he never accepted the terms articulated by his Chinese hosts, and he continued to press the limits of his reform agenda.

III. POUND AS STATESIDE PROPAGANDIST

A. Pound’s Public/Private Split

Pound’s work in China clearly demonstrates the analytical twists and turns necessary to operationalize his move from comparative lawyer to exporter, and at the same time publically paper over his failures. Yet his public relations work for the GMD even more forcefully illustrates how deeply the view of Chinese law as an object of Americanization severely undermined the American ability to assess the GMD’s legal reform, or lack thereof.

Pound’s very presence in China reflected the fact that the GMD leadership clearly understood that it was centrally important for Americans to view them as willing to accept American law. In this regard, the GMD had already been active before Pound arrived in bringing legal scholars and officials to China for tours and to generate positive press.172 But to the extent that these efforts were inspired by a clear-eyed, if cynical,

171. Subsequent volumes were to include Volume I, Constitutional Law and Administrative Law (900–1000 pages); Volumes II and III, Substantive Civil Law (1000–1500 pages each); Volume IV, Criminal Law (800–1000 pages); Volume V, Remedial Law (1300–1500 pages); and Volume VI, Conflicts of Law and International Cooperation in the Administration of Justice (800–1200 pages). A grand total of 7330 to 9850 pages—truly this was a project that would have taken him the rest of his life.

understanding of America, such strategic understanding was not reciprocated.

By all measures, the GMD’s hopes for Pound’s efficacy on this front were validated even when he was himself increasingly frustrated as a reformer. At every turn, he was strident and uncompromising in his effort to maintain the image of the GMD as an Americanizing agent in China. Despite the fact that his actual reform efforts were rebuffed, Pound was locked into the belief that China was inevitably Americanizing, and that his best efforts were to simply help facilitate this process in spite of whatever untidy problems temporarily accompanied it. While his more academic work spoke to the methodological tensions his time in China generated, Pound’s public relations activities grew out of a murky area in-between his conscious misrepresentations of what he knew of the GMD’s problems and his own deeply entrenched resistance to accepting feedback that challenged his presumptions of the GMD as an agent of Americanization.

As noted earlier, Pound’s public relations activities were important for maintaining the expectation of China’s Americanization by the GMD to counter a rising tide of stateside critics. Many U.S. State Department officials had begun to criticize Chiang and the GMD as neither liberal in orientation nor in possession of popular Chinese support, and these officials emphasized diplomatic negotiation with the CCP. As a result, Pound always couched his defenses of the GMD as a necessary, sometimes even reluctant, reaction to unfair victimization and libel by the uninformed or badly intentioned.173 Most directly in the realm of foreign policy, Pound leveraged his general renown to testify in Congressional hearings to press for continued support for the GMD.174 Here, Pound found a receptive audience who wanted affirmation that American law was not only exceptional, but could be transformative abroad.

To this end, everything that Pound wrote in the popular press about Chinese law validated the GMD’s commitment to legal reform in general, and American legal reform specifically. He also again made clear that China was incapable of reform-

173. He had a duty to be “speaking on behalf of the Chinese Government which seemed . . . to be important in view of the general misinformation current in [the] country and [the] persistent hostility of a section of the press and some of [the] periodicals.” HULL, supra note 20, at 312 (citation omitted).
ing itself without specialized American expertise. In this forum, his expressions of appreciation for the existing Chinese legal system functioned to promote the notions of commensurability that drove the global export of American law. Further, in his speeches and popular writings, Pound often did not restrict himself to mere commentary on legal reform; rather, he lauded the GMD on every front from social service provisions to agricultural development. During his time stateside, he was often called upon by GMD officials to respond directly to critical pieces in the American and foreign press. It was this propaganda work, not his actual reform agenda, that inspired Chinese supporters domestically and abroad to write to Pound to express their gratitude. At the same time, many American citizens also wrote to him, praising his efforts in providing a clear-eyed and sober view of Chinese affairs.

Naturally, Pound took aim most aggressively at criticisms of the GMD’s legal system and its Soviet influences. Pound not only rejected these attacks but also defended the conditions under which police, using their robust pretrial detention powers, detained citizens. He rejected criticisms that represented...
Chinese judges as corrupt and self-serving.\textsuperscript{182} Given his personal affiliation with many such judges, he often took the strongest umbrage to these claims, and compared Chinese judges to American exemplars such as Joseph Story and Thomas Cooley.\textsuperscript{183} Pound also addressed the poor reputation of Chinese lawyers, casting them as true patriots first, and self-interested professionals a distant second.\textsuperscript{184} He claimed that the Chinese legal system as a whole was as efficient as could be expected under the circumstances, and only conceded that it was at times underfunded, citing this fact as all the more reason to increase foreign aid.\textsuperscript{185}

Throughout all of these defenses, Pound was quick to compare the GMD favorably to the CCP. He attacked arguments that the Communists were more responsive to the needs of the Chinese populace.\textsuperscript{186} In regards to legal services, he stated that while the GMD had worked to get the “machinery of justice moving again,” this was untrue in “Communist-held areas.”\textsuperscript{187} He decried the recurring calls for the GMD to compromise with the CCP, in large part because he believed that the CCP did not believe in constitutionalism.\textsuperscript{188}

The most striking quality of Pound’s propaganda work was that, while it often mentioned law, the majority of his arguments centered on the moral virtue of Chiang and the GMD

\textsuperscript{182} See Roscoe Pound, \textit{Other News of China}, 10 AM. AFF. 176, 177 (1948); Pound, \textit{supra} note 90, at 15; POUND PAPERS, \textit{supra} note 28, at Part 3, Reel 68, 112.

\textsuperscript{183} POUND PAPERS, \textit{supra} note 28, at Part 3, Reel 68, 112.

\textsuperscript{184} See Pound, \textit{supra} note 87, at 352.

\textsuperscript{185} Pound said that administrative delays did exist, but this was only when there was a lack of funding or military disruptions. See Pound, \textit{supra} note 90, at 14–15; POUND, \textit{supra} note 86, at 12.

\textsuperscript{186} Critics often pointed to the CCP’s rural programs as the telling contrast to the GMD’s urban cronyism. Pound addressed the problems of the peasantry by noting that the GMD had invited many American agricultural reformers to China to increase production and ease the lives of farmers. See Pound, \textit{supra} note 182, at 178.

\textsuperscript{187} \textit{Id.} Pound also addressed the popular issue of women’s rights, long a fetish of American observers of China. Here, Pound disputed that the CCP was doing anything for women and contrasted the CCP’s inaction with the formal gender equality articulated in the Chinese Constitution, as well as the number of women he saw in GMD governmental positions. See POUND, \textit{supra} note 86, at 9–10.

\textsuperscript{188} \textit{See id.} at 2 (“Coalition of a constitutional government operating under a Bill of Rights with Communists is impossible . . . .”).
leadership. Pound emphasized the moral values of exceptional individuals as overcoming any particular institutional or cultural barrier to China’s Americanization. Thus, he argued that evaluations of democracy in China had to be interpreted through the work of these exceptional figures as fighting against the backwards Chinese populace. In this way, he gave Chiang great credit for building up a “strong progressive government” in the context of an often recalcitrant nation.

Pound also foreshadowed how this emphasis on moral virtue would come to rebut the harsh criticisms of many of America’s subsequent authoritarian allies during the Cold War. He defended Chiang’s openly authoritarian practices as evidence of his practicality in a time of war. He also made sure to mention that Chiang placed himself under the law, while defending Chiang’s emergency powers as mild in comparison to American historical precedent. Pound’s invocation of transitional emergency was also rife with references to the need for “security,” and Pound invoked the specter of unstable regimes abroad that had adopted democracy too quickly and had become “democracies on paper.” In fact, Pound told his audiences that the GMD were such incorruptible liberals that they were often too

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189. See, e.g., Pound, supra note 182, at 177–78.
191. Pound, supra note 182, at 177. Pound often cast his description of Chiang in quite personal terms.

You ask me about Chang Kai Shek. I saw something in him, had some talks with him, and observed the operation of government under him particularly as to the administration of justice and organization of courts. He impressed me as a strong man with a high sense of duty, an earnest desire to establish and maintain constitutional democratic government and a democratic way of life in China.

POUND PAPERS, supra note 28, at Part 3, Reel 68, 174.
192. See Pound, supra note 182, at 177–78. See also HARV. L. SCH. REC., supra note 175; Pound, supra note 107, at 277; Pound, supra note 92, at 274.
193. POUND PAPERS, supra note 28, at Part 3, Reel 68, 112. Pound compared criticisms of Chiang to charges of constitutional violations made against Abraham Lincoln during the Civil War, against Japanese internment during World War II, and against the military rule imposed on Hawaii before its ascension to statehood. See Pound, supra note 86, at 13–14; Pound, supra note 182, at 176.
194. Pound, supra note 139, at 198. See also POUND PAPERS, supra note 28, at Part 3, Reel 61, 155, 174.
idealistic and not sufficiently appreciative of the importance of order. 195

Pound’s propaganda work also presaged the growing venom of post-New Deal politics, as he gave no quarter to critics of the GMD. He always opted to question critics’ political loyalty rather than their strategic analysis. He routinely complained about the influence of such experts and further argued that they either did not have any real knowledge of Chinese conditions or that they proceeded from a purely anti-American ideological bias. With obvious irony, he also placed blame for other failed U.S.-GMD projects on such experts, claiming that the GMD’s great faith in America could lead them to rely “too much upon advice from experts from the Western world unacquainted with the conditions to which their advice was to be applied.” 196

Thus, in reaction to the idea that America should pursue diplomatic relations with the CCP, Pound responded with vehement claims about the broad support enjoyed by the GMD and the anti-American nature of questioning the successful export of American law to China. 197 He characterized a claim that the GMD enjoyed no support from the intellectual or business elites as an “outrageous statement.” 198 He routinely denied that the CCP had any real popular support in China, at times claiming that there was “no Communist Party in China,” and at most that there were “scattered Communist agitators and conspirators here and there.” 199 For all his claims of war-time exigency, he also increasingly came to attack those who claimed

196. POUND, supra note 86, at 12.
197. When critics pointed out the one-party nature of the GMD regime, Pound claimed that there were minority parties—of which there are many—but that the minority parties were “made up of leaders with few or no followers.” Id. at 12–13.
198. POUND PAPERS, supra note 28, at Part 3, Reel 68, 304.
that the Chinese Civil War was a real contest. Moreover, Pound repeatedly told American audiences that the GMD was China, and that criticism of the GMD was a violation of the long-standing American tradition of supporting China’s modernization. He assured his audience that America was still held in the highest regards in China, as it had been for over a century.

Pound stayed true to these positions until the bitter end. He had for many years argued that China’s future was secure “unless outside promotion of [C]ommunism brings about another era of disruption.” He denied problems within the GMD until the actual expulsion of the party from the mainland, and as late as 1949 he responded to questions about internal strife in China by offering up that he had seen “none at all.”

B. Pound’s Strategic Distortions

In Pound’s public and semi-public roles, he projected an image of himself as both a clear-eyed observer of Chinese affairs and a welcome reformer of Chinese law. To varying degrees, his projections were directly shaped by the context and contour of the new export-driven view of American-led foreign legal reform. Pound represented the GMD and its legal reforms as the willing recipients of American benevolence, and claimed that they were on the straight path to liberalization and democratization. He continued to justify his role as reformer by replaying the classic trope of faint praise that condemned Chinese backwardness but validated the Chinese potential for rehabilitation through Americanization. There is little doubt that he honestly believed in the general aims of this project, and that this belief made him an effective advocate for the GMD. Yet, at some point, the ardent nature of his public relations work for the GMD has to be reconciled with the fact that, as a legal reformer, his work yielded absolutely no results, and, tellingly,

200. See War in China, supra note 64.
201. “They remember how China was saved from partition by John Hay . . . All the Chinese (Communists excepted) recognize Americans as the one people who have never had aggressive designs against them; as the one people in whom experience has taught them to have confidence.” HARV. L. SCH. REC., supra note 175.
pushed him away from any collaborative projects with the GMD during his tenure.

What Pound’s archives reveal is that he practiced a dialogic of public confidence and private frustration that was rationalized by his unfailing faith in his ultimate mission. He simply rejected out of hand any and all developments in China that would invalidate his utility as a reformer or call into question America’s self-congratulatory view of Chinese affairs. Yet, despite what he may have claimed publically, or even hoped personally, he received a great deal of critical information about Chinese affairs from sources outside of the GMD.

Throughout Pound’s personal correspondence it is clear that he saw his mission in China as dovetailing with his larger political agenda, and that this was not a reversal as has been previously claimed. Instead, it was part of his preexisting fight against absolutism and, with growing emphasis, against communism. In his letters to Seavey, Pound unambiguously stated that he felt that the GMD were allies in America’s larger Cold War struggle.

It could be argued that Pound’s idealized view of the GMD can be explained by his limited and highly orchestrated existence while living in China. Certainly, the Chinese elites with whom he interacted reinforced such beliefs—even those legal reformers who struggled consistently against Chiang’s authoritarianism. In this vein, some commentators have assumed

204. See Hull, supra note 20, at 282.
206. Even given his relatively strained relationship with the GMD, and China generally, during this time, Wu continued to praise Pound and his work in China. See, e.g., John C. H. Wu, The Quest of Justice: Reflections on Modern Legal Philosophies, 33 Iowa L. Rev. 1, 3 (1947). Hsieh Kwan-sheng always described Pound’s work in the flattering manner which had preceded his arrival. Pound Papers, supra note 28, at Part 3, Reel 100, 628 (noting Pound’s “encyclopedic knowledge” and “wonderful power”). Other officials wrote to Pound in this way as late as 1949, claiming to be Pound’s “obedient pupil” and describing the positive impact of Pound’s work on “the morale of the people in general and the army.” Id. at Part 3, Reel 100, 708. See Xiaoqun Xu, Trial of Modernity: Judicial Reform in Early Twentieth-Century China, 1901–1937, at 53 (2008), for a history of these scholars’ struggles within the GMD.
that Pound was kept in the dark both about Chinese politics and the dim prospects that his agenda would be enacted.\footnote{207 See, e.g., Jianfu Chen, From Administrative Authorisation to Private Law: A Comparative Perspective of the Developing Civil Law in the People’s Republic of China 31 (1995).}

Yet, from Pound’s earliest contacts in the 1920s with Chinese legal scholars, he knew of the GMD’s domestic troubles, as well as about the uglier realities of Chiang’s weak commitment to democracy and legal reform.\footnote{208 In his earliest correspondence with Wu, Pound was introduced to the general state of unrest in post-1911 Chinese politics. Pound Papers, supra note 28, at Part 3, Reel 46, 438.} More directly, Pound’s high-profile appointment made him attractive to those Chinese legal elites outside of the GMD establishment who wanted to voice their criticisms to a respected foreigner.\footnote{209 See id. at Part 3, Reel 62, 140, 148.} Pound received detailed letters from reformers and judges who had been cast out of the GMD after agitating too aggressively for liberalizing reforms. These lawyers—many of whom asserted their own commitment to American legal values—warned him that the GMD was only interested in his utility as a propagandist.\footnote{210 Pound received an extensive letter in 1948 from a former Chief Justice of two southern Chinese provinces, Y.H. Tseng, who had left for Hong Kong. The letter laid out Tseng’s credentials, including his American legal education, participation in anti-Communist prosecutions, and his torture during the Japanese invasion. Tseng told Pound that he was purged from the GMD for being a true liberal and that the GMD gave more sway to advisers from fascist nations than those from America. Tseng ended the letter with his hope that Pound would stay in China if he believed “that such a regime can be defended and reformed into a democracy” and if Pound did, Tseng inquired whether Pound thought he could “in any way tell his rulers that torture and improper detention or execution of political opponents are condemned by civilized jurisprudence.” Id. at Part 3, Reel 62, 611.} In one such case, Pound carried out an extended correspondence with a Western-educated reformer from one of China’s minority liberal parties who consistently provided him with an alternative view of GMD policies.\footnote{211 Chao Byng, a Chinese lawyer who had earned a PhD in Law from the University of London and a DCL from Oxford before returning to practice in China. Early in 1947, Chao first wrote to Pound to “give you the ‘inside facts’ about the Chinese law courts, especially those in the interior of China which really represent the typical Chinese tribunals.” Chao claimed to represent one of the minority liberal parties that had tried to organize outside of the GMD, the National Liberal Party of China. Id. at Part 3, Reel 68, 278.} Yet Pound never validated the concerns or criticisms expressed in these letters, and he was likely
guarded in his responses given his public appointment. However, the content of these letters could not have been completely lost on him, and even though they had their own public strategies, it seems unlikely that none of Pound’s GMD interlocutors shared their struggles with him.212

Pound again steadfastly chose to see any defects in Chinese law as institutional and merely transitory in light of his moral evaluation of the GMD leadership. This allowed Pound to echo extant criticisms of the GMD in his reports as adviser, while simultaneously rejecting them in his public writings.213 And when he did make concessions in his public evaluations of the GMD, he made sure to articulate these defects as stemming from the influence of his domestic opponents, academically and politically.214 What this advocacy work also clarifies is that Pound’s loyalty was to Chiang and the GMD first, and “China” and the Chinese people second. It was the GMD that provided a bulwark against the spread of Communism, and especially against CCP populism.

It is thus clear that Pound knew a great deal more, or at the very least was exposed to a great deal more, critical information about the GMD’s legal system than he ever publically admitted, especially as to Chiang’s limited commitment to “the rule of law.” On one level, his public writings can be cast as simply trying to build more support for his own work within the GMD out of a paternalistic interpretation of what the American public “needed to know.” Here, the inerrant cultural confidence of the era imbued Pound with a personal confidence that served to cripple rather than enrich dialogue about Chi-

212. See, e.g., POUND, supra note 96, at ii (admitting that comparative law and history cannot “do the whole work of developing Chinese law” and that both “should be made to serve the needs of modern Chinese life”).

213. For example, Pound consistently valorized Chinese judges and claimed that the GMD judiciary was in fine working condition. Of course, Pound could not claim that the courts were flawless as this would have invalidated the need for his reforms. Thus, at different points in his articles Pound did note that the formal documents he discussed were not always well implemented. See Pound, supra note 182, at 178 (“Again there is need of making the judicial organization, which is excellent as a paper scheme, achieve its full possibilities in action.”). In his reports for the GMD, Pound rarely made such valorizing claims and instead was often quite critical of local courts and the lack of financial resources that the GMD had provided them. See, e.g., POUND PAPERS, supra note 28, at Part 3, Reel 61, 443.

214. See POUND, supra note 96, at 1–3.
nese legal developments through strategic misrepresentations, however well-intentioned.

Somewhere in Pound’s mind the alchemy of his faith in legal science and Americanization provided the rationalizations that kept him motivated in the face of repeated failure and frustration. This is, in essence, the self-reinforcing power that made modern American legal exceptionalism such a durable ideology. Collectively, presumptions about American superiority, legal evolution, a depoliticized science of law, and a deep moralism about the GMD all joined together to move Pound to promote a public image of successful legal reform efforts in China, despite only rhetorical encouragement from his GMD sponsors.

IV. POUND & LAW IN COLD WAR FOREIGN POLICY

A. Pound’s Anti-Communist Legalism

Whatever tensions Pound faced in reconciling his sense of mission with his many practical frustrations, they were, ironically, relieved with the CCP’s successful expulsion of the GMD from the Chinese mainland in October of 1949. The CCP’s victory quickly became known in America as “the loss of China.” This phrase reflected the presumption that China was America’s to lose. However, it proved true that the “loss” had a powerful impact on the competitive rubric of the Cold War. Rather than give him pause, after the events of 1949, Pound’s support for the GMD, and his anti-Communist rhetoric on China, only intensified.

When Pound returned from his last trip to China in 1948, he had taken up a temporary appointment at UCLA’s new law school. Even though Pound’s time in China had no impact on his intellectual views, it did crystallize his anti-Communism.215 His appointment was not accidental, as California’s proximity to China made it a hotbed for GMD supporters in America, who were frequently referred to as the “China Lobby.” While at UCLA, Pound became embroiled in the controversial tenure of the law school’s first dean, L. Dale Coffman, whose own stri-

215. Despite not impacting his intellectual views generally, Pound’s time in China did give great substance to his writings on legal evolution. In Pound’s final articulation of these ideas, China was invoked as the best example of his second stage of legal history, “strict law.” See generally McLEAN, supra note 94, at 39–44 (providing an overview of “strict law”).
dently anti-communist views garnered Pound’s unswerving support, but also led to Coffman’s ultimate ouster.216

As stated earlier, Pound was already a critic of socialism and communism before starting his work for the GMD. But it was not until he arrived in China that he became a rabid and publicly active anti-communist. Notably, Pound’s views on free speech had shifted several times during his lifetime, and he had not been involved in the early struggles over communism at Harvard. During World War I he had actually been a vocal critic of communist prosecutions and had openly challenged the Palmer Raids.217 Yet by 1948, he not only devoted a great deal of his efforts to anti-communist causes but, during his appointment at UCLA, he had become a strong proponent of loyalty oaths for academics and regularly brought red-baiting to evaluations of foreign legal reform efforts.218

Pound became specifically well-known for his criticisms of communist influence at Harvard, and, notably, he had a specific antipathy for the renowned Chinese historian John Fairbank.219 Therefore, a review of Pound’s behavior during this time strongly indicates that he never questioned his support of Chiang as even indirectly in service to authoritarianism, but interpreted his experience as a foundational stimulus for the reactionary politics of his later life.220

At no point did Pound characterize his work in China as a failure, but rather used the “loss” as political capital to call for

219. Pound singled out Harvard for its contribution to the Communist problem. In 1948, Kohlberg wrote to Pound about the activities of Fairbank and other “Communists” who were on the faculty at Harvard while he was posted in China. POUND PAPERS, supra note 28, at Part 3, Reel 46, 490. See also id. at Part 1, Reel 123, 67; Id. at Part 3, Reel 68, 17.
220. See HULL, supra note 20, at 329.
even greater legal reform efforts abroad. After 1949, he continued to write in glowing terms about the legal system of the GMD during the 1940s, and he never acknowledged that he had seen any political censorship or repression during his stay in China. Furthermore, and like so many before and after him, his appointment, however brief, had immediately transformed him stateside into a “China expert.” He was approached not only for his political commentary on Chinese development, but also for his opinions on specific cases involving Chinese law or litigants.

Pound’s first formal anti-communist affiliation was with Alfred Kohlberg’s American China Policy Association (“ACPA”). Kohlberg was a leading member of the China Lobby, and, like Pound, his anti-communism was catalyzed by his experience working in China. In December of 1946, Kohlberg first approached Pound to ask him to join the ACPA based on his new advisory position with the GMD. Pound quickly accepted, stating that “the Association is taking exactly the right stand with respect to China.” From that point onward, Pound participated in ACPA affairs, though it was not until after 1949 that he fully embraced his role in the organization and became a member of its board of directors. His many years of correspondence with Kohlberg expressed the stridency of his convictions, including his full support of Senator Joseph McCarthy.

During his time in China, Pound also broadened his participation to include other anti-communist groups. These other activities included becoming Vice-Chairman of Marx Lewis’s Council Against Communist Aggression.

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221. Seavey, in a short biography of Pound prepared for Collier’s jurisprudence encyclopedia, wrote: “[Pound] went to China to assist the Chinese Minister of Justice in setting up a modern system of courts. When the Communist debacle occurred, Pound returned to teaching.”

222. See, e.g., POUND PAPERS, supra note 28, at Part 1, Reel 122, 390. This was almost always associated with a fee paid to Pound for signing off on a client’s existing interpretation of Chinese law. See, e.g., id. at Part 1, Reel 122, 984 (claiming an opinion on Chinese corporate law); Id. at Part 1, Reel 122, 994 (showing Pound was paid $50 to sign off on a brief for Wells Fargo); Id. at Part 1, Reel 122, 987 (showing Pound was paid $100 to sign off on a brief for Chennault’s Civil Air Transport).

223. Id. at Part 3, Reel 46, 462.

224. See id. at Part 1, Reel 123, 83.

225. Id. at Part 1, Reel 123, 92. These other activities included becoming Vice-Chairman of Marx Lewis’s Council Against Communist Aggression. Id. at Part 3, Reel 70, 210.
CCP publications. It was through such participation that he influenced lawyer Pierre Goodrich, whose Liberty Fund supported the publication of Pound’s scholarship during the 1950s as it laid the groundwork for the rise of modern libertarianism in American law. During his later years, Pound was often contacted by lawyers looking to network through him into the anti-communist movement, and, in return, they offered to further publicize his views on China.

Pound’s main contribution to the China Lobby’s efforts was allowing them to use any creative characterization of his tenure as legal adviser to support the GMD and cast doubt on its domestic critics. Moreover, Pound’s claims about Chinese law became all the more valuable as law became a common point of contrast for distinguishing the United States from the Soviet Union. Like the American legal profession generally during this era, Pound emphasized the centrality of law in the Cold War struggle, a view that served as a key element in the further hardening of American legal parochialism. This anti-Soviet discourse began soon after Kohlberg had recruited Pound, and Pound was happy to allow Kohlberg to cite his views in any manner he pleased.

Thus, in the post-1949 era, Pound became an important figure in the transformation of America’s view of Chinese law from a fertile soil for Americanization to “Communist law.” Pound claimed that “law and lawyers are the most effective

226. See, e.g., GERALDINE FITCH, FORMOSA BEACHHEAD 103, 113 (1953).
228. POUND PAPERS, supra note 28, at Part 3, Reel 68, 29.
229. Id. at Part 3, Reel 46, 468. Pound told Kohlberg that the GMD “had adopted a democratic constitution which in all major respects is in accordance with the principles laid down by the all-party Political Consultative Conference.” Later Pound would expand the scope of his claims, and even modify them at Kohlberg’s request. After Kohlberg asked Pound about his views of the U.S. State Department in China—with which there is little evidence Pound had significant interactions during his tenure—Pound responded: “I have no objection at all to be quoted as saying that the State Department information office as I saw it in Nanking while I was Adviser to the MOJ from 1946 to 1949 was a foundation of misinformation.” Id. at Part 1, Reel 123, 67. See also William F. Homer, Jr., Ex-Law Dean Says U.S. Policy ‘Messed Up China Dreadfully’, Bos. Sunday Herald, Apr. 10, 1949. Pound also told his sister that the State Department had actively armed the CCP. HULL, supra note 20, at 314.
foes of Communist absolutism" and that China’s future was now a contrast between “Soviet rule . . . [and] a constitution.” Shortly after 1949, Pound began work on his main anti-Soviet publication. In that publication, he sourced the roots of his rejection of Soviet law to his time spent in China.

Like many of its legal critics, Pound linked Marxist theories of law, often through Pashukanis, to the New Deal. Through linking the loss of China to New Deal legal thought, Pound became useful to the broader anti-communist lobby by serving as not only an expert on China, but also on Soviet law. At the same time, his transformation into an anti-communist expert gave him a platform from which he could express his personal views on religion and law with much more confidence. Pound could now, as a legal scholar, more easily strike out against the now reviled atheism of the Soviets.

Pound was also important to Sino-American affairs as a conduit for shifting the dream of Americanization from China to Taiwan. Even though he would not travel again to Asia after 1949, he maintained his contacts with the GMD legal elites now in Taiwan. He continued to publish articles on Chinese law under the GMD as part of larger debates on foreign aid to Taiwan. Pound also continued to write letters of recommendation for GMD officials’ children to attend Harvard Law School, and he received letters from Chinese lawyers and academics asking for help in procuring employment or publication.

230. POUND PAPERS, supra note 28, at Part 1, Reel 49, 83.
231. Homer, supra note 229.
233. See Pound, supra note 58, at 9. Pashukanis was a leading Marxist theorist of law who had been executed in 1937 as part of Stalin’s purges. Pashukanis’s fate seemed no barrier to Pound’s use of him as Communist legal schools par excellence twenty years later.
234. The utility and nature of this shift can be seen in another of Pound’s replies to Kohlberg: “If justice in Red China is operating on the basis of Soviet law, of which I also have made a very careful study, I can testify that Soviet law is very largely a matter of window dressing for propaganda purposes.” POUND PAPERS, supra note 28, at Part 1, Reel 49, 738.
235. See, e.g., ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 111 (1957) (“Whether rule is borne by Rex or by Demos, a ruler ruling reasonably under God and the law founds his kingdom on a rock.”).
236. See, e.g., Pound, supra note 107, at 291.
in America.237 Even some of those who had provided criticism of
the GMD to Pound prior to 1949 were now anxious to court his
favor, and, self-servingly, provided him with the same over-
stated evaluations of Taiwanese and mainland Chinese affairs
that they had previously sought to rebut.238

As such, legal elites in Taiwan had a continued interest in
glorifying Pound and his work as a former legal adviser. This
led several Taiwanese presses to republish his earlier works.239
Ironically, his reception even among GMD scholars presaged
how limited American legal advisers’ control would often be
over the interpretation of their ideas in foreign contexts.
Whenever Pound was cited in Taiwan, it was almost always to
support the centralization of a legal system that gave little
power to the judiciary.240

This steady flow of trans-Pacific flattery and encouragement
helped sustain Pound’s commitment to the GMD until his
death in 1964. In the fifteen years since the “loss of China,”
his experience had become a rhetorical prop to validate his anti-
communist agenda, while his frustrations during his time as an
adviser were all but forgotten. In sum, for all the ready lessons
that could be drawn from his experience in China, the GMD’s
defeat for Pound only bolstered the assumption that American
law was both exceptional and should be fervently exported, ex-
panding the global scope of its universalism while entrenching
its parochialism.241

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237. POUND PAPERS, supra note 28, at Part 3, Reel 100, 435.
238. See id. at Part 1, Reel 49, 489. Of particular interest, Pound continued
his correspondence with the once GMD dissident Chao Byng after his 1949
flight to Hong Kong. Chao reversed his previous criticism of the and suppor-
ted Pound’s anti-Communist work and agreed with the ACPA and other China
Lobby groups that an American supported invasion of the mainland would be
met with popular support. Id. at Part 4, Reel 27, 876.
239. Id. at Part 1, Reel 49, 557.
240. Even Wu, who was Pound’s longest-running Chinese interlocutor, took
from Pound his faith in evolutionary legal development and his endorsement
of social engineering through law. See JOHN C. H. WU, JURIDICAL ESSAYS AND
STUDIES 120–42 (1928). See also Francis Liu, (Untitled), 51 CHINA L. REV. 6
(1949) (noting, from Pound, the rise of administrative law in America and the
inefficiency of judges).
241. See generally JONATHAN SPENCE, TO CHANGE CHINA: WESTERN ADVISERS
IN CHINA 1620–1960 (1969) (exploring the results of Western attempts to
mold China). Pound’s reaction to the fall of the GMD and the subsequent
scapegoating discourse in America typify Spence’s analysis of how reformers
managed to avoid recognizing the roots of their own failures. See id. at 292–
B. Pound’s Legacy as Failed Exporter

The fact that Pound’s time in China has for so long been passed over for study speaks in many ways to the very ordinariness of Pound’s legal reform project to contemporary sensibilities. Decades later, some biographers would still be content to state without detailed comment that Pound was invited “to visit China and rewrite its legal system” and to characterize this as just another of his many reform efforts. Today, the image of the American legal expert going abroad has become commonplace, even routinized, in America’s international legal relations. American legal ideals and institutions are now typically assumed to be imbued with socially transformative potential. Where such export was once deemed to provide a necessary line of defense against communist expansion, now it is often seen as an effective instrument against a wide swath of authoritarian regimes.

In personal terms, a great deal of Pound’s prior intellectual commitments made him a poor prospect to achieve actual reform in China. His theory of common law adjudication resolved tensions in his own intellectual positions through aspirational claims about future legal developments that did not require him to face the present realities of China. It also allowed him to successfully mask his practical failures with a soothing theory of American legal superiority and common law triumphalism. The increasing polemic of his later years reflected the fact that the logical coherence of his entire intellectual universe was based on a future supposition about the effects of sociological jurisprudence detached even from American legal experience. As a great escape from his challenges at home, in China Pound

93 ("Some [reformers] hurled themselves with increasing energy into their work, burying future uncertainties in the all-absorbing and often satisfying present; others argued that the Chinese had proven themselves unworthy to receive Western help—they were corrupt, shifty, and cruel.").

242. Hull, supra note 20, at 278. Hull also accepted various claims by Pound about Chinese law on face value. While Hull’s claims about Pound in China are often criticized in this Article, it should be noted that this is not a comment on the general quality of Hull’s work on Pound and Llewellyn, which is otherwise excellent. It is likely because Hull is the only writer on Pound to pause and give any comment on his time in China that she is cited in this Article more frequently than others who more than likely shared her reflexive assumptions on this particular topic.

243. See Kroncke, supra note 6, at 589.
further convinced himself that his legal science was more important than local politics and, in doing so, imagined that legal reform abroad was easier in less “advanced” legal systems than it had proven to be stateside.

It is true that Pound was seduced by the adulations he had long received from Chinese quarters, but the depth and breadth of his commitment to this project of Americanization in China defies the dismissive characterization of him as simply a fickle grandstander. 244 He was frustrated in China, but his larger commitments sustained his work even when his legal ideas and reforms were ignored by the GMD. It is significant that Pound never recommended reforms for Chinese law that he had not consistently recommended for American law, and there is no evidence that he saw his time in China as a refutation of sociological jurisprudence. 245 If anything, his time in China emboldened his preexisting faith in the necessity of judicial empiricism to combat absolutism, even if he did not condemn Chiang’s own absolutistic rule.

As a reformer, Pound’s attempt to actualize this ideal failed because—following a theoretical distinction of his own creation—he presumed that his judicial empiricism was the “modern element” that all legal systems could share as a template to lay over whatever particular “ideal element” their national cultures possessed. Yet so much of what he took as “modern” was not only culturally and historically specific to his version of American common law, but also represented an inherently politicized distribution of social and political power that invariably implicated entrenched interests in China. His presumptions were thus all the more limiting for the actual implementation of any legal reform through China’s highly contested political system. While perhaps honestly believing that China offered him a chance to enact his ideal system outside the restraints of American politics, his turn to solo work such as his Institutes of Chinese Law at Harvard revealed that he came to privately realize that this comparative free rein was an illusion.

Pound’s broadened commitment to anti-communism further aggravated these issues as it heightened his resistance to the empirical feedback he had received that would have challenged his loyalty to his project and the GMD. This personal dynamic

244. See Witt, supra note 12, at 229–31.
paralleled the larger American rejection of legal cosmopolitanism, where the “loss of China” only made the desire to successfully achieve legal reform elsewhere more urgent. More than ever, Pound needed to reconcile his belief in a common human legal science with the inherent parochialism of American legal exceptionalism now writ large into the Cold War. As such, his scholarship after 1949 showed no indication that he “learned” anything from his experience in China, though he included references to work on Chinese legal history in his final five-volume opus, *Jurisprudence*.246 He rarely mentioned Chinese law outside of his advocacy work, and he pursued no further study of Chinese subjects. Even the transnational mutualism he aspired to earlier in his work—using his characterization of GMD reform efforts to validate his own ideas at home—understandably disappeared after 1949.

If China did have an impact on Pound’s thought, it was in clarifying how he thought his work could be universalized. His anti-communism broadened his global gaze. As early as the 1920s, he had extolled the imperial theory of Roman jurists like Grotius, and he expanded his general judicial theory to include a valorization of the ability of international jurists to coordinate international society.247 Pound also included statements about this drive towards global legal unification in his early writings on China,248 and here he cast international rights as “reasonable expectations involved in life in civilized society.”249 During the late 1940s, he had begun to write on “world law” and “globalism.”

After 1949, however, he lost this faith in global cultural unification and rejected the strong claims of internationalists about “universal law.”250 His experience in China may have damp-

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250. See Pound, *supra* note 58, at 7–9; Roscoe Pound, *A World Legal Order: Law and Laws in Relation to World Law*, Address at The Fletcher School of
ened his enthusiasm for total global homogenization, but it clearly only strengthened his belief that his universal theory of modern law was nevertheless a global solution. Pound had little faith in international legalism per se, but full faith that whatever good could come from internationalization would be through the influence of modernized American common law, and not through the cosmopolitan participation central to his early career.

What is perhaps more important than evaluating the specifics of Pound’s reform mission is understanding how it clearly resonated with, and reinforced, the newly entrenched image of the American lawyer as a foreign reformer. At the time, domestic commentators rarely scrutinized or even mentioned exactly what Pound was doing in China or how he was going about it. Even Pound’s allies who agitated against the New Deal as a great paternalistic affront had little hesitation in presuming to know the proper shape of Chinese law for China.251 All that really seemed to matter was that Pound was a famous American legal scholar doing what American lawyers now did abroad, that is, “develop” foreign law towards a version of modernity pre-scripted as Americanization.

No one, even his political opponents on Chinese affairs such as John Fairbank, ever requested that Pound produce his data on Chinese courts, and most certainly not after 1949. That most of his public writings on China were formal analyses of documents compared, often only implicitly, with an idealized form of American law, generated little criticism. Few challenged the idea that Chinese law was flawed in comparison to American law, and, even in his pro-Taiwanese writings, Pound helped contribute to the idea that Chinese culture was anti-legal and that China now had “no law.”252 Lastly, he continued to deny agency to China or Taiwan when he cast American ac-

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251. See, e.g., STARBUCK, supra note 227, at 362 (“In February 1947, Goodrich wrote to Pound offering unsolicited and detailed comments on what [Goodrich] believed were the strengths and weaknesses of the new Constitution and how it should be improved.”).

252. See Wen-Yen Tsao, Equity in Chinese Customary Law, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 21, 43 (Ralph A. Newman ed., 1962) (noting that “[i]n the long history of legal evolution in China there were hardly any distinguished jurists”).
tion as determinative of both pre- and post-1949 developments. China had become an ideal type of American legal reform abroad far removed from domestic concerns, and, like all ideal types, was rarely troubling by reality.

CONCLUSION

Given Pound’s good intentions, one would hope to be able to identify salutary effects of Pound’s work in China on either Chinese law or American understandings of Chinese legal developments. But outside of perhaps developing some affective personal relationships, there genuinely seems to be almost none.253 His work had little impact on the GMD’s legal reforms, and possibly only aggravated the elitist tendencies of the liberal legal cohort that ran counter to the CCP’s successful grassroots rural political strategy. More problematically, Pound did not use his time in China to embrace the comparativism of his early life and therefore did not test and refine his own legal thought. Neither did he give American audiences clear-sighted insight into Chinese affairs, even when he had relevant information on what the “rule of law” meant in Chiang’s China. Further, he presented his Chinese interlocutors with none of the complexities of American legal experience, thus inhibiting them from developing critical perspectives on American law.

Ultimately, after his failure, he chose not to question his own presumptions, but instead proactively, and in reactionary terms, entrenched a dogmatic view of American foreign legal reform work that fueled the newly ascendant form of American legal exceptionalism that rejected his early commitment to comparativism.

While all of this may in some way serve to characterize Pound as ethnocentric or imperialistic, the basic fact remains that his view of Chinese law reflected, in lockstep, the general assumptions of the American legal community. In concrete

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253. There were a few GMD legal scholars who cited Pound as an influence after 1949. For example, Yang Zhaolong, head of the Criminal Section of the Ministry of Justice, considered himself a protégé of Pound after studying at Harvard in the 1930s. Yang, however, stayed in China after 1949 and worked for the CCP. Unfortunately, like most GMD holdovers in the CCP legal system, Yang was purged in the reactionary purges of the late 1950s. See Glenn D. Tiffert, Epistrophy: Chinese Constitutionalism in the 1950s, in BUILDING CONSTITUTIONALISM IN CHINA 59, 75 (Stéphanie Balme & Michael W. Dowdle eds., 2009).
terms, Pound’s time in China is a strong example of how this new export-driven view of American law abroad rarely served American interests effectively. While it is often possible in historical analysis to identify specific groups which benefit from spectacular failures, it is nevertheless difficult to see any American or Chinese benefit from the events leading up to and following 1949—save in some limited sense the GMD dictatorship that soon emerged on Taiwan.

Pound, like America more broadly, was trapped by his presumptions. He could only argue for some version of Americanization abroad as the solution for foreign legal development. While Pound saw himself as engaging in a scientific endeavor that was presumptively universal in approach, his evolutionary and parochial assumptions recursively compelled the same substantive conclusion regardless of the realities of local conditions abroad or the actual complexities of American legal history. By assuming that Chinese law was only an object of change, Pound’s intellectual views could not be influenced by his many frustrations and failures as a reformer. He did not seek to learn from Chinese legal experience, but he also could not learn from his personal experience and so become a better legal reformer—abroad or otherwise.

Nevertheless, Pound and his high profile appointment were historically important in that they helped increase the visibility and status of the American lawyer’s new role abroad, and in doing so, reinforced the deeply flawed valuation of legal science over local politics inherent in foreign reform efforts. Pound’s representation of legal developments in China was paradigmatic for American legal reformers abroad. He reconciled the tensions and negative feedback in his technical reform work by personalizing his efforts, most directly in the high moralism he used when discussing the GMD and Chiang. Here, Pound was swept away by the politics of legal reform in authoritarian regimes that would become prototypical during the Cold War era—where it was believed that transcendent individuals would overcome any local resistance to American legal reforms.254 His high moralism, woven into his evolutionary view

254. See generally Robert A. Packenham, Liberal America and the Third World: Political Development Ideas in Foreign Aid and Social Science (Princeton Univ. Press 1973) (discussing the approaches of social scientists and policymakers to foreign reform post-World War II).
of legal science, did little to inspire sober assessments of particular foreign legal systems.

It is critical to note that even though Pound did not expound upon the extant controversies of American law while in China, American politics during this period was actively grappling with its own domestic legal reform issues. The view of America as solely an exporter of legal knowledge actually served to narrow the empirical range of American legal debates, in effect closing American legal culture off from the experience of so many other nations, most of whom increasingly faced the common legal difficulties of a globalized world. Instead, for American law, the international legal world increasingly paralleled Pound’s view of foreign law as split between emulation and contagion.

It is in the mid-twentieth century move to place American law outside and above international legal development that the primacy of new export efforts in American foreign legal relations became intertwined with the marginalization of comparative law in America. By the mid-twentieth century, the promise of genuine comparative legal analysis had been lost to Pound, as it had been to the larger American legal community.255 As Pound’s story illustrates, foreign law was no longer a site of critical inquiry alongside which Americans could contemplate their own legal development. Rather, foreign law was solely a perpetual subject of American influence or potential threat. The legal internationalism that accompanied America’s new status as a superpower certainly had global ambitions, and the new legal exceptionalism now necessitated that the practical defects of foreign legal systems were to be compared to idealizations of American legal history. Sophisticated comparative lawyers still practiced their craft at the margins of the American legal community.256 However, even their best efforts could do little to substitute for what once had been a much more broadly shared commitment to comparativism.257

We can most directly see the lasting imprint of the ideas and approach with which Pound viewed Chinese law by looking at the manner in which they are still deeply embedded in Sino-

256. See Kroncke, supra note 3, at 544.
257. See id. at 544–52.
American relations today. While Pound’s story is largely unknown to most American lawyers who are presently attempting to influence Chinese legal development, the same pitfalls inherent in his export-oriented view continue to plague contemporary “law and development” work related to China. In the past three decades, the resurgence of interest in Chinese law by Americans has rearticulated much of Pound’s reform idealism, despite the fact that China has a forthrightly authoritarian regime.

Summary reports concerning the decades of post-1978 American legal reform work in China reveal that American lawyers and activists, even as they carry his same altruistic intentions, are repeating Pound’s errors, from the projection of American ideal types onto Chinese conditions to the flawed search for apolitical engagement with an actively adaptive authoritarian regime. Just like Pound, analytic contortions are made to optimistically project strong judicial review into China’s future.


259. Compare Stephenson, supra note 4, at 67–73 (describing the prioritization of developing the “rule of law” in China during the Clinton Administration), with Paul Gewirtz, The U.S.-China Rule of Law Initiative, 11 WM. & MARY BILL RTS. J. 603, 609 (2003) (“[F]oundational ideas remain in dispute within China . . . the ‘rule of law’ remains a contested ideal and is still contending for preeminence with phrases such as ‘rule by law’ and ‘ruling the country according to law.’”).

260. See, e.g., Jacques deLisle, Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond, 20 U. PA. J. INT’L ECON. L. 179, 248–68 (1999) (detailing the lack of knowledge and use of detailed prescriptions without local context by international actors, as well as the predominance of short term projects); Sophia Woodman, Bilateral Aid To Improve Human Rights, CHINA PERSP., Jan.–Feb. 2004, at 2, 12–15 (describing reform efforts that have proven difficult to assess, possess limited transparency, discriminate against non-English speaking partners, evidence a large urban bias, and are plagued by practitioner and donor exaggeration of results).

The basic idea that Chinese legal reform can be cajoled and molded according to American influence remains at the heart of international legal discourse from subjects as broad as human rights treaties to World Trade Organization ascension.\(^{262}\) Moreover, just as in Pound’s time, there are many current Chinese reformers—as diverse in normative outlook as China’s internal political landscape—looking to learn from, not simply ape, American legal experience.\(^{263}\) And potential interlocutors are just as poorly served as they were in Pound’s time by the skewed idealizations inherent in export-driven perspectives.\(^{264}\)

Pound’s tenure in China shows clearly that the broad-ranging scholarly search for comparative legal knowledge that characterized his early career was replaced by a well-intentioned, though ultimately self-defeating, desire to reshape the world in particular images of American law. This desire to reshape others was historically central to the particular form of modern American legal exceptionalism criticized today as inhibiting American legal development by setting American law outside the currents of global legal experience.\(^{265}\) Especially today,

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264. See Julie Mertus, *The Liberal State Vs the National Soul: Mapping Civil Society Transplants*, 8 Soc. & Legal Stud. 121, 127 (1999), for a non-Chinese case-study that summarizes the pitfalls of such an approach for foreign reformers.

265. See generally Sandra Day O’Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, 2 Int’l Jud. Observer, June 1997, at 2 (discussing the values of looking to the decisions of foreign courts, as well as foreign law generally, as a tool to broaden a lawyer’s and/or judge’s legal knowledge and competence); Ruth Bader Ginsburg, *The Value of a Comparative Perspective in Judicial Decisionmaking: Imparting Experiences to, and Learning from, Other Adherents to the Rule of Law*, 74 Rev. Jur. U.P.R. 213 (2005) (providing varying opinions on the benefits of comparative analysis); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 Harv. L. Rev. 129, 144 (2005) (“[T]o ignore foreign solutions, or to refrain from attending to them because they are foreign, betokens not just an objectionable parochialism, but an obtuseness as to the nature of the problems we face.”); Mark Tushnet, *The Possibilities of Comparative Constitu-
when American legal reform is as contested as ever internally, and where our legal solutions to pressing and basic social problems are still unresolved, such presumptions are not just self-defeating abroad, but they are a comparative disadvantage at home. Until we admit the possibility that we might have something to learn and contemplate from even legal cultures such as China’s, which we are so practiced at dismissing, then we likely will rarely see China, or ourselves, as clearly as a globalized world demands.

It is fitting to conclude with perhaps the most insightful thing Pound wrote during his later life: “How may we expect to realize an ideal of universal relief from poverty, distress, frustration or fear before we have found out how to bring about such a condition in our local society?”266

If only Pound, no less America, had truly taken this to heart.
INTRODUCTION

I haven’t time to tell you what emotions we experience in traversing this half-wild, half-civilized country, in which fifty years ago were to be found numerous and powerful nations who have disappeared from the earth, or who have been pushed back into still more distant forests; a country where are to be seen, rising with prodigious rapidity, new peoples and brilliant cities which pitilessly take the place of the un-

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happy Indians too feeble to resist them. Half a century ago the name of the Iroquois, of the Mohawks, their tribes, their power filled these regions, and now hardly the memory of them remains. Their majestic forests are falling everyday; civilized nations are established on the ruins . . . .

A vast and significant body of scholarship, dating back at least to Adam Smith, has long held secure private property rights to be a fundamental prerequisite for trade, labor specialization, efficient investments, credit access, liberty, government accountability, growth-promoting economic policies, functioning markets, and a myriad of other engines of economic development. Yet, historically, economic development has often involved the expropriation of land and resources from groups that are marginalized culturally, racially, ethnically, or socio-

1. Letter from Gustave de Beaumont to his brother (July 6, 1831), in GEORGE WILSON PIERSON, TOCQUEVILLE IN AMERICA 191 (Oxford Univ. Press 1938) (1830).

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economically, and the reallocation of these resources into the hands of more politically powerful constituencies with access to the knowledge and capital necessary for efficient investment. Reconciling this apparent contradiction requires recognizing that whose property rights are secure matters fundamentally for the political and economic implications of secure property rights.

Protecting the property rights entitlements of some inherently requires preventing others from claiming and controlling those same resources. “Before ‘property rights’ can be strong or weak, they must be allocated and defined”—and the allocation and enforcement of resource entitlements through legal institutions reflects the distribution of political power. But recent cross-country and comparative research regarding property


rights and economic development employs a black-box conception of property rights that effaces the heterogeneity in property rights enjoyment within countries.\textsuperscript{7} In other words, in this research, property rights are considered as a one-dimensional concept, in which rights are assumed to apply uniformly (homogeneously) to all people and entities that are subject to those laws. No recognition is given to the possibility that different constituencies may experience the application of the rule of law differently. Yet as legal scholars have long recognized, law is not divorced from politics and power, nor is it completely impartial and objective in its application.\textsuperscript{8} A one-dimensional conception of property rights or “institutional quality”\textsuperscript{9} more broadly ignores significant variation in the risk of expropriation faced by different ethnic, cultural, and religious groups in the same country.


\textsuperscript{8} Oliver Wendell Holmes, The Common Law (1881); see also William W. Fisher, III, Morton J. Horwitz, & Thomas Reed, American Legal Realism (1993).

\textsuperscript{9} “Institutions” is a term of art broadly used in the economics, political science, and political economy literature to refer to “the rules of the game” that structure and constrain “human interaction.” See INSTITUTIONS, supra note 2, at 3. “Institutional quality” is a broad term used to indicate how “good” or “bad” these institutions are. See generally Kevin E. Davis, Institutions and Economic Development: A Introduction to the Literature (NYU Sch. Law Working Papers, Paper No. 202, 2009), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1206&context=nyu_lewp.
Using a new set of indicators that measures the property insecurity of ethnocultural minorities, this Article demonstrates empirically that severe property insecurity for some groups often exists alongside very secure property rights for others. Heterogeneity in property rights enjoyment means that property rights can simultaneously be strong and secure for some groups and weak and insecure for other groups. In many countries, members of marginalized groups face significantly higher property insecurity than the majority, foreign investors, or domestic elites. The cross-national indices of institutional quality widely used in the research literature—initially designed to assess the property security of foreign investors—fail to adequately account for the legal institutions encountered by marginalized minority groups.

Moreover, this Article demonstrates empirically that the property rights security or insecurity experienced by marginalized groups is not related to long-run economic development. Economic growth can still occur when the property rights of the majority are secure but marginalized minorities face a high risk of expropriation. In such instances, land is reallocated into the hands of investors with better access to know-how, capital, and other complementary production inputs. At the same time, secure property rights for marginalized minorities are not required for the government accountability that facilitates aggregate growth-enhancing economic policies: security of property rights for elites can increase accountability of the governing elites towards other elites with divergent interests, while broad but not universal property rights security can generate accountability of public officials to the majority while still excluding the minority. Both mechanisms can incentivize the adoption of broadly growth-enhancing economic policies that benefit the majority but harm some other groups.

These findings have serious implications, opening up questions regarding potential trade-offs between property rights security for marginalized groups, property rights security for more politically powerful constituencies, socioeconomic inclusion, and economic growth. On the one hand, if aggregate economic growth is the objective, then policymakers may wish to ignore (or encourage) the expropriation of land and resources from marginalized groups, and the reallocation of these resources into the hands of more productive investors or political constituencies who will advocate for growth enhancing policies.
On the other hand, if broadly inclusive economic development that reduces poverty and socioeconomic exclusion in the short-term is the central goal, then attention must be paid \textit{ex ante} to distributional issues in terms of both outcomes and processes. This is a real and pressing issue today on almost every continent, and in countries as diverse as China, Indonesia, Brazil, Ecuador, Kenya, and Nigeria. Emerging economies, in particular, may seek to encourage capital inflows by improving the investment climate for foreign direct investment, and to develop hydropower, oil, arable land, and other natural resources often located in rural regions to power new industry and feed a growing urban population. The challenge from a policy perspective arises if there are trade-offs between property rights security for marginalized groups and aggregate economic growth. Ethnocultural groups with the least power and voice may be left out by growth-enhancing policies that strengthen the property rights of those with access to capital and political influence by weakening the property rights of marginalized groups. This suggests that a narrow focus on aggregate economic growth—without specific attention also to political and economic inclusion and the equitable application of the law—may hurt the most vulnerable.

I. LAW, POWER, AND HETEROGENEITY IN RIGHTS ENJOYMENT

A. The Scope, Allocation, and Enforcement of Property Rights

Some may disagree, but in reality, law is not impartial. In fact, it reflects the distribution and operation of political power. Yet recent legal and economics research on the relationship between property rights and economic development implicitly assumes that the laws of a country are applied uniformly to all without distinction.\footnote{See supra note 7 and accompanying text; \textit{infra} Section II.B.} In the cross-national literature in particular, if a state is considered to have a high level of property rights security and strong protections for property rights, everyone’s rights are taken as equally secure and the country is categorized as having “good institutions”.\footnote{\textit{Id.}} Likewise, if a state is considered to have a low level of property rights security and weak protection for property rights, everyone’s property rights are viewed as equally insecure and the country is classified as
having “bad institutions.”12 However, heterogeneity in the rule of law and disparities in property rights enjoyment between different groups within the same country have been largely ignored.

Work within institutional economics certainly recognizes that the “rules of the game” depend on relations of power.13 In the dialogic between institutional rules and organizational actors, individuals and organizations operate to maximize their own interests within a given set of incentives determined by the existing institutional constraints, but then also work to change these rules to their own benefit. This is the theoretical heart of the vast body of research that foregrounds the role played by institutions in long-run economic development.14

However, insufficient attention has been paid to the fact that not only the form of institutions, but also the scope and application of the rules depend on politics and the distribution of power. A one-dimensional lens is particularly apt to distort reality in the case of the right to property, which is a zero-sum game. Protecting the resource claims of some parties requires preventing others from using those same resources; therefore, property rights must be defined and allocated before their protection can be strong or weak.15 Given the zero-sum nature of

12. Id.
15. Kennedy, supra note 5, at 8.
property rights, alongside the role of political power in determining de facto institutional environments, the allocation and enforcement of resource entitlements is particularly prone to heterogeneous treatment of groups and claimants.

A property right is relational—it gives the possessor superior claims to a specific resource against the rest of the world, or some subset thereof. The possessor of a property right asserts and exercises her rights in relation to other potential claimants; she can simultaneously have superior rights against some, but inferior rights against others. For example, imagine a home owner who takes out three mortgages, using his home as collateral. If he defaults on all three loans, the holder of the first priority mortgage lien has the right to the value of the property up until the amount of the lien is satisfied, then the holder of the second priority lien—who has an inferior right compared to that of the first lender, but a superior claim to that of the third lender—has a right to the value of the property used as collateral until the debt is cleared, and so on. The common law rule of “finders keepers” likewise exemplifies the relational nature of property rights—the “finder” has superior rights to a found object against everyone except the original owner who lost the item. Clearly, therefore, the allocation and protection of a secure resource entitlement for one party inherently requires denying an alternative claimant the ability to control the use of that resource.

Classical political economists recognized the relational nature of property rights and the role played by political power in defining, allocating, and enforcing claims to resource entitlements. Although Jean-Jacques Rousseau lauded secure private property rights as a prerequisite for market exchange and a functioning modern economy, he also argued that the enshrinement of property rights in a social contract was, in essence, a grand theft perpetrated by the rich, clever, and strong.

16. See Hohfeld, supra note 4, at 743–45, 747; Calabresi & Melamed, supra note 4, at 1089–93.
on the less well-off.20 Having obtained *de facto* control over land and resources, Rousseau contended that the *de jure* protection of these property rights claims protected and perpetuated the tenuous and previously contested position of elites.21 Additionally, Karl Marx argued that the private property relations that form the legal superstructure of capitalism entrench the already powerful:22 in this view, private property enables capital accumulation, leading to ever increasing inequality and putting the owners of the means of production in an advantaged bargaining position vis-à-vis wage laborers, which allows the owners of capital to capture all surplus value.

Moreover, the role of political power in determining the scope, allocation, and enforcement of property rights is readily apparent both historically and in the modern administrative state.23 The multiplicity of potential property rights that may or may not be recognized and protected by *de jure* and *de facto* legal institutions also contributes to heterogeneity in the enjoyment of secure property rights. Property rights are widely understood by legal scholars as a “bundle of sticks”, with each stick in the bundle representing a right or a privilege.24 For example, the English case of *Sturges v. Bridgman*—upon which Ronald Coase based his famous *The Problem of Social Cost*25—addressed whether a physician had the right to stop his next-door neighbor, a confectioner, from operating his mortars to grind sugar.26 The question is whether, in the bundle of sticks that constituted property ownership, the doctor had the right to enjoy silence so that he could see his patients undisturbed, or whether the confectioner had the right to produce sugar in his factory. Coase argued that inefficiency results when neither right is clearly defined, thereby preventing bargaining;27 here

21. Id. at 55–84.
23. See supra note 6 and accompanying text.
24. Gerald Korngold & Andrew P. Morriss, Introduction to Property Stories 1 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009); Kennedy, supra note 5, at 26.
27. See generally Coase, supra note 2.
the first-order problem is clearly not in making the property right secure, but in defining and allocating it in the first place.

The wide diversity of rights that may be enjoyed as part of a bundle of property rights is evident in many low and middle income countries. Throughout Africa, for example, “one user might have the right to sow and harvest, another to collect fruit from trees on the land, and a third to bring in livestock to feed on crop residues after the harvest.”28 In southeast Nigeria and southern Mali, the village leaders allocate farming land to family heads based on need but retain reversionary rights to the land as trustees on behalf of the group, while individuals have enduring rights to any physical structures they build and to any trees they plant. This means that one family could have temporary use rights to the soil while the son of the person who planted nut trees on the land the generation prior has the right to gather the nuts.29 In the north-central flood plains of the Niger Delta, where herding, farming, and fishing coexist and are practiced by different ethnic groups, herders have the right to use given land for pasture during the off-season, while farmers use this same land to grow crops during a different part of the year.30 When some kinds of rights—some of the “sticks in the bundle”—are protected by property rights institutions, but others are not, the groups whose members enjoy the protected kinds of rights benefit, while those with unprotected rights lose out.

If private freehold titles are protected, but various usufruct rights such as hunting, fishing, grazing cattle, and gathering berries are not, then the parties best positioned to claim private freehold ownership benefit while others lose access to formerly shared resources. Because property rights can be understood as a bundle of sticks, when different groups lay claim to


different kinds of sticks, the recognition and protection of some rights, but not others, in the bundle creates heterogeneity in property rights security. Therefore, the scope of application of property rights protection can engender heterogeneity in the security of property rights enjoyment.

Due to the relational, zero-sum nature of property rights, as well as the complexity and multidimensionality of the bundle of rights that constitute property interests, we should expect that the role played by political power in determining the institutional rules of the game will often lead to heterogeneity between groups within countries in the enjoyment of property rights security—yet this is not the baseline assumption of much of the “institutions and economic development” research literature.31

B. Measuring Property Rights Security: One-Dimensional Indices in the Research Literature

Cross-country comparative research—which aims to explain aggregate growth or other development outcomes with reference to institutional conditions for an entire country-unit—is particularly susceptible to the eliding of property rights’ inherent complexity. Recent “institutions and development” research has often unwittingly adopted a legal positivist approach, in which law is seen as inherently impartial in its application.32 Heterogeneity in the scope and application of de facto institutions is effaced by this simplistic, legal positivist framework.33

This section examines the cross-country indices of institutional quality most widely used in the research literature, revealing that due to vantage point bias and methodology of construction, scores on these indices fail to adequately reflect the legal institutions encountered by marginalized minority groups. The focus is on indicators which have been widely influential: the International Country Risk Guide (“ICRG”), the Heritage Foundation’s property rights index, and the World

31. See supra note 7 and accompanying text; see also infra Section II.B.
32. HANS KELSEN, PURE THEORY OF LAW 1 (2007).
33. In contrast, legal realists have long sought to penetrate beyond stated rules and norms to understand how the law operates in action, highlighting the difference between the “law on the books” and “law in action”. See, e.g., Karl N. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222 (1931); Thomas J. Miles & Cass R. Sunstein, The New Legal Realism, 75 U. CHI. L. REV. 831 (2008).
Bank’s Worldwide Governance Indicators. The ICRG, a component of Political Risk Services (“PRS”), was first created in 1980 by the editors of a weekly newsletter on international finance and economics called *International Reports.* The ICRG risk ratings system has twenty-two components grouped into three major categories of risk: political, financial, and economic. Each component is assigned a numerical value, with the highest number of points indicating the lowest risk. ICRG scores are based on a subjective assessment by experts employed by PRS. The property rights index evaluates the risk of “outright confiscation and forced nationalization of property;” lower ratings are assigned to “countries where expropriation of private foreign investment is a likely event.”

The initial purpose of the ICRG was to “meet the needs of clients for an in-depth and exhaustively researched analysis of the potential risks to international business operations.” According to PRS, the primary users and consumers of the ICRG ratings data are “institutional investors, banks, multinational corporations, importers, exporters, and foreign exchange traders,” who use the ICRG model to “determine how financial, economic, and political risk might affect their business and investments now and in the future.”

Given that the intended customers of the ICRG are investors, multinational corporations, importers, and exporters, it is only logical that the ranking system would be targeted to reflect the investment risks posed to these kinds of customers. In other words, the information on expropriation risk, by its very design, is meant to reflect the risk posed to the enterprises of the large and often multinational businesses that are purchasing the ICRG data, not the average citizen of a country—and even less the property rights of marginalized ethnocultural minority groups, who are clearly not purchasing the ICRG data. This intentional evaluation of risk from the standpoint of foreign investors and domestic elites is reinforced by the source of the data—expert evaluations—as financial and business experts...

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37. *Id.*
are likely to be more familiar with threats posed to international capital than to poor local resource users.\textsuperscript{38}

This property rights index from ICRG has been widely used in cross-country research as a proxy for “institutional quality” in a general sense, and for the security of property rights more specifically. For example, in their well-known and widely-cited article examining the relationship between institutions and long-run growth, Stephen Knack and Philip Keefer used a re-scaled version of the ICRG index score to measure “institutional quality.”\textsuperscript{39} The frequently cited work of Daron Acemoglu, Simon Johnson, and James A. Robinson, in which settler mortality is used as an instrumental variable for institutions, also relies upon the ICRG risk of expropriation index as a proxy for institutional quality.\textsuperscript{40} The ICRG index is pervasive as well in the cross-country research on the relationship among natural resource abundance, institutions, growth, and conflict.\textsuperscript{41}

A number of other indices also attempt to quantitatively measure property rights across countries. Most prominently, the Heritage Foundation scores “the degree to which a country’s laws protect private property rights and the degree to which its government enforces those laws.”\textsuperscript{42} The Heritage Foundation’s property rights indicator is expansive, addressing: “the likelihood that private property will be expropriated[,] . . . the independence of the judiciary, the existence of corruption within the judiciary, and the ability of individuals and businesses to enforce contracts.”\textsuperscript{43} Like the ICRG index, the less certain the legal protection of property, the lower a country’s score. For example, a country receives 100% if “private property is guaranteed by the government[,][t]he court system

\begin{thebibliography}{9}
\bibitem{Knack&Keefer2004} Knack & Keefer, supra note 7, at 210, 212.
\bibitem{ColonialOrigins} See Colonial Origins, supra note 2, at 1370–71; Geography and Institutions, supra note 7, at 1266; see also infra Part I.C.
\bibitem{Heritage2012} Id.
\end{thebibliography}
enforces contracts efficiently and quickly[,] and [t]he justice system punishes those who unlawfully confiscate private property.” At the other extreme, a country receives a score of 0% when “private property is outlawed, and all property belongs to the state.” The index is a subjective score, based on information gleaned from the following sources, in order of the following priority: Economist Intelligence Unit, *Country Commerce*; U.S. Department of Commerce, *Country Commercial Guide*; U.S. Department of State, *Country Reports on Human Rights Practices*; and U.S. Department of State, *Investment Climate Statements*. Once again, all these sources except for the U.S. State Department Reports have as their primary audience large commercial investors interested in assessing the investment risks posed to their business ventures. Moreover, countries receive high scores only for securely protecting private property rights. Secure protection of the communal property rights of ethnocultural minorities is not considered by the index. This is a significant shortcoming, given that throughout Africa, Latin America, Asia, North America, and Europe, over 300 million members of indigenous groups hold land communally in accordance with customary law.

The World Bank’s widely used Worldwide Governance Indicators (“WGI”), initially developed by Daniel Kaufmann, Aart Kraay, and Pablo Zoido-Lobaton, incorporate the Heritage Foundation’s property security measure as well as the property rights measure from ICRG. The WGI consists of aggregate indices corresponding to six basic governance concepts: (1) Voice & Accountability; (2) Political Instability & Violence; (3) Government Effectiveness; (4) Regulatory Burden; (5) Rule of Law; and (6) Graft. These aggregate indices are based on governance indicators taken from thirty-five data sources—including both

44. *Id.*
45. *Id.*
46. *Id.*
the ICRG and the Heritage Foundation Index. It would be difficult to overstate the reach and influence of the WGI as a research tool in cross-country analysis. The most recent Governance Matters publication ranks as one of the top fifty downloads on the Social Science Research Network ("SSRN").

C. A New Index: Measuring the Property Insecurity of Marginalized Groups

This Article presents an alternative Property Insecurity Index, specifically designed to evaluate the security of property rights enjoyed or not enjoyed by marginalized groups, rather than foreign investors and domestic elites. The Property Insecurity Index is a composite measure of the property insecurity experienced by each minority group in every country included in the Minorities at Risk ("MAR") database. The MAR database assesses the political and economic exclusion of ethnocultural minorities in every country with a population of at least 500,000. Experts assign a numerical score indicating the severity of exclusion to each group along an array of political, economic, social, and cultural dimensions. A “minority at risk” is defined as “an ethnopoliitical group (non-state communal group) that collectively suffers, or benefits from, systematic discriminatory treatment vis-à-vis other groups in a society; and/or collectively mobilizes in defense or promotion of its self-defined interests.” The following four variables identify the factors present in the group which make it a minority at risk: (1) the group is subject to discrimination at present; (2) the group is disadvantaged due to past discrimination; (3) the group is an advantaged minority; and (4) the group supports

50. Id.
52. The MAR database was developed and is maintained by the University of Maryland’s Center for International Development and Conflict Management. CTR. FOR INT’L DEV. AND CONFLICT MGMT., MINORITIES AT RISK (MAR) CODEBOOK VERSION 2/2009 at 1 (2009), available at http://www.cidcm.umd.edu/mar/data/mar_codebook_Feb09.pdf.
53. Id.
54. Id.
political organizations advocating greater group rights. Groups are included in the MAR database if the group has a population larger than 100,000 or greater than 1% of a country’s population.55

The property insecurity score for the Property Insecurity Index for each group is based on MAR scores in three dimensions: dispossession from land, forced internal resettlement, and internal resettlement by policy. Like the ICRG and Heritage Foundation indices, the Property Insecurity Index measures the de facto, rather than de jure, protection from expropriation experienced by ethnocultural minority groups. The index detects state failure to protect the property rights of minority groups from incursions by other (possibly more powerful and influential) private actors, as well as direct state acts of expropriation. Country Property Insecurity scores are generated by aggregating the property insecurity scores of all minority groups within each country.

There are three versions of the Property Insecurity Index. The first, Property Insecurity (Weighted), is a sum of group property insecurities weighted by the group’s proportional representation within a country’s population. The second, Property Insecurity (Max), reflects the property insecurity of the worst-off group in a country. The third, Property Insecurity (Mean) reflects the average property insecurity score of minority groups within a country. All three versions are compared to the ICRG and Heritage Foundation Indices in Part I.D below. Property Insecurity (Max) is then used in Part II to examine the relation between property insecurity for marginalized groups and long-run economic development, because Property Insecurity (Max) best captures the most severe property insecurity faced by any group in a country.

55. Id. at 1-2.
Property Insecurity for Group G = \( P_g = \frac{\text{eviction}_g + \text{forced_resettle}_g + \text{resettle_policy}_g}{3} \)

Property Insecurity for Country I (Weighted) = \( \Sigma (g \cdot \text{gpro}_g) \cdot P_g \)

Property Insecurity for Country I (Max) = \( P_{\text{worst}} \)

Property Insecurity for Country I (Mean) = \( \text{Average}(P_g) \)

Where \( g \cdot \text{gpro}_g \) = group’s proportion of the population, \( \text{eviction}_g \) = dispossession from land, \( \text{forced_resettle}_g \) = forced internal resettlement, and \( \text{resettle_policy}_g \) = internal resettlement by policy.

This Property Insecurity Index departs fundamentally from other measures of property rights security and institutional quality in two ways. First, it relies on data sources that assess the experience of the worst-off populations in a country—precisely those groups that are supposedly the intended targets of economic development initiatives. Second, it explicitly aims to capture and aggregate the experience of many groups within a single country, rather than attempting to present an overall country measure of the average level of institutional quality supposedly experienced by everyone. In this sense, the conceptual starting point of the Property Insecurity measure is that a single indicator of property rights (or “institutional quality” more broadly) may potentially efface heterogeneity in rights enjoyment; an index that measures only averages, or the situation of elites, or both, inherently cannot detect variations in the experiences of different groups.

D. Empirical Evidence of Heterogeneity in Property Rights Security

The basic question of whether or not aggregate cross-country indices of property rights security reflect the property rights enjoyed by marginalized minorities can be answered empirically by examining the degree to which widely used measures of property rights institutions correlate with the level of property insecurity faced by ethnocultural minority groups. If property rights are homogeneous within countries, as implicitly assumed in much of the cross-country institutions and economic development research, then all measures of property rights security would be highly correlated—with any correlation less than one reflecting only the measurement error generated by the assignation of scores through subjective evaluation. The
ICRG index and the Heritage Foundation index would therefore be highly and positively correlated with each other, and both would be inversely related to the Property Insecurity Index. If instead property rights are indeed enjoyed heterogeneously by different groups within the same country, but the aggregate property rights indices are still reflecting the rights enjoyed by ethnocultural minorities—as opposed to simply measuring the rights enjoyment of foreign investors and domestic elites—then the ICRG and the Heritage Foundation Property Rights indices should be highly and inversely related to the Property Insecurity Index (Weighted), and weakly and inversely related to the Property Insecurity Index (Mean).

The empirical evidence reveals both that (a) property rights enjoyment is indeed heterogeneous between groups within countries, and (b) existing widely used cross-country indices of property rights fail to adequately consider the property rights security enjoyed by marginalized minorities. Although the Heritage Foundation and the ICRG measures indeed correspond highly with each other, neither is related to our new indicators that measure the property insecurity experienced by marginalized groups. Results are below in Tables 2 and 3, which show Kendall's rank correlation coefficients for the different property rights measures. The data availability for the Heritage Foundation and the ICRG measure differ, so Table 2 takes the years available for the ICRG Index as the baseline dataset, while Table 3 takes the years available for the Heritage Foundation Index as the baseline dataset. Descriptive statistics are displayed in Table 1.

Kendall’s coefficient is the appropriate measure of correlation because the data is not normally distributed—the Heritage Foundation and ICRG measures are left-skewed, while the Property Insecurity Index has a large number of zero value observations and is therefore right-skewed. Unlike Pearson’s correlation coefficient, the Kendall coefficient does not assume normality. And unlike Spearman’s coefficient, Kendall’s coeff-

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56. Correlation measures the relationship between variables. The widely used Pearson product moment correlation reflects the degree of linear relationship between two variables, and is calculated assuming that the variables are continuous and normally distributed, there are few or no outliers, and any relationship is linear. The Spearman’s correlation is the nonparametric version of the Pearson correlation, and can be used when the assumptions required for the Pearson test are violated, such as for ordinal and rank-
ficient is robust to “ties”, i.e., identical values for different observations, which are prevalent in this data set.

The correlation between the two aggregate measures of property rights security—the ICRG and Heritage Foundation Indices—is very high, regardless of the time period. Yet there is no statistical relationship whatsoever between the property insecurity of marginalized minorities and the ICRG or Heritage Foundation measures. The scatter plot graphs following the correlation tables further illustrate that the lack of any significant correlation between standard property rights measures and the new Property Insecurity indices is not an artifact of some nonlinear relation; there simply is no relation.

ordered variables, and when the underlying data is not normally distributed or there is a monotonic but non-linear relationship between variables. The Kendall correlation coefficient is a different non-parametric test that measures rank correlations, which is robust to ties and penalizes lack of correspondence by distance of dislocation rather than square of the distance.
### Table 1. Descriptive Statistics

<table>
<thead>
<tr>
<th>Property Insecurity</th>
<th>Whole World</th>
<th>High Income</th>
<th>Low Income</th>
<th>Oceania</th>
<th>Asia</th>
<th>Africa</th>
<th>Latin America and Caribbean</th>
<th>North America</th>
<th>Europe</th>
<th>AJR Sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean, 1985-1995</td>
<td>(1.50)</td>
<td>(0.19)</td>
<td>(0.21)</td>
<td>(0.56)</td>
<td>(0.29)</td>
<td>(0.16)</td>
<td>(0.44)</td>
<td>(0.25)</td>
<td>(0.23)</td>
<td>(0.21)</td>
</tr>
<tr>
<td>Max, 1985-1995</td>
<td>(2.10)</td>
<td>(0.25)</td>
<td>(0.30)</td>
<td>(0.56)</td>
<td>(0.41)</td>
<td>(0.27)</td>
<td>(0.44)</td>
<td>(0.75)</td>
<td>(0.49)</td>
<td>(0.29)</td>
</tr>
<tr>
<td>Weighted, 1985-1995</td>
<td>(1.18)</td>
<td>(1.11)</td>
<td>(1.17)</td>
<td>(1.00)</td>
<td>(1.28)</td>
<td>(1.23)</td>
<td>(1.10)</td>
<td>(1.03)</td>
<td>(1.10)</td>
<td>(1.10)</td>
</tr>
<tr>
<td>Mean, 1995-2003</td>
<td>(1.79)</td>
<td>(1.81)</td>
<td>(1.66)</td>
<td>(1.29)</td>
<td>(1.97)</td>
<td>(1.70)</td>
<td>(1.81)</td>
<td>(1.30)</td>
<td>(1.30)</td>
<td>(1.30)</td>
</tr>
<tr>
<td>Max, 1995-2003</td>
<td>(1.26)</td>
<td>(0.21)</td>
<td>(0.13)</td>
<td>(0.15)</td>
<td>(0.26)</td>
<td>(0.25)</td>
<td>(0.26)</td>
<td>(0.40)</td>
<td>(0.09)</td>
<td>(0.15)</td>
</tr>
<tr>
<td>Weighted, 1995-2003</td>
<td>(2.35)</td>
<td>(2.31)</td>
<td>(2.17)</td>
<td>(1.31)</td>
<td>(2.76)</td>
<td>(2.12)</td>
<td>(3.01)</td>
<td>(2.19)</td>
<td>(1.70)</td>
<td>(2.40)</td>
</tr>
<tr>
<td>Countries</td>
<td>198</td>
<td>87</td>
<td>87</td>
<td>14</td>
<td>49</td>
<td>53</td>
<td>37</td>
<td>2</td>
<td>42</td>
<td>64</td>
</tr>
</tbody>
</table>

Values are averages during sample period, with standard deviations in parentheses. Columns 2 and 3 split the sample in column 1 by the median income during the relevant period (from the World Bank’s World Development Indicators 2008) in the sample of column 1. The ICRG property rights index is the 0 to 10 scaled ICRG/IRIS version used by Acemoglu, Johnson, and Robinson (2001, 2002).
Table 2. Correlations: 1985-1995

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</thead>
<tbody>
<tr>
<td>ICRG Property Rights, 1985-1995</td>
<td>Correlation 1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>83</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Heritage Foundation Property Rights, 1995-2004</td>
<td>Correlation 0.517*</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>83</td>
<td>83</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property Insecurity Weighted, 1985-1995</td>
<td>Correlation -0.142</td>
<td>-0.043</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>83</td>
<td>83</td>
<td>83</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property Insecurity Mean, 1985-1995</td>
<td>Correlation -0.108</td>
<td>-0.083</td>
<td>0.582*</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>83</td>
<td>83</td>
<td>83</td>
<td>83</td>
<td></td>
</tr>
<tr>
<td>Property Insecurity Max, 1985-1995</td>
<td>Correlation -0.116</td>
<td>-0.132</td>
<td>0.566*</td>
<td>0.801*</td>
<td>1</td>
</tr>
<tr>
<td>N</td>
<td>83</td>
<td>83</td>
<td>83</td>
<td>83</td>
<td>83</td>
</tr>
</tbody>
</table>

Notes: 'Property Insecurity Weighted' is the sum of group property insecurity scores, weighted by their proportion of the population; 'Property Insecurity Maximum' is the property insecurity score of the worst off group; 'Property Insecurity Mean' is the unweighted average of group property insecurity scores. * represents significance at the 5% level.

