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POST-EARTHQUAKE LEGAL REFORM IN HAITI: IN ON THE GROUND FLOOR

Leonard L. Cavise

INTRODUCTION

The old European way of trying criminal cases, the so-called inquisitorial system, is dying. Throughout Latin America, countries have passed new codes of criminal procedure that have adopted the party system, similar to the accusatorial system in the United States. Even in Europe, lawyers and lawmakers are advocating for a more open and adversarial system. They have managed to enact new legislation calling, at least, for an end to the secrecy of the old procedures, a greater role for lawyers, and a more oral and public system for trying cases.\(^1\) Most dramatically, in France, the birthplace of the European model, President Sarkozy, in 2009, called to replace the centerpiece of the inquisitorial system, the juge d'instruction, with a more party-oriented judge and to transfer the duties of investigation to the public prosecutor.\(^2\) Considering that Napo-
leon birthed the inquisitorial system in France in 1808, it is significant that a French President himself is calling for such a major reform. The inquisitorial system appears to be in its death throes.

In 2008, President René Prévnl of the Republic of Haiti appointed two commissions (“the Commissions”) to revise the Penal and Criminal Procedure Codes of Haiti. The Codes had not been revised since 1835, when the Republic was just getting on its feet after the slave rebellion of 1803. Both the substantive and the procedural codes were drawn from the codes of France, then known, of course, as the Napoleonic Codes. They reflected the inquisitorial system of criminal justice, which centers around the juge d’instruction.

By the time of President Prévnl’s decision in 2008, Haiti was already well behind in the Latin American movement to transition its criminal justice systems from the inquisitorial to the accusatorial or adversarial model. As part of that movement, and encouragement via foreign aid from the United States, over twenty nations recodified their law and procedure, hoping to modernize the system, minimize the endemic weaknesses of the European model, and to attract foreign investment by providing a more predictable legal environment.3

President Prévnl named René Magloire, a former Minister of Justice, as chair of the Haitian Commissions.4 Magloire, partly because of his two terms as Minister of Justice, is a very well known legal personality in Haiti and a close friend of Prévnl’s. It was Magloire’s task to not only draft the new Codes but also to convince the practicing bar, which was heavily influenced by the French model, and the larger society to accept these reforms as a part of Haiti’s ongoing attempts to launch a functioning criminal justice system.

The challenges of such a reform were overwhelming in view of Haiti’s daunting lack of resources, pervasive corruption,

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their history of impunity in police conduct,\textsuperscript{5} and the resistance of the more traditional Francophiles and others invested in the maintenance of the present system. Additionally, the catastrophic earthquake in 2010 devastated Haiti, particularly the capital, Port-au-Prince, and caused the death of a number of the important players in the reform project.\textsuperscript{6} Almost miraculously, the project continued with the completion—an implausible three weeks after the earthquake—of another draft of the procedural Code and with the convening of the next international conference of the Commissions a mere two months later.

Part I of this Article will briefly describe the general historical and political antecedents to this reform initiative, including several of the previous projects to strengthen and solidify the Haitian criminal justice system. Part II will describe the Haitian criminal justice system as it presently exists, including its perceived deficiencies, as background to this law reform process. Part III will describe the reform process as the author viewed it. This description will touch upon the key elements of the discussion and the attempt by the Commissions and its invited guests to adopt the essence of the party system while adapting it to the legal cultural life of Haiti. Part IV describes the influence of the French in Haiti today and the effects of that influence on the reform process. Part V describes the historic first conference and the divergency of views on the necessity and direction of procedural reform. In Part VI, a description of the content of the new Haitian Criminal Law and Procedure Codes is begun with an exposition of the human rights preamble to the Criminal Procedure Code, which is key to public acceptance of the Codes. That preamble and the human rights provisions in other parts of the procedural Code are interesting particularly for the international norms adopted and the preservation of some traditional Haitian values. Part VII discusses other key procedural Code provisions, beginning with

\textsuperscript{5} Impunity refers generally to what Americans would call the arbitrary or capricious use of power without due process.

\textsuperscript{6} Particularly noteworthy, in this regard, is the death of Micha Gaillard, the Chair of the public advocate’s portion of the Commission. José de Córdoba, \textit{Micha Gaillard, Fought for Democracy}, WAll St. J. (Jan. 22, 2010), http://online.wsj.com/article/SB10001424052748703822404575019190559786092.html.
components of the accusatorial or party system that were rejected. In Part VIII, the accusatorial features that are accepted, in whole or in part, are outlined. Part IX describes possible infrastructure reform that will be necessary to implement the full slate of proposed reforms, along with, in Part X, an assessment as to what must happen in Haiti to develop a social consensus and thereby implement this dramatic transition. The Article concludes that, despite the assistance from foreign resources and the hard work and dedication of a cadre of lawyers and their allies, the development of a new criminal procedure system can only be realized with the development of democratic institutions in the country as a whole.

I. HISTORICAL ANTECEDENTS

Haiti had not written a new criminal code for substantive law or procedure since the Criminal Codes of 1835. Various new crimes, such as crimes outlawing forced labor and anti-drug trafficking laws, have been inserted into the existing Codes since then, but there has never been a comprehensive revision, which is particularly remarkable in a code-based legal system. It is estimated that fully 165 legal or administrative provisions

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8. Many supplemental laws to the criminal code were passed by executive order rather than passing through parliament. Aside from the highly irregular nature of these laws, many of them are unknown even to the legal community. Some of these additional laws were introduced by the “Décret du 7 avril 1982” which is an attempt to harmonize Haitian law with various international conventions and treaties that the Government of Haiti had signed or to change some legal definitions, e.g., the definition of rape. Décret du 7 avril 1982 harmonisant la Législation pénale en vigueur avec les Conventions Internationales signées et ratifiées par le Gouvernement Haïtien [Decree Harmonizing the Penal Code with International Conventions Signed and Ratified by the Haitian Government], in Org. Am. States, L’Entraide Judiciaire en Matière Pénale et d’Extradition [Mutual Legal Assistance in Criminal Matters and Extradition], in http://www.oas.org/juridico/mla/fr/hti/fr_hti_penal.html#. See HANS JOERG ALBRECHT, LOUIS AUcoin & VIVIENNE O’CONNOR, UNITED STATES INSTITUTE OF PEACE, BUILDING THE RULE OF LAW IN HAITI: NEW LAWS FOR A NEW ERA 2 (2009); see also Décret du 6 juillet 2005 modifiant le régime des Agressions Sexuelles et éliminant en la matière les Discriminations contre la Femme [Decree Modifying Rape and Eliminating Discrimination Against Women], in LE MONITEUR (Haiti), Aug. 11, 2005, at 1–6.
in the Codes are no longer relevant in the modern era.\footnote{INT’L CRISIS GROUP, KEEPING HAITI SAFE: JUSTICE REFORM 10 (2011) [hereinafter KEEPING HAITI SAFE].} New codes were passed, by contrast, in other legal disciplines such as the Labor Law in 1961, the Rural Code in 1962, and the Code of Civil Procedure in 1963.\footnote{See Marisol Florén-Romero, Researching Haitian Law, GLOBALEX (May/June 2008), http://nyulawglobal.org/globalex/Haiti.htm.}

The Criminal Codes of 1835 were based entirely on the French system of law drafted in France between 1804 and 1812.\footnote{Haiti, FOREIGN LAW GUIDE: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD, http://www.foreignlawguide.com/ip/flg/Haiti.htm (last visited Mar. 1, 2013).} Known as the inquisitorial system, the French system features the key role of the investigating judge, the \textit{juge d’instruction}, and lesser roles for the attorneys. The inquisitorial system has a long investigatory phase that is closed to the parties and the public. The \textit{juge d’instruction} is charged with not only investigating, but also evaluating and judging the case. Oral trials were not conducted nor was there provision for any oral proceedings. The role of lawyers was normally confined to arguments at a proceeding that most resembles sentencing in the American system. Appeal is \textit{de novo}. The victim is a full party, entitled to the same participation as the other two parties. The dossier used by the judge to investigate is commonly replete with second and third party statements rather than statements from persons with personal knowledge.\footnote{RICHARD VOGLER, CRIMINAL PROCEDURE IN FRANCE, in COMPARATIVE CRIMINAL PROCEDURE 14, 19–21 (noting that the dossier must contain “all available evidence”). For a more complete treatment of the traditional French inquisitorial system, see \textit{id.} at 14–95.}

Many European countries and virtually all of the countries of Latin America mimicked the French system and adopted what was commonly called the Napoleonic Code for their criminal justice systems. Over time, the structural weaknesses of the French system became more apparent, and critics decried the extended delays, the secrecy of proceedings, the lack of advocacy during the guilt-innocence phase, prolonged pretrial detention, lack of confrontation or cross-examination of witnesses, and lack of written decisions based upon a record. Added to that were the additional dysfunctions of impunity, police cor-
ruption, and long post-trial sentences in depraved prison conditions, adding impetus to reform movements, first in Europe and then elsewhere.\textsuperscript{13}

Though many countries considered modernizing or transitioning their criminal systems to the accusatorial model, a reform movement did not take hold in Latin America until the 1980s. In the following twenty years, over half of the nations of Latin America managed at least to pass new codes of criminal law and procedure, which reflected the accusatorial or “party” model of criminal justice.\textsuperscript{14} Though there is only basic similarity in the codes adopted, the principal features of this system, familiar to American trial lawyers, are generally included in the codes of the transition states. Those features include oral and public trials, control by the parties of the evidence and witnesses presented, party control of the investigation, prosecutorial control of the police, prosecutorial discretion in charging and dismissing decisions, a judge or jury verdict, rules of evidence that exclude hearsay and prejudicial information, and the power of the parties to plea bargain.

Many of the law reforms were not complete transitions to the adversarial model, but rather to a hybrid system. Adapting the adversarial model to their local conditions, some states rejected key important American trial features such as the jury, plea bargaining, the reduced role of the victim at trial, and appeals restricted to questions of law.\textsuperscript{15} However, many reformers had seen the elements of open and adversarial hearings, public trials, power in the prosecutor to bring and dismiss charges, party presentation of witnesses and evidence, and prosecutorial control of the investigating police as key components of the transition. Other key elements of the party system, plea bargaining

\begin{flushright}
\textsuperscript{13} Mireille Delmas-Marty \& J. R. Spencer, European Criminal Procedures 11–13, 18–27 (2002).
\end{flushright}
in particular, have been subjected to much closer scrutiny and remain part of the continuing dialogue.

Many of the reforms have not yet been realized because most countries are still in the implementation phase. Finding the resources to train police, prosecutors, defenders, judges, court personnel and prison administrators is, in many cases, an imponderable undertaking. Changing the culture of how cases are litigated or, more precisely, imposing a party superstructure on a civil law foundation requires extensive training. Additionally, maintaining the political will to continue with the transition will vary with the changing political atmospheres in each country. In Italy, for example, there have been at least three “restorations” of prior procedure by the Corte di Cassazione, and at least one “counter-reaction” by a Parliament intent on institutionalizing the new reforms.

II. BACKGROUND OF THE HAITI PROJECT

In 1993, Jean-Bertrand Aristide, twice president of Haiti, wrote:

> The need for a judicial system that will bring [human rights abusers] to justice is the major concern, the major desire, and the major issue for most Haitians. We need to see that justice is done and that those who have committed such heinous crimes – crimes against humanity – will be brought to justice.

Aristide was speaking of a justice system that, aside from and beyond its treatment of crimes against humanity, was simply dysfunctional. Arbitrary arrest and prolonged deten...
tortion, torture and summary execution, impunity in prosecutions, corruption, secrecy, unending delay, lack of counsel, incompetent judges, total lack of confrontation, inhumane prison conditions—all of these were but the first glimpse of the profound dysfunction that had become, over many years, the Haitian criminal justice system. Additionally, murder and torture by government-employed predators, the Duvaliers’ army known as the Tonton Macoutes, were commonplace during the many years of the Duvalier dictatorships. When, in 1991, there was a coup d’état overthrowing the very popular Presi-


22. It should be noted that, after the January 2010 earthquake, all of the 5400 prisoners in the Civil Penitentiary, the largest penitentiary in Port-au-Prince, escaped. Eight months later, only 629 had been recaptured. HUMAN RIGHTS WATCH, WORLD REPORT 2011: HAITI (2011), available at http://www.hrw.org/sites/default/files/related_material/haiti_1.pdf. At least one commentator has called the conditions in Haitian prisons “the worst in the world.” Kate Heartfield, Hell is a Haitian Prison, OTTAWA CITIZEN (Can.), June 4, 2009, available at http://www2.canada.com/components/print.aspx?id=e3a6275b-b474-4a32-8149-129177f4571c&sponsor=. The U.N. Rule of Law Indicators Project noted that “all of Haiti’s prisons were overcrowded prior to the earthquake. According to the report prior to the earthquake, ‘[T]he least crowded prison, in Les Coteaux, is at 230% of official capacity and the most crowded facility (Hinche) holds more than ten times the number it was designed to hold.’” Christopher Stone, A New Era for Justice Sector Reform in Haiti 10 (Harvard Kennedy Sch. Faculty Research Working Paper Series, RWP10-033, 2010), available at http://dash.harvard.edu/handle/1/4448872.

dent Aristide, leading to a three-year reign of terror, the situation reached a new low:

The law has been used to reify and reinforce the domination of a small elite over the great mass of poor peasants and workers, and has almost never functioned to punish even in the case of the worst massacres. Even when dictatorial leaders have been overthrown, they have usually been allowed to leave the country to join their bank accounts. As a result, the Haitian poor justifiably have little faith in the Haitian state in general and the legal system in particular.24

As Haiti struggles now from dictatorship toward a distant form of representative democracy, the threat of a return to authoritarian rule is always present, particularly in the face of starvation and an ineffective government. As Haiti’s drama unfolds, the question remains whether the judiciary and the criminal justice system can play a role in regaining the path to development and responsive government. Foreign experts regularly ask whether there can ever be rule of law in a country that has so little tradition of democracy and has not internalized the importance of the rule of law and the legitimacy of a reformed criminal justice system.25 There is no easy response.

The overwhelming problems in Haiti’s justice sector have not escaped international notice. In 2006, the World Bank identified long delays in the criminal justice system caused by “communication failures between the investigative ‘judicial’ police and prosecutors on evidence-gathering and the preparation of cases, inadequate tracking and management of case files by court clerks, and deficient enforcement of judicial orders for prisoner transfers and release.”26 The treatment plan, however, concluded that reforms cannot be solely focused on “technical capacity building, training, and infrastructure, but instead must be integrated into a broader process of state building and

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democratic consolidation. . . . The creation of a national constituency in favor of reform is essential to furthering change in the police and justice system.”

This conclusion came after a lengthy description of failed reform efforts from international donors and the “paralysis of disorganization” and dysfunction of the Ministry of Justice. Most Haitians have felt excluded from even having the right to petition the courts, unlike the high privilege accorded to violent gang leaders who not only had access to the courts but also to the defense lawyers. Members of the bar available to the indigent are few and far between.

In 2005, the Inter-American Commission on Human Rights (“IACHR”) reported that Haiti’s longstanding problems would not change without “urgent reforms to strengthen the administration of justice and the rule of law in Haiti.” The IACHR’s analysis of the court system found that many of the laws were outdated, that there was a lack of effective access to legal assistance, and that the police failed to execute judicial orders. These failures resulted in 85% to 90% of all criminally-accused being held in pretrial detention for long periods of time, pervasive and prolonged pretrial delay, and widespread impunity for state actors. Conclusions like these are commonplace. The IACHR singled out a number of cases, highlighting in particular the removal, on December 9, 2005, of five judges of Haiti’s Supreme Court by the then-interim President Boniface Alexandre, who replaced them with five judges of his own choosing apparently without constitutional authority.

27. Id. at 58.
28. Id. at 53. Both Haitians and international human rights groups have criticized some of the efforts of the U.S. Agency for International Development (“USAID”) and its contracting agencies for projects drawn with little or no input from local actors or for failure to attend Haitian-led programs. Brody, supra note 24, at 234.
29. CARIBBEAN COUNTRY MANAGEMENT UNIT, supra note 26, at 54.
30. Id. at 54.
31. Id. at 57.
32. Id. at 54. A notable exception is the Institute for Democracy in Haiti, which has staff lawyers available to the indigent.
34. Id. at vi.
35. Id. at 15–16.
when they found that, in 2004, an appallingly low total of only six trials were scheduled in the entire country. Of the six, one was not heard because the file was not sufficiently prepared; another was not heard because the defendant had escaped from prison. The court heard three trials in absentia because the defendants had escaped, and one trial resulted in acquittal for the co-defendants due to lack of evidence. In that case, the defendants were former leaders of the paramilitary group Front for the Advancement and Progress of Haiti (“FRAPH”), who were widely known as the Duvaliers’ “death squad” torturers and executioners.  

The IACHR ultimately concluded, based upon general agreement both internationally and in Haiti specifically, that there should be a comprehensive redesign and reform of the country’s criminal laws.

In November 2007, the Haitian Government itself issued a “Growth and Poverty Reduction” Strategy Paper designed to articulate a vision to “lift Haiti out of poverty and destitution.” In Chapter 7, the government outlined the weaknesses in the justice system, such as “executive branch interference in the exercise of judicial authority,” corruption, impunity, organized crime, the public’s inability to understand or trust the legal system, long delays, practically nonexistent maintenance of criminal records, “arbitrary and abusive” preventive detention, appalling prison conditions, and the overall lack of training or adequate salaries. The document was dedicated to the establishment of an “equitable legal order, a functional judicial system, and a general climate of security . . .” wherein justice would be “accessible,” “credible,” “independent,” and “efficient.”