Table 3. Correlations: 1995-2004

<table>
<thead>
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</tr>
</thead>
<tbody>
<tr>
<td>Heritage Foundation Property Rights, 1995-2004</td>
<td>Correlation 1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>89</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ICRG Property Rights, 1985-1995</td>
<td>Correlation 0.526*</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>89</td>
<td>89</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property Insecurity Weighted, 1995-2003</td>
<td>Correlation -0.023</td>
<td>-0.068</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>89</td>
<td>89</td>
<td>89</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property Insecurity Mean, 1995-2003</td>
<td>Correlation -0.143</td>
<td>-0.098</td>
<td>0.662*</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>89</td>
<td>89</td>
<td>89</td>
<td>89</td>
<td></td>
</tr>
<tr>
<td>Property Insecurity Max, 1995-2003</td>
<td>Correlation -0.161*</td>
<td>-0.087</td>
<td>0.680*</td>
<td>0.880*</td>
<td>1</td>
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<tr>
<td>N</td>
<td>89</td>
<td>89</td>
<td>89</td>
<td>89</td>
<td>89</td>
</tr>
</tbody>
</table>

Notes: 'Property Insecurity Weighted' is the sum of group property insecurity scores, weighted by their proportion of the population; 'Property Insecurity Maximum' is the property insecurity score of the worst off group; 'Property Insecurity Mean' is the unweighted average of group property insecurity scores. * represents significance at the 5% level. Phase IV release of the MAR dataset includes data from 1945-2003.
Figure 1. Scatterplot of Correlations: 1985-1995

Figure 2. Scatterplot of Correlations: 1995-2004
II. PROPERTY RIGHTS & ECONOMIC DEVELOPMENT

A. Micro and Macro Theories: Why It Matters Whose Property Rights Are Secure

There is an extraordinarily large and diverse body of research regarding the relationship between property rights and economic development. Most social scientists—from classical political economists to contemporary legal scholars and new institutional economists—argue that secure property rights are a necessary prerequisite for economic development.\(^{57}\) However, implicit and unstated in most of these theories is that it fundamentally matters whose property rights are secure. From a neoclassical and new institutional "micro" perspective, only secure property rights for those with skills, knowledge, and capital lead to economic growth. From a political economy and new institutional "macro" viewpoint, only secure property rights for those who will use their political voice to agitate for growth enhancing economic policies are related to long-run development.

At a micro level, secure property rights are thought to generate economic growth for three reasons. First, secure property rights internalize externalities, thereby incentivizing efficient levels of investment and ensuring that a resource is neither over- nor under-utilized.\(^ {58}\) Second, clear allocation and enforcement of resource entitlements can generate efficiency gains by reducing transaction costs in exchanges between parties and allowing reallocation to more efficient users.\(^ {59}\) Third, secure private property rights may facilitate access to credit and the conversion of dead assets into investment capital because the underlying asset can serve as collateral, making re-

57. See von Hayek, supra note 2, at 112–16; Marx, Capital, supra note 2, at 59–69; Institutions, supra note 2, at 33–35, 51–52, 110, 121; Williamson, supra note 2, at 26–29; Colonial Origins, supra note 2, at 1369, 1373; Alston, Libecap, & Schneider, supra note 2, at 58, 59; Besley & Ghatak, supra note 2, at 5, 10, 26; North & Weingast, supra note 2; Posner, supra note 2, at 3–5; Rousseau, supra note 2, at 55–84; Smith, supra note 2; Rodrik, Subramanian, & Trebbi supra note 7, at 132.

58. See Demsetz, supra note 2, at 348; Besley, supra note 2, at 905–07, 916; Field, supra note 2, at 286–89; Goldstein & Udry, supra note 2, at 981–84.

59. See Coase, supra note 2, at 19; Besley & Ghatak, supra note 2, at 17–18.
payment commitments more enforceable.\textsuperscript{60} Markets, credit access, and efficient resource use drive economic growth by enabling specialization and gains from trade, providing capital for reinvestment, and increasing productivity.

At the core of these micro-theories of property rights and economic development is an implicit assumption that what actually matters is property rights security for those with access to complementary production inputs, i.e., skills, knowledge, or capital. Appropriate know-how or access to capital is obviously implicit in the internalization of costs and benefits, which is the basis for secure private property rights. Efficient levels of investment and resource utilization can only occur when the owner has the necessary complementary production inputs.\textsuperscript{61} Likewise, a growth-enhancing reallocation of resource entitlements into the hands of more efficient users will not occur— even and especially with secure private property rights—when the existence of multiple owners creates a hold-out problem,\textsuperscript{62} or when owners place an idiosyncratic, non-economic value on a property.\textsuperscript{63} And when property rights are \textit{secure} but non-alienable, as is the case with forests, pastures, and fisheries held collectively according to indigenous customary tenure law,\textsuperscript{64} greater property rights security for customary resource holders will actually prevent reallocation through voluntary market exchange. Therefore, secure property rights for owners who lack the skills or capital to invest efficiently in a resource but who also will not or cannot bargain for some reason\textsuperscript{65} may actually prevent a more economically efficient allocation of resources and impede growth. The credit access theory explicitly recognizes the relationship between property rights, access to capital, and growth; if the poor are credit constrained for exog-


\textsuperscript{61} Besley & Ghatak, supra note 2, at 26–34.


\textsuperscript{63} Margaret Radin, \textit{Property and Personhood}, 34 STAN. L. REV. 957, 986 (1982).

\textsuperscript{64} Bruce, supra note 40.

\textsuperscript{65} Id.; Heller, supra note 107, at 673–74; Radin, supra note 108, at 987; Sened, supra note 6, at 76.
enous reasons such as ethnic discrimination, or actually face savings rather than credit constraints, then making property rights more secure will not "unlock" hidden capital.

At a macro level, a number of Western political theorists have argued that secure private property rights engender political accountability, which in turn leads to economic policies that are broadly growth-enhancing, rather than narrowly beneficial to only powerful, rent-seeking elites. According to this view, private property is an essential pillar in the protection of individual liberty. The individual economic security that private property provides is thought to act as a safeguard against the potentially totalitarian power of the state, and individuals are much more likely to actively oppose government policies when they know their livelihoods are not at risk. The resulting political accountability to a broad cross-section of the population encourages governments to implement economic policies that benefit society as a whole, such as investments in education, roads, and other public goods.

Relatedly, some contend that the failure of political interest groups to implement the most effective growth promoting policies and then use political power to bargain over distribution results from a commitment problem, which stems from weak property rights. Since political power is in part a result of


68. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL (2012); see generally Colonial Origins, supra note 2; Institutions, supra note 13; Inequality, supra note 21.

69. VON HAYEK, supra note 2, at 115.


71. See generally Daron Acemoglu, Simon Johnson & James A. Robinson, Institutions as a Fundamental Cause of Long-Run Growth, in 1A HANDBOOK OF ECONOMIC GROWTH VOLUME 385, 387 (Philippe Aghion & Steven N.
economic power, political groups who benefit relatively less from growth enhancing economic policies and foresee that their relative economic position will decline and thus their relative political strength as well, will resist pie-maximizing economic policies that hurt their relative economic positions—in fear that newly ascendant political-economic elites will change the rules of the game.72 Strong protections against government expropriation theoretically allow the commitment problem to be overcome by ensuring that those who gain in relative economic strength will not use their new political power to seize the assets of those who gain less from pie-maximizing growth policies. Other researchers and theorists strongly disagree, contending that private property reinforces, rather than constrains, the power of elites, because it is precisely the institution of private property that puts the owners of capital inputs in an advantaged bargaining position vis-à-vis labor. In this view, private property relations facilitate the increasing concentration of economic capital and corresponding political power, rather than serving as a check on government authority.73

A far more nuanced understanding of the role played by secure property rights in generating government accountability and constraining the power of elites is required. Elites are not a single monolithic group—different groups of elites have different interests and compete amongst themselves for power.74 Security of property rights for elites can therefore increase accountability of the governing elites towards other elites with divergent interests,75 incentivizing the adoption of broadly beneficial economic policies. Likewise, accountability of public officials to the majority, facilitated by broad but not universal property rights security, may incentivize growth-enhancing

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72. Id. at 621, 623.

73. See Vivek Chibber, Locked In Place 59–61 (2003); Douglas Hay, Property, Authority and the Criminal Law, in Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England 17, 18–19 (Douglas Hay et al. eds., 1975); Marx, Capital supra note 2; Marx, supra note 33.


economic policies that benefit the majority even while hurting some groups. Seen in this light, secure property rights for marginalized minorities are not required for the kind of government accountability that leads to aggregate, growth-enhancing economic policies. Once again, whose property rights are secure matters.

B. Empirical Econometric Findings

This section empirically tests whether the political and economic implications of secure property rights indeed do depend on whose property rights are secure, demonstrating that security of property rights for marginalized minorities is irrelevant for long-run economic development. First, the core empirical strategy is explained. Second, the results and findings are presented and discussed. Third, two alternative econometric models are employed as a robustness check to confirm the validity of the results.

A generalized least squares (“GLS”) model with bootstrapped standard errors is used to regress log per capita income on the indices of property rights from ICRG, Heritage Foundation, and the new measures of Property Insecurity. Results are reported in Table 4. Bootstrapping entails estimating the sampling distribution by sampling with replacement from the original data, and allows hypothesis testing based on the empirical population distribution even when data is nonparametric and violates common assumptions regarding continuity or parametric families. The nonparametric approach of bootstrapped standard errors was adopted because the empirical distribution of the primary variable of interest—Property Insecurity—does not meet parametric assumptions, and there is no a priori theoretical reason to assume any particular asymptotic population distribution. Therefore, in order to accurately assess statistical significance, a technique that is applicable regardless of the form of the data’s probability density function had to be utilized. The results in Table 4 are based on resampling with replacement 1000 times.

The linear regressions are for the GLS equation:

\[ \log y_i = \alpha + \beta P_i + \mu X_i + e_i \]  

(1)

where \( y_i \) is GDP per capita in country \( i \), \( P_i \) is the property rights measure, \( X_i \) is a vector of covariates, and \( \epsilon_i \) is the random error term. The coefficient of interest is \( \beta \), which measures the effect of property security and insecurity on per capita income. An alternative specification, where the outcome of interest is the composite Human Development Index (“HDI”) from the UNDP Human Development Reports Office, is also examined. The HDI is an average of life expectancy, literacy rates plus gross school enrollment, and log per capita income.\(^77\)

The Property Insecurity scores are the average from 1985 to 2003, the most recent time period for which MAR data was available for group dispossession from land, forced internal resettlement, and internal resettlement by policy. The ICRG Property Rights index is the average for 1985 to 1995, the most recent time period available and the data widely used in previous studies.\(^78\) Heritage Foundation Property Rights scores are the average for the ten year period beginning in 1995, the first year for which data became available.\(^79\) All dependent variables are for 2005 to mitigate the possibility of reverse causality. Regional dummies are based on classifications from the United Nations Development Programme (“UNDP”).\(^80\) This approach was adopted because “[t]he conventional choice for regional dummies—the World Bank’s regional classifications—is endogenous” as the World Bank “regions themselves are defined on the basis of per capita income.”\(^81\)


\(^{78}\) See, e.g., Colonial Origins, supra note 2, at 1378; Geography and Institutions, supra note 7, at 1266; Boschini, Pettersson & Roine, supra note 63, at 600; Djankov & Reynal-Querol, supra note 63; Knack & Keefer, supra, note 7, at 217; Mehlum, Moene & Torvik, supra note 63, at 13.


\(^{80}\) See United Nations Dev. Programme, http://www.undp.org/content/undp/en/home.html (last visited Nov. 18, 2012) (The list of countries within each regional bureau is available after accessing the link of that bureau office.).

Table 4. Large Sample: Cross-Sectional GLS Regressions of Long-Run Development

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Dependent Variable: HDI Score, 2005

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Notes: Dependent variables are log GDP per capita (PPP) and the Human Development Index score; Property Rights (ICRG) is the 0 to 10 scaled version from IRIS where a higher score means more protection against expropriation; Property Insecurity Weighted is the sum of minority group insecurity weighted by the group’s proportion of the population; Property Insecurity Max is the property insecurity score for the worst-off group in a country; Property Insecurity Mean is the unweighted average of group property insecurity scores; higher property insecurity scores indicate higher levels of property insecurity (the inverse of the property rights indicator); the omitted continent dummy is for North America; all property insecurity scores are logged to base e. Standard errors in parentheses. ***, **, and * represent significance at the 1%, 5%, and 10% levels, respectively.
The large sample of cross-country GLS regression results displayed in Table 4 indicates that there is no relationship between the property insecurity of marginalized minority groups and either GDP per capita or HDI. The findings here also reaffirm robust previous findings from other studies of a strong correlation between long-run development and security of property rights for foreign investors and domestic elites. Countries in which marginalized segments of the population suffer from severe property insecurity often have relatively high levels of per capita income and high achievement in terms of human development outcomes, reflecting steady economic growth rates since 1500 C.E. In other words, countries where marginalized groups experience significant property insecurity—as measured by the risk of forced displacement and resettlement—often still experience high growth. The property insecurity of marginalized minorities does not undermine economic development as measured by either per capita income or HDI. However, property rights security for elites and foreign investors—and other segments of the population whose experience with legal enforcement is adequately captured by the ICRG and Heritage Foundation indices—does improve long-run growth. In the relationship between property rights and long-run economic development, it fundamentally matters whose property rights are secure. Based on the new bottom-up measure of Property Insecurity presented here, this Article finds that although secure property rights for elites and foreign investors are positively correlated with long-run economic development, property rights for marginalized groups are not. Aggregate long-run growth is not affected by property insecurity for marginalized minorities.

From an econometric standpoint, the failure to find a significant statistical relationship between Property Insecurity and the dependent variables GDP per capita, and also between Property Insecurity and HDI means that the standard for rejecting the null hypothesis—that there is no relationship between property insecurity and economic development—was not met. Therefore, to avoid erroneous reliance on a “false negative,” we must assess the likelihood of a Type II error. A Type II error occurs when the null hypothesis is not correct, but a statistical test fails to reject it regardless. The probability of a Type II error under the various model specifications and assumptions employed here can be evaluated according to given
hypothesized effect size, number of variables, and sample size. As detailed in Appendix 1, for all the empirical specifications presented in this Article, the likelihood of a Type II error is less than 5–10% (depending on parameter assumptions). Therefore, the finding of no relationship between property insecurity and long-run growth is reliably robust.

However, as an additional robustness check on these empirical findings, this analysis utilizes the limited sample and reproduces the ordinary least squares specification presented by Acemoglu, Johnson, and Robinson ("AJR") in their well-known paper, which argues that institutional quality, specifically property rights security, is a fundamental determinant of economic development. Findings can be directly compared by examining the impact of Property Insecurity within the same universe of observations and using the same regression strategy. For the AJR specification, the Property Insecurity Index covers the period 1985 to 1995—the same time frame as the ICRG Property Rights measure initially used by AJR—and the continent dummies, latitude control, and year for the per capita GDP dependent variable are also the same as those used by AJR. Results in Table 5 once again indicate that there is no relationship between property insecurity of marginalized minorities and long-run economic development.

82. The likelihood of a Type II error is less than 10% in models with a small hypothesized effect (0.05), while for a slightly larger hypothesized effect (0.1), the likelihood falls to 5% or less.
83. The AJR base sample is limited to sixty-four ex-colonies for which data is available on settler mortality. Colonial Origins, supra note 2, at 1377.
84. Id. at 1378; Geography and Institutions, supra note 7, at 1252, 1253.
86. Colonial Origins, supra note 2, at 1378–80; Geography and Institutions, supra note 7, at 1248–49.
Table 5. AJR Sample: OLS Regressions of Long-Run Development

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Notes: Dependent variables are log GDP per capita (PPP) in 1995 and the Human Development Index score from 1995 to 2000; property rights (ICRG) is the 0 to 10 scaled version used by Acemoglu, Johnson, and Robinson (2001, 2002) where a higher score means more protection against expropriation; property insecurity weighted is the sum of minority group insecurity weighted by the group’s proportion of the population; property insecurity max is the property insecurity score for the worst group in a country; property insecurity mean is the unweighted average of group property insecurity scores; higher property insecurity scores indicate higher level of property insecurity (the inverse of the ICRG Property Rights indicator); the omitted continent dummy is for America; base sample includes countries with data for settler mortality and all variables; all property insecurity scores are logged to base e. Standard errors in parentheses. ***, **, and * represent significance at the 1%, 5%, and 10% levels, respectively.
The AJR\textsuperscript{87} article is well-known not for its finding of a simple correlation between expropriation risk and per capita income, as such a correlation could be explained by reverse causality and omitted variables, but for its creative use of settler mortality as an instrumental variable to predict institutional quality in an attempt to avoid endogeneity problems.\textsuperscript{88} Arguing that low settler mortality rates and sparse pre-colonial populations encouraged settlers to replicate European institutions with strong private property rights and checks against government power—while colonial disease environments and factor endowments favoring the establishment of extractive industries generated higher degrees of inequality, less accountable political institutions, and ultimately less secure property rights for the majority of the population—AJR\textsuperscript{89} found a strong and significant relationship between settler mortality and the ICRG Property Rights indicator.\textsuperscript{90}

As another additional robustness check on the new empirical findings presented here, this Article also re-estimates AJR's instrumental variable model, substituting 	extit{Property Insecurity} as the property rights measure. Again, the results confirm our findings. For almost all specifications, the first-stage relationship between settler mortality and property rights disappears when any measure of 	extit{Property Insecurity} is used, and in the models where the relationship is statistically significant, the sign is the opposite of what the expectation would be if low set-

\textsuperscript{87} Colonial Origins, supra note 2.


\textsuperscript{89} Colonial Origins, supra note 2, at 1370–71.

\textsuperscript{90} See generally Colonial Origins, supra note 2.
tler mortality rates indeed facilitated the widespread enjoyment of property rights. Results are shown in Appendix 2 (Table 6, Panels C–E). Stated succinctly, there is no relationship between Property Insecurity and settler mortality. This finding reaffirms our previous findings that the indices commonly used to measure property rights security do not reflect the property rights enjoyed or not enjoyed by marginalized groups; if they did, then settler mortality would also predict Property Insecurity (with the opposite sign). This finding also calls into question the validity of settler mortality as an instrumental variable for secure property rights, as utilized by AJR, since theoretically if settler mortality is operating through the mechanism AJR posits, then it should also predict Property Insecurity.

Taken together, these empirical results confirm that the relationship between property rights and economic development depends on whose property rights are secure, and that the security of property rights for marginalized minorities is irrelevant for long-run economic growth. Growth can occur when the property rights of elites and foreign investors are secure but vulnerable minorities face a high risk of expropriation.

This can be understood given the dual theoretical framework discussed above in Part II.A, which identifies both the micro and macro mechanisms through which secure property rights facilitate economic development. From a micro perspective, long-run growth may be possible in a country despite property insecurity for marginalized groups because resources are being reallocated into the hands of investors with better access to complementary production inputs. From a macro perspective, if one pathway through which secure private property rights leads to economic growth is by increasing government accountability, then the findings presented here indicate that a more nuanced understanding of the role played by private property rights in constraining the power of elites is required. Since the ICRG index measures the security of property of elites and large investors, while the Property Insecurity Index is sensitive to the risk of expropriation faced by less powerful ethnocultural minorities, one might predict that Property Insecurity would be a more appropriate proxy for constraints on elites than the ICRG measure. However, the absence of a relationship between Property Insecurity and long-run economic growth indicates that secure property rights for ethnocultural minorities are not
necessary for the kind of government accountability that incentivizes the adoption of growth-enhancing economic policies.

C. Historical and Contemporary Case Studies

Heterogeneity in property rights security, as well as the complex relationship between secure property rights and economic development, is also evident historically. The enclosure of the commons in seventeenth century Britain—broadly acknowledged to have reduced overgrazing and increased agricultural investments on newly enclosed land—improved the property rights security of landed elites but eroded the property rights of small and medium cottagers who previously had rights to the newly enclosed commons.91 Increasing the security of private property rights for the gentry required expropriating the property of small-hold farmers and pastoralists. The criminal law of eighteenth century Britain operated explicitly to strengthen the property rights claims of landed elites and to erode customary use rights traditionally enjoyed by yeomen. The Black Act of 1723 created fifty new capital offenses punishable by hanging, directed at “crimes” that had previously been understood as customary use, such as deer stealing, breaking the heads of fishponds, and cutting down young trees.92 The complex web of usufruct rights in the forest—in which the rights to harvest trees and berries, hunt deer, and clear land for agriculture were shared among many parties and determined by season and status93—was crystallized into clear-cut freehold titles that vested in the landed gentry.94 By redefining crimes as an offense against property, rather than against another person, the Black Act allowed law to cloak itself in impartiality—masking the power relations underlying the allocation and enforcement of property rights entitlements.95 Here, greater property rights

91. See Yelling, supra note 3, 46–70.
93. For the canonical description of the progression of Western law from status to contract, see Henry James Sumner Maine, Ancient Law: Its Connection to the History of Early Society 319 (10th ed. 1861) (“Not many of us are so unobservant as not to perceive that in innumerable cases where old law fixed a man’s social position irreversibly at his birth, modern law allows him to create it for himself by convention . . . .”).
94. Thompson, supra note 97, at 270–77.
95. Id.
security for some actors entailed greater property insecurity for others.

Likewise, the dispossession of Native Americans from their land was a necessary prerequisite for the expansion of large plantations and the widespread establishment of small freehold farms for white settlers throughout the United States in the first two centuries of the nation’s history. Approximately 100,000 Native Americans had their eastern homelands seized during the nineteenth century. The Cherokee, Chickasaw, Choctaw, Creek, and Seminole suffered wholesale legal expropriation and were forcibly removed to marginal land by the Indian Removal Act of 1830. Congress passed the Indian Removal Act in 1830; by 1840, over 50,000 Native Americans had been forcibly relocated from the American Southwest, opening twenty-five million acres for settlement. Later, fourteen thousand Cherokee men, women, and children were marched overland, at gunpoint, by the U.S. Army in the summer of 1838. Four thousand died from inclement weather, mistreatment by soldiers, inadequate food, and disease. The widely lauded secure private property rights enjoyed by yeoman American farmers in the nineteenth century were made possible by the property insecurity of Native Americans.

Brazil is a contemporary example of a dynamic, rapidly growing upper middle income country with a high level of property insecurity for marginalized groups. But Brazil also has strong property rights protections for a broad cross-section of citizens, particularly elites and foreign investors. Brazil's GDP per capita in 2005 was $8,505 and its growth rate reached 7.5% in 2010. Its most recent ICRG Property Rights Security score

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100. Institutions, supra note 21; Inequality, supra note 21, at 52–53, 59–60.

was in the top half globally at 7.9—higher than the world mean of 7.06—while its Property Insecurity scores for the same period were also both in the upper fiftieth percentile. Brazil currently gathers approximately 90% of its energy from hydroelectric power—a production structure that requires the construction and operation of hydroelectric dams for continued growth.\footnote{102}{PBS, supra note 3.} Since 1985, 50,000 indigenous and local residents have been displaced and resettled due to dam construction, with a majority of resettled households left worse-off than they had been prior to dam construction.\footnote{103}{THAYER SCUDDER, THE FUTURE OF LARGE DAMS: DEALING WITH SOCIAL, ENVIRONMENTAL, INSTITUTIONAL, AND POLITICAL COSTS 58–62 (2005).} In 2010, the Brazilian government approved construction of the world’s third largest hydroelectric power plant on the Xingu River, a large tributary of the Amazon. Projected to generate 11,000 megawatts, the Belo Monte dam will provide power for Brazil’s fast-growing economy while displacing approximately 20,000–40,000 indigenous Amazonian Indians.\footnote{104}{PBS, supra note 3.}

**CONCLUSION**

The history of economic development on every continent is rife with examples of the role played by power in determining whose property rights are made secure and insecure under *de facto* legal institutions, and the considerable heterogeneity of property rights security enjoyed by different groups in the same country. Economic growth has often involved the expropriation of property from marginalized groups and the reallocation of these valuable resources into the hands of more politically powerful constituencies with access to the knowledge and capital necessary for efficient use and investment.

Property rights are complex in both legal content and political and economic meaning; they are not a traffic light along a one-dimensional continuum of “strong” to “weak.” The heterogeneity of property rights enjoyment—widely recognized by contemporary legal scholars working in the domestic context—has been inadequately considered in recent cross-country international and comparative property rights research. Property rights have instead often been conceptualized in a formal rather than a realist framework, based on the implicit assump-
tion that rights enjoyment is uniform across a society. The cross-national indices of property rights widely used in the cross-country research literature—initially designed to assess the risk of expropriation faced by international businesses—fail to adequately account for the institutional framework encountered by marginalized minority groups. In fact, as this Article shows, members of marginalized groups often face significantly higher property insecurity than foreign investors and domestic elites. In many countries, strongly secure property rights for some coexist alongside insecure property rights for others.

Understanding the role played by property rights in economic development requires nuanced attention to this complex heterogeneity in property rights enjoyment. Although it has been widely argued that secure private property rights are a prerequisite for economic development, it actually matters whose property rights are secure. When heterogeneity in property rights enjoyment is considered, the findings presented here demonstrate that property insecurity of marginalized minorities does not necessarily reduce long-run economic development.

These findings are thought-provoking as they challenge widely held assumptions regarding the relationship between property rights and economic development. At a micro level, growth can occur when property rights are broadly secure but marginalized minorities face a high risk of expropriation, because resources may be reallocated into the hands of investors with access to knowledge, capital, and other complementary production inputs. And at a macro-level, secure property rights for marginalized minorities are not required to incentivize governments to adopt broadly growth-enhancing economic policies, as security of property rights for elites can increase accountability of governing elites towards other elites with divergent interests, while broad but not universal property rights security can generate accountability of public officials to the majority.

The practical implications of these findings push in two directions. On the one hand, if aggregate economic growth is the objective, then policymakers may wish to ignore (or encourage) the expropriation of land and resources from marginalized groups, and the reallocation of these resources into the hands of more productive investors. On the other hand, if broadly inclusive economic development that reduces poverty and socioeconomic exclusion is the central policy objective, then atten-
tion must be paid to distributional consequences—meaning that summary country-level measures such as growth, income per capita, and HDI are incomplete and sometimes inappropriate indicators.

The relationship between distributional issues and poverty reduction has generally been examined with reference to “vertical” income inequality, which represents the distribution of income among households and individuals. The links between growth, inequality, and poverty reduction have been extensively explored over the past two decades. 105 As a result of this research, there is a broad consensus on two stylized facts. 106 First, aggregate economic growth is critically important for poverty reduction. Historically, countries that have experienced the longest and most consistent periods of economic growth have likewise seen the greatest reduction in poverty; and richer countries generally have substantially lower poverty rates than do poor countries. Second, all other factors held constant, lower initial levels of inequality and more progressive changes in income distributions promote poverty reduction. In two countries that experience the same growth rates, the country that began with a more equal distribution of income will see a greater reduction in poverty, and poverty will fall faster in countries where the rate of growth for the poor is faster than the rate of growth for the non-poor. 107 Stated succinctly, changes in poverty can be related to changes in mean income, and changes in relative incomes.

The challenge from a policy perspective arises if there are trade-offs between pro-growth and pro-redistributive policies. When should a government pursue a set of policies that would promote high growth rates, but at the cost of increasing inequality or eroding the incomes of some of the poor while raising the incomes of others? When might a government want to pursue pro-redistributive policies that hurt aggregate growth? Answering these questions requires a clear normative framework regarding policy objectives: is the goal a reduction in the pov-

105. See J. Humberto López, Chapter 4: The Relative Roles of Growth and Inequality for Poverty Reduction, in Poverty Reduction and Growth: Virtuous and Vicious Circles 57 (Guillermo E. Perry et al. eds., 2006).
106. Id. at 70–71.
107. See generally, id.
A reduction in the severity of poverty for the poorest, higher incomes for the majority, or improvement in some other measure of well-being, and over what time horizon? Answering this question also requires contextually specific data and empirical analysis that would allow reliable predictions regarding the growth elasticity of poverty and likely distributional and growth effects of a given basket of policies.

This line of research on inequality, growth, and poverty provides an analogous framework to the challenge presented here by a similarly complex dynamic between property rights security for marginalized groups, property rights security for more politically powerful constituencies, and economic growth. Given the possibility of trade-offs between property rights security for marginalized groups and aggregate economic growth, when would a government prioritize one over the other? Again, answering this question requires a clear normative framework. Are secure property rights an end-in-themselves, regardless of any effects on economic outcomes, as a rights-based framework would suggest? Or are secure property rights justified and justifiable only on social welfare grounds? If the latter, what are the objectives the government is seeking to maximize (reducing the absolute number of poor, reducing the severity of poverty for the poorest, improving social and economic inclusion of marginalized groups, raising the incomes of the majority, increasing aggregate economic growth, etc.)? And, in a given country context, what is the empirically projected relationship between policies and these outcomes?

One implication is clear, however: aggregate economic growth does not necessarily mean inclusive economic development. Those with the least power and voice may be left out and left behind by growth-enhancing policies that strengthen the property rights of those with access to capital and political influence by weakening the property rights of marginalized groups. This

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108. The number of people below a given poverty line, defined as $1.25 or $2 a day.
109. The growth elasticity of poverty is the percentage reduction in poverty rates associated with a percentage change in per capita income.
111. See generally Demsetz, supra note 2; Coase, supra note 2; see also De Soto, supra note 2, at 224.
suggests that a narrow focus on aggregate economic growth—without specific attention also to political and economic inclusion and the equitable application of the law—can exacerbate poverty and socioeconomic exclusion and hurt the most vulnerable.
APPENDICES

Appendix 1: Probability of Type II Error

A Type II error occurs when a null hypothesis is false but a statistical test incorrectly fails to reject it. The probability of a Type II error is symbolized by $\beta$. $\beta$ depends on the hypothesized effect size ($E$), the number of observations ($N$), the number of variables in the full model ($V$), the number of test variables ($T$), and the $\alpha$-level chosen as the cut-off of statistical significance. Hypothesized effect size ($E$) is derived by comparing the hypothesized $R^2$ of the model including the Property Insecurity indicator with the $R^2$ of the model including only the control variables.

$$ E = R^2_f - R^2_r $$

$$ P(\text{Type II Error}) = \beta $$

$$ \beta (E, N, V, T, \alpha) $$

Figure 3 illustrates the very small likelihood of a Type II error in our regression models. The figure shows the cut-off number of observations required for Type II error likelihoods of less than or equal to 5% ($\beta = .05$) and 10% ($\beta = .1$), for hypothesized effects of 0.05 and 0.10, across the ranges of $R^2$ values encountered in the large sample GLS regressions shown in Table 4, at a significance level of $\alpha = 0.10$, given our model with six variables. Because lower values of $\alpha$ increase the likelihood that an econometric model will fail to reject a null hypothesis even if false, a 10% significance level is used—the highest $\alpha$-value commonly used in the literature. Since the smaller the hypothesized effect, the larger the number of observations required to reduce the likelihood of a false negative, small hypothesized effects are used.

For a hypothesized effect of $E = R^2_f - R^2_r = 0.1$, $\beta$ is less than .05 ($\beta < .05$) at all relevant $R^2$ values. For a hypothesized effect of $E = R^2_f - R^2_r = 0.05$, $\beta$ is less than .05 ($\beta < .05$) at all but the lowest bounds of the $R^2$ range. In other words, for all models the likelihood of a Type II error is less than 10% at even a small hypothesized effect, while the likelihood falls to 5% or less for a slightly larger hypothesized effect.
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<tr>
<td>N=44</td>
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<td>N=68</td>
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<tr>
<td>N=104</td>
<td>N=132</td>
<td>0.400 - 0.350</td>
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</tbody>
</table>

**Figure 3**

Hypothesized change in R^2 = 0.05

\[ H = 0.700 - 0.600 \]

\[ H = 0.600 - 0.500 \]

\[ H = 0.500 - 0.400 \]

\[ H = 0.400 - 0.300 \]

\[ H = 0.300 - 0.200 \]

\[ H = 0.200 - 0.100 \]

\[ H = 0.100 - 0.000 \]

\[ \text{Hypothesized change in } R^2 = 0.05 \]
Appendix 2: Instrumental Variable Approach

The two-staged least squares estimates used by Acemoglu, Johnson, and Robinson ("AJR") treat property rights security, $P_i$, as endogenous, and are modeled as

1st Stage: \[ P_i = \alpha + \beta \log M_i + \mu X_i + \epsilon_i \]  \hspace{1cm} (5)

2nd Stage: \[ \log y_i = \alpha + \beta P_i + \mu X_i + \epsilon_i \]  \hspace{1cm} (6)

where $M$ is the settler mortality rate and $X_i$ is a vector of co-variates.\textsuperscript{112}

AJR argue that settler mortality rates affect institutions only through the structure of production, where high settler mortality rates favored the establishment of extensive extraction economies that relied on concentrated capital and the employment of low-skilled workers—ultimately producing property rights institutions that favored elites—while low settler mortality led to broadly egalitarian land distribution and small scale self-employment, which ultimately engendered the widespread enjoyment of secure property rights.\textsuperscript{113} The theoretical relationship underlying this instrumental variable strategy suggests that if property security and property insecurity are simply two sides of the same coin, settler mortality rates should also predict the Property Insecurity of ethnocultural minorities.

However, as shown in Table 6 (Panels C–E), the first-stage relationship between settler mortality and property rights disappears when we substitute in any measure of Property Insecurity. There is no statistically significant relationship for virtually any of the specifications, and for the two that show statistical significance of the relationship, the significance is de minimis and the sign is the opposite of what we would expect if low settler mortality rates indeed facilitated the widespread enjoyment of property rights. Stated succinctly, there is no relationship between Property Insecurity and settler mortality. This finding has three implications. First, it means that the second stage relationship (Table 6, Panel A)—for Property Insecurity and log per capita GDP—is not valid, because the settler mortality instrumental variable is not valid. Second, this find-

\textsuperscript{112} See generally Colonial Origins, supra note 2; Geography and Institutions, supra note 7.

\textsuperscript{113} Id.
ing reaffirms our previous findings that the commonly used indices of the strength of property rights security do not reflect the property rights enjoyed or not enjoyed by marginalized groups; if they did, then settler mortality would also predict *Property Insecurity* (with the opposite sign). Third, this finding calls into question the validity of settler mortality as an IV for secure property rights, as utilized by AJR, since theoretically, if settler mortality is operating through the mechanism AJR pos-
ts then it should also predict *Property Insecurity*. 
<table>
<thead>
<tr>
<th>Table 6. AJR Sample: IV Regressions of Log GDP per Capita</th>
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<tr>
<td>Expropriation Risk (ICRG)</td>
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<tr>
<td>Property Insecurity Weighted</td>
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<td>Property Insecurity Max</td>
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<td>Property Insecurity Mean</td>
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<tr>
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<tr>
<td>“Other” continent dummy</td>
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<tr>
<td>R²</td>
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<tr>
<td>Number of observations</td>
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Panel B: First Stage for Average Protection Against Expropriation Risk, 1985-1995

| Log European Settler Mortality | -0.61*** (0.13) | -0.53*** (0.14) | -0.44** (0.17) | -0.35* (0.18) | |
| Latitude | 2.01 (1.33) | 2.00 (1.38) | |
| Asia dummy | 0.33 (0.50) | 0.47 (0.50) | |
| Africa dummy | -0.27 (0.41) | -0.42 (0.41) | |
| “Other” continent dummy | 1.23 (0.84) | 1.05 (0.84) | |
| R² | 0.27 (0.30) | 0.31 (0.33) | |
| Number of observations | 64 | 64 | 64 | 64 |

Continued on next page
### Panel C: First Stage for Property Insecurity Weighted, 1985-1995

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### Panel D: First Stage for Property Insecurity Max, 1985-1995

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### Panel E: First Stage for Property Insecurity Mean, 1985-1995

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Notes: All Property Insecurity scores are logged to base e. ***, ** and * represent significance at the 1%, 5% and 10% levels respectively. Instrumental variable is settler mortality from AJR (2001).
INTRODUCTION

Across the Middle East and North Africa, corrupt dictatorships are currently being swept away with astonishing speed. To fulfill the democratic promise of this wave of authoritarian collapse, these nations must build political systems committed to pluralism, the rule of law, and representative government. The adherence to written constitutional rules that structure and limit the exercise of political power is central to this mission. But how can these countries transform written constitutional rules into a “respect-worthy” form of higher law that can actually limit the power of government?

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3. Frank Michelman devised the concept of a “respect-worthy” constitution. See Frank Michelman, Is the Constitution a Contract for Legitimacy?, 8 Rev. Const. Stud. 101, 125–28 (2003). Jack Balkin describes Michelman’s concept of respect-worthy as something more than merely legal validity in a positivist sense, and something less than complete justice. Rather, legitimacy is a feature of legal systems that makes them worthy of respect, so that people living in legitimate legal systems have reasons to accept the use of
Or, in other words, how can these countries make new democratic constitutions “matter”?

The scholarly answer focuses on the process of constitution-making. It argues that written constitutional rules “matter” when they are drafted and ratified during a period of extraordinary popular mobilization. In this process of “popular constitution-making,” constitutional drafting and ratification necessarily involves irregular mechanisms of extraordinary popular mobilization, such as extra-parliamentary constitutional conventions and referendums. By operating outside the rules and institutions of ordinary politics, the people will be able to act in their sovereign capacity as the “constituent power.” In this constituent position, the people themselves become the author of constitutional rules, maximizing the democratic “legitimacy” state coercion to enforce laws that they do not necessarily agree with and may even think quite unjust.


of these rules and transforming them into a form of higher law.\(^7\)

Popular constitution-making is grounded on the belief that a successful process of constitution-making must be separated from ordinary politics. This view is so deeply ingrained that a recent article found that “[n]early all the normative and positive work on constitutions proceeds from the assumption that constitutional politics are fundamentally different in character from ordinary politics.”\(^8\) In constructing a normative agenda for post-authoritarian constitution-making, scholars and commentators have drawn on this belief to encourage new democracies to deploy extraordinary popular mechanisms such as constitutional conventions and referendums in their constitution-making process.\(^9\)

The experience of constitution-making in post-Communist Europe and Asia, however, challenges this scholarly consensus. First, many Central and Eastern European post-Communist countries have established strong systems of constitutional review without using popular mechanisms to draft and ratify their constitutions. Instead, they used inherited, Communist-era institutions and related rules to draft their new constitutions, a process that Andrew Arato calls “parliamentary constitution-making.”\(^10\) In these countries, “[c]onstitutional change was so closely associated with political change that it implied a constitutional politics not readily distinguishable from ordinary politics.”\(^11\) The relative success of this form of parliamentary

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7. This is an author-based theory of “legitimacy,” where a constitution is “respect-worthy” because of who drafted it. And, arguably, the most democratically “legitimate” author of a democratic constitution is the people themselves. For more, see Michelman, *supra* note 3, at 125–28.


constitution-making in building constitutional orders that limited political power and protected individual rights has led some scholars to formulate a new “legal” model for democratic constitutional adoption.\(^\text{12}\)

Second, and more disturbingly, the mechanisms and rhetoric of popular constitution-making have not produced constitutions that limit the concentration of power and protect individual liberty in the post-Communist world. Instead, irregular popular mechanisms like referendums and constitutional conventions have helped charismatic presidents unilaterally impose authoritarian constitutions on society.\(^\text{13}\) As Stephen Holmes and Cass Sunstein describe it, “the greater role granted to popular referenda and extra-parliamentary authorities, the less constitutionalism matters as a political force.”\(^\text{14}\)

This Article will explore why popular constitution-making has led to constitutional dictatorship. Part I will detail the theoretical underpinnings of popular constitution-making.\(^\text{15}\) Part II will describe how many Eastern European countries rejected popular constitution-making and instead drafted new constitutions through ordinary political processes and within the pre-existing legal system.\(^\text{16}\) Part III will demonstrate how popular constitution-making has helped undermine constitutionalism by providing opportunities for charismatic politicians with little desire for constitutionally-limited government to appeal to the people. Claiming to be the agent of the people, these charismatic figures were then able to justify their decisions to sidestep parliamentary opposition and push through “authoritarian constitutions” that concentrated vast power in their own hands.\(^\text{17}\) Part IV will conclude by stressing the importance of stable rules and institutions in constraining the constitution-making process.

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13. See infra Part III.
15. See infra Part I.
16. See infra Part II.
17. See infra Part III.
I. POPULAR CONSTITUTION-MAKING AND THE PEOPLE’S CONSTITUENT POWER

Anarchy is a frightening but necessary transitional stage; the only moment in which a new order of things can be created. It is not in calm times that one can take uniform measures.18

As post-Communist countries began to draft new democratic constitutions in the late 1980s and early 1990s, political scientists and constitutional theorists focused on a largely neglected question at the intersection of constitutional and democratic theory: How can new democracies increase the likelihood that new written constitutional rules will—in contrast to their authoritarian-era predecessors—create binding constitutional law that can limit governmental power?19 This field of inquiry was entirely new in the early 1990s. Writing in 1992, Bruce Ackerman deplored the lack of a “powerful literature” that described how “[a] piece of paper calling itself a constitution can be . . . a profound act of political self-definition.”20

To address this question, theorists began by considering strategies for boosting the “democratic legitimacy” or “respect-worthiness” of a new democratic constitution.21 Hesitant to recommend specific constitutional content, theorists focused purely on an ideal process of constitutional foundation that would ensure that the new constitution was generated by the true sovereign power in a democracy, the people. This “author-based” version of constitutional legitimacy would ensure that the constitution would be respect-worthy by connecting “the revolutionary will of the people” to “the making of a constitution.”22

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20. ACKERMAN, LIBERAL REVOLUTION, supra note 5, at 47.
This author-based approach drew heavily on the concept of “constituent power” developed by the French theorist Emmanuel Joseph Sieyes.23 Sieyes’s theory held that the people—or as he termed it, “the Nation”—act in two capacities in a democracy. The Nation most often acts through ordinary institutions and elected representatives within pre-established rules. In exceptional situations, however, the Nation exercises its sovereign “constituent power” (pouvoir constituant) to repudiate existing legality and establish a new government of “constituted powers” (pouvoir constitue), such as a parliament, an executive, or courts.24 A truly democratic constitution, unlike legislation, is therefore the product of an exceptional moment of popular mobilization in which the monolithic mass of the Nation directly creates a new constitutional order.25

OSGOODE HALL L. J. 199, 215 (2010) (“[T]he basic condition for democratic legitimacy is the realization of democracy at the level of the fundamental laws—that ordinary citizens have the real possibility of participating in the re-constitution of the norms that govern the state through highly participatory procedures. In other words, the democratic legitimacy of a constitutional regime depends on the way in which it approaches the question of constituent power.”). For more on the link between revolutionary thought and this theory of popular constitution-making, see William Partlett, Liberal Revolution, Legality, and the Russian Founding Period, REV. CEN. & E. EUR. L. (forthcoming 2013).

23. See SIEYES, supra note 6, at 136–39. The American revolutionaries also drew on the concept of popular sovereignty as the basis for new constitutional law. They were, however, more cautious in exercising that power. James Madison wrote that the people’s exercise of constituent power is of “too ticklish a nature to be unnecessarily multiplied.” THE FEDERALIST NO. 49, at 341 (James Madison) (Jacob E. Cooke ed., 1961). John Adams commented that “[i]t is certain, in theory, that the only moral foundation of government is, the consent of the people. But to what extent shall we carry this principle?” Letter from John Adams to James Sullivan (May 26, 1776), in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES, AND ILLUSTRATIONS 375 (Charles Francis Adams ed., 1854).


25. SIEYES, supra note 6, at 136–37. This theory of constitutional legitimacy is grounded on social contract theory and sees constitutions as a special kind of contract between the people and their government. “Social contract theory imagines political societies as resting on a fundamental agreement, adopted at a discrete moment in hypothetical time, that both bound individual persons together into a single polity and set fundamental rules regarding that polity’s structure and powers.” Jacob T. Levy, Not So Novus an Ordo: Constitutions Without Social Contracts, 37 POL. THEORY 191, 192 (2009).
Popular constitution-making theory draws its inspiration from Sieyes’s belief that popular sovereignty is synonymous with the *unitary concept of the nation*. It stands for the principle that for the people to truly act, they must do so outside of the ordinary, pre-existing rules or institutional subdivisions inherited from the old regime. Instead, they must act as a national whole. This disregard for pre-existing legality and institutions is not a problem; it instead creates the basis or “political bottom” for a new democratic constitution. Illegal revolu-

(providing further background on social contract theory). This theory therefore draws on enlightenment thinking that sees constitution-making as the product of the people’s rational will.

26. Bruce Ackerman, *Transformative Appointments*, 101 Harv. L. Rev. 1164, 1182 (1988) (discussing national referendum process as best way for capturing vision for constitutional change “handed down to us by the Founders.”). American legal scholars have argued that the American founders shared a unitary vision of popular sovereignty. Akhil Amar argues that the concept that “sovereignty was absolute and indivisible” was “almost universally held in the 1780s.” *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 507 (1994). Richard Kay described how the American founders invoked “a well-developed theory of constituent authority according to which the people’s will was both anterior and superior to every instance of positive law, not excluding any constitutional text.” *Constituent Authority*, 59 Am. J. Comp. L. 715, 718 (2011).

27. This sentiment was best summed up in Thomas Paine’s proclamation that “[t]he constitution of a country is not the act of its government, but of the people constituting a government.” THOMAS PAINE, *Rights of Man: Being an Answer to Mr. Burke’s Attack on the French Revolution*, in RIGHTS OF MAN, COMMON SENSE AND OTHER POLITICAL WRITINGS 83, 122 (1791).


29. *Id.* (stating “it is exactly its break with prior legality that invested the Constitution with the power it still exercises over [Americans] and with its, at least formal, primacy in our legal system.”). See also James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. Pa. L. Rev. 287, 296, 303–04 (1990); 2 Bruce Ackerman, *We the People: Transformations* 14–15 (1998). It is important to note that popular constitution-making was a contested idea during the American founding period. Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 Rutgers L.J. 911, 922–23 (1993) (stating that in the immediate aftermath of the Revolutionary War, “many Americans . . . continued to believe that their legislatures were the best instruments for interpreting and changing these constitutions. The state legislatures represented the people, and the people, it seemed, could scarcely tyrannize themselves.” Wood then shows how this view shifted radically in the 1780s).
tionary constitutional foundation is therefore a virtue: To enjoy the status as legally binding higher law, constitutional foundation must be separated from the ordinary laws and conventions of ordinary politics.

A. A Revolutionary Agenda for Capturing the People’s Constituent Power

As Communism collapsed, commentators drew on popular constitution-making to formulate a normative agenda for post-Communist constitutional adoption.\textsuperscript{30} Popular constitution-making lent itself well to post-Communist constitutional creation because it linked the revolutionary street protests in city squares across the former Communist countries to the creation of binding constitutional law.\textsuperscript{31} Seen as products of the masses of newly liberated post-Communist people, new constitutional rules would be protected “against erosion by political elites who had failed to gain broad and deep popular support for their innovations.”\textsuperscript{32}

To build binding new constitutional law, commentators therefore stridently opposed parliamentary constitution-making or adherence to pre-existing constitutional rules. These commentators instead argued that new democracies should turn to irregular institutions such as constituent assemblies and popular referendums, which could capture the collective voice of the Nation.\textsuperscript{33} This extraordinary process would help foster the leg-

\textsuperscript{30} See supra note 9 and accompanying text. This interest was also widespread amongst non-legal commentators. See, e.g., RALF DAHRENDORF, REFLECTIONS ON THE REVOLUTION IN EUROPE 91 (1991) (commenting that “[a]fter the constitution, normal politics takes over.”).

\textsuperscript{31} See supra note 9. Other potential theories of constitutional legitimacy were not as appealing. For instance, foundationalism—the concept that post-Communist constitutional legitimacy would be drawn from constitutions with certain democratic provisions—was rejected for being too elitist. Furthermore, the Burkean historicism belief in gradual constitutional change placed too much emphasis on these countries’ illiberal history. Finally, monism—the idea that elected legislatures should generate constitutional law—was seen as too easily overturned by temporary majorities. For more, see ACKERMAN, supra note 5, at 3–33 (analyzing competing theories of constitutional legitimacy).

\textsuperscript{32} ACKERMAN, supra note 5, at 10.

\textsuperscript{33} See supra note 30. Donald Lutz explained that “[t]he doctrine of popular sovereignty required that constitutions be written by a popularly selected convention, rather than the legislature, and then ratified through a process
gitimacy of the new written constitution, placing it above ordinary politics. As two leading political scientists put it, “[t]he optimal formula [is] one in . . . which the work of the constituent assembly gains further legitimacy by being approved in a popular referendum . . . .”

Bruce Ackerman, “America’s greatest theorist of transition,” has described this popular constitution-making agenda in detail. Ackerman strongly urged post-Communist drafters to avoid “a series of ad hoc modifications of the older Communist texts” through parliamentary amendment. Instead, he argued, constitutional drafters should aspire “to attempt a comprehensive statement of their revolutionary principles.” Calling this the “triumphalist scenario,” Ackerman argued that appealing to the people would lead to the constitutionalization of post-Communist revolutionary fervor.

To draft a new constitution, Ackerman suggested that post-Communist constitutional drafters should convene a constitutional convention to capture the people’s true constituent power. Although newly elected post-Communist legislatures were unlikely to legally authorize these irregular institutions, Ackerman was not worried. Instead, he argued that the extra-legal nature of these bodies accorded them important symbolic value, as had been in the case in the United States:

To them, the legally anomalous character of the “convention” was not a sign of defective legal status but of revolutionary possibility—that a group of patriots might speak for the People with greater political legitimacy than any assembly whose


36. Ackerman, Liberal Revolution, supra note 5, at 61.

37. Id.


39. Ackerman, Liberal Revolution, supra note 5, at 51–54.

40. Id. at 53.
authority arose only from its legal form. . . . As the revolu-
tionary years moved on, Americans insisted that the People
could deliberate on constitutional matters only in special bod-
ies whose very name—“convention”—denied that legal forms
could ultimately substitute for the engaged participation of
citizens. 41

Ackerman also argued that popular referendums should be
an important part of the constitution-making process. He be-
lieved that referendums echoed the spirit of the American Rev-
olution where the drafters “appealed for support from the Peo-
ple over the heads of existing governments.”42 In particular, a
referendum would be critical in ensuring that the constitution
would serve as “a popular symbol of the revolutionary genera-
tion’s achievement”43 and would capture a “mandate from the
people.”44

To mobilize popular opinion around these irregular institu-
tions, Ackerman called for strong charismatic presidential
leadership.45 In particular, Ackerman pushed for the constitu-
tionalization of presidential charisma to avoid a constitution
with “soft constitutional norms” that would be “too easy for a
parliamentary majority” to ignore.46 Consequently, he encour-
age Russia President Boris Yeltsin to refuse to “strike a
deal” with the members of the elected Russian Parliament and
instead encouraged him to “use the impasse [with parliament]”
to catalyze popular opinion behind a new democratic constitu-
tion.47

Jon Elster, the leading political scientist to address this field
of constitution-making, drew on the insights of political science
in support of popular constitution-making. Using eighteenth-
century French and American history as examples, he rea-

41. ACKERMAN, supra note 5, at 175 (emphasis in original).
42. ACKERMAN, LIBERAL REVOLUTION, supra note 5, at 53.
43. Id.
44. Id. at 54 (citation omitted).
46. ACKERMAN, LIBERAL REVOLUTION, supra note 5, at 63.
47. Id. at 58–59.
soned, “constitutions ought to be written by specially convened assemblies and not by bodies that also serve as ordinary legislatures. Nor should the legislatures be given a central place in the process of ratification.”

Elster argued that an irregular constitutional convention, in contrast to an ordinary legislature, was far more likely to be an impartial body of deep deliberation necessary for constitution-making. For Elster, the irregular nature of these institutions would help insulate the process of constitution-making from the taint of short-term political bargaining. He reasoned that conventions “promote the predominance of reason over interest” because “the pressure on speakers to produce impartial arguments may be especially strong in the constitutional setting, compared to ordinary legislatures.” This production of a more principled decision would help ensure a more apolitical and legitimate constitution. Without taking such an irregular path, “a constitution will lack legitimacy to the extent that it is perceived to be a mere bargain among interest groups rather than the outcome of rational argument about the common good.”

II. CONSTITUTIONAL FOUNDATION BY MIXING ORDINARY AND EXTRAORDINARY POLITICS

This new trend towards peaceful transition is puzzling because it raises serious questions about the accepted wisdom that genuine transitions to constitutional democracy require a violent tear in the political fabric and a radical shift in the polity’s conception of its own identity.

A large number of Central and East European countries have been successful in constructing constitutional democracy with-

50. Id. (emphasis in original).
out employing the mechanisms and rhetoric of popular constitution-making. These countries consciously rejected revolutionary mechanisms in favor of negotiated paths to constitutional foundation. For instance, a “high-ranking Hungarian jurist . . . remarked that even enthusiastic supporters,” of political change in Hungary “avoid[ed] the term ‘revolution,’ preferring to speak of ‘peaceful transition’ instead.” As Andrew Arato observed, Central and Eastern European constitutional drafters sought to avoid a “state of nature, outside of all law by postulating constitutional continuity with old regimes.”

As a result, Central and East European countries actively avoided revolutionary attempts at popular constitution-making. In Hungary, a pro-presidential group “presented a petition with 200,000 signatures calling on parliament to hold a referendum which would decide,” whether to introduce direct presidential elections and also whether to shift “some powers from the government to the president.” The Hungarian Parliament rejected this option after the Constitutional Court ruled that the “constitution cannot be amended by referenda.” Similarly, when Albanian President Sali Berisha’s constitutional draft, which faced criticism for its authoritarian tendencies, failed to gain the necessary support in the parliament, President Berisha attempted to circumvent the Albanian Parliament and put his draft to a referendum. The Constitutional Court in Albania ruled “that submitting the constitution to a popular vote without first asking parliament to vote violated the Law on Major Constitutional Provisions.” Finally, in Poland, a center-right party “drummed up half-a-million signatures and demanded a parallel referendum on their version of

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54. The success of constitutional democracy in these countries does not necessarily spring from the process of constitution-making; there are of course additional factors at play outside of the scope of this Article.
55. PREUSS, supra note 22, at 91. Hungary’s exclusive use of ordinary institutions to amend the constitution might also have allowed it.
58. Id.
60. Id. at 146.
the civic constitution.61 The Polish parliament successfully blocked this attempt to appeal to the people through irregular processes.62

Instead, the Central and East European countries amended and established new constitutional orders by combining ordinary and extraordinary institutional mechanisms.63 Ordinary parliaments became the locus for both ordinary legislation and constitutional lawmaking, linking an emerging culture of civil engagement through parliamentary-based politics to the creation of constitutions.64 These newly empowered parliaments created commissions, consisting of both legal experts and members of parliament, to draft the post-Communist constitutions under the standing rules set forth in their parliamentary tradition. These drafts were only given to the people in a referendum after parliamentary ratification in accordance with procedures inherited from amended Communist-era constitutions.65 This use of parliamentarian rules to fundamentally reshape the constitutional order meant that “[w]holy new political arrangements [were] institutionalized throughout the region on the basis of a string of constitutional amendments passed by weakly legitimate parliaments, assemblies that are, in turn, fragmented into a chaos of small parties.”66

62. Id.
63. Holmes & Sunstein, supra note 14, at 285.
64. See Arato, supra note 56, at 144. Most Communist countries, including China today, have Soviet-style written constitutions, which create a system of legislative supremacy. For more on the constitutional structure of the 1977 Soviet Constitution, see Christopher Osakwe, The Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution, 127 U. Pa. L. Rev. 1350, 1411–32 (1979).
65. Holmes & Sunstein, supra note 14, at 280.
66. Id. at 286.
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<th>Country</th>
<th>Drafters</th>
<th>Ratifiers</th>
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<td>Poland67</td>
<td>Parliamentary commission (drafted both the interim constitution and the final constitution)</td>
<td>Parliament AND referendum (1996)</td>
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<td>Hungary68</td>
<td>Parliament (amended more than 70% of the Communist-era constitution)</td>
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<tr>
<td>CzechRepublic69</td>
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<td>Romania71</td>
<td>Parliamentary commission</td>
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<td>Bulgaria72</td>
<td>Parliamentary commission</td>
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<td>Germany (reunification)73</td>
<td>N/A</td>
<td>Parliament (Sept. 20, 1990)</td>
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Influenced by the popular constitution-making literature, scholars and commentators argued that the Central and Eastern European rejection of popular constitution-making jeopardized the super-legality of constitutional law. In particular, they

67. See SANFORD, supra note 61, at 89–90.
69. LUDWIKOWSKI, supra note 57, at 167–68.
70. Id.
71. Id. at 127. In Romania, “Communists, attempting to establish their reputation as reformers, declared that the primary task of the new parliament would be to draft a new constitution.” Id.
72. Id. at 115.
“condemn[ed] easy paths to constitutional modification in Eastern Europe . . . and [] denounced more generally the ‘confusion’ between constitutional politics and ordinary politics characteristic of every post-Communist society.”

Andrew Arato questioned whether the “democratic legitimacy of a constitutional construction created through continuity with a rejected old regime can be significantly reconstructed mid-stream without damage to constitutionalism.”

Lloyd Cutler argued that ordinary legislatures should not ratify constitutions because, “if the legislature is the final word, the legislature can always change the constitution” and the process will not lead to “a true legitimization of the constitution.”

He criticized the German Constitution for being “simply an act, a so-called basic law of the legislature,” which is, “something that also plagues how [a country] go[es] about building a constitution in that part of the world.”

Peter Quint also argued that there would be “a price to be paid” for Germany’s decision to incorporate East Germany, the German Democratic Republic, without a constituent assembly, stating:

The drafters thereby relinquished the powerful democratic process of education and deliberation that such a procedure would have afforded—even if the Basic Law had not been significantly altered—as well as an attendant increase in democratic legitimacy. . . [i]f there had been a constituent assembly under Article 146 leading to a new constitution, there might have been a greater sense of a common political enterprise than there now is.

A. E. Dick Howard also criticized Central and Eastern European drafters for failing to draw on the people’s constituent power in the creation of a new constitution. He found it to be a “paradox” that “[t]he device of the constitutional convention or constituent assembly is not used” while “referenda are quite rare.”

Additionally, Jon Elster lamented Central and Europe-

74. Holmes & Sunstein, supra note 14, at 284.
77. Id. at 73.
78. Quint, supra note 73, at 702 (emphasis in original).
79. Symposium, supra note 76, at 57.
an drafters’ failure to raise the constitution above the whims of everyday ordinary politics, warning that “[t]he constitution will lose many of its desirable properties—notably that of inspiring confidence and creating a climate in which investors are willing to make long-term investments—if everyone expects that it will be continually revised.”

These worries, however, have proven to be overstated. With the exception of Hungary, which recently ratified a constitution criticized for rolling back democratic freedoms, other Central and Eastern European countries have built stable constitutional orders by mixing ordinary and irregular political mechanisms in the constitution-making process. The relative success of these countries’ transitions to their new constitutions might suggest that a constitutional order does not draw its “respect-worthiness” solely from the process of constitution-making.

Scholars have begun to acknowledge that mixing ordinary and extraordinary mechanisms in constitution-making presents an alternate route to constitutionalism. Cass Sunstein and Stephen Holmes argued that although “a sharp split” between constitution-making and ordinary politics is “preferable”, the “peculiar conditions of Eastern Europe do not make this a sensible solution.” They conclude that “the very creation of a constitutional culture in post-Communist societies depend[ed] upon a willingness to mix constitutional politics and ordinary


82. This is a contention that lies outside the scope of this Article. Dick Howard has speculated that ongoing implementation of human rights norms by assertive courts might further legitimize these constitutions. He comments that “[s]ince you don’t find in post-communist Europe constitutional conventions and referenda and other notions of how one puts the constitution on a legitimate basis, I raise the question of whether the work of the constitutional courts might begin to supply some of that sense of legitimacy.” Symposium, supra note 76, at 58.

83. Some have seen this gradual legal constitution-making as following a model first set by Spain in the 1970s. See Guerra, supra note 12, at 1939–40.

84. Holmes & Sunstein, supra note 14, at 275.
politics." Similarly, Vicki Jackson noted “that democratic legitimacy can emerge through a range of processes, including those formally controlled by less than fully legitimate governments or by occupying military authorities from liberal democracies.” Ruti Teitel, seeking to explain what she described as a “puzzling conflation of ordinary politics and constitution-making,” hypothesized that transitions have their own unique characteristics, requiring the creation of a “transitional jurisprudence.” Teitel, however, admitted that the understanding of this special kind of jurisprudence remains incomplete, conceding that the “constitutional component of [her] project points to a research agenda, which should be challenging of some of the meta-theoretical predicates of the prevailing constitutional canon.”

III. POPULAR CONSTITUTION-MAKING AND AUTHORITARIAN CONSTITUTIONS

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<tr>
<th>Country</th>
<th>Drafter(s)</th>
<th>Ratifier(s)</th>
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<tr>
<td>Russia</td>
<td>Presidential appointed Constitutional Convention</td>
<td>Referendum</td>
</tr>
<tr>
<td>Belarus</td>
<td>Presidential administration</td>
<td>Referendum</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>Presidential administration</td>
<td>Referendum</td>
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85. Id. at 285.
86. Jackson, supra note 2, at 1271–72. (writing that “some political scientists and lawyers argue for particular kinds of processes-for example, separate ‘conventions’ [rather than standing general legislative bodies] to draft constitutions-both to avoid the institutional and personal self-interest of existing members of legislative bodies and to better embody the interests of people in a specifically constitutional process. Yet enough examples exist of successful parliamentary adoptions to make one skeptical of insisting on this one form.”). Id. at 1292–93.
87. Teitel, supra note 11, at 2080.
90. Lukashuk, infra note 177, at 314–117.
The legally anomalous and extra-parliamentary mechanisms and rhetoric of popular constitution-making, however, did play an important role in post-Communist constitution-making further east. In the former Soviet Union, these irregular and popular mechanisms emerged as a useful tool for power-hungry politicians bent on reasserting personal leadership but unable to risk the domestic and international costs of openly autocratic rule amidst a post-Cold War global democratic “zeitgeist.” Consequently, these post-Communist figures manipulated referendums and produced highly choreographed constitutional conventions to delegitimize ordinary constitutional rules and institutions such as parliaments, and to constitutionalize presidential dictatorship.92 In other words, the mechanisms of constituent power helped cloak the creation of plebiscitary dictatorship in the garb of liberal constitutionalism. Russia’s process of post-Soviet constitutional foundation is the paradigmatic example.

A. Russia

Russia initially followed the “parliamentary” model of constitution-making. By 1992, the Russian parliament had amended the Communist-era constitution numerous times and created a constitutional document that bore little resemblance to its Soviet-era counterpart.93 Most importantly, the constitution no longer contained any reference to the Communist Party’s monopoly on power and instead established a constitutional system of parliamentary supremacy with an elected president and a constitutional court.94

The two-tiered Russian parliament emerged at the center of this new constitutional system. At the base of this two-tiered system was the Congress of People’s Deputies (“Congress”), a body that was elected in March 1990 and comprised of 1,098

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93. JOHN MCCORMICK, COMPARATIVE POLITICS IN TRANSITION 217 (2012).
The Congress had the power to amend the constitution, pass laws, elect a chairman, and approve the head of government as well as other state officials. The Congress, therefore, was "like a constituent assembly, which assumes control of the state temporarily in a time of crisis in order to lay the constitutional foundations of a new political order." To govern between its meetings, the Congress elected a permanent standing body, the Supreme Soviet.

Both the Supreme Soviet and the Congress became important arenas for political debate and criticism. In fact, as Yeltsin’s rapid economic reforms grew increasingly unpopular, these representative bodies became a key point of opposition. The Supreme Soviet also emerged as a focal point for constitution-making, creating a Constitutional Commission under the leadership of Oleg Rumiantsev. Rumiantsev was a leading Russian westernizer; he had convened a discussion group, Democratic Perestroika, which was one of Moscow's many such small, informal political discussion groups. Mr. Rumiantsev’s draft constitution ultimately sought to draw on this advice to create a western-style semi-presidential system in Russia.

96. Id.
98. Remington, supra note 95, at 85.
99. Id. at 104–11.
100. Peter Pavilionis, The Eurasia Center, A New Constitution for Russia, J. Democracy 1 (Dec. 23, 2005), available at http://www.rumiantsev.ru/englishtexts/18/ (noting, “Rumiantsev and his similarly youthful advisers and associates on the commission were ardently committed to the importance of legal culture and constitutionalism. They were (and still may be) the most eloquent and committed adherents of the rule of law to be found in Russia.”); Robert B. Ahdieh, Russia’s Constitutional Revolution: Legal Consciousness and the Transition to Democracy 1985–1996 52 (1997).
1. The Russian Constitutional Court

The newly created Russian Constitutional Court emerged as a surprisingly powerful body in enforcing the amended Communist-era Russian Constitution. Under the energetic leadership of Chairman Valerii Zorkin, the Court attempted to ensure that the new amendments, which proclaimed separation of powers and law-based limitations on government, were adequately enforced. In its first case, the Court struck down a presidential decree seeking to merge the Internal Police and the Foreign Intelligence Service. The Court opened this decision with a broad statement that “[o]ne of the fundamental principles of a constitutional system is that each government institution may only make decisions and carry out actions that are within its competency, determined in the Constitution.” The Court went on to state that “[t]he President is not able to contradict the Constitution and the laws of the Russian Federation or the elements of a system of checks and balances, underpinned by the principle of separation of powers based in Article 3 of the Russian Declaration of Sovereignty.” The Zorkin Court did not just limit presidential power, later decisions also struck down unconstitutional extensions of power by the Russian Parliament.

Zorkin’s attempts to enforce Russia’s amended constitutional system were complicated because much of the Russian political elite were unaccustomed to constitutional limitations on the practice of political power. As Zorkin explained in a speech to the Congress in the spring of 1992, many officials in both the presidential and parliamentary branches of power were unwill-

104. Id.
ing to respect the limitations placed on their behavior by the existing constitution.106

2. Yeltsin’s Visions of Presidentially-Dominated Form of Government

The first elected president, Boris Yeltsin, and his supporters were hostile to constitutional limits on presidential power. They saw a truly democratic constitutional order as one with an elected president as the supreme institution.107 In a speech to the parliament, Yeltsin described the underlying centrality of presidential dominance in Russian democracy, asserting, “I am a strong proponent of presidential power. But not because I am president, but because without the presidency Russia would not survive . . . because the president is elected by the entire people, he embodies the integrity and unity of Russia.”108 One of Yeltsin’s aides outlined the presidential administration’s vision of presidential power. He explained that the Russian president differs from the presidency:

imagined in textbooks or in its classical form. The fundamental concept of the presidency is as the superior power. The presidency ensures the idea of an independent and responsible Government, formed in order to decide questions of governmental operation. And the presidency ensures that the Government works with the regional legislatures in the creation of a single governmental vertical.109

106. Scheppelle, supra note 102, at 1795.
107. See infra note 123.
This aide insisted that this system was democratic because of its basis in popular sovereignty, or narodovlastie.110 In other words, the Russian Presidency’s power flowed directly from its embodiment of the people’s constituent power.

3. Yeltsin’s De-Legitimization of Existing Political Institutions

This view of superior presidential power conflicted with Russia’s amended Communist-era constitution. Thus, it was only a matter of time before the president would come into conflict with constitutional legality and its two chief institutions, the Constitutional Court and the parliament. In this struggle, Yeltsin repeatedly attempted to argue that both the Constitutional Court and the parliament were Communist-era relics that did not represent the people’s newfound constituent power.111

This feud began in earnest at the end of 1992 when President Yeltsin demanded that Congress renew his expansive decree powers so that he could continue his macroeconomic reforms.112 Without these powers, the Presidency could no longer fulfill the presidential administration’s expansive view of “proper” presidential power. As Congress debated whether to renew the delegation of these powers to Yeltsin, rumors circulated of a presidential coup d’état.113 In a December 10, 1992 speech to the Congress, President Yeltsin attacked the existing constitution for affording too much power to the legislature, protesting, “[t]he constitution, or what has become of it, is turning the Supreme Soviet, its leadership and its Chairman into the absolute rulers of Russia . . . [they are] accustomed to giving orders without being accountable.”114 Drawing on the language of

110. *Id.* This aide proclaimed that the “stable, strong, and capable organization of power” is rooted in a “democratic basis: popular sovereignty (narodovlastie) . . . . The people decide the matter.” *Id.*


114. Way Out of the Crisis, supra note 111, at 1–2.
popular constitution-making, he called for the people to decide the nature of this constitutional system directly,

In this situation, I consider it necessary to appeal directly to the citizens of Russia, to all the voters. To those who voted for me in the election and thanks to whom I became President of Russia. . . . The Congress and the President have but one judge—the people. . . . My proposal is based on the constitutional principle of people's rule, on the President's constitutional right to appeal to the people, and on the President's constitutional right of legislative initiative.115

As Yeltsin stepped up these attacks and it seemed that Russia was on the brink of civil war, Chairman Zorkin stepped in to broker a compromise. He was ultimately successful. President Yeltsin and the leader of parliament, Ruslan Khasbulatov, reached a compromise—Khasbulatov agreed to a referendum in April 1993 in return for Yeltsin's agreement to choose a Prime Minister from the three candidates having the broadest support in the Congress.116

In January 1993, the leader of the Russian parliament, realizing the dangerous ramifications of allowing Yeltsin a popular mandate in a popular referendum, attempted to back away from this promise. He argued that a referendum was simply an appeal to mob rule and a way to “distract public opinion from the truth, to separate people into the ‘just’ (supporters of the strengthening of presidential power) and the ‘unjust’ (the anti-reformers’ and ‘all those reactionary Deputies’), and to establish some type of dictatorial regime (a regime of mob rule).”117

As the constitutional debate raged on, the Congress met again in March 1993.118 The leader of parliament warned that Yeltsin’s appeals to the people’s constituent power “devalue the existing Constitution, destabilize the political situation . . . [and] have a certain logic, which consists, apparently, in implying that the potential for carrying out ultraradical reforms by

115. Id. at 2–3.
constitutional, democratic methods have been exhausted.”

The Congress responded by stripping Yeltsin of his extraordinary powers, reducing the Russian Presidency to its textual role as head of the executive branch in a formal semi-presidential, separation-of-powers system.

Yeltsin refused to accept this arrangement. In a March 20th televised speech, he called for “special administrative rule, a condition in which the Supreme Soviet and the Congress of People’s Deputies would be subordinated to the president and would not have the right to cancel his decrees or to pass laws contradicting them.” In support of this coup, he argued that the Congress was undermining the people’s ability to realize their constituent power:

The eighth Congress was, in point of fact, a dress rehearsal for revenge by members of former Party nomenklatura. They simply want to deceive the people. We hear them lie in the oaths of loyalty to the Constitution that they continually take; from Congress to Congress, that document is bent and reshaped in their own interests, and blow after blow is dealt to the very foundation of the constitutional system of popular sovereignty [(narodovlastie)].

This move, however, met stiff resistance; the existing constitutional rules still commanded respect. Most importantly, the head of the Russian Armed Forces spoke out against Yeltsin’s speech in a hastily convened session of the Presiding Committee of the Supreme Soviet, saying that the Armed Forces would not participate in political infighting and would follow the constitution. The Constitutional Court convened a special ses-

120. *SAKWA*, supra note 89, at 49.
121. *Id.*
124. *MEDVEDEV*, supra note 122, at 97. According to Medvedev, Yeltsin had taped the speech on the morning of March 20th and had distributed tapes to the foreign embassies before consulting his advisors. The secretary of Yeltsin’s Security Council, Yuri Skokov, refused to endorse the new decree and tried to persuade Yeltsin not to take this step. *Id.*
sion on March 21st and, by the morning of March 22nd, had declared Yeltsin’s speech unconstitutional.\textsuperscript{125} The Congress also met on March 21st and called an emergency session for March 26th.\textsuperscript{126} Yeltsin backed down when he saw that his attempt at a rupture in legality was not going to be successful; the published decree from his speech on March 24th deleted any mention of “special administrative rule.”\textsuperscript{127}

The Congress convened a special session on March 28th to consider Yeltsin’s impeachment and the referendum.\textsuperscript{128} In Red Square, Yeltsin gave a speech to a crowd of supporters claiming that the impeachment vote did not matter because he would only submit to the “verdict of the people.”\textsuperscript{129} 66 percent of the deputies called for his impeachment, uncomfortably close to the 75 percent needed. The deputies also voted to hold a referendum on April 25, 1993.\textsuperscript{130} Yeltsin’s political luck had held; he now would have his chance to appeal to the limitless constituent power of the people.