36. Id. at 71–72.
37. Id. at 73.
40. Id. at 77–79.
A principal target of the justice sector reform, as set forth in the Strategy Paper, was the modernization of legislation through the adoption of specific and targeted changes in the Penal Code and the Criminal Procedures Code. This mandate posed the question of whether the present system should be reformed or whether it should be discarded in favor of a complete transition to the accusatorial model. States in transition commonly deal with this question, as each country seeks to minimize the trauma to the established legal order. Several international non-governmental organizations have attempted small reforms in Haiti. “Judicial strengthening” is a typical reform that sends many of the legal players to a variety of training seminars but seldom results in any basic changes. This is not to say that many judges, prosecutors, and police have not benefited from the training exercises. However, very few of the training sessions have convinced the majority of people that anything has changed or that the legal system is any more conscious of due process or human rights than it ever was. It was therefore determined that a group of changes embracing both the accusatorial and inquisitorial systems should be attempted.

III. THE HAITI LAW REFORM PROJECT

In 2009, René Magloire, chair of the Commissions to reform the Criminal Law and Procedure Codes, invited the author to serve as Senior Advisor to the Commissions to aid in the drafting, codification, and implementation processes. As a French speaker experienced in preparing lawyers and judges for the transition from the inquisitorial to the accusatorial model, the author traveled to Haiti in May 2009. The two Commissions were comprised of the principal players in the reform process, including the dean of the largest law school, the vice-president of the highest court (“Cour de cassation”), the Minister of Justice, and the head of the Justice Section of MINUSTAH, the much-criticized U.N. peacekeeping force in Haiti.

41. Id. at 80.
42. Stotzky, The Indispensable State, supra note 25, at 242.
43. For a full exposition see Cavise, supra note 14, at 787–93.
The establishment of two separate Commissions, for the substantive criminal law and another for the criminal procedure law, may have been unnecessary. The procedural transformation is a more complex and controversial undertaking, although the substantive criminal Code does require some modernization and integration. However, the Haitian criminal Code has adapted somewhat to the modern era by codifying new crimes. Procedural transition, on the other hand, would have a more dramatic societal impact. The Commissions, composed of lawyers, criminologists, and sociologists, were particularly well-situated to avoid the political turf questions that have plagued other transitions from the inquisitorial to the accusatorial system. No member of either Commission held political or governmental office. Nonetheless, the power of the Commissions was unquestioned due to the presidential mandate and Magloire’s status not only as a former and very well known Minister of Justice, but also as a close advisor to President Préval.

Magloire intended to plan for an international workshop on Haiti’s transition in Port-au-Prince in June 2009, a month after the author’s initial visit. The workshop would unveil the reform project and act as an initial exposition of the accusatorial model of criminal law. Magloire had planned for several prominent protagonists, whether Haitian or foreign lawyers, to demonstrate the advantages of the party model. The Commissions


45. ALBRECHT, AUCONN & O’CONNOR, supra note 8, at 2–4. Another problem, however, is that many unmodified portions of the criminal law are unclear or completely outdated.
hoped to convince the attendees that joining the reform movement, already underway in many Latin American countries, would serve Haiti best. The Commissions also hoped that the June conference would unite all the interested national and international parties around addressing several key questions: (1) the jurisprudential underpinnings of the Code reforms, (2) the substance of various actual Code provisions, (3) the process of reform of the Codes, and (4) the implementation issues to expect.

Planning also focused on anticipated obstacles to reform, including jurists who may be hesitant to adopt the accusatorial model or who may prefer small-scale modifications to “Grand Reform.” This has never been an easy question to resolve. The United States, which is the principal employer of the party model, has a number of very strong cultural differences with all of the countries transitioning, and a widely-displayed number of criminal procedure structures that have, in practice, collapsed into virtual dysfunction. The American plea bargaining system, always viewed with suspicion internationally as akin to a business negotiation, is all the more unattractive when it is learned that fully 95% of all federal criminal dispositions are by guilty plea,\(^46\) that people are allowed to plead guilty even though they maintain their innocence,\(^47\) and that defendants can be threatened with increased charges if they refuse to plead guilty.\(^48\) Internationally, including in Haiti, the pervasiveness and perceived unfairness of the guilty plea in the American system is seen as a systemic expedient rather than a proper resolution of a criminal case based upon guilt or innocence.

One important cultural difference is the jury. Most Latin countries have rejected the jury as the arbiter of the facts for a variety of reasons.\(^49\) The lack of a jury tradition is probably the principal reason for hesitation but an underlying bias is the

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often-encountered feeling that the citizen of Latin countries or Haiti are simply unprepared to assume the responsibilities of being a juror: to impartially receive, understand, and review the evidence and to pronounce a verdict, even if that verdict is against the prosecutor and the police who represent the government. The history of repression in many of these countries has been so strong that the average citizen will still hesitate to contradict the wishes of the representatives of the government.

On a more philosophical plane, there is resistance to the confrontational and, as perceived, overly adversarial nature of the accusatorial common-law system. A basic trust in the truth-seeking ability of the single judge survives even in countries where abuses abound. When the advocates prepare the trial, compiling proof (a more quantitative goal) is seen as more important than the evaluation of that proof (the qualitative goal). Freiberg points out that, too often in the adversarial system, cases are presented to courts as “disputes” and trials are regarded as contests of opposing interests—confrontational and antagonistic. The emphasis is not on finding the truth but rather on destroying the other side’s version. Defense attorneys instruct their clients to “deny everything” and make the prosecution prove its case rather than to accept responsibility where appropriate and perhaps even show contrition. This domination of the system by a sense of adversarialism has led several countries to seek out alternative dispute resolution models that encompass some degree of compromise, mediation, and acceptance of responsibility. This is particularly true in countries where the state apparatus has very high legitimacy and trustworthiness, such as in the Nordic countries.

For reasons such as this, a number of European and Latin countries have opted for what they call a “mixed” or “hybrid” system, which normally lies somewhere between the inquisitorial and the accusatorial models. It is virtually impossible and

51. Id. at 84.
52. Id. at 85.
53. For a cataloging of differences and similarities see DELMAS-MARTY & SPENCER, supra note 13, at 27–32.
indeed ill-advised to consider whether to adopt the “pure” or the “mixed” as a matter of principal. These reforms should be discussed one by one and, in most circumstances, results will be considered “hybrid” even if the country adopts the key constructs of the accusatorial model. Once a country decides to retire the judge of instruction as the investigator, caller of witnesses, evaluator of the evidence, and final judge, it has already prepared the way for the party model. Once the criminal case has been turned over to the parties for an oral and open hearing with live witnesses and cross-examination, the essence of the party system has been adopted. Transferring power from the judge to the prosecutor is an impactful reform, given that the prosecutor will control the investigating police, the charging decision, the investigation itself, and the state’s presentation of evidence. In the absence of a functioning criminal defense bar, particularly for the overwhelming numbers of indigent defendants, the balance of power between the parties will be tilted dramatically towards the prosecution, at least until public defender offices can be funded, and the attorneys trained. This transference of power from the judge to the prosecutor is obvious to the Haitian criminal lawyers and, as will be seen, results in serious doubts for some about the entire transition.

The author’s task, at this early stage, was to outline the principal points for discussion in both the plenary session and the small working groups at the June conference, focusing on the practical differences—such as the role of the prosecutor—in order to draw out the philosophical differences. The field from which to propose questions, both practical and philosophical, is very rich. The accusatorial system differs dramatically from the inquisitorial system in well over twenty respects. Even if one is convinced that a transition should occur in the key ways previously mentioned, such as turning over the proceedings to counsel, conducting open and oral hearings, developing a strong defense, and changing the judge’s role to that of an arbiter mainly of questions of law, it does not necessarily follow that each of the other ancillary changes often discussed should be adopted in all cases. Experiences in other countries have shown which parts of the transition would be the most difficult to accept, certainly at this early stage. Nonetheless, foreigners placed in the role of experts in the design and implementation of justice projects such as this one should proceed cautiously to avoid being impatient, judgmental, or over-bearing. Allegiance to the accusatorial system, particularly common among Ameri-
cans, can lead to biases and assumptions that are unhelpful in this context. All too often, small groups of foreign experts have developed codes in consultation with a discreet number of government officials, but virtually no consultation with the remainder of the bar or other parts of civil society. Fortunately, Magloire was also very sensitive to that problem. After much discussion, it was determined that the working groups at the first conference should concentrate on the following issues:

1) Whether to maintain the juge d'instruction or to adopt President Sarkozy's formulation of the juge de l'instruction, which, despite seeming to be almost exactly the same appellation, provides for a judiciary more akin to that of the party system, a referee between the parties as they present evidence;

2) Whether to give the prosecutor control of the judicial police;

3) Whether to implement the concept of l'égalité d'armes, which contemplates a considerable expansion of the role of the defense counsel to bring the defense into an equal position with the prosecution, at least at trial, and;

4) How to set and enforce time limits in regards to the rights to a speedy trial, and to be free from unnecessary preventive detention.

If time permitted, the working groups would also consider the role of the victim, training and jurisdiction of justices of the peace, oral presentation of evidence in general, and plea bargaining. This list of topics did not touch upon many smaller

55. Conference notes on file with author.
56. In most traditional European systems, the victim is a full party to the proceeding, with rights to call witnesses, argue, contest legal rulings, and appeal. See infra text accompanying notes 78–80.
57. One of the major hesitations about oral witness examination is the suggestiveness and aggressiveness of cross-examination. See Cavise, supra note 14, at 804–05.
58. Transition countries have developed a variety of ways of adopting some form of plea bargaining without opting into the purely American model. The widely held perception is that, in the United States, some defendants will plead guilty without actually being guilty because of the pressure brought to
sub-issues, including the principle of opportunité,59 various burdens of proof, whether the invocation of the right to silence can give rise to negative inferences, and reform of law school curricula and teaching methods. Again, the field from which to draw is infinite.

Most of the roadblocks to a wholesale reformation of the criminal justice system encountered at the conference were entirely foreseeable. Primarily, and always a concern in Haiti, the problem of financing the transition. How can Haitians persuade foreign donors to finance the law reform project when Haiti has so many other “survival” issues to face? That question remains unanswered today. How, and in which jurisdiction, to conduct training is another major concern.60 This question brings into play the predictable turf issues, which also remain largely undecided. How can the reformers educate the public to boost popular confidence in the justice system? How can this project be coordinated with prison reform and judicial administration initiatives? The questions are numerous, but one formidable but unspoken obstacle was the resistance of the French and the Francophiles to the transition.

IV. THE HISTORY OF FRANCO-HAITIAN RELATIONS

A very short look at historical Franco-Haitian relations may be useful. The French have, of course, the longest history in Haiti. French rule began in 1660 after the Spanish decided to concentrate on what has become the Dominican Republic. The Spanish formally ceded the western half of the island to the French in 1697.61 By the 1780s, the French colony of Saint

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59. Opportunité refers to the right of the prosecutor to dismiss a criminal charge without prior consultation with the presiding judge.

60. In the wake of the earthquake, non-governmental organizations (“NGOs”) have been very reluctant to turn over dedicated funds to Haitian government without assurances of when and how the funds will be spent. See Jake Johnston, Op-Ed., Humanitarian Aid in Haiti: Supply and Demand, CARIBBEAN J. (Dec. 23, 2011, 6:00 AM), http://www.caribjournal.com/2011/12/23/op-ed-jake-johnston-on-humanitarian-aid-in-haiti-supply-and-demand/.

Domingue, from which Haiti emerged, had become a major producer of coffee and sugar. The French imported 790,000 slaves, far more than any other country in the Americas, including the United States, to do the labor. The French also killed their slaves at the highest rates through generally inhumane treatment. The revolt of the slaves began in 1791 and culminated in a full-scale invasion by the armies of Napoleon in 1802. The French suffered enormous losses, and the former slaves made a final declaration of independence in 1804. The French immediately imposed a trade embargo, which was not lifted until France recognized the independent republic in 1825 in exchange for a ransom payment of 150 million gold Francs.

In 1915, Haiti was occupied by U.S. marines sent to protect U.S. and French interests. The military occupation lasted until 1934 and, thereafter, the United States and France together supported a considerable number of ruling juntas and dictatorships in Haiti. In 1986, France granted asylum to Haitian dictator Jean-Claude “Baby Doc” Duvalier. With the election of Jean-Bertrand Aristide in 1994, and his reelection in 2000, the people of Haiti indeed had found a popular hero in whom they were convinced democratic ideals resided. Aristide, however, was not at all trusted by foreign interests. The United States and France installed World Bank official Gerard Latortue as prime minister after a 2004 military coup that overthrew Aristide. A continuing issue, reiterated by Aristide in 2003, is Haiti’s demand for $21 billion as restitution for the ransom

63. Id. at 18.
64. Id. at 17, 25.
65. Id. at 18.
66. The term “junta” usually refers to a form of non-democratic governance of a country. Whether it be a military or civilian junta, it usually means governance by a small committee, often leading to dictatorship.
68. See id. at 26–27.
paid to the French for independence.\textsuperscript{70} It is plain, however, that, at some point in the latter part of the last century, the United States took the lead in managing Haiti's relations with the rest of the world. Nonetheless, Haitians continue to see France as a main culprit in the destruction of Haitian democracy. Additionally, France contributes far less foreign aid to Haiti than Canada, the United States, and the Nordic countries, despite its historical legacy, commonality of language, and institutional development, including the legal system.\textsuperscript{71}

Despite the lack of the kind of post-colonial foreign aid that is typical of the “mother country,” France maintains a strong presence in Haiti and continues to play a role in the nation’s affairs. In that context, it is not surprising the French would have strong opinions about the idea of Haiti transforming its criminal justice system away from the French inquisitorial model toward the American model. Beyond a certain national chauvinism in defense of the French-founded civil code system, many French critics think of the transition and its logistical burden as too costly for such a poor and undeveloped country. They also see the reforms as too difficult to implement for the Haitian people, most of whom are unschooled and illiterate. Indeed, it is undeniable that the maintenance of one \textit{juge d'instruction} is certainly less expensive than the party model. However, those financial savings come at the cost of many fundamental rights that Haitians are entitled to enjoy just as much as any other people. This particular manifestation of “Haitian exceptionalism” must also play a role in the French perspective that any criminal procedure reforms should proceed slowly, even though so many of the Latin countries that have begun the transition are, themselves, very poor and underdeveloped. Finally, it should not go unnoticed that French critics may be particularly forthright when the question is seen as whether to adopt yet another American way of doing things.


V. THE FIRST LAW REFORM CONFERENCE: A CLASH OF VIEWS

In June 2009, the conferences and workshops on the modernization of the Codes took place in Port-au-Prince. Besides the leading members of the Haitian bar and Haitian academics, a number of French representatives (including an appellate judge from Toulouse and a Supreme Court Justice from Senegal), there were several independent foreign experts in attendance. One of the “godfathers” of transition movements in Latin America, the Argentine Alberto Binder, made valuable contributions, along with a number of jurists from the Dominican Republic whose experience is seen by many as a model for Haitian legal development. Several American government funding agency officials were also present. The foreign presence also included representatives from the U.N. Mission in Haiti (“MINUSTAH”), the United States Agency for International Development (“USAID”), the International Legal Assistance Consortium, the U.S. Institute of Peace, and the Organization of American States.

The purpose of this first conference was to expose the principal Haitian actors to the importance of this transition and to the experiences of other countries in Latin America that had attempted to implement the accusatorial system. As anticipated, discussion over the two days centered on several key questions.

The first major discussion topic had to be, of necessity, the question of the suppression or maintenance of the juge d’instruction. Even those seeking to maintain the status quo were, for the most part, willing to admit that adjustments had to be made. For example, the accused should be given a lawyer

72. L’Atelier sur la Modernisation du Code Pénal et du Code d’Instruction Criminelle [Workshop on the Modernization of the Penal and Criminal Procedure Codes], June 9–10, 2009, Port-au-Prince, Haiti (agenda and materials on file with author); see ALBRECHT, AUCOIN & O’CONNOR, supra note 8 at 1, 5.

73. Dr. Alberto Binder, Professor in Procedural Rights and the University of Buenos Aires, is also the Director of the Public Policy Center for Socialism (“CEPPAS”), Director of the Latin American Institute for Security and Democracy (“ILSED”), and Co-Director of the review “Judicial Systems,” published by the CEJA.

74. Commentary about this conference is drawn largely from the only formal minutes taken (“Rapport de synthèse”) as well as some of the author’s notes and impressions.
who has access to the file and the right to contradict and cross-examine; the police should be subjected to examination or interrogatories by the judge during the investigation phase. A separate judge should be charged with making the preventive detention or bail decision; the juge d'instruction must be more respectful of individual liberties and the problem of pretrial delay. There is also the possibility of creating a panel of three persons to oversee complex cases such as those of organized crime. Defendants should be granted the right to appeal from the results of the judge’s investigation. Those favoring the elimination of the present juge d'instruction, fell into two camps: those who would follow the standard transition course and transfer the judge's investigating power to the prosecutor, and those who would create a restyled juge d'instruction with much more defined powers, including preservation of the judge's supervision of the investigation.

It is impossible to discuss reforming the role of the trial judge without discussing strengthening the role of the prosecutor under the new Code. The reaction of the Haitian bar to this transfer of power from the former investigating judge to the public prosecutor has been typically circumspect. Those who tend to trust prosecutors are in agreement with the proposed changes. Those who prefer the watchful eye of a supposedly impartial investigating judge resist the transfer. Particularly when it is understood that the prosecutor would also control the investigating police, and basically displace the trial judge from any investigatory or supervisory role, the dramatic nature of this transformation becomes even more pronounced.

In a country such as Haiti, where neither prosecutors nor judges are well paid and both are subject to corrupting influences, there is no reason to assume that the processes employed by the prosecutor will be any more transparent than those of the traditionally secretive juge d'instruction. It should be of some consolation, however, that, optimistically, there would be a functioning defense bar, which could operate as a check on the power of the prosecutor. When a prosecutor violates a provision of the Code or when, for example, a prosecutor forces the police to conduct a one-sided investigation, the benefit of the adversarial system is that the defense counsel could then bring a motion before the sitting trial judge seeking relief. If, as is usually provided, the defense has access to discovery while the case is progressing towards trial, it may come to the defense counsel's attention that the prosecutor is engaging in misconduct, allowing the defense to pursue appropriate relief
before the judge. This check on the prosecutor’s power can only be realized when there is a functioning criminal defense bar in Haiti. The training of criminal defense lawyers, along with retraining of all the principal players in the criminal justice system, should be a main focus of the infrastructure reform.