4. The April Referendum

The Congress approved four questions for the April 25th referendum, asking the Russian people:\textsuperscript{131}

1. Do you have confidence in Boris Yeltsin, the President of Russia?

2. Do you approve of the social and economic policy of the President of Russia and of Russia’s government since 1992?

3. Do you consider early presidential elections necessary?

4. Do you consider early elections for the full Parliament necessary?

After a dispute between parliamentary members and the president, the Constitutional Court ruled that the first two questions did not have “legal significance” and therefore would not

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 99.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 101.
make any legal changes to the constitution.\footnote{132 Postanovlenie Konstitutsionnogo Suda Rossiiskogo Federatsii, Apr. 21, 1993. In VKS, No. 2-3, pp. 38-44 (1994).} Yeltsin’s team, however, ignored this decision. For them, a mandate from the people transcended any pre-existing rules or institutions. As one of Yeltsin’s closest constitutional advisors, Sergei Shakhrai, stated “[i]f the president receives a vote of confidence on the first referendum question while on the fourth question the electorate votes for early elections for the People’s Deputies, he will fully implement the provisions in his March 20 televised address to the people.”\footnote{133 Viktor Kozhemyako, Threat Of A State Of Emergency, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, May 19, 1993, at 9 (translating Pravda, April 24, 1993, at 1).}

After a fierce political campaign, 58.05% of voters in the referendum expressed their confidence in Boris Yeltsin’s leadership.\footnote{134 Georgy Ivanov-Smolensky, According To The Latest Data From The Central Electoral Commission, 58.05% Of Russian Citizens Participating In The Referendum Cast Their Votes For Boris Yeltsin, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, May 26, 1993, at 1 (translating Izvestia, Apr. 28, 1993, at 2).} Despite the Constitutional Court’s decision, Yeltsin’s team immediately capitalized on these results. Yeltsin proclaimed that “[t]he Russian Soviet Federation Socialist Republic has been peacefully replaced by the Russian Federation. The state has changed its legal identity,”\footnote{135 Vasily Kononenko, President Of Russia Begins Promised Changes By Presenting Draft of New Constitution, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, May 26, 1993, at 7 (translating Izvestia, Apr. 30, 1993, at 1–2).} A key Yeltsin advisor held a press conference and proclaimed that the Congress could no longer remove the president from his post, force the government to resign, or adopt a new constitution.\footnote{136 Sergei Shakhrai: The Deputies Must Repeal Their Most Recent Decisions, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, May 26, 1993, at 3–4 (translating Ros. Vesti, Apr. 28, 1993, at 1).} Asked what would happen if the Congress failed to comply, he said “[t]he president and the government received a vote of confidence in the referendum. They will conduct the economic reform on the basis of their own decisions.” The message from the Yeltsin Administration was clear—no pre-existing institution or rule could limit the supreme force of the Russian people’s constituent power.
To realize his popular mandate and formalize its transformative effects, Yeltsin convened an appointed constitutional convention. Yeltsin saw this extralegal body, which unlike the Congress was unelected, as a kind of proto-legislature that would replace the sitting parliament.\textsuperscript{138} He commented that “[i]t seem[ed] to [him] that the constitutional convention can be transferred into a Federation Council and will be one of the houses of parliament.”\textsuperscript{139} Parliamentary delegates were not welcome. For instance, after trying to take the podium in the early days of the Convention, Khasbulatov was shouted down by the audience, after which he led seventy representatives from local parliaments in walking out and in calling the conference a sham.\textsuperscript{140} The sessions of the Constitutional Convention were closed, and only the working commission could approve changes to the constitution. The working commission was a smaller body comprised of Yeltsin’s closest advisors and regional executives who saw Yeltsin’s desire to eliminate legislative power as a way of increasing their own power in the regions.\textsuperscript{141}

5. Legitimizing Extra-legality

The Constitutional Convention eventually produced a constitution that formalized the Yeltsin Administration’s authoritarian vision for Russia’s constitutional system. In order to avoid any parliamentary checks, the Constitutional Convention placed the president above the system of separated power.\textsuperscript{142} As the embodiment of the people and the head of the unitary state, the president was the “guarantor” of the constitution and en-

\textsuperscript{138} Vlasti posle referenduma [The President names the day of the Constitutional Convention], KOMMERSANT, VLAST, (Russ.) May 12, 1993.
\textsuperscript{139} Id.
\textsuperscript{140} AHDIEH, supra note 100, 59.
\textsuperscript{142} Id. at 129–34 (describing the Yeltsin Administration’s intention of raising the president above the system of separated powers).
sured the harmonious interaction of the branches. The text contained very few limitations on presidential power.

Unsurprisingly, neither parliament nor the regional parliaments were eager to ratify this new constitution. Refusing to compromise with the parliament, which had written its own draft constitution based on Western constitutionalism, Yeltsin issued a decree on September 21, 1993 disbanding the Russian Parliament and all regional parliaments, and prohibiting the Constitutional Court from meeting. The decree suspended any parts of the existing constitution that contradicted the decree. The decree claimed legitimacy from the parliament’s “direct opposition to the will of the people, reflected in the referendum of April 25, 1993. . . [which] had the highest possible legal force across the entire Russian nation.” Yeltsin was making the classic constituent power argument: Both the parliament and constitution under which it drew its powers were illegitimate because they had opposed the people’s sovereign constituent power.

As they had done in March, both parliament and the Constitutional Court reacted immediately. The Constitutional Court declared Yeltsin’s decree unconstitutional and authorized the legislature to impeach Yeltsin under the existing constitution for attempting to illegally disperse a lawfully enacted representative body. The parliament swore Aleksandr Rutskoi in as the new president and he began issuing decrees. President Rutskoi also called for a mass strike to resist Yeltsin’s unconstitutional actions, and a tense standoff ensued. Yeltsin, in his

144. MEDVEDEV, supra note 122, at 105–6.
146. MEDVEDEV, supra note 122, at 106–07.
147. Id. at 107.
own memoir, remembered how close he was to losing control of the country at this point.\footnote{148} \footnote{Boris N. Yeltsin, \textit{ZAPISKI PREZIDENTA [NOTES OF A PRESIDENT]} 381 (N.N. Kudriavtseva & B.D. Minaev eds., 1994).}

As power hung in the balance, Yeltsin’s team worked furiously to establish the legitimacy of his dissolution of parliament and proroguing of the Constitutional Court both domestically and internationally. The central argument in this effort was that President Yeltsin had acted in accordance with the constituent power and therefore his actions had been legitimate, if not technically legal.\footnote{149} For instance, the Ministry of Justice issued a statement after the dissolution of parliament seeking to justify Yeltsin’s actions: “[Although the president] acted beyond the legal framework, he acted in accordance with the constitutional principles of government by the people, and to protect the will of the people.”\footnote{150}

Yeltsin also sought to shore up his international backers. In a speech to an audience in the United States, one of Yeltsin’s advisors attacked the Russian Parliament for defying the people. He claimed:

\begin{quote}
[T]he Congress of People’s Deputies [parliament] simply was unable to comprehend any rule of law higher than constitutional law, and that the Congress is unable to distinguish constitutional law from constitutional principles. The principles expressed in the current Constitution have never achieved the level of being ‘constitutional.’ Instead, the Constitution of the Russian Federation itself might be unconstitutional. This idea is based upon the simple notion that the current Constitution expresses principles that are in direct conflict with the will of the Russian people.\footnote{151}
\end{quote}

In contrast to Yeltsin’s failed coup attempt in March, Yeltsin’s September decree was far more successful in marshaling support amongst key Yeltsin constituencies in three ways. First, Yeltsin’s “victory” in the April referendum helped him obtain key support from the most powerful player in the international community: the United States. During the tense standoff between Yeltsin and the parliament, United States

\begin{flushright}
149. See infra notes 170–71.
\end{flushright}
officials gave their full backing to Yeltsin, arranging for a large economic package to help support him. United States government officials used the language of constituent power-based, extraordinary politics to justify this support. The Senate majority leader, George Mitchell of Maine, said that Yeltsin’s actions were justified because they were “consistent with the views of the overwhelming majority of the Russian people.” Lee Hamilton, chairman of the House Foreign Affairs Committee, described the existing Russian Constitution as “unworkable” and that the April referendum “stated the clear preference of the Russian people for early elections and for the Yeltsin reforms.”

Second, key opinion leaders in the United States media also drew on the language of constituent power to justify Yeltsin’s actions. A New York Times editorial supported Yeltsin’s actions:

Mr. Yeltsin can claim a degree of rough-and-ready democratic legitimacy for his decrees. His 1991 election as President represented a fuller democratic choice than the 1990 parliamentary elections, in which many Kremlin-endorsed candidates ran unopposed. Just this past April, a national plebiscite conferred a fresh vote of confidence on the President and, most importantly, endorsed the early dissolution of Parliament. Given the lack of constitutional clarity, that vote gives Mr. Yeltsin moral authority to act as he did.

Another influential New York Times columnist, Serge Schmemann, relied on the concept of popular constitution-making to describe, how “a constitution itself could be ‘unconstitutional’ if it served only a small clique, that ‘the people’ was not only a rhetorical flourish, that a popularly elected president might have higher moral authority than a legal but dysfunctional assembly.”

Third, Yeltsin also enjoyed domestic support. A 1993 public survey found that 50% of Russians believed that Yeltsin had
been justified in using military force to “control the situation.”\footnote{Survey conducted by LABADA-TSENTR, Rossiiane o sobytiakh 3-4 oktiabria 1993 goda [Russians on the events of October 3-4, 1993] (Oct. 3, 2005), available at http://www.levada.ru/press/2005100301.html.} Most importantly, as the regional assemblies remained largely on the sidelines, Defense Minister Pavel Grachev reluctantly complied with Yeltsin’s order to suppress street level disturbances and forcibly disband the parliament.\footnote{JAMES H. BRUSSTAR & ELLEN JONES, NATIONAL DEFENSE UNIVERSITY, THE RUSSIAN MILITARY’S ROLE IN POLITICS 24–27 (1995).} Only a few thousand Russians took to the streets in support of the existing constitutional legality; Yeltsin’s attempts to delegitimize the previous system had proven successful.

6. An Authoritarian Constitution

As Yeltsin assumed his position as dictator in the absence of an elected parliament or constitutional court, he quickly worked to solidify his new position by ratifying a new constitution. Consequently, he signed a decree stating that he would place a draft constitution before the Russian people in a nationwide referendum set for December 12, 1993.\footnote{Decree of the President of the Russian Federation: On Holding a Nationwide Vote on the Draft Constitution of the Russian Federation, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, Nov. 17, 1993, at 7 (translating ROS. VESTI, Oct. 19, 1993).} He once again sought to justify this decision by appealing to the constituent power of the people:

\begin{quote}
recognizing the unshakable nature of people’s rule as the foundation of the Russian Federation’s constitutional system, cognizant of the fact that the repository and sole source of power in the Russian Federation is its multinational people, and with a view to implementing the people’s right to directly resolve the most important questions of the life of the state . . .
\end{quote}

\footnote{Id.}

its long list of individual rights, the key provisions ensured that there were no constitutional limits on presidential power.162 The presidency remained outside the tripartite system of separated powers, exercising a fourth type of “presidential power,” and enjoyed significant control over each of the three subordinate branches of government.163 First, the President had a virtual monopoly over executive power. Article 111 (4) of the Constitution provided that if the lower house of the parliament (the Duma) rejected the president’s choice of Prime Minister to lead the government, the president was then required to appoint a Prime Minister and dissolve the Duma.164 Furthermore, the president had the power to annul any executive branch edicts.165

Second, the president held significant constitutional power to control the legislative branch of the government. This was particularly true with regard to the upper house of the Russian Parliament, the Federation Council.166 Article 95 (2) stated that the Federation Council was comprised of “two representatives from each of Russia’s subjects: one from the executive branch and one from the legislative branch.”167 Furthermore, according to Article 77 (2), the bodies of executive power in the federal center and in the regions formed a “unified system of executive power.”168 Because of the president’s monopoly over the executive branch, one-half of the “senators” in the Federation Council were therefore subordinated to the president. This subordination was deliberate because Yeltsin had originally seen the Federation Council as only a consultative body that would help the Russian president exert power in the regions.169 In order to

162. See, Partlett, supra note 141, at 105, 106–07.
163. The full text of the Draft Constitution can be found in 45 CURRENT DIG. OF THE POST-SOVIET PRESS, Dec. 8, 1993, 4-16.
164. Id.
165. Id.
166. Id.
167. Id.
168. Id.
169. See Aleksei Zuichenko & Lev Bruni, Parliament: The Council of the Federation Will Be Formed by the Voters, 45 CURRENT DIG. OF THE POST-SOVIET PRESS, Nov. 10, 1993, at 16–17 (translating Sevodnya, Oct. 12, 1993, at 1). Yeltsin’s Decree Number 1400 disbanding the parliament initially stated that the upper house would be made up automatically of the heads of the executive and legislative branches of government in the regions. Most of these executive representatives were Yeltsin appointees. However, because of
ensure that the Federation Council would remain in this simply advisory role, Yeltsin personally intervened in the final days before releasing the draft and “insisted that the Federation Council be “formed” rather than “elected” as originally envisioned by the Constitutional Convention.\(^\text{170}\) In making this change, Yeltsin hoped to ensure that this powerful body, which had the power to veto bills passed by the lower house and to confirm all judicial appointments, would stay out of party politics and remain subordinated to the presidential apparatus.\(^\text{171}\) As the Chairman of the Federation Council said in 1999, “the upper house of the Federal Assembly is an element of stability; in a period of abrupt change it protects the country from social upheaval. For the first time in the history of Russia, a non-political organ has emerged which influences state policy and stands by the people.”\(^\text{172}\)

Third, the president had full control over the judicial branch of government. The president appointed all of the judges to both the Supreme Court and the Constitutional Court with the consent of the Federation Council.\(^\text{173}\) Because the Federation Council was under presidential control, the president’s appointment power was essentially unchecked.

On December 12, 1993, this authoritarian constitution received a slight majority in a national referendum. In the aftermath of constitutionalizing his vision of a presidential republic, Yeltsin used the language of popular constitution-making to describe the ratification, declaring, “[a] popular mandate to strengthen the system of government has been received.” “No matter whom the voters cast their ballots for, they were agreed on one point: Russia needs strong rule, Russia needs order, people are irritated by the amorphous nature of power, they are tired of inconsistent and halfhearted decisions, and they


\(^\text{171}\) Remington, supra note 96, at 181 (“[T]he Federation Council would not be party run or party oriented. Instead, it would be overseen by a chairman and deputy chairmen.”).

\(^\text{172}\) Chaisty, supra note 170, at 105.

\(^\text{173}\) Konstitutsiya Rossiskoi Federatsii [Konst. RF] [Constitution] art. 83 (Russ.).
are exasperated by the rise in crime.”174 Yeltsin’s aides were not shy about the nature of the constitutional system that they had created. One aide admitted that the illusion of a smooth and swift transfer from a dictatorship to a free-market democracy is gone. . . . Now the talk is of a transitional regime of ‘enlightened authoritarianism’ or ‘guided democracy’ or some such hybrid that makes no secret of the need for a prolonged concentration of power in the presidency.”175

B. Belarus and Kazakhstan

Kazakhstan and Belarus initially ratified their post-Communist constitutions through parliamentary constitution-making. As the success of Yeltsin’s extralegal actions resonated across the post-Soviet space, however, presidents in these countries, who shared Yeltsin’s disdain for limitations on presidential power, exploited the rhetoric and mechanisms of popular constitution-making to assert, and legitimize, their own presidentially dominated, authoritarian constitutions.

1. Belarus

The Belarusian Parliament drafted Belarus’s first post-Soviet constitution. The process began in November 1991, when the parliament’s Constitutional Commission submitted a draft constitution to the Belarus Parliament.176 The most debated aspect of the constitution surrounded the creation of an elected president. On one side, the Speaker of the Belarus Parliament, himself a frontrunner for the presidency, warned against introducing a president for “at least another three years” in order to ensure that “the parliament should shape up and help strengthen existing democratic institutions.”177 On the other, nationalist political parties argued that, “[e]conomic, legal, and administrative chaos required a strong state and a strong executive.”178

175. EUGENE HUSKEY supra note 97, at 32.
176. GÖNENC, supra note 59, at 190.
178. Id. at 301.
After numerous drafts, on March 15, 1994, the parliament finally ratified a compromise creating a strong president by a margin of four votes.\footnote{Id. at 302.} The newly established office of the president was given significant constitutional powers, becoming the head of state and the head of the executive.\footnote{Constitution Watch: Belarus, 3 E. EUR. CONST. REV. 3 (1994).} This new constitution also created an independent parliament, which was the "highest representative, standing, and sole legislative body of state power" and had the power to elect the judges to the Constitutional Court.\footnote{Lukashuk, supra note 177, at 302–03.} Most importantly, the president could not dissolve the parliament.\footnote{Id. at 304.}

Soon after ratification of the new constitution, Belarus elected Aleksandr Lukashenko as its first President. Lukashenko was no democrat, however, and shared Yeltsin’s view that political power should be concentrated in the Presidency. As parliament became a major source of opposition to Lukashenko’s policies, he increasingly moved to limit parliamentary power. In a 1995 interview on state media, President Lukashenko argued that Belarus had a similar history to Germany and therefore needed a strong leader to bring it out of its profound political and economic crisis. He stated that “German history teaches that the leading role of the president at [that] stage in history was critical and indisputable . . . .”\footnote{DAVID MARPLES, BELARUS: A DENATIONALIZED NATION 79 (1999).} Echoing President Yeltsin’s conception of the presidency, Lukashenko stated later in a speech that his ideal constitution had “three branches of power; legislative, executive, and judicial. And all these branches grow on the tree of the presidency.”\footnote{Lukashuk, supra note 177, at 309.}

A year after his election, Lukashenko began to draw on the rhetoric and mechanisms of popular constitution-making to advance his authoritarian vision of a presidentially dominated constitutional system. “In the spring of 1995, [he] demanded the right to dissolve parliament,” and illegally added that issue to a national referendum on the national symbols of Belarus.\footnote{Id.} He also began issuing decrees that encroached on parliamentary powers, justifying these actions on the idea that the president cannot issue an illegal decree because of his status as the
direct representative of the people. A former Belarusian Constitutional Court Judge described how “lawyers in the president’s circle referred to the ‘theory of legal laws.’ This approach was based on the belief that “the president automatically knew better because he was popularly elected” and that “[i]f a law contradicts the public mood and the intentions of the president, on the other hand, it is ‘non-legal’ and may be ignored.”

Parliament resisted Lukashenko’s attempts to weaken its powers. It issued a proclamation that Lukashenko’s statements regarding “his unwillingness to obey the constitution and the law, his disrespect and insult of other branches of power, first of all the Supreme Soviet, his promises to introduce ‘direct presidential rule’ show that the process of damaging the foundations of law and civic stability has begun.” In 1996, parliament promoted a “Movement in Support of the Constitution,” which demanded “support for the rule of law and the decisions of the Constitutional Court.” The previously disparate political parties in parliament also began to coalesce in opposition to Lukashenko’s utter disregard for legality. Civil society was beginning to rally around Belarus’ ordinary political institutions. In May 1996, the parliament threatened to refuse to approve Lukashenko’s ministers; in return, Lukashenko appointed them anyway.

As in Russia, the newly created Belarusian Constitutional Court worked alongside parliament to counter President Lukashenko’s actions, and “[i]n 1995, the Court examined 14 Presidential decrees and ruled 11 of them illegal.” In response, Lukashenko pledged to ignore Constitutional Court decisions and demanded that the Constitutional Court Chief Justice resign. Several months later, “Lukashenko issued a de-

187. Lukashuk, supra note 186, at 64.
188. Id.
190. Id. at 312.
191. Id.
192. Id.
193. Id. at 311.
194. MARPLES, supra note 183, at 79.
cree “obliging government and local authorities to carry out all his previous decrees and disregard the rulings of the Constitutional Court.”

As the standoff devolved into a constitutional crisis, Lukashenko exploited the rhetoric of popular constitution-making and called for a referendum to ask the people, among other questions, whether Belarus should adopt the 1994 constitution with “those changes and additions proposed by President Lukashenko?” The changes included new powers for the president to appoint the majority of Constitutional Court judges and the creation of a bicameral legislature where the president would appoint one-third of the legislators in the upper house. Parliament countered by adding its own proposed changes to the constitution that would abolish the post of president altogether.

Seeking to serve as intermediary, the Constitutional Court issued a ruling that neither amendment should be decided by referendum, warning that Belarus “‘is a young state and such hasty and ill-thought out moves can only worsen the political situation.’” The chairman of the Constitutional Court also cautioned parliament about the dangers that Lukashenko’s changes posed to the constitution, stating “[t]omorrow we will have a totalitarian regime in the centre of Europe—complete with a castrated parliament and Constitutional court.”

As the crisis deepened and the likelihood of violence increased, Russian officials stepped in to help broker a compromise. These officials, however, ended up taking a pro-Lukashenko stance. Yeltsin called the Speaker of the Belarusian Parliament and warned him “not to mess with the president.” The powerful mayor of Moscow and the leader of one of the Parliament’s largest parties sided with Lukashenko. Ultimately, Lukashenko “agreed that the referendum’s results would be consultative rather than binding [and] parliament

195. Lukashuk, supra note 177, at 311.
196. Id. at 313.
197. Id.
198. Id. at 314.
199. Id.
200. Id. at 315.
201. Id.
agreed to halt the impeachment proceedings” and schedule the referendum.202

Prior to the referendum, Lukashenko saturated the official mass media with pro-presidential propaganda.203 This media strategy worked; ultimately, 77.6% of the populace supported Lukashenko’s pro-presidential changes to the constitution.204 Although these results were technically non-binding, it was impossible to resist the bare political logic of a broad-based popular mandate for presidential power. In political reality, the legitimacy of a popular mandate obliterated any attempts to maintain legality. Citing the results of this referendum, Lukashenko immediately dissolved the parliament.205

Ruling as a dictator, Lukashenko scheduled a new referendum for November 1996 to introduce an entirely new constitution.206 This constitution would create, as Lukashenko maintained, a “real separation of powers.”207 This nation-wide referendum was also a success for the president, as a majority of the populace ratified a new constitution “establishing a semi-authoritarian regime.”208 Lukashenko’s new constitution gave the Belarusian president powers similar to those of the Russian president, including a virtual monopoly of executive power, a stronghold on the upper house of the parliament, and complete control of the judicial branch. Lukashenko therefore had followed the Yeltsin model, making wide use of the mechanisms and rhetoric of popular constitution-making to justify his elimination of parliament and the ratification of a presidentially dominated, authoritarian constitution.

2. Kazakhstan: Managed Democracy

In contrast to Belarus and Russia, Kazakhstan’s president, Nursultan Nazarbaev, dominated the early period of constitution-making. The former leader of the Kazakh Communist Party, Nazarbaev had made a quick transition to electoral politics in the post-Communist period. In December 1991, 95% of Ka-

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202. Lukashuk, supra note 177, at 315–17.
203. Id. at 315.
204. GÖNENÇ, supra note 59, at 192.
205. See id.
206. Id.
207. Id.
208. Id.
zakhs elected Nazarbaev to the presidency, largely because no one had been permitted to run against him.\footnote{JAMES MINAHAN, MINIATURE EMPIRES: A HISTORICAL DICTIONARY OF THE NEWLY INDEPENDENT STATES 136 (1998).}

After Kazakhstan gained independence in 1992, President Nazarbaev understood the importance of writing a new constitution and appointed a working commission to draft one.\footnote{Steven Kanter, Constitution Making in Kazakhstan, in 5 INT’L LEGAL PERS. 65, 67 (1993).} Nazarbaev was not a proponent of pluralistic electoral democracy. Instead, he envisioned the president as the manager of political life and valued economic reform before democratic reform, stating that, “[i]n this vitally important sphere [of the economy] there is no room for an orgy of democracy.”\footnote{Martha Brill Olcott, Nursultan Nazarbaev and the Balancing Act of State Building in Kazakhstan, in PATTERNS IN POST-SOVIET LEADERSHIP 169, 180 (Timothy Colton & Robert Tucker eds., 1995) (citations omitted).} He went on to comment that “the stabilization of the economy and the transition to the market demand a categorical ban on any party, political, or ideological interference in this process.”\footnote{Id.}

Nazarbaev’s working commission produced a draft constitution in June 1992, establishing a strongly presidential form of government.\footnote{Kanter, supra note 210, at 76, 88.} President Nazarbaev’s appointed commission tightly controlled the debate throughout, the most contentious question being whether Kazakhstan’s national language would be Russian or Kazakh.\footnote{Id. at 76.} The Kazakh Parliament obediently adopted this draft on January 28, 1993.\footnote{Id. at 65–66.} This new constitution established a system of government with a very strong president, positioning him as the guarantor of rights and liberties and of the constitution itself.\footnote{Id. at 88.} The constitution created a parliament but gave the president wide appointment power “from the chief executives responsible for implementation of policy down to the lowest level of government.”\footnote{Olcott, supra note 211, at 179.} Although weak, the parliament still possessed the right to amend the
constitution by a supermajority, and was the highest representative body in the nation.218

As time went on, the Kazakh Parliament began to exercise its limited powers. In particular, it began “to develop some of the fundamental characteristics of an institution capable of providing the checks and balances essential to the functioning of a pluralistic society.”219 Underlying this parliamentary opposition was unhappiness with Nazarbaev’s macroeconomic policy, which had led to a “flailing economy that sported a 2,500 percent annual inflation rate.”220

In May 1994, the parliament took the unprecedented step of giving Nazarbaev’s Prime Minister a vote of “no confidence.”221 In July, parliament was able to override Nazarbaev’s veto of two consumer-friendly bills.222 The Speaker of the parliament also began to see an important role for the parliament in Kazakhstan’s system of political government. He “began holding the government accountable for its actions and decrees, claiming that they must have a basis in law and that parliament had to propose and pass new legislation rather than leave the initiation of legislation to the executive branch.”223 He also called on parliamentary members to defend a parliamentary tradition in Kazakhstan that “stretch[ed] back to the councils of biis of the fifteenth to eighteenth centuries.”224 Additionally, the parliament created a new party to ensure respect for the existing constitution called the “Legal Development of Kazakhstan.”225

As in Russia and Belarus, the beginnings of a civil society were coalescing around the “ordinary” Kazakh parliament.

Nazarbaev had little patience for this growing parliamentary opposition. Instead of dispersing the parliament by force, however, Nazarbaev chose to cloak his actions in the language of popular constitution-making. His first strategy was to use his

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219. OLCOTT, supra note 91, at 109.
220. Id. at 101.
221. Id. at 103.
222. Id. at 103–04.
223. Id. at 109.
224. Id.
control of the Constitutional Court to dismiss the parliament “legally.”226 Unlike Russia or Belarus, the first Kazakh Constitutional Court had close ties with the presidential administration.227 After playing no role in Kazakh politics since its inception, the Court unexpectedly ruled on a major electoral claim.228 This decision rendered the parliament invalid because “[a]lthough the complaint had been brought about a single voting district in Almaty, the constitutional court ruled that the entire 1994 parliamentary elections had been unconstitutional.”

After the decision, Nazarbaev appeared before parliament and declared the nullification of parliament’s popular mandate.230 He then disbanded parliament, turning off its power, water, and telephone, and sending in workmen to begin remodeling the building.231 Ruling as a dictator, he then created his own handpicked People’s Assembly, which postponed the next presidential elections until 2000.232 Then, “[c]laiming that he wanted to defer to the ‘popular will,’” he held a referendum on the postponement of presidential elections in April 1995.233

Nazarbaev then held another referendum to endorse the adoption of another constitution in August 1995, which “expanded presidential power at the expense of the legislature, which became a largely consultative body, with legislation initiated by the president.”234 This new constitution eradicated any possibility of parliamentary checks on presidential power.235 Although it is likely that Nazarbaev would have found a way to defeat his parliamentary opponents, Nazarbaev’s decision to follow this path suggests the importance of the language and mechanisms of popular constitution-making in legitimizing the elimination of parliament and the foundation of a presidential dictatorship.

226. Id. at 25.
227. See OLCOTT, supra note 91, at 110–11.
228. Id. at 109–10.
229. Id. at 110.
230. Id. at 111.
231. Id.
232. Id.
233. Id.
234. Id. at 111–12.
235. Id. at 112.
IV. THE IMPORTANCE OF PRE-EXISTING INSTITUTIONS OR RULES IN CONSTITUTION-MAKING PROCESS

Post-Communist constitution-making vividly shows how charismatic executives can strategically use the populist rhetoric and irregular mechanisms of popular constitution-making to marginalize ordinary political institutions and legality. Relying on appeals to the constituent power, a force “that bursts apart, breaks, interrupts, unhinges any pre-existing equilibrium and any possible continuity,” magnetic leaders have been able to convert a moment of popular endorsement into an opportunity to unilaterally reshape the institutional framework of the state and secure constitutional dictatorship.

Captured by the revolutionary potential of popular constitution-making, theorists have therefore made a critical error: They have failed to grasp that post-authoritarian countries have weak institutions. In this environment, popular constitution-making can allow an individual or party to ignore existing institutions and unilaterally reorganize the institutional apparatus of the state in their interests by appealing to the “superhuman, irresistible ‘general will’” of the people’s constituent power (the nation). To avoid unilateral seizures of this constitution-making power, constitution-making must be grounded in stable institutions—even at the risk of weakening popular legitimacy.

Bruce Ackerman is guilty of this error. He dismisses charges that popular constitution-making can “degenerate into unspeakable tyranny with bewildering speed” by pointing to the role of extraordinary political mechanisms in fostering a deep “dialogue between leaders and citizenry that finally succeeds in

236. See HANNAH ARENDT, ON REVOLUTION 217–81 (1963). Hannah Arendt refers to these stable and spontaneous institutions as the “treasure” of the “revolutionary tradition.” Id.
238. See ARENDT, supra note 236, at 217–18.
239. Id. at 54.
generating broad popular consent for a sharp break with the
received wisdom of the past.” 241 Popular constitution-making in
the American Founding period, however, encouraged deep de-
liberation because of a strong network of state and local repre-
sentative institutions. These institutions tightly controlled con-
stitution-making, encouraging deliberation, negotiation, and
compromise.242 As Willi Paul Adams observed,

In the Whig theory of social contract, “the people” were the fi-
nal authority to which all political power reverted in cases of
flagrant abuse of delegated governmental power. But in the
actual assumption of political power, no unit as vast and
amorphous as “the people” could possibly act as the vehicle of
the political process. It was instead the remarkably stable
territorial units of towns, cities, counties, and colonies that
took control.243

Modern post-authoritarian countries, however, do not have
these networks of institutions to organize the people and con-
strain unilateral appeals to that amorphous people. As Steven
Kotkin demonstrates, post-Communist collapse was not the re-
sult of stable institutional pressure from an organized civil so-
ciety.244 Instead, it was the product of a top-down implosion of
the Communist party.245 This kind of implosion is common in
post-Cold War political change, and characterizes a number of

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241. Id.
242. KALYVAS, supra note 45, at 227–28. Andreas Kalyvas writes:

[T]he American revolutionaries were able to avoid the language and
practice of absolute ruptures . . . [because] they relied on a pre-
existing legal layer composed of royal and company charters, com-
mon law, and colonial pacts, which remained intact during the entire
period of political foundation. By refusing to eliminate them, the
American revolutionaries remained within the law even during such
exceptional moments. They escaped the lawlessness and power vac-
uum that a complete break would have necessarily created. The
preexisting legality was not broken; it was used as a foothold to se-
cure the new beginning.

Id. at 227.

243. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN
IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE
244. STEVEN KOTKIN, UNCIVIL SOCIETY: 1989 AND THE IMPLOSION OF THE
COMMunist establishment, xiv (2009).
245. Id.
political transformations in one-party states across Asia, including Indonesia, Taiwan, and South Korea. Consequently, modern post-authoritarian societies must seek other ways to institutionalize popular power to avoid unilateral assertions of constitution-making power.

Post-Communist countries in Eastern Europe solved this problem by relying on the “ordinary” rules and institutions inherited from the Communist era. Although this solution undoubtedly sacrificed democratic legitimacy, this solution highlights a hidden advantage of a legacy of sham constitutionalism. Given new life in free elections, this constitutional framework can provide a set of rules and institutions for refining and enlarging the voice of the people while also constraining unilateral appeals to an amorphous concept of a nation.

The lessons of post-Communist constitutionalism remain highly relevant across the world. Indeed, in the midst of economic and political crisis, charismatic figures still deploy the mechanisms and rhetoric of constituent power to dismantle existing institutions and expand their personal power. In Ukraine, for instance, President Viktor Yanukovich—an advocate of a Russian style presidential system in Ukraine—called for a referendum to overcome parliamentary opposition and strengthen the role of the president in Ukraine’s political system. Furthermore, in Venezuela, President Hugo Chavez has repeatedly sought to use the mechanisms and rhetoric of constitutional politics to strengthen his power. Finally, the latest wave of authoritarian collapse in the Middle East has demonstrated a similar shortage of informal extralegal institutions that can channel popular participation, particularly for

247. Arato, supra note 56, at 142–43.
248. The Federalist 10 (Madison).
See also David Landau, Constitution-Making Gone Wrong, Alabama L. Rev. (forthcoming).
the secular parts of society. In these countries, successful constitutional lawmaking also requires institutional-based constitution-making. In Egypt, the military’s decision to set the guidelines for the constitutional lawmaking process is an important step toward constraining any attempts at unilateral assertion of power by the dominant party.

The insights of constitutional politics in the former Communist world also shed important light on American constitutional law debates. In recent years, influential legal scholars have questioned whether Article V provides the only process for amending the United States Constitution. Without Article V as a guide, however, is every potential process valid as long as it commands the direct voice of “the nation”? For instance, could a charismatic United States President at a time of crisis rewrite the United States Constitution and put it to a nationwide referendum? The post-Communist experience shows the dangers of amending a constitution through a referendum; whether future drafters follow the procedures of Article V or not, the United States should continue to base constitutional change on stable representative institutions.

In sum, the post-Communist constitutional experience reveals the dangers of grounding a new constitution on the unorganized and diffuse constituent power of “We the National Majority.” It therefore reminds us of a fundamental requirement for the constitution-making process: That there are external rules or institutions for ensuring the deep democratic deliberation and compromise needed for a successful constitutional or-

253. See, e.g., Amar, supra note 29, at 1043–44, 1046; U.S. CONST. art. V.
255. Stable institutions help encourage compromise and negotiation, which help ensure a healthier process of democratic deliberation. See SUNSTEIN, supra note 2, at 6–8.
256. Henry Monaghan, *We the People(s), Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 174 (1996) (describing how he has “considerable doubts about the wisdom of constitution-making by ‘We the Majority.’”).
The use of an inherited constitutional order is just one method of ensuring a stable institutional basis for constitution-making. Whatever method employed, however, it is difficult to avoid the simple conclusion that the process of constitutional lawmaking risks enabling constitutional dictatorship unless institutional constraints are placed on the process of constitutional creation.

257. DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (1990) (defining institutions as “rules of the game . . . or . . . humanly devised constraints.”).

258. Vicki Jackson describes how “the use of non-democratic, ‘independent’ elements to secure the guarantees of an interim or permanent constitution may also have an important role to play [in constitution-making] in deeply polarized settings.” Supra note 2, at 1295. In the United States, state legislatures have balked at calling a special Constitutional Convention under Article V of the Constitution for fear that it would be completely unconstrained. James Kenneth Rogers, Note, The Other Way to Amend the Constitution: The Article V Constitutional Convention Process, 30 HARV. J.L. & PUB. POL’Y 1005, 1010–11 (2007) (discussing need for external constraints to avoid constitutional dictatorship).
INTRODUCTION

Before U.S. and coalition forces can withdraw from Afghanistan and declare the military mission a success, the Afghan National Security Forces (“ANSF”) must first be able to self-sustain and defend its country from the insurgency that has plagued Afghanistan for the last ten years. Getting the ANSF to that level, however, will require significant training, partnering, and mentoring. As a consequence, training the ANSF has now become a key component of U.S. foreign policy for Afghanistan and of the eventual withdrawal of U.S. forces from the region. The responsibility for training the ANSF falls to the greatest degree upon the United States and its coalition partners through NATO’s principal command, the International Security Assistance Forces (“ISAF”).

Until February 2010, the Combined Security Transition Command–Afghanistan (“CSTC–A”), led by the United States,
coordinated the training of the ANSF. The CSTC–A was later combined with the NATO Training Mission–Afghanistan (“NTM–A”), a command primarily focused on building the institutional capacity of the ANSF and training its recruits.

Key to training the ANSF are partnering, or mentoring, teams, comprising mentors provided by NATO who pair with their Afghan counterparts in positions of all ranks—from as high as the Ministry of Defense, to the Afghan National Army (“ANA”) Corps, down to the Brigades and Companies. Each ANA Corps, for example, has a Judiciary and Staff Judge Advocate (the “Corps SJA” or “SJA”), who serves as the principal legal advisor to the Corps Commander. As part of NATO’s mentoring team, a legal mentor, who is usually a field-grade U.S. Judge Advocate, partners with the Corps SJA and is principally responsible for training him and his staff, together forming the Office of the Staff Judge Advocate (“OSJA”). I served as an ANA legal mentor for the 207th ANA Corps in Herat for six months in 2011.

Although others have written about mentoring SJAs, very little has been said since 2007. Much has changed in Afghanistan since then, not just from an operational standpoint, but also from a policy perspective, including the significance of the

4. See id. at 23.
5. See id. at 23–24.
6. There are currently seven established Corps throughout Afghanistan: the 201st, 203rd, 205th, 207th, 209th, 215th, and the 111th Division. JOINT CTR. FOR INT’L SEC. FORCE ASSISTANCE, AFGHAN NATIONAL ARMY (ANA) MENTOR GUIDE 2–21 (2011) [hereinafter ANA GUIDE] (on file with author). The 201st is located in Kabul; the 203rd in Gardez; the 205th in Kandahar; the 207th in Herat; the 209th in Mazar-e-Sharif; the 215th in Lashkar Gah; and the 111th Division in the Capital. Afghan National Army (ANA)–Order of Battle, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/world/afghanistan/ana-orbat.htm (last visited Oct. 27, 2012).
7. See ANA GUIDE, supra note 6, at 2–20.
8. See Daniel J. Hill & Kevin Jones, Mentoring Afghan National Army Judge Advocates: An Operational Law Mission in Afghanistan and Beyond, ARMY LAW., Mar. 2007, at 12, 13 n.18. When I left Afghanistan in October 2011, there was one Canadian Army Major serving as a legal mentor, two U.S. Navy Commanders, one U.S. Air Force Colonel, and three U.S. Army Lieutenant Colonels.
mentor mission. For these reasons, I consider it important to revisit the topic and include my experience and lessons learned to benefit future Judge Advocates deploying as ANA legal mentors.

Before deploying as ANA legal mentors, Judge Advocates should understand some basic concepts needed for a successful mission. Because legal mentors will interact frequently with the ANA (not just with the SJA, his staff, and the judges, but also with many non-legal ANA officers, including the Corps Commander), they should have a good understanding of Afghan history and culture, the ANA military and civilian legal systems, and some basic Dari. A cursory understanding of these topics will not be enough for mission success, because laws do not exist in isolation. They are shaped by the political, cultural, and economic characteristics of the society to which they apply. Previous mentors have learned that a lack of cultural awareness can be a major obstacle to mission success. Consequently, legal mentors must gain insight into Afghan social norms and nuances for rule of law programs to succeed.

Part I of this Essay provides some basic background information for deploying Judge Advocates; Part II addresses significant challenges that ANA legal mentors face; Part III suggests solutions or approaches to those challenges; and finally, a Conclusion offers some closing remarks.

I. BACKGROUND

As previously mentioned, NATO’s top command in Afghanistan is ISAF, currently commanded by U.S. Army General

10. This Essay is not intended to provide the requisite level of understanding on these topics for prospective ANA legal mentors. Rather, it is intended to provide a brief overview so Judge Advocates can continue their course of self-study before deploying. To learn more about the topics, see generally THOMAS BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY (2010); EHSAN M. ENTEZAR, AFGHANISTAN 101: UNDERSTANDING AFGHAN CULTURE (2007); MARTIN EWANS, AFGHANISTAN: A SHORT HISTORY OF ITS PEOPLE AND POLITICS (2002); SETH G. JONES, IN THE GRAVEYARD OF EMPIRES: AMERICA’S WAR IN AFGHANISTAN (2009) (discussing the rise of the insurgency in Afghanistan from a historical and structural perspective); BARNETT R. RUBIN, THE FRAGMENTATION OF AFGHANISTAN: STATE FORMATION AND COLLAPSE IN THE INTERNATIONAL SYSTEM (2d ed. 2002); STEPHEN TANNER, AFGHANISTAN: A MILITARY HISTORY FROM ALEXANDER THE GREAT TO THE FALL OF THE TALIBAN (2002).
John Allen. The task of training the ANA falls squarely on ISAF.

According to its mission statement, ISAF “conducts operations in Afghanistan to reduce the capability and will of the insurgency, support the growth in capacity and capability of the Afghan National Security Forces (ANSF), and facilitate improvements in governance and socio-economic development in order to provide a secure environment for sustainable stability that is observable to the population.” Subordinate to ISAF are two commands, each led by a U.S. Lieutenant General: NTM–A and ISAF Joint Command (“IJC”).

On the one hand, NTM–A “oversees [the] training and equipping of Afghan [security] forces throughout Afghanistan.” It also develops military doctrine for the ANA and provides high-level training, via defense colleges and academic institutions, for ANA senior officials.

At the operational level, Operational Mentor and Liaison Teams (“OMLTs”) mentor ANA troops by focusing on building the capability and scope of the ANA. OMLTs are essentially multi-disciplinary ISAF military forces that fall under the purview of IJC. By “co-ordinating the planning of operations and ensuring that the ANA units receive necessary enabling support,” OMLTs provide training, mentoring, and liaison services between ANA and ISAF forces. In October 2010, 150 OMLTs

13. Id.
17. Id.
18. Public Diplomacy Div., Fact Sheet: NATO’s Operational Mentor and Liaison Teams (OMLTs), N. ATL. TREATY ORG. (June 2010), http://www.nato.int/isaf/topics/factsheets/omlt-factsheet.pdf [hereinafter Pub-
were operating within Afghanistan, seventy-six of which were from the United States.\textsuperscript{19}

On the other hand, the IJC “conducts population-centric comprehensive operations to neutralize the insurgency in specified areas, and supports improved governance and development in order to protect the Afghan people and provide a secure environment for sustainable peace.”\textsuperscript{20}

Thus, while NTM–A and OMLTs are ISAF’s training and equipping arm, the IJC is ISAF’s operational arm.\textsuperscript{21} As a comparison, Judge Advocates deploying as ANA legal mentors are detailed to IJC as part of ISAF’s operational arm in much the same way the ANA Corps SJA is part of the ANA operational arm.

\textbf{A. A Brief History of Afghanistan}

Afghanistan has on more than one occasion been referred to as the “graveyard to empires.”\textsuperscript{22} History explains how it has earned this moniker.

Since the time of Alexander the Great, Afghanistan has been the battleground for several empires and the crossroads for many conquerors.\textsuperscript{23} The nineteenth century and the beginning of the twentieth century saw Afghanistan as a critical strategic piece to the “Great Game” played between Russia and Britain.\textsuperscript{24} It was then that Afghanistan engaged in three Anglo-

\begin{itemize}
  \item KATZMAN, supra note 1, at 24. For the ANP, the partnership teams are called the Police Operational Mentoring and Liaison Teams (“POMLTs”) and are staffed with fifteen to twenty personnel each. \textit{Id.} in October 2010, 317 POMLTs were operating in Afghanistan; 279 were from the United States. \textit{Id.}
  \item Id. OMLTs also serve as liaisons between coalition forces and ANA forces during operations. Public Diplomacy Div., \textit{Fact Sheet}, supra note 18. Perhaps it is because the OMLTs serve as liaisons for operations that they are part of IJC.
  \item KATZMAN, supra note 1, at 1.
  \item JONES, supra note 10, at xxv–xxviii; KATZMAN, supra note 1, at 1.
  \item JONES, supra note 10, at xxvi; KATZMAN, supra note 1, at 177–82.
\end{itemize}
Afghan wars, which eventually led to Afghan independence from Britain on August 8, 1919.25 During the middle of the twentieth century (1933–1973), Afghanistan was ruled by King Mohammad Zahir Shah.26 Under his rule, Afghanistan adopted a constitution, formed a national legislature, and afforded women unprecedented freedoms.27 It was also during this period of relative peace when King Zahir allied Afghanistan with the Soviet Union.28 Through its political and arms-purchase relationship with Afghanistan, the Soviet Union built large infrastructure projects throughout Afghanistan, *inter alia*, the north-south Salang Pass/Tunnel and Bagram airfield, many of which remain today.29

Following a bloodless coup in 1973,30 the country succumbed to instability “when diametrically opposed Communist Party and Islamic movements grew in strength.”31 The instability mounted until December 27, 1979, when the Soviet Union sent troops into Afghanistan to prevent Islamic militias, or *mujahedin*, from seizing power.32 For the next twenty years, Afghanistan remained in an almost continuous state of armed conflict.33

In the years following the Soviet defeat in 1989, civil war among formerly allied mujahedin leaders caused the destruction of most of the country’s infrastructure.34 The constant state of war and lawlessness created an ideal situation for the Taliban to seize power by promising to restore order in exchange for rule (1996–2001).35

25. *Katzman* supra note 1, at 1; see also *Barfield*, supra note 10, at 115–46, 181–82; *Jones*, supra note 10, at 6–8; *Rubin*, supra note 10, at 19, 47–54.
27. *Id.*
28. *See id.*
32. *Id.*; see also *Barfield*, supra note 10, at 211, 234; *Jones*, supra note 10, at 11–19; *Tanner*, supra note 10, at 229–35.
The presence of Al Qaeda in Afghanistan and the Taliban’s refusal to extradite bin Laden for his complicity in the 9/11 attacks led to the eventual U.S. invasion and removal of the Taliban from power. More than ten years later, the United States and its NATO allies remain locked in Afghanistan.\textsuperscript{36}

These last thirty years of war in Afghanistan are well documented and have left the country with a weak central government and an economy that ranks as one of the worst in the world.\textsuperscript{37} Afghanistan today remains largely dependent on foreign aid,\textsuperscript{38} with little to no infrastructure, scant potable water, scarce electricity, and a citizenry plagued with meager health conditions and little or poor medical care.\textsuperscript{39} In all, 40\% of the country is unemployed, 72\% is illiterate,\textsuperscript{40} and less than 15\% of the land is arable, all leading to a significant reliance on an opium trade that supplies 80\% of the world’s opium and accounts for 60\% of Afghanistan’s GDP.\textsuperscript{41}

B. The Culture: A Basic Foundation

It has often been said that a people’s culture develops from its history and that culture, in turn, defines a people. Just as it is important to know its history, understanding Afghanistan’s culture may help mentors understand why Afghans act a certain way or even anticipate how they may act.\textsuperscript{42}

Attempting to define Afghans as one homogeneous culture would be an oversimplification of a very complicated reality; there are just too many variations of ethnicity, tribes, sub-tribes, and villages.\textsuperscript{43} Thus, rather than learn cultural nuances, the study of which could take years of training, legal mentors should instead try to grasp and understand cultural commonal-

\textsuperscript{36} BARFIELD, supra note 10, at 318–20, 333–36.
\textsuperscript{38} Id.
\textsuperscript{39} Lieutenant Commander Vasilios Tasikas, Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm, 7 ARMY LAW. 45, 52 (2007).
\textsuperscript{40} CIA, supra note 37.
\textsuperscript{41} Tasikas, supra note 39 at 52.
\textsuperscript{43} See id.
ities particular to the region to which they are assigned. The location of the ANA Corps to which a mentor is assigned will be indicative of the prevalent ethnicities, tribes, and villages present in the Corps.

For instance, in Afghanistan these commonalities include the following:

1. [t]ribal and Islamic cultures are traditional and conservative;
2. [t]ribal codes (honor, revenge, and hospitality) are social controls;
3. [t]ribal identity and loyalty . . . take precedence over individual identity and private loyalty;
4. [s]elf-interest and personal gain outweigh the fear of retribution or legal/punitive action and hypocrisy or loss of respect;
5. [a] Jirgah or a Shura often make decisions, depending upon the circumstance;
6. [t]he most important duty of an Afghan man is to defend and control his assets: women, gold and land;
7. [h]ospitality is an essential aspect of Afghan culture.

By studying and understanding these cultural commonalities, mentors will be better prepared to successfully carry out their mission.

Ultimately, when trying to understand Afghan conduct, mentors should keep in mind that God, family, village, and tribe all take priority before country or nation. Understanding this crucial concept will go a long way, particularly when encountering widespread government corruption, which is discussed later.

C. The Law

Judge Advocates deploying as legal mentors should also be well versed in relevant military and civil Afghan law. Afghanistan’s history of war and occupation has left an indelible impression upon its people, particularly in their failure to apply

44. See id.
45. Id. at 67–68.
46. See ANA GUIDE, supra note 6, at 1-4; ENTEZAR, supra note 10, at 75–77.
the rule of law. This is especially evident with the people’s almost cavalier acceptance of high-level government and military corruption.\(^{47}\) But by knowing Afghanistan’s history and understanding its culture, mentors will soon realize how law has now become more relevant and why it is as intertwined with Afghanistan’s culture as it is with its history.

There are five sources of law in Afghanistan: (1) Islamic law; (2) the 2004 Constitution; (3) codes, decrees, and legislation; (4) international treaties and covenants; and (5) various regulations and orders.\(^{48}\) Above all other laws, however, Islamic law takes precedence.\(^{49}\) In fact, the Afghan Constitution specifically provides that “no law can be contrary to the sacred religion of Islam.”\(^{50}\)

The law applicable to the ANA is found in several codes of military justice.\(^{51}\) Although initially based upon the United States Uniform Code of Military Justice (“UCMJ”), the ANA codes have since been revised to instill Afghan culture and standards.\(^{52}\) The codes, or laws of military justice, were written to reinforce the significance of the rule of law within the ANA and emphasize a well-disciplined and combat-ready army.\(^{53}\)

Echoing article 3 of the Afghan Constitution, nothing within the ANA codes can be contrary to Islam or Shari’a; in fact, the codes specifically permit Shari’a, as well as the Afghan Civil

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49. AFGHAN CONSTITUTION art. 3.
50. Id.
51. See Hill & Jones, supra note 8, at 14 & n.24. The Afghan Constitution removes the military courts from the Afghan civil judicial system. AFGHAN CONSTITUTION art. 122.
52. See Hill & Jones, supra note 8, at 14. Unlike the UCMJ, the ANA military justice codes are not consolidated in one document. Rather, the ANA military justice code is comprised of several codes, which incorporate by reference the Afghan Civil Code and Shari’a law. Those ANA codes are: (1) Afghan National Army Law of Military Courts (“LMC”); (2) Military Criminal Procedure Code (“MCPC”); and (3) Military Crimes Code (“MCC”).
53. See Hill & Jones, supra note 8, at 16.
Penal Code, to supplement the ANA codes when offenses are not specified.  
Three separate provisions make up the ANA military justice codes, each of which will be discussed in turn:

1. the Law of Military Courts Code ("LMC"), which contains eighteen articles within seven chapters and determines the authority and jurisdiction of the military courts;  
2. the Military Criminal Procedure Code ("MCPC"), which contains sixty-one articles within seven chapters and regulates the criminal investigation process in the military;  
and

3. the Military Crimes Code ("MCC"), which contains forty-eight articles within three chapters and establishes military crimes and punishment within the military.

The LMC establishes the ANA military court system. It defines the roles of prosecutors, military judges, and defense counsel. It also designates primary military trial courts and a military court of appeals, with “exclusive jurisdiction of purely military offenses committed by members of the [ANA].” Appeal from the ANA military court of appeals is made to the Supreme Court of Afghanistan.

The MCPC is authorized pursuant to article 8(B) of the LMC. Within its sixty-one articles, the MCPC regulates the
“procedures relating to discovery, investigation and trial of duty related crimes” allegedly committed by ANA soldiers,64 much like the due process articles found in the UCMJ.65

The MCC is more or less a revision of a former Soviet-era military justice code.66 The MCC outlines the elements of various military crimes, as well as their associated confinement terms.67 In addition to crimes typical of a military crimes code—such as desertion, mutiny, and absent-without-leave (“AWOL”)—the MCC contains crimes specific to Afghanistan, to wit, corruption and violations pertaining to the operation of vehicles68 and selling or losing combat equipment.69 Furthermore, the MCC incorporates all crimes punishable under the Afghan Civil Penal Code and Islamic law.70 In such instances, jurisdiction may lie with either a military or civilian court.71 For these reasons, legal mentors need to have some understanding of the ANA codes, the Afghan Civil Penal Code, and basic Islamic law.

II. CHALLENGES WHEN ADVISING THE ANA

A. Advising the ANA—What is Mentoring?

Before discussing the kinds of challenges Judge Advocates should expect to encounter when mentoring the ANA, it is probably best to first cover, in greater detail, what it means to “mentor.”

In Afghanistan, legal mentors provide training guidance, administrative advice, as well as advice to the SJA and his staff on routine and non-routine legal matters. Legal mentors also serve as experts for or advisors to the SJA, OSJA, and Corps judiciary when cases are complex or potentially involve political interference, or when help from a third party is need-

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64. MCPC art. 1.
65. Watts & Martin, supra note 9, at 7. For a good overview of the MCPC, see id. at 7–9.
66. See id. at 9.
67. MCC arts. 9, 12–47.
68. Id. art. 30.
69. Id. arts. 35, 36.
70. See id. art. 47.
71. Id.
ed. Keeping in mind U.S. policy for Afghanistan, the mentor mission is consistent with the principal objective of developing each Corps OSJA into a self-sufficient legal office, with the capacity to conduct thorough and impartial internal investigations.\footnote{See Hill & Jones, \textit{supra} note 8, at 17–19.} That, in turn, will lead to good order and discipline within the Corps’ ranks and eventually to the Corps’ assuming responsibility for security in its respective region.

The most critical kind of mentoring that legal mentors provide is legal training to the OSJA so that they can then provide legal training to the ANA soldiers. Some of the topics covered during training sessions taught by ANA Judge Advocates include the rules of engagement, the law of armed conflict, non-judicial punishment, and ethics. These issues seem to be the ones that resonate most frequently through the ANA. Ensuring each Corps understands and complies with the laws of armed conflict will better prepare Afghanistan for the day when the ANA accepts responsibility for the security of all Afghanistan.

Legal mentors also provide administrative guidance. More specifically, they advise on tasks required for running a legal office. These tasks may include completing supply requisitions (a form called a MOD 14 in the ANA system), non-commissioned officer evaluation reports, counseling statements, investigation reports, or statements for non-judicial punishment.\footnote{Training the OSJA on these topics is important because they will be required to complete many of the same forms for their own soldiers or be asked by other commanders on how best to complete the forms.} Administrative training and advice may also entail showing the ANA how to track and catalogue regulations and orders or how to organize case management files.

In addition to administrative advice, legal mentors may advise on a number of other matters as well. These matters may be legal (e.g., strategy for a particular case), political (e.g., dealing with a particular commander who is reluctant to submit to a criminal investigation), logistical (e.g., difficulty obtaining supplies through the MOD 14 process),\footnote{There have been multiple instances when requisition of simple supplies through proper ANA channels are delayed for months because of the ANA’s own bureaucratic inadequacies. \textit{See ANA GUIDE, \textit{supra} note 6, at 2-46 to 2-47. The ANA must learn how to resolve their own issues and requisition their own supplies through their own chain of command and requisitioning system. \textit{See id.} Only when a situation warrants intervention and after efforts} or operation-
In these instances, legal mentors should be prepared to provide *ad hoc* advice, whether it is to the SJA, prosecutors, defense counsel, or commanders. It is imperative, however, that legal mentors *never* tell their principals what to do; advice should be given as a suggestion, or even as a question, so the Afghans can claim ownership of and responsibility for the final decision.\(^{75}\)

As each OSJA develops, the SJA’s relevance to his respective Corps Commander will increase so that eventually each OSJA will be responsible for not only military justice matters, but also for rendering legal advice on administrative, fiscal, and operational matters.\(^{76}\)

But mentoring is more than simply providing advice. It is also about developing relationships with the ANA. The job, in a sense, is oftentimes more diplomatic than legal. This is part of the reason mentors who aim to better engage their principals must understand Afghan history and culture. When mentors engage their principals, everyone in the OSJA feels empowered knowing that they have their mentor’s support.\(^{77}\) Over time, a sense of trust will develop between the mentor and his principals, which is crucial to the success of the mentor’s mission. Trust, however, must be earned, not purchased by furnishing material goods (an error committed in the past, for example, with office furniture, wide-screen TVs, and vehicles) or making shallow promises. The trust I refer to is only attained through the development of an honest, professional relationship. Nevertheless, mentors must master the delicate balance between developing a trustworthy, professional relationship with their ANA colleagues and fulfilling their primary duty of service to their country.

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\(^{75}\) In many instances, particularly with corruption cases, commanders or ANA judge advocates will tell defendants that they do not want to prosecute or investigate, but are being forced to do so by American advisors. Any perception of American influence on case disposition places the mentor into a precarious position. It is better to make it known that decisions are made by the Afghans and that mentors are there to provide suggestions and advise.

\(^{76}\) When I left the 207th in October 2011, the SJA was just starting to review operational plans for legal sufficiency.

\(^{77}\) *See Rule of Law Handbook*, supra note 16, at 276.
B. Challenges when Mentoring the ANA

Evidently, mentoring has its particular challenges. Helping to establish a functional, stand-alone, and credible military and OSJA in the midst of an insurgency accompanied by terrorism, criminal activity, and routine government corruption is one of the greatest challenges any attorney could ever face. However, knowing and understanding the challenges beforehand will help Judge Advocates to adjust accordingly and succeed in this challenging mission.

1. Ethnicity

Ethnicity presents an important type of cultural challenge. Ethnic issues are prevalent throughout Afghanistan and are mirrored within the ANA. Working within an ethnically diverse ANA presents a unique and difficult challenge for legal mentors because of the prejudices that exist among the various ethnic groups.

Afghans are historically a multiethnic people and devoutly loyal to their tribal or ethnic affiliations. Consequently, ethnic discrimination plagues all ranks of the ANA. Commanders, and even those higher in the chain of command, often manipulate subordinates of differing ethnicity, while subordinates, particularly the largest group—Pashtuns—likewise manipulate commanders of minority ethnicity, such as Hazara.

In the military justice context, ethnic discrimination appears rampant. There have been examples of commanders issuing non-judicial punishment (“NJP”) inequitably based on ethnic-

78. “An ethnic group is a large group of people with a common racial, national, tribal, linguistic, religious, or cultural origin or background.” Afghan Culture, supra note 42, at 68. “Afghanistan’s major ethnic groups are defined by language and origin, whereas sub-ethnic groups may be defined by religion, geography, history, politics, and/or tribes.” Id. at 69.
79. ANA GUIDE, supra note 6, at 3-4 to 3-5.
80. Id. at 1-2 to 1-3, 3-4 to 3-5. In Afghanistan, 42% of the population are Pashtun; 27% are Tajik; 9% are Hazara; 4% are Aimak; 3% are Turkmen; 2% are Baloch; and 4% are other. 80% of the population is Sunni Muslim and 19% is Shia Muslim. Central Intelligence Agency, supra note 19. These groups are often referred to as tribes, although there are also subgroups within each of these groups. Afghan Culture, supra note 42, at 69.
81. ANA GUIDE, supra note 6, at 3-5.
82. See id.
83. A form of punishment given administratively by commanders for minor military infractions.
ity. In criminal justice matters more serious than NJP, commanders and even prosecutors have protected or obstructed investigations of soldiers because of ethnic allegiances. Ethnic prejudice is also apparent when cases are detailed to prosecutors or when judgments or sentences are handed down by judges. Although most ANA leaders and soldiers will deny this discrimination exists, tribal or ethnic authority pervades the ANA.

When cultural or ethnic discrimination is suspected, mentors should try to instill national values and support for the rule of law as paramount to ethnicity.84

2. Intimidation

Influence through intimidation has become an accepted practice in the ANA and presents another challenge for legal mentors.85 Those seeking to influence a particular individual might intimidate that person directly or indirectly through threats to his or her family.86 Although commanders, soldiers, or witnesses may want to do what is legally right, they are often constrained in their ability to do so because of fear for their or their family’s safety.87

More often than not, intimidation is the reason many corruption cases or high-profile military justice cases are dismissed or not pursued to their end. It is also usually why witnesses refuse to cooperate in investigations or testify at trials, critical evidence is lost, or defendants are suddenly reassigned or disappear. This regrettable situation often leaves prosecutors with no choice but to dismiss the case. Accordingly, mentors should remain flexible and understand that intimidation may be the primary reason some high-level matters are never pursued.88

3. Confessions

ANA prosecutors rely heavily on confessions to prove their cases.89 This reliance, in large part, is historically and culturally based on Islamic law teachings whereby confessions made in

84. ANA GUIDE, supra note 6, at 3-5.
85. Id. at 3-7.
86. Id.
87. Id.
88. See id.
89. Id. at 3-6.
an open court before God are rarely challenged. With this in mind, better-informed defendants, usually senior-ranking officials in high-profile corruption cases, will simply refuse to speak, knowing that, as a result of this refusal, the prosecutors or investigators will most likely abandon their case.

Fortunately, ANA prosecutors today are starting to trend away from this past accepted practice, particularly as they develop their advocacy and case-development skills. Legal mentors can work with prosecutors on developing cases that do not need confessions to succeed in court.

4. Illiteracy

Illiteracy presents yet another interesting challenge for legal mentors, especially when training ANA soldiers on rules of engagement, laws of armed conflict, NJP, and ethics. On a larger scale, illiteracy within the ANA negatively impacts the overall U.S. mission in Afghanistan, albeit indirectly.

Although efforts are underway to increase the literacy rate, illiteracy and an aversion to writing among those who are literate has left the ANA with inadequate to almost-nonexistent record keeping. As a result, many form-driven processes, such as counseling statements, promotions, NJPs, and payroll records, which a U.S.-military trained Judge Advocate might take for granted, have suffered. When routine paperwork is not completed, soldiers might miss pay or promotions, or they might be wrongly punished (or so they believe), leaving them feeling disconnected and discouraged. These discouraged, unpaid soldiers might react by going AWOL, deserting, or joining the insurgency. This, in turn, leaves the ANA undermanned, poorly motivated, and generally unable to defend its country against the insurgency, ultimately preventing it from effectively taking responsibility for the security of Afghanistan. Thus, poor record keeping causes an unintentional domino effect within the ANA, with the effect worsening as it moves down the chain.


91. ANA GUIDE, supra note 6, at 2-41.

92. See id. at 2-45.
While legal mentors cannot directly combat illiteracy within the ANA, they can provide the OSJA with PowerPoint presentations and training that cover critical legal subjects and are geared toward the illiterate ANA soldier.93

5. Leadership

Lack of experienced leaders possessing any formal military training is another challenge to mentoring the ANA.

Prior to the recent efforts to build a new Afghan National Army, there had essentially been no Afghan Army since the Soviets left Afghanistan in 1989, leaving many former mujahedeen fighters, warlords, and militia to serve as officers and non-commissioned officers (“NCOs”).94 Many ANA commanders and even SJAs got their positions through patronage, intimidation, bribery, or some other means of influence.95 This has resulted in many senior leaders with little to no formal education or military training.96 For example, when I arrived at the Corps to which I had been assigned, the SJA was not a lawyer or even trained in the law. He was a former mujahedeen artillery battalion commander suspected by many throughout the Corps as being corrupt. Fortunately, before the end of my term, the ANA Judge Advocate General replaced him with a well-respected former judge and law professor.

“This lack of training, combined with a promotion system that favors influence peddling and patronage, remains an impediment to ANA leadership development.”97 Lack of experienced leaders poses a unique challenge for legal mentors trying to instill discipline and respect for the rule of law within the ANA.

6. The Soviet Model

The senior leaders in the ANA who have previous military experience or training received it during the days of the Soviet occupation, leaving a leadership model built largely on Soviet
military tradition. Under this system, NCOs have very little authority or decision-making ability, if any. Because leaders do not have authority and are not expected to make decisions, they are not held accountable for the actions of their subordinates. This way, they remain in charge until something is amiss, when they can then shift the blame to those beneath them. Hence, leaders are reluctant to make recommended changes, because enacting change means they take on the risk of failure, whereas remaining with the status quo means they can simply blame the underlying problem on someone else. In other words, under the Soviet model, leaders prefer to do nothing, which poses a challenge for legal mentors looking to effect change.

7. Working with Coalition Partners

Legal mentors will often work with coalition partners, either when serving as part of an OMLT, or when working alongside coalition teams. Working with coalition members who have their own priorities and cultural idiosyncrasies offers a new set of challenges.

In Afghanistan, the country is divided into Regional Commands (“RCs”), with each RC commanded by a different NATO commander. The coalition commander of the RC also usually heads the OMLT assigned to the region. In addition, depending on where the Corps is located, the battle-space commander, in other words, the commander in charge of the particular RC or portion thereof, may be a coalition commander. Thus, coalition members work in a number of settings in Afghanistan.

Afghans have definite perceptions of coalition members, some positive, but many negative. Some perceptions may be historically based (as is the case with the British or Russians), while others may be culturally or linguistically based. These perceptions may affect how Afghans interact with the legal mentor or

98. See id. at 3-9.
99. Id.
100. See id. at 3-10.
101. Id.
102. Id.
103. See id. at 2-29.
104. See KATZMAN, supra note 1, at 30.
105. ANA GUIDE, supra note 6, at 3-10.
how the mentor addresses them, which could impact the entire mission.

At other times, the mentor will need support from a coalition or OMLT partner, but for one reason or another, it does not come. Hence, legal mentors should remember that diplomacy is just as important when working with coalition partners as it is when dealing with Afghans.

8. Other Rule of Law Operators in the Battle-Space

In addition to the ANA legal mentor, there are other organizations conducting similar rule of law mentoring in the battle-space.\textsuperscript{106} Unlike ANA mentors, these operators work within the civilian rule of law arena and may include the following: Brigade Combat Teams (“BCTs”), NATO Rule of Law Field Support Mission (“NROLFSM”), the Department of State—Bureau of International Narcotics and Law Enforcement Affairs (“DOS/INL”), U.S. Agency for International Development (“USAID”), the Department of Justice (“DOJ”), Provisional Reconstruction Teams (“PRTs”), and the United Nations Assistance Mission Afghanistan (“UNAMA”).\textsuperscript{107} Since there may be times when the legal mentors’ interests intersect with those of the civilian operators’, or when information gained from these operators located at the regional and provincial levels is helpful to the legal mentors, getting to know them could prove beneficial.\textsuperscript{108}

BCTs and NROLFSM are military-led and provide civilian rule of law support. BCTs are co-located at the brigade-level with their own rule of law personnel and routinely engage with local civilian provincial and appellate judges.\textsuperscript{109} NROLFSM, on the other hand, does not engage in rule of law advising, mentoring, or training.\textsuperscript{110} Instead, it coordinates civilian and military rule of law efforts with DOS counterparts focusing on five main areas:

\textsuperscript{109} NATO Rule of Law Field Support Mission, supra note 107 at 26.
\textsuperscript{110} See NATO Rule of Law Field Support Mission, supra note 107.
[1] Security—for civilian rule of law experts; [2] Coordination—to facilitate movements of the experts in conjunction with other actors also working in the area in Afghanistan, and to provide a liaison and outreach function; [3] Movement support—such as secure convoys; [4] Engineering support—for possible infrastructure upgrades at designated Rule of Law facilities; and [5] Oversight of the contractual process—in connection with the engineering support and in accordance with current ISAF practices.111

The U.S. civilian agencies providing civilian rule of law support are DOS/INL, USAID, and DOJ. DOS/INL works and operates through two programs: (1) the Justice Sector Support Program (“JSSP”), which provides regional training programs and supports the Afghan Attorney General’s Office and the Ministry of Justice, and (2) the Corrections Systems Support Program (“CSSP”) which “supports the prison system, develops corrections infrastructure, and provides training.”112 In addition, USAID supports the Supreme Court of Afghanistan, assists in reforming the law, and helps the Afghans draft legislation.113 Finally, “DOJ has the lead with the Criminal Justice Task Force (the specialist counternarcotics task force), the Anti-Corruption Unit in the Attorney General’s Office, and the U.S. Marshals Service protection efforts.”114

To a lesser extent, PRTs are also involved in rule of law efforts.115 PRTs “are civil-military organizations (CMOs) that are staffed by U.S. government (USG) civilian and military personnel to assist foreign provincial governments with their reconstruction efforts; their security and rule of law efforts; and their political and economic development.”116 While a PRT might not have a coordinator dedicated to civilian rule of law efforts (although this may change), “PRTs can contribute to justice reform in Afghanistan [by b]uilding judicial infrastructure, [f]acilitating information-sharing (PRTs are popular with

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111. Id.
112. RULE OF LAW HANDBOOK, supra note 16, at 201.
113. Id.
114. Id.
115. See id. at 201–04. PRTs are the “principal vehicle to leverage the international community and Afghan government reconstruction and development programs.” Id. at 202. Currently there are twenty-five teams scattered throughout most of the thirty-four provinces in Afghanistan; twelve are led by the United States. Id. at 201.
116. See id. at 193.
Afghan nationals, giving them good situational awareness),
[ad]vising on the best use of donor funds, [and h]elping to coor-
dinate reconstruction efforts with the UNAMA.”117

Finally, of the various non-governmental organizations
(“NGOs”) conducting rule of law operations, UNAMA is most
prevalent,118 having its own mandate “to lead the international
civilian efforts . . . [and] to support and strengthen efforts to
improve governance and the rule of law.”119 Their usefulness
may depend upon the RC to which they are assigned.

Because there are so many organizations conducting rule of
law operations in the battle-space, coordination and unity of
effort is sometimes required. For instance, in Afghanistan,
ANA soldiers convicted to confinement may spend their term in
civilian prisons.120 As a result, there may be times when coor-
dination between the mentor and the civilian rule of law coun-
terparts (NROLFSM, CSSP, or JSSP) will be needed if a visit
to or information about a prison is requested. At other times,
coordination among the mentor and the agencies may be needed
because the ANA and civilian authorities have concurrent
jurisdiction (e.g., when an ANA soldier commits a civilian of-
fense off-post and off-duty, or if an ANA picks up and detains a
Taliban or al-Qaeda suspect, subject to the jurisdiction of the
National Directorate of Security).121

9. Working with Interpreters

An interpreter (or linguist) can be a mentor’s greatest as-
et.122 In fact, without an effective interpreter, the legal mentor
could find himself in trouble. Poor interpreters have led to
mentors being dismissed or discounted by their principals
simply because of poor translation or poor protocol. Advising
through an interpreter is a skill that must be developed.123 A
linguist with a lay background offers different capabilities than
one with a legal background. An “uneducated or otherwise un-

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117. Id. at 204.
118. Id. at 200.
120. MCPC art. 45; Hill & Jones, supra note 8, at 19.
121. See Hill & Jones, supra note 8, at 14; Watts & Martin, supra note 9, at 6.
122. ANA GUIDE, supra note 6, at 3-4.
123. Id.
sophisticated interpreter” can complicate a relationship and potentially sabotage the mission.124

There are many legal terms that lawyers use as common-speak that do not have equivalents in Dari or Pashto, the main languages of Afghanistan.125 For instance, there are no Dari words for defendant or plaintiff; nor are there words for misdemeanor or felony. Instead, the legal community in Afghanistan uses Arabic words just as we use Latin words in the English legal system. Other words do not have literal translations: the Supreme Court is the “clean court”; when “charges” are referred, there is an “accusation”; an attorney does not dismiss a case, he “exits” it. In one instance, an attorney intended to speak of keeping a client’s confidentiality; however, the interpreter (who happened to have no legal background) translated the idea as “keeping secrets from your client.” In this particular example, one translation is an ethical duty, and the other is ethical grounds for sanctions.

It is also important to use the same interpreter, especially if he routinely delivers quality services.126 In most instances, the ANA principals with whom mentors work will have already developed a concurrent relationship with the interpreter from prior mentors.127 This prior relationship can serve as a bridge for introductions and may even help curry favor.128

The SJA, his key staff, the judges, and key personnel in the Corps (particularly senior leadership) should keep the interpreter’s cell phone number available, and vice-versa, in the event someone needs to contact the mentor or the mentor needs to schedule a meeting. A good Rolodex and contacts with key ANA personnel is an essential element for success.129

There are several tips legal mentors should keep in mind when using an interpreter. Mentors should speak to the person addressed, not to the interpreter.130 Look at the addressee when speaking. Make sure the interpreter only translates what is said and nothing more. Keep sentences short to avoid over-

125. CIA, supra note 37.
126. RULE OF LAW HANDBOOK, supra note 16, at 227.
127. See id.
128. See id.
129. See id. at 227–228.
130. ANA GUIDE, supra note 6, at 3-4.
whelming the interpreter.\textsuperscript{131} Do not allow for adjustments, unless it is culturally necessary or something said is inappropriate. Also be careful as to word choice and using sayings which are often not translated well or misunderstood. A good interpreter can help overcome these obstacles. The interpreter should always advise if he hears or believes there may be a dangerous situation. Do not curse or use profanity. Many Afghans understand some English, and if they hear profanity, they may believe they are being insulted. Similarly, do not allow the interpreter to hold private discussions with the principals and do not hold private conversations with the interpreter because it is considered impolite or even offensive unless the discussion is translated.\textsuperscript{132} Finally, always speak clearly and simply.

10. Conflicts of Interest

While gaining trust is paramount for success as a legal mentor, trust does not create a fiduciary relationship between the legal mentor and his principal. In fact, legal mentors do not have fiduciary relationships with any members of the ANA. As such, no privileges flow from this relationship, and there should be no conflicts of interest.

During the course of the deployment, legal mentors may encounter instances where information gained through the ANA relationship must be compromised to Coalition Forces. If ever in doubt, it is always best to consult with the IJC chain of command, starting with the IJC SJA.

11. Corruption

Cultural challenges become especially frustrating considering the epidemic high-level government corruption that may at times seem a culturally-accepted means for conducting business.\textsuperscript{133} Corruption is one of the greatest concerns for gaining stability in Afghanistan.\textsuperscript{134} Corruption permeates every level of the ANA and Ministry of Defense.\textsuperscript{135} It is often rationalized be-
cause of the high risks and low pay for ANA soldiers. 136 Many in the ANA do not see it as a problem per se but rather as a means of survival. 137 Legal mentors who encounter corruption should encourage commanders to conduct investigations. 138

Discovering corruption is often harder than simply conducting an investigation, however, and investigations often present their own challenges, including obstruction by commanders. One method for discovering corruption is through observing relationships and the seemingly casual discussions that may flow from them. Thus, it is important for legal mentors to develop close, professional relationships with the SJA, the Criminal Investigation Division (“CID”) chief, the Inspector General (“IG”) mentor, the hospital mentors, the Military Police (“MP”) chief (and his mentor, if applicable), the finance mentor, the Garrison Commander, the G2 Chief (and his mentor), the G3 Chief (and his mentor), the Brigade Commanders, and the Corps Commander. Depending on the Corps, there may be other liaisons that may be of help as well.

To combat corruption, mentors should incorporate ethics into discussions whenever possible, using analogies to illustrate key points. 139 Lecturing should generally be avoided. 140 One legal advisor was particularly effective by equating corruption with support for the insurgency, pointing out that every dollar taken through corruption feeds the insurgency ten-fold, thus diminishing ANA efforts.

Finally, the SJA should refer cases where senior commanders are implicated to his higher chain of command, in particular to the ANA Judge Advocate General, for guidance or referral of charges. This way the SJA can avoid investigating the same commander with whom he has, and may continue to have, a professional relationship.

12. Logistics

In most instances, the ANA OSJAs lack adequate resources, supplies, technology, and even paper. 141 In fact, until recently,
most did not even have copies of the military codes, laws, or regulations that one would expect to find in an SJA office.

Besides lacking equipment and supplies, most SJA offices are not fully or well staffed either. Each OSJA has a manning requirement (or \textit{tashkil})\textsuperscript{142} that was designed for a much smaller Corps. Cases frequently cannot be investigated or tried for lack of investigators or investigator kits, defense counsel, or judges. These logistical difficulties often affect investigations. For example, investigators might not be able to secure a crime scene or preserve evidence because they do not have vehicles and thus cannot get there fast enough. Unreasonable delays between the time an accused is incarcerated and the time he is charged are also common because of these logistical challenges.

Logistical restrictions can also affect the legal mentor’s mission, particularly when needing to travel outside the perimeter (e.g., visiting the civilian jail or meeting with ANP, civilian judges, or politicians) because security concerns limit obtaining vehicles and a security detail.

13. Insurgency

Finally, the greatest challenge for the mentor in the battlespace will be the insurgency. Meeting and addressing all of the aforementioned challenges, and then some, while fighting an insurgency is incredibly difficult.\textsuperscript{143}

In addition to fighting an insurgency, there is the ever-present threat of infiltration of the ANA base.\textsuperscript{144} There have been instances when units have been comprised of soldiers who were former Taliban fighters, from pro-Taliban villages, or compromised by intimidation, bribery, or corruption.\textsuperscript{145}

Every day I mentored there was a continuous threat of an attack, whether from my principal, someone in his office, or someone that had infiltrated the ANA compound. In fact, just as I was arriving in theater, a mentor and several other coalition members were shot and killed by their ANA principal. I do not know the specifics of the attack (a large part of the details remain classified), but I do know that subsequent to those kill-

\textsuperscript{142} See id. at 2-19.
\textsuperscript{143} See id. at 2-15 to 2-16.
\textsuperscript{144} Id. at 3-7.
\textsuperscript{145} Id.
ings, mentors remained on a heightened state of preparedness when working with the ANA.

III. SOLUTIONS

A. Successful Practices

a. “Strive to understand the culture and the law, both in theory and in practice.” For Afghans, God, family, village, and tribe all take priority before country. Learn the civilian civil code and basic Shari’a law since both are relevant sources of the ANA military justice code. Failing to know or understand the history, culture, or law will be considered an exploitable weakness. Learn how cases develop and how they are investigated; how the SJA reviews investigations and assigns cases for prosecution; how prosecutors work their cases and draft and submit a charge sheet; how the Court intakes cases and the effect of the Court’s review; how defense counsel investigate, prepare, and work cases; and finally, learn and understand the prosecutor’s, defense counsel’s, and court’s roles at trial.

b. Learn the pressure points of the ANA military justice system. These include the effect of ethnic relationships among the victim, suspect, chain of command, SJA, and judiciary; the potential an accused, a witness, or a victim may be influenced by one of his superiors; the level of corruption within the ANA military; the potential for intimidation by senior officials of prosecutors, military judges, CID investigators, and witnesses; and the potential level of incompetence, particularly in the investigation phase.

c. “Establish and maintain strong, open, and trusting relationships,” not just with the ANA but also with the interagency, coalition, and NGO partners as well. Make a point to meet with the other rule of law actors. By getting out and attending rule of law working groups outside the base, you will gain valuable insight into how other actors operate in the rule of law environment, in addition to gaining leverage for coordinating future rule of law efforts. There is no local rule of law problem in a country with a national government developing as quickly as Afghanistan’s. Any project that ignores the necessary relationships among foreign and host nation stakeholders

146. RULE OF LAW HANDBOOK, supra note 16, at 210.
147. Id.
is bound to fail in the long run, if for no other reason than there
will be no national support to sustain it.

d. Similarly, get to know the key mentors and their principles, in particular the Corps Commander, Garrison Commander,
Garrison tenant Commanders, G2, G3, Corps finance Chief,
IG, and MP Chief. The mentors can provide valuable insight
into ANA issues that are particularly relevant to the legal ad-
visor and OSJA. At the same time, encourage the SJA to forge
his own relationships with the ANA principals and their men-
tors.

e. When giving advice or opinions, be clear and respectful,
providing rationale for your thoughts. Avoid giving rash advice
based on naiveté (which is part of the motivation for under-
standing the culture and history). When a dissenting opinion is
based on sound, rational reasoning, legal advisors will gain the
trust and respect of their principals.

f. Understand that an advisor’s “power” derives from the abil-
ity to pass along information and spot issues for senior-ranking
officials at both ISAF and the Ministry of Defense. This ability
should be used prudently. Do not threaten its use lightly. Seek
this avenue only when convinced higher echelons (at least on
the coalition side) will agree that the issue is sufficiently im-
portant to merit their intervention.

g. Keep matters simple.148 Pursue simple and practical sys-
tems for training and mentoring.149 Be honest and succinct and
try to keep meetings short. Rather than lecturing, mentors
should use analogies and discussion points to illustrate im-
portant points. Although “infrastructure and process are im-
portant,” the primary focus should be on the people through
“educating, developing, mentoring, and empowering” the
ANA.150

h. Words and word choice matter. Be careful what is said in
English. Be professional. Use appropriate language. Many Af-
ghans understand English and words taken out of context may
be misconstrued.

i. Provide incentives for producing. Objectives should be of-
fered to the ANA as a personal incentive. Remember where the
Afghan priorities lie (God, family, tribe). Consider how Af-

148. Id.
149. Id.
150. Id.
Afghans’ actions may be influenced by other factors, such as loyalties (e.g., “tribal, ethnic, religious, bureaucratic, financial”); personal obligations (e.g., financial, or to their tribe, ethnicity, or religion); and third-party influences inimical to the rule of law (e.g., “corruption, poverty, foreign influences, crime, fear, insurgency, lack of education”).

j. Instill in commanders the necessity for following the rule of law. Remind commanders to utilize the SJAs as the principal rule of law advisors and also remind SJAs how they can minimize their own personal exposure for violations.

k. Remember the objective is not for the ANA to look like the U.S. Army, but rather for the ANA to be a professional and competent military organization in a form appropriate for Afghanistan.

l. Utilize your own strengths to your advantage. Everyone will approach the position and address issues from different angles as defined by their prism of personal experience. Use that past experience as leverage for accomplishing tasks. Do not expect too much. Set realistic goals. The levels of bureaucracy in Afghanistan create an incredibly slow process, so patience is a pre-requisite for success.

B. Unsuccessful practices

a. Do not think you know everything. Remain flexible and open minded. This is not Iraq and even if you have been to Afghanistan before, the landscape changes almost daily. Do not try to go it alone by disregarding the expertise and experience of others. Know, understand, and use, when applicable, all available resources to your advantage. The mission is not new and many of the issues you encounter have been previously addressed by others. Do your research before embarking on a new quest. Besides the civilian rule of law operators, the Afghans can provide a valuable resource. They have been here the longest and many, including your interpreter, have the institutional memory on how things have been done for your RC.

b. Failing to adhere to cultural prerequisites or etiquette or disregarding cultural advice (e.g., from the linguist) can prove devastating and has, at times, doomed legal advisors.

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151. Id. at 160.
152. See ANA GUIDE, supra note 6, at 3-3.
c. Do not tell the principal what he “has” to do. Instead guide them by asking questions, for example, have they done X or thought of Y? This way they think of the issues and solutions themselves and can take responsibility for the plan.

d. Do not promise things that may not, or cannot, happen. By failing to deliver, credibility is lost and may not be recovered. Rather, say that you will “look into it.” There is a perception among Afghans that Americans promise but do not deliver. Similarly, failing to follow-up on tasks or promises is another means to lose credibility and trust.

e. Keep a professional attitude and do not let things get personal. Many suggestions will be ignored or disregarded. Understand why a suggestion was disregarded. Knowing the culture and how things operate in Afghanistan and how tasks are accomplished may give better insight into how suggestions should be made next time.

f. Do not undermine the SJA or anyone of authority in front of subordinates.

g. You are not a fiduciary to the SJA or the judiciary. Despite what some may think, you represent the United States and as such your duty of loyalty and confidences run to it, not to the ANA.

CONCLUSION

Key to U.S. policy for Afghanistan is training, partnering with, and mentoring the ANA so it can self-sustain and be capable of defending its country from the insurgency that has beset Afghanistan for the last ten years. Developing the ANA Corps OSJA into a self-sufficient legal office is a critical component of this policy. An OSJA capable of providing accurate and timely advice for a well-disciplined Corps, and that respects the rule of law and complies with the laws of armed conflict and rules of engagement, will eventually be able to take responsibility for the security of its respective region, which will lead to the eventual withdrawal of U.S. and coalition forces from the region.

Judge Advocates deploying as ANA legal mentors will encounter many challenges unique to Afghanistan while fighting an ongoing insurgency. Before deploying, Judge Advocates should spend a significant amount of time learning and understanding the history, culture, law, and basic political framework of post-conflict operations and be ready to develop alli-
rances with other legal rule of law operators in the region. It is my hope that with this information, Judge Advocates deploying as ANA legal mentors will be well equipped and prepared to handle any of the challenges expected in theater.
CAMBODIA V. THAILAND: A CASE STUDY ON THE USE OF PROVISIONAL MEASURES TO PROTECT HUMAN RIGHTS IN INTERNATIONAL BORDER DISPUTES

INTRODUCTION

The Temple of Preah Vihear (“Temple”) was constructed during the reign of the Khmer Empire¹ as a dedication to Shiva, the Hindu god of destruction.² Internationally recognized for its architectural complexity, stone ornamentation, and religious value as a modern day place of pilgrimage, the Temple holds sacred value to local residents and tourists alike.³ However, due to its location on a highly contested portion of the Thai-Cambodian border, the Temple sits vulnerably at the center of a longstanding territorial dispute.⁴ Despite a 1962 ruling

¹. The Khmer Empire ruled over present day Cambodia as well as parts of Laos, Thailand, and Vietnam from the 9th – 15th century C.E. Khmer Empire, NEW WORLD ENCYCLOPÄDIA, http://www.newworldencyclopedia.org/entry/Khmer_Empire (last visited Sept. 23, 2012).

². Temple of Preah Vihear, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION: WORLD HERITAGE CONVENTION, available at http://whc.unesco.org/en/list/1224 (last visited Sept. 28, 2012). King Yasovarman I founded the Temple in the 9th century C.E., and its construction was carried out over the next 300 years by successor kings. The remote location atop a 525-meter cliff provides exquisite views and has allowed the Temple to remain largely intact, despite being a source of conflict and land mines during the Cambodian Civil War and the invasion of the Khmer Rouge from 1975-1998. The Temple remains a source of national pride for both Cambodia and Thailand due to its historical, cultural, and religious significance. Id.; Khmer Empire, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Khmer_Empire (last visited Sept. 23, 2012).

³. Temple of Preah Vihear, supra note 2.

⁴. The Temple is located on a plateau in the eastern sector of the Dangrek mountain range, which constitutes the border between Thailand and Cambodia. Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 15 (June 15) [hereinafter Cambodia v. Thai., Judgment]. “Questions of sovereignty are complicated by the Temple’s location at the top of a 1,640-foot cliff. It is almost inaccessible from Cambodia, but it is reachable through Thailand by a comfortable drive over a paved road.” Seth Mydans, Thai-Cambodian Temple Standoff Continues, N.Y. TIMES (July 21, 2008), http://www.nytimes.com/2008/07/21/world/asia/21cambodia.html#.
by the International Court of Justice ("Court") that the Temple "is situated in territory under the sovereignty of Cambodia" and that Thailand is obligated to withdraw any military forces stationed "at the Temple, or in its vicinity on Cambodian territory," questions of territorial sovereignty remain unresolved and armed conflicts surrounding the Temple have resulted in fatalities, injuries, and evacuations of local civilians.5

The most recent outbreak of armed violence occurred after Cambodia nominated the Temple as a UNESCO6 World Heritage site.7 Thailand responded to the nomination in two ways, first by deploying troops to occupy the area around the Temple and then by publicly asserting ownership over 4.6 square kilometers of land adjacent to the Temple.8 Although Thailand concedes that the Temple is situated in Cambodian territory, Thailand asserts that the 1962 judgment did not effectively delineate the entire frontier line9 and that its obligation to withdraw military forces from the Temple was not a permanent order and therefore, as it applied only to the 1962 altercation, is no longer in effect.10 On April 28, 2011, Cambodia brought the case before the Court in hopes of bringing peace to the conflict-
ed region and of finally resolving the longstanding border dispute.\footnote{11} Though consent by both parties is generally required to invoke the Court’s jurisdiction, Article 60 of the Statute of the International Court of Justice (“Statute”) authorizes parties to unilaterally seek clarification of prior judgments.\footnote{12} Accordingly, despite Thailand’s jurisdictional objections,\footnote{13} Cambodia requested an interpretation of the 1962 Judgment to clarify whether “Thailand’s obligation to withdraw its military forces goes beyond a withdrawal from only the precincts of the Temple itself and extends to the area of the Temple in general” and whether the obligation is “general and continuing.”\footnote{14} Due to the outbreak of armed conflict near the Temple, Cambodia also requested the immediate withdrawal of all Thai troops from the area as a provisional measure.\footnote{15} Under Article 41 of the Statute, the Court may issue provisional measures to preserve the disputed rights and prevent incidents likely to aggravate or extend the conflict while the judgment is pending.\footnote{16}

\begin{itemize}
\item \footnote{11} Id. at 2, 7–8; see also Thai-Cambodia Clashes ‘Damage Preah Vihear Temple’, BBC News (Feb. 6, 2011), http://www.bbc.uk/news/world-asia-pacific-12377626.
\item \footnote{13} In the present case, Thailand argued that there was no dispute between the parties under Article 60, and therefore the Court had no basis for jurisdiction. Cambodia v. Thai, Provisional Measures Order, ¶ 31. Thailand also objected to the Court’s jurisdiction in 1959 on grounds that it had not accepted compulsory jurisdiction of the Court under Article 36. Thailand argued that the Siamese declaration of September 20, 1929, accepting compulsory jurisdiction of the Court under Article 36. Thailand argued that the Siamese declaration of September 20, 1929, accepting compulsory jurisdiction of the Court, lapsed with the dissolution of the PCIJ and could not be renewed by the 1950 declaration. However, the Court rejected Thailand’s arguments on grounds that the 1950 declaration revealed a clear intention to recognize the compulsory jurisdiction of the present court, since there was no other Court to which it could have related. See generally Temple of Preah Vihear (Cambodia v. Thai.), Preliminary Objections Judgment, 1961 I.C.J. 17 (May 26) [hereinafter Cambodia v. Thai., Preliminary Objections Judgment].
\item \footnote{14} Cambodia v. Thai., Application Instituting Proceedings, ¶¶ 36–37.
\item \footnote{16} Statute of the I.C.J. art. 41, para.1, supra note 12. The Court has held that “[t]he context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions be-
On July 18, 2011, the Court issued an order (“July 18 Order”) granting Cambodia’s request for provisional measures and directing both countries, inter alia, to (1) withdraw all military personnel from a judicially devised provisional demilitarized zone (“PDZ”) surrounding the Temple and (2) to refrain from any armed activity directed at the zone. Neither party complied with the order of troop withdrawal following the execution of the July 18 Order and troops remained stationed at the Temple despite the binding judgment. In creating the PDZ—to prevent further harm to persons and property in the area pending its judgment on the merits—the Court broke with its precedent of confining its provisional measures to only those rights directly at issue in the primary dispute, here the right to territorial sovereignty.

By extending protection to civilians in the area of the Temple, the Court reinforced its recent liberalization of the power to issue provisional measures to protect human rights in pending border disputes. Although this is a welcome departure from longstanding jurisprudence, the July 18 Order also strayed from precedent in other, alarming ways. First, the PDZ includes the Temple, which the Court has previously ruled belongs to Cambodia, as well as other undisputed territories not

cause the respective rights of the parties to a dispute before the Court are not preserved. “LaGrand (Ger. v. U.S.) Judgment, 2001 I.C.J. 466, ¶ 102 (June 27) [hereinafter Ger. v. U.S., Judgment].

17. Cambodia v. Thai., Provisional Measures Order, ¶ 69(B)(1). The Court provided coordinates of the PDZ in paragraph 62 of the Order as well as a sketch-map illustrating the demilitarized zone in relation to the two States. Id. at 16-17.


brought before the Court in the main proceeding. Second, the measure greatly diverges from prior provisional measures involving territorial disputes without providing legitimate justification for eschewing precedent.

Despite the Court’s laudable intentions to protect the Temple and civilian population, its creation of the PDZ exceeds the Court’s jurisdictional authority and violates principles of territorial sovereignty that are inherent in international law. This Note will explore the Court’s expanding power to issue provisional measures and the question of whether the short-term benefits of preventing the risk of irreparable harm outweigh the long term costs of deterring states’ willingness to consent to the Court’s jurisdiction. Part I of this Note will discuss the powers of the International Court of Justice generally and its evolving jurisprudence to issue provisional measures for the protection of human rights. Part II will describe the origins of the Temple dispute and the contentious provisional measure issued by the Court in the July 18 Order. Part III will discuss the importance of maintaining judicial constraints and will suggest alternative measures available to protect parties’ rights in the future while staying within the bounds of the Court’s jurisdiction and respecting notions of territorial sovereignty.


23. Cambodia v. Thai., Provisional Measures Order, pp. 1–2 (dissenting opinion of Judge Xue); Cambodia v. Thai., Provisional Measures Order, ¶ 9 (dissenting opinion of President Owada); Cambodia v. Thai., Provisional Measures Order, ¶ 4 (dissenting opinion of Judge Donoghue).

24. The jurisdiction of the International Court of Justice is consent-based and therefore, the Court may only adjudicate disputes when both States have recognized its jurisdiction. Contentious Jurisdiction, INTERNATIONAL COURT OF JUSTICE, available at http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1.
I. BACKGROUND

A. The Role of the International Court of Justice

Judicial settlement of international disputes evolved from the use of international mediation and arbitration at the beginning of the twentieth century. In 1899 and 1907, two Hague Conferences led to the adoption of the Convention on the Pacific Settlement of International Disputes and the establishment of a Permanent Court of Arbitration.\(^\text{25}\) Shortly thereafter, in 1921, the League of Nations established the Permanent Court of International Justice ("PCIJ") to provide a full-time judicial system to resolve international disputes.\(^\text{26}\) However, the outbreak of World War II led to the demise of the League of Nations and all of the features of the PCIJ were transferred to the International Court of Justice in 1946, including the governing Statute of the Court, which is annexed to the U.N. Charter and to which all members of the United Nations are parties.\(^\text{27}\)

As successor to the PCIJ, the International Court of Justice adopted many of its traditions as well as precedent. The Court currently resides in the Peace Palace in The Hague and serves as the "principal judicial organ for the United Nations."\(^\text{28}\) Jurisdiction is limited to civil disputes between states and requires consent ad litem.\(^\text{29}\) Accordingly, a state may only be compelled to settle an international dispute before the Court after specifically consenting to jurisdiction for that particular dispute.\(^\text{30}\) Consent may be achieved in three ways: (1) the state may accept general compulsory jurisdiction of the Court pursuant to Article 36(2) of the Statute;\(^\text{31}\) (2) the state may enter into


\(^{26}\) Id.

\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) Article 34(1) of the Statute provides that "[o]nly states may be parties in cases before the Court." Statute of the I.C.J., art. 34(1), supra note 12. Contentious Jurisdiction, INTERNATIONAL COURT OF JUSTICE, supra note 24. Ad litem is a Latin term meaning "for the suit." BLACK’S LAW DICTIONARY 49 (9th ed. 2009).

\(^{30}\) Contentious Jurisdiction, INTERNATIONAL COURT OF JUSTICE, supra note 24.

\(^{31}\) Article 36(2) of the Statute provides "[t]he States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the
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a special agreement with the other disputant to refer the matter to the Court; or (3) the state may be a party to a treaty or international agreement which stipulates that any dispute will be referred to the Court. Cases brought to the Court may be argued before all of the Court’s fifteen judges—elected for nine-year terms by the U.N. General Assembly and the Security Council—however, upon mutual agreement, parties may opt for a smaller chamber of three or more judges to adjudicate disputes.

Under Article 60 of the Statute, a judgment by the Court is “final and without appeal.” However, Article 60 further provides that “[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.” The power to interpret judgments is an important

same obligation.” Sixty-six states have recognized the Court’s jurisdiction as compulsory through such declarations. However, these declarations may also include certain reservations that will prevent the Court from having jurisdiction under specific circumstances. Declarations Recognizing the Jurisdiction of the Court as Compulsory, INTERNATIONAL COURT OF JUSTICE, available at http://www.icj-cij.org/jurisdiction/index. Currently, neither Cambodia nor Thailand has a declaration in force recognizing the Court’s jurisdiction as compulsory. Id.

32. Article 36(1) of the Statute provides that, “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.” Statute of the I.C.J., art. 36(1), supra note 12.

33. Id. In such cases the matter is generally brought before the Court in a written application instituting proceedings. The application is a unilateral document which indicates the subject of the dispute, the parties, and the specific provision which is the basis of jurisdiction. Basis of the Court’s Jurisdiction, INTERNATIONAL COURT OF JUSTICE, available at http://www.icj-cij.org/jurisdiction/index.php.


37. Id. This provision is supplemented by Article 98 of the Rules of the Court, which provide, “In the event of dispute as to the meaning or scope of a judgment any party may make a request for its interpretation.” Rules of the Court, art. 98(1), I.C.J. ACTS & DOCS 153. In the Interpretation of Land and Maritime Boundary, Judge Weeramentary noted,
mechanism to ensure international peace and security when countries dispute the application of the Court’s judgment, which may otherwise result in a lack of compliance and further aggravation of the resounding conflict. The only requirement for jurisdiction in an interpretation proceeding is that there be a “dispute as to the meaning or scope” of a prior judgment. Consent by both parties is not required because it is “deemed to have already been given by virtue of consent to refer to the main dispute to the Court.” This aspect may become problematic if the judges construe their interpretive power broadly because it may deter countries from consenting to the Court’s jurisdiction in the first place. Moreover, the Court has formally recognized that there is no time limit governing the Court’s ability to interpret a prior judgment, meaning the Court has the power to interpret a judgment even fifty years after its passage.

Due to the unique nature of Article 60 proceedings, the Court has devised three important limitations to help preserve the rights of the parties and respect the concept of finality in judgments. First, “any request for interpretation must relate to the operative part of the judgment and cannot concern the reasons

A judgment, however well crafted, could well embody phraseology which, in the context of a given set of circumstances, may require some clarification. It is one of those incidents of litigation which the judicial experience of ages has shown may arise from time to time, and it is precisely for this reason that Article 60 ... made such clear provision for the right of interpretation.


40. KAIOBAD, supra note 38, at 104.
42. Cambodia v. Thai., Provisional Measures Order ¶ 37. “Whereas it should, at the outset, be made clear that Article 60 of the Statute does not impose any time-limit on requests for interpretation.” Id. In contrast, there is a time limit for revision of a judgment under Article 61 of the Statute of the Court. The application for revision must be made within six months from the discovery of a new fact and within ten years from the delivery of the judgment. Statute of the I.C.J., art. 61, supra note 12.
for the judgment except in so far as these are inseparable from 
the operative part.”43 Second, “the authority to interpret a 
judgment under Article 60 is not a power to enforce a judgment 
or to oversee its implementation.”44 Finally, the Court’s 
“[i]nterpretation can in no way go beyond the limits of the 
Judgment.”45 In *Interpretation of the Preliminary Judgment in 
the Cameroon-Nigeria Land and Maritime Boundary*, dissent-
ing Judge Weeramantry noted, “[Parties] may not, for example, 
under the guise of an application under Article 60, attempt to 
seek revision of a judgment or reopen a matter which is already 
res judicata.”46 Given these powerful and intentional limita-
tions, it is important that the Court take them into account 
when ordering a provisional measure pursuant to Article 60.47

In any case before the Court, the judges have the ability to is-
sue binding provisional measures pending a judgment on the 
merits.48 These interim measures have proven to be an effective

43. *Interpretation of Land and Maritime Boundary between Cameroon 
[hereinafter Nigeria v. Cameroon, Judgment]. *See also Interpretation of 
Avena and Other Mexican Nationals* (Mex. v. U.S.), Provisional Measures, 2008 
I.C.J. 311, ¶ 47 (July 16).

44. Cambodia v. Thai., Provisional Measures Order, ¶ 8 (July 18, 2011) 
(dissenting opinion of Judge Donoghue). The Court has noted that Article 60 
“does not allow [the Court] to consider possible violations of the Judgment 
which it is called upon to interpret.” *Interpretation of Land and Maritime 
(dissenting opinion of Vice-President Weeramantry).

45. *Interpretation Asylum Case* (Col ombia v. Peru), Judgment, I.C.J. Re-
ports 1950, p. 403.

46. Nigeria v. Cameroon, Judgment, 1999 I.C.J. 31, at 43 (dissenting opin-
ion of Vice-President Weeramantry). Res judicata is a Latin term meaning “a 
thing adjudicated.” The phrase refers to an issue that has been definitively 
settled by judicial decision and is therefore barred from subsequent adjudica-

47. The Court has only issued provisional measures under Article 60 juris-
diction in one other case. *See Avena & Other Mexican Nat’ls*, (Mex. v. U.S.), 
Provisional Measures Order, 2008 I.C.J. 311, ¶ 8 (July 16) [hereinafter Mex. 
v. U.S., Provisional Measures Order]. In that case, however, five judges dis-
sented to the order of provisional measures for lack of jurisdiction under Arti-
cle 60. In a joint dissent, Judges Owada, Tomka and Keith argued, “Humanitar-
ian considerations which clearly underlie the decision cannot override the 
legal requirements of the Statute of the Court.” *Id.* at 341. Judge Buer-
genthal further criticized the order for setting a troubling precedent for cases 
involving Article 60 jurisdiction. *Id.* at 334.

preventative tool to ensure that one party to a case will abstain from actions that could adversely affect the rights of the other while the judicial proceedings are in progress.\textsuperscript{49} The Court has broad discretionary power under Article 41 of the Statute, which provides “[t]he Court shall have the power to indicate, if it considers that circumstances so require, \textit{any} provisional measures which ought to be taken to preserve the respective rights of either party.”\textsuperscript{50} Furthermore, Article 75 of the Rules of Court states, “[t]he Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.”\textsuperscript{51} The language of these provisions demonstrates the Court’s considerable flexibility in deciding both when a provisional measure is necessary and if so, the manner in which it should be ordered.\textsuperscript{52}

In issuing provisional measures, the Court requires three conditions-precedent: (1) the asserted rights must be plausible; (2) there must be a link between the alleged rights and the provisional measures sought to protect them; and (3) there must be an imminent risk of irreparable prejudice to the disputed rights.\textsuperscript{53} These conditions-precedent are particularly im-

\begin{itemize}
  \item \textsuperscript{50} Statute of the I.C.J., art. 41(1), \textit{supra} note 12 (emphasis added).
  \item \textsuperscript{52} \textit{See} Statute of the I.C.J., art. 41(1), \textit{supra} note 12; Rules of the Court, art. 75(2), \textit{supra} note 37.
  \item \textsuperscript{53} Cambodia v. Thai., Provisional Measures Order, pp. 9-12. \textit{See also} Costa Rica v. Nicar., Provisional Measures Order, ¶¶ 53, 64; Avena & Other Mexican Nat'l's, (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶ 58 (Mar. 31) [hereinafter Mex. v. U.S., Judgment]. The Court must satisfy these three conditions any time it issues an order of provisional measures, even if it is
important due to the nature of Article 41 proceedings. The short time frame renders the Court unable to consider the detailed evidence or arguments, which are otherwise required for a judgment on the merits, and the Court is only vested with prima facie jurisdiction. Accordingly, the conditions-precedent must be fully considered and clearly met in order to ensure that the Court does not overstep its authority to issue binding orders.

B. The Use of Provisional Measures to Protect Human Rights

The power to issue interim measures to protect persons from imminent danger is arguably one of the most powerful mechanisms by which an international tribunal can address human rights abuses. That power is expanding even more as courts are construing it more liberally in pending border disputes. This growing trend is a departure from the PCIJ’s narrow interpretation of Article 41, which denied provisional measures for the protection of human rights where those rights were ancillary to the subject matter of the dispute. For example, in 1932, the Norwegian government instituted proceedings in the PCIJ against the Danish government to establish the legal value done proprio motu (by the Court’s own initiative) pursuant to Article 75 of the Rules of the Court.


The Court’s work in the sphere of provisional measures of protection, as it has developed from its cautious beginnings at the start of the existence of the Permanent Court in 1927 is probably the most significant of the Court’s activities for the settlement of international disputes and the maintenance of international peace and security, the prime objective of the United Nations of which the Court is a principal organ.

Id.


lidity of a 1932 Norwegian Royal Decree claiming sovereignty over the Southeastern territory of Greenland.\textsuperscript{58} The Norwegian government requested an order of provisional measures requiring the Danish government “to abstain in the said territory from any coercive measure directed against Norwegian nationals.”\textsuperscript{59} However, the PCIJ dismissed Norway’s request on grounds that the provisional measure requested would not “affect the existence or value of the sovereign rights claimed by Norway over the territory in question,” which, the Court held, were the only rights the Court could take into account in issuing a provisional measure.\textsuperscript{60}

The International Court of Justice has since departed from this strict interpretation and has demonstrated a more functional approach in the issuance of provisional measures.\textsuperscript{61} Former ICJ President Rosalyn Higgins has noted:

The requirements for the indication of provisional measures have evolved over the years. Although these are now well established, their scope and application in particular circumstances continue to evolve. At the same time, the evolving jurisprudence on provisional measures shows a growing tendency to recognize the human realities behind disputes of states.\textsuperscript{62}

\textsuperscript{58} Id. at 278.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 285.
\textsuperscript{61} Prior to 1986, the International Court of Justice followed the PCIJ’s jurisprudence in denying provisional measures when requested to protect rights not directly at issue in the main proceeding. \textit{See} Interhandel (Switz. v. U.S.) Provisional Measures Order, 1957 I.C.J. 105 (Oct. 24); Aegean Sea Continental Shelf (Greece v. Turk.) Provisional Measures Order, 1976 I.C.J. 3 (Sept. 11). However, as Rosenne notes, “During the last twenty or so years, requests for provisional measures have gone beyond measures required to protect the rights which the requesting party is claiming.” Rosenne, \textit{supra} note 55. \textit{See} Costa Rica v. Nicaragua, Provisional Measures Order, ¶ 85; Cameroon v. Nigeria, Provisional Measures Order, 1996 I.C.J. 13, ¶ 48; Frontier Dispute (Burk. Faso/Mali), Provisional Measures Order, 1986, I.C.J. 3, ¶ 11 (Jan. 10) [hereinafter Burk. Faso/Mali, Provisional Measures Order].


The Burkina Faso/Mali Order and the Cameroon/Nigeria Order, taken together, go beyond the series of cases in which provisional measures that protect human life were indicated because the dispute in question was exactly about such rights . . . Taken together, they
The jurisprudential trend toward more far reaching orders in cases involving armed conflict is consistent with principles in the U.N. Charter and human rights law. However, this liberal trend does not grant the Court unfettered discretion to disregard concepts of state sovereignty and territorial integrity, thereby compromising the legitimacy of the Court. The Court must respect the procedural mechanisms in place and abide by accepted principles of international law in order to maintain an effective presence in international affairs.

C. Legal Precedent

There have been three prior cases in which the Court has ordered two parties to disengage their respective military forces as a means to avoid violent border conflicts pending a judgment on the merits. However, in none of the three did the Court go so far as to order the withdrawal of military troops from territories that “indisputably belong to the sovereignty of one or the other of the parties.” The Court has previously ordered the parties to withdraw only from the areas of sovereignty that were being contested and which were the subject of the legal dispute. Furthermore, in prior provisional measures, the Court has generally refrained from defining the specific terms would seem effectively to overrule the determination by the Permanent Court of International Justice in the Eastern Greenland case that no measures will be indicated to afford protection to persons if that goes beyond the subject matter of the dispute.

Id.

63. Id.; see also U.N. Charter, preamble.
64. Cambodia v. Thai., Provisional Measures Order, ¶ 45; Cambodia v. Thai., Provisional Measures Order, at 4 (dissenting opinion of Judge Xue); Cambodia v. Thai., Provisional Measures Order, ¶ 10 (dissenting opinion of President Owada); Cambodia v. Thai., Provisional Measures Order, ¶ 2 (dissenting opinion of Judge Donoghue); Cambodia v. Thai., Provisional Measures Order, (dissenting opinion of Judge Al-Khasawneh); Cambodia v. Thai., Provisional Measures Order (dissenting opinion of Judge ad hoc Cot).
66. Cambodia v. Thai., Provisional Measures Order, ¶ 7 (dissenting opinion of President Owada).
of the troop withdrawal itself and instead left it to the disputing states to decide troop movements or ordered the parties to withdraw to positions occupied before the armed conflict.68

1. Frontier Dispute

In 1983, the governments of Upper Volta (now Burkina Faso) and the Republic of Mali signed a Special Agreement submitting to the Court a dispute involving the delimitation69 of their common frontier line.70 Prior to the Court’s boundary delimitation, armed forces of the Republic of Mali attacked Burkina Faso for violating its territorial sovereignty when it occupied Malian border villages and conducted a population census in Malian territory.71 Due to the onset of violent armed conflicts along the border, both parties requested an immediate order of provisional measures to prevent further conflict.72 The Court recognized that the rights at issue in the primary proceeding were “the sovereign rights of the Parties over their respective territories on either side of the frontier,”73 however, the Court determined that troop withdrawal was necessary to prevent harm to persons or property in the disputed area.74 This was the first

71. On December 25, 1985 Burkinabe troops occupied the villages of Dioulouna, Kounia, Selba, and Douna, and raised the flag of Burkina Faso. Id.
72. Id. at ¶¶ 6(4), 6(8), 8(3)-(4). Burkina Faso requested, inter alia, that each Party “shall withdraw its forces from the area claimed by Mali... [and] refrain from any act of territorial administration beyond the line adopted in 1975 by the Legal Sub-Commission of the OAU Mediation Commission.” Whereas Mali requested a provisional measure ordering “each of the Parties to refrain from any act or action which might prejudice the rights of the other Party... [and] refrain from any act of whatsoever kind which might aggravate the dispute.” Mali objected to Burkina Faso’s request on grounds that a troop withdrawal would constitute a judgment on the merits and was incompatible with the ceasefire agreements. Id.
73. Id. at ¶ 15.
74. Id. at ¶ 19. The Court noted,

Whereas, in particular, when two States jointly decide to have recourse to a chamber of the Court, the principal judicial organ of the United Nations, with a view to the peaceful settlement of a dispute,
case in which the Court extended the “the nature of the rights claimed... to cover the eligibility of actual or potential injury to human beings for protection through the indication of provisional measures.”75 This landmark decision was the first to advocate the use of provisional measures as a tool to protect human rights even when those rights are not directly at issue in the proceeding.76

After determining that provisional measures were necessary to protect the civilian population, the Court unanimously ordered both parties to withdraw their troops to mutually agreed-upon positions.77 The parties were given twenty days to reach an agreement on the troop withdrawal78 and, if unable to do so, were ordered to allow the Court to step in and determine the positions through an order.79 The Court refrained from indicat-

in accordance with Article 2, paragraph 3, and Article 33 of the Charter of the United Nations, and incidents subsequently occur which not merely are likely to extend or aggravate the dispute but comprise a resort of force which is irreconcilable with the principle of the peaceful settlement of international disputes, there can be no doubt of the Chamber’s power and duty to indicate, if need be, such provisional measures as may conduce to the due administration of justice.

Id.


77. Id. at ¶ 27.
78. Id. at ¶ 32(1)(D).
79. Id. at ¶ 32. The court issued the following provisional measures:

A. The Government of Burkina Faso and the Government of the Republic of Mali should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Chamber or prejudice the right of the other Party to compliance with whatever judgment the Chamber may render in the case;
ing the terms of withdrawal itself, explaining that doing so “would require a knowledge of the geographical and strategic context of the conflict which the Chamber does not possess, and which in all probability it could not obtain without undertaking an expert survey.” 80 The parties came to an agreement with the help of the Ministers for Foreign Affairs of the Accord de non-agression et d’assistance en matière de défense (ANAD) 81 and there were no further conflicts before the Court entered its final judgment on the merits. 82

2. Land and Maritime Boundary between Cameroon and Nigeria

A decade later, the Court built upon the precedent established in Frontier Dispute and confirmed the Court’s authority to protect human rights in international territory disputes through provisional measures. 83 The case revolved around a

B. Both Governments should continue to observe the ceasefire instituted by agreement between the two Heads of State on 31 December 1985;

C. Both Governments should withdraw their armed forces to such positions, or behind such lines, as may, within twenty days of the date of the present Order, be determined by an agreement between those Governments, it being understood that the terms of the troop withdrawal will be laid down by the agreement in question and that, failing such agreement, the Chamber will itself indicate them by means of an Order;

D. In regard to the administration of the disputed areas, the situation which prevailed before the armed actions that gave rise to the requests for provisional measures should not be modified.

Id.

80. Id. at ¶ 27.


83. In the Judge Mbaye’s Declaration he responded to this progression by stating that, “[t]he Court has consolidated its jurisprudence.” Cameroon v. Nigeria, Provisional Measures Order, 1996 I.C.J. 13, 34 (separate opinion of
maritime boundary dispute between Cameroon and Nigeria and the issue of territorial sovereignty over the Bakassi Peninsula.\textsuperscript{84} Cameroon brought the dispute before the Court in 1994 and requested the bench to “specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea.”\textsuperscript{85} However, on February 3, 1996, while the judicial proceedings were in progress, Nigerian troops occupied the Bakassi Peninsula and violence broke out along the Cameroon-Nigeria border.\textsuperscript{86} Cameroon immediately requested an order of provisional measures.\textsuperscript{87} Due to the gravity of the situation, while the Court deliberated, the President of the Security Council intervened and called upon both parties to respect the ceasefire agreement and to return their troops to the positions occupied before the dispute was referred to the Court.\textsuperscript{88}

In determining whether to grant Cameroon’s request for provisional measures, the Court recognized two important limitations: (1) that it cannot “make definitive findings of fact or of imputability,” and (2) the rights of the Parties “must remain unaffected by the Court’s decision.”\textsuperscript{89} After careful consideration, the Court issued a provisional measure on March 15, 2012.

\begin{footnotesize}
\textsuperscript{85} Id. ¶ 9.
\textsuperscript{86} Id. ¶ 18. On February 3, 1996, Nigerian troops attacked Cameroonian troops resulting in one death, one person missing and several wounded, as well as significant property damage. \textit{Id.}
\textsuperscript{87} Id. ¶ 18 (Mar. 15). Cameroon requested that the Court indicate the following provisional measures:

\begin{enumerate}
\item [(1)] The armed forces of the Parties shall withdraw to the position they were occupying before the Nigerian attack of 3 February 1996;
\item [(2)] the Parties shall abstain from all military activity along the entire boundary until the judgment of the Court takes place; (3) the Parties shall abstain from any act or action which might hamper the gathering of evidence in the present case.
\end{enumerate}

\textit{Id.} ¶ 20.
\textsuperscript{88} Id. ¶ 45.
\end{footnotesize}
1996, ordering both Parties, *inter alia*, to “ensure that the presence of any armed forces in the Bakassi Peninsula does not extend beyond the positions in which they were situated prior to [February 3, 1996].”90 The measure was consistent with the Security Council’s order that both Parties “take necessary steps to return their forces to the positions they occupied before the dispute was referred to the International Court [of Justice].”91 By doing so, the Court remained within the confines of the dual limitations it had articulated, listed above, and adhered to principles of territorial sovereignty.92

3. Certain Activities Carried Out by Nicaragua in the Border Area

The Court took a third approach in ordering provisional troop withdrawal from contested territory in *Certain Activities Carried Out by Nicaragua in the Border Area*.93 The dispute arose in 2011 after Nicaragua sent armed forces to Costa Rica, without the latter’s consent, for the purpose of protecting Nicaraguan workers engaged in the construction of a canal across Costa Rican territory.94 Costa Rica claimed that the presence of Nicaraguan troops violated principles of territorial sovereignty and constituted a threat of force in violation of the U.N. Charter.95 Additionally, Costa Rica alleged that Nicaragua’s dredging operation led to the deforestation of internationally protected rainforests.96 Costa Rica brought the case before the Court in order to protect its right to territorial sovereignty and to obtain reparation for the environmental damage. Pending the outcome of the case, Costa Rica also requested provisional measures requiring Nicaragua to withdraw its troops from the disputed area immediately and to discontinue its dredging operations.97

The Court granted Costa Rica’s request for provisional measures in part. The Court refused to order provisional measures requiring Nicaragua to suspend its dredging operations because it did not find a risk of irreparable harm to Costa

91. Id. ¶ 46.
92. Id. ¶ 43.
94. Id. ¶¶ 3, 31.
95. Id. ¶ 2.
96. Id. ¶ 31.
97. Id. ¶ 13.
Rica’s environment or to the flow of the Colorado River.\textsuperscript{98} However, the Court did order both parties to withdraw troops from the “disputed territory” as a means necessary to protect the civilian population from the threat of force.\textsuperscript{99}

Costa Rica had a stronger claim to the territorial title over the disputed land; however, the Court issued an even-handed measure that effectively ordered both parties out of the disputed area.\textsuperscript{100} Furthermore, each Party retained responsibilities for policing the area over which it unquestionably had sovereignty.\textsuperscript{101} In so doing, the Court complied with the fundamental limitation on its power to issue interim measures — that it may not prejudge a temporary order on the merits of the overall case.\textsuperscript{102}

4. Significance of Prior Orders

The prior orders discussed above are not binding on the Court; however, they are highly influential and have shaped the Court’s jurisprudence on provisional measures in the context of territorial disputes.\textsuperscript{103} The progression of the Orders’ reach into human rights considerations demonstrates a broadening of the Court’s authority to issue provisional measures.\textsuperscript{104} In the Frontier Case, the Court ordered troop withdrawal to protect human rights, which were incidental to those being disputed in the main proceeding, effectively overruling the

\textsuperscript{98} Costa Rica v. Nicar., Provisional Measures Order, ¶ 82.
\textsuperscript{99} Id. ¶ 86.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id. ¶ 85.
\textsuperscript{103} Under Article 59 of the Statute of the Court, “The decision of the Court has no binding force except between the parties and in respect of that particular case.” Statute of the I.C.J., art. 59, supra note 12; see also Gilbert Guillaume, \textit{The Use of Precedent by International Judges and Arbitrators}, 2 \textit{JOURNAL INT’L DISP. SETTLEMENT} 5, 12 (2011).
\textsuperscript{104} For example, in \textit{Cameroon v. Nigeria}, the Court observed:

Where the rights at issue in these proceedings are sovereign rights which the Parties claim over territory, and whereas these rights also concern persons; and whereas armed actions have regrettably occurred on territory which is the subject of proceedings before the Court . . . . The Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute.

PCIJ’s narrow interpretation of Article 41. Yet, this initial extension of rights was consistent with the principles set forth in the U.N. Charter and other humanitarian concerns, suggesting that it was an appropriate step in a popular direction. Yet, in a show of important restraint, the Court left it to the conflicting parties to determine the terms of the withdrawal. Whereas in the Land and Maritime Boundary case, the Court indicated the general positions for troop withdrawal itself, albeit in a manner consistent with the Security Council’s recommendation and limited to the territory in dispute.

The prior cases broadened the Court’s power to issue provisional measures without overstepping the Court’s jurisdictional bounds or infringing upon the territorial sovereignty of the Parties. These cases demonstrate three different appropriate approaches the Court may use to determine troop withdrawal positions: (1) mandating that the parties reach a mutual agreement, (2) ordering parties’ armed forces to return to those positions occupied prior to the conflict, and (3) ordering a mutual withdrawal from the “disputed territory.” Although these were viable options available to the Court in the Interpretation of Temple of Preah Vihear, the Court opted for a fourth approach that was unprecedented and unwarranted.

II. ORIGINS OF THE PREAH VIHEAR DISPUTE

A. 1904 Franco-Siamese Treaty

The legal dispute over the Temple has its origins in an ambiguous border delimitation of the Thai-Cambodian border. On February 13, 1904, France (under which Cambodia was a protectorate) and Siam (as Thailand was then known) entered

106. ROSENNE, supra note 55, at 4; See generally U.N. Charter.
108. Id.
into a boundary settlement treaty. Article 1 of that treaty stipulated that the border between Thailand and Cambodia was to follow along a watershed in the eastern Dangrek Mountains and Article 3 delegated authority to a Franco-Siamese Mixed Commission to carry out the exact delimitation of the boundary. French officers created a definitive boundary in 1906 and published a map of the frontier ("Annex I Map"), which illustrated the entire Preah Vihear promontory, including the Temple, to be located in Cambodian territory. The frontier line in the Annex I Map diverged from the treaty’s original watershed provision, which had placed the Temple in Thailand’s territory. Following the execution of the treaty,

115. *Id.* at 16.
116. Article 1 of the 1904 Franco-Siamese Treaty provides:

   The frontier between Siam and Cambodia starts, on the left shore of the Great Lake, from the mouth of the river Stung Roluos, it follows the parallel from that point in an easterly direction until it meets the river Prek Kompong Tiam, then, turning northwards, it merges with the meridian from that meeting-point as far as the Phnom Dang Rek mountain chain. From there it follows the watershed between the basins of the Nam Sen and the Mekong on the one hand, and the Nam Moun, on the other hand, and joins the Phnom Padang chain the crest of which it follows eastwards as far as the Mekong. Upstream from that point, the Mekong remains the frontier of the Kingdom of Siam, in accordance with Article I of the Treaty of 3 October 1893.

*Id.*

117. Article 3 of the 1904 Franco-Siamese Treaty provides:

   There shall be a delimitation of the frontiers between the Kingdom of Siam and the territories making up French Indo-China. This delimitation will be carried out by Mixed Commissions composed of officers appointed by the two contracting countries. The work will relate to the frontier determined by Articles 1 and 2, and the region lying between the Great Lake and the sea.

*Id.*

118. The maps were drawn up by French officers at the request of the Siamese Government, due to the limited means of the Siamese Government. The French officers completed eleven maps covering a large portion of land between the countries. *Id.* at 18, 21. The Commission agreed that the frontier line “should ascend the Dangrek from the Cambodian plain by the Pass of Kel, which lies westwards of Preah Vihear.” *Id.* at 17.

119. *Id.* at 15.
both countries asserted forms of control over the Temple and the issue was not revisited for another fifty years.\textsuperscript{120}

\textbf{B. 1962 Judgment}

In 1953, Cambodia attained its independence from France and sent guards to the Temple as a symbol of their territorial integrity.\textsuperscript{121} However, Cambodian troops arrived to find that Thai forces had reclaimed sovereignty over the Temple.\textsuperscript{122} Thailand and Cambodia attempted to settle the dispute peacefully and carried out territorial negotiations in Bangkok.\textsuperscript{123} Cambodia claimed sovereignty on the basis that Thailand had accepted the Annex I map and was therefore precluded from denying its validity.\textsuperscript{124} Thailand responded with claims that the Annex I map was not legally binding on the parties and that “at all material times, Thailand has exercised full sovereignty in the area of the Temple to the exclusion of Cambodia.”\textsuperscript{125} The parties failed to come to an agreement and Cambodia brought the issue before the Court in 1959 to determine which country had rightful ownership to the Temple.\textsuperscript{126}

In order to make a judgment on the competing claims to the Temple, the Court needed to resolve the threshold issue of which treaty provision governed the boundary—the watershed provision or the Annex I map.\textsuperscript{127} Basing its decision on the lan-

\begin{itemize}
\item \textsuperscript{120} Cambodia v. Thai., Judgment, 1962 I.C.J. 6, 27. Since the 1904 Treaty, Cambodia “performed only a very few routine acts of administration.” Thailand showed more evidence of conduct in the area of the Temple, however, “the acts concerned were exclusively the acts of local, provincial, authorities” in the vicinity of the Temple. \textit{Id.} at 30. Furthermore, although Thailand came into possession of Preah Vihear and certain other parts of Cambodia after WWII, Thailand and France entered into a Settlement Agreement whereby the States agreed to revert back to the status quo. In order to settle the terms of the agreement, France set up a Franco-Siamese Conciliation Commission consisting of two representatives for each State and three neutral commissioners. During the negotiations Thailand objected to part of the frontier line but did not object to the frontier line concerning Preah Vihear and even “filed with the Commission a map showing Preah Vihear as lying in Cambodian” in 1947. \textit{Id.} at 28.
\item \textsuperscript{121} \textit{Id.} at 31.
\item \textsuperscript{122} \textit{Id.} at 31.
\item \textsuperscript{123} \textit{Id.} at 27.
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} Cambodia v. Thai., Judgment, 1962 I.C.J. 6, 11–12.
\item \textsuperscript{126} \textit{Id.} at 8.
\item \textsuperscript{127} \textit{Id.} at 17.
\end{itemize}
language of the treaty, the Court determined that the watershed provision was merely a guideline on the general character of the boundary, whereas the map delineated the boundary’s exact course. Accordingly, the frontier would be “the line resulting from the work of delimitation, unless the delimitation were shown to be invalid.” The Court found that the map held official standing and that Thailand had accepted the map through its conduct and acquiescence, “conferring on it a binding character.” Therefore, the Court declared the Temple to be in the sovereign territory of Cambodia. The issue was then laid to rest for fifty years.

128. In its decision, the Court stated that,

[in] general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question... There are boundary treaties which do no more than refer to a watershed line... The Parties in the present case must have had a reason for taking this further step. This could only have been because they regarded a watershed indication as insufficient by itself to achieve certainty and finality.

Id. at 34.

129. Id. at 34–36.

130. The Court held that Thailand could not reasonably assert that it had never accepted the map because Thailand “for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier.” Cambodia v. Thai., Judgment, 1962 I.C.J. 6, 22. Moreover, the Court found significance in a visit to the Temple by Prince Damrong, President of the Royal Institute of Siam, in 1930. When the Prince arrived at the Temple, the French Resident for the Cambodian province greeted him with the French flag flying. The Court held that this constituted a “tacit recognition by Siam of the sovereignty of Cambodia (under the French protectorate) over Preah Vihear.” Id. at 30–31.

131. Id. at 34–36.

132. Cambodia v. Thai., Provisional Measures Order, at 48. Following the decision, Thailand “accepted the decision of the Court, turned over the Temple to Cambodia, withdrew its troops stationed at the temple, and withdrew the Thai tricolor national flag from the disputed area.” The Thai government also formally informed the U.N. Acting Secretary-General on July 6, 1962 that:

His Majesty’s Government desires to make an express reservation regarding whatever rights Thailand has, or may have in the future, to recover the Temple of Phra Viharn by having recourse to any existing or subsequently applicable legal process, and to register a protest against the decision of the International Court of Justice award-
C. 2008-Present

On July 7, 2008, UNESCO listed the Temple as a World Heritage Site due to its “outstanding universal value.” One week later, Thai forces occupied land adjacent to the Temple – included in the UNESCO nomination – claiming territorial rights on the basis of the original watershed line in the 1962 Judgment. The presence of Thai troops and combat vehicles outside the Temple resulted in intermittent armed clashes between Thai and Cambodian forces. On February 4, 2011, after nearly three years of sporadic armed conflicts, the Security Council called for a permanent ceasefire and encouraged the

See Cambodia v. Thai., Application Instituting Proceedings, ¶ 12. However, no official claims were made by Thailand in the area of the Temple until 2008. Id.


134. Cambodia v. Thai., 1962 I.C.J. 6. The Democrat Party in Thailand, under the leadership of Abhisit Vejjajiva, strongly objected to Cambodia’s nomination of the Temple as a World Heritage Site in 2008 out of concern that it would negatively affect Thailand’s sovereignty in the area surrounding the Temple. This led to the occupation of Thai troops at the Temple and the resultant border conflict lasting from 2008–2011. However, the recent election of Yingluck Shinawatra for Prime Minister of Thailand is expected to mitigate the border conflict and help bring peace to the neighboring countries. Yingluck Shinawatra was formally elected on July 3, 2011. Supalek Ganjanakhundee, Restoration of Relations with Cambodia ‘a priority’, NATION (July 5, 2011), http://nationmultimedia.com/2011/07/05/national/Restoration-of-relations-with-Cambodia-a-priority-30159463.html. Cambodia v. Thai., Application Instituting Proceedings, ¶ 14.


136. In a press statement, Ambassador Maria Luiza Ribeiro Viotti of Brazil stated, “The members of the Security Council called on the two sides to display maximum restraint and avoid any action that may aggravate the situa-
parties to work with the Association of Southeast Asian Nations (“ASEAN”) to reach a diplomatic resolution. However, the powerful political divide between the nations has complicated the process and led to failed negotiations.

On April 28, 2011, Cambodia brought the matter before the Court and requested an interpretation of the Judgment rendered on June 15, 1962. Specifically, Cambodia requested clarification on three specific issues: (1) whether the line shown on the Annex I map represents a binding boundary between the Parties; (2) the meaning and the scope of the phrase “vicinity of Cambodian territory;” and (3) whether Thailand’s obligation to withdraw armed forces was of a continuing or instantaneous character. Cambodia additionally requested the immediate withdrawal of all Thai troops as a provisional measure pending the Court’s decision on the merits, as discussed in this Note’s Introduction.

137. ASEAN was established in 1967 pursuant to the ASEAN Declaration. The aims and purposes of the Declaration include stimulating economic growth and advancing cultural achievements in the region as well as the promoting compliance with the U.N. Charter to ensure regional comity and stability. Overview, Association of Southeast Asian Nations, http://www.asean.org/about_ASEAN.html. Thailand and Cambodia are both Member States of ASEAN. Member Countries, Association of Southeast Asian Nations, www.aseansec.org/74.htm. As ASEAN members, Thailand and Cambodia are signatories to the 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC), which obliges them to resort to peaceful settlement of inter-state disputes. Treaty of Amity and Cooperation in Southeast Asia, Feb. 24, 1976, 1025 U.N.T.S. 316.


141. Id. ¶ 31.
D. July 18 Order

On July 18, 2011, the Court granted Cambodia’s request for provisional measures after finding that the Court had prima facie jurisdiction under Article 60\(^{142}\) and that Cambodia had fulfilled the conditions-precedent.\(^{143}\) First, the Court found plausible Cambodia’s asserted rights of sovereignty and territorial integrity under the Court’s 1962 Judgment.\(^{144}\) Second, it found that a link existed between the provisional measures Cambodia had requested and the country’s asserted rights of sovereignty and territorial integrity.\(^{145}\) Lastly, the Court found merit in Cambodia’s claim that recent armed conflicts surrounding the Temple had created an urgent need for judicial intervention, notwithstanding the existence of a ceasefire.\(^{146}\)

Based on these findings, the Court granted Cambodia’s request and issued the following four provisional measures:

1. Both Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone, as defined in paragraph 62 of the present Order, and refrain from any military presence within that zone and from any armed activity directed at the zone…
2. Thailand shall not obstruct Cambodia’s free access to the Temple of Preah Vihear or Cambodia’s provision of fresh supplies to its non-military personnel in the Temple…
3. Both Parties shall continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by

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142. Jurisdiction under Article 60 requires that there be a dispute between the meaning or scope of a prior judgment. The Court found that the parties demonstrated a difference in opinion regarding: (1) the meaning and scope of the phrase “vicinity on Cambodian territory;” (2) the nature of the obligation imposed on Thailand to withdraw military forces; and (3) the issue of whether the 1962 Judgment recognized the Annex I map as binding with respect to the entire frontier. Cambodia v. Thai., Provisional Measures Order, ¶ 31.


144. Id. ¶ 39. Thailand asserted that Cambodia’s rights were not plausible because “the rights invoked in the request for interpretation must be based on the facts examined in the 1962 Judgment and not on facts subsequent to that Judgment.” Id. ¶ 36.

145. Id. ¶ 45. Thailand argued that the link has not been established because Cambodia’s request refers to the status of the Annex I map, which cannot be the subject of interpretation. Id. ¶ 43. Judge Xue also argued that the necessary link had not been established in the issuance of the provisional demilitarized zone. Cambodia v. Thai., Provisional Measures, at 4 (dissenting opinion of Judge Xue).

146. Cambodia v. Thai., Provisional Measures, ¶ 56.
The Court directed both Parties to cooperate with ASEAN and refrain from any action that might aggravate or extend the dispute. The Court’s order of provisional measures—directing both Parties to cooperate with ASEAN and refrain from any action that may aggravate or extend the dispute—are consistent with the Court’s jurisprudence and represent a practical interim solution under the circumstances. It is the order directing both parties to withdraw from a provisional demilitarized zone, which includes the Temple and additional, undisputed territory that is an unprecedented measure exceeding the Court’s jurisdiction.

III. A Break From Precedent

A. Necessary Expansion to Protect Human Rights

The importance of provisional measures lies in their ability to prevent imminent harm, rather than simply compensate the aggrieved parties. International proceedings often take months or even years to be resolved and therefore provide an inadequate remedy in urgent situations, particularly in the context of human rights cases. Therefore, provisional measures play the crucial role of protecting persons from imminent danger or death while at the same time preserving important procedural safeguards to ensure justice is achieved through a deliberative judgment on the merits.

Provisional measures have been granted more frequently in recent years to ease international tensions and preserve rights to pending disputes.Previously, this judicial tool was used...
with caution and exercised only under the most dire circumstances, resulting from the PCIJ’s narrow interpretation of the language “as circumstances so require.”153 However, the Court has gradually provided a more liberal interpretation of the urgency and gravity required to warrant an order of interim measures, particularly in the realm of border disputes.¹⁵⁴ This trend is not isolated to the International Court of Justice, but has been demonstrated by other international bodies as well such as the Inter-American Court of Human Rights, the European Court of Human Rights, the U.N. Human Rights Committee, the U.N. Committee against Torture, and the Inter-American Commission on Human Rights.¹⁵⁵

Provisional measures provide an effective way in which international tribunals may prevent human rights atrocities rather than merely compensate victims after the fact. Accordingly, the Court was within its jurisdictional and institutional capacity to depart from the PCIJ’s jurisprudence and follow a more functional approach that is consistent with its role as the principal judicial organ of the United Nations.

B. PDZ Constitutes Judicial Overreach

Article 41 of the Statute grants the Court explicit power to indicate any measure deemed necessary to protect rights before the Court; however, there are innate limitations in that power.¹⁵⁶ These limitations stem from the Court’s jurisdiction and jurisprudence discussed in Part I of this Note, as well as from widely accepted principles of sovereignty and territorial integ-


154. “The need for the preservation of rights is the legal basis that entitles the Court to indicate provisional measures under Article 41 of the Statute.... In the past this provision was interpreted strictly.” Cameroon v. Nigeria, 1996 I.C.J. 13, 50 (Separate Opinion of Judge Ajibola). Judge Ajibola observed in 1996 that “[r]ecent decisions of the Court and its Chambers have given a more liberal interpretation to this issue of the preservation of rights.” Id.


156. Statute of the I.C.J., art. 41, supra note 12.
It was because of these internal and external limitations, despite the absence of express statutory limitations on the Court’s authority to issue provisional measures, that five judges dissented to the PDZ as exceeding the Court’s jurisdictional bounds. Among the dissenting judges was Judge Xue, who argued that the measure “puts into question the proper exercise of the judicial discretion of the Court in indicating provisional measures, both under the law and by the jurisprudence of the Court.”

Although troop withdrawal may have been necessary to avoid irreparable harm and to protect the rights of local civilians, the inclusion of the Temple in the Court’s order raises substantial questions concerning the Court’s competence to devise provisional measures and may lead to adverse effects on party compliance. The PDZ forces both parties to withdraw troops from their own undisputed sovereign territory and the measure greatly diverges from prior judgments involving territorial disputes without providing legitimate justification for eschewing precedent.

1. Undisputed Territory

Judgments by international tribunals involving territorial disputes are sensitive and require consideration of many important factors such as “history, culture, perceptions of ‘right-
fulness,’ prior administrative lines, presence in the area of tribal and language groups, access to natural resources and respective political power.” Consequently, territorial boundary disputes are generally resolved through diplomatic negotiations and then legally reflected in treaties, rather than through the courts. According to one study, courts adjudicated only thirty out of 348 territorial disputes between 1919 and 1995. Yet Courts may be gaining more of a role in boundary conflicts, evidenced by the large, and growing, portion of cases before the International Court of Justice concerning border conflicts. Still, the Court has never before ordered countries to withdraw armed forces from their own undisputed territories.

Territorial sovereignty is a particularly sensitive issue in Southeast Asia where decolonization and shifting empires have exacerbated political relations and heightened nationalism concerns. These issues and the longstanding conflict along the Thai-Cambodian border further support dissenting Judge Owada’s view that the Court does not have the power to issue provisional measures that “encroach upon the sovereignty of a State without its consent, either explicit or implicit, even with the best of intentions.”

Furthermore, in the July 18 Order, the Court devised a demilitarized zone using four coordinated points on a flat map without sufficient knowledge of the “ground situation in the territories.” In the Frontier Dispute, the Court refused to define territorial boundaries without the assistance of expert car-

163. Prescott & Triggs, supra note 69, at 138.
164. Id.
165. Id.
166. “Approximately one third of the contentious cases before the ICJ have dealt with boundary disputes of one kind or another.” Id.
167. Judge Xue observed that, “in all the cases that either directly involve territorial disputes or bear territorial implications, the Court, in indicating provisional measures, has invariably confined such measures to the disputed territories and never gone beyond such areas.” Cambodia v. Thai., Provisional Measures, at 1 (dissenting opinion of Judge Xue).
168. “Cambodia, which has been annexed throughout history by its neighbors on both its eastern and its western borders, is particularly sensitive, and its temples are a source of national pride.” Mydans, supra note 4.
169. Cambodia v. Thai., Provisional Measures, ¶ 11 (dissenting opinion of President Owada).
170. Cambodia v. Thai., Provisional Measures Order, at 3 (dissenting opinion of Judge Xue).
Rather, the Court ordered the parties in that case to withdraw their troops to such positions determined by an agreement between the parties. This allowed the Court to avoid making any arbitrary and impractical determinations on troop placement. The Frontier Dispute Court demonstrated judicial restraint and pragmatism in its refusal to issue a judgment that it may be criticized as institutionally incompetent to make. The PDZ devised by the Court in the present case, however, does not guarantee cohesion with the land or demonstrate judicial restraint.

2. Lack of Justification for Eschewing Precedent

Legal justifications and sound reason are important aspects of the Court’s role in adjudicating disputes in a fair manner. According to Thomas Franck, even without an overarching mechanism to enforce international law, states will nevertheless comply if they perceive the law to be fair. Fairness, in this sense, entails both procedural fairness and perceived substantive fairness. In the July 18 Order, the Court failed to provide sufficient reasons for the adoption of the provisional demilitarized zone under the factual circumstances, especially considering the other viable options available. This lack of justification could be detrimental to the perceived legitimacy of the judgment as the parties may fail to comply based on resentment, disagreement, or a sense of illegitimacy.

172. Id. ¶ 32(1)(D).
173. Cambodia v. Thai., Provisional Measures, ¶ 9 (dissenting opinion of President Owada).
174. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 3 (1990). “In the international system, rules usually are not enforced yet they are mostly obeyed. Lacking support from a coercive power comparable to that which provides backing for the laws of a nation, the rules of the international community nevertheless elicit much compliance on the part of sovereign states.” Id.
175. Judge Xue wrote, “I regret that the Court did not give sufficient reasons for the adoption of the PDZ as one of the provisional measures, particularly upon what considerations such extraordinary measure is warranted.” Cambodia v. Thai., Provisional Measures Order, at 2 (dissenting opinion of Judge Xue). Judge Owada also criticized the Majority’s Order as “devoid of legal justification.” Cambodia v. Thai., Provisional Measures Order, ¶ 9 (dissenting opinion of President Owada).
Non-compliance with the Court’s provisional measures constitutes a violation of international law under the U.N. Charter.\textsuperscript{177} However, in practice a State’s unwillingness to comply with provisional measures does not have significant ramifications.\textsuperscript{178} Most likely, a non-complying state will suffer only reputational harm, for example, “being designated as a rogue state or as a State that considers itself above international law.”\textsuperscript{179} Accordingly, the benefits of non-compliance often outweigh potential reputational effects, which has resulted in a lack of uniformity in states’ compliance with orders of provisional measures.\textsuperscript{180}

Consequently, the July 18 Order raises concerns that the Court’s expanding power to issue provisional measures will negatively impact States’ willingness to consent to the Court’s jurisdiction. As the Court’s Judge Donoghue observed,

[T]oday’s Order will not enhance the Court’s scope to contribute to the peaceful resolution of disputes, but instead will chill the appetite of States to consent even in a limited way to the Court’s jurisdiction, e.g., in a special agreement, through a compromissory clause or through a declaration that contains some limitations. If States cannot be confident that the

\textsuperscript{177} Article 94(1) of the United Nations Charter provides that “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.” U.N. Charter, art. 94, para. 1. Moreover in Germany v. U.S., the Court confirmed the binding nature of provisional measures issued under Article 41 by stating that the provisional measure “was consequently binding in character and created a legal obligation for the United States.” Ger. v. U.S., Judgment, 2001 I.C.J. 466, ¶ 110.

\textsuperscript{178} See generally Joseph Sinde Warioba, Monitoring Compliance with and Enforcement of Binding Decisions of International Courts, in 5 MAX PLANCK YEARBOOK OF U.N. LAW (J.A. Frowein and R. Wolfrum eds., 2001) (discussing the need for the development of a world mechanism to enforce binding decisions of international courts).

\textsuperscript{179} Pasqualucci, \textit{supra} note 155, at 46.

\textsuperscript{180} \textit{Id.} at 4. Nicar. v. U.S., Provisional Measures Order, 1984 I.C.J. 209, ¶ 41; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Request for Provisional Measures, 1979 I.C.J. 7 (Dec. 15); \textit{see also} Nuclear Tests (N.Z. v. Fr.), Provisional Measures Order, 1973 I.C.J. 135 (June 22) [hereinafter N.Z. v. Fr., Provisional Measures Order] (France refused to comply with the Court’s provisional measure and subsequently withdrew from the Court’s jurisdiction.)
Therefore, the July 18 Order may negatively impact the Court’s ability to issue authoritative judgments in the future.\textsuperscript{182}

The Court had alternative courses of action available to it when ruling on the provisional measure, provided in prior decisions as well as in the Rules of the Court. Arguably, the Court could have achieved its goals of reducing the risk to human lives by simply ordering both Parties to abstain from any military activities in the disputed territory.\textsuperscript{183} Furthermore, the Court could have also indicated a provisional measure similar to that rendered in the \textit{Burkina Faso/Mali} case, asking the Parties, with the co-operation of the Association of Southeast Asian Nations (ASEAN), to determine themselves the positions to which their armed forces should be withdrawn. Failing such agreement, the Court could then, if necessary, draw its own lines by means of an Order.\textsuperscript{184} These alternatives would have preserved the Court’s legitimacy and created a similar result to that which came from the Court’s unfortunate and overreaching mandate without encroaching on the parties’ territorial sovereignty. This in turn, may have resulted in compliance by the parties and a full troop withdrawal as ordered.

\section*{Conclusion}

The Court should strive to apply international norms and procedures consistently to achieve harmonization and legitimacy. This is especially important due to the jurisdictional posture of the Court and the need for consent by both parties in each particular dispute. Provisional measures have been increasingly prominent in recent years due to their impact in protecting civilian populations and preventing any escalation of armed conflict during the pendency of border disputes.\textsuperscript{185} Inter-

\begin{enumerate}
\item\textsuperscript{181} Cambodia v. Thai., Provisional Measures Order, ¶ 28 (dissenting opinion of Judge Donoghue).
\item\textsuperscript{182} See Thomas M. Franck, \textit{Judging the World Court} 47 (1986) (discussing state’s general unwillingness to submit matters of national importance to the compulsory jurisdiction of the Court.)
\item\textsuperscript{183} Cambodia v. Thai., Provisional Measures, at 3 (dissenting opinion of Judge Xue).
\item\textsuperscript{184} Id.
\item\textsuperscript{185} See Nuclear Tests (Austl. v. Fr.), Interim Protection Order, 1973 I.C.J. 99, at 106 (June 22); Nuclear Tests (N.Z. v. Fr.), Interim Protection Order,
im measures are a necessary tool for international tribunals because they offer preventative protection to potential victims rather than mere compensatory relief to actual victims.\footnote{186} The value of provisional measures can be further demonstrated by the fact that international proceedings can take years to be resolved and the rights at stake may be affected before the final judgment is determined.

The beneficial value of these provisional measures, however, is contingent upon compliance by the disputants.\footnote{187} In order to ensure party compliance, the Court must adhere to the procedural mechanisms set forth by the Statute of the Court and Rules of the Court, as well as established doctrines of international law. The July 18 Order constituted an unnecessary overreach that undermined the Court’s legitimacy and may adversely impact future consent by U.N. member states.\footnote{188} Furthermore, underscoring the misguided nature of the Court’s decision, the PDZ has proven to be ineffective as neither party complied with the terms of the order following the judgment.\footnote{189}

As of this writing, armed forces continue to occupy the area

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186. See Pasqualucci, *supra* note 155, at 3. The “protective function [of provisional measures] is more important than the compensatory function of a final judgment.” *Id.*

187. For example, the United States refused to comply with the Court’s order of provisional measures in the case concerning the Vienna Convention on Consular Relations. The right at issue in the main proceeding, Walter LaGrand’s right to life, was irreparably harmed by his execution. Ger. v. U.S., Provisional Measures Order, 1999 I.C.J. 9, ¶ 24; Ger. v. U.S., Judgment, 2001 I.C.J. 466, ¶ 34.

188. Judge Koroma observed, “In the absence of such power, the Court’s efficacy could be diminished in many cases, since it would run the risk of facing a fait accompli [a thing accomplished and presumably irreversible] or seeing an issue become moot by the time it issues a judgment.” Costa Rica v. Nicar., Provisional Measures (Separate Opinion of Judge Koroma).

surrounding the Temple, with virtually no remaining hope for the Court to be a part of a resolution to the dispute.  

Michelle Barnett*

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190. Thailand and Cambodia began to withdraw troops on July 18, 2012, exactly one year after the July 18 Order. However, both sides have replaced their troops in the area with police and civilian security guards. Therefore, it is unclear whether this action can “be deemed as troop withdrawal in accordance with the court order.” Thailand Must Show Maturity in Handling Preah Vihear, THE NATION (Aug. 12, 2012, 7:01 AM) http://www.nationmultimedia.com/politics/Thailand-must-show-maturity-in-handling-Preah-Vihe-30188340.html.

* B.A. University of California Santa Barbara (2010); J.D. Brooklyn Law School (Expected 2013). I would like to thank my parents, Dave and Debbie Barnett, and my sister, Tanya Barnett, for their constant love and encouragement throughout my academic career. I would also like to thank the staff and editors of the Brooklyn Journal of International Law for their skillful and diligent assistance in helping me prepare this Note for publication. All errors and omissions are my own.
So I’d be very happy, maybe not in five but ten years from now, if we simply could go out of business – that [The Responsibility to Protect] becomes so much a part of international and national behavior that there is no need anymore for the U.N. to keep pushing it.

Edward Luck, Special Advisor to the Secretary-General of the United Nations, August 2011

INTRODUCTION

In February 2011, Colonel Muammar Qaddafi ordered his forces to massacre more than one thousand Libyans on account of their peaceful protests against his regime.¹ This led to the U.N. Security Council’s passage of Resolution 1970² on February 26, 2011, which invoked the Libyan leadership’s responsibility to safeguard its people, criticized the violence against its citizens, and imposed sanctions as a first means of international pressure to stop the violence.³ On March 17, after

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³ See Evans, Kamener Oration, supra note 1.
it became clear that Col. Qaddafi was planning a major attack on Benghazi, the U.N. Security Council passed Resolution 1973, allowing for coercive military action to take “all necessary measures’ to enforce a no-fly zone, and ‘all necessary measures . . . to protect civilians and civilian populated areas under threat of attack.”

In pursuing these objectives, Resolution 1973 implemented an international legal doctrine known as the Responsibility to Protect (‘R2P’). R2P proposes that when a country fails to protect its citizens from one of four mass atrocities—genocide, war crimes, ethnic cleansing, and crimes against humanity—it is the responsibility, and indeed the duty, of the international community to prevent the atrocity from going forward. The impetus for R2P came from a series of humanitarian catastrophes in the twentieth century. Some of these garnered Securi-

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7. See U.N. Secretary-General, Remarks on Responsible Sovereignty: International Cooperation for a Changed World at Berlin Event, U.N. Doc. SG/SM/11701 (July 15, 2008) [hereinafter Remarks on Responsible Sovereignty]; see also Elizabeth F. DeFeis, The Responsibility to Protect and International Justice, 10 J. INT’L BUS. & L. 91, 98 (2011) (“The goal [of the R2P] is to develop an international legal norm or policy, which achieves international protection, international accountability, and the prevention and deterrence of further occurrences of mass atrocities and serious crimes.”).

8. See, e.g., Samantha Power, Bystanders to Genocide, ATLANTIC (Sept. 2001), http://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/4571/ (reporting that approximately 800,000 Tutsi Rwandans were murdered by the Hutu).
ty Council resolutions that authorized military intervention or other action under Chapter VII of the U.N. Charter, including episodes in Somalia, Liberia, Rwanda, Haiti, Sierra Leone and Kosovo. Yet while the passage of these resolutions led some scholars to assume an emerging challenge to traditional notions of state sovereignty, the Security Council’s efforts did not have a profound physical effect on halting the killing of innocent people. Ethnic cleansing in Kosovo, in particular

9. U.N. Charter, ch. VII.


By 1992, almost 4.5 million people, more than half the total number in the country, were threatened with starvation, severe malnutrition and related diseases. The magnitude of suffering was immense. Overall, an estimated 300,000 people, including many children, died. Some 2 million people, violently displaced from their home areas, fled either to neighbouring countries or elsewhere within Somalia. All institutions of governance and at least 60 per cent of the country’s basic infrastructure disintegrated.

lar, emphasized the failings of the U.N.’s traditional approach and fueled the development of R2P.\textsuperscript{18} By 2008, Secretary-General Ban Ki–Moon stated that R2P “is a concept, not yet a policy; an aspiration, not yet a reality.”\textsuperscript{19}

Yet, after Resolution 1973’s passage in 2011, R2P is no longer just a concept; it is a reality for Libyans, the United States, and the North Atlantic Treaty Organization (“NATO”).\textsuperscript{20} It is not merely an aspiration of those members of the international community who support military intervention. While the response to the Libyan crisis was not the first use of R2P,\textsuperscript{21} it was the first time the doctrine had been used to impose military force in order to protect civilians.\textsuperscript{22} As a result, world leaders, international and foreign policy experts, and humanitarian organizations have had a moment to reflect on the successes and failures of R2P.\textsuperscript{23}


\textit{Id.}; \textit{Flashback to Kosovo’s war}, BBC NEWS (July 10, 2006, 15:02 GMT 16:02 UK), http://news.bbc.co.uk/2/hi/europe/5165042.stm (“Meanwhile, a campaign of ethnic cleansing against Kosovo Albanians was initiated by Serbian forces. Hundreds of thousands of refugees fled to Albania, Macedonia and Montenegro. The international tribunal in The Hague said its investigators had found at least 2,000 bodies.”).