Some of the resistance to this aspect of the reform exists simply because the public prosecutor is today under the control of the executive branch and arguably subject to additional political influences. The fear expressed was that a subservient prosecutor’s office would become a jurisdiction unto itself with the power to both prosecute and judge. On the other hand, the new Code provides that the office of the prosecutor shall be independent and that there is a clear separation of powers between the executive and the judiciary. These provisions, if complemented by the necessary increase in material and human resources, are seen as a possible path to a stand-alone prosecutor’s office. Some safeguarding suggestions included a precise hierarchy in the office of the public prosecutor with clear lines of authority, creation of a civil remedy for those victimized by prosecutorial abuse, judicial supervision over malfeasance in the office, and, of course, strengthening the defense function as part of the equal power or “égalité d’armes.” Even those who are the most supportive of the juge d’instruction had to agree with the absolute necessity of prescribing time limitations for the various stages of the process to avoid the same interminable delays in the prosecutor’s office as have traditionally been seen with the juge d’instruction.

Discussion over whether or not the prosecution should have the power to dismiss unilaterally (the principle of opportunité) a charge is generally controversial, particularly in countries like Haiti, where corruption is a severe problem. In some transition countries, such as Italy, the judge must approve a dismissal whereas in France, for example, the prosecutor has the sole power to do so. Once again, the view is that unbridled power vested in the prosecutor can lead to corruption or influence peddling. Several provisions of the present criminal

75. Freiberg, supra note 50, at 84.
Code\textsuperscript{76} and several decisions of the \textit{Cour de cassation} have not given the prosecutor that right.\textsuperscript{77} Nonetheless, the right to dismiss generally was supported since it would result in a reduction in the number of docket cases and the number of persons being held without trial. The decision to dismiss a previously filed case must, however, be on the record, with notification to the victim. A discussion was also had about a third path between prosecution and dismissal—alternative dispute resolution.

Another important question was the role of the victim in the criminal process, as the right of participation of the victim ("\textit{partie civile}\textsuperscript{78}\textsuperscript{2}\textsuperscript{3}\textsuperscript{4}"\textsuperscript{5}) is another transitional sticking point. In inquisitorial systems, the victim is ordinarily much more included as a full third party to the criminal process.\textsuperscript{79} The victim, with or without counsel (provided the victim qualifies for free court-appointed counsel), presently has the right to appeal a judgment, to present argument, and to fully share in the, albeit limited, role enjoyed by the parties in the inquisitorial system.\textsuperscript{80} In the Haitian draft code, the victim, defined as a person who has "personally and directly suffered damage" as a result of the crime, even has the right to contest before the trial judge a prosecutor’s decision to deny him or her designation as \textit{partie civile}. In the accusatorial model, the victim loses that third party role. The prosecutor, at least in the American model, is charged with protecting the participation of the victim. This ordinarily means that the victim, who is often the complaining witness, can be a witness at a preliminary hearing, motion, or trial if called by the prosecutor and can testify, with restrictions, during sentencing.\textsuperscript{81} Beyond that, the American system, at least, allows the victim to proceed civilly for money damages or other appropriate relief, but in a separate cause of action.

The prospect of a drastically reduced role for the victim in the adversarial system was not well received in Haiti, just as it has

\textsuperscript{76} See \textit{Code d'instruction criminelle} [C.I.C.] arts. 37, 42, 51 (Haiti), \textit{translated in Gendarmerie Translation of the Code Penal and the Code d'Instruction Criminelle} 8–12 (1922).

\textsuperscript{77} In French civil parlance, the right to dismiss is referred to as \textit{système d'opportunité}.

\textsuperscript{78} See Freiberg, \textit{supra} note 50, at 92–93.


\textsuperscript{80} Reference here is made to the victim impact statements approved by the U.S. Supreme Court in \textit{Payne v. Tennessee}, 501 U.S. 808, 824–30 (1991).
not been well received in other transition states, particularly those where victims seldom actually bring civil suits and look to the criminal trial for damages.\footnote{See, e.g., Codice di procedura penale [C.P.P.] arts. 74, 75 (It.). Under these provisions, civil actions are joined to the criminal proceeding. \textit{Id}.} Even when presented with, if nothing else, the logistical difficulties of three-party trials, including three opening statements, three closing arguments, three direct examinations, three cross-examinations, and three sets of exhibits and motions, it was never seriously doubted that the new Code would continue to recognize the victim’s rights as in the old Code. Those rights, as the draft law is presently written, would also include the presentation, by the victim, of third-party witnesses such as experts. The rights of the victim would also include, in the new Code, perhaps the most obstructing provision of all: the victim’s right to contest a prosecutor’s decision to drop a case.\footnote{See discussion of the prosecutor’s right of opportunité supra notes 59, 75–77 and accompanying text.} The importance of allowing a prosecutor to drop criminal charges that should not be in the system or cannot be proven is difficult to overestimate when considering the enormous backlog of cases. Should victims be allowed to contest that decision through court proceedings that can do nothing but frustrate the intent to relieve the congested dockets, Haiti will continue to face the possibility of protracted proceedings in potentially every case.

Analyzing the reluctance to transition to a more common-law version of the role of the victim is not difficult when one understands the importance, in Haiti, of public acceptance of this entire transition. To tell victims that they would have a much more limited role would undoubtedly provoke a feeling of not having been heard or not having had a day in court, and could therefore diminish the public confidence essential to the success of the system even before implementation.

There seemed to be consensus that a \textit{partie civile} could only be a physical person and could not be a business or corporation, \textit{personne morale}. There also seemed to be a consensus that the role of the victim should remain unchanged from that presently existing under Haitian law, meaning that the victim can assert his or her rights at all phases of the criminal process, including the right, as discussed, to petition the judiciary when the pros-
executor refuses to prosecute. Some advocated that “associations” could also be treated as parties civiles. Finally, to help alleviate the concern that victims would be shut out of the process, there was also support for the idea that victims of unsolved crimes should receive indemnification from a public fund.83

The question of preventive detention self-divided into two sub-issues: la garde a vue, referring generally to the period of time officials can detain a suspect for purposes of investigation without presentment to a judge,84 and the more internationally standardized concept of preventive or pretrial detention. La garde a vue not only had its supporters at the Haitian conference, but a number of jurists felt that the traditional limit of forty-eight hours of detention was unrealistically short given the problems of communication, distance, and transportation. In serious cases, an indefinite garde a vue under judicial supervision was proposed. Others, perhaps in the majority, felt that the forty-eight-hour limitation was a constitutional guarantee of individual rights and liberties that must not be touched. As to preventive detention, referring to all detention prior to judgment, the conference reinforced the idea that liberty is the rule, that detention should be the exception, and that any judicial decision to hold a suspect would have to not only conform to the speedy trial provisions of the Code, but must also be the subject of a decision on the record by the judicial officer. Any prolonged detention would have to be justified on the record, with a right to appeal the detention, and to be released when the limits were surpassed. The conference also reconfirmed the availability of the writ of habeas corpus to contest detention.85

Another important question was the nature of proceedings in minor criminal cases or “contraventions.” In Haiti, justices of the peace, most of whom are not lawyers, typically preside over these proceedings. They also serve a double function (“double casquette”) as judicial police, meaning that they investigate the cases over which they will later preside. In the inquisitorial system, that is the classic dynamic. In the party system, however, the double casquette is a source of confusion and dysfunc-

83. Conference notes and materials on file with author.
85. Conference notes and materials on file with author.
tion in the procedural chain. Most participants wished to end the double function and return investigation to the judicial police. A minority felt that a police investigation conducted by a justice of the peace normally inspired more confidence in the results.

A more controversial issue was who should be the fact-finder at trial. Even though the present Haitian Constitution calls for jury trials in certain cases, there was, in the drafting process, very little support for the adoption of criminal jury trials. The objections were typical in that the participating Haitian lawyers did not feel that their fellow citizens were “qualified” to apply the law to the facts of a case. This has generally been the reaction in most transitioning Latin American countries. The idea that a decision by a jury could be seen as more legitimate because it comes from the people themselves does not yet have traction in Haiti. Several alternative proposals were made. Some reformers were content to stay with one judge, while others preferred a panel of three persons including at least one judge. Not only were very few participants in favor of the American model of the six or twelve-person jury, but few were willing to support even the maintenance of the present Haitian Constitutional provision. If there was a consensus point, it would have been around the three-person panel, as proposed and reserved for felony-type cases, while the single judge would oversee minor crimes. Some felt that panels of judges are simply unrealistic, given the lack of resources and the high costs of training. Almost all participants agreed, however, on the idea of judge specializations (“chambres spécialisées”) where judges

86. Article 50 of the 1987 Constitution of the Republic of Haiti calls for jury trials in “crimes de sang” or “blood felonies.” CONST. of 1987 art. 50 (Haiti). Commentators say, however, that there have been no jury trials for several years. INT’L CRISIS GROUP, HAITI: JUSTICE REFORM AND THE SECURITY CRISIS 3 (2007) [hereinafter SECURITY CRISIS].

87. See Cavise, supra note 14, at 803–04. For an example of one of the few codes that has introduced a jury system, see CÓDIGO DE PROCEDIMIENTO PENAL [C.P.P.] art. X (Bol.) (enacted on March 25, 1999, as Law No. 1970). On the other hand, Brazil has had a jury system since 1822. In that country, a group of seven jurors is selected from a group of twenty-one as the “Jury Council.” Edmundo Hendler, Lay Participation in Argentina: Old History, Recent Experience, 15 SW. J. L. & TRADE AM. 1, 4–5 (2008).

88. CONST. of 1987 art. 50 (Haiti).
with particular training would preside over certain types of cases.

Internationally, in those criminal court systems where there is no jury, the rules of evidence and discovery are not highly developed. Theoretically, the judge does not need to be protected from the introduction of prejudicial evidence such as improper character evidence or hearsay. Often, particular code provisions are adopted to reflect evidentiary concerns, rather than embarking on the more complex process of elaborating rules of evidence or discovery. Some participants at the Haitian conference were in favor of the adoption of a code of evidence to control the admissibility or nonadmissibility of physical or material proof, the accessibility of all proof to both sides, and the availability of experts and technical or scientific proof. Others felt that particular Code provisions would be sufficient. The question was left unresolved.

Another key procedural mechanism of the accusatorial system that has received a mixed reaction in Haiti is plea bargaining. In the inquisitorial system, guilty pleas ordinarily are not admitted since the investigating judge decides guilt or innocence. However, most civil systems have found a way to accommodate some degree of plea negotiation to adapt to rising crime rates and limited judicial resources. The hesitation is due to the philosophical difficulties inquisitorial countries have had with the idea that justice would depend on a negotiation, sometimes regardless of actual guilt or innocence. The Haitian reaction to plea bargaining proposals was typical of civil law countries. Lawyers are very hesitant both to see culpability as an object of deal-making and to give prosecutors and defense lawyers, independent of the judge, the authority to arrive at a negotiated disposition. To include a provision that the judge must approve the plea bargain is often of little consolation. What most transitioning countries fail to appreciate is that plea bargaining can relieve much of the stress on the criminal justice system and that a large percentage of cases can be disposed of through equitable and reasonable negotiation. Unfortunately, Haitians have seen the results of the plea bargaining system in the United States where fully 97% of all criminal cases in the federal system and 94% of all state cases are disposed of by guilty pleas, rendering most of the previously

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89. See, e.g., Marafioti, supra note 16, at 90.
90. KEEPING HAITI SAFE, supra note 9, at 11.
cherished trial rights largely illusory. They have also come to understand that the desperately overcrowded American criminal system has led to Supreme Court sanctioning of what could be considered distortions of plea bargaining, such as *North Carolina v. Alford* or *Bordenkircher v. Hayes*. It is one thing to encourage a country to adopt plea bargaining *grosso modo*, but to include the notion that one can plead guilty without actually being guilty, or that a prosecutor can threaten to and actually increase the charges on a defendant who refuses to plead guilty, would be to delegitimize the process as consistent with basic human rights norms.

Rather than sublimate human rights protections within other provisions of the new Code, it was determined that a human rights preamble should introduce it, partially to codify but also to make the statement that human rights is at the forefront of this reform. At the conclusion of the conference, the author was asked to draft the human rights preamble to the new criminal procedure Code. That work was undertaken immediately in full anticipation of another conference in a few months at which the discussion could be continued.

On January 12, 2010, the earthquake struck Haiti, centering on a point just outside Port-au-Prince, the seat of government and home to all central government institutions. As many as 300,000 people were killed, and even more were injured; 208,000 residences were destroyed, along with 1300 educational institutions, and more than fifty hospitals and health centers. The National Palace, the Ministry of Justice, and the Supreme Court buildings were destroyed. Since the earthquake, institutions throughout Haiti have been in a state of disarray if not total dysfunction. As the United Nations Development Programme noted:

> The earthquake destroyed almost all the Government’s infrastructures (buildings, archives, technical and IT systems) and

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severely affected its capacity to deliver the basic public and administrative services . . . .97

Violence erupted almost everywhere. Looting, even grave-robbing, massive prison escapes,98 and a complete absence of local authority throughout the affected region of the country worsened the situation.99 Women have suffered particularly in the aftermath in that sexual abuse, always prevalent in Haitian society,100 became an epidemic in the tent cities.101 Key personnel in the criminal justice system, including various key officials in the Ministry of Justice and various members of the Cour de cassation, did not survive. There was also widespread loss of judicial files with the destruction of judicial buildings.102 The capacity of the very diminished government to carry out large justice reforms seemed most implausible, especially in the face of widespread starvation, homelessness, and violence.

With Port-au-Prince in chaos, without essential infrastructure such as electricity and clean water, and with food in short supply, it was fully expected that the law reform project would be put on hold indefinitely—at least until the basic needs of the population had been fulfilled. That was a mistaken assumption. In the days after the earthquake, President René Préval summoned his surviving ministers to his base at the airport and the rule of law was again declared a priority for the gov-

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99. Id.
101. The situation remains, at this writing, out of control, even in the face of the adoption, in July 2005, of a statute requiring that laws against rape be enforced. James D. Wilets & Camilo Espinosa, Rule of Law in Haiti Before and After the 2010 Earthquake, 6 INTERCULTURAL HUM. RTS. L. REV. 181, 201 (2011); Faedi, supra note 100, at 181–82 (discussing the Décret Modifiant le Régime des Agressions Sexuelles et Éliminant en la Matière les Discriminations Contre la Femme).
102. See also HAITI, ACTION PLAN, supra note 21, at 7.
ernment. The Minister of Justice contacted all Haitian courts, prosecutors, and police to request an assessment of damage and fatalities, along with an inventory of urgent needs. He also reactivated the Ministry of Justice in a series of warehouses near the destroyed Ministry. Amidst this chaos, barely three weeks after the earthquake, the third draft of the procedural Code began circulating and, within two months, another conference was called.

VI. THE HUMAN RIGHTS PREAMBLE

The best hope for democracy in Haiti ultimately lies in respect for the human rights and autonomy of each individual. Most agree that there is parity between respect for individual human rights and the creation of a democracy. One cannot overstate the role that the legal system can play in the development of human rights and therefore in the transition to democracy. This is particularly true in a country like Haiti that has suffered dictatorship, occupation, and privation for so long and has so little tradition of democracy. Nonetheless, the people of Haiti hunger for their human rights and have often risen in protest against an autocracy designed to oppress them.

It is not enough to pass new codes. That kind of formal recognition of rights has yet to yield practical results in Haiti. The supremacy of law remains unrecognized. The equality of persons before the law is still only an aspiration. The accountability of government officials is nonexistent. The accessibility of law is not a reality for most people. Efficiency, predictability, and transparency are unknown. A national discussion must be held among all those whose lives are affected by the criminal justice system. This discussion cannot be held while Haitians

104. Id.
105. The reform of the Code of Criminal Procedure is, at this writing, in its eighth draft form, the most recent having been issued in June 2012.
107. “Governance lies at the root of Haiti’s multiple crises. Decades of dictatorship and military coups with only short democratic interludes have hindered the emergence of a coherent and nationally owned governance system.” See UNDP, supra note 97.
are still living in tents at displacement camps. The discussion must be had hand-in-hand with recovery.

It would be supremely progressive if Haiti were to develop a social consensus around universally recognized principles that guarantee the rights of the individual, including the right to participate in the democracy, to choose between competing interests, and to have an equal voice in the popular debate. The human rights aspect of a new criminal law and procedure is likely to be the part most noticed by a distrusting populace that was never exposed to a working legal system. Developing a social consensus might spark a new moral consciousness born of respect for the government and its laws, and of increased intolerance for corruption, bias, and impunity.

At this point, the recognition of “the autonomous individual as a paradigm for democracy” by the public is practically impossible, given the institutional dysfunction, the disorganization of political parties, and the lack of resources for public education. In anticipation of the country’s development of democratic institutions and the consolidation of the structural integrity of the nation, the legal system must be ready. It must assure the Haitian people that there can be justice in the country, that judges and legal officials do not have to be corrupt, and, most importantly, that any arrested person can look forward to more than languishing in a local jail without charges, without a lawyer, and without any defense. The legal system must afford the individual defendant the opportunity to contest the charges and to put the system to the test.

An important step in the process of the consolidation of the rule of law is the drafting of the fundamental human rights guarantees (“Principes Fondamentaux” or “Fundamental Principles”). Haiti must adopt these and apply them to every criminal defendant. In the United States, most individual rights are

110. See Stotzky, The Truth about Haiti, supra note 62, at 9 (discussing how law influences moral consciousness in countries like Haiti).
111. Id. at 11.
112. Haiti is a state party to the key international treaties pertaining to human rights and the administration of justice, including the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the American Convention on Human Rights (providing for equality before the law, the right to personal liberty, the right to a fair trial, the right to a hearing within a reasonable time, and the due process of law). See HAITI: FAILED JUSTICE?, supra note 33, at 22–26, 55–57.
encapsulated in the Bill of Rights and elaborated upon through case law. In Haiti, as today’s framers contemplated the drafting of a new criminal procedure Code, it was determined that the code should be preceded by a formal declaration of those rights drawn from international guarantees, the preamble of the criminal procedure Code of the Dominican Republic, and from a sense of the Haitian needs.