\textsuperscript{19} Remarks on Responsible Sovereignty, \textit{supra} note 7.

\textsuperscript{20} See, e.g., Fahim, Shadid & Gladstone, \textit{supra} note 1.

\textsuperscript{21} See \textit{infra} Part III.

\textsuperscript{22} See \textit{infra}; Alex J. Bellamy, \textit{Libya and the Responsibility to Protect: The Exception and the Norm}, 25 \textit{ETHICS & INT’L AFF.} 1, 1 (Fall 2011) [hereinafter Bellamy, \textit{The Exception and the Norm}]; Bellamy & Williams, \textit{supra} note 4, at 825 (“[T]he situation in Libya marked the first time the council had authorized the use of force for human protection purposes against the wishes of a functioning state.”).

\textsuperscript{23} See, e.g., Luck, \textit{supra} note 6. For example, the government of Brazil proposed a parallel concept to R2P called “Responsibility While Protecting.”

Gareth Evans, Co-Chair, Global Centre for the Responsibility to Protect,
This Note will argue that preventing humanitarian atrocities (hereinafter “humanitarian prevention”) stands alone as customary international law (“CIL”), meaning that nations already operate under an obligation to prevent mass atrocities independent of the R2P doctrine. The question whether humanitarian intervention, or unauthorized military intervention (hereinafter “military intervention”) is CIL is not a new one, and this Note does not attempt to look again at whether R2P advances the legality of unilateral military intervention. Rather, this Note supports a statement made by Gareth Evans, co-chair of the International Commission on Intervention and State Sovereignty Report, arguing against the narrow view that “R2P is just another name for military intervention,” by recognizing that prevention and rebuilding—two fundamental elements of R2P, as will be discussed in detail below—expand...
the doctrine beyond such a narrow scope.\textsuperscript{27} In other words, there is sufficient evidence that humanitarian prevention—
independent of its role as a component of R2P—enjoys CIL status,\textsuperscript{28} regardless of the legal status of military intervention.\textsuperscript{29}


\textsuperscript{28} Discussed infra in Part III.

\textsuperscript{29} There are two lines of argument that question the legality of military intervention. First, the case that military intervention is illegal rests most obviously in the language of the U.N. Charter. Article 2(4), which plainly prohibits the use of force by states. U.N. Charter art. 2, para. 4. Even where the scope of the U.N. provision could be narrowed to outlaw force only “against the territorial integrity or political independence” of states, in practice, this argument has failed. See, e.g., Corfu Channel (U.K. v. Albania), 1949 I.C.J. 4 (Apr. 9) (Britain arguing, and the ICJ rejecting, the argument that its unwelcomed sweep for mines in Albanian waters did not meet the level of intervention prohibited by Article 2(4)). Thus, any customary international law would have to overcome the strong presumption that military intervention is illegal. Second, in 2006, years before R2P’s use in Libya, some scholars viewed R2P as a comprehensive approach to military intervention. See Hamilton, supra note 16, at 293; see also Bellamy, The Exception and the Norm, supra note 22, at 1 (“Where it was once a term of art employed by a handful of like-minded countries, activists, and scholars, but regarded with suspicion by much of the rest of the world, [R2P] has become a commonly accepted frame of reference for preventing and responding to mass atrocities.”); Thomas G. Weiss, RtoP Alive and Well After Libya, 25 Ethics \& Int’l Aff. 1, 1 (Fall 2011) (“With the exception of Raphael Lemkin’s efforts on behalf of the 1948 Genocide Convention, no idea has moved faster in the international normative arena than [the R2P.]”; but see Helene Cooper & Scott L. Malcolmson, Welcome to My World, Barack, N.Y. Times, Nov. 13, 2008, (Magazine), at 44, 49 (quoting former Secretary of State Condoleezza Rice, “[W]e thought the Responsibility to Protect meant something . . . . [but] in the Darfur case it has turned out to be nothing but words. I think it has been an enormous embarrassment for the Security Council and for multilateral diplomacy.”). However, a universally recognized approach to humanitarian crises does not necessarily mean that military intervention itself is recognized CIL. See Vesel, supra note 96, at 14 (“The difficult question to answer is whether the U.N. Security Council’s power to evaluate threats to international peace and security is a power granted primarily to the Security Council or exclusively to it.”). For example, those legal scholars who support military intervention often call for it to be codified in the U.N. Charter or a General Assembly Resolution. Id.; see generally Burton, supra note 25.
Part I of this Note discusses the background of R2P leading up to its formal recognition by the U.N. General Assembly in 2005. Part II reviews one modern approach to defining customary international law, under which humanitarian prevention may best be analyzed. Finally, Part III identifies humanitarian prevention as customary international law and addresses R2P and Libya, considering how the crisis in Libya may have resulted in an exceptional application of R2P.

I. BACKGROUND OF R2P

A. The Impetus for R2P

The international conflicts of the early twentieth century, including both World Wars, encouraged the development of the U.N. Charter. That Charter was deliberately crafted to place a strong emphasis on state sovereignty. But by the end of the century, numerous instances of humanitarian crises—often the very kind proscribed by the U.N. Charter—forced the international community to consider how to respond to mass atrocity when traditional notions of state sovereignty counseled against any kind of interference. Though by no means the only example of humanitarian crisis in the late twentieth century, this

30. G.A. Res. 60/1, supra note 6, ¶¶ 138–139.
33. ICISS REPORT, supra note 27, at para. 1.35 (“The defen[s]e of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people.”). Brookings Institution scholar Francis Deng, who was later appointed the U.N.’s Special Advisor for the Prevention of Genocide, co-authored Sovereignty as Responsibility. See FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY (1996).
34. Following the 1994 Rwandan genocide, the international community struggled once again as it considered how to respond to the humanitarian crisis in Kosovo in 1998–1999. See Gregory C. Shaffer & Mark A. Pollack, Hard Versus Soft Law in International Security, 52 B.C. L. REV. 1147, 1211 (Sept. 2011). There, the Federal Republic of Yugoslavia ("FRY") reportedly performed major crimes against humanity—such as rape, mutilation, and murder—on the Kosovo-Albanian population. See Horrors of Kosovo Revealed, BBC NEWS (Dec. 6, 1999), http://news.bbc.co.uk/2/hi/europe/551875.stm. At the beginning of the crisis, approximately 500,000 Albanians in Kosovo fled their homes to seek safety. See Rapid Needs Assessment Among Kosovar Refugees Hosted by Albanian Families and Assessment of Human Rights Violations Committed in Kosovo,
section will review the Rwandan genocide in some detail in order to demonstrate the strong motivation for adopting R2P.

In March of 1998, President Clinton issued what would later be termed the “Clinton apology” on the tarmac of the Rwandan airport. His apology came four years after Hutu militiamen murdered some 800,000 Tutsi Rwandans. Samantha Power, the Senior Director for Multilateral Affairs in the National Security Council in the Obama Administration, has


35. Power, Bystanders to Genocide, supra note 8, at 2.
36. See id. The author quotes President Clinton’s speech:

It may seem strange to you here, especially the many of you who lost members of your family, but all over the world there were people like me sitting in offices, day after day after day, who did not fully appreciate [pause] the depth [pause] and the speed [pause] with which you were being engulfed by this unimaginable terror.

Id. Clinton also said:

The international community, together with nations in Africa, must bear its share of the responsibility for this tragedy . . . We did not act quickly enough after the killing began. We should not have allowed the refugee camps to become safe havens for the killers. We did not immediately call these crimes by their rightful name: genocide.

John Ryle, A Sorry Apology from Clinton, GUARDIAN (Apr. 13, 1998), http://www.guardian.co.uk/Columnists/Column/0,5673,234216,00.html (criticizing Clinton’s apology as being disingenuous because the lack of intervention was in fact U.S. policy, not an administrative oversight).

37. See Power, Bystanders to Genocide, supra note 8, at 1.
38. Power is also a winner of the Pulitzer Prize for her book, A Problem from Hell: America and the Age of Genocide. See generally, SAMANTHA POWER,
suggested that the cause of the United States’ delayed recognition of the Rwandan atrocity stemmed from the existence of two competing narratives. To those on the ground, she explains, Hutu actions clearly constituted genocide; whereas, in the minds of U.S. policymakers, Rwanda was engaged in a civil war. In Washington, the images of brutal killing in Rwanda immediately brought back memories of the failed peacekeeping efforts in Somalia in 1993. As a result, one United States official recalled, “[a]nytime you mentioned peacekeeping in Africa . . . the crucifixes and garlic would come up on every door.” Although the United States eventually voted in the Security Council to send peacekeeping troops to Rwanda, it conveyed in no uncertain terms that it would not be sending U.S. troops. By May of 1994, six weeks after the most serious fighting began, then-U.S. Secretary of State Warren Christopher finally acknowledged that the extermination of Tutsi was a genocide. Whatever responses under the Genocide Convention this admission implicated, hundreds of thousands of Tutsi were already dead.

In 2000, after the majority of violence had abated in both the Rwanda and Kosovo conflicts, then-U.N. Secretary-General Kofi Annan asked the international community, “if military intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?” With the blessing of the U.N., the


39. See Power, Bystanders to Genocide, supra note 8, at 8.
40. See id. (emphasis added).
41. See id. During peacekeeping efforts in Somalia in 1993, which lasted for over ten months, a firefight broke out in which images of wounded U.S. soldiers, and one dead U.S. Ranger, were broadcast on Somali television. At least eighteen American soldiers died and seventy-three were wounded throughout the conflict. See id.
42. Id.
43. Id.
44. Id.
45. See Power, Bystanders to Genocide, supra note 8, at 15.
46. See id. at 14. By May 18, humanitarian agencies put the death toll at between 200,000 and 500,000, mostly Tutsi, civilians. See id. On either side of the estimation, these numbers easily met the stipulations of the Genocide Convention. See id.
47. ICISS REPORT, supra note 27, at vii (2001).
government of Canada and world organizations endeavored to answer this question.48

B. The International Commission on Intervention and State Sovereignty

Following Secretary-General Kofi Annan’s challenge, Canada established the International Commission on Intervention and State Sovereignty (“ICISS”).49 The goal of the ICISS was to articulate a fresh perspective on the issues that encompass the sovereignty-intervention debate.50 The ICISS presented its Report (“Report”) in December 2001,51 and in doing so, succeeded in shifting the discussion from one of sovereignty versus military intervention to one that focused on a state’s inherent responsibility to protect its citizens.52 The Report ushered in a major linguistic and conceptual change by assuming that sovereignty includes a responsibility for states to protect their national citizenry from crimes against humanity.53 Furthermore, the Report went so far as to say that when states fail to protect their own populations, it is permissible, indeed incumbent upon, other states to prevent violence against innocent civilians.54


49. See generally id. The ICISS was composed of the Government of Canada together with a group of major foundations. See id., at vii.

50. See id., ¶ 1.41.


53. See ICISS REPORT, supra note 27, ¶ 1.41; see also Massingham, supra note 25, at 816 (“[T]here seems to be consensus that speaking in terms of a responsibility to protect rather than right to intervene provides a very significant departure from the 1990s articulations of military intervention. Indeed, this language shift is seen by many as being very powerful.”).

54. See Dastoor, supra note 52, at 28.
While the crux of the Report addresses the question of which circumstances make it appropriate for states to take coercive military action against another state in order to protect people at risk, it also lays the foundation for the creation of the customary international law of preventing humanitarian crises. The Report presented this analysis in three parts: the “responsibility to prevent,” the “responsibility to react,” and, when the proper reaction calls for military intervention, the “responsibility to rebuild.”

1. The Responsibility to Prevent

The Report identifies three essential conditions that states must meet in order to effectively prevent the large-scale human suffering and loss about which the ICISS is concerned. These conditions are: (1) “early warning,” or knowledge of an imminent conflict situation and the dangers that accompany it; (2) the so-called “preventive toolbox,” wherein policy measures are available to make a positive difference with respect to that conflict; and (3) the “political will” to implement the policies that will prevent the pending humanitarian crisis. The goal of the ICISS was not to reinvent the wheel on conflict prevention, yet the Report goes into some detail about the three conditions above and continuously mentions the importance of prevention as a precursor to military intervention.

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55. See generally, ICISS REPORT, supra note 27.
56. See ICISS REPORT, supra note 27, ¶ 4.1

When preventive measures fail to resolve or contain the situation and when a State is unable or unwilling to redress the situation, then intervention measures by other members of the broader community of States may be required. These coercive measures may include political, economic or judicial measures, and in extreme cases—but only in extreme cases—they may also include military action.

Id.
57. Id. ch. 3.
58. ICISS REPORT, supra note 27, ch. 4.
59. Id. ch. 5.
60. See id., ¶ 3.9.
61. Id.
62. Id.
63. Id.
64. See, e.g. id., ¶¶ 3.9, 4.1, 4.13, 4.38; see also Charity, supra note 52, at 93.
2. The Responsibility to React

The ICISS clarifies that the responsibility to react must first and foremost limit state actions to those of equal proportion to the seriousness of the crisis. Possible reactions include political, economic, or judicial measures, and, in the most extreme cases, they may also include military intervention. The Report identifies six criteria that together form the predicate to any military intervention: “right authority, just cause, right intention, last resort, proportional means and reasonable prospects.” The ICISS does not attempt to supersede domestic, sovereign control of the state—the sanctity of which is reflected

65. See ICISS REPORT, supra note 27, ¶ 4.39 (“The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question.”).

66. See id. ¶ 4.1. The Commission also notes that measures short of military intervention should be implemented with as much care. See id. ¶ 4.5. Economic sanctions, in particular, have been criticized for having much harsher outcomes on civilian populations than the leaders against whom the sanctions were originally imposed. See id. ¶ 4.5.

67. Id. ¶ 4.16 (original emphasis omitted). There have been numerous discussions, and literature is extensive, on what conditions are required to trigger military intervention in reaction to a humanitarian crisis. See, e.g., id. ¶ 4.15 (“It is true that there are presently almost as many different lists of criteria for military intervention as there are contributions to the literature and political debate on this subject.”). However, there is substantial indication that the Security Council is unlikely to endorse either the ICISS’s recommendations for conditions that elicit military intervention or any other inflexible triggers. See, e.g., Evans, Kamener Oration, supra note 1; see also Wheeler, supra note 25, at 552, 559, 564 (discussing the positions of China, Russia and the United States in response to a British proposal that permits military intervention without Security Council authorization in the event of a humanitarian crisis. Each of those three permanent members of the Security Council rejected the proposal.); Letter from Ambassador John Bolton, Permanent Representative of the United States of America, to the United Nations (Aug. 30, 2005) (on file with author). U.S. Ambassador John Bolton acknowledged:

[T]he international community has a responsibility to act when the host state allows such atrocities. But the responsibility of the other countries in the international community is not of the same character as the responsibility of the host . . . We do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.

Id.
in Articles 2(4)\textsuperscript{68} and 2(7)\textsuperscript{69} of the U.N. Charter—and therefore recommends that the Security Council approve all military action under Chapter VII.\textsuperscript{70} This was the method used to authorize intervention in Libya, pursuant to Resolutions 1970 and 1973.\textsuperscript{71} The Report then acknowledges that intervention may not be available in every circumstance, but rejected this line of reasoning as an excuse to avoid any intervention efforts.\textsuperscript{72} This insight is particularly relevant given the current debate, as of this writing, over why military intervention was invoked in Libya but has not been used in the same capacity in Syria.\textsuperscript{73}

3. The Responsibility to Rebuild

Finally, the Report mandates an obligation to rebuild post-intervention.\textsuperscript{74} Whenever an intervening body considers military intervention, the Report suggests, it should also formulate a post-intervention strategy to prevent the resurgence of whatever factors originally instigated the crisis.\textsuperscript{75} The Report goes on to address some of the main impediments to effective post-intervention strategy, such as security, justice and reconcilia-

\begin{itemize}
  \item \textsuperscript{68} U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").
  \item \textsuperscript{69} U.N. Charter art. 2, para. 7.
  \item Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to [settlement] under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.
  \item \textsuperscript{70} U.N. Charter, ch. VII. See ICISS REPORT, supra note 27, ¶ 6.13; see also Defeis, supra note 7, at 93 (noting that initial resistance to the R2P lay in concerns that addressing human rights as member states would violate Article 2(7) of the U.N. Charter).
  \item \textsuperscript{71} See S.C. Res. 1970, supra note 2; see also S.C. Res. 1973, supra note 4.
  \item \textsuperscript{72} See ICISS REPORT, supra note 27, ¶ 4.43; see also James Pattison, The Ethics of Military intervention in Libya, 25 ETHICS & INT’L AFF. 1, 7 (2011) ("[W]hen compared to no action in Libya or anywhere else . . . saving some lives is better than saving none.") (emphasis omitted).
  \item \textsuperscript{73} See infra note 217 and accompanying text.
  \item \textsuperscript{74} See ICISS REPORT, supra note 27 at ch. 5.
  \item \textsuperscript{75} See id. ¶ 5.
\end{itemize}
tion, and economic development.\textsuperscript{76} Providing recommendations for addressing these concerns, the Report emphasizes that, though valid, such difficulties must be viewed as obstacles to overcome rather than excuses for abstaining from needed intervention.\textsuperscript{77}

\textbf{C. High-Level Panel on Threats, Challenges and Change and the “Three-Pillar” Approach}

In 2005, the U.N. Secretary-General’s High-Level Panel on Threats, Challenges and Change issued a report (“High-Level Panel Report”) entitled \textit{A More Secure World: Our Shared Responsibility}.\textsuperscript{78} By citing Chapter VII and the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”),\textsuperscript{79} the High-Level Panel Report counters the conception that non-intervention is an appropriate response to humanitarian atrocities.\textsuperscript{80} It adopts the ICISS’s view that when member states sign the U.N. Charter, they not only benefit from establishing themselves as sovereign nations but also accept the responsibility to protect human lives from atrocities.\textsuperscript{81} The High-Level Panel Report also acknowledges that history provides numerous examples of sovereign states having been either unable or unwilling to protect its citizens, and in doing so the report places some of the responsibilities to protect on the international community.\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{76} ICISS \textit{Report}, supra note 27, at ch. 5.
\item \textsuperscript{77} Id. ¶ 5.6–5.7.

\begin{quote}
We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.
\end{quote}

\textit{Id}.
\item \textsuperscript{79} See G.A. Res. 260, supra note 32.
\item \textsuperscript{80} See High-Level Panel Report, supra note 78, ¶ 200.
\item \textsuperscript{81} See id. ¶ 29.
\item \textsuperscript{82} See id. Any collective action on behalf of the international community should be done in strict accordance with the U.N. Charter and the Universal Declaration of Human Rights. \textit{Id}.
\end{itemize}
Once the High-Level Panel Report was released in 2004, the General Assembly codified its support for R2P in the Outcome Document from the 2005 World Summit. Though nonbinding, the Generally Assembly’s resolution required significant negotiation and represented a substantial step forward in affirming international commitment to R2P. Shortly thereafter, in April 2006, the Security Council expressly adopted the language of R2P in Resolution 1674 on the Protection of Civilians in Armed Conflict.

Secretary-General Ban Ki–Moon has shown particular interest in and support for R2P. He has given a number of speeches on the topic since the beginning of his term as Secretary-General, perhaps most notably in 2008 when he laid out the succinct “three pillars” approach, encapsulating the ICISS’s original framework for R2P. The first pillar states that individual nations unanimously affirm their responsibility to protect their populations from four crimes, whether acted or incited: genocide, war crimes, ethnic cleansing and crimes

83. G.A. Res. 60/1, supra note 6, ¶¶ 138–139.
84. However, because of the negotiations, paragraphs 138 and 139 of the Outcome Document support the concept in general but exclude some of the measures that would guide its implementation. See Shaffer & Pollack, supra note 34, at 1232.
86. See, e.g., Remarks on Responsible Sovereignty, supra note 7 (focusing on the function of regional and sub-regional arrangements in accordance with the R2P).
87. See, e.g., U.N. Secretary-General, Implementing the Responsibility to Protect: Rep. of the Secretary-General, ¶ 11, U.N. Doc A/63/677 (Jan. 12, 2009) [hereinafter Implementing].
88. See generally, id.; see also Remarks on Responsible Sovereignty, supra note 7.
89. See G.A. Res. 260, supra note 32 (“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . . .”). For example, genocide occurred when Hutu murdered 800,000 Tutsi in Rwanda. See Power, Bystanders to Genocide, supra note 8, at 15.
90. War crimes are “grave breaches” to the 1949 Geneva Convention, such as “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” Geneva Convention, art. 50, Aug. 12, 1949, 6 U.S.T. 3516.
against humanity. The second pillar states that the international community endorses this goal by demanding preventive steps that neither require Security Council unanimity nor come after images of devastation and death that “shock the conscience of the world.” The third pillar insists that U.N. member states respond to the four listed crimes quickly and decisively, and in accordance with the U.N. Charter. Such a response may draw upon a range of U.N. resources and should preempt the atrocity from unfolding while emphasizing flexibility and durability.

It is with this in mind that this Note turns to a brief discussion of Customary International Law and ultimately considers whether the second pillar—centering on humanitarian prevention—is an international norm.

II. CONTEMPORARY CUSTOMARY INTERNATIONAL LAW

CIL has frequently been discussed in the context of R2P and military intervention. For the purposes of this Note, military intervention refers to unilateral military action without the Security Council’s authentication under Chapter VII of the U.N. Charter. Military action invoked under the R2P framework is legally authorized by the Security Council, and therefore is contemplated separately from military intervention. Such U.N. authorizations abide by the U.N. Charter by seeking to “maintain or restore international peace and security” to the

(May 27, 1994) (“[T]he Commission confirms its earlier view that ‘ethnic cleansing’ is a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.”).

93. Remarks on Responsible Sovereignty, supra note 7.
94. See id.
95. See id.
97. See U.N. Charter art. 42; Vesel, supra note 96, at 13 (“The issue here is unilateral intervention, which for the purposes of this article is defined as any intervention outside of a specific U.N. Security Council resolution, as authorized under Article 42 of the U.N. Charter.”).
98. See U.N. Charter ch. VII; see also ICISS REPORT, supra note 27, ¶ 6.13.
Section A will discuss the traditional view of CIL. Section B will introduce one contemporary view of CIL in which state action is deemphasized. This contemporary approach will then be applied in Part III to show that humanitarian prevention is CIL.

A. Traditional View of Customary International Law

For most of the twentieth century, treaties, such as the U.N. Charter or other multilateral agreements between two or more nations, have governed international laws. Before the start of the first World War, however, CIL was the principle form of international law, in both the sphere of public international law—laws governing nations—and that of private international law—laws governing private disputes between international parties.

CIL has historically been composed of two sources: state practice and opinio juris. “State practice,” objectively measured, refers to those actions that have become internationally legitimized through “general and consistent” usage. Opinio juris is “a subjective feeling of legal obligation regarding the practice in question.” For example, it is fair to assume that opinio juris cautions state leaders against committing genocide.

99. U.N. Charter art. 42; see also Vesel, supra note 96, at 13–14 (discussing how customary international law may justify intervention where the U.N., through Art. 42, has not).

100. See infra; see also Curtis A. Bradley & Mitu Gulati, Customary International Law and Withdrawal Rights in an Age of Treaties, 21 DUKE J. COMP. & INT’L L. 1, 3 (Fall 2010) [hereinafter Bradley & Gulati, Withdrawal Rights]. (‘Far from being well understood and accepted, the theory of CIL today is riddled with uncertainty.”).

101. Id.


103. See Vesel, supra note 96, at 13. A small subset of norms are considered “preemptory norms,” or “jus cogens norms,” which are so absolute in their character that they do not permit any exceptions. Bradley & Gulati, Withdrawal, supra note 102, at 212. Examples of jus cogens norms that cannot be overridden, even by treaty or prior persistent objection, are genocide, slavery, and torture. Id. at 212–13.


Because opinio juris is “generally contained within a particular dense [state] practice,” it does not usually require its own showing unless there is a specific ambiguity concerning when the norm is invoked.106 Using the same example, because states generally do not engage in genocide, a separate showing of subjective opinio juris is not necessary to demonstrate that genocide is illegal under CIL.

Traditionally, as long as state practice and opinio juris attach to a specific action, that action is considered legitimate under international law and may be binding without an international agreement, treaty, or international court decision.107 As a result, CIL can bind states universally and may be based significantly less on explicit consent than treaties or other international agreements,108 which are only binding on party states.109 Moreover, as they are based on implicit understandings and custom, there is typically no opportunity for a state to unilaterally “withdraw” from observation of a CIL, as it might do with a statute.110

B. One Contemporary View of Customary International Law

There is significant debate about what sources are acceptable for fulfilling the requirements of CIL.111 For example, some

107. Various scholars treat this standard definition differently; some seek to deemphasize the subjective element (opinio juris) and others have attempted to deemphasize the objective element (state action). See Bradley & Gulati, *Withdrawing*, supra note 102, at 210.
108. Id. at 214.
109. Id.
110. Id.
111. Id. In a subsequent article, Professors Bradley and Gulati expound,

It is not clear, for example, what counts as state practice. Should a nation’s treaty practice count? Can evidence of opinio juris, such as positions taken in international institutions, also constitute state practice? How much state practice must there be, and for how long? Similar questions abound for opinio juris. For example, to what extent do the views expressed by a state with respect to international resolutions or treaty norms count as evidence of opinio juris for CIL? To what extent can opinio juris be inferred from practice? More fundamentally, if CIL requires that nations believe that they are legally obligated, how does that belief arise in the first place?
scholars cite treaties as evidence of state practice in order to justify a new principle of CIL, a practice that other scholars question. And though the International Court of Justice (“ICJ”) has accepted some international resolutions, such as those promulgated by the U.N. General Assembly, as evidence of a new CIL, critics have questioned how nonbinding agreements can satisfy the requirements of state practice and opinio juris. This is particularly relevant to establishing humanitarian prevention as CIL in light of the General Assembly’s endorsement of the R2P at the 2005 World Summit.

With the conception of establishing CIL in flux, Professors Curtis A. Bradley and Jack L. Goldsmith identified a contemporary way to analyze the creation of CIL, which challenges the traditional approach in three ways. First, it relies less frequently on state practice than previous conceptions of CIL. Second, it posits that CIL has the potential to develop quickly. And third, it considers the ways in which CIL can regulate the relationship between the state and its citizens, rather than the relationship between two nations. Under this approach, an abundance of human rights violations are now widely accepted as CIL that would not be otherwise.

Bradley & Gulati, Withdrawal Rights, supra note 100, at 4.

112. See, e.g., Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 23 (2005) (“Treaties, especially multilateral treaties, but also bilateral ones, are often used as evidence of customary international law, but in an inconsistent way.”).

113. See, e.g., Jonathan I. Charney, International Agreements and the Development of Customary International Law, 61 Wash. L. Rev. 971, 972 (1986) (discussing the ambiguities raised by the question of “which circumstances of negotiation and conclusion of international agreements contribute to new rules of customary law”).

114. See Bradley & Gulati, Withdrawing, supra note 102, at 213.

115. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 254–55 (July 8) (“[General Assembly resolutions] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris.”).

116. See generally G.A. Res. 60/1, supra note 6, ¶¶ 138–139.


118. Id. at 842.

119. Id.

120. Id.

121. Id. Bradley and Goldsmith go on to state:
1. Deemphasizing State Practice

The contemporary understanding of CIL is less tied to state practice than the traditional model, evidenced in large part by the acceptance of “General Assembly resolutions, multilateral treaties, and other international pronouncements” as sufficient evidence of state practice. Put another way, nations’ verbal or written commitments regarding a specific action are themselves considered state action. Human rights norms are more likely to be governed by CIL under this trend because a country may find itself party to a General Assembly resolution committed to preventing humanitarian crises when that country may not have independently committed to do so otherwise.

For example, in an ICJ case about U.S. military intervention in Nicaragua, the court relied significantly upon General Assembly resolutions and multilateral treaties to prove the existence of CIL principles regarding the acceptable use of force and non-intervention. In regards to state practice, the ICJ said:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated

There is widespread agreement that CIL now protects the rights to be free from genocide, slavery, summary execution or murder, “disappearance,” “cruel, inhuman or degrading treatment,” “prolonged arbitrary detention,” and “systematic racial discrimination.” An intergovernmental human rights committee recently asserted that CIL also protects “freedom of thought, conscience and religion,” a presumption of innocence, a right of pregnant women and children not to be executed, and a right to be free from expressions of “national, racial, or religious hatred.”

Id. at 841–842 (citing Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987); United Nations, Human Rights Committee, General Comment Adopted by the Human Rights Committee Under Art. 40, ¶ 4, of the International Covenant on Civil and Political Rights, General Comment No. 24(52) at 3, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994)).

122. Bradley & Goldsmith, supra note 117, at 839.

123. See infra.

as breaches of that rule, not as indications of the recognition of a new rule.\textsuperscript{125}

The ICJ assumes the existence of a rule before demonstrating state practice in support of the CIL and then concludes state actions to the contrary are evidence of a breach of the rule.\textsuperscript{126}

The need for independent, concrete examples of state practice in order to establish a CIL is thus diminished. Responding to this statement, one scholar—endorsing the traditional conception of CIL—lamented that “[t]he Court thus completely misunderstands customary law.”\textsuperscript{127}

The United States has demonstrated the same decreased emphasis on state practice embraced by the ICJ. The United States Court of Appeals for the Second Circuit, in \textit{Filartiga v. Peña-Irala},\textsuperscript{128} consistently referred to treaties, the U.N. Charter, and General Assembly resolutions to satisfy the state practice requirement and thus establish a CIL principle against the use of torture.\textsuperscript{129} It even acknowledged the frequency with which states do not comport to this rule, but then rejected the conclusion that this fact prevented them from finding evidence of a CIL.\textsuperscript{130} While some have criticized the decreased importance of state practice in identifying CIL,\textsuperscript{131} the development has no doubt been instrumental to determining that many human rights violations are CIL.\textsuperscript{132} Indeed, it is also instrumental in finding that humanitarian prevention is a CIL, as there is evidence that some states have failed to prevent humanitarian atrocities.

\begin{itemize}
  \item\textsuperscript{125} \textit{Id.} at 98.
  \item\textsuperscript{126} See \textit{id}.
  \item\textsuperscript{128} Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (applying the Alien Tort Statute to hold aliens liable for tortious conduct, committed abroad, that violates the law of nations or a treaty of the United States).
  \item\textsuperscript{129} See \textit{id.} at 882–885.
  \item\textsuperscript{130} \textit{Id.} at 884 (“The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law.”).
  \item\textsuperscript{131} For example, in response to the ICJ’s opinion in the Nicaragua case, Professor D’Amato stated, “[i]t reveals the August judges of the International Court of Justice as collectively naive about the nature of custom as the primary source of international law.” D’Amato, supra note 127, at 105.
  \item\textsuperscript{132} See \textit{id}.
\end{itemize}
2. Quick Development

A second difference between the traditional concept of CIL and this more modern approach is the opportunity under the latter for CIL to develop rapidly.\(^{133}\) For example, the ICJ stated that “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law.”\(^{134}\) One reason for this reduced temporal emphasis, proponents suggest, is that developments in communication technology allow a state’s actions to be publicized quickly.\(^{135}\) Another reason is that the proliferation of international organizations and institutions “accelerate[s] the process of customary law formation by relying upon the unique form of state practice which occurs in multilateral organizations like the United Nations.”\(^{136}\) Thus, the fact that R2P was not codified until the early twenty-first century should not count against the argument for humanitarian prevention as CIL.

3. Relationship between Nations and Their Citizens

Finally, the nature of the relationships traditionally covered by international law has changed.\(^{137}\) Rather than only governing relations among nations, CIL is now implicated in the relationship between the ruling party of a nation and its citizens.\(^{138}\) But with the rise of human rights norms that are recognized as CIL, such as genocide and ethnic cleansing, many of which focus on the treatment of citizens by their state, there has been a natural move toward viewing CIL as laws that govern the relationship between a nation and its citizens.\(^{139}\) This is clearly implicated by R2P when a leader fails to uphold his responsibility to protect the state’s civilians.

\(^{133}\) Bradley & Goldsmith, supra note 117, at 840.
\(^{137}\) Bradley & Goldsmith, supra note 117, at 840.
\(^{138}\) Id at 841.
\(^{139}\) Id.
The military intervention in Libya has given the international community a moment to reflect on the successes and failures of the R2P framework. In a 2010 article examining the role of R2P five years after the 2005 World Summit, Alex Bellamy, a professor of Peace and Conflict Studies at University of Queensland, argued that the first pillar of R2P (as articulated by Secretary-General Ban Ki-Moon) simply restates human rights law. The prohibition of genocide, war crimes, ethnic cleansing, and crimes against humanity is already well established in CIL. But pillars two and three, he continues, are not CIL themselves. He makes this determination partly by recognizing the inconsistent and shallow evidence of state practice. Yet considering the modern conception of CIL discussed in Part II, wherein state practice is less important to establishing human rights principles of CIL, Bellamy’s hesitancy to recognize pillar two—preventive measures—as an international norm may be overly cautious, considering contemporary efforts to prevent mass atrocities. Section A will demonstrate how humanitarian prevention is CIL when evaluated under Bradley and Goldsmith’s framework. Section B will identify the anomaly of Libya, in light of the military intervention there in 2011. Finally, Section C will briefly note the crisis in Syria, currently unfolding in 2012, and how the relevant actors there are still adhering to humanitarian prevention despite ongoing violence.

141. Id. (“[The] R2P’s first pillar is therefore best understood as a reaffirmation and codification of already existing norms.”).
142. See id. at 160–62. The extent to which pillars two and three can be considered norms is whether there is a shared expectation that “1) governments and international organizations will exercise this responsibility, that 2) they recognize a duty and right to do so, and that 3) failure to act will attract criticism from the society of states.” Id. at 161. Further, even if pillars two and three are norms, they are weakened by indeterminacy, or the R2P’s flexibility regarding when and how best to respond to humanitarian crises. See id. at 161–62.
143. Id. at 161.
A. Humanitarian Prevention

The international community’s responsibility for humanitarian prevention is itself CIL. Not only does this mean that there exists a legal obligation for states to prevent humanitarian crises, but also—if preventive measures are applied effectively\(^\text{144}\)—that there is less need for the Security Council to invoke military intervention under the reaction prong of R2P before intervening countries may take legally justified action. Therefore, even while military intervention in the form of unilateral military intervention has not yet been established in CIL,\(^\text{145}\) humanitarian prevention certainly has\(^\text{146}\) when considered under the three prongs of Bradley and Goldsmith’s framework: de-emphasis on state practice, rapid development, and CIL as

144. Importantly, past attempts at prevention techniques have not always been successful. For example, peacekeeping preventive efforts in Rwanda were too little, too late. See Power, Bystanders to Genocide, supra note 8, at 5. The U.N., commanded by Romeo Dallaire and other human rights organizations, were tasked with demilitarizing the Hutu so that the Tutsi could return without fear of being killed. See id. at 4. Dallaire was told that the 5,000 soldiers he thought would be necessary to keep peace would never be fulfilled, so he trimmed his request to 2,500. See id. This allotment was not nearly sufficient to control the Hutu extremists. See id.; see also Homans, supra note 51 (describing when Bosnian Serbs massacred more than seven thousand Muslim men and boys while Dutch U.N. peacekeepers could do nothing to prevent the violence). Similarly, during the 1993 Somalia dispute, peacekeeping efforts were likely insufficient to have a successful outcome. See Power, Bystanders to Genocide, supra note 8, at 8. Also in Somalia in 2006, after an increase in violence, the African Union and then-U.S. President George W. Bush called for a United Nations peace deployment. Bellamy, The Exception and the Norm, supra note 22, at 6. This deployment of peacekeepers, however, has not been entirely successful. See generally Paul D. Williams, Into the Mogadishu Maelstrom: The African Union Mission in Somalia, 16 INT’L PEACEKEEPING 514 (2009).

145. See supra note 25 and accompanying text.

146. The ICJ supports this argument with its decision in the 2007 case of Bosnia & Herzegovina vs. Serbia & Montenegro. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 91, ¶ 430 (Feb. 26) (holding that a state incurs responsibility “if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide”). One scholar has argued that this judgment simply reiterates the core legal premise of R2P, which is the prevention and punishment of genocide, as written in the Genocide Convention. See Louise Arbour, The Responsibility to Protect as a Duty of Care in International Law and Practice, 34 REV. OF INT’L STUD. 445, 450–51 (2008).
applied between a nation and its citizens. Established in Part II above, humanitarian prevention satisfies the latter two prongs because of the prolific action taken in the first decade of this century and the underlying purpose of R2P as a nation’s responsibility to protect its citizens from atrocity. Thus, the analysis below focuses only on opinio juris and state action.

1. Evidence of Opinio Juris: Voicing Support for Humanitarian Prevention

The ICISS Report identifies a strong commitment to prevention in R2P, evidenced in large part by its call for the international community to close the gap between rhetoric supporting preventive measures and actions that actually demonstrate a commitment to prevention. Moreover, after consultations with experts around the world, the ICISS reported that all prevention techniques must be fully exhausted before implementing military intervention, prompting some scholars to note that prevention is the most important aspect of R2P.

Though the military intervention prong of R2P gets the most attention and is arguably the most likely to be challenged, states’ concerns about sovereignty are less acute than they once were. Indeed, according to one assessment during 2005-2009
of states’ support of R2P, those portions of the ICISS Report regarding peace and prevention are fairly uncontroversial.\textsuperscript{153} Even during times where nations, particularly the United States, opposed sending their own troops to prevent mass atrocities, those same nations often acknowledge that certain peacekeeping efforts are the Security Council’s obligation to fulfill.\textsuperscript{154} Such was the case during the Rwandan genocide, when the United States used this obligation to defend the position that the peacekeeping efforts must be tenable.\textsuperscript{155}

After Resolution 1973 was passed and NATO military forces went into Libya, many anticipated a backlash against R2P at the General Assembly debate in July 2011.\textsuperscript{156} This anticipation was largely unwarranted.\textsuperscript{157} Rather than encountering criticism that NATO had gone too far in its military attack against Libya, and that Resolution 1973 itself was too much of an affront to traditional notions of sovereignty,\textsuperscript{158} “there was overwhelming support for the basic concept[] and absolutely no move to overturn it.”\textsuperscript{159} Some countries, such as Cuba, Vene-

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\textsuperscript{154} \textit{See} Power, \textit{Bystanders to Genocide}, supra note 8, at 18.

\textsuperscript{155} \textit{See id.}

\textsuperscript{156} Evans, Kamener Oration, \textit{supra} note 1; \textit{see also} Dastoor, \textit{supra} note 52, at 26.

\textsuperscript{157} \textit{See id.}

\textsuperscript{158} Since the July 2011 United Nations discussion, there has been some negativity towards NATO’s execution of the Security Council’s mandate in Resolution 1973. \textit{See} Shaffer & Pollack, \textit{supra} note 34, at 1236. Russia, China, and South Africa in particular, have accused NATO of overstepping its bounds with the intense military campaign it waged against Col. Qaddaffi’s regime. \textit{See, e.g.,} Bellamy & Williams, \textit{supra} note 4, at 845.

\textsuperscript{159} Evans, Kamener Oration, \textit{supra} note 1; \textit{see also} Eaton, \textit{supra} note 153, at 795. Gauging attitudes towards the R2P from 2005–2009, “[i]t appears as if support for a detailed responsibility to protect doctrine as actually decreased.” However, those who were outright opposed to the doctrine, such as “North Korea, Iran, and Sudan are, to varying degrees, pariahs for their human rights records and belligerency.” \textit{Id}. 
zuela, and Iran, voiced objections, but even their opposition to R2P was less vehement than in past instances. More than anything, in fact, the discussion at the July 2011 General Assembly meeting showed overwhelming and enthusiastic support for preventive measures. As in earlier debates, though perhaps stronger here, states were generally comfortable with their responsibility to protect their own citizens and to assist in that protection should another leader’s own efforts willingly or unwillingly fail. Those who voiced discomfort lay their concerns in the more intrusive forms of engagement, such as military intervention.

In 2009, Secretary-General Ban Ki–Moon released his “three pillars” report, “Implementing the Responsibility to Protect,” which challenged the U.N. member states to further their commitment to R2P “from words into deeds.” In the General Assembly debate following the release of Mr. Ban’s report, ninety-four speakers, representing 180 member states, participated in the conversation. They overwhelmingly voiced their support for the prevention and halting of mass atrocities. Most significant to the establishment of humanitarian prevention as CIL, the member states unanimously conceded to the “importance of the first two pillars and the fundamental obligation to prevent mass atrocity crimes.”

160. Evans, Kamener Oration, supra note 1.
161. See infra.
162. See Evans, Kamener Oration, supra note 1.
163. Id.
164. Remarks on Responsible Sovereignty, supra note 7; see also Implementing, supra note 87. The General Assembly formally committed itself to giving further consideration to the Secretary-General’s proposals; G.A. Res. 63/308, U.N. Doc A/RES/63/308 (Oct. 7, 2009).
166. See id.
167. Id. at 2. The assessment continues,

From Algeria to Vietnam, member states agreed on the fundamental obligation to prevent mass atrocity crimes. As the representative of Nigeria emphasized, prevention rather than intervention was the priority. Even the few member states that struck a skeptical tone, such as Pakistan and Venezuela, were more welcoming on this point. This suggested a clear avenue for action by the member states.

Id. at 6.
2. Institutional Support for Humanitarian Prevention

Since R2P’s conception, multiple government and institutional mechanisms have been established to support the doctrine.\textsuperscript{168} One example, The Global Centre for the Responsibility to Protect, was founded by international scholars and academics to transform the intellectual concept of R2P into a practical guide to proper state practice, and has been joined in its efforts by the International Crisis Group, Human Rights Watch, Oxfam International, Refugees International, and WFM–Institute for Global Policy.\textsuperscript{169} The International Coalition for the Responsibility to Protect was also established by regional and non-governmental organizations to promote normative consensus around R2P.\textsuperscript{170}

At the U.N. level, two positions have been created to oversee the implementation of the R2P principle. Francis Deng was appointed by Secretary-General Ban Ki–Moon as Special Advisor on the Prevention of Genocide.\textsuperscript{171} Edward Luck was appointed as the Special Adviser to the Secretary-General for the Responsibility to Protect.\textsuperscript{172} The designation of these positions is particularly important to humanitarian prevention because they act as early warning systems to the Security Council when specific situations could result in mass atrocity.\textsuperscript{173}

3. State Practice Supporting Humanitarian Prevention

Adopting the formula of CIL outlined in Part II, the following demonstrates sufficient state action in support of humanitarian prevention as CIL. Section a will offer evidence of state practice

\begin{itemize}
  \item \textsuperscript{168} See infra.; see also Bellamy, Five Years On, supra note 140, at 144 (“Five years on from its adoption, [R2P] boasts a Global Centre and a network of regional affiliates dedicated to advocacy and research, an international coalition of nongovernmental organizations (NGOs), a journal and book series, and a research fund sponsored by the Australian government.”).
  \item \textsuperscript{169} Who We Are, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, http://globalr2p.org/whoweare/index.php (last visited Nov. 25, 2011).
  \item \textsuperscript{170} Learn About the International Coalition for the Responsibility to Protect, INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT, http://www.responsibilitytoprotect.org/index.php/about-coalition (last visited Nov. 25, 2011).
  \item \textsuperscript{172} See id.
  \item \textsuperscript{173} See id.
\end{itemize}
in the form of binding and nonbinding international agreements. Section b will then provide evidence of state action undertaken by the Security Council.

a. International Agreements

The 2005 World Summit Outcome, codifying U.N. member states’ commitment to the three pillars of the R2P, provides the clearest demonstration of humanitarian prevention as state practice.\footnote{174} The Security Council provided further evidence in this direction in 2006 when it adopted the language of the 2005 Outcome Document in Resolution 1674.\footnote{175} Then, following the 2009 General Assembly debate regarding the Secretary-General’s “Implementing the Responsibility to Protect” report,\footnote{176} a General Assembly resolution codified the member states’ intention to give real consideration to the Secretary-General’s recommendations about how to turn the concept of R2P into state practice.\footnote{177}

b. Preventative Measures in Action

U.N. peacekeeping missions over the last decade have focused primarily on the protection of civilians.\footnote{178} While some have argued that protecting civilians is an activity distinct from preventing mass atrocity under R2P,\footnote{179} they are in fact

\footnote{174}{See G.A. Res. 60/1, supra note 6, ¶¶ 138–139.}
\footnote{175}{S.C. Res. 1674, supra note 85. Prior to Libya, the Security Council remained relatively quiet on the R2P, instead focusing on its agenda called the Protection of Civilians ("PoC"). See Jennifer Welsh, \textit{Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP}, 25 ETHICS \\& INT'L AFF. 1, 2 (2011). Welsh points out that those countries who are less supportive of the R2P have emphasized the more decisive threats to peace and security addressed by the PoC, as opposed to the broader human rights initiative sought by the R2P. \textit{Id.} at 3.}
\footnote{176}{See G.A. Res. 63/308, supra note 164.}
\footnote{177}{\textit{Id.} ("Recalling the 2005 World Summit Outcome, especially paragraphs 138 and 139 thereof . . . [d]ecides to continue its consideration of the responsibility to protect.") (emphasis omitted).}
\footnote{178}{Bellamy \\& Williams, supra note 4, at 828. Note that some Security Council members have complained that civilian protection can be a ruse for hidden agendas. \textit{Id.} at 847; see also U.N. SCOR, 66th Sess., 6531 st mtg., U.N. Doc. S/PV.6531 (May 10, 2011) (discussing the protection of civilians in armed conflict).}
\footnote{179}{Jennifer Welsh addresses this issue, arguing}
two sides of the same coin: protecting civilians cannot be seen as entirely distinct from preventing their deaths, even where both situations do not involve a leader’s having shirked his or her responsibility to protect the nation’s civilians. As a result, Security Council-imposed peacekeeping missions can be used as evidence of preventative action.\textsuperscript{180} Even though these actions were taken under Chapter VII authority, with the consent of the recognized government, they nonetheless dedicate a strong commitment to preventing harm to civilians.

More recent focus on preventative measures is evidenced within the United Nations itself.\textsuperscript{181} In a recent interview, Edward Luck cited a number of examples where the U.N. implemented R2P prior to Libya.\textsuperscript{182} In all of these cases, R2P consist-

\begin{itemize}
  \item It is important to underscore, however, that while the Protection of Civilians ("PoC") and [the R2P] overlap, they are not the same: the PoC is in one sense narrower, in that it only refers to situations of armed conflict (and [R2P] crimes can occur outside that context); but it is also broader in that the rights of civilians in armed conflict extend beyond protection from mass atrocities . . . In its concentration on situations of armed conflict, the PoC directs the energies of the Council toward more clear-cut threats to peace and security, as opposed to the more contested area of mass human rights violations (the broad rubric of the [R2P]).

Welsh, supra note 175, at 3; see also The Relationship between the Responsibility to Protect and the Protection of Civilians in Armed Conflict, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT (May 9, 2011), http://globalr2p.org/media/pdf/The_Relationship_Between_PoC_and_R2P-Updated.pdf.


\textsuperscript{181} Several member states noted that the Security Council’s focus is increasingly dedicated to civilian protection. See generally U.N. SCOR, 65th Sess., 6351st mtg., U.N. Doc. S/PV.6351 (June 30, 2010).

\textsuperscript{182} Luck, supra note 6 (“If you look at the last several years, we’ve invoked the responsibility to protect . . . eight or nine times.”).
ed either of quiet diplomacy—diplomacy that did not require the use of sanctions of military force—or some kind of action less than military force. Under the lens of R2P, these U.N.-backed actions focused on prevention.

For example, in Kyrgyzstan in 2010, the U.N. sent educators to help the central government gain control over what looked like the potentiality for an ethnic cleansing of the Uzbek community. Similarly, in Guinea, the U.N. worked with regional and sub-regional organizations to iterate to the Guinean government its duties under R2P. And in Cote d'Ivoire, supporters of President Gbagbo, who lost the 2010 presidential election but retained control of the country’s military forces, took steps to indicate that genocide or ethnic cleansing may be imminent. The U.N. took this as a serious sign of the possibility for ethnic cleansing or genocide. Though the U.N.’s early reaction did not prevent the thousands of deaths that unfolded before Gbagbo was arrested in April 2011, Luck points out, “[y]ou never know what the hypothetical might have been: what would have happened if you didn’t do anything?” This statement highlights the emphasis the U.N. now places on prevention. In an ideal world, the U.N. would never need to consider how to respond with military force after considerable death, but rather, only how to successfully prevent those deaths before they occur.

Although the process to build the needed capacity to prioritize prevention of mass atrocities has been slow, Secretary-

183. Id.
184. See infra.
186. Luck, supra note 6.
188. Luck, supra note 6.
190. Luck, supra note 6.
191. See id.
General Ban Ki–Moon has persistently emphasized its essentiality. In the Libyan example, after it became clear of Col. Qaddafi’s intention to mutilate protestors, U.N. High Commissioner for Human Rights, Navi Pillay, issued a statement on February 22, 2011, that “[p]rotection of civilians should always be the paramount consideration in maintaining order and the rule of law. [Libyan] authorities should immediately cease such illegal acts of violence against demonstrators. Widespread and systematic attacks against the civilian population may amount to crimes against humanity.” Also on February 22, Deng and Luck issued a statement reminding Col. Qaddafi of his 2005 pledge to adhere to the principles of R2P. On February 23, the Secretary-General echoed the call for Libya to take responsibility for the safety of its citizens, thus setting the stage for Resolution 1970, “which condemned attacks on the [Libyan] civilian population that it deemed could amount to crimes against humanity. . . .” Despite its robust command, the preventive measures outlined in Resolution 1970 were “relatively uncontroversial.”

192. Bellamy, The Exception and the Norm, supra note 22, at 2. But see Welsh, supra note 175, at 6–7 (arguing the need to elaborate on the coercive tools available to the international community either to prevent, or react to, mass atrocity). As Welsh points out, “the Libyan case suggests that preventive action does not end with the onset of pillar three. Indeed, the majority of the policy tools and measures considered and implemented through Resolution 1970 fall within what Ban Ki–Moon calls ‘timely and decisive response.’” Id. at 7.

193. For a detailed account of the events leading up to Resolutions 1970 and 1973, see Bellamy & Williams, supra note 4.


197. Id at 3. The measures in Resolution 1970, which included an arms embargo, assets freeze, travel bans, and referral of the case to the International Criminal Court, were robust for Security Council standards. Weiss, supra note 29, at 289.

When Resolution 1970 did not succeed in halting the violence, the Secretary-General took it upon himself to phone Col. Qaddafi in an attempt to persuade him to comply with Resolution 1970.199 Only when these preventive measures failed did the Security Council resort to military force under Resolution 1973, paving the way for the NATO intervention.

B. R2P and Libya: A Special Case?

Prior to the Libyan intervention, much of the literature on R2P encouraged development of the doctrine by focusing on conceptualizing and institutionalizing the norm.200 The most pivotal moment for such forward movement of R2P, and indeed its most obvious invocation, was in Security Council Resolution 1973, which authorized use of all necessary force to protect Libyan civilians from Col. Qaddafi’s military attacks.201 The obvious question follows: if military action was invoked under a R2P framework in Libya but is not in other similarly volatile and deadly conflicts, is R2P effective and, in turn, worth promoting? This section discusses why Libya may have been a special case and thus an outlier in the R2P discussion.

Four important points provide context for an honest reflection about the intervention in Libya and its effects on the future of R2P. First, Libya was exceptional because of the viciousness with which Col. Qaddafi attacked the protesting Libyan citizens.202 In particular, Col. Qaddafi identified his targets as “cockroaches,” the exact term used by the Hutu in Rwanda to identify the Tutsi who were slaughtered.203 He later identified the protesters as “rats” and “vermin” who must be “eliminated” such that their “blood flow[ed] from the streets.”204 These words were indications to the U.N. that the probability of mass atrocity was imminent and high.205

Second, prior to Security Council action, regional multi-state organizations, which are normally most concerned with protecting the sovereignty of their members, called for an inter-

199. See Bellamy, The Exception and the Norm, supra note 22, at 3.
200. See Shaffer & Pollack, supra note 34, at 1235 n.441.
201. See id. at 1235.
202. See Shaffer & Pollack, supra note 34, at 1236.
203. Luck, supra note 6.
204. Id.
205. Id.
vention. 206 The Arab League, the African Union, and the Gulf Cooperation Council all advocated for a no-fly zone before the Security Council responded to Col. Qaddafi’s behavior. 207 Their strong public stance made clear that Col. Qaddafi “had few friends in the region” 208 and ultimately pressured China and Russia to abstain from vetoing Resolution 1973. 209

Third, the time frame for the crisis to unfold was extremely short. 210 Conflict was not widely anticipated, evidenced by the fact that none of the world’s risk-assessment organizations considered Libya as a possible place of mass atrocity before the uprising began. 211 For example, the International Crisis Group did not issue a risk alert until after the conflict began. 212 The speed with which Qaddafi began killing civilians did not leave time for the Security Council to implement some of the more gradual precautions, such as mediation, before it issued Resolution 1970. 213 Resolution 1973, which came shortly thereafter, preempted the fall of Benghazi by days, at most. 214 Had Qaddafi’s actions been less swift, it is possible that the preventative measures included in Resolution 1970, such as tough economic sanctions, an arms embargo, freezing Col. Qaddafi’s assets, and referring the case to the International Criminal Court (“ICC”), would have been enough.

And finally, any real analysis of whether the Libyan intervention was a success is, only a year later, at least incomplete if not premature. 215 Though Col. Qaddafi is dead, leaving room

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206. See id.; see also Shaffer & Pollack, supra note 34, at 1236.
207. See Luck, supra note 6; see also Bellamy & Williams, supra note 4, at 841.
209. Id.
211. See Bellamy & Williams, supra note 4, at 838 n.52; see also Bellamy, The Exception and the Norm, supra note 22, at 4 n.6.
213. See id.
214. See id.
215. See, e.g., Simon Chesterman, “Leading from Behind”: The Responsibility to Protect, the Obama Doctrine, and Military Intervention, 25 ETHICS & INT’L AFF. 1, 6 (2011) (“At this writing, it is far from clear how the Libyan conflict will play out, but that outcome will have consequences that reach far beyond Libya itself.”).
for an entirely new Libyan government to form, only time will tell whether this intervention made way for a positive future for Libya and the Middle East, particularly Syria. If


Democracy is about much more than removal of dictators and elections. The rule of law, due process, human rights and the vital need for a democratic culture is yet to emerge in the region. In the absence of the manifestation of these principles, we are seeing Christians being killed in Egypt, cinemas being burnt in Tunisia, and demands for hard-line interpretations of sharia as state law being made by Salafist groups.


217. One of the biggest challenges facing the R2P, at least in terms of the perception that it is an established international norm, is how R2P can lead to military intervention in Libya, but not Syria, where, as of this writing, an estimated 20,000 civilians have been killed since protests broke out in March of 2011. See Steven Lee Myers & Jane Perlez, No Movement on Major Disputes as Clinton Meets with Chinese Leaders, N.Y. TIMES, A10, Sept. 5, 2012. An additional 240,000 Syrian refugees have fled the country. Id.; see also Pattison, supra note 72, at 276 (“The intervention in Libya is morally problematic because the NATO-led coalition has failed to act in response to similar situations in Bahrain, Syria, and Yemen.”), Shadi Hamid, the director of research at the Brookings Doha Center and a fellow at the Saban Center for Middle East Policy at the Brookings Institution, says that without military intervention, the “Libyans would not be enjoying their newfound freedom.” Shadi Hamid, Will Syrians Seek Outside Help?, N.Y. TIMES (Oct. 21, 2011, 4:40 PM), http://www.nytimes.com/roomfordebate/2011/10/20/qaddafis-end-the-mideasts-future/libyas-lessons-for-syria. But, Hamid also comments that the Libyan model is only useful to the extent that it can be replicated. See id. In the months following the outbreak of violence, Syrians began to call for more help in the form of no-fly zones, ground troops and arms transfers. See id.; see also Syria Unrest: Arab League Denounces Civilian Killings, BBC NEWS (Oct. 29, 2011, 4:24 ET) [hereinafter Syria Unrest], http://www.bbc.co.uk/news/world-middle-east-15503350. But see Jonathon Marcus, Why China and Russia Rebuffed the West on Syria, BBC NEWS (Oct. 5, 2011, 7:35 ET), http://www.bbc.co.uk/news/world-middle-east-15180732 (discussing the meaning of China’s and Russia’s vetoes of a Security Council resolution condemning the crackdown by President al-Assad in Syria). As in Libya, the Arab League has put significant pressure on the Assad regime to “take the necessary measures” to protect Syrian civilians. See Syria Unrest. However, to date the Security Council has not taken steps to quell the violence in Syria that are nearly as aggressive as was Resolution 1973.
general consensus among the international community regards Libya as unsuccessful, this will pave the way for critics of R2P to reiterate their doubts about the doctrine’s legitimacy.\footnote{Weiss, supra note 29, at 287.}

C. Looking Forward: Syria and Beyond

Alex Bellamy argues that “[d]ebates about preventing and responding to mass atrocities are no longer primarily about \textit{whether} to act, but about \textit{how} to act.”\footnote{Id. Bellamy cites the United Nations’ and regional organizations’ responses to crises in Kenya, Guinea, Côte d’Ivoire, Darfur, eastern Democratic Republic of Congo, and the 2011 referendum in Sudan as examples where the decision was not whether, but how, to react to developing problems. \textit{Id. See also Welsh, supra note 175, at 1 (“There is much wisdom in Thomas Weiss’s statement that today ‘the main challenge facing the responsibility to protect is how to act, not how to build normative consensus.’”) (citing Weiss, supra note 29, at 291).}} The Libyan case provides an example that early assessment and pooling capacities can play a positive role in planning and executing prevention strategies.\footnote{Bellamy, \textit{The Exception and the Norm}, supra note 22, at 2.} But more than this, it demonstrates the degree to which humanitarian prevention is CIL. The question was not whether to stop Col. Qaddafi from taking over Benghazi, but how best to stop him.\footnote{An in-depth article on President Obama presents another point of view; that Resolution 1973’s biggest advocate was the president of the United States and that it was his advocacy, rather than humanitarian prevention’s status as CIL, that led to action in Libya. Michael Lewis, \textit{Obama’s Way}, \textit{Vanity Fair}, Oct. 2012, at 211. In a discussion of the days leading up to President Obama’s role in the authoring of Resolution 1973, Lewis represents that by the time the President made his decision to get behind the U.N. resolution, “[n]o one in the Cabinet was for it . . . . There was no constituency for doing what he did.” \textit{Id.} at 262 (quoting a witness who was present for the relevant deliberations). Rather, it seems from Lewis’s portrayal that not intervening was never really on the table for President Obama once Col. Qaddafi was clear about cleansing the city of Benghazi. \textit{See id.} He quotes the President as responding to a non-intervention strategy with, “That’s not who we are,” which Lewis takes to mean, that is not who the President is; Lewis writes that “[t]he decision was extraordinarily personal” for him. \textit{Id.}}

In 2011 and 2012, Syria has been frequently cited as evidence that R2P is merely wishful thinking on the part of military interventionists and that Libya is an outlier.\footnote{See supra note 178 and accompanying text.} However, the extent to which this is true can only be in regards to military intervention, not prevention tactics. The United States, Europe-
an Union, and Arab League all imposed tough economic sanctions on Syria in the late fall of 2011. On November 22, 2011, the General Assembly passed a resolution condemning the Syrian government under President Bashar al-Assad for not upholding its responsibility to protect Syrian civilians. Seven months later on June 30, 2012, the United Nations-backed Action Group on Syria (“AGS”), agreed on a six-step plan for a transition to peace to be implemented by former Secretary-General Kofi Annan, as well as criticized the continuing violence. As of this writing, the U.N. Office for the Coordination of Humanitarian Affairs was ramping up its ground presence in Syria, providing aid to the more than 200,000 internally displaced persons. In addition, U.N. Security Council resolution 2043 sent the United Nations Supervision Mission in Syria

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to monitor violence and provide support for the six-point plan adopted by the AGS.\(^{228}\)

Regretfully, the Action Group’s Joint Envoy resigned from its mission, in part due to disagreements among the five permanent Security Council members on the best approach to the worsening situation.\(^{229}\) Yet, the actions above still suggest that the international community recognizes its legal obligation to halt mass atrocity, which is heavily embedded in the R2P doctrine. The fact that military intervention has not yet been imposed in Syria does not necessarily indicate an R2P failure.\(^{230}\) Rather, if prevention techniques can prove successful, it is a signal of two important points: first, that Edward Luck’s wish that the U.N. be able to stop pushing the doctrine is coming true. Second, it is evidence that the international community recognizes its obligation under CIL to prevent humanitarian atrocity.

**CONCLUSION**

R2P codified a nation’s responsibility to protect its citizens from mass atrocities and the international community’s role in assisting in that endeavor. In doing so, R2P paved the way for the emergence of a new international norm, one that mandates the prevention of human destruction. Humanitarian prevention—under an approach to CIL that minimizes state practice, allows CIL to develop quickly, and states that CIL governs the conduct between a nation and its citizens—is a binding law on nations. But such a designation is not in itself a solution to human destruction; nations and international institutions must be steadfast in adhering to its call. This will require per-

\(^{228}\) Mission Home, UNITED NATIONS SUPERVISION MISSION IN SYRIA, UNITED NATIONS, http://www.un.org/en/peacekeeping/missions/unmis/ (last visited Oct. 16, 2012). The supervision mission has since been suspended, owing to the escalation of violence and the use of heavy weapons. Id.


\(^{230}\) For example, “Mr. Jassem, the Qatari foreign minister, said the goal of the sanctions was stopping such killing, and to try to do so without foreign military intervention.” Bakri & MacFarquhar, supra note 223. He continued, “All the work we are doing is to avoid foreign intervention,” he said. ‘But if the international community does not take us seriously in this then I cannot guarantee that there will be no foreign interference.” Id.
sistence, patience, and creativity in approach, to ensure that citizens are not innocent casualties of their state’s misconduct.

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THE ISRAELI ANTI-BOYCOTT LAW:
BALANCING THE NEED FOR
NATIONAL LEGITIMACY AGAINST THE
RIGHTS OF DISSENTING INDIVIDUALS

INTRODUCTION

On July 11, 2011, the Israeli Parliament—the Knesset—approved the controversial Law for Prevention of Damage to the State of Israel through Boycott (“Anti-Boycott Law”, or “ABL”) which instituted civil penalties for Israeli citizens who organize or publicly endorse boycotts against the country.¹ The immediate, polarizing impact of the legislation resulted in a charged Israeli populace, and rhetoric on both sides grew increasingly extreme.² Critics slam the ABL as an impermissible strike against the fundamental rights of free speech and free expression.³ To infringe on such basic rights, they argue, is to strike a blow against democracy and to take a step along the path toward fascism.⁴ Conversely, supporters defend the ABL as a mechanism to combat damaging economic protests against


². See Bradley Burston, Israel's boycott law: the quiet sound of going fascist, HA'ARETZ (July 12, 2011), http://www.haaretz.com/blogs/a-special-place-in-hell/israel-s-boycott-law-the-quiet-sound-of-going-fascist-1.372881.; but see, Harriet Sherwood, Israel's boycott ban draws fire from law professors, THE GUARDIAN (July 14, 2011), http://www.guardian.co.uk/world/2011/jul/14/israel-boycott-ban-criticised (quoting Prime Minister Netanyahu as saying that the criticisms of the ABL were “reckless, irresponsible attacks against the legitimate attempt by a democracy on the defensive to draw a line between what is acceptable and what is not.”).

³. Editorial, Not Befitting a Democracy, N.Y. TIMES (July 17, 2011), http://www.nytimes.com/2011/07/18/opinion/18mon2.html (quoting the Anti-Defamation League warning that the ABL “impinged on the basic democratic rights of Israelis to freedom of speech and freedom of expression,” and Ha’Aretz that the ABL was “undemocratic.”).

⁴. See Burston, supra note 2.
Israel’s policies regarding the settlements in the West Bank.\(^5\) To these supporters, protests against the state of Israel from within its own population risks the de-legitimization of the Israeli government in the eyes of the world.\(^6\) These supporters are quickly reminded by ABL opponents, though, that some major international entities have already expressed dismay over the ABL, criticizing the un-democratic nature of the law.\(^7\)

With both sides of the ABL debate firmly entrenched, the Israeli Supreme Court (“Supreme Court”)\(^8\) will have to render a decisive interpretation, determining if the ABL is a valid exercise of the Knesset’s legislative authority.\(^9\) Despite what may seem like a clear-cut violation of traditionally protected individual rights, the outcome of a challenge to the ABL is far from certain. Israel has no formal constitution, and lacks codified protection for the values of free speech and free expression.\(^10\) Therefore, in order to strike down the ABL, the Supreme Court must construe these protections from Israeli legal tradition, without the benefit of being able to point to a statute codifying free expression.\(^11\) Yet, given the body of Israeli free speech and

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5. It is common practice for groups critical of Israeli policy to undertake “boycotts, disinvestment and sanctions” (“BDS”) against Israel. Not Befitting a Democracy, supra note 3. Left-wing activists have embraced such tactics, even within Israel, as a method to protest the more right-leaning government. Israeli Lawmakers Pass West Bank Settlement Boycott Law, BBC NEWS – MIDDLE EAST (July 11, 2011), http://www.bbc.co.uk/news/world-middle-east-14111925.


8. For the purposes of this Note, “Supreme Court” refers to the highest court of Israel unless otherwise noted.


10. See infra notes 12–15.

11. Israeli legal tradition—that is, the potential sources of law to which the Supreme Court can look when making their decisions—include Israeli
free expression jurisprudence, as well as international norms and policy concerns, the Israeli Supreme Court should overturn the ABL as an impermissible intrusion on fundamental rights.

Part I of this note provides some background information on the Israeli legal system and the authority of the Supreme Court. Part II examines the ABL itself, the political climate in which the law was passed, and the reaction thereto. Part III examines the relevant precedent regarding the protection of free speech and free expression, first under Israeli legal tradition and then under both foreign and Jewish traditions. Finally, Part IV explains why those precedents reviewed in Part III, combined with relevant policy concerns, mandate that the Supreme Court invalidate the ABL.

I. THE ISRAELI LEGAL SYSTEM

Any arguments for or against the validity of the ABL must be evaluated in light of the constraints and policies of the Israeli legal system. Section A of this Part will discuss the constitutional history of Israel and how the country has evolved to compensate for the lack of a formal written instrument. Section B will examine the power of the Supreme Court within Israel’s quasi-constitutional framework and also the interaction between the Supreme Court and the Knesset. By the end of this Part it will be clear that if the ABL is violative of Israeli law, the Supreme Court has the power to strike it down.

A. Israeli Constitutional Law

Unlike America, Israel lacks a formal constitution to provide direction in answering potential questions regarding basic human rights protections. Upon achieving statehood in 1948, the Israeli Declaration of Independence “stipulated that a constitution would be drafted,” but no such document was ever

statutes, Israeli common law, international precedent (including American) and the teachings and values of Judaism (“Jewish law”). See generally Daniel Friedmann, The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period, 10 ISR. L. REV. 192 (1975); Uriel Gorney, American Precedent in the Supreme Court of Israel, 68 HARV. L. REV. 1194 (1955).

12. Dalia Dorner, Does Israel Have a Constitution?, 43 ST. LOUIS U. L.J. 1325 (1999); See also SUEZ NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL 35 (2007) (“Israel has no one official document known as ‘the constitution.’”).
produced. Over time, in place of a unified constitution, the Knesset passed a series of eleven mostly procedural regulations called the “Basic Laws,” which outlined the organization framework of the Israeli legal system and provided protection for some fundamental human rights. Taken together, the Basic Laws comprise a de facto constitution that distills the essence of Israeli “constitutional principles.”

B. The Israeli Supreme Court

The Supreme Court has two different functions. First, it serves as the final court for appeals coming from the lower levels of the Israeli court system. Second, it acts as the High Court of Justice, with original jurisdiction to hear “matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court.” In practice, the role of the High Court of Justice has often been to resolve pending constitutional or administrative issues. However, unlike the American Supremacy Clause, Israeli law contained no expression of the Basic Laws’ supremacy over other national legislation, resulting, for many years, in the Supreme Court’s inability to invalidate legislation with any clear

13. Maya Tarr, Regulating the Airwaves in Israeli’s Burgeoning Democracy: Why the Israeli High Court of Justice Should Have Acknowledged Free Speech in the Case of Artuz Seven, 18 Cardozo J. Int’l & Comp. L. 687, 691–92 (2010). The inability to pass a formal constitution is likely due to “divergent views” on constitutional principles within Israel’s “heterogeneous” society. Id. at 692; see also Ruth Gavison, Law, Adjudication, Human Rights, and Society, 40 Isr. L. Rev. 31, 50 (2007).

14. NAVOT, supra note 12, at 36–37. The eleven basic laws are The Knesset (1958); Israeli Lands (1960); The President of the State (1964); The Government (1968); The State Economy (1975); Jerusalem, the Capital of Israel (1980); The Judiciary (1984); The State Comptroller (1986); Freedom of Occupation (1992); and Human Dignity and Liberty (1992). Id. at 37.


17. Tarr, supra note 13, at 696.

authority.19 This hesitancy changed in 1995, with the landmark Supreme Court decision in United Mizrachi Bank v. Migdal Agricultural Cooperative,20 in which the Supreme Court decided that two of the Basic Laws,21 Human Dignity and Freedom of Occupation (“Human Rights Basic Laws”), would constitute an Israeli “Bill of Rights,” supreme to other legislation.22 The Supreme Court reasoned that the Human Rights Basic Laws grant the power of judicial review over “the failure of a regular law to meet [the Human Rights Basic Laws’] requirements . . . such a law is constitutionally flawed and the Court may declare it void.”23 Since Migdal, the Supreme Court has been far more aggressive in invalidating legislation that conflicts with the Human Rights Basic Laws.24 Thus, having granted itself the power of judicial review, the Supreme Court has established its own authority to strike down the ABL should it find that the ABL conflicts with the protections of the Human Rights Basic Laws.25

19. Tarr, supra note 13, at 691. Tarr notes the lack of a law addressing the superiority of the Basic Laws over other legislation as a possible source for the Supreme Court’s historical hesitance to exercise Judicial Review over the decisions of the Knesset. Id. at 692.
21. Prior to 1992, the Basic Laws were purely organizational and lacked “meaningful safeguarding of substantive values.” Tarr, supra note 13, at 692. The passage of the Human Rights Basic Laws has been called Israel’s “constitutional revolution” for its recognition and codification of protected civil rights and its role in providing for judicial review. Barak, supra note 18, at 18.
22. CA 6821/93 Migdal Agricultural Collective, at 139–40.
23. Id. at 139. Migdal has been described as “the Israeli equivalent of Marbury v. Madison.” Tarr, supra note 13, at 695.
25. See supra notes 19–23. However, currently pending before the Supreme Court (presented in April 2012) is a proposed Basic Law that would provide the Knesset with the authority to override a Supreme Court veto by vote of a sixty-five member super majority (out of 120). Lahav Harkov, Joanna Paraszczyk, Rivlin Voices Support for Basic Law on Legislation, Jerusalem Post (Apr. 8, 2012), http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=265290. Under the proposed Basic Law: Legislation, the Knesset would have the power to enact legislation in spite of the Supreme Court’s opposition, potentially stripping the Supreme Court of its deciding vote on the ABL. See id. Supporters of the new Basic Law view it as protection against the whims of the branch of government least accountable to the general public, while critics worry that
II. THE ABL

After establishing the proper authority for evaluating the validity of the ABL, the focus of the following Part turns to the ABL itself. Section A of this Part will address the history underlying the ABL and the political motivations of each side of the debate. Section B will examine the actual terms of the ABL and how they could affect individuals. Section C will address both the negative and positive reactions to the passage of the ABL. By the end of this Part, the reader will better understand the political motivations weighing on each side of the ABL discussion.

A. Origins of the Conflict

Israel occupies a precarious geographical place near the center of the Muslim world, surrounded by potentially hostile nations. Since its inception in 1948, Israel has fought numerous wars for its very survival and its right to exist as a nation. Even when not faced with imminent, traditional warfare, protesters still threaten Israel’s legitimacy through economic warfare, specifically the practice of boycotts, disinvestment, and sanctions (“BDS”) meant to weaken Israel’s economy. Today, Israel’s policies regarding the West Bank settlements are increasingly controversial and, in protest, opponents of Israeli policy have participated in international movements advocating for the Knesset is simply removing the last remaining check on its growing power. See Nathan Jeffay, Israel in Power Struggle with Top Court, JEWISH DAILY FORWARD (Apr. 29, 2012), http://forward.com/articles/155370/israel-in-power-struggle-with-top-court/.

27. See id. at 364–75.
28. See Rosenberg, supra note 6.
29. See, e.g., MARTIN A. WEISS, CONG. RESEARCH SERV., RS 22424, THE ARAB LEAGUE BOYCOTT OF ISRAEL (2006) (“The Arab League has maintained an official boycott of Israeli companies and Israeli-made goods since the founding of Israel in 1948.”).
ing the use of BDS tactics. 31 Such tactics have been advocated by a diverse group of supporters ranging from “international, radical pro-Palestine campaigners, Western liberals, and Israeli leftists.” 32 It is this third group (Israeli leftists) that seems to have particularly caught the attention of Israeli lawmakers such as Knesset member Zeev Elkin, the sponsor of the ABL, who noted that he was concerned that the boycotts have “increasingly come from within our own midst.” 33 In 2011, some Israelis began calling for boycotts of products with links to the West Bank settlements. 34 In response, Elkin, a member of Prime Minister Benjamin Netanyahu’s Likud party, proposed the ABL as a way to alleviate the damage felt by West Bank businesses as a result of the boycott campaigns. 35 The Knesset passed the ABL by a margin of forty-seven to thirty-eight. 36

B. The Provisions of the ABL

The ABL defines a boycott as “deliberately avoiding economic, cultural or academic ties with another person or body solely because of their affinity with the State of Israel, one of its institutions or an area under its control, in such a way that may cause economic, cultural or academic damage.” 37 Under the ABL, it is a civil offense to:

33. Not Befitting a Democracy, supra note 3.
34. Joel Greenberg, Israeli Anti-Boycott Law Stirs Debate on Settlement Products, WASH. POST (July 22, 2011), http://www.washingtonpost.com/world/middle-east/israeli-anti-boycott-law-stirs-debate-on-settlement-products/2011/07/20/gIQA91LyTI_story.html. Elkin stated that he sponsored the ABL in order to “provide legal recourse to people harmed by boycott campaigns that targeted them because of where they happen to live.” Id.
35. Id.
36. Harkov, supra note 1.
37. ABL, supra note 1, at 1–2.
knowingly publish[] a public call for a boycott against the State of Israel, where according to the content and circumstances of the publication there is reasonable probability that the call will lead to a boycott, and he who published the call was aware of this possibility. 38

Should an individual deliberately call for a boycott in violation of this provision, then that individual may be liable for “[punitive] damages that are independent of the [amount of] actual damage caused.” 39

C. Response to the ABL

Response to the passage of the ABL was immediate and vigorous; supporters defended the bill passionately, while opponents petitioned the Supreme Court to overturn it within days of its passage. 40 Supporters of the ABL view the law as a protection against the threat boycotts pose to the very legitimacy of the Israeli government, 41 as well as protection against the economic and social prejudices these boycotts place upon Israeli businesses. 42 The threat to legitimacy posed by BDS actions is especially problematic for Israel because such actions shift discussion from questions about Israel’s policies to questions over

38. Id.
39. Id. “In calculating the sum of these damages, for example, the court will take into consideration, among other things, the circumstances under which the wrong was carried out, its severity and its extent.” Id.
42. See Eldad, supra note 40; Greenberg, supra note 34.
Israel’s very economic viability. Supporters argue that, given such a clear threat, the ABL presents a reasonable and proportional restriction on the freedom of expression when balanced against the interest of state security. Alternatively, opponents of the ABL argue that delegitimization is not an appropriate fear given Israel’s relative strength and prosperity, and that the public’s interest in maintaining the basic right of political speech is far too important to be abridged for such a nebulous and long-term threat.