The human rights principles are intentionally brief to allow for the Code itself to be the more complete elaboration. However, the preamble is significant in that it adopts basic human rights principles hitherto unspecified in Haitian law. The most important Fundamental Principles, beginning with Article 110 of the eighth draft of the Code of Criminal Procedure are:113

1. All persons are equal before the law and in court, and are subject to the same rules. The law must prohibit all discrimination, notably that of race, color, sex, language, religion, sexual preference, political opinion, national or social origin, or socioeconomic resources.

2. The legality principle, which provides that no crime shall be charged unless, at the moment of commission, Haitian or international law to which Haiti is a signatory makes the act criminal, is codified. Where there is sufficient evidence that a crime has been committed, the prosecutor normally is required by law to prosecute.114 Punishment shall not be imposed, if it is not authorized in the applicable law at the time of commission. Laws shall be made retroactive only when they operate in favor of the accused.

3. There is a presumption of innocence in the code’s preamble. Haitians have the right to be silent without any inference of culpability, the right to be free from testifying against oneself, the right to have the prosecution bear the burden of proof, the prohibition of press coverage that presumes the guilt of the accused, the right to be free from deprivation of pretrial liberty except in exceptional cases, and the right to judicial review. In addition, to deal with the complicated issues of the garde à

113. Conference notes and materials on file with author.
114. This is the version of the legality principle as adopted in countries such as Germany, Austria, Italy, Spain, and Portugal. Freiberg, supra note 50, at 84.
The Preamble also provides that Defendants shall be brought before a judge within forty-eight hours to determine pretrial release.

4. The state must prove its case beyond a reasonable doubt (“au-delà de toute doute raisonnable.”).

5. All suspected or prosecuted persons have the right to be informed of the charges against them, the right to be assisted by a lawyer and, if necessary, an interpreter, and the right to be present at trial. The right to counsel includes counsel during police interrogations, the preliminary phase, and all phases of trial. For those who cannot afford counsel, one will be appointed free of charge.

6. The function of investigation and judicial review shall be separate.

7. The trial shall be held within a reasonable period of time.

8. All evidence admitted before the court and entered into the record must have been obtained legally or must be rejected by the tribunal.

9. Depositions and the trial until the pronouncement of judgment shall be conducted orally.

10. Cross-examination is at the center of the criminal process. This means that the accused has the right to be physically present at the trial and all other parts of the trial procedure, the right to dispute the evidence or indications of culpability, and the right to enter exculpatory evidence.

11. There is a guaranteed right to appeal a conviction. This requires a written decision from the trial court as to both facts and law.

12. Double jeopardy is prohibited, including a ban against a second prosecution even where the first prosecution was dropped or dismissed, unless new elements have been discovered.

13. Foreign judgments will be recognized in accordance with international treaties and conventions. The decision of an international court recognized by Haiti could provoke a reopening of a previously disposed-of case.

14. The right to an independent and impartial tribunal is guaranteed.

15. There is also an explicit right to a fair and public trial.

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115. See supra note 84 and accompanying materials.
VII. KEY FEATURES OF THE NEW CRIMINAL PROCEDURE CODE THAT DIFFER FROM THE ACCUSATORIAL SYSTEM

Beyond the preamble, the Code as drafted includes a large number of other provisions characteristic of the accusatorial system. The most basic guarantees for the defendant, such as the right to defense counsel, the right to independently call witnesses, and the right to produce evidence, are all improvements on the old system that was so reliant on the investigating judge. Those new rights are reflected throughout the Code.

The Haitian decision to include a role for the victims remains a major variance with classical accusatorial procedure. Aside from granting the victim full party status, the Code also specifies that victims will be treated with compassion, dignity, and respect, and that their interests will be taken into account at all stages, especially when the victim is a minor, a senior citizen, physically or mentally handicapped, or a victim of sexual violence or other violations against women. The victim has a right to demand that an investigation be opened, and the right to present evidence. The government must consider those demands. The victim shall also be notified of the progress of the case. Additionally, the trial tribunal can order that the victim be given access to the case file and the evidence, and ensure that the victim’s right to counsel and to present experts is not infringed.

Another unorthodox set of provisions concerns the method of questioning witnesses. Counsel may ask questions and even make brief observations or commentary during the questioning of the defendant. First, the prosecution calls its witnesses, followed by the defense and the victim, and, if necessary, the judge. Both the prosecution and the defense have the right to respond, implying that what is called a rebuttal case in the United States is afforded not only to the prosecution but also to the defense—not normally the case in the United States.116 All witnesses may be cross-examined and the judge may question witnesses if she wishes. Cross-examinations must be relevant either to the case or to the credibility of the witness. Witnesses

116. In the United States, the prosecution normally has the right to present a rebuttal case after the defense case. In the discretion of the judge, the defense may call witnesses after the prosecution’s rebuttal but that is reserved to the extraordinary discretion of the trial judge.
are first examined by direct examination, followed by cross-examination, followed by redirect, as necessary.

Conditions of pretrial release remain somewhat different. The new Code retains the old inquisitorial procedure of holding a recently arrested defendant in *garde à vue* for people where there is a “reasonable motive.”117 Those motives include the prevention of flight or destruction of evidence. The *garde à vue* is for twenty-four hours, but the chief prosecutor may authorize a twenty-four-hour extension. If the detainee has an attorney, that *Mission de l’Administration Penitentiare* attorney must be notified of the detention and may communicate in confidentiality with the detainee. There is also a specific right to have a family member notified of the detention. Aside from the obvious difference that there is no *garde à vue* in the American system, there is also the fact that, for almost all crimes in the United States, a bond amount will be set which entitles the defendant to pretrial release upon posting. The Haitian system, much like other transition states, does not adopt the bail-setting procedures. After the *garde à vue* period has passed, the criminal defendant is either released or detained until trial, depending on a variety of factors including flight risk, danger to the community, and the seriousness of the charged offense.

There is no provision for plea bargaining in the new Code. There are provisions concerning the right to plead guilty and the power of the judge to consider guilty pleas when passing a sentence, but there are no provisions granting the prosecutor the right to reduce or dismiss charges pursuant to guilty plea or the right to make an agreement with defense counsel as to sentencing, subject to the judge’s approval. The success of the new Code and the reformed system will depend largely on the acceptability of plea bargaining as a way of dislodging the overcrowded courts in Haiti.

VIII. KEY FEATURES OF THE NEW CRIMINAL PROCEDURE CODE THAT RESEMBLE THE ACCUSATORIAL SYSTEM

Turning to those provisions that more evenly track the classical accusatorial procedure, a large number of provisions govern how the case is to be handled in the pretrial stage. Access to the case dossier is a key aspect of the reform in that the international concept of the *égalité d’armes* is meaningless if the files are unavailable to the defense. Under the proposed Code,

117. *See supra* note 84 and accompanying materials.
access is permitted whenever the court is open. Within five days, the chief prosecutor can ask the court to deny access in cases of possible pressure or intimidation of witnesses or victims. The decision to deny access is itself appealable.

As to investigation, any of the parties, including the victim, can demand that the prosecutor conduct an interrogation, investigate a certain place, or make any other inquiry that is necessary to the investigation. The parties may also request certain tests by experts. In case of refusal, the parties may approach the judge of the preliminary or investigative stage. As to investigative techniques, the Code has very specific provisions on the interception of communications, including telecommunications, surveillance, personal mail, financial transactions, and the like.

The problem of cases lying dormant for many months or even several years was addressed. In cases where no investigation has been conducted for four months, the defendant can demand that the prosecution close the investigation. If the chief prosecutor does not move to close the investigation within one month, the defendant can petition the judge.

The defendant must be immediately advised of his right to remain and that he has a right to a court-appointed lawyer if lacking sufficient funds to hire his own. These Miranda-type warnings must be given before any interrogation. In addition, all persons interrogated must be advised of the right to an interpreter. If the person requests counsel, no further questions may be asked until the attorney arrives or until two hours have passed at which time the questioning may begin again. As to the questioning of other witnesses, the code declares that measures for the protection of witnesses must be taken where justified, including provisions for anonymous witnesses.

Rights guaranteed under what would be the Fourth and Fifth Constitutional Amendments in the United States are code-based in Haiti. The key provisions are that evidence seized without a warrant is inadmissible. Warrants must be based on “reasonable motives.” The proposed code is very specific about the content of any warrant and the exceptions. For example,

immediate danger to a person in the place of search will excuse the necessity for a warrant. There is also a provision that law enforcement must avoid unnecessary modes of intrusion such as the “knock first” rule and restrictions on execution of warrants between 6 p.m. and 6 a.m. Also based upon “reasonable motives,” there are specified limitations on the search of a person or an automobile without a warrant.

Expert witnesses may be requested by the parties or the investigating judge. The procedures for the request are outlined in the Code. The provisions are very detailed, right down to the oath that the witness must take. The Code even specifies the medicolegal extent of autopsies. DNA examinations must be done pursuant to warrant.