III. ANALYSIS

Freedom of expression and democracy are inextricably linked. Free expression rights “facilitate individuals in forming and joining groups for advocacy and action,” which serve as “indispensable features” of modern society. Given the importance of expressive rights, many countries have provided explicit guarantees of the freedom of expression. Israel is no exception, as it legally recognizes “all human rights that characterize modern democracy,” among which it counts the freedom of expression. Therefore, the following sections will look at the history of freedom of expression law in Israel, as well as internationally, to determine whether the ABL falls within the scope of the protection granted to this particular right.

44. Eldad, supra note 40 (noting that the ABL is limited only to the sort of public calls for boycott that could actually threaten the state, still allowing every Israeli “to buy whatever he wants.”).
45. Rosenberg, supra note 6.
46. See Burston, supra note 2.
47. For the purposes of this Note, freedom of expression will be used as a “catch-all” term incorporating any protected political right, including speech, assembly, participation, and association.
49. Id. at 447.
50. See, e.g., infra Part III.B.1.
A. Israeli Freedom of Expression

For years, protection of political expression existed in the Israeli common law without “statutory support.”\(^\text{52}\) In 1992, the Knesset passed the Human Rights Basic Laws, giving this protection a textual home and providing the Supreme Court with an avenue for invalidating legislation that challenged it.\(^\text{53}\) The Human Rights Basic Laws provide explicit protection from deprivation of the right to “human dignity, liberty, property, privacy, freedom of occupation, and freedom from detention, imprisonment, and extradition.”\(^\text{54}\) However, this protection is limited, making exceptions for violations of the Human Rights Basic Laws made (1) in response to a valid threat to the State of Israel and (2) narrowly tailored to meeting only the desired end.\(^\text{55}\) Accordingly, any violation of a protected right must be evaluated in terms of its justification and proportionality to meeting that end.\(^\text{56}\)

Freedom of expression is not explicitly provided for in the Human Rights Basic Laws,\(^\text{57}\) so in order to receive the same protections listed above, the Supreme Court must interpret the law to find that expression is implicitly included.\(^\text{58}\) The Supreme Court has consistently done so by reading freedom of expression into the explicit guarantee of human dignity provided for in the text of the Human Rights Basic Laws.\(^\text{59}\) Despite

\(^\text{52}\) Id.

\(^\text{53}\) See supra Part II.A.

\(^\text{54}\) Barak, supra note 18 at 16.

\(^\text{55}\) See Basic Law: Human Dignity, 5754-1994, SH No. 1454, §8 (1994) (Isr.) (“No violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.”); see also Barak, supra note 18, at 16.

\(^\text{56}\) See NAVOT, supra note 12, at 41–42.

\(^\text{57}\) HCJ 2557/05 Majority Camp v. Israel Police (2) IsrLR 399, 409 [2006] (Isr.).

\(^\text{58}\) Tarr, supra note 13, at 695.

\(^\text{59}\) Barak, supra note 18, at 12, 16; Zaharah R. Markoe, Note, Expressing Oneself Without a Constitution: The Israeli Story, 8 CARDOZO J. INT’L & COMP. L. 319 (2000). This construction of the Human Rights Basic Law has become the accepted standard for the breadth of protection provided by the Basic Laws. See, e.g., HCJ 4804/94 Station Film Co. Ltd. v. Film Review Board IsrLR 1, 13 [1997] (Isr.); PPA 4463/94 Golan v. Prison Service IsrLR 1, 18, 58 [1995–1996] (Isr.) (“Even without an express provision, freedom of speech is included in human dignity, according to the meaning thereof in sections 2 and 4 of the Basic Law. For what is human dignity without the basic liberty of an individual to hear the speech of others and to utter his own speech.”).
the constant security threats facing Israel, the Supreme Court’s integration of free expression into the fabric of the Basic Laws is also consistent with the attitudes of the Israeli populace, who have indicated support for “abstract democratic principles” on a level consistent with that of the American populace. Since free expression is entitled to the protection of the Supreme Court under the Human Rights Basic Laws, any violation thereof can only be justified if legislation in question is: (1) in response to a valid threat to the State of Israel and (2) narrowly tailored to meeting only the desired end.

Free expression jurisprudence in Israel dates back to the landmark decision in Kol Ha-Am v. Minister of the Interior, in which the Supreme Court held free expression to be a supreme right, well before the passage of the Basic Law: Human Dignity. In Kol Ha-Am, the Israeli Interior Minister had shut down an Israeli newspaper, which had criticized Israel for its support of military action in Korea, because he saw it as a potential threat to the state’s safety. The Supreme Court held that because free expression was such a “fundamental right,” it cannot be abridged without being able to forecast serious danger “almost to a certainty.” In this case, Supreme Court found

60. See supra Part II.A.
61. JULIE L. ANDSAGER ET AL., FREE EXPRESSION IN 5 DEMOCRATIC PUBLICS 122 (2004).
63. HCJ 75/53 Kol Ha-Am v. Minister of the Interior 7 PD 871 [1953] (Isr.).
64. See id.
65. Id.
66. The right to free expression is fundamental because
democracy consists, first and foremost, of government by consent, the opposite of government maintained by the power of the mailed fist; and the democratic process, therefore, is one of selection of the common aims of the people and the means of achieving them, through the public form of negotiation and discussion, that is to say, by open debate and the free exchange of ideas on matters of public interest [‘Public opinion’ plays a vital part in that discussion, carried on through the political institutions of the state, such as parties, general elections and debates in the legislature · and it plays that part not only when the citizen goes to the polls, but at all times and in all seasons.

Id. at 7 (citation omitted).
67. Id. at 27 (“In the light of circumstances, that the publication makes it possible, amounting almost to a certainty, that serious harm will be caused to
that the threat alleged by the Interior Minister, that of decreased confidence in the Israeli government, was insufficient.68

After the passage of the Human Rights Basic Laws, the Kol Ha-Am near certainty standard was approved legislatively in the Basic Law: Human Dignity.69 Just a few years after the codification of this rule, the Supreme Court took to expanding on the “near certainty” standard for modern application. In Station Film Co. Ltd. v. Film Review Board, the Supreme Court held that free expression rights (in this case, the ability to exhibit a provocative film) were not limitless, and could be abridged “in order to advance societal goals, such as ensuring the country’s very existence and democratic nature, as well as protecting the integrity of the judicial system, as well as public peace and security.”70 However, the Supreme Court clarified that in order to justify abridging free expression the perceived threats must be nearly certain.71 Drawing on the Kol Ha-Am near certainty test, the Supreme Court explained the appropriate balance as follows:

Freedom of expression may be impaired if the following two conditions are satisfied. First the harm the expression causes to the public peace must be serious, grave, and severe. The harm must exceed the “level of tolerance” acceptable in a democratic society and shake that society to its very foundation. Second, the probability of such an injury to public peace occurring must be nearly certain. It is insufficient to say that the harm be only possible and probable.72

In practice, the Supreme Court need not always follow this test verbatim, but instead has the discretion to “adopt a suitable test, while considering the substance and importance of competing principles . . . with respect to their relative priority and the measure of protection which we would like to grant each principle or interest.”73 For artistic censorship cases, like

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68. See generally id.
70. HCJ 4804/94 Station Film at 15.
71. Id. at 17.
72. Id. (emphasis added) (internal quotation marks omitted).
Station Film, the Supreme Court has typically allowed for punctures in the cloak of free expression protection. For example, in Israel Film Studios v. Levi Geri, the Supreme Court determined that a newsreel that presented an obviously biased and misleading picture of a political topic did not need to be protected because of “the newsreel’s unique ability to affect the audience through its visual medium.” However, in cases where the act of expression is not pure fiction, like Station Film, or heavily biased (like Israel Film Studios), the Supreme Court has been much more hesitant to restrict expression, even if that expression is critical of Israeli policy. This hesitancy was on full display when the Supreme Court held, in Bakri v. Israel Film Council, that a documentary portraying Palestinian reactions to Israeli terrorist activities merited the court’s protection even though it may have been anti-Israel and “offensive.”

Beyond the context of artistic expression, the Supreme Court’s application of the Kol Ha-am near certainty test has skewed even more heavily toward protection of the rights of individuals. In Majority Camp v. Israel Police, the Supreme Court ruled that an interest group seeking to stage a rally in support of a particular government action had the fundamental right to demonstrate publicly. Similarly, in Levi v. Southern District Police Commander, the Supreme Court held that the Israeli Police did not have the ability to deny protestors the right to demonstrate unless the police could show “substantial evidence” of harm to public security. In Levi, the Committee against the War in Lebanon, an anti-war advocacy group, had applied for a permit to stage a march against political vio-

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74. See, e.g., HCJ 4804/94 Station Film; HCJ 243/62 Israel Film Studios v. Levi Geri 16 PD 2407 [1962] (Isr.).
75. Markoe, supra note 59, at 335.
76. See HCJ 316/03 Bakri v. Israel Film Council 58(1) PD 249[2003] (Isr.); see also HCJ 680/88 Schnitzer v. Chief Military Censor 42(4) PD 617 [1989] (Isr.).
77. See HCJ 316/03 Bakri at 30.
78. See, e.g., HCJ 2557/05 Majority Camp at 409.
79. “A demonstration that has a political or social background is an expression of the autonomy of the individual will, freedom of choice, and freedom of action that are included within the scope of human dignity as a constitutional right.” HCJ 2557/05 Majority Camp at 411.
The Israeli police denied the permit application on the grounds that it was being planned for the anniversary of the murder of a leader in the peace movement and the police feared that the protest would incite violence and threaten public safety. The Supreme Court found the police’s “serious apprehension over a grave threat to public order and security” was not enough for the Court to allow them to suspend the protestors’ right to express themselves under the clear probability test. However, the Supreme Court does not rule in favor of free expression in every instance. For example, in State of Israel v. Kahanae, the Supreme Court allowed for a revocation of free expression rights in the case of a radical politician, Binyamin Kahanae, who had been convicted of sedition for voicing antigovernment rhetoric. Kahanae had been distributing pamphlets, in response to terrorist attacks, advocating for government-sanctioned violence against Arab villages within Israel. After a series of reversals, the Supreme Court (using the familiar language of the Hol Ha-Am test) found a “near certainty” that the defendant’s continued discourse would harm the government “structure.” The Supreme Court also explained that the law of sedition was designed to protect the value of “social cohesiveness,” and Kahanae’s actions posed a direct threat to this value. Furthermore, the Supreme Court determined that a violation of social cohesiveness presented potentially dire consequences for the state of Israel. Taken together...

81. Id.
82. Id.; Markoe, supra note 59, at 341.
85. CrimFH 1789/98 Kahane at 197.
86. The trial court initially acquitted Kahane, but the appellate court convicted him on appeal. Gur-Arye, supra note 84, at 168–72. The Supreme Court overturned Kahane’s conviction then finally reinstated it upon rehearing. Id.; CrimFH 1789/98 Kahane.
87. Id. at 199, 225.
88. Id. at 213–15; Gur-Arye, supra note 84, at 170.
89. Justice Or noted that the value of social cohesiveness “is of special importance against the background of a society with a varied social mosaic like the state of Israel, in which minorities, and members of different religious sects, live side by side and in which the differences among the various popu-
er, the probability and severity of the harm threatened by Kahana's actions was enough for the Supreme Court to uphold Kahana's conviction and to quash his freedom of expression.90

The final category of expression discussed by the Supreme Court, although far less conclusively, is commercial expression.91 In Kidum Yazmuth U'Molut v. Broadcasting Authority, the Supreme Court examined the issue of whether an advertiser had the right to display controversial advertisements.92 The advertisement in question was the slogan of Kidum, which in fact meant "Go Excel," but also "provoked the connotation" of a Hebrew curse word.93 The Israeli Broadcasting Authority decided to prohibit the display of this advertisement on the grounds that it "includes an offense to good taste or contradicts public order or harms the public." Kidum filed suit, alleging an infringement of their right to free expression.94 The Supreme Court agreed with Kidum, finding that the actions of the Broadcasting Authority were a violation of Israeli free expression tradition.95 The Supreme Court cautioned, though, that while free expression is a "superlative right" entitled to the highest protection of the Court, purely commercial expression does not threaten political or democratic participation like other types of expression and may therefore be subject to lesser protection.96 However, the Supreme Court stopped short of categorizing Kidum's advertisement as falling outside of this lesser protection, invalidating the Broadcasting Authority's deci-
sion because the commercial expression in question did not “ser-
iously offend public sensibilities.” 97

Taken as a whole, Israeli law provides strong protection for
the rights of individuals to express themselves, so long as that
expression does not immediately threaten the public order with
serious harm. 98 Given Israel’s precarious political reality, 99
maintaining the proper balance point for Israeli society is a dif-
ficult task. 100 However, the Supreme Court has generally pro-
tected the rights of the minority to express themselves, particu-
larly in the political context without evidence of truly extreme
danger. 101

B. Foreign Freedom of Expression

1. American Free Expression

Aside from Israeli law, the Supreme Court often relies on for-

eign precedent to provide guidance on thorny issues of first im-

pression. 102 Chief among the bodies of foreign precedent con-
dered by the Supreme Court is American law, to which the Su-

preme Court turns with frequency. 103 Both evolving from the

British common law model, 104 Israeli law and American law

share many of the same foundational principles and “reason-

ing.” 105

American law distinguishes between political and commercial

expression in determining the appropriate level of government

intervention. 106 Regarding political expression, American law

requires that “the government must show an imminent threat

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97. ALMAGOR, supra note 91, at 94.
98. See supra notes 64–83.
99. See supra notes 26–36.
100. See id.
101. See supra notes 64–90.
102. Gorney, supra note 11, at 1210.
103. Id. ("... American [law] occupies a ‘prominent place’ [in Israeli juris-
prudence].").
104. Id. Like America, Israel emerged from British rule and began to fash-
ion its legal system from the existing British common law model. See gen-
erally NAVOT, supra note 12, at 35–37; Gorney, supra note 11, at 1210.
105. Id. at 1210.
106. See Briggs & Stratton Corp. v. Baldridge, 728 F.2d 915 (7th Cir. 1984).
of harm before regulating [expression].” 107 Indeed, the American concept of “clear and present danger” served as the model for the “substantially similar” near certainty test developed by the Supreme Court to evaluate violations of the freedom of expression. 108 Within the political expression context, U.S. courts have consistently found that the right of citizens to boycott domestic business is unquestionably protected by the First Amendment of the U.S. Constitution. 109 In NAACP v. Claiborne Hardware Co., the United States Supreme Court ruled that participants in a damaging boycott of white-owned business could not be held liable for damages sustained by local businesses, because the value of the expression was more important than the potential harm. 110 Commercial expression, on the other hand, does not receive the broad constitutional protection received by political speech in America. 111 However, constitutional protection for boycott expression does not extend universally to all potential boycotts. In 1979, in response to the Arab boycott of Israel, Congress passed the Export Administration Act (“EAA”) which prohibited “any United States person” from taking action “with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States.” 112 The seemingly broad reach of the EAA is actually far narrower than it first appears. 113 The EAA was passed to combat the practice of “secondary boycotts,” whereby the Arab countries that were boycotting Israel (the “primary boycott”)

107. Steven G. Gey, The Brandenburg Paradigm and Other First Amendments, 12 U. PA. J. CONST. L. 971, 977 (2010). The imminence Gey refers to is described as the “clear and present danger standard.” Id. at n.27.
108. See HCJ 75/53 Kol Ha-Am; Tarr, supra note 13, at 695.
110. Claiborne Hardware, 458 U.S. 886.
111. See Briggs & Stratton Corp., 728 F.2d 915.
113. See Lahoud, supra note 112, at 373.
would boycott any U.S companies that participated in trade with Israel.\textsuperscript{114}

The United States Court of Appeals for the Seventh Circuit addressed the constitutionality of the EAA in \textit{Briggs & Stratton Corp. v. Baldridge}.\textsuperscript{115} There, Briggs & Stratton, a major American corporation claimed that the EAA violated their free expression rights because they could not respond to questionnaires\textsuperscript{116} from Arab companies who were participating in the Arab boycott of Israel.\textsuperscript{117} The Seventh Circuit rejected the corporation’s claims and upheld the provisions of the EAA, distinguishing between those strict protections afforded to political expression and the lesser protection available for commercial expression.\textsuperscript{118} Specifically, the Seventh Circuit decided that Briggs & Stratton’s participation in the Arab questionnaires was not political speech because “[Briggs & Stratton] do not seek to answer the questionnaire in order to influence the Arabs decision to conduct or enforce a trade boycott with Israel.”\textsuperscript{119} Instead, filling out the questionnaire was merely commercial speech because Briggs & Stratton’s motivation in filling out the questionnaires was simply that “they wish[ed] . . . to show that the boycott’s sanctions should not be applied to them . . . .”\textsuperscript{120} In further defending the constitutionality of the EAA, the Seventh Circuit noted that Briggs and Stratton were, “free to communicate their views about the relative merits of the Arabs’ political decisions,” and it was only the secondary participation in a foreign boycott that was prohibited.

American law thus clearly defines the boundaries of expression regulation. Political expression is afforded the heightened protection of an imminent danger standard, while commercial expression can be infringed at the government’s discretion. In the boycott context, the law is similarly clear. Primary boycot-

\begin{itemize}
  \item \textsuperscript{114} \textit{Id} at 378–79. Indeed, the United States recognized the right of the Arab countries to engage in the primary boycott of Israel, just not the secondary boycott. \textit{Id}.
  \item \textsuperscript{115} \textit{Briggs & Stratton Corp.}, 728 F.2d 915.
  \item \textsuperscript{116} In conjunction with their boycott of Israel, Arab countries would send questionnaires to U.S. businesses to gauge their degree of trade with Israel, and then if the questionnaire revealed trade with Israel, they would initiate secondary boycotts of the responding company. \textit{Id} at 916.
  \item \textsuperscript{117} \textit{Id}.
  \item \textsuperscript{118} \textit{Id} at 917–18.
  \item \textsuperscript{119} \textit{Id} at 917.
  \item \textsuperscript{120} \textit{Id}.
\end{itemize}
ing, that is, direct expressions of political will through economic measures, is entitled to full free expression protection. Secondary boycotts, commercial in nature, do not merit similar protection. The link between the boycott standard and the general expression standard is clear. Where a restriction on expression or boycott threatens an individual’s ability to participate in democracy (i.e. political speech or a primary boycott), this restriction is impermissible. However, where the individual’s interests at stake are something less central than democratic rights (i.e. economic rights, secondary boycott participation), regulation is permitted much more freely.

2. International Free Expression

The international legal community has paid increasing attention to issues of human rights, particularly with respect to participation in the political process. Members of that community agree that, “everyone has the right to take part in the government of his country,” and that “every citizen [has a right] to ‘take part’ in the ‘conduct of public affairs.’” The U.N. further expanded these guarantees in 1996 when they explained that it lies implicit in the guarantee of participation in public affairs that every citizen have the opportunity to “exert[] influence through public debate, conduct[] a dialogue with their representatives, and exercis[e] their capacity to ‘organize themselves.’” Such guarantees speak to the high level of importance placed on free expression, especially political expression, by the international community.

As for the ABL, its provisions clearly limit the ability for Israeli citizens to “organize themselves” by forming boycotts of Israeli products or businesses. Furthermore, boycotts certainly represent the ability of individuals to attempt to take

121. See, e.g., Claiborne Hardware, 458 U.S. 886.
122. See, e.g., Briggs & Stratton Corp., 728 F.2d 915.
123. Steiner, supra note 48, at 450–52.
127. ABL, supra note 1, at 1–2.
part in government by influencing their countries policies. Therefore, the ABL is out of step with the protections for political freedom of expression rights advanced by the international community with increasing frequency.

3. Jewish Freedom of Expression

A central part of Israel’s identity is its status as the “state of the Jewish people.”128 Accordingly, the teachings and values of Judaism have played a major role in shaping Israel’s legal system.129 As a preliminary matter, Israel has established a series of religious courts, separate from the secular court system, to adjudicate religious issues that may arise.130 For secular courts, including the Supreme Court, the precise value of Jewish law as precedent is uncertain.131 What is certain, however, is that Jewish law serves, at the very least, as a guideline for the moral principles of the state of Israel to which the Supreme Court may turn when informing their decisions on difficult issues.132

128. See NAVOT, supra note 12, at 309.

129. IZHAK ENGLARD, RELIGIOUS LAW IN THE ISRAEL LEGAL JUSTICE SYSTEM 111 (1975). (“Religious institutions... are interlocked with the state’s legal system.”).

130. NAVOT, supra, note 12, at 144–45.


132. The Knesset acknowledged Jewish law as an important piece of judicial decision-making in passing the “Foundations of the Law Act”, which read: “where a court, faced with a legal question requiring decision, finds no answer to it in statute law, or case law or by analogy, it shall decide the issue in the light of the principles of freedom, justice, equity and peace of the Jewish heritage.” NAVOT, supra, note 12, at 73; See also Nahum Rakover, Modern Application of Jewish Law 209, 210, Vol. I, Jewish Legal Heritage Society (1992) (“The justice that we are obliged and endeavor to do will be more certain and more solidly grounded if it finds support in our legal tradition and in the righteous wisdom of our forebears.”) (quoting El. A. 2/84 Neiman v.
In Jewish tradition, freedom of expression has long existed as an implied right within some of Judaism’s oldest and most central tenets. The foundation of biblical human rights protection is the central tenet that men were created in the “very image of God,” and therefore each individual is deserving of equal respect in relation to every other person. From this idea, Jewish tradition evolved to protect the ability of individuals to express themselves, even when they are in an unpopular minority, as the thoughts and words of all those created in God’s image are entitled to equal respect. An early example of free expression principles comes from examination of the writings of the biblical prophets. Despite the fact that every prophet claimed to be espousing God’s word, the writings of the prophets were all quite different and often in conflict with one another. However, the fact that “all [prophets] were permitted to function and indeed, as the pages of the Bible bear witness, to preserve considerable sections of their literary activity for posterity,” speaks to the importance that early Jewish society placed on the ability to express differing viewpoints. Similarly, in a dispute between two important Rabbis, the Sanhedrin (an ancient high court of Jewish law) decided to allow both to continue teaching because Judaism thrives on the differing interpretations that come from allowing everyone to express their own views.

Beyond allowing the existence of disparate and often conflicting viewpoints, Jewish law clearly points to protecting the
rights of individuals on a broader level. The Book of Leviticus lays the groundwork for the fundamental protection of individual liberty in stating, “thou shalt proclaim liberty throughout the land, unto all the inhabitants thereof.” By extension, the Torah’s discussion of liberty can be extended to individual freedoms, including the freedom of expression. Another core Judaic concept that speaks to a broad protection of individual rights is Rabbi Hillel’s classic exhortation, “Do not do to another what you would not wish to be done to you – that is the whole of Jewish law, everything else is but commentary and elaboration.” Similarly, “Rabbi Akiba [citing a biblical phrase] stated, . . . ‘thou shalt love thy neighbor as thyself.’” Together, these quotes reflect the idea that, “[o]ne of the fundamental principles in Jewish law is that there should be no discrimination between individuals, who all alike are created in the image of God.” Limiting the free expression rights of a particular class of individuals is precisely the type of discrimination prohibited under these tenets because to distinguish between the value of the expression of different people is to distinguish between people who were created in the image of God. Therefore any government action that seeks to discriminate between groups of individuals on the basis of their right to express themselves stands in conflict with Jewish legal tradition.

C. Policy Concerns

Aside from legal concerns, Israel must also consider the political and financial repercussions of the ABL’s passage. First, Israel receives an enormous amount of money from its allied countries. Chief among those allies is the United States. The United States and other members of the international

141. See generally Shetreet, supra note 134, at 307–12.
142. Id. at 309 (quoting Leviticus 25:10).
143. See Shetreet, supra note 134, at 309.
144. Id. (citing Justice Haim Cohn, The Spirit of Israel Law, 9 Is. L.R. 456,461 (1974)).
145. Id. at 310.
146. Id.
147. See id.
149. See id.
community have voiced their extreme displeasure with the ABL. Therefore, Israel may risk losing some, indeed perhaps a significant portion, of its financial support should it fail to strike down the ABL. Second, given the politically charged atmosphere in Israel and the Middle East, and in light of recent accusations of substandard human rights protections in its dealings with the Palestinians, Israel risks further damage to its own public image. These accusations of human rights violations have led to international backlash, and mounting anger, against Israeli policy, and Israel may lose precious political capital and alienate some of its most loyal allies by affirming the ABL. Such a delicate political climate speaks to the importance of Israel maintaining a positive public image in the international community in order to continue fiscal stability and political viability as an independent nation.

IV. SYNTHESIS

Regardless of the prism through which it is viewed, be it Israeli law, foreign law, or religious law, the ABL is an impermissible violation of the right to free expression. Beginning with Israeli law, the Supreme Court allows for restrictions in violation of the right to free expression only where the government can show both severe harm to the public and a near certainty that severe harm flowing from the expression in question. In contrast with the severity of harm that has been deemed sufficiently dangerous to impinge of free expression rights, the harm addressed by the ABL is relatively minor. In Kahanae, the Supreme Court found that the harm posed by a seditious individual who was advocating for the extermination of entire villages of Arab-Israelis was sufficiently severe to jus-
tify infringing on that individual’s right to free expression.\textsuperscript{155} Further defining the boundary of free expression, in \textit{Bakri}, the Supreme Court held that the harm posed by the exhibition of a film critical of Israel, such as delegitimization and public order, was insufficient to meet the severity of harm requirement.\textsuperscript{156} Looking at \textit{Kahanae} and \textit{Bakri}, the Supreme Court has clearly distinguished between physical harm and other more intangible harms, finding that only when the public faced physical danger was the government justified in limiting the freedom of expression.\textsuperscript{157} In the case at hand, the harm that the ABL purports to prevent is much more analogous to \textit{Bakri} than to \textit{Kahanae}. The West Bank boycotts pose no direct threat to human safety, amounting only to potential pecuniary damages or delegitimization of the government.\textsuperscript{158} Therefore, the degree of harm purported to be protected by the ABL is insufficient to require an exemption from the protection of freedom of expression.\textsuperscript{159} The ABL also fails to meet the \textit{Kol Ha-Am} near certainty standard because its harms are far too remote. The Supreme Court has established an extremely high bar for the certainty with which harm must flow from a particular expression to justify that expression’s suppression.\textsuperscript{160} In \textit{Kahanae}, the Supreme Court determined that an active call for violence was sufficiently certain to cause harm to the public, and therefore interference with free expression rights was justified.\textsuperscript{161} However, in \textit{Levi}, the Supreme Court determined that even the police’s “serious apprehension over a grave threat to public order and security” was not enough certainty to justify restriction.\textsuperscript{162} Together, \textit{Kahanae} and \textit{Levi} reflect the exacting nature of this near certainty standard.\textsuperscript{163} Indeed, the Supreme Court seems to have cumulatively stated that an actual call to violence and the threat of violence, even when verified by the local police, is

\begin{itemize}
\item 155. See CrimFH 1789/98 Kahane.
\item 156. See HCJ 316/03 Bakri.
\item 157. Compare CrimFH 1789/98 Kahane, with HCJ 316/03 Bakri.
\item 158. See supra Part II.B; see also ABL, supra note 1.
\item 159. See HCJ 316/03 Bakri.
\item 160. Compare HCJ 153/83 Levi, at 416, with CrimFH 1789/98 Kahane.
\item 161. CrimFH 1789/98 Kahane.
\item 162. HCJ 153/83 Levi, at 419.
\item 163. Compare HCJ 153/83 Levi, with CrimFH 1789/98 Kahane.
\end{itemize}
not enough to meet the standard.\textsuperscript{164} In the present case, the ABL falls well short of this high bar. Unlike a call to violence, the effects of a boycott are quite remote.\textsuperscript{165} Indeed, it is likely that the economic consequences of any boycott on the country as a whole would not be felt for some time.\textsuperscript{166} Applying the high bar set by the Supreme Court, the ABL clearly lacks adequate justification under the probability prong of the \textit{Kol-Ha-Am} near certainty test.

Alternatively, supporters of the ABL could argue that, as discussed in \textit{Kidum}, the ABL addresses commercial expression (boycotts being economic in nature), and therefore may be subject to a less strict standard.\textsuperscript{167} After all, the Supreme Court has been more lenient in allowing restrictions in the realm of film censorship (a commercial activity), as noted in Part III. A of this Note.\textsuperscript{168} Indeed, the argument continues, the expression in those cases is most similar to the ABL because they each regard offensive expressions that threaten the public order.

However, such an argument misses the mark. First, the Supreme Court has refrained from actually deciding that commercial expression receives a lower standard, instead merely suggesting that it might.\textsuperscript{169} Second, even if commercial expression were entitled to a lower standard, the ABL does not deal with commercial expression because the Supreme Court distinguished commercial expression on the grounds that purely commercial expression does not implicate the democratic rights of the expressing individual.\textsuperscript{170} For censorship cases like \textit{Station Film} and \textit{Israeli Film Studios}, this distinction holds true.\textsuperscript{171} An inability to exhibit one’s creative work does not infringe on one’s ability to participate in the political process, only one’s ability to make money. By contrast, the ABL strikes at the very heart of an individual’s right to participate in the democratic process. The boycotts targeted under the ABL are clear examples of political expression aimed at the policies of

\textsuperscript{164} Id.
\textsuperscript{165} See Rosenberg, supra note 6.
\textsuperscript{166} Id.
\textsuperscript{167} See ALMAGOR, supra note 91.
\textsuperscript{168} See HCJ 4804/94 Station Film; HC 243/62 Israel Film Studios.
\textsuperscript{169} See ALMAGOR, supra note 91.
\textsuperscript{170} See id.
\textsuperscript{171} See HCJ 4804/94 Station Film; HC 243/62 Israel Film Studios.
the Israeli government. To prevent individuals from participating in political discourse in this way is precisely the type of violation of a “supreme right” that the Supreme Court distinguished in *Kidum*.

Jewish law will, additionally, advise the Supreme Court that the ABL is an invalid exercise of legislative discretion. Cumulatively, the totality of Jewish legal tradition speaks to the protection of the rights of individuals and the Torah provides for individuals to be treated freely and without discrimination. The ABL stands in direct conflict with these principles. Primarily, by limiting the expression of those unhappy with the direction of the Israeli government, the Knesset is running afoul of the Jewish tradition of protecting the voices of dissident elements of society. Moreover, the ABL restricts the “liberty” of those who seek to engage in boycotts, in direct violation of the provisions of *Leviticus*.

American law, despite stemming from origins similar to Israeli law, also provides no support for the ABL. Recall that, as a preliminary matter, American law distinguishes between political speech (strictly protected) and commercial speech (less protected). The boycotts targeted by the ABL are not commercial expression, but are instead clear examples of political expression, representing protests of Israeli policies. Therefore, through the lens of American law, the ABL would still fail as it is entitled to the same strict, “near certainty” standard applied in Israeli law.

However, even under American law’s more permissive commercial expression standard, the ABL cannot pass muster. As noted in Part III.B, United States courts have permitted government prohibition on boycott participation, but only where the boycotts in question are secondary, and not related to the

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172. See *supra* Part II.C.
173. See *supra* Part III.B.3.
174. See *id*.
175. See *id*.
176. See *id*.
177. See *id*.; *Leviticus* 25:10.
178. See *supra* Part III.B.1.
179. See Burston, *supra* note 2. See also Lis, *supra* note 7; Mozgovaya, *supra* note 7.
180. See *supra* note 101.
individual’s political rights. Similar to the ABL, the EAA presents the possibility of enforcing pecuniary penalties on parties advocating for a boycott. However, the ABL and American anti-boycott legislation are easily distinguishable. Crucially, the ABL is a ban on domestic boycotting of domestic business (primary), while the American regulations concern participation in foreign boycotts (secondary). Primary boycotts merit a court’s protection far more than participation in a secondary boycott because domestic boycotts are an avenue for participation in one’s own government, a practice firmly established as a fundamental right. However, participation in a secondary boycott has been established as a non-political expression. Therefore, while America does have anti-boycott regulations in force, they would not justify a law analogous to Israel’s ABL.

Nor does International law provide justification for the ABL. Similar to both Israeli and American law, international law has provided for the fundamental right to participate in one’s government. As described above, the ABL represents an impermissible violation of an individual’s right to participate in democracy. The ABL thus runs afoul of the principles of international law and cannot be justified as an appropriate restriction of the Israeli populace’s right to express themselves.

CONCLUSION

The ABL is a violation of the right to free expression, whether analyzed from an Israeli, American, Jewish, or international perspective. To impinge on such a fundamental human right, particularly as it pertains to participation in the political process, is an impermissible blow to the power of the individual. Furthermore, given that the ABL lacks support from the inter-
national community upon whom Israel relies for financial contributions, continued adherence to the ABL could have disastrous effects on Israel as a whole. Therefore, when considering the legal and practical concerns posed by the ABL, it is clear that the Supreme Court should strike down the law as unconstitutional.

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188. See supra Part III.C.

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FUNDING ENTREPRENEURIAL VENTURES IN CHINA: PROPOSALS TO MORE EFFECTIVELY REGULATE CHINESE FOREIGN PRIVATE ISSUERS

"Laws are useless when men are pure, unenforceable when men are corrupt."¹

INTRODUCTION

Over the past thirty years, the People’s Republic of China has emerged into an economic juggernaut.² China has leveraged its population of 1.3 billion people³ to industrialize at an incredible rate.⁴ Three decades of 9 percent average annual growth in gross domestic product ("GDP")⁵ resulted in China supplanting Japan as the world's second largest economy in 2010.⁶ Moreover, by focusing on infrastructure spending and

¹. Chinese proverb.
the export of consumer goods to drive economic growth, China has managed to largely avoid the financial turmoil that has roiled developed economies, particularly the United States and the European Union, since late 2007.

The vibrancy of China’s economy has led to the emergence of a middle class and a generation of “budding entrepreneurs” who seek to build new businesses and raise capital. Western investors have been eager to seek investment opportunities in these fast-growing Chinese businesses and to enter a market that, a generation ago, was off-limits to outsiders. Foreign investment in Chinese firms, however, has been plagued with problems. Regulators have discovered numerous instances of corruption and fraud, often perpetrated through deceptive accounting practices, within Chinese companies publicly listed in the United States. These revelations have resulted in international finger pointing between the United States Securities and

10. Id.
13. Id. at 286.

This Note explores the issues raised by such tainted firms and suggests policy changes that may result in more effective regulation of Chinese public companies. Specifically, this Note argues that by implementing legislation that mirrors provisions of the United States’ Sarbanes-Oxley Act of 2002, China may be able to develop and, more importantly, enforce a stricter regulatory regime that will reduce corporate fraud. Part I of this Note provides an overview of the Chinese economy’s transition from an inward, state-controlled system to a global power. Part II describes the opportunities attracting Western investors to China and the advantages to Chinese business of seeking Western capital. Part III outlines the deficiencies of the current Chinese regulatory system and reviews several recent transactions that have failed due to its insufficiency. Finally, Part IV suggests a regulatory framework that will allow Chinese businesses to access the Western capital markets while assuring investors that the companies are making fully honest and transparent disclosures.

I. THE RISE OF CHINA

A. The Centralized Economy

control over land ownership and implemented harsh restrictions on human rights and business policies.\textsuperscript{19} In 1953, all private businesses officially came under state control.\textsuperscript{20} The economy became centrally planned and rapidly focused on manufacturing and industry.\textsuperscript{21} However, this approach had many disadvantages that ultimately suppressed growth\textsuperscript{22} and China morphed into a “dormant economic giant.”\textsuperscript{23}

\textbf{B. The Beginnings of a Privatized Economy}

Following Mao’s death, Deng Xiaoping came to power and, in 1978, began a series of major economic reforms known as the “Open-Door Policy.”\textsuperscript{24} The Open-Door Policy advocated the use of “market mechanisms and foreign resources . . . to speed up the growth and modernization of the economy.”\textsuperscript{25} These reforms were a stark departure from the rigid planning of the command economy under Mao and generally followed a theme of “market-oriented socialism.”\textsuperscript{26} The new economic plan included banking and securities market reforms as well as a strengthening of the national economy by providing both domestic and foreign investment capital to Chinese industries.\textsuperscript{27}

“Limited privatization”\textsuperscript{28} was an important part of Deng’s Open-Door Policy and was promoted by the Chinese govern-

\begin{itemize}
\item \textsuperscript{19} Ramey, \textit{supra} note 18, at 454. Mao theorized that “this type of planned economy would result in maximum productivity and efficiency, since the entire population would be employed for the good of the country.” Friedman, \textit{supra} note 16, at 477.
\item \textsuperscript{20} China 1949 to 1953, HIST. LEARNING SITE, http://www.historylearningsite.co.uk/china_1949_to_1953.htm (last visited Nov. 24, 2012).
\item \textsuperscript{21} Ramey, \textit{supra} note 18, at 454.
\item \textsuperscript{22} Id. “[The] state-run economy produced few incentives for its people to pursue operational efficiency, and no accountability for the profits or losses of their businesses. As a result, the Chinese economy generated massive waste and losses.” Friedman, \textit{supra} note 16, at 477.
\item \textsuperscript{23} Hu & Khan, \textit{supra} note 5, at 1.
\item \textsuperscript{24} Ramey, \textit{supra} note 18, at 456.
\item \textsuperscript{25} Id. Deng Xiaoping characterized his reforms as “socialism with Chinese characteristics.” Friedman, \textit{supra} note 16, at 478.
\item \textsuperscript{26} Ramey, \textit{supra} note 18, at 456–62 (describing “market-oriented socialism” as a mixture of capitalist notions and social ideals).
\item \textsuperscript{27} Id. at 456.
\item \textsuperscript{28} “Limited privatization” refers to “minority private equity participation in state-owned enterprises so as to enable the government to retain majority control of the market.” Friedman, \textit{supra} note 16, at 478.
\end{itemize}
ment as a means to attract capital into the economy.29 By privatizing some industries, the government was able to sell its stake to private interests while using the proceeds to reinvest capital into the economy.30 The state still retained a controlling interest in the “privatized” entity, however.31 The concept of “limited privatization” thus allowed the government to achieve two objectives.32 First, the government was able to infuse capital into the economy, thereby promoting growth.33 Second, the government was able to retain a position in these “privatized” businesses to promote its socialist agenda and goals,34 while retaining full control of select industries such as the media.35 By achieving these two feats, “limited privatization” set the stage for China’s economic renaissance.36

C. A Global Economic Power

The results of China’s economic reform were rapid.37 Since 1978, when Deng Xiaoping removed hard-line Communist policies and began to promote the free-market, China’s economy has increased in size ninety times over.38 During this time, China has seen an average growth of more than 9 percent per year, with several peak years exceeding 13 percent growth in...
GDP.39 From a broader perspective, the economy has successfully transitioned from an agrarian economy into an industrial and service-based economy.40 Three developments—out of many more—are particularly illustrative. First, four out of five Chinese were employed in agriculture in 1978; by 1994, that number dropped to only one in two.41 Second, four of the world’s top ten companies today, as measured by market capitalization, are from China.42 Third, in August 2010, Agricultural Bank of China Limited closed the largest initial public offering ever at $22.1 billion.43

By focusing on areas like infrastructure spending, China has largely avoided the worst of the “Great Recession” that continues to plague much of the developed world as of mid-2012.44 In fact, China’s growth rate in 2009—the very height of the crisis—stood steady at 8.7%.45 Though there may be a number of

39. Hu & Khan, supra note 5, at 1. Before 1978, China saw annual growth of about 6 percent per year, but with “painful ups and downs along the way.” Id.

40. See generally Finn, supra note 12, at 285. See also Hu & Khan, supra note 5, at 5 (reciting that the reforms began with the decollectivization of agriculture and the development in rural areas of a non-agricultural employment sector).

41. Hu & Khan, supra note 5, at 5.

42. Hamlin & Yanping, supra note 4. These companies are PetroChina Company, Industrial & Commercial Bank of China Limited, China Mobile Limited, and China Construction Bank Corporation. Id.

43. Id. Five years after China’s first state-owned lender went public, the country is now home to four of the world’s ten largest banks by market capitalization. Id. Throughout this Note, “$” refers to U.S. Dollars unless otherwise stated.

44. Geoff Dyer, China Embarks on Infrastructure Spending Spree, FIN. TIMES (June 7, 2010, 5:55 PM), http://cache.ft.com/cms/s/0/dc65a5c8-6fc2-11df-8cf-00144feabc0.html#axzz1acBNCaZZ. “New roads have been built and gleaming airline terminals constructed, but the biggest emphasis has been on rail, especially the rapidly expanding high-speed network. . . . China plans to lay 18,640 miles of track by the middle of the decade at a cost of as much as Rmb4,000 bn.” Id. China’s economic performance during the Great Recession has been described as “the envy of the Western world.” Jeremy Page, Many Rich Chinese Consider Leaving, WALL ST. J. (Nov. 1, 2011), http://online.wsj.com/article/SB10001424052970204394804577011760523331 438.html?mod=WSJ_hp_MIDDLENexttoWhatsNewsTop (describing annual GDP growth of 9.1% in the third quarter of 2011 and an International Monetary Fund estimate of 9.5% GDP growth for all of 2011).

factors for China’s success during the recession, China’s role as a “resource vacuum” has played an undeniably important role.\textsuperscript{46} For example, China is the world’s number one buyer of iron ore and copper and number two importer of crude oil.\textsuperscript{47}

With China’s 1.8 billion people, three decades of 9 percent average growth in GDP per year, and an apparent immunity to the global economic downturn occurring outside of its borders, it is unsurprising that China has been quickly ascending the International Monetary Fund’s ranking of countries by GDP.\textsuperscript{48} China, with a GDP of $5.9 trillion, surpassed Japan in 2010 to become the world’s second largest economy.\textsuperscript{49} In the next decade, China is projected to overtake the United States and become the largest economy in the world.\textsuperscript{50} As the United States struggles with debt-financing entitlement obligations and national security,\textsuperscript{51} China holds about $1.2 trillion of United States Treasury bills,\textsuperscript{52} making it the largest financier of U.S. debt outside of the United States.\textsuperscript{53} The tremendous investment China has accumulated in the United States makes certain that its rise will have a significant impact on the global economy going forward.

\begin{itemize}
\item[46.] Rapoza, supra note 8.
\item[47.] Hamlin & Yanping, supra note 4.
\item[48.] Becoming Number One, supra note 6.
\item[49.] Id.
\item[50.] Id. This determination assumes an average annual growth rate of 2.5\% for the United States. Id. Depending on the calculation of exchange rates, the date could be even sooner. Id. The current calculation using purchasing power parity, which takes into account the relative cost of goods in the various countries, shows that the United States and China are actually very close in economic might and that China will overtake the United States by 2016. Id. Calculation using current market prices leaves China further behind, though, as does any formula involving GDP per person metrics. Id.
\item[51.] Jack Welch & Suzy Welch, Who Will Rule The 21st Century?, BLOOMBERG BUS. WK. (July 1, 2007), http://www.businessweek.com/perm/content/07_27/b40410889.htm (“If not dealt with, entitlements like Social Security, Medicare, and Medicaid will create a budget deficit that will explode over the next 20 years.”).
\item[53.] See Rapoza, supra note 8.
\end{itemize}
II. THE CHINESE ENTREPRENEUR AND WESTERN OPPORTUNITIES FOR INVESTMENT

The introduction of “limited privatization” has had two socio-logical effects on the nation. First, market economic policies have led to the rise of a large, wealthy middle class. Second, an entrepreneurial spirit has developed within that middle class, to which an increasingly educated Chinese populace is seeking to cater by using research and technology to develop fast-growing new ventures. This is a self-perpetuating effect that will be central to China’s ability to sustain its incredible rate of development.

A. The New Middle Class

Since the state began to move towards “market-oriented” socialism, the United Nations estimates that China has lifted 300 million of its citizens out of poverty. Further, according to the World Bank, China’s poverty rate has gone from 6% in 1996 to 2.8% in 2004. Presently, China’s middle class consists of 300 million people, or approximately 25% of the population. Ac-
According to the Chinese Academy of Social Sciences, families with assets valued from RMB150,000 ($18,137) to RMB300,000 ($36,275) are to be classified as middle class. This middle class is composed of “a range of different sorts of white-collar people—entrepreneurs, employees of large state-owned enterprises and multinational companies, CPC officials, lawyers, doctors, and teachers.” The ascent of this middle class may perhaps be most clear when considering that many children of parents who were assigned manual labor jobs by the CPC a generation ago now work at start-up companies. The philosophy of the new Chinese middle class is that money may be the only possible means of achieving personal autonomy in a nation where political freedoms are still very restrained.

B. The Chinese Entrepreneur

Entrepreneurism in China has been a catalyst for the nation’s economic growth since the late 1990s. Rising expectations and the constant drive for money has driven a new generation of Chinese, many of whom were not even born at the time of the 1978 reforms, to become entrepreneurs. The reforms under Deng Xiaoping and the Open-Door Policy granted greater autonomy to enterprise managers, allowing them to truly control their businesses by pricing goods at competitive levels, hiring efficient workers and firing inefficient workers, and re-

62. Xin Zhigang, Dissecting China’s ‘Middle Class’, CHINA DAILY (Oct. 27, 2004), http://www.chinadaily.com.cn/english/doc/2004-10/27/content_386060.htm. While these numbers may seem low, it is important to remember the purchasing power parity discrepancy between China and Western nations, as well as China’s per capita GDP rests around $2000. Throughout this Note, “RMB” refers to Chinese Renminbi unless otherwise stated.
63. Ford, supra note 61.
64. See, e.g., id. (describing the youngest generation of Chinese as being able to afford luxuries, such as cars and vacations, which were unknown to their parents’ generation).
65. Id. One “middle class” woman interviewed for the article stated her belief in the power of money to ensure well-being. Id. As an example, she cited the tainted infant milk scandal of 2008, where over 12,000 babies were poisoned by adulterated milk. Id. Middle class families, she says, were able to afford imported baby formula. Id.
66. Yueh, supra note 54, at 15. In 2006, the World Bank estimated that there were 40 million small- and medium-sized enterprises in China. Id.
67. See generally id. at 15–18.
68. Hu & Khan, supra note 5, at 5.
taining corporate earnings for future investment. These enter-
prises have developed new products, created jobs, paid taxes,
and have “given the national economy a flexibility and resi-
liency” that was absent under Mao’s leadership. As the CPC
relinquishes its control of business, the emergence of entrepre-
neurs has “transformed the economy into one increasingly
driven by competition, innovation and productivity,” resulting
in private company growth of over 30 percent per year.

A major challenge faced by those seeking to start their own
businesses in China has been access to credit. It is estimated
that less than 0.5 percent of Chinese small- and medium-sized
businesses can obtain loans from local banks. Chinese banks,
despite the “limited privatization” movement, remain state-
owned and prefer to issue credit to “politically favored govern-
ment companies.” In addition, seed investment capital, money
typically available in mature markets to fund start-up ven-
tures, is almost non-existent in China. To some extent, this
unwillingness to lend reflects a more conservative Chinese in-
vestment philosophy. Chinese venture capitalists, a nascent
industry itself, prefer companies with fully developed prod-

69. Id.
70. Id.
71. Yueh, supra note 54, at 18.
72. Fuhrman, supra note 11 (“[These companies] have the scale, experience, management and market leadership to continue to double in size every two to three years.”).
73. Yueh, supra note 54, at 16.
74. Id. A survey shows that only 7 percent of entrepreneurs have adequate funding to capitalize their businesses. Id.
75. Joe McDonald, China Promises More Loans for Small Companies, BOSTON GLOBE (Oct. 12, 2011), http://www.boston.com/business/articles/2011/10/12/china_promises_more_loans_for_small_companies. Approximately 70 percent of bank loans finance companies controlled by the state, despite the fact that the state sector produces only 34 percent of total industrial output. Ramey, supra note 18, at 483.
77. See id.
ucts, a customer base, and a sales history when evaluating an investment. Because of the unwillingness of banks to lend and the absence of early-stage “angel” investors, Chinese businesses have been forced to turn to a high-interest underground credit market akin to loan-sharking.

C. Reverse Mergers as a Means to Access the American Capital Markets

Chinese companies seeking a stable source of funding are eager to bypass the local funding regime entirely. These businesses often seek to access the broad capital markets of the United States. At the same time, due to China’s confluence of a large population, increasingly educated populace, and rising standards of living, American investors are eager to provide capital to Chinese companies that offer access to the burgeoning Chinese market. The potential for growth investment in China is illustrated by the Halter USX CHINA Index, which posted a gain of 60% in 2009.

80. McDonald, supra note 75. An economist at Credit Suisse recently valued the Chinese “informal lending” market at four trillion yuan ($615 billion) and growing at a rate of approximately 50 percent a year. Id.
82. DeLaMater, Recent Trends in SEC Regulation of Foreign Issuers: How the U.S. Regulatory Regime Is Affecting the United States’ Historic Position as the World’s Principal Capital Market, 39 CORNELL INT’L L.J. 109, 109 (2006) (“Since World War II, the United States has been the world’s principal capital market . . . with substantial retail participation by individual investors and small institutions, plentiful capital for equity financing and a willingness to hold long-term debt securities.”).
83. Barbarians in Love, supra note 81 (describing China as particularly “seductive” for Westerners).
85. Id.
The early 2000s, Western investors have been excited to explore similar speculation in alternative markets such as China.

The result of Western investment interest and the Chinese desire to access the more developed Western capital markets has been the rapid emergence of Chinese companies choosing to list their securities on American stock exchanges. The most common route chosen to list in the United States by these companies has been the reverse merger. A reverse merger occurs when a private Chinese company is merged into an existing American public shell company. The American shell company’s board resigns, and then the new Chinese board assumes control, changes the company’s name, and begins to issue


87. See Finn, supra note 12, at 285–86. The small business start-up scene in China has been described as having a “frenetic feel” to it, similar to the dot-com boom days. Ron Gluckman, Seeding China’s Start-Up Scene, With A Nod to Silicon Valley, N.Y. TIMES (Dec. 15, 2011, 8:22 PM), http://dealbook.nytimes.com/2011/12/15/seeding-chinas-start-up-scene-with-a-nod-to-silicon-valley.

88. Alpert & Norton, supra note 84.

89. Jamil Anderlini, Investing: Problems Flagged Up, FIN. TIMES (July 4, 2011, 8:26 PM), http://www.ft.com/cms/s/0/6f5c9e8e-a671-11e0-ae9c-00144feabd0c0.html.

shares to the public. A reverse merger allows a company to start accessing the U.S. public markets without going through the lengthy initial public offering (“IPO”) formalities controlled by the SEC. By not having to officially file for an IPO, companies avoid the legal and auditing fees associated with negotiating with underwriters. More significantly, companies listing by reverse merger are not required to file a registration statement for review by the SEC.

About 350 Chinese reverse mergers have closed since 2003. Though deals of this nature rarely exceed one billion dollars in market capitalization, these 350 transactions have a combined capitalization of over fifty billion dollars. Because of this strategy, Chinese foreign issuers are able to access American capital markets without regulatory review of their disclosure and without oversight as to whether their financial statements were properly audited. In the late 2000s, a combination of American regulators, auditors, and activist investors began to unveil many Chinese companies listing in the United States as frauds, threatening American investors, tarnishing the reputa-

91. Bruce Einhorn & Frederik Balfour, Going Public, Chinese Style, BLOOMBERG BUS. WK. (Mar. 5, 2007), http://www.businessweek.com/magazine/content/07_10/b4024067.htm. For example, Ticketcart Inc., a defunct online retailer of printer cartridges, was merged with Tieli Xiaoxinganlin Frog Breeding Company, a Chinese nutritional supplements retailer, to allow the Chinese company to go public in the United States. Id.


93. Norris, supra note 92.

94. Id.

95. Alpert & Norton, supra note 84.

96. Id.

tion of the Chinese economy, and ultimately harming the interests of Chinese entrepreneurs seeking foreign capital.98

III. DEFICIENCIES IN THE CHINESE REGULATORY SYSTEM AND CORPORATE FRAUD

Some have described the oversight of “foreign private issuers,” including Chinese companies listed on U.S. securities exchanges, as a “regulatory vacuum,”99 with neither the United States nor China effectively monitoring those companies that list via reverse merger. The lack of oversight has resulted in massive losses by international investors, which continue as of this writing. This Part describes the current regulation of securities in the United States and China and the deficiencies that the Chinese system faces with regards to enforcement. It then provides an explanation for the underperformance of Chinese reverse merger listings and the instances of corporate fraud that regulators and investors have unveiled. Lastly, this Part examines both the current regulatory abyss in which Chinese foreign private issuers find themselves and the inability of American and Chinese regulators to find compromise.

A. A Tale of Two Regulatory Regimes

In the United States, the federal securities laws “establish mandatory disclosure of the business and financial conditions

98. It is important to note that many well-established Chinese companies list on American exchanges through means other than reverse mergers. Steve Dickinson, Thinking Clearly About Chinese Companies Listed on US Stock Exchanges. Or, If a Tree Falls in a Sino-Forest . . ., CHINA L. BLOG (July 1, 2011), http://www.chinalawblog.com/2011/07/thinking_clearly_about_chinese_companies_listed_on_us_stock_exchanges.html. They are typically government-controlled companies that concurrently trade on either the Shanghai or Shenzhen stock exchanges. Id. These companies form the heart of the Chinese industrial and service economy. Examples include China Eastern Airlines Corporation, China Life Insurance Company Limited, China Mobile, and China Unicom. See id. These companies are considered Chinese “blue-chips” and have not been implicated in any fraudulent activity. See id. Companies pursuing the reverse merger route tend to be small-cap technology companies operating under unique structures such as the VIE (variable interest entity). See id.
99. Anderlini, supra note 89.

The Securities Act applies to an issuer’s initial offering of securities. Domestic companies wishing to issue their securities to the public must have the approval of the SEC. Prospective issuers gain such approval through a multistep process, typically beginning with the company filing a registration statement on Form S-1 and disclosing information about the issuer, the security offered, and any potential underwriters. Under the Securities Act, companies must make full disclosure of all pertinent information to potential investors in the registration statement. Further, the SEC requires that financial statements, audited by an independent certified public accountant, accompany the registration statement. The registration statement is reviewed by the SEC and, in the event the SEC makes comments about the filing, subsequently revised by the issuer. Once the SEC fully approves the document, it is

102. Fanto & Karmel, supra note 100, at 53.
104. All forms are SEC forms unless otherwise stated.
106. Q&A: Small Business and the SEC, supra note 97 (defining “full disclosure” as “the facts investors would find important in making an investment decision.”). Supreme Court Justice Louis Brandeis once observed that “sunshine is the best disinfectant, electric light the best policeman.” PINTO & BRANSON, supra note 86, at 167. One of the main purposes of the “full and fair disclosure” philosophy is to prevent fraud by eliminating three mechanisms through which fraud manifests itself: “non-disclosure, half-truth, [and] disclosure in a misleading way.” Id. at 168. Full and fair disclosure encourages efficient public capital markets and protects prospective investors. Pavkov, supra note 90, at 496.
108. Id.
declared “effective” and the issuer is free to become a public reporting company.\footnote{109} The Exchange Act governs the subsequent issuance and trading of securities by requiring public companies to file timely reports with the SEC relating to their ongoing financial performance and operations.\footnote{110} These reports include an annual report with audited financial statements on Form 10-K, as well as quarterly reports with unaudited financial statements on Form 10-Q and current reports concerning certain episodic events on Form 8-K.\footnote{111}

Compliance with the federal securities laws, particularly the initial registration of securities by a new issuer under the Securities Act, entails significant cost.\footnote{112} Section 11 of the Securities Act imposes liability upon every person who signed the registration statement for “any untrue statement of a material fact” contained “in any part of the registration statement.”\footnote{113} Due to the considerable degree of liability involved, issuers are wise to retain legal counsel and an accounting firm that will “credibly audit and certify financial statements.”\footnote{114}

\footnote{110. Fanto & Karmel, supra note 100, at 53; Pavkov, supra note 90, at 496.}
\footnote{112. PINTO & BRANSON, supra note 86, at 172. Aside from legal expenses, fees include auditing expenses, SEC registration fees, and the cost of printing copies of the issuer’s prospectus once finalized. Id.}
\footnote{113. 15 U.S.C. § 77k; PINTO & BRANSON, supra note 86, at 171. Section 11 liability is vast.}

Defendants under [Section 11 of the Securities Act] include the issuer, every person who signed the registration statement (the principal executive officer, chief financial officer, comptroller or other chief accounting officer, and a majority of directors must sign), every person who was a director, those named as becoming a director, and every accountant, engineer, appraiser or “other person whose profession gives authority to a statement made by him” who “expertises” or certifies a portion of the registration statement. The issuer is strictly liable.

\footnote{Id. (emphasis in original).}
\footnote{114. PINTO & BRANSON, supra note 86, at 171.
The accountancy firms reviewing the financial statements of public reporting companies in the United States are themselves regulated by the Public Company Accounting Oversight Board (“PCAOB”). The PCAOB is a nonprofit organization that provides regulatory oversight to the audits of public companies. The organization seeks to “protect the interests of investors” and ensure the dissemination of “informative, accurate and independent audit reports.” The PCAOB was created as part of the reforms promulgated under the Sarbanes-Oxley Act of 2002 (“SOX”) in response to a wave of corporate and accounting scandals in the United States.

China’s securities regulatory regime, particularly with respect to enforcement, is decidedly primitive as compared to

116. See id.
117. Id. The SEC oversees the PCAOB and approves the rules, standards, and budget proffered by the PCAOB. About the PCAOB, PUB. COMPANY ACCT. OVERSIGHT BOARD, http://pcaobus.org/About/Pages/default.aspx (last visited Sept. 7, 2012). The PCAOB is funded by annual fees assessed to public reporting companies according to their market capitalization. See id. The PCAOB is managed by a board appointed to staggered five-year terms by the SEC, in consultation with the Federal Reserve and the Secretary of the Treasury. See id. Potential sanctions, which the PCAOB may levy on audit firms for violations of its standards, include “fines, censures, removal from client arrangements, limitations on activities, and suspension from audit functions on a temporary or permanent basis.” John Paul Lucci, Enron—The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley, 67 ALB. L. REV. 211, 223 (2003).
118. About the PCAOB, supra note 117. The most prominent of the corporate and accounting scandals of 2001-02 was the December 2001 collapse of Enron. See Lucci, supra note 117, at 211–12 (“Financial scandals involving WorldCom, Qwest, Global Crossing, Tyco, and Enron ultimately cost shareholders $460 billion.”). Enron was a Houston, TX-based corporation engaged in energy and commodities trading. Gary M. Cunningham & Jean E. Harris, Enron and Arthur Andersen: The Case of the Crooked E and the Fallen A, 3 GLOBAL PERSP. ON ACCT. EDUC. 27, 31 (2006). Enron was once the seventh largest company in the United States by market capitalization. Dan Ackman, Enron the Incredible, Forbes (Jan. 15, 2002, 12:00 PM), http://www.forbes.com/2002/01/15/0115enron.html. Enron’s auditor, Arthur Andersen LLP, was considered one of the most prestigious accounting firms in the world. Cunningham & Harris, supra note 118, at 31. Enron imploded in the fall of 2001 after the revelation of a series accounting irregularities and instances of insider trading amongst Enron senior executives. See id. at 34, 40–44. Arthur Andersen was convicted in June 2002 of obstruction of justice for shredding accounting working papers in connection with the Enron audit and eventually dissolved. See id. at 34, 44–45.
what exists in the United States.\textsuperscript{119} This has resulted in a Chinese securities market that has been described as “notoriously corrupt and ‘casinolike [sic].’”\textsuperscript{120} The primary government regulator in China is its equivalent of the SEC,\textsuperscript{121} the China Securities Regulatory Commission (“CSRC”).\textsuperscript{122} The powers of the CSRC are delineated in the Securities Law of the People’s Republic of China (“Chinese Securities Laws”),\textsuperscript{123} which sets forth the regulatory regime for both initial and subsequent offerings of securities by Chinese companies.\textsuperscript{124} The CSRC’s basic functions, similar to the SEC, include general supervisory powers over the securities markets;\textsuperscript{125} verification, examination, and approval of public offerings of securities;\textsuperscript{126} and, notably, “supervis[ing] the securities market behaviors of the listed compa-


\textsuperscript{121} See Friedman, \textit{supra} note 16, at 484 (discussing how the CSRC, a regulatory body “subordinate to the State Council,” is similar to the United States scheme, in which the SEC is “subordinate to the executive branch.”). In addition, the CSRC draws its regulatory authority by a grant from the legislature through their promulgation of the Chinese Securities Laws. \textit{Id}. at 485. Similarly, the SEC was created through Congressional passage of the Exchange Act. \textit{See} 15 U.S.C. § 78d.

\textsuperscript{122} See Friedman, \textit{supra} note 16, at 484.


\textsuperscript{124} \textit{See id}. art. 10–77 (China).

\textsuperscript{125} \textit{See id}. art. 166 (China).

\textsuperscript{126} \textit{See id}. art. 10, 167(5) (China).
nies and their shareholders who shall fulfill the relevant obligations according to the relevant laws and regulations.\footnote{127}

As under the Securities Act in the United States, the registration of new securities in China must be accompanied by legal, accounting, and financial reports.\footnote{128} Similar to the Exchange Act in the United States, public companies in China must file periodic reports with the CSRC disclosing their financial condition and performance.\footnote{129} However, there is no independent accounting oversight body similar to the PCAOB in China.\footnote{130} Therefore, the responsibility to police companies’ disclosures and enforce the submission of accurately audited financial statements rests with the CSRC alone.\footnote{131}

Structurally, the CSRC is an institution within the State Council, China’s most powerful executive body.\footnote{132} Some have

\footnote{127. \textit{China Securities and Regulatory Commission, China SEC. REG. COMMISSION}, http://www.csrr.gov.cn/pub/csrc_en/about/who/intro (last visited Sept. 7, 2012). Further, the CSRC’s mandate states that the body will “regulate, according to law, the securities business activities of. . . those law firms, public accounting firms and asset appraisal organizations that are engaged in securities business.” \textit{ZHENGQUAN FA}, art. 167(3) (China).

128. \textit{ZHENGQUAN FA}, art. 58 (China).

129. See \textit{id.} art. 60–62 (China). However, while the Exchange Act requires annual, quarterly, and current reports, the Chinese Securities Laws require annual reports, “interim” reports every six months, and “ad hoc” reports upon certain triggering events. 15 U.S.C. § 78m; \textit{ZHENGQUAN FA}, art. 60–62 (China).

130. See Andrea Shalal-Esa & Sarah N. Lynch, \textit{Exclusive: Justice Department Probing Chinese Accounting}, \textit{REUTERS} (Sept. 29, 2011), http://www.reuters.com/article/2011/09/29/us-china-usa-accounting-idUSTRE78S3QM20110929 (quoting Robert Khuzami, Director of Enforcement at the SEC, that inadequate accounting and audit review in China is “a big issue” and “not acceptable”). Interestingly, the Chinese constitution does contemplate accounting oversight, as evidenced by the constitution’s establishment, within the State Council, of an Auditor-General position that oversees an independent auditing body. \textit{XIANFA} art. 86, 91 (1982) (China). However, the auditing body’s jurisdiction is limited to regulating the “auditing [of] revenue and expenditure of departments under the State Council” and local municipalities. \textit{Id.} art. 91, § 3 (China). This limited jurisdiction of the Auditor-General is further clarified in the Chinese Securities Laws, which describe the Auditor-General’s authority over “stock exchanges, securities companies, securities registration and clearing institutions and the securities regulatory authority.” \textit{ZHENGQUAN FA}, art. 9 (China).

131. \textit{See ZHENGQUAN FA}, art. 65 (China).

132. \textit{Id.} art. 7 (China). The State Council is “the executive body of the highest organ of state power[ and] the highest organ of state administration.” \textit{XIANFA} art. 85 (China). The membership of the State Council consists of the
recognized this lack of independence as being problematic for enforcement purposes.\footnote{133} A survey of mature economies shows that the chief regulatory body is typically structured independently to ensure enforcement efficacy.\footnote{134} In China, though, the government has dual interests, only one of which is regulation.\footnote{135} Since the CPC still has a large presence in some industries that were deemed off-limits to the “limited privatization” movement, the government remains a dominant shareholder in many companies.\footnote{136} The CSRC, as a State Council agency, is therefore placed in the position of regulating a securities market in which the government is a significant participant.\footnote{137} It is not difficult to imagine situations where the government “encourages” the CSRC to back off of a regulatory enforcement ac-

\footnote{133. HUI HUANG, INTERNATIONAL SECURITIES MARKETS: INSIDER TRADING LAW IN CHINA 86 (2006).}

\footnote{134. \textit{Id.} (citing the SEC in the United States, the FSA in the United Kingdom, and the ASIC in Australia as three examples of regulator independence). “It goes without saying in developed securities markets that a securities regulatory body should be structured independently to enable it to effectively carry out its regulatory role.” \textit{Id.}}

\footnote{135. \textit{Id.}}

\footnote{136. \textit{See} Ramey, \textit{supra} note 18, at 464; Carew, \textit{supra} note 31. The state shows no sign of relinquishing control of certain sectors, such as “national securities-related industries, natural monopolies, sectors providing important goods and services to the public, and important enterprises in pillar industries and the high-technology sector.” Donald C. Clarke, \textit{Law Without Order in Chinese Corporate Governance Institutions}, 30 NW. J. INT'L L. & BUS. 131, 144 (2010).}

\footnote{137. HUANG, \textit{supra} note 133, at 86 (estimating that state-owned shares make up about two-thirds of all shares on the market). Further, the CSRC’s main enforcement tool is referral to the judiciary. \textit{See} ZHENQUAN FA, art. 173 (China). The judiciary branch in China is equally conflicted with respect to the CPC and government interests. \textit{See} Clarke, \textit{supra} note 136, at 182.}
Conflicts of interest aside, the enforcement power of the CSRC is rather limited.\textsuperscript{139} There is evidence that the agency has trouble securing funding and retaining talent.\textsuperscript{140} For one example, the CSRC employs only 1,465 staff despite China’s enormous population.\textsuperscript{141} The agency’s powers to investigate companies and collect evidence are therefore limited.\textsuperscript{142} To provide a second example of the CSRC’s weak legitimacy, Chinese courts often do not cooperate with the agency’s requests to freeze corporate assets.\textsuperscript{143} The passive judicial response to CSRC inquiries is partially due to the fact that Chinese judges are the appointees of local political authorities.\textsuperscript{144} Yet there is also a procedural element involved, as Chinese plaintiffs must file suit in the defendant’s domicile.\textsuperscript{145} A corporate defendant is likely either controlled by the local government or, if the company has been privatized under the 1978 reforms, by locally influential executives.\textsuperscript{146} The local government and court officials may have an interest in the company’s performance.\textsuperscript{147} Therefore, due to locality interests, these courts are satisfied to allow a local company to continue operating without regulatory interference.\textsuperscript{148} In sum, while the CSRC ostensibly appears to mirror the SEC’s goals and regulations, the agency is largely

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Clarke, supra note 136, at 180. If the securities markets are not paying good money for issues of [state-owned enterprises’] stock, then the CSRC is not doing its job, and if clamping down on abuses would hurt the markets—for example, by obstructing the flow of funds into the market from illegal sources—then the CSRC may not have the political will to do so.
\item Id. See Huang, supra note 133, at 84–86.
\item See id. at 84–85 (explaining that many Chinese view the CSRC has a training ground for private sector financial employment).
\item Id. at 84.
\item Id. at 86.
\item Id.
\item Clarke, supra note 136, at 182. In addition to corruption and vulnerability to political pressure, Chinese judges tend to have a low level of education. Id.
\item Id.
\item Id.
\item See id.
\item See id.
\end{enumerate}
\end{footnotesize}
ineffective in enforcing the Chinese Securities Laws, thereby allowing investors and companies to pursue potentially fraudulent activity without fear of penalty. 149

One theory as to China’s lack of effective oversight blames the relative youth of the Chinese securities industry. 150 While the American regulatory regime arose in response to the Great Depression, 151 China has attempted to develop securities regulation in a time of prosperity. 152 Its regulatory bodies, which oversee the banking and insurance industries, predate the growth of China’s banks into some of the largest in the world. 153 Further, although the CSRC has been creating new regulations quickly, 154 it is too understaffed to enforce its own laws. 155 The current Chinese securities market consists of approximately 1,200 Chinese public reporting companies issuing securities to a market of 1.3 billion people. 156 Nevertheless, China does in fact have largely similar regulations to those found in Western economies. 157 Therefore, some academics con-

149. See Markets in China, supra note 14.
150. From 1989 to October 2002, China went from having no securities market to a securities market with over 1,200 publicly listed companies. These companies collectively constituted a market capitalization of 4.27 trillion yuan ($514.3 billion). Ji Chen & Stephen C. Thomas, The Ups and Downs of the PRC Securities Market, 30 CHINA BUS. REV. 36, 36 (2003).
151. Q&A: Small Business and the SEC, supra note 97 (reciting that, in the United States, Congress enacted the federal securities laws in response to the Stock Market Crash of 1929 and tasked the SEC to administer them). The United States has a history of reactionary financial regulatory legislation beyond just the federal securities laws in the 1930s. The technology boom of the 1960s involving Xerox, IBM, and Polaroid led to the passage of the Williams Act (regulating corporate takeovers), ERISA (regulating employee benefit plans), the Hart-Scott-Rodino Act (amending existing antitrust law), and the Foreign Corrupt Practices Act (providing for further accounting transparency), all in the 1970s. DeLaMater, supra note 82, at 115.
152. Yin, supra note 120, at 409.
153. Dinny McMahon & Aaron Back, Resignations Suggest Shift for China's Banks, WALL ST. J. (Oct. 29, 2011), http://online.wsj.com/article/SB10001424052970203687504577003734190522426.html. Despite China’s position as the world’s second largest economy, the financial sector remains underdeveloped and regulators face major challenges. Id.
154. Yin, supra note 120, at 415.
155. See Chen & Thomas, supra note 150, at 39.
156. Id.; WORLD FACTBOOK, supra note 3.
157. Yin, supra note 120, at 412–13. China looked to the Western regulatory structure for guidance when drafting the CSRC’s mandate. Id. In a sur-
tend that the source of problems found in Chinese companies is management, not government.158 Due to the overwhelmingly centralized state of the Chinese economy a generation ago, these scholars argue, many Chinese falsely disclose information, manipulate markets, and trade on inside information due to their lack of experience with capitalism.159

Putting aside the unlikely explanation of a cultural propensity towards deceitful behavior, the principal difference between the Chinese and American financial regulatory systems remains the principal regulator’s willingness to pursue enforcement and independent accounting oversight of companies.160 An examination of case studies confirms that accounting irregularities, as well as revelations of outright fraud, are frequently to blame for the underperformance of the many Chinese foreign private issuers listing in the United States via reverse mergers.

B. The Underperformance of Reverse Merger Listings

As discussed above, many Chinese small businesses that have sought to access American capital markets have done so through a reverse merger with an existing American shell company and subsequently listing either on an exchange, such as the New York Stock Exchange (“NYSE”) or the NASDAQ, or on the over-the-counter (“OTC”) bulletin board system.161 Since

prising move, Premier Zhu Rongji recruited a Shanghai-born, U.S.-educated woman to be Vice Chairperson of the CSRC. Some observers see this as an attempt to “fall in line with Western securities regulation standards.” Id. For a comparison of United States and Chinese securities regulation, see supra notes 100–160 and accompanying text.

158. See, e.g., id. at 414; Finn, supra note 12, at 287.

159. See Yin, supra note 120, at 414 (noting “lack of experience in capitalist economic policies” as a factor in regulatory problems plaguing China). See also Finn, supra note 12, at 287 (describing a “cultural grounds for acceptance of bribery” and frequent corruption). Finn draws a connection between corruption and the emergence of the post-1978 Chinese economy. Id. Further, he states that “corruption has an adverse effect on foreigners doing business in China.” Id.


161. Anderlini, supra note 89. Public companies which are not listed on an exchange trade in the OTC market, a “securities quotation and trading system for broker-dealers.” Pavkov, supra note 90, at 508, 510–11. The OTC
the goal of the Chinese company conducting a reverse merger is to find an easy means to access the American public markets, rather than the traditional merger motivation of finding a strategic partner, many of the reverse merger deals have involved odd corporate combinations. For example, Winner Group, a Chinese medical-device retailer, merged into the shell of Las Vegas Resorts. Zhongsen International, a tire manufacturer, likewise merged into the American shell of Rub A Dub Soap. Chinese foreign private issuers that have pursued this sort of “backdoor listing” are not subject to SEC review or reporting, nor are they subject to the rules and regulations issued by the individual exchanges on which they list their securities.

Despite Western enthusiasm over the wondrous growth in China, many of the Chinese companies listing via reverse merger have underperformed. A Barron’s study of 158 Chinese foreign private issuers in the United States shows that the median among them underperformed the benchmark Halter USX CHINA Index by 75% and the Russell 2000 small-cap stock index by 66%. The American investor seeking to invest in the Chinese small-business boom and the Chinese entrepreneur seeking American growth capital bore the brunt of these losses.

marketplace does not have the trading floor of an exchange. Id. at 508 (explaining that securities in the OTC marketplace are traded by dealers known as “marketmakers.”). The OTC marketplace is particularly popular with Chinese foreign private issuers due to its lower standards for review and approval. Double Due Diligence Efforts Before Investing, supra note 92. See also Pavkov, supra note 90, at 511 (describing the OTC bulletin board system and the Pink Sheets as the “wild west of stock markets.”). The OTC marketplace requires only that companies are current in their Exchange Act filings and are not listed concurrently on any national securities exchange. Id. By contrast, the NYSE has the most stringent listing standards and often delists companies that “significantly reduc[e] operating assets or scope of operations and companies entering bankruptcy or liquidation.” Id. at 508. This makes the NYSE a less popular venue for Chinese reverse mergers. See id. (explaining that public shells are deterred from remaining on the NYSE).

162. See Alpert & Norton, supra note 84.
163. Id.
164. Id.
165. Double Due Diligence Efforts Before Investing, supra note 92.
166. See, e.g., Alpert & Norton, supra note 84.
167. Id.
168. Id.
The group of Chinese foreign private issuers listing via reverse merger has been described as a “minefield” of disappointment, often caused directly by accounting irregularities and fraud. Examples of failed listings of this nature began almost as soon as the first Chinese companies came to market. Perhaps the most notable early case occurred in September 1997 when Asia Electronics Holding Company, a TV component manufacturer, raised forty-two million dollars on the NASDAQ before going “into a tailspin” following the arrest of its leader for “fraudulent investment schemes.” The scandal proved to be merely the tip of the iceberg, however, and the full scale of corporate fraud within Chinese foreign private issuers continues to emerge to this day.

C. Recent Cases of Corporate Fraud and Accounting Irregularities

Chinese small businesses listing in the United States via reverse mergers engage in fraudulent accounting in China in order to attract growth-focused American investors. One of the most-cited examples of this occurred in 2006 with China Expert Technology, whose audited financial statements showed $175 million in revenue over four years. Regulators discovered that the company was a sham, with no revenue and few, if any, customers.

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169. Id. Even large-cap stocks listing on the NYSE have been implicated. The largest IPO of 2003, China Life Insurance, was quickly subject to a shareholders’ derivative action due to accounting discrepancies. Finn, supra note 12, at 287–88.

170. Anderlini, supra note 89.

171. Alpert & Norton, supra note 84. Asia Electronics was one of the first Chinese listings on the NASDAQ. Id. Today, the NASDAQ is the most popular venue for Chinese foreign private issuers, with 159 China-based companies on the exchange. Holmes, supra note 160.

172. Many of these companies keep two sets of books: one for the Chinese regulators and one for SEC examination. Holmes, supra note 160. For example, NYSE Euronext-listed China Green Agriculture, a fertilizer manufacturer, was alleged to have reported one set of sales and net income figures to the SEC and a different set to the Chinese government. Id. The company’s stock proceeded to lose 35% of its value after it admitted to the veracity of the claims. Id.

173. Id.

174. Id. The company was later subject to a class action suit brought by its shareholders, who won a default judgment against China Expert Technology. Id. The company, however, was entirely judgment-proof. Id.
The vast scale of accounting scandals in Chinese foreign private issuers listing via reverse merger came to light in the spring and summer of 2011. Between March and May of that year, more than 24 Chinese foreign private issuers disclosed auditor resignations or accounting problems, such as the inability to confirm balance sheet figures. In June 2011, Orient Paper, a cardboard manufacturer and NYSE Euronext-listed Chinese company, lost two-thirds of its market capitalization after analysts visited its factory and discovered it to be “idle and dilapidated.” The analysts, employed by Hong Kong-based Muddy Waters Research (“Muddy Waters”)—which has built a reputation for being bearish on Chinese small-cap stocks—estimated that Orient Paper overstated the value of

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All the assets are in China. The people are in China. [One] can’t so much as serve a subpoena in China . . . . You can’t get any discovery in China. The SEC would be completely blocked from any regulatory action against a Chinese person or entity. What can they do? Nothing.

*Id.* (quoting Laurence Rosen, an attorney who represents disgruntled shareholders of China Expert Technology).


177. Barboza & Ahmed, supra note 176. The firm’s name is derived from a Chinese proverb that says that “the easiest way to catch fish is by muddying the water, forcing it to the surface.” *Id.* “Muddy Waters . . . [is] taking direct aim at reverse mergers [it] say[s] have dubious practices. The organization [is] issuing research reports, posting surveillance videos and collecting corporate documents.” *Id.* “Small-cap” is shorthand for companies with a small market capitalization, generally considered to be between $300 million and $2 billion. Small Cap Definition, INVESTOPEDIA, http://www.investopedia.com/terms/s/small-cap.asp (last visited Aug. 19, 2012).
its assets by ten-fold and revenues by forty-fold in the course of its SEC disclosure.178

That same month, the SEC halted trading and sought a “stop-order” to cancel the effectiveness of the registration statements of China Intelligent Lighting and Electronics Inc. and China Century Dragon Media Inc.179 The SEC alleged that each company had failed to publicly disclose that their auditors had resigned after questioning the accuracy of each company’s financial statements and bank records.180 Similarly, China-based RINO International, a sewer equipment manufacturer, was delisted by the NASDAQ181 after a short-seller uncovered accounting discrepancies involving customer contracts that had never been executed.182 RINO had gone through three auditors and four chief financial officers in four years.183 Shares lost two-thirds of their value before the stock was delisted.184

Some of the premier institutional investors in the United States have suffered losses when otherwise attractive deals implode.185 The Carlyle Group, a private equity firm that has

178. Alpert & Norton, supra note 84.
180. Id. Resignation or dismissal of a company’s outside auditors requires disclosure through an 8-K filing with the SEC. Pinto & Branson, supra note 86, at 163.
181. Each stock exchange registered with the SEC under the Exchange Act has the authority to set listing standings, which issues must meet in order to be listed on that exchange. Pavkov, supra note 90, at 508. The penalty for failure to meet an exchange’s listing standards is often “delisting,” or removal from the exchange. Id. Listing standards often include a required “number of shareholders, trading volume, number of publicly held shares, aggregate market value of shares outstanding, and total global market capitalization.” Id. The NYSE has the most stringent listing standards, and therefore Chinese reverse mergers tend to occur on the regional exchanges and the OTC marketplace. Id.
182. Holmes, supra note 160.
183. Alpert & Norton, supra note 84. The company also restated its financial results twice during that time period. Id.
184. Holmes, supra note 160. Investors in RINO lost $400 million. Id.
185. See Robert Cookson & Henny Sender, Carlyle Faces Questions over China Investments, FIN. TIMES (May 5, 2011, 8:03 PM), http://www.ft.com/cms/s/0/7971bb26-773e-11e0-aed6-00144feabd0.html (describing The Carlyle Group’s problems with its Chinese investments). See also Barboza & Ahmed, supra note 176 (stating that Paulson & Company,
about $153 billion under management,186 bought a 22 percent ownership interest in China Agritech, a NASDAQ-listed fertilizer manufacturer that came to the market in 2005 via a reverse merger.187 Yet as of mid-2012, China Agritech faces delisting from the exchange for failing to file its account on time188 and the company has gone through three auditors in three years.189 Such examples demonstrate that the failures seen in Chinese small-cap stocks are indicative of systemic problems with regulation and oversight in China, and are not due to inadequate due diligence on the part of the investor.

A significant dimension to the reversal merger scandals is the fact that most of the activities have initially come to light as a result of short-sellers’ independent research, only to be followed by regulatory investigations.190 Muddy Waters, one of the more high profile Chinese foreign private issuer short-sellers,191 views its role as filling a gap in regulatory oversight between the United States and China.192 RINO and China Media Express were each delisted after Muddy Waters accused them of fraudulent activities.193 Similarly, regulators suspended Duoyuan Global Water after Muddy Waters made accusations of fraud against them.194 At Duoyuan, four of its six independent directors resigned after claiming the company’s management was obstructing its investigation into the corporation’s internal controls and accounting.195

Muddy Waters also targeted a forestry company named Sino-Forest, a company listed on the Toronto Stock Exchange196 that

John A. Paulson’s hedge fund, lost billions of dollars after the collapse of Sino-Forest).

187. Cookson & Sender, supra note 185.
188. Id.
189. Id.
190. See Barboza & Ahmed, supra note 176.
191. See generally id.
192. See id. Muddy Waters describes itself as “regulat[ing] in an area with little oversight.” Id.
193. Anderlini, supra note 89.
194. Id.
195. Id.
196. Id. Although Sino-Forest is not traded on a U.S. exchange, it is otherwise an apt case study of the issues and contentions raised in this Note.
has become the poster-child for Chinese accounting fraud.\footnote{197} On June 2, 2011, Muddy Waters released a research report\footnote{198} alleging that the company was a Ponzi scheme\footnote{199} in the range of $900 million.\footnote{200} The essence of the claim by Muddy Waters was that Sino-Forest vastly overstated its forestry holdings in China.\footnote{201} The stock slumped from a high of C$25.30 ($24.63) per share in March 2011 to a low of C$1.99 ($1.94) following the release of the Muddy Waters report.\footnote{202} Trading of the stock was thereafter halted by the Toronto Stock Exchange.\footnote{203} Billions of dollars’ worth of investment funds have been lost as a result of this series of Chinese reverse merger frauds, and the situation continues to unfold as of this writing.\footnote{204}


\footnote{198}{Anderlini, \textit{supra} note 89.}

\footnote{199}{A “Ponzi scheme” is “a fraudulent investing scam promising high rates of return with little risk to investors.” \textit{Ponzi Scheme Definition}, INVESTOPEDIA, http://www.investopedia.com/terms/p/ponzischeme.asp (last visited Aug. 19, 2012).}


\footnote{202}{Markets in China, \textit{supra} note 14.}

\footnote{203}{Austen, \textit{supra} note 201.}

\footnote{204}{Michael Rapoport, Sen. Schumer Urges Audit Watchdog to Act on China, WALL St. J. (Nov. 22, 2011), http://online.wsj.com/article/SB10001424052970203710704577052543850533540.html.}
D. The Regulatory Abyss

Scandals within the Chinese small-cap sector have cost American investors approximately thirty-four billion dollars in losses over the past five years.205 In response, American exchanges are suspending a number of Chinese companies from trading while inquiries proceed.206 Separately, the SEC is halting the offering of shares by these companies as they investigate claims of fraud against Chinese reverse merger listings. The contention amongst many American investors, however, is that these scandals should have never occurred in the first place.207 Aspects of corporate internal control such as the production of accurate financial statements and bank account balances, as well as the elimination of accounting discrepancies, fit squarely within the realm of the auditors’, regulators’, and exchanges’ responsibilities as gatekeepers.208 While the Chinese media contends that a few “bad apples” have tarnished the sector, U.S. securities experts maintain that it is a series of “fundamental weaknesses in the regulatory environment” surrounding reverse mergers that is to blame.209

Chinese foreign private issuers have fallen into a “regulatory vacuum” of market regulation.210 The principal U.S. securities regulator, the SEC, is too understaffed to review the heavy volume of reverse merger activity.211 Further, the SEC cannot en-

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205. Holmes, supra note 160. The majority of these losses occurred in Chinese companies gaining access to the U.S. market through reverse mergers. Id.
206. See Cookson & Sender, supra note 185. “Of the 19 NASDAQ stocks currently suspended from trading, 15 are Chinese.” Id.
207. Holmes, supra note 160.
208. Some have argued that the Chinese lawyers, accountants, intermediaries, and stock promoters who bring these companies to market are small and inexperienced, therefore neglecting to conduct sufficient due diligence or proper audits. Anderlini, supra note 89. Nevertheless, ignorance cannot be accepted as an excuse given the massive losses seen in the Chinese small-cap space. Pavlo, supra note 90 (opining that the failure of Chinese company management to learn American compliance requirements is no excuse for fraud).
209. Holmes, supra note 160.
210. Anderlini, supra note 89.
211. The SEC has “hundreds of deals to review [in the small-cap space], thousands of related financial statements, and no easy way to verify financial statements that relate to operations in China.” Holmes, supra note 160 (stating that even assigning the entire Enforcement division’s resources for two
force its regulations relating to the disclosure produced by these companies as the fraudulent activities have occurred in China, which lies outside of the SEC’s subpoena power.212

The principal Chinese securities regulator, the CSRC, has no incentive to regulate shares of companies which are only bought and sold in the United States.213 The CSRC has chosen not to enforce its disclosure standards for Chinese businesses trading on American exchanges in spite of its direct obligation to do so—one of the CSRC’s codified functions is to “supervise the offering of securities outside of China by Chinese enterprises.”214 In addition, despite the existence of a Memorandum of Understanding between the SEC and the CSRC that calls for enforcement cooperation between the two regulators, the CSRC has shown little willingness to collaborate.215 Even within its own jurisdiction, the CSRC rarely brings enforcement actions against those companies defrauding investors and clients through dodgy accounting practices.216

One of the most surprising aspects of the reverse merger scandals is the extent to which the auditors of these troubled companies are U.S.-registered accounting firms.217 Some of these auditors are small American firms that outsourced their years to Chinese foreign private issuer investigations would barely make a dent).

212. Alpert & Norton, supra note 84. Some have suggested that Chinese small business owners are aware of this jurisdictional constraint on the SEC and have acted accordingly. Holmes, supra note 160. Because of the number of legal challenges that American regulators face internationally, some have termed the United States a “paper tiger.” Kara Scannell, Reverse Mergers Test U.S. Regulators, FIN. TIMES (July 4, 2011, 9:17 PM), http://www.ft.com/intl/cms/s/0/18338c8e-a65c-11e0-ae9e-00144feabdc0.html.

213. Alpert & Norton, supra note 84.


217. Anderlini, supra note 89 (stating that 74 percent of Chinese reverse merger companies were audited by U.S. firms).
audit work to local firms in China. However, several Big Four American accounting firms have also been implicated. In May 2011, Deloitte Touche Tohmatsu (“Deloitte”) resigned as auditor for Longtop Financial Technologies (“Longtop”), a Chinese financial software company with $1.1 billion in stock market value. In a letter filed publicly with the SEC, Deloitte explained that upon seeking confirmation of bank account balances, Deloitte auditors were harassed by company management, who “threat[ened] to stop [staff] from leaving the company premises unless [the staff] allowed the company to retain [Deloitte’s] audit files.” These threats came after Deloitte had discovered that Longtop did not have any of the money that they had claimed in their books. Shortly after Deloitte’s letter was filed, Longtop’s stock was suspended from the NYSE and is now considered worthless. The fraud at Longtop is noteworthy because of the size of the company and the fact that Chinese banks were allegedly providing Deloitte with false bank statements supporting Longtop’s inaccurate disclosures.

218. Id.
221. Norris, supra note 92. Deloitte had signed off on Longtop’s financial statements for six years prior to their resignation. Id.
222. Id.
223. Id. (“Longtop’s chairman, Jia Xiao Gong, told a Deloitte partner that there was ‘fake cash recorded on the books because there had been ‘fake revenue in the past.’”).
224. Id. (“Just what, if anything, Chinese officials choose to do could provide an indication about whether defrauding foreign investors is deemed a serious crime in China.”).
The Longtop scandal exploded into a global episode of finger-pointing between the United States and China. Deloitte now finds itself in an uncomfortable bind between foreign regulators. Upon the revelation of the Longtop scandal, the SEC asked Deloitte’s Shanghai office to produce its audit papers. The firm declined, stating that such production would place it afoul of Chinese secrecy laws. In October 2011, the SEC brought suit against Deloitte, seeking an administrative subpoena. Should Deloitte ignore the subpoena, they will face a criminal conviction for noncompliance. Chinese regulators, however, are preventing Deloitte’s Shanghai office from disclosing the information requested. The PCAOB has also become embroiled in the mess, threatening to revoke Deloitte’s registration.

The PCAOB, established to police accounting firms engaging in poor gatekeeping of the exact type that has been occurring in the Chinese reverse merger space, has been powerless to flex its muscles as China will not let the PCAOB inspect local auditors engaged by American listed companies. In a comment


[T]he SEC is unlikely to back away from a case in which American investors suffered losses based on what appears to be a rather brazen accounting fraud. And the Chinese government is unlikely to accede to allowing the auditors to respond to a subpoena that would create a precedent for other firms being compelled to disclose their work papers.

229. Henning, supra note 227.
230. Norris, supra note 228.
231. Henning, supra note 227.
232. Pentland, supra note 15. “Deloitte China issued a press release stating: ‘As a matter of national sovereignty, the law of the People’s Republic of China precludes our firm from producing the requested documents to a foreign regulator without approval from [the CSRC].’” Id.
233. Id.
234. Alpert & Norton, supra note 84. This includes the Chinese affiliates of American Big Four firms. Norris, supra note 92. James Doty, chairman of the
letter sent to the SEC in May 2009, the CSRC stated that the PCAOB should “fully rely on the work of the CSRC.” Further, the Chinese government has expressed its disagreement with the PCAOB’s “unilateral basis” for foreign inspections, citing sovereignty concerns. As the scandals surrounding Chinese reverse merger companies escalated in the summer and fall of 2011, U.S. Senator Charles Schumer (D-NY) sent a letter to the PCAOB urging them to exert their enforcement authority to bar any Chinese accounting firms that are not subject to PCAOB inspection from performing audit work on Chinese companies listed in the United States. “This standoff,” Senator Schumer wrote, “has gone on long enough.”

The SEC/PCAOB and the CSRC have come to a standstill, with each side waiting for the other to blink. Given the magnitude of the current crisis of confidence in the audits of Chinese foreign private issuers, initiative needs to be taken that goes beyond the exchange of letters and bypasses the use of diplomatic summits that may be futile, costly, and time-consuming.

IV. PROPOSALS TO REGULATE CHINESE FOREIGN PRIVATE ISSUERS

It is imperative that there be a regulatory framework that will allow Chinese companies to access the U.S. capital markets while assuring American investors that the issuer is transparent and fully honest in its disclosures. Further, any regulatory framework must be enforceable, an aspect that the Chinese have forgone in the past. As word of the troubles in


236. Id.

237. Rapoport, supra note 204.

238. Id. “The board’s failure to do what it was created to do—particularly in the face of Chinese corporate accounting scandals that have already cost U.S. investors billions—is deeply troubling.” Id.

239. Id.

240. Markets in China, supra note 14 (“Reports of prosecutions in China over dodgy accounting in cases where investors or clients are victims remain scarce.”). See also David A. Caragliano, Note, Administrative Governance As Corporate Governance: A Partial Explanation for the Growth of China’s Stock
the Chinese small-cap space spreads, and without any new regulatory schemes, American investors will inevitably be driven away from the market. The losers, in the end, will be the many legitimate Chinese entrepreneurs who are deprived of fundraising opportunities abroad as well as international investors pursuing a growth-oriented investment strategy.

The instinctive reaction is to suggest that American regulators enact an outright prohibition on reverse mergers. However, this proposal is not prudent. The reverse merger technique, effectuated properly, can provide benefits to both the company and investors. Small-cap, private companies have special financing needs that reverse mergers may be able to effectuate.

For example, reverse mergers allow smaller companies to access new capital and to promote themselves to new investors in the public markets. Investors benefit from reverse mergers by gaining access to “embryonic companies with high growth potential.” Such access is typically only available to venture capital firms and their respective investors.

Markets, 30 Mich. J. Int’l L. 1273, 1311 (2009) (“Like most transition economies, China has exhibited under-enforcement of its securities laws, and companies have operated under non-market standards.”).

See Holmes, supra note 160 (describing how investors can no longer assume that a company’s presence on an American exchange represents any degree of integrity).

“Even the harshest critics of the [reverse merger] category concede that there are plenty of Chinese companies—even small caps—offering solid opportunities for investors. At the same time, the skeptics caution that individual investors will likely find it difficult to separate the good from the bad.” Id.

See, e.g., Pavkov, supra note 90, at 513.

Id. at 489. As the company’s exposure grows, it may find additional opportunities to finance its operations through equity as a result of its use of the reverse merger mechanism. Id.

Venture capital funds escape registration requirements under the Investment Company Act of 1940 by limiting their investors only to those who are “qualified purchasers.” Investment Company Act of 1940, 15 U.S.C. § 80a-3(c)(7) (2011). A “qualified purchaser” is defined as an individual with at least five million dollars in investments. Id. at § 80a-2(a)(51). Therefore, the majority of retail investors do not have access to venture capital funds. See Pavkov, supra note 90, at 489. Further, small businesses have difficulty pursuing IPOs through the traditional process of seeking investment bankers to underwrite their securities. Id. This is attributable to the fact that investment bankers prefer to underwrite lower-risk companies. Id. Therefore, “non-
hough substantial due diligence may be required, retail investors should not be impeded from pursuing a growth investment strategy through investment in reverse merger companies.\textsuperscript{248}

There is a better course than prohibiting reverse merger transactions. The essence of an improved regulatory framework capable of confronting these challenges is a stronger regulation of the accounting firms that have certified these troubled companies. The extent to which the “reputational intermediaries” or gatekeepers, on whom investors have traditionally relied to verify disclosure, have participated in the frauds is troubling.\textsuperscript{249}

Since PCAOB-led examinations of the audits of Chinese foreign private issuers are being frustrated by the Chinese government, the answer must come from within China’s borders. Simply put, if the Chinese will not allow the American regulators to properly execute their mandate, then the burden should be on the Chinese to oversee those Chinese accountancy firms that are signing off on the audits of companies listing on American exchanges. The first step towards effective regulation of these listings is the creation, by the Chinese government, of an organic independent auditing oversight body that will internally regulate Chinese gatekeepers. The creation of the PCAOB through the passage of SOX in the United States could provide a template for the Chinese establishment of a new counterpart to the PCAOB. Such an organization would ideally work with the PCAOB to set international standards.

An independent auditing oversight body in China is needed because China’s accounting firms themselves are failing inves-

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\textsuperscript{248} Double Due Diligence Efforts Before Investing, supra note 92. Diligence on Chinese foreign private issuer investments should include “working closely with experienced legal counsel, accountants and, occasionally, private investigation firms to affirm an investee’s representations, as well as speaking with its clients. . . . [A] visit to the investee’s operations should be conducted.” Id. China is a very promising market, but effort is required to find investments of true value. Id.

\textsuperscript{249} Caragliano, supra note 240, at 1311. Dan David, vice president at GeoInvesting, another Chinese small-cap short-seller, stated: “We had counted on the fee collectors—the investment banks, the accountants and the lawyers—to tell us what was right . . . . Now, we’re doing our own due diligence, and hiring people in China to investigate.” Barboza & Ahmed, supra note 176.
tors in their capacities as gatekeepers.\textsuperscript{250} China’s accounting firms bear few, if any, penalties for their failure to produce accurate financial reports.\textsuperscript{251} In addition, the CSRC has shown a “general unwillingness to enforce its standards in its core competence of securities regulation.”\textsuperscript{252} The lack of regulation and enforcement by the CSRC is in direct opposition to its mission of “supervis[ing] the offering of securities \textit{outside} of China by Chinese enterprises.”\textsuperscript{253} The CSRC’s nonfeasance also runs against its commitment to work with the American regulators in the area of “technical and enforcement assistance.”\textsuperscript{254} It appears inevitable that any oversight of auditing, which relies on the CSRC for implementation and enforcement, “may not turn out to be terribly meaningful” to Chinese companies listing in the United States.\textsuperscript{255}

Opponents to the creation of such an organization, however, will argue that the implementation of SOX-like legislation abroad is unwarranted because SOX unfairly burdens foreign private issuers.\textsuperscript{256} On a general level, SOX has been challenged

\begin{itemize}
  \item \textsuperscript{250} Clarke, supra note 136, at 161. The legal and accountancy professions in the United States are considerably more developed and sophisticated than their Chinese equivalents. \textit{Id.} China has few lawyers and its law schools do not emphasize the goals of investor protection that the United States believes is at the heart of securities law. \textit{See id.} Further, Chinese accountants “are not trained to handle complex financial matters.” \textit{Id.}
  \item \textsuperscript{251} Caragliano, supra note 240, at 1304 (“Chinese lawmakers have struggled to articulate a workable liability standard for accountants.”). The CSRC has not made the sanctioning of accounting firms a priority. Clarke, supra note 136, at 161–66 (describing only seven civil actions in the last ten years brought against accounting firms, each of which concerned creditors lending to companies on the basis of inaccurate financial certifications). Litigation in response to investor complaints relating to inaccurate certifications is non-existent. \textit{See id.} at 165.
  \item \textsuperscript{252} Clarke, supra note 136, at 180. Clark suggests that the CSRC’s unwillingness to regulate “stems from its dual mission as market regulator and market promoter for the state.” \textit{Id.}
  \item \textsuperscript{253} Friedman, supra note 16, at 483 (emphasis added).
  \item \textsuperscript{254} SEC News Release, supra note 215. \textit{See also} Yin, supra note 120, at 412.
  \item \textsuperscript{255} Clarke, supra note 136, at 180.
  \item \textsuperscript{256} \textit{See, e.g.,} Christopher Hung Nie Woo, \textit{United States Securities Regulation and Foreign Private Issuers: Lessons from the Sarbanes-Oxley Act}, 48 AM. B. L.J. 119, 174 (2011); Lee J. Potter, Jr. \& Eberhard Röhm, \textit{SEC Extends Sarbanes-Oxley Deadline for Some Foreign Companies}, ARENT FOX LLP (Sept. 14, 2006),
\end{itemize}
on the grounds that its initiatives conflict with other nations’ local regulatory practices.257 Specifically with respect to foreign private issuers, SOX opponents contend that the compliance costs required are prohibitive for smaller companies.258 There is evidence that some foreign private issuers exited the American market following the passage of SOX and that the legislation caused other foreign companies to opt not to list in the United States.259 While SOX remains controversial as applied to foreign private issuers, it has resulted in the creation of an enforcement and regulatory body for auditing firms, the PCAOB, a necessary evil in an industry that has proven to be incapable of self-regulation.260 If China continues to cite sovereignty concerns as the basis for barring PCAOB inspections within its borders,261 then the best solution is the creation by China of an independent body similar to the PCAOB to regulate its auditing firms.

This proposed regulatory structure has already proven successful in the United States. The PCAOB has worked effectively as a regulator of gatekeepers because SOX provided for stringent enforcement of the increased regulation, which is something the current Chinese regime refuses to do.262 To provide one important example, SOX and the PCAOB make individuals personally accountable for the accuracy of financial disclosures.263 Corporate officers are subject to severe civil or even


257. Woo, supra note 256, at 141–42. For example, during SOX’s public comment period, Germans raised the issue that the law’s certification requirements are premised on an issuer having one CEO. Id. at 142 (noting that, in German companies, multiple directors may jointly represent the company in a capacity similar to the American CEO).

258. Potter & Röhm, supra note 256. At issue in particular is Section 404, which requires that companies produce an assessment of the effectiveness of their internal controls in their Annual Report on Form 10-K. Id.

259. Woo, supra note 256, at 144.

260. See Cunningham & Harris, supra note 118, at 46. Prior to the Arthur Andersen scandal, the accounting profession in the United States was subject to self-regulation or limited oversight on the state-level. See id.

261. See Rapoport, supra note 204.

262. See Markets in China, supra note 14.

263. Cunningham & Harris, supra note 118, at 46. Corporate officers must certify that “the financial statements . . . fairly present in all material respects the financial condition and results of operations of the issuer.” 15 U.S.C. § 7241. This motivates senior officers to become more actively involved
criminal liability for inaccurate financial statements. Financial statement certifications are required to accompany every annual and quarterly report filed in accordance with the Exchange Act. Officers are also required to certify their company’s internal control structure. A separate certification must be made by the auditor to “attest to, and report on, the assessment made by the management of the issuer . . . in accordance with standards for attestation engagements issued or adopted by the [PCAOB].” These initiatives have proved successful in reestablishing integrity into American financial reporting. If the Chinese are willing to implement the certification requirements of SOX and an independent accounting oversight board similar to PCAOB, the plan could be effective in enforcing more stringent regulation of corporate officials and gatekeepers.

In addition, increased collaboration between the United States and China could supplement China’s creation of an accounting oversight board and certification standards. To foster such collaboration, though, it will be necessary to update and utilize the Memorandum of Understanding between the SEC and the CSRC. The current version of the agreement dates to 1994 and needs to be revised to reflect actual procedural and information-sharing initiatives between the two regulators. In July 2011, in a positive signal for future collabo-

in the disclosure process and to “take personal responsibility for their financial documents.” Lucci, supra note 117, at 229–30. See also Cunningham & Harris, supra note 118, at 46.

264. Cunningham & Harris, supra note 118, at 46; Lucci, supra note 117, at 230. “These stiff punishments [are] designed to send a strong message to corporate executives.” Lucci, supra note 117, at 230.

265. Woo, supra note 256, at 139.


267. Id. at § 7262(b).


269. The SEC has used the certification requirements of SOX in post-Enron enforcement actions. See Pinto & Branson, supra note 86, at 164. For example, the SEC successfully prosecuted the CFO of HealthSouth on charges of false and reckless SOX certifications. Id.

270. Finn, supra note 12, at 313 (“The SEC recognizes that international cooperation is vital to the SEC’s ability to regulate international securities transactions.”).

271. Id. at 319.

272. Id. at 314.
ration, a delegation of SEC and PCAOB officials met in Beijing with China’s Ministry of Finance and the CSRC. However, the Chinese cancelled a subsequent meeting scheduled to take place in Washington, D.C. in October 2011 and talks have since stalled.

The problems presented by poor auditing standards are threatening the financial stability of the small-cap market and demand redress. Implementation by China of an independent accounting oversight board and certification standards providing personal liability to corporate officers can help to regulate the audits coming out of China. The regulators on both sides of the Pacific, however, need to work together. The United States wants to protect its investors and China wants to ensure easy access to financing for its firms that wish to list abroad. An alliance between these two economic powers is necessary for investors to have faith in Chinese audits.

CONCLUSION

The Chinese regulatory regime continues to be troubled by a “high degree of corruption and a low degree of transparency.” The instances of accounting irregularities and corporate fraud that were uncovered in the summer and fall of 2011 highlight the problems China faces as it continues its ascent as a global economic power. By refusing to properly enforce the production of accurate financial information by its companies listed abroad, and thwarting American efforts to do the same, China is hurting foreign investors, damaging the reputation of its economy and national character, and ultimately, hurting many of its own citizens who seek foreign capital to fund their new businesses. The SEC and the CSRC are currently at an impasse, harming each of their interests. The implementation of an independent accounting oversight board in China, along with more stringent certification requirements, will cause the Chinese to be more proactive in regulating gatekeepers and allow for investor confidence in the audits of Chinese foreign pri-

274. Rapoport, supra note 204.
275. Auditing in China, supra note 227.
276. Id.
277. Finn, supra note 12, at 315.
vate issuers. Finally, the U.S. and Chinese regulators need to work together to ensure that the fraudulent activities of American-listed Chinese issuers are eliminated, thereby ensuring a free and efficient flow of capital between the two nations.

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*B.A., Washington and Lee University (2008); J.D., Brooklyn Law School (expected 2013); Executive Articles Editor of the *Brooklyn Journal of International Law* (2012–2013). I am grateful to the *Journal* staff and editors for their constructive criticism and editing of this Note from proposal through publication. I am also indebted to the countless teachers and professors who have taught me throughout my academic career. Finally, thank you to my family and friends who have supported and encouraged me in all of life’s endeavors. All errors and omissions are my own.*
THE FOREIGN CORRUPT PRACTICES ACT: TOWARD A DEFINITION OF “FOREIGN OFFICIAL”

INTRODUCTION

The Mexican government is the only entity permitted to own and exploit Mexico’s natural resources, and as such, it may create other entities tasked with the management and distribution of those resources. The Mexican government has used this mandate to create a petroleum company, Petróleos Mexicanos (“PEMEX”), which it wholly owns. The Mexican government appoints every member of the PEMEX governing board and employs PEMEX’s other employees, as well.

Exxon and Occidental are both American petroleum companies that compete for the ability to drill for oil in Mexican waters, and the Mexican government has authorized PEMEX to grant those concessions. Consider the following hypothetical: Exxon submits a bid of $95 million for the drilling concession and Occidental submits one worth $100 million. PEMEX has made no indication of which company it plans to choose, but arranges to select the winning bid and award the contract at a public ceremony to which both companies are invited. During the ceremony, but before PEMEX awards the contract, the chief executive officer and chairman of Exxon gives the chief executive officer of PEMEX a check for $10 million, at which point PEMEX awards Exxon the drilling concession.

Now, consider the U.S. Foreign Corrupt Practices Act (“FCPA”). The FCPA prohibits paying bribes to foreign offi-

2. Id. (noting that the PEMEX website indicates that it is “[a] government agency . . . created and . . . owned by the Mexican government.”).
3. Id.
4. Id.
5. The Central District of California posed this hypothetical in the course of Aguilar, Id. at 1119–20.
6. All figures are in U.S. Dollars.
8. Id. at 1119–20.
cials to improperly attain business abroad. Under the FCPA, a “foreign official” is “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such entity.”

Do Exxon’s actions fit within that framework? Should the Department of Justice (“DOJ”) prosecute one or both of the parties for violating the FCPA? Is the president of PEMEX even a “foreign official”? The Central District of California in United States v. Aguilar asked the defendants during a hearing on this exact hypothetical,

whether any responsible Congressional leader would respond to such a DOJ inquiry by saying, “No, do not prosecute Exxon or its CEO, because PEMEX is a state-owned corporation and it was not the intention of Congress to consider any corporation an ‘instrumentality’ of any foreign government, regardless of the other facts warranting prosecution.”

The defendants answered the inquiry by suggesting that a Congressional leader may indeed respond in just such a way, provided he was uninfluenced by political considerations and elections. Although the court posited that “whether injected with truth serum or not, members of Congress would not deem such a prosecution to be beyond the purview of the FCPA merely because PEMEX is a state-owned corporation,” the debate has yet to be officially resolved in American jurisprudence. In fact, the Aguilar court posed this hypothetical precisely because it found that the legislative history of the FCPA did not point directly towards including or excluding employees of state owned corporations within the definition of “foreign official.”

10. Id.
13. Id.
14. Id.
15. Id. at 1119. As this Note went to print, the DOJ issued a guidance indicating that it does consider these employees within the purview of the FCPA. Although the guidance is “non-binding, informal, and summary in nature,” it will be a useful tool for the courts when faced with defining “foreign official.” See U.S. DEPT. OF JUSTICE AND SEC. EXCH. COMM’N, FCPA: A
Despite the potential ambiguity in the statute, the DOJ has been prosecuting a growing number of actions pursuant to the FCPA, increasing from five in 2004 to seventy-four in 2010. The settlement figures are also on the rise, with half of the ten biggest FCPA settlements, which in some cases topped $350 million, occurring in 2010. This continued increase may be attributable in part to the Obama Administration, evidenced by U.S. Attorney General Eric Holder’s 2009 proclamation that, because corruption is a “scourge on civil society” and “one of the greatest struggles of our time,” it requires vigilant enforcement. Yet even before the current administration, the DOJ and the Securities and Exchange Commission (“SEC”) began increasing enforcement following the set of amendments that expanded the FCPA’s scope in 1998. Additionally, the DOJ and SEC began encouraging firms to disclose FCPA violations voluntarily, and the firms have been doing so with greater frequency, as a result of the Sarbanes-Oxley Act and its disclosure requirements.

For many industries, doing business in corruption-prone areas may be something that simply comes with the territory, requiring a balancing between pursuing international business...


17. Id. (“[R]ecent years have seen a spike in enforcement, from five actions in 2004 to 74 in 2010. Five of the ten biggest settlements ever were last year, including a $400 [million] fine against BAE systems, a British defense contractor, and a $365 [million] fine against ENI, an Italian oil firm.”).
opportunities and avoiding running afoul of U.S. law. 21 For example, in the energy industry, “the work of navigating ancient kingdoms and secretive relationships has become an integral part of finding new [oil] reserves, . . . [and] has led the industry . . . to the most difficult corners of the earth.” 22 These energy companies, and other types of businesses, have been targeted in the upswing of DOJ and SEC prosecutions under the FCPA that began in 2004. 23 Likewise, Wal-Mart, which has been rapidly expanding across the globe, found itself in trouble in Mexico in early 2012, and Hollywood studios have had to answer similar questions about their dealings in China and the accompanying FCPA implications. 24

These businesses will also need to conform to the United Kingdom Bribery Act 2010 (“U.K. Act”), which was passed in 2010 and went into effect in July 2011. 25 This statute is even broader in scope and more restrictive than the FCPA, even if some consider it “better crafted,” because it is also fairer to firms. 26 The U.K. Act provides a compliance defense, which protects honest firms from suffering the most severe of consequences if a briber was “one rogue employee,” and the firm had a clear and effective anti-bribery program. 27 Regardless of the U.K. Act’s specific content, there can be no doubt that it presents additional anti-corruption hurdles that global businesses must meet if they want to avoid the courtroom. 28

As can be expected, the enthusiasm of the DOJ and SEC for the FCPA is not shared universally. 29 Some have suggested

22. Id.
26. Bribery Abroad, supra note 16.
27. Id.
28. See id.
29. Shawn McCarthy, Resource curse puts companies in crosshairs: U.S.-listed Canadian firms will be included in SEC international anti-corruption
that this vigorous enforcement of the FCPA essentially serves as a “de facto sanction” against these corruption-prone countries,\textsuperscript{30} while many players in big business see the FCPA as injurious to the United States’ competitive advantage and as a major hindrance to business profitability.\textsuperscript{31} Essentially, they believe the FCPA “holds [American companies] to a higher standard” than their foreign competitors, which are permitted to conduct their business in a way that would technically violate the FCPA.\textsuperscript{32} The statute’s additional restraints on American companies thus negatively affect their ability to compete in those markets.\textsuperscript{33} The high chance of violating the FCPA and facing prosecution discourages about a third of British and a quarter of American companies from doing business in countries that are prone to corruption.\textsuperscript{34} Due to concerns about “onerous compliance costs and competitive disadvantage,” some companies would “prefer the rule-making be harmonized among major trading partners to reduce the potential for problems.”\textsuperscript{35} Although such harmonization would require significant work from the outset, an essential starting point, which would greatly improve companies’ ability to plan their business abroad, would be solidifying a definition of “foreign official.”\textsuperscript{36}

The particular question of how to define a “foreign official” under the FCPA is at issue for any type of corporation looking
to do business abroad.\textsuperscript{37} Energy companies are an illustrative example of the “foreign official” ambiguity problem because many energy companies are nationalized, wholly or partially, so their agents may arguably be considered public officials. Any U.S. companies looking to operate in compliance with the law, then, need to be able to identify which energy sector agents may trigger FCPA liability, though all too often this proves to be a difficult task.\textsuperscript{38} Recent cases in the United States address the definition of “foreign official,” however, the courts have yet to provide a clear one.\textsuperscript{39}

When a statute’s text is ambiguous, courts may “turn to the legislative history to ascertain Congress’s intent.”\textsuperscript{40} Additionally, if the legislative history is inconclusive, the court may apply the rule of lenity and construe the statute in favor of the defendant (in the case of “foreign official,” narrowly).\textsuperscript{41} However, “[t]he rule of lenity applies only where . . . resort[ing] to any and all other sources still results in a tie as to the proper interpretation.”\textsuperscript{42} Therefore, reviewing the stated motivations for enacting anti-corruption legislation in the United States, the U.K., and relevant international organizations, and subsequent

\textsuperscript{37} Joel M. Cohen et al., \textit{Under the FCPA, Who is a Foreign Official Anyway?}, 63 BUS. LAW. 1243, 1245–46 (2008).

\textsuperscript{38} See id. at 1268–69. Although some nations are trending towards privatizing nationally-owned companies rather than nationalizing private companies, that transition is often caught in a state of limbo, leaving those companies still partially state-owned. To provide one example, Iran privatized all of its major industries but specifically excluded its oil and gas industry from that process. \textit{Id}.


\textsuperscript{40} United States v. Kozeny, 493 F. Supp. 2d 693, 701 (S.D.N.Y. 2007) (citing Xia Ji Chen v. U.S. Dep’t of Justice, 471 F.3d 315, 326 (2d Cir. 2006)).

\textsuperscript{41} \textit{Id}.

\textsuperscript{42} \textit{Id} (citing Johnson v. United States, 529 U.S. 694, 713 n.13 (2000)).
American judicial interpretation of “foreign official,” can provide guidance in the creation of an as-yet unsolidified definition of the term “foreign official” within the FCPA.

Part I of this Note will propose three analytical lenses through which one may examine anti-corruption legislation. Part II will use those lenses to survey comparative anti-bribery measures developed by the Organization for Economic Co-Operation and Development (“OECD”) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“Convention”) and also the United Kingdom. Part III will then focus those lenses on the FCPA itself, exploring its history and judicial interpretation. Part IV will examine the specific matter of “foreign official” in light of the general discussion of anti-corruption legislation and consider a definition using the three analytical lenses offered at the beginning of this Note.

I. THREE ANALYTICAL LENSES FOR DEFINING “FOREIGN OFFICIAL”

The following three analytical models may provide direction as to the intended meaning of “foreign official”: the Charming Betsy Doctrine; the level playing field argument; and the public trust doctrine, which includes both the traditional and corporate proconsul variations. Each proposed model will be described in turn.

A. The Charming Betsy Doctrine: Complying with International Norms

In 1804, the court in Murray v. Schooner Charming Betsy held that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” That concept has become known as the Charming Betsy Doctrine. The Charming Betsy Doctrine has had a lasting impact on legislation, and compliance with international

43. Aguilar, 783 F. Supp. 2d at 1117.
44. See id.
45. See infra Part I.A.
46. See infra Part I.B.
47. See infra Part I.C.
49. See, e.g., Aguilar, 783 F.Supp.2d at 1116.
norms was an important factor behind the implementation of the FCPA. The need and desire to align with the views of the international community influenced the anti-corruption legislation in the United Kingdom, as well. Thus, examining international definitions of “foreign official,” and the motivations behind the specific wording of said definitions in light of the Charming Betsy Doctrine, could help clarify the definition within the American legislation.

B. The Level Playing Field Approach: Promoting Fair Competition

Considering the motivating effect that compliance with international norms had on drafting the American and British anti-corruption legislation, reviewing the goals of the OECD Convention could help direct our understanding of the FCPA and the U.K. Act and, specifically, their respective uses of the term “foreign official.” The OECD is an independent organization that serves to “promote policies that will improve the economic and social well-being of people around the world.” The ideas motivating the OECD in general, and the OECD Convention, provide another analytical lens: the level playing field. One major goal of the OECD Convention was to “level [the] playing field,” or, in other words, to promote fair competition. This popular concept deals with the competitiveness of markets that have been compromised by corruption. Applying the level playing field concept to the U.K. and U.S. legislation, and to their respective definitions of “foreign official,” could therefore provide another route to clarification.

51. See id. at 126.
52. See Cohen, supra note 37, at 1259–60. For a more extensive discussion of the OECD and its goals, see infra Part II.A.
54. Cropp, supra note 50, at 125.
55. Id. at 123.
56. Id. at 124–25.
C. The Public Trust Doctrines

1. Public Trust: The Traditional View

Some international organizations view corruption in terms of the public trust doctrine. In their view, the public grants certain individuals positions of power, and when those individuals corruptly exploit those positions, it is a breach of public trust.\footnote{57 \textit{OECD, CORRUPTION: A GLOSSARY OF INTERNATIONAL STANDARDS} 2 (2007) [hereinafter OECD, GLOSSARY].} For example, the OECD Convention defines corruption as the “abuse of public or private office for personal gain.”\footnote{58 Id. at 19.} Similarly, Transparency International is an international coalition against corruption that “work[s] cooperatively with all individuals and groups, with for-profit and not-for-profit corporations and organisations, and with governments and international bodies committed to the fight against corruption.”\footnote{59 \textit{Who We Are, TRANSPARENCY INTERNATIONAL}, http://www.transparency.org/whoweare/organisation/mission_vision_and_values (last visited Aug. 26, 2012).} It defines corruption as “behaviour on the part of officials in the public sector, whether politicians or civil servants, in which [those officials] improperly and unlawfully enrich themselves, or those close to them, by the misuse of the public power entrusted to them.”\footnote{60 OECD, GLOSSARY, supra note 57, at 20.}

2. Public Trust: The Corporate Proconsul View

The “corporate responsibility” or corporate proconsul model is a variant of the public trust model and can elucidate the definition of “foreign official,” as well.\footnote{61 In \textit{The Foreign Corrupt Practices Act}, George Greanias and Duane Windsor contemplate corporations as being the holders of public trust. They discuss the idea of “the corporation as government proconsul.” This concept accounts for what the authors perceived as a “major change in government intervention in the private sector . . . from government action to achieve economic ends to government action intended to reach various social goals.” \textit{GEORGE C. GREANIAS & DUANE WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE} 46 (1982).} This model has a similar concept to the traditional public trust model—that a duty is owed to the public at large stemming from the entity’s place of power.
and trust within society—only here the entity in that place of power and trust is a corporation rather than a public official. The corporation, “by virtue of the financial, human, and natural resources that it commands, by the great wealth which it accumulates and expends, and by its ability to affect even those not directly affiliated with the enterprise, has power that is not merely economic but also social and political,” and therefore is afforded public trust. Importantly, this corporate accountability concept is distinct from that of legal corporate responsibility.

Corporate accountability,

is rooted in the concept that corporations have been granted a franchise or license by society that is in the nature of a privilege. Continuation of that franchise requires an accounting of the corporation’s relationship with and contribution to society. The franchise comes with terms and conditions; thus the corporate community must hold itself accountable to society beyond legal compliance with statutes and regulations. Accountability extends to corporate power, corporate performance, and corrupt behavior. Legal compliance and ethical behavior are expected.

Because the public places its trust in the corporation, corporate corruption and bribery violates that trust. Though neither iteration of the public trust doctrine defines “foreign official” per se, both may still provide valuable insight into the way many international actors approach the term.

II. COMPARATIVE LEGISLATION

Studying foreign anti-corruption legislation, in addition to policy proposals from international organizations, is a constructive exercise when analyzing vague domestic legislation such as definitional language within the FCPA. Doing so in this case is not only important for application of the Charming Betsy Doctrine, but it also helps to generally survey the anti-corruption landscape. The OECD Convention and the U. K. Act

63. Id. at 44, 46.
64. Id. at 46.
65. Id. at 44.
66. See id. at 35–36.
67. Id.
68. Id. at 45–46.
provide useful comparative legislation for the FCPA and also working definitions of the term “foreign official.”

A. OECD Convention

The mission of the OECD is to promote equal economic footing for all countries through fair, multilateral trade and competition.69 The OECD Convention was adopted in November 1997, entered into force in February 1999, and as of April 2012, thirty-four OECD member countries and five non-member countries had signed onto it.70 The Convention “establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective.”71

Generally, the OECD subscribes to the level playing field or fair competition model of validating anti-corruption legislation:

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the [OECD] shall promote policies designed:

- to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
- to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.72

However, the OECD has also faced outside pressure to adopt the fair competition approach. “[The] diplomatic pressure exerted by the United States on other nations to level the playing field internationally, was arguably a key factor in the creation of the 1997 OECD Convention, which in turn resulted in

69. OECD, GLOSSARY, supra note 57, at 2.
72. OECD, GLOSSARY, supra note 57, at 2.
FCPA-like legislation in numerous signatory nations,” including the United Kingdom. Moreover, the fact that the OECD strives to “accord[] with international obligations” suggests that the same motivations behind the *Charming Betsy* Doctrine were also at play during the drafting of the OECD convention.

B. The U.K. Act

The U.K. Act criminalizes the bribery of government officials, both domestic and foreign; commercial bribery; the acceptance of bribes; and the failure of a corporation to prevent the offering of bribes. Furthermore, the statutory language encompasses several types of entities, including firms incorporated in the United Kingdom, those that have a business—or any part of a business—within the United Kingdom, and any person that is “associated” with such corporations. The statute defines an “associated” person as anyone that acts on behalf of the corporation.

Although the U.K. Act is progressive in many respects, including its provision imposing strict liability on firms failing to prevent bribery, it also affords corporations some defenses. To offer one important example, a corporation under investigation may escape liability by providing proof that it composed, diligently implemented, and informed employees and associates of adequate anti-bribery compliance rules.

1. The U.K. Act and *Charming Betsy*

The *Charming Betsy* Doctrine, though a feature of U.S. law, represents an approach to enacting and interpreting a nation’s domestic legislation that played a crucial role in creating the U.K. Act. The OECD Convention put forth standards for anti-corruption legislation and made recommendations for the Unit-
ed Kingdom to bring itself into immediate compliance with those standards in 2003, 2005, and 2007.\footnote{OECD, United Kingdom: Phase 2bis: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 5 (Oct. 16, 2008) [hereinafter OECD, Phase 2bis]; OECD, Implementing the OECD Anti-Bribery Convention: Report on the United Kingdom 2007, at 89 (July 17, 2006) [hereinafter OECD, Implementing]; see also Tim Pope & Thomas Webb, The Bribery Act 2010, 25(10) J. INT’L. BANKING L. & REG. 480, 480 (2010).} In October 2008, the OECD indicated, in its report on a British bribery case,\footnote{In 2004, the United Kingdom’s Serious Fraud Office ("SFO") began an investigation into alleged bribery by BAE Systems PLC, a British exporter of military aircraft, in relation to a contract with Saudi Arabia for Al-Yamamah aircraft. See The Queen on the Application of Corner House Research and others v. Director of the Serious Fraud Office, [2008] UKHL 60, (appeal taken from [2008] EWHC (Admin) 246). The SFO halted the investigation in 2006 prompting the criticism by the OECD. See id. In 2008, the Divisional Court found that the SFO’s discontinuation of the investigation into BAE Systems was unlawful. See id. The House of Lords overturned that decision on appeal, deciding that the Director of the SFO acted properly in taking into account threats made against the British public if the investigation continued, regardless of whether it was in violation of Article 5 of the OECD Convention. See id.} that it was “disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK.”\footnote{OECD, Phase 2bis, supra note 82, at 4; Pope, supra note 82, at 481.} Such criticism by the OECD, in which other international organizations and even other countries joined, likely influenced the U.K.’s decision to reform its anti-bribery legislation,\footnote{Id. at 123 ("In reality, external pressures and concerted international criticisms of the UK’s existing approach to corruption may have had greater impact on the genesis of the Act than is suggested.").} though the explanatory notes to the U.K. Act suggest that it was written in response to the country’s self-realization that existing anti-corruption laws were outdated, convoluted, and “in need of reform.”\footnote{Cropp, supra note 50, at 122.}
In addition to the OECD’s influence, the United States also may have impacted the United Kingdom’s decision to revise its anti-corruption legislation. The U.S. National Security Strategy identifies the fight against corruption as an integral part of its mission to protect human rights and to stimulate development and security around the world. Transparency and accountability with regard to the finances of governments and their public officials are important parts of such anti-corruption effort. The United States, in seeking to expand its security policies and to maintain competitive advantages for citizens engaging in foreign business, has exerted pressure on the United Kingdom to bring its own anti-corruption legislation up to international norms.

The language in provisions of the U.K. Act itself is also indicative of the United Kingdom’s reaction to international pressure to reform its anti-corruption legislation. For example, which the Commission similarly notes that “the current law is riddled with uncertainty and in need of rationalization.”

Id. 87. Id. at 125.

Indeed the disadvantage occasioned to US corporations by the compliance requirements of the FCPA, and subsequent diplomatic pressure exerted by the United States on other nations to level the playing field internationally, was arguably a key factor in the creation of the 1997 OECD Convention, which in turn resulted in FCPA-like legislation in numerous signatory nations.

Id. The United States influenced the creation of the OECD Convention, which in turn influenced the United Kingdom to bring its anti-corruption legislation up to international norms. Id. See also, G. Sullivan, The Bribery Act 2010: Part I: an overview, 2 CRIM. L. REV. 87, 96–97 (2011) (U.K.).


89. Id. (“Pervasive corruption is a violation of basic human rights and a severe impediment to development and global security. We will work with governments and civil society organisations to bring greater transparency and accountability to government budgets, expenditures and the assets of public officials.”)

90. Id. at 97 (“Obviously, the United States will want to pursue this increasingly robust anti-corruption strategy at least cost to its competitive position. One can anticipate various forms of encouragement from the United States for the United Kingdom to do its bit.”).

91. Id. at 94 (“Perhaps the most significant role for this new offence is to flag clearly that the United Kingdom is compliant with its treaty obligations to combat the bribery of public officials.”).
the U.K. Act makes it a distinct offense to bribe a foreign official.92 This offense appears to be somewhat redundant, or even superfluous,93 considering that other provisions of the U.K. Act adequately prohibit bribery. It seems that including the distinct offense of bribing foreign officials is meant to placate the OECD by adopting similar language to that promulgated by the Convention, and to visibly demonstrate the United Kingdom’s effort to expeditiously improve upon its anti-corruption legislation.94

2. The U.K. Act and the Level Playing Field Approach

Through its anti-corruption legislation, the United Kingdom also seeks to level the playing field, but not solely for the sake of curbing unfair advantages.95 Bribery not only subverts the marketplace, but also diverts funds from public projects to corrupt individuals.96 This results in a “human tragedy,” in which “power is abused[,] the weak are exploited[,] and the dishonest rewarded.”97 The U.K. Act aims to rectify that wrong and to right the imbalance of power.98

92. U.K. Act, c. 23, § 6(1)–(8); Sullivan, supra note 87, at 94.
93. See id.
94. Sullivan, supra note 87, at 94. In regards to the specific offense of bribing a foreign official,

There is reason to doubt whether this offence makes any substantive contribution to the criminalisation of bribery. Since 2001 UK corruption legislation has been given an extra-territorial dimension and it is difficult to envisage conduct falling within the new foreign public officials offence which would not also be covered by the two core bribery offences, subject to any jurisdictional constraints. Additionally, where foreign officials are bribed on behalf of UK companies, the companies are very likely to be exposed to liability under the failure of a commercial organisation to prevent bribery offence, which has a very wide jurisdictional base. Perhaps the most significant role for this new offence is to flag clearly that the United Kingdom is compliant with its treaty obligations to combat the bribery of public officials.

Id.

95. Pope, supra note 82, at 480.
96. Id.
97. Id. (internal citations omitted).
98. See Cropp, supra note 50, at 124; see also Randal C. Archibald, Even as It Hurts Mexican Economy, Bribery is Taken in Stride, N.Y. TIMES, April 23, 2012, at A4.
3. The U.K. Act and the Public Trust Doctrines

Certain aspects of the U.K. Act also suggest that the drafters of that statute considered “public trust” to be an important concept.\textsuperscript{99} The U.K. Act criminalizes conduct that induces a foreign public official to improperly perform a relevant function or activity.\textsuperscript{100} When defining those relevant functions or activities, the U.K. Act provides that the function or activity meet one of three conditions, namely that the person performing the activity is expected to do so in good faith, is expected to perform it impartially, or is in a “position of trust by virtue of performing it.”\textsuperscript{101} The three preceding conditions are “relevant expectations” under the U.K. Act, and the official function is performed improperly only if the performance breaches one of those “relevant expectations.”\textsuperscript{102} Section five of the Act provides a test to determine the impropriety of given conduct.\textsuperscript{103} Notably, that test is based on “what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned.”\textsuperscript{104} By adopting a reasonableness standard that focuses only on the British perspective, this test disregards the local custom and practice of the country in which the alleged action—i.e. bribery—may be taking place, unless that country permits or requires the action in question under its written law.\textsuperscript{105}

The U.K. Act also appears to be influenced by the idea of corporate responsibility, or the corporate proconsul approach to the public trust doctrine. This is evidenced in large part by provisions that afford targeted companies defenses that hinge on the company’s ability to prove internal cultures of responsibility. The Serious Frauds Office (“SFO”) “will expect to see not just paper-compliance, but rather an anti-corruption culture, ‘fully and visibly supported at the highest levels’ in the commercial organization.”\textsuperscript{106} Some proponents of the public trust doctrine argue that the U.K. Act should aim for a “behavioural

\textsuperscript{99} Sullivan, supra note 87, at 88.
\textsuperscript{100} U.K. Act, c. 23, § 4; David Aaronberg & Nichola Higgins, The Bribery Act 2010: All Bark and No Bite . . . ?, 2010 ARCHBOLD REV. 5, 6 (2010) (Eng.).
\textsuperscript{101} Aaronberg, supra note 100, at 2.
\textsuperscript{102} U.K. Act, c. 23, § 4(2); Aaronberg, supra note 100, at 7.
\textsuperscript{103} U.K. Act, c. 23, § 5.
\textsuperscript{104} Aaronberg, supra note 100, at 2.
\textsuperscript{105} Sullivan, supra note 87, at 91.
\textsuperscript{106} Aaronberg, supra note 100, at 6 (emphasis in original).
change” in corporate Britain such that “no form of corruption is tolerated.”

The United Kingdom’s implicit desire for corporate responsibility is clear, both from the fact that it is much easier to prosecute companies under the bribery statutes and from the fact that the U.K. Act provides an adequate procedures exception. Lord Bach, the former Minister for Legal Aid, indicated in a December 2009 letter to the House of Lords that,

[i]t is not our intention to drag well run companies before the courts for every infraction. It would be wrong to leave organizations open to a heavy fine if a rogue element within its ranks bribes on behalf of the organization when those who manage it can show they have put in place procedures designed to prevent bribery on its behalf.

The availability of the adequate procedures defense illustrates that the United Kingdom is not simply interested in prosecuting companies for violating the U.K. Act. Rather, it is more interested in encouraging companies to make meaningful changes to their corporate culture and to make fighting corruption a priority. Companies would be more inclined to formulate effective compliance programs if they knew it would help them avoid liability in the future. Indeed, the interplay between the “long-arm jurisdiction” and the adequate measures

107. Id. at 1.
108. Id. at 5, stating:

Section 7 [of the U.K. Act] is intended to make it much simpler to prosecute such organizations for bribery offences. Previously prosecutors had to identify the directing will and mind within a company at the time an offence was committed and obtain evidence of that person’s knowledge and involvement. Unsurprisingly, there were few prosecutions. Under the new Act, prosecutors will need only to prove fault by an individual connected to a relevant organization—"A"—in order to engage this section.

Id.; see also U.K. Act, c. 23, § 7.
109. Aaronberg, supra note 100, at 5.
110. Id.
111. Id.
112. Id. at 1, 8.
113. See id. at 8.
114. The U.K. Act employs “long-arm jurisdiction” because, “nationals [and] closely connected persons of the regulated country, including companies incorporated in the regulated country, can be prosecuted regardless of where
defense strikes “an appropriate balance between the need to aggressively police corrupt activities in foreign jurisdictions and the need to protect corporations which have committed resources to establishing principles-based policies, procedures and controls, notwithstanding the nefarious acts of the corporation’s employees or agents.”

III. THE FOREIGN CORRUPT PRACTICES ACT

A. History

Congress enacted the FCPA in 1977 following a confluence of events—the Watergate scandal, an SEC investigation, and a voluntary bribery disclosure program—that exposed the fact that American companies had been making millions of dollars in bribes to foreign officials. Congress responded to these findings by amending the Securities and Exchange Act of 1934, which resulted in the creation of the FCPA.

The FCPA has two provisions: the anti-bribery prohibitions and specific accounting requirements. The anti-bribery provisions addressed the corrupt practices by which American businesses obtained business abroad, which frequently consisted of outright bribes to government officials or the payment of fees to “consultants” who then acted as intermediaries to facilitate bribes. The accounting provisions addressed the accompanying “slush funds, off-book accounts and other financial practices,” which served to conceal the corruption.

The FCPA prohibits corruptly paying a foreign official money or anything of value, either directly or indirectly, for certain purposes. Those purposes include attempting to influence any official act or decision, inducing the official to commit an

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115. Cropp, supra note 50, at 136.
118. Low, supra note 19, at 718.
119. Id.
120. Id.
unlawful action, or trying to secure an improper business advantage.\textsuperscript{122} As noted in the Introduction of this Note, “foreign official” under the FCPA is,

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.\textsuperscript{123}

Judicial interpretation of “foreign official” is almost nonexistent. The court in \textit{Aguilar} notes only that the FCPA does not define instrumentality and the court in \textit{Aluminum Bahrain B.S.C. v. Alcoa Inc.} reserved judgment on whether or not employees of a holding company owned by the government of Bahrain were “foreign officials” in terms of the FCPA.\textsuperscript{124}

1. The FCPA and the \textit{Charming Betsy} Doctrine

International pressure has had an impact on the creation of the FCPA similar to that which influenced the U.K. Act.\textsuperscript{125} The United States Congress adopted the FCPA, and incorporated it into the Securities and Exchange Act of 1934,\textsuperscript{126} following the Watergate scandal.\textsuperscript{127} One main purpose of the FCPA was to repair international perception of the American democracy after it had faltered.\textsuperscript{128} International views on anti-corruption, and OECD policies in particular, also influenced specific provisions of the FCPA during the amendment processes, which oc-

\begin{itemize}
\item \textsuperscript{122} Id.
\item \textsuperscript{125} Cropp, \textit{supra} note 50, at 125.
\item \textsuperscript{126} \textsc{Stuart H. Deming}, \textit{The Foreign Corrupt Practices Act and the New International Norms} v, xvii (2d ed. 2010); Cropp, \textit{supra} note 50, at 125.
\item \textsuperscript{127} The Watergate scandal unearthed “myriad illegal contributions to President Nixon’s reelection campaign and corporate slush funds used to bribe foreign officials and police.” Stephen A. Fraser, \textit{Placing The Foreign Corrupt Practices Act on The Tracks in The Race For Amnesty}, 90 \textsc{Tex. L. Rev.} 1009, 1010 (2012).
\item \textsuperscript{128} Deming, \textit{supra} note 126, at xvii, 3; Cropp, \textit{supra} note 50, at 125 n.13.
\end{itemize}
curred in 1988 and 1998. For example, the United States implemented the OECD suggestions through the 1998 amendments by extending the jurisdiction under the FCPA to include considerations of the nationality of the perpetrators. The 1998 Amendments also expanded the FCPA to allow prosecution of “any person” that commits bribery, whether or not the entity they work for was also prosecuted, where before only corporate persons—not individuals—had been held liable. The amendments indicate that not only was the United States conscious of its image abroad when it originally drafted the FCPA, but it also continued to make an effort to conform with international norms when it drafted the two rounds of amendments in 1988 and 1998.

2. The FCPA and the Level Playing Field Approach

Given the United States’ pressure on the OECD and other countries to adopt the level playing field approach, it follows that one could read the FCPA, and thus define “foreign official,” in light of that same concept of fair competition. In United States v. Kay, although not specifically addressing the issue of defining “foreign official,” the Fifth Circuit subscribed to the view that Congress intended generally for the FCPA to promote fairness in competition. The Kay court considered whether the illegal gain of tax reductions fell within the proscription of bribes that secure business abroad. The court held that any payment to a foreign official that reduces a company’s costs—even if simply by reductions in customs duties and other taxes—indirectly benefits the company and affords an unfair advantage over its competitors in violation of the FCPA.

129. Deming, supra note 126, at 3; Cropp, supra 50, at 125 n.18.
130. Deming, supra note 126, at 7. Jurisdiction now depends only on whether or not the person has status as an American citizen or national, or whether an entity is subject to U.S. laws either by incorporation or because its principal place of business is situated in the United States. Id. at 7–8.
131. Cropp, supra note 50, at 125.
132. Deming, supra note 126, at xvii, 3, 7–8; see Cropp, supra note 50, at 125.
133. Cropp, supra note 50, at 125.
134. See United States v. Kay, 359 F.3d 738 (5th Cir. 2004) [hereinafter Kay I].
135. Id. at 747–48.
136. Id. at 749, 756.
3. The FCPA and the Public Trust Doctrines

Not only does the international community view corruption as an issue of public trust, but American judicial interpretation of the FCPA also does the same.137 The court’s treatment of the word “corruptly” in the FCPA is indicative of a traditional public trust model of analysis.138 The Second Circuit noted the similar usage of the word “corruptly” in the FCPA and in 18 U.S.C. § 201, pertaining to bribery of public officials and witnesses.139 In *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Intl B.V. v. Schreiber*, the Second Circuit noted that, due to these similarities, Congress probably intended to incorporate the elements of domestic bribery within the FCPA.140 Addressing bribery, the court stated that it had “repeatedly held in [the 18 U.S.C. § 201] context that ‘a fundamental component of a ‘corrupt’ act is

Avoiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors. Bribing foreign officials to lower taxes and customs duties certainly can provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business.

*Id.* at 749.

137. See *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Intl B.V. v. Schreiber*, 327 F.3d 173 (2d Cir. 2003) [hereinafter *Schreiber*]; see also United States v. Kay, 513 F.3d 432 (5th Cir. 2007) [hereinafter *Kay II*].

138. See *Schreiber*, 327 F.3d at 174.

139. *Schreiber*, 327 F.3d at 182–83. 18 U.S.C. § 201 refers to the Bribery of Public Officials and Witnesses. Subsection (b) provides in pertinent part that whoever,

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent— (A) to influence any official act . . . shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.


a breach of some official duty owed to the government or the public at large.”141 The Second Circuit had elaborated previously on the concept of a breach of trust in United States v. Rooney, reporting that “[b]ribery in essence is an attempt to influence another to disregard his duty while continuing to appear devoted to it or to repay trust with disloyalty.”142 In making these findings, the court emphasized that it is the public who suffer when dishonest officials fail to serve them as they had been entrusted to do.143

Beyond the interpretation of the word “corruptly,” American jurisprudence has also indicated that the FCPA as a whole is a statute about public trust.144 In United States v. Kay, the Fifth Circuit affirmed the lower court’s decision to enhance the defendant’s sentence for violating the FCPA. The court predicated this enhancement upon the United States Sentencing Guidelines, which specifically allow for increased punishment if the defendant abused a position of trust.145 Until this decision, no court had decided whether the FCPA qualified as a violation of public trust deserving of a sentencing enhancement. The Fifth Circuit held that violation of the FCPA, like embezzlement or fraud, did indeed warrant a sentencing enhancement for abuse of public trust.146

The FCPA can also be analyzed in light of the corporate proconsul variation of the public trust doctrine. This version of the public trust doctrine developed as the American corporate environment shifted from focusing solely on profitability to also considering social responsibility.147 This shift led to the “idea of the corporation as a means for implementing public policy. [The] idea of the business enterprise as government proconsul,”148 and the FCPA was an example of the federal government using the corporation as a proconsul in foreign affairs.149 The concept of the corporation as a government proconsul arguably developed because, “[the] American government [had]
come to realize . . . that enormous economic power is the power to affect society at large.”

In the United States, the bulk of economic power has been organized in the corporate form. “To effect major social change, it thus is argued, one must harness [the] enormous potential [of this corporate form].” Hence, American corporations became a leading force in reforms relating to racial and sexual discrimination, environmental protection, and equal employment. Likewise, the FCPA developed from this corporate proconsul concept, and “[i]n a sense . . . is an extension of the corporate-governance movement.” Indeed, the FCPA’s implementation illustrated that “very little of the system that gave rise to the proconsular strategy ha[d] been dismantled.” Therefore, a corporate proconsular analysis of the term “foreign official” may help solidify a precise and more general working definition.

B. Judicially Defining “Foreign Official”

American courts have acknowledged the undefined nature of “foreign official” under the FCPA; however, they have only provided limited assistance in remedying the issue. In fact, this uncertainty has allowed for a broadening of the term “foreign official,” causing problems for American business. Because most cases settle before reaching trial, “judges have given little guidance as to what the FCPA’s bewildering text actually means. So, for now, it means whatever an aggressive prosecutor says it does.”

In addition to those defendants that neatly fit the statutory definition, federal prosecutors have been identifying individuals employed by state-owned companies as “foreign officials.” Doing so has made it difficult for companies to assess when their activities may come under the purview of the FCPA, especially when operating in markets in which wholly and partially

150. Id.
151. Id.
152. Id.
153. Id.
154. Id. at 45.
155. Id. at 46.
158. The Economist, supra note 16.
state-owned companies are common. This, in turn, adversely affects American companies looking to do business in foreign markets. Consequently, businesses have begun challenging the imprecision of “foreign official” in their defense of allegations of FCPA violations. United States v. Aguilar and Alumnum Bahrain B.S.C. v. Alcoa Inc are two such cases.

1. United States v. Aguilar

The “foreign official” question surfaced in United States v. Aguilar, which was litigated in the Central District of California in 2011. Keith E. Lindsey, Steve K. Lee and Lindsey Manufacturing Company (“the Lindsey Defendants”), were charged with conspiracy to violate the FCPA and with substantive violations of the FCPA. In the same case, two Mexican citizens, Enrique Aguilar and his wife Angela Aguilar (“the Aguilar Defendants”), faced the same charges, inter alia, as the Lindsey Defendants. The jury found the Lindsey Defendants and Angela Aguilar guilty of violating the FCPA, a first in the prosecutorial history of the FCPA since most defendants choose to settle before trial. The defense, however, fought for dis-
missal\textsuperscript{170} of the indictment based on grounds of prosecutorial misconduct.\textsuperscript{171} The court granted the defense’s motion, threw out the convictions of the Lindsey Defendants, and dismissed the indictment.\textsuperscript{172} Although the indictment ultimately was dismissed, the court’s treatment of “foreign official” is still informative as to one member of the judiciary’s view on the matter.

The indictment stemmed from the bribery of two highly ranked officials, Nestor Moreno and Arturo Hernandez, of the Mexican utility company Comisión Federal de Electricidad (“CFE”),\textsuperscript{173} which is wholly state-owned.\textsuperscript{174} The Lindsey Defendants allegedly made payments to the Aguilar Defendants

\begin{footnotesize}
\begin{enumerate}
\item[170] The Government responded by filing the Government’s Response to the Defendants’ Supplemental Brief in Support of their Motion to Dismiss the Indictment with Prejudice Due to Alleged Repeated and Intentional Government Misconduct on September 5, 2011. USA v. Noriega et al, 2:10CR01031.
\item[171] As reported in the May 10, 2011 Wall Street Journal article, Jan L. Handzlik of Greenberg Traurig LLP, who represented Azusa, Calif.-based Lindsey, and its president, Keith Lindsey, said, “We are very disappointed by the jury’s verdict.” “We continue to believe in our clients’ innocence and will pursue our motion to dismiss the indictment on grounds of prosecutorial misconduct,” said Handzlik.
\item[172] See United States v. Aguilar, 831 F.Supp.2d 1180, 1182 (C.D. Cal. 2011). The court found that [t]he Government team allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one Defendant and her lawyer, recklessly failed to comply with its discovery obligations, posed questions to certain witnesses in violation of the Court’s rulings, engaged in questionable behavior during closing argument and even made misrepresentations to the Court.
\item[173] The Mexican Government owned CFE, an electric utility company that was responsible for supplying electricity to all of Mexico aside from Mexico City. Aguilar, 783 F. Supp. 2d at 1109.
\item[174] Id.
\end{enumerate}
\end{footnotesize}
through the Aguilars’ company, Grupo International De Asesores S.A. (“Grupo International”). The Aguilar Defendants then allegedly routed large portions of those payments to the CFE officers as bribes. According to prosecutors,

[f]or a government official, Nestor Moreno lived pretty large.

Moreno, the director of operations for Mexico’s nationalized electricity monopoly, drove a $297,000 Ferrari and owned a $1.8-million yacht named Dream Seeker.

Moreno couldn’t afford these luxuries on his salary at the Federal Electricity Commission in Mexico City. Instead, U.S. prosecutors alleged, they were gifts from Lindsey Manufacturing Company, an Azusa company that was peddling its electricity transmission equipment to foreign buyers.

Before winning on their prosecutorial misconduct claim, the Lindsey and Aguilar Defendants originally moved to dismiss the indictment on the grounds that officers or employees of state-owned corporations should not be considered “foreign officials” under the FCPA, arguing that “under no circumstances can a state-owned corporation be a department, agency, or instrumentality of a foreign government.” However, the court rejected this argument, denied the motion to dismiss, and stated that CFE could be considered an “instrumentality” of the Mexican government and therefore come within the reach of the FCPA. Thus, Mr. Moreno and Mr. Hernandez found themselves within the folds of the FCPA as “foreign officials.”

The Aguilar court noted, however, that “[t]he FCPA does not define ‘instrumentality,’” and then undertook a discussion of what the word “instrumentality” may mean in terms of the FCPA. Both sets of defendants suggested that “instrumental-

175. Grupo International was incorporated in Panama and headquartered in Mexico. Grupo International claimed to provide sales representation services to companies doing business with CFE and would receive a percentage of the revenue that companies like Lindsey Manufacturing gained from their contracts with CFE. Id. at 1111.
176. Id.
179. Id. at 1119–20.
180. Id. at 1112 (emphasis in original).
181. Id. at 1113–20.
“instrumentality” should be interpreted in light of the two words preceding it in the statute: “agency” and “department.” In light of this preceding language, they asserted, “instrumentality” should only include entities that possess the characteristics that are common to both “agencies” and “departments.” The court entertained this argument, although it did not ultimately agree with it, and proposed a “non-exclusive list” of the characteristics that are consistent between agencies and departments:

- The entity provides a service to the citizens—indeed, in many cases to all the inhabitants—of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.
- The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park.
- The entity is vested with and exercises exclusive or controlling power to administer its designated functions.
- The entity is widely perceived and understood to be performing official (i.e., governmental) functions.

The court continued the plain meaning analysis of “instrumentality” by considering how the FCPA uses the term, starting with a review of the structure, objective, and policy of the FCPA as a whole. Having been defeated in their first effort, the defendants now argued that the FCPA focuses on only the bribery of governments and politicians and that this limitation was evident by Congress’ decision not to criminalize all foreign
bribery during the drafting and amending processes. The government countered that the FCPA should instead be construed according to the Charming Betsy doctrine.

The court ultimately found the government’s Charming Betsy argument to be persuasive, focusing on the fact that the United States signed onto, and amended the FCPA in accordance with, the OECD Convention. The OECD Convention defined “foreign public official” to include “any person exercising a public function for a foreign country, including for a public agency or public enterprise . . . ,” and defines “public enterprise” as “any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence.” After signing the OECD Convention, the United States amended the FCPA in 1998 to include the OECD language “public international organizations” in its definition of “foreign official.” The defense in Aguilar found it notable, however, that whereas Congress had added “public international organizations” into its definition of “foreign official” to conform with the OECD, it did not add “public enterprise” into the definition.

Both the government and the defense relied heavily on analyses of the FCPA legislative history to determine what Congress intended to fall within the meaning of “foreign official.” The defense argued that not only did Congress fail to insert “public enterprise” during the 1998 Amendment process, but they had also declined to target bribes intended to influence state-owned corporations when faced with previous opportunities to do so. More specifically, “Congress rejected proposed bills that explicitly addressed payments to employees of state-owned corporations.” The failure of proposed Senate Bill of August 6, 1976, which would have defined “foreign official” as “essentially, officers, employees or others acting on behalf of a

188. Id. at 1115.
189. Id. at 1116; Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18, 2 L.Ed. 208 (1804).
190. Aguilar, 783 F. Supp. 2d at 1117.
191. Id. at 1116 (citing OECD Convention, art. 1) (emphasis in original).
192. Id.
193. Id. at 1118.
194. Id. at 1117–19.
195. Id. at 1118.
196. Id. at 1117.
foreign government” and would have included state-owned corporations in the meaning of “foreign government,” exemplifies one such rejection. Additionally, during a prior round of amendments to the FCPA in 1988, the amenders focused on “routine government action.” The Aguilar defendants claimed the “routine government action” focus in 1988 was further evidence that Congress did not consider corporations to be included in that definition. Lastly, as previously mentioned, Congress had a chance in 1998 to explicitly include “public enterprise” when amending the FCPA following the OECD Convention but did not do so.

The government addressed the FCPA legislative history by arguing that the FCPA’s failure to mention explicitly state-owned companies did not mean that Congress meant to exclude them entirely. Further, the government maintained that when Congress uses a general term such as “instrumentality,” it necessarily includes the more specific examples within that, such as state-owned company or public enterprise.

Although the court acknowledged both sides of the legislative history debate, it ultimately held that, “the legislative history of the FCPA is inconclusive.” The court further stated that, “[a]lthough it does not demonstrate that Congress intended to include all state-owned corporations within the ambit of the FCPA, neither does it provide support for Defendants’ insistence that Congress intended to exclude all such corporations from the ambit of the FCPA.” The court’s refusal to clarify the meaning of “foreign official” by issuing such vague and inconclusive language resulted in a continued—if not heightened—confusion regarding the meaning of the term, and a definitive definition remains elusive.

197. Id.
198. Id. at 1118 (emphasis omitted).
199. Id.
200. Id.
201. Id. at 1118–19.
202. Id. at 1119.
203. Id.
204. Id.; see also Aluminum Bahrain B.S.C. v. Alcoa Inc, 2012 WL 2094029, at *3 (W.D. Pa. June 11, 2012) (holding that the question of whether employees of a state-owned holding company are “foreign officials” within the meaning of the FCPA is an issue of fact for the jury).

The Western District of Pennsylvania addressed the “foreign official” question in June 2012 in Aluminum Bahrain B.S.C. v. Alcoa Inc.205 Aluminum Bahrain (“Alba”), a holding company owned by the government of Bahrain, alleged various fraud, conspiracy, and Racketeer Influenced and Corrupt Organizations Act (“RICO”) claims against defendant William Rice.206 These claims included an allegation that Rice was involved in illegal payments to foreign officials, and specifically alleged that “Bruce Hall, Zamil Al Joweiser and Yousif Shirawi, all executives and agents of Alba, received millions of dollars in bribes by virtue of their employment with Alba.”207 Rice moved to dismiss the complaint for failure to state a claim.208 The court denied Rice’s motion to dismiss.209

The Alcoa court held, inter alia, that the status of employees of Alba as “foreign officials” was still a question of fact. The court’s leaving of the “foreign official” question to interpretation by the fact-finder means that the term is still undefined. It also suggests that the factors constituting a “foreign official” are case sensitive, rather than determinable as a matter of law. Thus, with the meaning of “foreign official” rendered a question of fact, the definition is open to even further broadening, the full breadth dependent on the determination of the fact-finder within the given case. Alcoa, like Aguilar, was one of the few instances where an FCPA case made it to trial rather than settling,210 making it one of the few opportunities to define “foreign official” judicially. Like the earlier case, the Alcoa court’s decision to leave this question to the fact-finder created more uncertainty and prolonged the “foreign official” issue.

The Eleventh Circuit will have an opportunity to assess the scope of “foreign official” in United States v. Esquenazi, in which the United States filed its appellate brief on August 21, 2012.211 It will have a chance to review the legislative history of the FCPA and “any and all other sources” that may assist in

206. Id., at *1, *3.
207. Id. at *3.
208. Id. at *1.
209. Id.
211. See Brief for the United States, United States v. Esquenazi, No. 11-15331-C (11th Cir. Aug. 21, 2012), 2012 WL 3638390 at *1.
disambiguating the term “foreign official,” and, if circumst-
ances demand, it could decide to apply the rule of lenity and con-
strue the definition in favor of the defendants. Using the fol-
lowing three lenses could be effective in helping the court un-
tangle the information, and perhaps nail down a definition of
“foreign official.”

IV. ANALYZING “FOREIGN OFFICIAL” UNDER THE THREE LENSES

The *Aguilar* court posed a hypothetical as to whether the
president of PEMEX is a “foreign official,” discussed at the be-
inning of this Note. As was made apparent in *Aguilar* and
*Alcoa*, the FCPA legislative history is inconclusive, and no level
of the judiciary has really spoken on the matter of “foreign offi-
cial” either. Therefore, to reach an answer, or at least a pos-
sible path towards an answer, it may be instructive to view the
particular concept of “foreign official” in the same manner in
which this Note analyzed the OECD Convention, the U.K. Act,
and the FCPA in general. The three proposed lenses—the
*Charming Betsy* Doctrine, the Level Playing Field approach,
and the Public Trust doctrines—may help refine the analysis
and bring a definition of “foreign official” into focus.

A. “Foreign Official” and the Charming Betsy Doctrine

Since complying with international norms was one of Con-
gress’ motivating factors behind enacting and drafting the
FCPA, one way to parse the statute’s definition of “foreign offi-
cial” would be to mirror those of the international community.
Both the OECD and the United Kingdom subscribe to a defini-
tion of “foreign official” broader than strictly an officer or em-
ployee of a foreign government. The OECD Convention pro-
vides that a “foreign public official” is “any person holding a
legislative, administrative or judicial office of a foreign country,
whether appointed or elected; any person exercising a public
function for a foreign country, including for a public agency or
public enterprise; and any official or agent of a public interna-
tional organization.” The OECD Convention specifies that a

2011).
214. See supra Part III.B.
215. OECD, GLOSSARY, supra note 57, at 31.
“foreign country’ includes all levels and subdivisions of government, from national to local.” 216 The U.K. Act also includes within the definition of “foreign public official” 217 anyone that performs a public function “for any public agency or public enterprise of that country or territory (or subdivision of such country or territory.)” 218 The “public enterprise” language in both the OECD Convention provision and the U.K. Act prohibits bribing employees or agents of state-owned corporations. 219

As noted, “foreign official” in the FCPA is still not as well defined as it is under either the OECD Convention or the U.K. Act. The definition of “foreign official” in the FCPA was modified in 1998 to slightly mirror the language of the OECD Convention definition by including “any official or employee of a public international organization or any individual or entity acting on behalf of a public international organization.” 220 However, there are still some uncertainties as to what exactly the definition of “foreign official” includes. Under the FCPA,

[t]he term ‘foreign official’ means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization. 221

The use of the word “instrumentality” is ambiguous, as was discussed by the Aguilar court. 222 The term is broad and can encompass persons that would not otherwise appear to be “foreign officials,” such as employees of companies owned in whole or in part by a state government. 223 However, inclusion of state-owned company employees is not specifically provided for with-

216. Id.
220. OECD, GLOSSARY, supra note 57, at 20.
223. Cropp, supra note 50, at 136.
in the act.\textsuperscript{224} If the U.S. Congress were to follow the \textit{Charming Betsy} doctrine, then it would likely include public enterprises and agents thereof in its definition of “foreign official,” sweeping employees of state-owned corporations into the reach of the FCPA. Though Congress had a chance to modify the FCPA in this manner but chose instead to leave it broadly defined, the court in \textit{Aguilar} appears to follow the path charted by the OECD and the United Kingdom.\textsuperscript{225} Furthermore, the court in \textit{Aguilar} noted that the FCPA does not define “instrumentality,” which in turn lends ambiguity to the definition of “foreign official.”\textsuperscript{226} The court also indicated that using the FCPA’s legislative history to interpret the meanings of those terms is inconclusive and the court should instead construe the terms according to the \textit{Charming Betsy} doctrine.\textsuperscript{227} The court therefore was persuaded that the definition of foreign official should be examined with the lens provided by the OECD Convention.\textsuperscript{228}

International norms regarding the meaning of “foreign official” would lend support to the United States’ decision to include persons working for corporations wholly owned or partially owned by states in its own definition.\textsuperscript{229} Thus, if constructing the PEMEX situation according to the \textit{Charming Betsy} doctrine, looking to international sources such as the U.K. Act, then “foreign official” would be defined broadly and would include the president of PEMEX as a “foreign official.”\textsuperscript{230} Exxon would therefore be subject to prosecution under the FCPA.\textsuperscript{231}

\textbf{B. “Foreign Official” and The Level Playing Field Approach}

To consider a definition of “foreign official” that levels the playing field, one could look to the \textit{Kay} court for support. The \textit{Kay} court’s view of anti-corruption legislation as a means to level the playing field in international markets is in line with the general value of fair competition that underlies the FCPA.

\begin{itemize}
\item \textsuperscript{224} See 15 U.S.C. § 78dd-1(f)(1).
\item \textsuperscript{225} See \textit{id.} at 1117.
\item \textsuperscript{226} \textit{Id.} at 1112.
\item \textsuperscript{227} \textit{Id.} at 1116 (citing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18, 2 L.Ed. 208 (1804)).
\item \textsuperscript{228} \textit{Id.} at 1117.
\item \textsuperscript{229} See OECD, GLOSSARY, supra note 57, at 31; \textit{see also} Bribery Act, 2010, c. 23, § 6(5) (Eng.).
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id.}
itself, the OECD Convention, and the U.K. Act. Applying this concept to the “foreign official” issue would likely result in a broad definition, since any kind of bribery, whether involving public officials or private persons, would create an unfair advantage.

Assessing the PEMEX hypothetical according to the level playing field doctrine reaches a similar conclusion. The level playing field approach aims to eradicate bribery of any kind in order to create a fair and competitive marketplace, so Exxon’s undue influence on PEMEX’s decision in awarding the contract would also be subject to prosecution under this analysis.

C. “Foreign Official” and the Public Trust Doctrines

Superimposing the public trust concept on the definition of “foreign official” may not necessarily support a broad-based definition. Although the OECD version of the public trust doctrine includes the abuse of private office, other adaptations, including that of the United States, seem to indicate that the doctrine would only pertain to public officials. However, the corporate proconsul variation of the doctrine does seem to sug-

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234. See id.

235. OECD, GLOSSARY, supra note 57, at 19, 20.

236. See id. at 19.

237. Id. at 19–20.
suggest that a public trust definition of “foreign official” could be broader than originally contemplated.238

In view of this alternate iteration of the public trust doctrine, the scope of “foreign official” under that analytical lens is expanded.239 Whereas the traditional public trust doctrine might have limited “foreign officials” to individuals squarely in the public sphere, the corporate proconsul approach opens the door to liability of private individuals as well.240 If corporations can be guardians of public trust by virtue of being financial powerhouses, then it would be fair to include the associated individuals as a form of official encompassed by the FCPA.241 Therefore, adhering to the corporate proconsul adaptation of the public trust model rather than the conventional version would support instead a broader definition of “foreign official,” more like the scope of definitions sustained by the Charming Betsy and level playing field lenses.

In sum, the traditional public trust doctrine would apparently prosecute the president of PEMEX only if he were clearly an official of the Mexican government, rather than the president of a corporation that happens to be state-owned.242 However, when the alternate version of the public trust doctrine—the corporate proconsul approach—is taken into consideration, this analytical model would conclude that Exxon’s actions were violative of the FCPA.243

It is probably most prudent to define “foreign official” according to the corporate proconsul variant of the public trust lens. Given the expanding influence of corporations, this view would likewise expand their accountability. Broadly defining “foreign official” in terms of public trust would satisfy the motivations of the other models as well. The “foreign officials” are trusted to serve the public dutifully, and it is possible that the public could intend for those trusted officials to serve in a way that would not offend international norms or unfairly skew the playing field. Furthermore, “resort[ing] to any and all other sources,” did not “still result in a tie,” so application of the rule of lenity would not be necessary and courts would not be re-

238. GREANIAS, supra note 61, at 44.
239. See id. at 46; Aaronberg, supra note 100, at 8.
240. GREANIAS, supra note 61, at 46.
241. See id.
243. GREANIAS, supra note 61, at 46; see supra Part III.D.
quired to construe “foreign official” narrowly in favor of the defendants.\footnote{244} Therefore, using the public trust doctrine to identify who is a “foreign official” would satisfy the proponents of each analytical lens, while also adjusting to the modernizing world in which corporations are increasingly situated in positions of public trust.

CONCLUSION

Whichever lens Congress or the courts decide to use to examine the problem of defining “foreign official,” it will likely direct their focus to a broad definition encompassing certain private individuals in addition to government officials.\footnote{245} As for the PEMEX hypothetical, Exxon will likely find itself in trouble no matter which way the court views “foreign official.”

\textit{Katherine M. Morgan}∗

OVER-DETENTION: ASYLUM-SEEKERS, INTERNATIONAL LAW, AND PATH DEPENDENCY

INTRODUCTION

We have seen this problem before. We have examined the shocking case studies of asylum-seekers detained categorically and for prolonged periods of time before. We have watched the United States shirk their international legal commitments to ensure the dignity and humanity of refugees before. Yet despite the ongoing outcry of non-governmental organizations (“NGOs”) and legal scholars, and despite recent attempts by the United States government to improve the immigration system, little has been done to adequately improve the plight of detained asylum-seekers desperate to avoid removal to a country in which they are likely to face persecution.

1. See, e.g., President Barack Obama, Remarks by the President on Comprehensive Immigration Reform in El Paso, Texas (May 10, 2011) [hereinafter Remarks by the President] (transcript available at http://www.whitehouse.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas) (“[T]he truth is, we’ve often wrestled with the politics of who is and who isn’t allowed to come into this country. This debate is not new.”).


5. See, e.g., A.B.A., supra note 2.


7. Compare Exercising Prosecutorial Discretion, supra note 6 (establishing prosecutorial discretion policy), with Julia Preston, Obama Policy on Deporting Used Unevenly, N. Y. TIMES, Nov. 13, 2011, at A16 (alleging that despite the factors to be considered in light of the prosecutorial discretion policy some groups see less benefits than others).
Against a backdrop of domestic concern—exacerbated by the attacks of 9/11\textsuperscript{8}—that immigration carries inherent risks, the United States has detained non-citizens of all types for a variety of reasons\textsuperscript{9} and pursuant to broad legal mandates.\textsuperscript{10} While there are admittedly some conditions under which detention can be a legitimate governmental function, many countries often subject entrants to detention that is “arbitrary” or “unnecessary” in violation of international human rights laws and norms.\textsuperscript{11} In the United States, the decision to categorically detain asylum-seekers—despite the existence of potential solutions in the international community, including successful

\textsuperscript{8} Kevin Sullivan & Mary Jordan, Foreword to A.B.A., supra note 2, at v.

The horrific September 11, 2001 terror attacks on New York City and Washington, D.C. fundamentally changed the way our nation of immigrants views itself. Shameful episodes of anti-immigrant violence immediately after the attacks grabbed most of the headlines. But the more significant shift has played out more quietly in federal government offices where immigration policy is made. The United States government, acting on a new urgency to control immigration and American borders, has tightened an array of regulations that affect how people from other countries may enter or live in the United States.

\textit{Id.} While the 9/11 terror attacks perhaps intensified this fear, the concern about the link between immigration and domestic terrorism may have begun much earlier. \textit{See, e.g.}, Robert D. McFadden, Immigration Hurts City, New Yorkers Say in Poll, \textit{N. Y. Times}, Oct. 18, 1993, at B4.

\textsuperscript{9} U.S. DEP’T OF HOMELAND SEC., OFF. OF IMMIGR. STAT. ANN. REP., IMMIGRATION ENFORCEMENT ACTIONS: 2010, at 1 (2011) [hereinafter IMMIGRATION ENFORCEMENT ACTIONS], available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf (“Foreign nationals may be removable . . . for violations including failure to abide by the terms and conditions of admission or engaging in crimes such as violent crimes, document and benefit fraud, terrorist activity, and drug smuggling.”). While this Note will hone in upon the detention of refugees and asylum-seekers, it is important to remember that these groups are just a portion of the non-citizen population detained each year. \textit{See id.}

\textsuperscript{10} \textit{E.g.}, 8 U.S.C. § 1225(b)(1)(A)(ii) (2012) (expedited removal and, thus, mandatory detention, for all aliens arriving without having gone through the proper immigration channels).

\textsuperscript{11} U.N. High Comm’r for Refugees [UNHCR], Alternatives to Detention of Asylum Seekers and Refugees, ¶¶ 1–2, U.N. Doc. POLAS/2006/03 (Apr. 2006) (by Ophelia Field & Alice Edwards) [hereinafter Alternatives to Detention] (finding that many states presume detention for asylum-seekers despite contrary interpretations of international laws).
NGO pilot efforts which use individualized risk-analysis\(^{12}\) and “Alternatives to Detention”\(^{13}\) (“ATD”) programs—may amount to unnecessary or arbitrary detention that violates international human rights law.\(^{14}\) The arbitrary and unnecessary nature of these detentions may have a particularly egregious impact on the class of asylum-seekers\(^{15}\) affected, where the depri-

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12. Risk analysis is used in this Note to mean an individualized determination of a detained asylum-seeker’s eligibility for parole or release to an Alternatives to Detention program, which includes an assessment of that individual determining identity, risk of flight, potential for posing danger to the community, or regarding any other justification for release. See SEEKING PROTECTION, supra note 4, at 72–73.

13. “Alternatives to detention” is a term of art meaning an “alternative means of increasing the appearance and compliance of individual asylum seekers with asylum procedures and of meeting other legitimate concerns which States have attempted to address . . . through recourse to detention.” Alternatives to Detention, supra note 11, at ¶ 4. They will be discussed in more depth throughout this Note.


15. A subtle distinction exists between a refugee and an asylum-seeker; the United States defines refugees as those seeking protection before they arrive in the country while asylum-seekers are seeking protection after arriving in the United States. DANIEL C. MARTIN, U.S. DEPT OF HOMELAND SEC., OFFICE OF IMMIGR. STAT. ANN. FLOW REP., REFUGEES AND ASYLEES: 2010, at 1, 4 (2011). The Department of Homeland Security further separates affirmative asylum-seekers, who apply for asylum at a port of entry or within one year of arrival in the United States, from defensive asylum-seekers, who file for asylum in order to avoid removal or those who are subject to expedited removal. Id. at 4. In contrast, international discourse distinguishes asylum-seekers from refugees on the basis that asylum-seekers “are individuals who have sought international protection and whose claims for refugee status have not yet been determined,” that is, their cases are still pending. 2009 UNHCR Stat. Y.B. 13, http://www.unhcr.org/4ce532ff9.html. The distinction is irrelevant for the purposes of this Note because the language within U.S. statutes grants authorization to seek asylum to the same non-citizens as those protected in the international definitions of “refugee.” Compare 8 U.S.C. § 1158(b)(1)(A) (2012) and 8 U.S.C. § 1101(a)(2) (2012) with Convention Relating to the Status of Refugees [Refugee Convention], art. 1, July 28, 1951, 189 U.N.T.S. 150 and Protocol to the 1951 Convention Relating to the Status of Refugees [Protocol to Refugee Convention], Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. This Note will focus on defensive asylum-seekers who announce their intention to seek asylum at the port of entry to the Unit-
vation of liberty can exacerbate the traumas that led to their flight from their country of origin in the first place.16

The United States has recognized that the immigration system needs work.17 In the detention context, the United States has identified the need to incorporate risk analysis tools18 and ATDs in order to improve the process.19 However, the steps the United States has taken to develop and implement these tools have significantly deviated from the recommendations of experts in the field20 and have failed thus far to bring the country


19. Id.

into compliance with international law.21 This Note argues that unless the United States incorporates the recommendations of asylum experts to use thorough risk-analysis in creating an individualized ATD program, it will be unlikely to reduce the unnecessary or arbitrary detention of many asylum-seekers and will therefore be unable to meet the minimum human rights standards required under international law.22

Part I of this Note looks at the current U.S. immigration detention system and some of the now well-established failures of the asylum detention process preventing the country from conforming to international human rights laws and norms. Part II explores the rationales behind detention of asylum-seekers with an eye toward how risk-analysis and ATDs can improve the system. Part III analyzes the current momentum for reform of the system in the context of path dependency, the notion that the future of the system will be dependent upon—and constrained by—decisions made now,23 and addresses why it is essential to implement the recommendations of asylum experts now. Part IV discusses how the United States, by ignoring the recommendations of asylum experts regarding risk-analysis and alternatives to detention, has continuously violated international law. Part V lists the additional policy benefits to the United States should it adopt the proposed changes of asylum experts.

I. BACKGROUND

A. Current Status of the Detention System

Since its transition from the former Immigration and Naturalization Service (“INS”) to its current home as a subset of the Department of Homeland Security (“DHS”), the Immigration

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21. Compare Exercising Prosecutorial Discretion, supra note 6, with Preston, supra note 7.

22. E.g., ExCom on Detention, supra note 20; Alternatives to Detention, supra note 11.

and Customs Enforcement (“ICE”) division has rapidly expanded the scope of its detention power and the numerical capacity of individuals in detention.\textsuperscript{24} The United Nations has defined detention as “the deprivation of liberty in a confined place, such as a prison or purpose-built reception or holding centre. It is at the extreme end of the spectrum of deprivations of liberty . . . ”\textsuperscript{25} In the U.S. immigration context, the purview of detention includes “the authority . . . to detain aliens who may be subject to removal for violations of administrative immigration law.”\textsuperscript{26}

Throughout fiscal year 2010, ICE detained 363,064 non-citizens.\textsuperscript{27} ICE now has bed-space to house 33,400 detainees daily and averages 33,330 detainees per day—a notable increase from the daily average of 27,990 in 2007.\textsuperscript{28} As of 2009, asylum-seekers constituted about 1400 of these daily detainee totals.\textsuperscript{29} In addition to a budget of over $2 billion for its Immigration Detention and Removal Office (“DRO”), Congress gave DHS unsolicited additional funding to increase the total number of beds by 600, to 34,000 total, in fiscal year 2012.\textsuperscript{30} The

\begin{itemize}
  \item \textsuperscript{24} See SCHRIO, supra note 18, at 2, 4.
  \item \textsuperscript{26} SCHRIO, supra note 18, at 4.
  \item \textsuperscript{27} IMMIGRATION ENFORCEMENT ACTIONS, supra note 9, at 4. This statistic includes all categories of non-citizens, not just asylum-seekers. Id.
  \item \textsuperscript{28} Fact Sheet: Detention Management, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT [ICE], http://www.ice.gov/news/library/factsheets/detention-mgmt.htm (last accessed June 22, 2012). ICE notes that these numbers do not include counts for non-citizens detained with the Mexican Interior Repatriation Program or the Office of Refugee Resettlement. Id.
  \item \textsuperscript{29} SCHRIO, supra note 18, at 11. 11,244 people were granted affirmative asylum in fiscal year 2010, with the highest percentage of those coming from China. MARTIN, supra note 15, at 5. This follows a general decreasing trend in grants of asylum over the past several years. Id.
  \item \textsuperscript{30} H.R. REP. NO. 112-91, at 52 (2011); NATIONAL IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION
amount of available bed space may affect the amount of time an individual is detained.\textsuperscript{31} The average time of detention for asylum-seeking is controversial; some experts say it ranges from 47 to 109 days, while others indicate that it might be much longer.\textsuperscript{32}

Within the U.S. system, detention often consists of placement in county jails or commercialized detention centers.\textsuperscript{33} While this Note does not explore human rights violations or improvements extant within the detention system beyond its arbitrary or unnecessary overuse, it is worthy of mention that extensive scholarship explores issues involving the general criminalization of the civil immigration system;\textsuperscript{34} the effects of


\textsuperscript{32} Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010: Before the S. Comm. on the Judiciary, 111th Cong. (2010) (statement for the record from Physicians for Human Rights), available at http://rcusa.org/uploads/pdfs/PHR%20Testimony,%205-19-10.pdf; UNLOCKING LIBERTY, supra note 20, at 12. The U.S. Supreme Court case Zadvydas v. Davis, which declared detentions of more than six months to be unreasonable and at odds with the U.S. Constitution, does not protect asylum-seekers because it only addressed the detention of those who were detained while awaiting deportation, as opposed to awaiting asylum proceedings. 533 U.S. 678 (2001).

\textsuperscript{33} Inter-American Commission on Human Rights, Organization of American States, Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II, doc.78/10, 85–87 (2010) [hereinafter IACHR]. As of 2009, approximately 50% of all detainees were held in county jails that also contained prisoners. SCHRIRO, supra note 18, at 10.

\textsuperscript{34} See generally Anil Kalhan, \textit{Rethinking Immigration Detention}, 110 COLUM. L. REV. SIDEBAR 42 (2010). Criminal and immigrant populations in detention are treated essentially the same. SCHRIRO, supra note 18, at 4.
family and child detention; and the lack of adequate medical care, access to legal representation, and workable civil standards for detention.

B. The Process for Detaining Asylum-Seekers in the United States

Currently, non-citizens entering the United States without legally having gone through the proper immigration process in advance are automatically placed in expedited removal proceedings unless they express their desire to apply for asylum to an immigration officer. Once they do so, an immigration officer will detain the asylum-seeker pending the filing of their asylum application and an interview with an asylum officer. From this point forward, the asylum-seeker is subject to mandatory detention, unless and until they can establish a basis for discretionary parole or they are deported.

After filing for asylum, the detainee proceeds to what is referred to as a “credible fear hearing” or “credible fear inter-

35. Alternatives to Detention, supra note 11, at ¶¶ 58-62.
36. See generally Riddhi Mukhopadhyay, Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States, 7 SEATTLE J. FOR SOC. JUST. 693 (2009).
38. SCHRIBO, supra note 18, at 4 (“ICE adopted standards that are based upon corrections law and promulgated by correctional organizations to guide the operation of jails and prisons.”).
39. 8 U.S.C. § 1225(b)(1)(A)(ii)(2012). Some exceptions do exist to bar an arriving alien from applying for asylum in the United States. Notably, he or she cannot have come from a safe third country where he or she could have sought asylum; additionally, subject to extenuating circumstances, he or she cannot have waited more than a year to apply for asylum after arriving in the United States or have had a previous unsuccessful asylum application. 8 U.S.C. § 1158(a)(2)(A).
40. 8 U.S.C. § 1225(b)(1)(A)(ii). While both are members of ICE, asylum officers are distinct from immigration officers in that they have “professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of [asylum] applications” and that more experienced asylum officers supervise them. 8 U.S.C. § 1225(b)(1)(E).
41. 8 U.S.C. § 1225(b)(1)(B)(ii); IMMIGRATION ENFORCEMENT ACTIONS, supra note 9, at 2. Parole will be discussed in more depth below.
"42 which may take place up to forty-five days after the filing of an application for asylum. 43 At the hearing, one seeking asylum must establish to the satisfaction of an asylum officer that he or she has a "credible fear of persecution" in his or her home country. 44 This fear is defined as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and other such facts as are known to the officer, that the alien could establish eligibility for asylum" under existing U.S. law. 45 At a credible fear hearing, an ICE officer has the sole ability to determine if the asylum-seeker has a credible fear that will likely support a future favorable asylum ruling by an immigration judge. 46 This is the first, but not only, opportunity for individual discretion or arbitrariness to seep into the asylum process. 47 If the determination of the asylum officer is unfavorable, the asylum-seeker will be slated for expedited removal "without further hearing or review." 48 If favorable, the asylum officer will refer the asylum-seeker for asylum adjudication in front of an immigration judge. 49 By statute, the entire proceeding, excluding appeal, should be concluded within 180 days, although the

42. E.g., Brâné & Lunholm, supra note 31, at 150.
47. ExCom on Detention, supra note 20, at 3 (stating that discretion leads to arbitrariness). For a criticism of the United States’ ability to determine credibility as being arbitrary in relation to refugee determinations, see Andrew F. Moore, Unsafe in America: A Review of the U.S.-Canada Safe Third Country Agreement, 47 SANTA CLARA L. REV. 201, 237–238 (2007).
48. 8 U.S.C. § 1225(b)(1)(B)(iii)(I). If the asylum-seeker makes a “prompt” request, he or she may have the decision reviewed by an immigration judge, which by statute must happen no later than seven days after the negative credible fear determination. 8 U.S.C. § 1225(b)(1)(B)(ii)(III).
49. Skinner, supra note 46, at 275.
statute provides for the extension of this timeframe for “exceptional circumstances.”

As noted, prior to being granted asylum by an immigration judge, arriving asylum-seekers are subject to mandatory detention unless they can establish their basis for discretionary parole. This presumption in favor of detention is codified in 8 U.S.C. § 1182(d)(5)(A), which authorizes the Attorney General,
in his discretion[, to] parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Thus, asylum-seekers will only be paroled if an individualized case analysis reveals there is an “urgent humanitarian reason” or “significant public benefit” for so doing. This basis for parole has also been defined as applying to those classes of aliens “whose continued detention is not in the public interest as determined by [ICE officials].” In a policy shift effective early 2010, ICE began to interpret parole in the “public interest” under this section to require “that the alien’s identity is sufficiently established, the alien poses neither a flight risk nor a danger

53. 8 C.F.R. § 212.5(b)(5) (2012). Other classes enumerated under this section are more readily eligible for parole because they do not include a discretionary determination by an ICE official; these include individuals with serious medical conditions, pregnant women, juveniles, and those who are serving as witnesses in court proceedings. Id.
54. 8 U.S.C. § 1182(d)(5)(A). See also 8 C.F.R. § 212.5(b); Credible Fear Parole, supra note 51, at 2, 6–8.
to the community, and no additional factors weigh against the release of the alien.”

While this development is a positive shift because it streamlined and increased the transparency of parole decisions, the proof requirements remain an especially weighty burden for asylum-seekers. Despite apparent sympathy to the circumstances of asylum-seekers, the policy emphasizes the discretionary nature of parole and requires the asylum-seeker to bear the burden of demonstrating this information to the satisfaction of an ICE officer. The policy standards themselves recognize the inherent difficulties for asylum-seekers to provide adequate documentation or produce credible witnesses to corroborate their claims on asylum matters. These difficulties may include a lack of travel documents, often associated with an asylum-seeker’s unwillingness or inability to contact their for-
mer government, or a lack of ties to any community within the United States as a result of their recent urgent arrival. Asylum-seekers are additionally prejudiced because, by virtue of their situation, any attempt to meet this proof requirement to gain parole must be done while in detention. Moreover, the same set of challenges, particularly the notion that “detention will often deprive the asylum-seeker of an opportunity to present his or her [case] or to have the assistance of counsel,” limit the asylum-seeker’s ability to successfully obtain parole. Furthermore, because the policy standards are non-binding, they can be changed at any time and thus do not provide any lasting guarantees even for the opportunity of parole. As a result, the system remains weighted in favor of continued detention.

C. How the U.S. Detention System Violates International Human Rights Laws and Norms

Numerous legal scholars and advocacy groups have argued that the U.S. detention policy—featuring a presumption in fa-

59. Id.
60. Mark L. Noferi, Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings, 18 Mich. J. Race & L. (forthcoming 2012) (discussing how detention leads to “cascading deprivations” of rights of those detained—for example, the difficulties in obtaining counsel from detention may lead to higher rates of unsuccessful cases and time wasted arguing over appointed counsel for detainees); Guy S. Goodwin-Gill, Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection, in Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection, 185, 223 (Erika Feller et al. eds., 2003) (“Detention will often deprive the asylum-seeker of an opportunity to present his or her case.”); Sampson et al., supra note 20, at 50 (“social isolation is a significant issue for most detainees.”). The parole determination “typically occurs within three weeks of apprehension.” Unlocking Liberty, supra note 20, at 20.
61. Goodwin-Gill, supra note 60, at 223. See also, Noferi, supra note 60, at 25–26 (“The difficulty of challenging an immigration detention and case while detained is compounded by the inability of most detainees to secure counsel—or, indeed, any adequate source of legal assistance.”).
63. IACHR, supra note 33, at 45–47; Kalhan, supra note 34, at 51.
64. See Credible Fear Parole, supra note 51, at 6–8. See also IACHR, supra note 33, at 45–47; Kalhan, supra note 34, at 51.
Various treaties and conventions articulate an aversion to immigration detention in the vast majority of circumstances, finding it to be violative of human rights principles. This includes the more specific rules regarding asylum-seekers who declare their desire to seek asylum once they are within the country to which they fled. "In most cases, only if an individual’s claim to refugee status is examined before he or she is affected by an exercise of State jurisdiction . . . can the State be sure that its international obligations are met.” This pre-approval, however, may prove challenging for asylum-seekers to attain given that the persecution many of them are fleeing might not provide the time or opportunity to plan ahead and apply for protection in another country before leaving their home country.

The United States is not a party to all of such conventions or treaties, although it is arguably bound under customary international laws or norms to abide by them anyway. The United States is not a party to all of such conventions or treaties, although it is arguably bound under customary international laws or norms to abide by them anyway.
cation of customary international law declares that a country “violates international law if, as a matter of state policy, it practices, encourages or condones . . . prolonged arbitrary detention.”

Admittedly, some international laws or norms have exigency exceptions that allow states to detain aliens in cases of “necessity.” However, as most of those detained do not present any risks to the State from which they are seeking aid, these exigency exceptions do not justify the categorical detention of all asylum-seekers.

There are multiple international treaties that protect the rights of people seeking asylum, and many have prohibitions against “arbitrary” detention, “unnecessary” detention, or both. Beginning with the Universal Declaration of Human Rights (“UDHR”), the international community has recognized “the right to seek and to enjoy in other countries asylum from persecution.” Furthermore, the UDHR established that “no one shall be subjected to arbitrary arrest, detention, or exile.”

While establishing these rights that would come to form the basis of international human rights law, the drafters of the UDHR did not define many of the terms they used, including “arbitrary.”

The 1951 Convention Relating to the Status of Refugees (“1951 Convention”) expanded upon the UDHR by creating a multilateral treaty wherein “the contracting states shall not apply to the movements of such refugees restrictions other

74. See, e.g., Refugee Convention, supra note 15, art. 31(2); Goodwin-Gill, supra note 60, at 232.
75. See Back to Basics, supra note 14, at 2 (“[L]ess than ten percent of asylum applicants . . . disappear when they are released to proper supervision and facilities.”).
76. UDHR, supra note 66, art. 9 (against arbitrary detention); Refugee Convention, supra note 15; Protocol to Refugee Convention, supra note 15; ICCPR, supra note 66, at arts. 9, 12 (against arbitrary and unnecessary detention). The two terms are interrelated, as detaining unnecessarily can constitute arbitrariness. See, e.g. Brânè & Lundholm, supra note 31, at 157.
77. UDHR, supra note 66, art. 14(1)(III).
78. Id. art. 9 (emphasis added).
than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.” 80 While detention for identity verification, public safety, and national security have been given as examples of detention that could potentially be considered “necessary,” and therefore permissible under the 1951 Convention, some scholars have interpreted detention subsequent to these conditions to be only for extraordinary circumstances.81 While the United States did not sign the 1951 Convention, it did ratify the 1967 Protocol to the 1951 Convention that incorporated and modernized the Convention, thereby binding the United States to those international obligations.82

In addition to the 1951 Convention/1967 Protocol restrictions against unnecessary detention, the 1966 International Covenant on Civil and Political Rights (“ICCPR”) prohibits detention from being “arbitrary.”83 Under Article 9 of the ICCPR, arbitrary detention, though not precisely defined, is expressly prohibited.84 Article 9 further holds speedy access to a court proceeding to be essential for anyone “deprived of his liberty by . . . detention.”85

Because much of the language in these treaties is vague or undefined, the international community seeks guidance from both the United Nations High Commissioner for Refugees (“UNHCR”) and the Executive Committee of the UNHCR (“Ex-

80. Refugee Convention, supra note 15, art. 31(2) (emphasis added).
81. Goodwin-Gill, supra note 60, at 232.
82. Refugee Convention, supra note 15; Protocol to Refugee Convention, supra note 15. The United States signed the 1967 Protocol without any reservations, understandings, or declarations (“RUDs”) relevant to this analysis. Protocol to Refugee Convention, supra note 15.
83. ICCPR, supra note 66, art. 9(1). The United States ratified the ICCPR in 1992, attaching RUDs that limit some provisions, but none specifically relevant to this analysis. Id. The United States declared the Convention to be non-self-executing, or incapable of taking effect without implementing legislation. Id; Kessler, supra note 3, at 577; Black’s Law Dictionary 1482 (9th ed. 2009) (defining self-executing).
84. ICCPR, supra note 66, art. 9(1); Kessler, supra note 3, at 580 (“In the context of Article 9(1), [arbitrary] encompasses not just unlawful detentions, but also all those that are unjust, unpredictable, unreasonable, capricious, and disproportional.”).
85. ICCPR, supra note 66, art. 9(4).
in interpreting its obligations to refugees. The ExCom has stated that

[W]ide discretionary powers [to detain] . . . are far too frequently applied in an arbitrary manner. For instance, a large number of asylum-seekers are detained on the formal basis that it is likely that they will abscond . . . international standards dictate that there must be some substantive basis for such a conclusion in the individual case.

The specious justification of needing to prove an asylum-seeker’s identity is yet another example of arbitrariness in the detention process. Proving identity “should not routinely be judged necessary” in light of the circumstances which lead asylum-seekers to flee persecution in the first place. The ExCom guidelines emphasize that implementing individualized, “prompt, mandatory and periodic review of all detention orders before an independent and impartial body” of the destination-state’s need to detain is fundamental to avoiding arbitrary detention. Furthermore, the UNHCR has continually advocated for a presumption against detention.

Scholars have additionally argued that arbitrary detention exists where there is “inappropriateness, injustice, and lack of predictability” in the detention process. “Arbitrary detention occurs when refugee applicants are detained on the basis of broad criteria that do not allow for individualized determina-

86. See, e.g., I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 n.22 (1987). The United States Supreme Court has held that at least one set of guidelines established by the UNHCR is helpful in interpreting 1967 Protocol obligations. Id. In discussing the Handbook on Procedures and Criteria for Determining Refugee Status, written by the UNHCR, the Court said, “the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.” Id. The Court noted that the guidance, while helpful, was non-binding. Id. See also, Skinner, supra note 46, at 278–79.
87. ExCom on Detention, supra note 20, at 3.
88. Id. at 4.
89. Id.
90. Id. at 3–4.
tions of the need for detention, when there is no administrative or judicial review, or when detention occurs for disproportionate or extended periods.”

U.S. practices are arbitrary because detention is applied as a “blanket policy;” chances for parole—varying “anywhere from 0.5% to 98%”—are inconsistent;

judicial review, in practice, is either unavailable or limited by judges citing a lack of jurisdiction; and because compliance rates are quite high, further supporting “the argument that the detention of asylum seekers is arbitrary because it is unnecessary.” Moreover, there is evidence to suggest arbitrariness in parole decisions, as some watchdog groups have found that the choice to parole an asylum-seeker can sometimes be made based on available bed space in detention centers rather than the merits of an individual’s claim for release.

As put forth in the Restatement Third, “[A] single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement; arbitrary detention violates customary law if it is prolonged and practiced as state policy.” This weighs against the United States’ categorical detention of all asylum-seekers because, without sufficient individualized assessment, there is no way to ensure detention is necessary.

Additionally, because the U.S. policy leaves determinations of credible fear and parole to the discretion of individual ICE officers, any localized breach or non-compliance can result in international law violations.

The international community has noticed the United States’ violations of international law. Following his May 2007 visit, the UN Special Rapporteur on Human Rights of Migrants expressed his “serious concern” with the status of the U.S. deten-

93. Moore, supra note 47, at 267.

94. Brané & Lundholm, supra note 31, at 157 (“[Parole policy] seems to depend more upon the personality of the district director and the available bed space than it does upon a reasoned policy of release criteria.”).

95. Id.

96. Moore, supra note 47, at 263, 269.


98. See Goodwin-Gill, supra note 60, at 219.

99. Id.

tion system. The Special Rapporteur “[came] to the conclusion that the United States ha[d] failed to adhere to its international obligations to make the human rights of the 37.5 million migrants living in the country . . . a national priority, using a comprehensive and coordinated national policy based on clear international obligations.” His report went on to discuss the various violations of international law within the United States and made recommendations for improvement that included the complete elimination of mandatory detention. Similarly, the Inter-American Commission on Human Rights produced in 2011 a comprehensive report on the U.S. immigration and detention system. Along with urging the United States to “comply fully with the international human rights obligations under the American Declaration [of the Rights and Duties of Man],” the Commission advocated for the country’s discontinuation of mandatory detention practices.

II. DISASSOCIATING FROM PRESUMPTIONS THAT FAVOR DETENTION

In order to become compliant with international law, the U.S. detention practices for refugees and asylum-seekers need to align more closely with the protection-based mandates of the aforementioned provisions that proscribe detention from being either arbitrary or unnecessary. To do this, the United States needs to utilize risk-analysis and ATDs to release or parole detainees held without legitimate justification. However, no alternative program can be successful until the U.S. immigration system shifts its application of immigration statutes from

102. Id. at 3.
103. See generally id.
104. Id. at 24.
105. IACHR, supra note 33.
106. Id. at 155. In its reply to the draft version of the report, the United States was quick to point out that the American Declaration is “a nonbinding instrument that does not itself create legal rights or impose legal obligations on signatory states.” Id. at 7. The IACHR countered that the Declaration does create obligations for member and non-member states alike under the charter of the Organization of American States, the American regional counterpart to the United Nations, of which the United States is a member. Id. at 10.
107. Id. at 147.
108. See Part I.B., supra.
the categorical mandatory detention of asylum-seekers to a more flexible system where detention is used only as a last resort.\textsuperscript{110} Many asylum experts have advocated for this and have created programs based on the “presumption against detention” model.\textsuperscript{111} To understand how, by following suit, the United States could avoid arbitrary or unnecessary detention, it is first helpful to recognize the rationales it puts forth for using a mandatory detention policy in the first place.\textsuperscript{112} Section A enunciates what risks the United States assumes when, rather than detain, it releases asylum-seekers into an ATD program and, by extension, the community. Sections B and C seek to understand the potential benefits of effectively implemented risk analysis and ATD programs as compared to those currently in operation within the U.S. system.

A. Detention Rationales

Countries often cite the inherent risks associated with admitting aliens as a rationale for detaining them.\textsuperscript{113} As discussed in Part I.B, the current U.S. detention policy centers on these risks by presuming detention for aliens unless they are able to establish: 1) their identity, 2) that they are not a flight risk and, 3) that they are not a danger to society; or they must establish they have an additional extenuating circumstance that justifies their release.\textsuperscript{114} By exploring the scope of these inherent risks, the United States can better address any actual risks and ultimately eliminate the use of detention that is excessive in matching the scope of that risk.\textsuperscript{115}

The United States justifies detention—at least until there is satisfactory proof of the asylum-seeker’s identity—by citing the need to ensure that the alien will comply with specific proceedings, including meeting attendance, hearings, and, potentially,

\begin{itemize}
  \item[110.] See, e.g., JAILS AND JUMPSUITS, supra note 37, at 42.
  \item[111.] See, e.g., SAMPSON ET AL., supra note 20.
  \item[112.] See Brané & Lundholm, supra note 31, at 149–52 (exploring detention rationales).
  \item[113.] See id.
  \item[114.] Credible Fear Parole, supra note 51, at 2–3, 6–8. Extenuating circumstances include serious medical conditions, pregnancy, juvenile status, and aliens slated to serve as witnesses. 8 C.F.R § 212.5(b); Credible Fear Parole, supra note 51, at 2.
  \item[115.] See Brané, supra note 31, at 149–52.
\end{itemize}
removal.\textsuperscript{116} The United States has declared, “asylum-related fraud is of genuine concern”\textsuperscript{117} and also wants to be certain before paroling an asylum-seeker that the person is not threatening to the community or the nation as a whole.\textsuperscript{118} Further, the current policy indicates that detention will continue if there are “serious adverse foreign policy consequences that may result if the alien is released or [if there are] overriding law enforcement interests.”\textsuperscript{119} Moreover, the U.S. immigration system is bogged down\textsuperscript{120} and the caseload in immigration courts is high, increasing the time that asylum-seekers in detention must wait for their case to be heard.\textsuperscript{121}

Yet if the U.S. method of detention is meant to serve as a deterrence to emigration, the strategy itself would violate international laws.\textsuperscript{122} Regardless of a host country’s detention policies, asylum-seekers will always impose some level of risk to that country.\textsuperscript{123} Thus, to argue that U.S. asylum detention is an

\begin{footnotesize}
\begin{enumerate}
\item Credible Fear Parole, \textit{supra} note 51, at 6 (“likelihood of appearing when required”) (emphasis added).
\item \textit{Id.} at 7.
\item \textit{Id.} at 8.
\item \textit{Id.}
\item See, e.g., Michael Matza, \textit{Immigration Cases Clogging Federal Courts}, PHILA. INQUIRER, July 18, 2011, at A2 (“Despite the nationwide hiring of more than 40 additional [immigration court] judges in the past year, the number of deportation cases, asylum claims, and green-card fraud prosecutions ... is at an all time high: 275,000 and climbing.”); Dan Moffett, \textit{Conveyor Belt to Deportation: Asylum Cases don't get Attention they Deserve}, PALM BEACH POST, Feb. 16, 2010, at A14 (“the system is choked by an exploding caseload and an exponential increase in outside pressures...the backlog has gotten progressively worse in the last decade.”) (internal quotation marks omitted).
\item Refugee Convention, \textit{supra} note 15, at art. 31(2); Protocol to Refugee Convention, \textit{supra} note 15 (incorporating the articles of the Refugee Convention); See \textit{Alternatives to Detention}, \textit{supra} note 11, at 228 (noting the fear that deterrence is the true rationale behind U.S. detention and parole policies).
\item \textit{Back to Basics}, \textit{supra} note 14, at 1. “Any reduction in global asylum numbers have been associated with non-entrée policies, including contain-
\end{enumerate}
\end{footnotesize}
effective deterrence factor is to ignore the reason that people are seeking asylum in the first place: they consider the situation they are fleeing to be worse. Risk-analysis tools and ATDs can work together to ameliorate the concerns that justify detention, and reduce the burden on the U.S. immigration system, by allowing for the parole of more asylum-seekers.

B. The Importance of Risk-Analysis

To address these limited, but admittedly legitimate, fears and still comply with international obligations, the United States needs to assess the level of risk that asylum-seekers pose on an individual level, regarding both danger to society and risk of flight. Risk-analysis tools fill the gap between categorical detention and ATDs by ensuring that any method used for a person is necessary and not arbitrary, thus complying with international treaties. Detention can be legitimate under international law only when an individualized assessment establishes that there is no lesser method that the government can take to mitigate the dangers posed by that particular non-citizen. This is because international human rights law requires that detention decisions be made on a case-by-case basis after an individualized assessment of the functional and legitimate need of detaining a particular individual, the understanding that anyone deprived of liberty is entitled to judicial review of this decision.

124. Back to Basics, supra note 14, at 2 (“[T]hreats to life or freedom in countries of origin are likely to be a greater push factor than any disincentive created by detention policies in countries of destination.”). “The principal aim of asylum seekers and refugees is to reach a place of safety . . . those who are aware of the prospect of detention before arrival believe it is an unavoidable part of the journey, that they will still be treated humanely despite being detained.” Sampson, supra note 20, at 11.
125. Sampson, supra note 20, at 22.
126. Schriro, supra note 18, at 17, 20. While this Note focuses on risk-analysis as the capacity to reduce threats posed to the community, the assessments can also include screening for special vulnerabilities present in the individual that require attention. Sampson, supra note 20, at 22.
127. Unlocking Liberty, supra note 20, at 15.
128. See, e.g., ExCom on Detention, supra note 20, at 3 (noting that arbitrariness results unless there is an individualized determination that a person is likely to abscond).
and that any restriction of liberty should be the least restrictive means necessary.\footnote{129}

An appropriate risk assessment tool would allow the United States to screen for the identified threats posed by non-citizens entering the country—lack of identity, risk of flight, and risk of danger—in order to make decisions about the level of supervision and support necessary to ensure compliance with the system.\footnote{130} Such a tool could allow the United States to increase legitimacy within the system through increased compliance while reducing detention costs in favor of less-costly ATDs.\footnote{131}

One criticism of the efficacy of any risk-assessment procedure is that there is a general absence of data at either the national or the international level regarding the success or failure of asylum-seekers to comply with proceedings or mandates.\footnote{132} “The scarcity of governmental statistics with regard to those who abscond [or fail to comply with a removal order] severely weakens the empirical evaluation of one form of conditional release in comparison to another.”\footnote{133} One way to ensure that asylum-seekers are paroled or, if detained, that detention is in the least restrictive manner, is to increase predictability of asylum-seekers absconding by improving data collection via risk assessments.\footnote{134}

An interesting parallel can be drawn to recent risk and data collection paradigms the U.S. Customs and Border Patrol (“CBP”) has utilized, in the context of national security, regarding the flow of people and goods through U.S. borders.\footnote{135} In response to increasing terror threats against the United States, CBP has utilized improved data analysis to distinguish be-

\footnote{129. Id.}
\footnote{130. See SAMPSON, supra note 20, at 22 (“[A]ssessment enables authorities to make an informed decision about the most appropriate way to manage and support the individual as they seek to resolve their migration status and to make case-by-case decisions about the need to detain or not.”).}
\footnote{131. See Unlocking Liberty, supra note 20, at 41–42 (identifying the shortcomings of “standard risk assessment” as opposed to individualized risk assessment).}
\footnote{132. See Alternatives to Detention, supra note 11, at 24–25.}
\footnote{133. Id. at 25.}
\footnote{134. SCHRIRO, supra note 18, at 18–19.}
between safe and unsafe traffic, goods, and passengers. Speeding up the screening process for safe traffic actually increased CBP’s ability to focus resources on who or what was a true threat. Essential to speeding up safe traffic is the sharing of information not only within an organization but also between an organization and “safe” civilians, across multiple agencies, and among nations. CBP’s efforts provide a model for the way that ICE can speed up the parole of safe detainees in order to better focus on those that are unsafe. Based on CBP’s model, the United States might be able to speed asylum-seekers into parole or ATDs in a number of ways, such as having ICE offices become more efficient at reporting factors contributing to or detracting from compliance; requiring ICE and NGOs to compile data on asylum-seekers’ compliance; or by sharing statistics with Canada and Mexico relating to risks posed by asylum-seekers and ultimate compliance. The expedited process could have similar benefits as those seen by CBP—the ability to focus finances and personnel on true

137. Bersin, supra note 136. See also, UNLOCKING LIBERTY, supra note 20, at 41 (“Using individualized custody determinations could improve efficiency by maintaining the detention levels necessary and diverting those resources to more appropriate means of ensuring that immigrants report for immigration proceedings.”) (emphasis added).
140. Compare id. See also, Holding Patterns, supra note 25, at 28:30–30:18 (discussing frustration at how detention issues become localized despite the fact that many countries face them, but how governments are beginning to work together).
threats—while also avoiding unnecessary or arbitrary detention by releasing individuals who qualify into ATDs.\textsuperscript{141} To ensure that the process does not become discriminatory or too bureaucratic, expert input, trained staff, specific guidelines, and formal review should be a part of any new data analysis process.\textsuperscript{142}

While overriding long-standing aversions to sharing between countries could be a challenge at any level of cooperation, the benefits of increased data sharing and analysis in this digitized, information-driven society outweigh the drawbacks.\textsuperscript{143} Data regarding compliance on a national or international level could influence detention planning on the whole and decisions made in individual cases in the same way data from pilot programs have already shaped decisions on a smaller scale.\textsuperscript{144} Ultimately, by “designing effective alternatives to detention and knowing when they can and should be relied upon to work,” risk analysis, supplemented by data collection, can help to reduce unnecessary and arbitrary detention.\textsuperscript{145}

\textbf{C. Why Alternatives to Detention are Important}

In the spectrum between full detention and unrestrained liberty, ATDs occupy any method that is not at either extreme.\textsuperscript{146} These methods include, from the most to the least restrictive: in-home detention and electronic monitoring; supervision or reporting; residency restrictions; release to community supervision; release on bail, bond, or surety; and documentation.\textsuperscript{147} It is important to note, however, that just because a given method has been classified as an ATD does not mean it necessarily

\begin{footnotes}
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\item See Bersin, supra note 138. See also, JAILS AND JUMPSUITS, supra note 35, at 29 (“if the data used during risk assessment is linked appropriately to a centralized database . . . the tool may provide much-needed information about release processes and classification decisions at all facilities in the detention system, improving the potential for oversight and accountability.”).
\item SCHRIRO, supra note 18, at 18–21; \textit{Back to Basics}, supra note 14, at 81.
\item Bersin, supra note 138, at 9–11. Bersin noted that U.S. Customs and Border Patrol operates the “U.S. government’s largest collection, storage and dissemination functions with respect to unclassified data.” \textit{Id.} at 10.
\item See VERA, supra note 16, at iii; \textit{Alternatives to Detention, supra} note 11, at 24–25.
\item Alternatives to Detention, supra note 11, at 25.
\item \textit{Back to Basics}, supra note 14, at 8–9.
\item \textit{Id.} at 53.
\end{enumerate}
\end{footnotes}
complies with international law. The intensity of a given ATD method varies, but in order to avoid violating international legal mandates it should comport with the level of risk established via risk-analysis on a case-by-case basis. Because of this, asylum-seekers already eligible for parole without restrictions should not be placed in ATD programs that are more restrictive than parole as doing so would result in more restrictions on liberty than necessary. ATDs should be utilized for those asylum-seekers who do not require more restrictive deprivations of liberty, such as detention, and not as a substitute for lesser restrictions like release on parole.

Many ATD methods, if implemented properly, could allow the United States to harmonize the delicate balance between the systemic risks that lead to over-detention and the international human rights laws that only authorize detention as a last resort. This is because many ATDs occupy a middle ground, addressing the risks that detention is intended to prevent while allowing the asylum-seeker to be free from unnecessary or arbitrary detention. Some programs utilize residency restrictions in a variety of ways, including “open centers, semi-open centers, [or] directed residence” that often allow the asylum-seeker to be released into the community with varying levels of supervision. The most successful ATD programs utilize a combination of ATD methods designed to meet the needs and risks of individual asylum-seekers.

Yet even some ATD programs can violate international law; methods such as home detention and electronic tagging are “very intensive” methods in relation to the restrictions they place on liberty and can rise to the level of detention despite technical release. It is possible that even allowing for release

148. Id. at 9.
149. Compare SAMPSON, supra note 20, at 22 with Part I.C., supra.
150. UNLOCKING LIBERTY, supra note 20, at 39.
151. Id.
152. See, e.g., SAMPSON, supra note 20 (presenting the “Community Assessment and Placement model,” which blends risk analysis and ATDs to meet humanitarian standards).
153. Sampson, supra note 20, at 53.
155. See, e.g., Sampson, supra note 20, at 22.
156. UNLOCKING LIBERTY, supra note 20, at 38–39; Holding Patterns, supra note 25, at 36:36–38:40 (stating that these intensive methods should be a last resort).
on bail, bond, or surety—often considered less restrictive and typically involving no more restrictions on liberty than a financial or vouch-person guarantee—may violate international law where asylum-seekers remain unnecessarily detained simply because they have little access to funds or community sponsors, and not because they pose a threat.\textsuperscript{157} As such, implementing these methods alone may not bring the United States into compliance with international law.\textsuperscript{158}

One example of a successful NGO pilot ATD program is the community supervision experiment titled “Appearance Assistance Program” (“AAP”), developed and tested in the late 1990s by the Vera Institute of Justice at the request of then-extant INS.\textsuperscript{159} The program provided for asylum-seekers classified in its “intensive” track\textsuperscript{160} to be released from detention to the supervision of AAP staff.\textsuperscript{161} The supervision included monthly monitoring and reporting requirements—both in person and via phone—and repeated flight-risk evaluations.\textsuperscript{162} AAP also offered support to asylum-seekers by giving information about obligations, hearing dates, the legal process, and the available services within the community.\textsuperscript{163} By utilizing strategic intake interviews and supervision that had the potential to alert AAP staff of participant non-compliance or the threat thereof, AAP staff were able to recommend decreased, constant, or increased supervision, or even redetention if necessary.\textsuperscript{164} Not only did asylum-seeker participants have high appearance rates at court dates\textsuperscript{165}—93%—thereby addressing the risks used to jus-

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\bibitem{158} See, \textit{UNLOCKING LIBERTY}, supra note 20, at 38. See also, Part I.C., supra.
\bibitem{159} \textit{VERA}, supra note 16. The program divided non-citizens in the program into three groups. \textit{Id.} at 1. Only the findings relating to the asylum-seeker group will be discussed in this Note.
\bibitem{160} The program also operated a low-intensity “regular” track, not the subject of this inquiry, wherein participants voluntarily enrolled in the program after being released on parole by INS. \textit{VERA}, supra note 16, at 2.
\bibitem{161} \textit{Id.}
\bibitem{162} \textit{Id.}
\bibitem{163} \textit{Id.}
\bibitem{164} \textit{Id.} at 13–17.
\bibitem{165} The high appearance rates are as compared with appearance rates of 78% for asylum-seekers that were members of the control group, on parole but not participating in AAP. \textit{Id.} at 27.
\end{thebibliography}
tify categorical detention,166 but the program also reduced unnecessary detention by presuming release and only redetaining those who violated the conditions of release or who truly were a flight risk.167

III. IMMIGRATION, DETENTION, AND PATH DEPENDENCY

Despite the expansive reach of ICE and DHS detention powers, the United States is on the edge of immigration reforms that have the potential to change the face of the immigration system and could bring the country within the standards mandated by international laws.168 The Obama Administration began to discuss an overhaul of the immigration detention system in response to an unfavorable report by a DHS consultant.169 Since then, a series of developments has energized the reform advocates seeking to alter the status quo of immigration and detention in the United States.170 Attorney General Eric Holder made a 2011 announcement (“PD Memo”) that granted discretion to ICE officers to decline prosecution or detention in a number of situations, including those pertaining to asylum-seekers.171 Additionally, in late 2011, DHS began a review of 300,000 immigration cases with the aim of implementing the PD Memo and allowing the department to focus its limited resources on “deporting foreigners who committed serious crimes or pose national security risks.”172 Furthermore, ICE has recently developed and begun testing a risk assessment tool to be used in determining parole-eligibility for detainees, slated for

166. See Part II.A., supra.
169. SCHIRO, supra note 18; Detention Reform Accomplishments, supra note 170.
171. Exercising Prosecutorial Discretion, supra note 6.
nationwide implementation in 2012.\textsuperscript{173} The United States has also consolidated multiple former ATD programs into one – the Intensive Supervision Appearance Program II (“ISAP II”) – and executed a contract with a private company to administer it.\textsuperscript{174} Finally, several senators introduced a bill during the 112\textsuperscript{th} session to enact “comprehensive immigration reform” which includes provisions for the protection of asylum-seekers.\textsuperscript{175}

The importance of this reform momentum can be illustrated by the theory of path dependency, first popularized by economist Paul David in the mid-eighties, wherein “individual decision[-]making early on in the path may lead to a ‘lock-in’ of a pattern that is collectively suboptimal.”\textsuperscript{176} To illustrate the theory, David examined the series of decisions made by individual business owners and individual typists to buy and be trained on QWERTY keyboard models. The purchase of these keyboards led to the “lock-in”, or enduring prominence, of the suboptimal keyboard configuration long after the technology that required said layout had been phased out.\textsuperscript{177} The lock-in of a given method creates “the very heavy disincentives that face those who would wish to depart significantly from that which has gone before,” and acts to reinforce the existing situation.\textsuperscript{178} It is significantly more difficult to alter the course after the method becomes “locked-in” because of the “technical interrelatedness, economies of scale, and quasi-irreversibility of investment” that lead to the method becoming entrenched despite other, better, methods being available.\textsuperscript{179}

\textsuperscript{173} Unlocking Liberty, supra note 20, at 21.
\textsuperscript{174} Detention Reform Accomplishments, supra note 170; Unlocking Liberty, supra note 20, at 31–32.
\textsuperscript{175} S. 1258, 112\textsuperscript{th} Cong. (2011).
\textsuperscript{177} David, supra note 23. David declared the configuration suboptimal because winning speed-typists typically utilized a Dvorak Simplified Keyboard (“DSK”) layout and because a U.S. Naval study revealed that the cost of retraining typists to use the DSK layout could be recouped within ten days due to the increased efficiency of the typists on that keyboard. Id. at 332. By the time the technological limitation that required the QWERTY configuration – jamming typebars – was obsolete, the configuration was already locked-in. Id. at 333–34.
\textsuperscript{178} Wilsford, supra note 178, at 253–54.
\textsuperscript{179} David, supra note 23, at 334. In the QWERTY example, David describes “technical interrelatedness” as the positive feedback loop between
The U.S. detention of asylum-seekers is similar to the QWERTY conundrum. The prominence of the presumption in favor of detention can be, in part, explained by the positive feedback loop between the public and political responses to terrorism. Decisions made in response to terrorism have contributed to the prominence of mandatory detention for asylum-seekers, at least until they can prove they are not a risk. Now it is clear that categorical mandatory detention is suboptimal, as it violates international laws. Despite being obsolete, the presumption in favor of detention might now be locked-in because it is easier to continue using it than to alter infrastructure and training to facilitate eliminating it.

individuals choosing to learn QWERTY typing because business owners seek to hire QWERTY-trained typists and business owners purchasing QWERTY machines and thus seeking to hire QWERTY-trained typists. Id. at 334–35. “Economies of scale” are represented by the decrease in “user costs of a typing-writing system based upon QWERTY . . . as it gained acceptance relative to other systems.” Id. at 335. David illustrates the “quasi-irreversibility of investments” as the point in development when QWERTY keyboards became “locked-in” because “it became privately profitable [for non-QWERTY manufacturers] in the short run to adapt machines to the habits of men...rather than the other way around.” Id.

180. See generally, id.
181. See, e.g., Homeland Security Act of 2002, 6 U.S.C. § 101 et. seq. (2002) (establishing DHS, changing the INS to ICE, and mainly focusing its mission statement on the prevention of terrorist attacks through securing the homeland); Alison Mitchell & Todd S. Purdum, A Nation Challenged: The Lawmakers; Ashcroft, Seeking Broad Powers, Says Congress Must Act Quickly, N. Y. TIMES, Oct. 1, 2001, at A1 (indicating lawmakers urged strict immigration control in response to national security concerns after 9/11, but that the momentum for control began after the 1993 World Trade Center bombings); McFadden, supra note 8, at B4 (“[M]ost New Yorkers think illegal immigrants pose a serious threat of terrorism and believe that the [1993 World Trade Center] bombing would not have occurred if immigration controls had been tighter.”); Brané, supra note 31, at 150–151 (discussing security as a common reason that countries might choose to detain). See generally, David, supra note 23.
183. See Part I.C., supra; See generally, David, supra note 23.
184. See generally, David, supra note 23. Compare Exercising Prosecutorial Discretion, supra note 6, with Preston, supra note 7.
Digressing from the path is not impossible. Radical deviations from the status quo become more likely when institutional frameworks that keep to the current path, like ICE policies in favor of detention, meet with unpredictable external forces, like the current momentum for U.S. immigration and detention reform. Like political reform momentum, external forces in the path dependency context are “fleeting comings together of a number of diverse elements into a new, single combination.” Because of this, U.S. immigration and detention reform is at a critical juncture where immense change is possible. It is essential that the United States capitalize on this opportunity and reform in a way that brings its practice into compliance with international law standards as this moment is fleeting and changes in the elements, such as the inauguration of a new political party into power, could close the window of opportunity. In addition to haste, it is imperative to alter the status quo in a way that does actually bring the United States within international law mandates because anything else could potentially lock-in a new, equally suboptimal method.

IV. IGNORING RECOMMENDATIONS OF ASYLUM EXPERTS LEADS TO INEFFICIENT REFORMS IN THE ASYLUM DETENTION SYSTEM

Rather than taking full advantage of the opportunity to bring its immigration and detention system into compliance with international human rights law, the United States has constructively ignored the recommendations of asylum experts and, thus, recent efforts at progress have failed to amount to any significant decrease in unnecessary or arbitrary detention. In

186. Wilsford, supra note 178, at 270.
187. Id. at 256–58, 270.
188. See generally, id.
189. See, id. at 254.
190. See, David, supra note 23, at 336, stating

Despite the presence of the sort of externalities that standard static analysis tells us would interfere with the achievement of the socially optimal degree of system compatibility, competition in the absence of perfect futures markets drove the industry prematurely into standardization on the wrong system – where decentralized decision making subsequently has sufficed to hold it. (emphasis in original).

191. Compare Exercising Prosecutorial Discretion, supra note 6, with Preston, supra note 7.
some instances NGOs have achieved high success rates in designing and piloting programs that implement their recommendations for risk analysis and ATDs.\textsuperscript{192} However, as this Part will illustrate, the United States has repeatedly decided against implementing their recommendations and has instead moved toward a suboptimal path in which reformed programs continue to violate international obligations.\textsuperscript{193}

\textbf{A. The United States Takes Steps Toward Suboptimal Risk-Analysis}

When ICE, DHS, and the Obama Administration pledged an overhaul of the U.S. immigration and detention system, they identified the need for a risk assessment mechanism that would facilitate non-citizens in being either paroled or enrolled into ATD programs.\textsuperscript{194} At the beginning of 2010, ICE worked with various NGOs, led by the Lutheran Immigration and Refugee Service ("LIRS"), to develop this "risk assessment tool."\textsuperscript{195} The exact details of this tool have not been made public.\textsuperscript{196} However, both LIRS and Human Rights First indicated that ICE’s tool is designed to use "objective criteria to guide decision-making regarding whether or not an alien should be detained or released; the alien’s custody classification level, if detained; and the alien’s level of community supervision (to include an ICE ATD program), if released."\textsuperscript{197} LIRS noted that the tool “includes mathematically weighted factors that should signal the likelihood of threat to the community based on past

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\item \textsuperscript{192} See, e.g., \textit{Unlocking Liberty}, supra note 20, at appendices B, C, D, 54–61; \textit{VERA}, supra note 16.
\item \textsuperscript{193} See, e.g., \textit{Unlocking Liberty}, supra note 20, at 29.
\item \textsuperscript{194} \textit{Schriro}, supra note 18, at 17, 20. While ICE does have a system in place that “classifies detainees as low, moderate, or high custody[,] the primary basis for classification is criminal history[,]” and its purpose is to aid in housing already detained aliens and not for risk analysis associated with parole. \textit{Id.} at 17.
\item \textsuperscript{195} \textit{Detention Reform Accomplishments}, supra note 170; \textit{Unlocking Liberty}, supra note 20, at 21.
\item \textsuperscript{196} \textit{Unlocking Liberty}, supra note 20, at 21.
\item \textsuperscript{197} \textit{Unlocking Liberty}, supra note 20, at 20; \textit{Jails and Jumpsuits}, supra note 35, at 29. While LIRS did not indicate where they received the information, Human Rights First quoted email correspondence between their office and ICE officials, dated October 1, 2011. \textit{Id.}
\end{itemize}
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behavior as well as of absconding for each and every individual ICE apprehends.”

The tool, slated for nationwide implementation in 2012, has already garnered criticism from those to whom ICE has granted advanced exposure. In reviewing a pilot version, the UNHCR expressed concern that the “tool, based on a mathematical calculation, risks becoming a bureaucratic, tick-box exercise and may lead only to artificial individual assessments rather than real ones. It also appears heavily weighted in favour of detention.” Based on these assessments, it seems that this aspect of ICE’s tool could become arbitrary and thus would not satisfy international obligations. The continued presumption for detention also violates the guidance for implementing the policies advocated in the UDHR, 1951 Convention, 1967 Protocol, and ICCPR.

Furthermore, although designed subsequent to ICE consultations with NGOs specializing in asylee and refugee protection, the tool apparently falls short of asylum experts’ recommendations. LIRS, after providing support to ICE in the development stages of the tool, found it contains a “total absence of individualized assessment of risk for people subject to mandatory detention. There is also no standard assessment of risk with judicial review for people eligible for parole, such as arriving asylum-seekers who are found to have a credible fear of return.” These apparent shortcomings affect the ability of the United States to sufficiently satisfy international standards by, specifically, avoiding arbitrariness through individualized assessments and judicial review.

198. Unlocking Liberty, supra note 20, at 20.
199. Id. at 20-21, 41.
201. See Part I.C., supra.
202. See UDHR, supra note 66, at art. 14(1) (III); Refugee Convention, supra note 15; Protocol to Refugee Convention, supra note 15; ICCPR, supra note 66, at art. 9(1). See also Part I.C., supra.
203. Detention Reform Accomplishments, supra note 170; Unlocking Liberty, supra note 20, at 21.
204. Unlocking Liberty, supra note 20, at 21 (“While the list [of special vulnerability factors to be included in the tool] falls short of the recommendation from experts to ICE, the creation of a tool can be followed by improvement of it.”).
205. Id. at 41.
206. See supra, Part B.1.
By ignoring the recommendations of LIRS and other asylum experts involved in the development of the tool, ICE squandered a valuable opportunity to comply with international law. Subsequent to viewing ICE’s new tool, LIRS published their recommendations to ICE regarding a risk assessment tool. It envisions a dynamic individualized assessment procedure that encourages release, or, if some form of detention is necessary, the least restrictive ATD or detention procedure necessary to mitigate the risks presented by the individual alien. It also allows for review of a determination should there be a change in circumstances or risk factors for an asylum-seeker. Had ICE adopted a risk-assessment tool in line with these recommendations, it would allow for a greater chance of eliminating arbitrary, unnecessary detention. Instead, ICE has selected a suboptimal path that has the potential to “lock-in” continuing violations of international human rights law for future iterations of the tool.

B. ICE Takes Steps Toward Suboptimal ATDs

In 2004, Congress approved funding for ATD programs and ICE solicited bids for the contract to manage them. Various NGOs—including the Vera Institute—bid for the contract, basing their qualifications on their expertise in refugee, asylee, and immigration services. In a further example of the United States selecting to move down a suboptimal path, ICE “gave the contract to Behavioral Interventions Inc., a private company whose model was based on the use of electronic monitoring.” Behavioral Interventions Inc. (“BI”) and its parent company still hold the U.S. ATD contract.

207. See UNLOCKING LIBERTY, supra note 20, at 21 (stating issues with ICE’s risk analysis tool “will severely limit its capacity to advance the efficiency of custody and removal operations as a whole”).
208. Id. at appendices B, C, D, 54–61.
209. Id. at appendix B, 54–55.
210. Id.
211. See id. at 20–22.
212. See David, supra note 23, at 335–36; Wilsford, supra note 178; Part III, supra.
213. UNLOCKING LIBERTY, supra note 20, at 29.
214. Id.
215. Id.
216. Id.
Commonly used in the criminal judicial system, home curfew and electronic tagging are the most restrictive ATDs, and, as noted above, are considered by some to be an additional form of detention.\(^\text{217}\) BI currently uses ICE’s congressional ATD funding to combine those most restrictive methods with reporting requirements—“installation of biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants”\(^\text{218}\)—to administer a single program: the Intensive Supervision Appearance Program II (“ISAP II”).\(^\text{219}\) While for the first time in 2009 ICE included the presence of a “needs-based case management component” as a requirement for a company to obtain the ATD contract, this appears to be an as yet unfulfilled commitment.\(^\text{220}\) In looking at the restrictive nature of these methods, scholars have noted, “sometimes what is called an alternative to detention may in fact be an alternative form of detention.”\(^\text{221}\)

This is especially true when considering that “rather than looking to the current detention populations and utilizing various supervision methods as a step down from unnecessary detention, [ISAP II] is seeking individuals already released into the community to increase restrictions of liberty on more people.”\(^\text{222}\) The use of ISAP II in these scenarios remains arbitrary and subject to the discretion of the ICE officer analyzing the parole eligibility of an asylum-seeker.\(^\text{223}\) For example, while “[a]liens should be assigned conditions of supervision according to an assessment of the alien’s flight risk and danger to the community[, in ISAP II] assignment to a[n ATD] program is determined in part by residency,” as only those asylum-seekers detained in close proximity to a regional ISAP II office are eli-

\(^{217}\) Back to Basics, supra note 14, at 53–54; Alternatives to Detention, supra note 11, at 36–38; Unlocking Liberty, supra note 20, at 38.

\(^{218}\) Unlocking Liberty, supra note 20, at 31.

\(^{219}\) Id. at 31–32.

\(^{220}\) See id. at 31.

\(^{221}\) Alternatives to Detention, supra note 11, at 4 (emphasis in original).

\(^{222}\) Unlocking Liberty, supra note 20, at 32. This theory is additionally supported by statements of ICE officials to Congress in explaining their 2012 budget requests: “[T]he ICE Assistant Secretary noted that the cost of ATD per individual is higher than detention per detainee . . . because the individuals enrolled in ATD remain in the system significantly longer than those in detention.” H.R. REP. NO. 112-91, at 53 (2011).

\(^{223}\) See Part I.B. & Part I.C., supra.
gible to participate. 224 “ICE has not requested-and Congress has yet to authorize-sufficient funding to expand ATD programs nationally-so that any immigration detainees who is eligible for an ATD program could be placed into it.” 225

Furthermore, ICE’s plan for ISAP II “would not use ATDs as an alternative that would decrease the use of existing detention beds...[t]he total number of individuals in ICE custody or supervision, whether detained on Alternatives to Detention, would increase under this plan.” 226 Thus, the United States continues to unnecessarily detain parole-eligible asylum-seekers by placing them into ISAP II. 227 “ICE’s plan also explicitly precludes the use of ATDs for individuals who are technically subject to ‘mandatory detention.’” 228

V. POLICY BENEFITS TO UNITED STATES SHOULD IT ADOPT THE RECOMMENDATIONS

In addition to the benefit of being in compliance with international human rights laws, there are numerous advantages for the United States should it adopt the proposed programs. 229 First, the country can maintain its status as a leader in the international community in good faith, and a stance of internal compliance will better position the country to encourage other nations to follow suit. 230 Next, much of U.S. foreign policy in the war on terror depends on how the country is perceived in the international community and among individual populations. 231 Because many people will still be deported, how they feel about the process and what they say to others upon return to their countries may have an impact on public image in areas where the United States desperately needs support. 232 A reputation of humanitarian treatment and fair dealings could go a long way.

224. Schriro, supra note 18, at 20.
226. Id. at 28 (emphasis in original).
229. E.g., Brané, supra note 31, at 170.
230. Id.
231. Id.
232. Id.
Finally, there is an enormous potential for financial savings.\textsuperscript{233} Currently, it costs $95 per day to detain an asylum-seeker, but only $22 per day to support that same person in an alternative program.\textsuperscript{234} Some estimate that the disparity could be even more extreme, with ICE overhead costs bringing detention costs up to $164 per detainee per day while some forms of ATDs cost as little as thirty cents per day.\textsuperscript{235} While the numbers include more than just asylum-seekers, the savings associated with detaining only those who present a true risk, such as only detaining those who have “committed violent crimes, the agency could save nearly $4.4 million a night, or $1.6 billion annually—an 82\% reduction in costs.”\textsuperscript{236}

CONCLUSION

When coupled with an efficient and individualized risk analysis program, Alternatives to Detention adequately address the risks of releasing the majority of asylum-seekers into the community during the pendency of their asylum processing.\textsuperscript{237} Instituting this combination would benefit the United States financially and in its international standing in addition to allowing the United States to comply with its international human rights obligations regarding the detention of asylum-seekers.\textsuperscript{238} The United States should move quickly to adopt the recommendations of asylum experts, capitalizing on the current momentum for reform in the detention system and decisively ending its violations of international human rights laws.

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\textsuperscript{233} Back to Basics, supra note 14, at 85.
\textsuperscript{234} Id.
\textsuperscript{235} National Immigration Forum, supra note 30, at 2.
\textsuperscript{236} Id. at 8.
\textsuperscript{237} See Sampson, supra note 20, at 22; Amnesty Int’l, supra note 20, at 16.
\textsuperscript{238} See Sampson, supra note 20, at 22; Amnesty Int’l, supra note 20, at 16.
\textsuperscript{*} B.A. University of Michigan (2007); J.D. Brooklyn Law School (Expected 2013). Deepest thanks to my family and Jon Robak for their love and support, to Anna Campbell and Kiran Sheffrin for ideas, inspiration, and insight, and to Professor Mark L. Noferi for his assistance and encouragement. I also am grateful to the staff of the Brooklyn Journal of International Law for their tireless efforts in the publication of this Note.