In all criminal matters, the accused is first declared to be under “judicial control.” The preliminary judge (“juge de l’enquête et des libertés”) may impose a restriction from a long list of possible restraints upon the accused. All of those restrictions can be reviewed or modified upon demand, with special provisions for modification of pretrial conditions after the case has passed from the investigation to the trial stage, meaning after a finding of probable guilt has been made. The investigative judge may order pretrial detention in “exceptional” cases, where the accused is subject to at least three years of imprisonment upon conviction, or where the accused has violated the conditions of pretrial release. These decisions are subject to appeal. The detention cannot exceed “a reasonable duration,” which is defined as either four or six months depending on the seriousness of the crime, with the usual provisions for an extension if in conformity with a lengthy set of criteria.119

No witness is required to incriminate himself. Statements of witnesses made before trial are available to refresh a witness’ recollection, but may not be put to substantive use. In a section called “Rules of Evidence,” relevance is required and there are prohibitions against cumulative evidence, evidence unlawfully seized or coerced, privileged information, evidence of prior sexual behavior, un counselled confessions, and “proof which damages the integrity or equity of the proceedings or the rights of the accused.”

The court for minor offenses (“tribunal correctionnel”) will be composed of one judge. Cases will be placed on the docket pursuant to citation or garde à vue. Civil parties can use the criminal proceeding to sue for damages. A decision as to guilt or in-

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119. Conference notes and materials on file with author.
nocence will also include an amount for damages. More serious offenses will be tried in tribunaux criminels presided over by a judge or jury, as previously described. Verdicts are by majority vote. The least serious offenses ("contraventions") will be tried by justices of the peace. The judge of the investigatory phase cannot participate in the trial (incompatibilité). All trials and preliminary hearings are to be public and in the presence of the defendant. Audio or visual recording, in the judge’s discretion, is required unless there are “precise” written minutes.

Appellate rights are also set forth, providing not only an appeal of right but also that the appeal will be de novo and not simply restricted to a review of questions of law. The Code also makes provisions for writs of habeas corpus specifying when a prisoner must be released from custody, for extradition of defendants to other countries under international agreements, and for the special treatment of juveniles.

IX. INFRASTRUCTURE REFORM IN HAITI

It is obvious that any reform to the Criminal Law and Procedure Codes must be accompanied by training and increased capabilities by all justice actors. In the judiciary, the Superior Judiciary Council awaits a filling of eight vacancies, the Judicial Inspection Unit ("JIU") and the Academy for the Training of Judges ("École de la Magistrature") must be reorganized and strengthened. The Cour de cassation has a number of vacancies. All need both human and financial resources. As to the attorneys who will now take lead roles in the conduct of criminal cases, training in the new system, resources for adequate salaries and facilities, and coordination with the police and court personnel will be fundamental. This is particularly true if the guarantee of adequate defense counsel is to have any meaning. Since Haiti has no tradition of public defense, a public defender’s office composed of trained and adequately funded

120. See supra Part V.
121. KEEPING HAITI SAFE, supra note 9, at 1.
122. Id.
123. Id.
124. Trial judge salaries are estimated at between $400 and $500 per month. SECURITY CRISIS, supra note 86, at 3–4. Poorly compensated judges is a prime reason for corruption. See Salas, supra note 54, at 26–27.
personnel will be essential. Until now, the bar associations have been expected to provide pro bono counsel in criminal cases, however, in many areas of the country, there are no bar associations whatsoever. Where they do exist, support has been woefully inadequate.125

To acculturate the practicing bar to the new way of trying cases, there needs to be massive reeducation, starting in the law schools. Projects envisaging advocacy training in the law school curriculum should be encouraged. The bar associations, both in Port-au-Prince and in the principal political subdivisions, called départements, should also develop a variety of training programs to train its present members. Classes and tutorials in oral procedure, investigative techniques, direct and cross-examination, and legal argument would be necessary. Internationals can be of particular assistance in this aspect of training.

This is not to overlook the essential element that the office of the public prosecutor, through the Ministry of Justice or independently, must retool to oversee any reform process to assure its integrity.126 Key to the effective functioning of the party system is the independence of the prosecutor. As an organ of the executive, there could always be attempts at interference with prosecutorial authority in ways that would not even be attempted with the judiciary. Prosecutors will also have to be trained in investigative techniques and supervision of the investigating police. With little experience in actual investigation, one can anticipate a continuing over-reliance on defendant confessions. At some point, however, prosecutors will have to learn how to conduct on-the-scene forensic investigations independently and how to supervise the police, who will also need training.

As much hesitation as there is in Haiti about such a major transfer of power from the judge to the prosecutor, there is,

125. SECURITY CRISIS, supra note 86, at 5. At various times, there have been other programs designed to address the absence of defense counsel, including a U.S. Administration of Justice program in the last decade under which law students were trained to provide defense representation. The program failed for lack of supervision. Id. at 9–10. The International Legal Assistance Consortium (“ILAC”) has, over the years, begun pilot programs in various areas of the country to provide counsel or judicial assistance. Some of those programs still exist. See, e.g., Important ILAC Break-through in Haiti, INT’L LEGAL ASSISTANCE CONSORTIUM (Jan. 18, 2011), http://www.ilac.se/2011/01/18/important-ilac-break-through-in-haiti/.
126. KEEPING HAITI SAFE, supra note 9, at 11.
nonetheless, a consensus view the new code represents a major improvement in the human rights guarantees of the defendant. 127 Much of the success of the new Code will depend on the good will and talent of prosecutors who now must bring and possibly dismiss charges; honor all the constitutional and human rights provisions regarding search and seizure, preventive detention, and speedy trial; and supervise the investigating police in the collection and preservation of evidence. One can expect resistance from several quarters, including from the Haitian judicial police. 128 Haitian judicial authorities have traditionally operated largely as independent units—judge, prosecutor, and police—and not as components of a single system. 129

Justices of the peace in Haiti are the local judges who sit in judgment of all offenses that are not serious felonies. 130 The justices are normally not trained legal professionals. This results not only in a lack of uniformity but also in violations of fundamental human rights by justices who are insensitive to, or unschooled in, basic guarantees. This creates a particularly dangerous human rights situation since justices of the peace handle fully 80% of all cases outside Port-au-Prince. 131 To make matters worse, Haitian judicial authorities do not require that justices of the peace separate the judicial function from their other common role as judicial police (the double casquette). 132 There have been training programs for justices of the peace in the past—most of them unsuccessful attempts at creating a culture change in administration of local justice. This time, the training needs to be part of and simultaneous with a nationwide effort at broad reform so that the justices know that this is not just one more foreign attempt to change how they have always done things. 133

Since investigation of crime should eventually fall to the police (under prosecutorial supervision), whether it be the judicial

127. See Keeping Haiti Safe, supra note 9, at 10, and discussion supra Part VIII.
128. Keeping Haiti Safe, supra note 9, at 11.
129. Id.
130. Id. at 12.
132. Id.
133. Id. at 6–7.
police or other duly constituted enforcement agency, it goes without saying that training, equipment, and salary increases are absolutely necessary. For example, forensic evidence is virtually unknown in Haiti for lack of training and resources. Beyond that, if the prosecutors are to oversee investigation, working with the police and carrying cases through trial, there must be guarantees of independence and freedom from retaliation, professional or otherwise. One suggestion is that an Office of the Attorney General be created to oversee prosecutorial careers and their functioning within the trial and appellate system.  

Case management systems are noticeably absent as well. There is no uniform system for registering or filing cases or case records. There is no coordination between court administrators and the prison system. There is a lack of communication between the local centers and Port-au-Prince. Police have no way to know of a suspect’s criminal record. Prison authorities have no way to learn of court dates. For that matter, there is a lack of basic office supplies. Again, international assistance would be crucial, as it has been in many Latin countries, to establish a uniform records maintenance and communication system. In Haiti, however, there has traditionally been a reluctance to fund infrastructure because of concerns about sustainability.

Since much of this reform process centers on the political will to spend the resources necessary to give the criminal justice system a new foundation, it is noteworthy that the new President, Michel Martelly, has announced that he intends to respect the separation of powers between the executive and the judiciary and that, despite indications to the contrary, he believes the reforms to the justice sector should continue. In January 2012, President Martelly reconstituted the reform commissions, naming some new members, maintaining René

134. Keeping Haiti Safe, supra note 9, at 11.
136. There is a long history in Haiti of funding projects that do not result in any permanent changes but rather function only as long as the funding term. Id. at 4.
Magloire as vice-president, and continuing the mandate for two years.138 There is some degree of importance to the rapidity with which the reforms are instituted. This is a period of wholesale transformation in Haiti: in commerce, agriculture, government, labor, and housing. A complete reform of the criminal law and procedure system should be integrated into this era of change in the country. External funding is probably more available now and in the short-term than it will be in the long-term. Finding that the executive and the parliament are attuned to and capable of making major changes should be more attractive to funders than the piecemeal reforms that do little to address the kind of impunity that has endemically marked the system.139

X. DEVELOPING THE SOCIAL CONSENSUS

All parties in Haiti understand that the legal recognition of human and procedural rights does not at all guarantee their enforcement in practice.140 Several transition efforts in other countries of Latin America have at least temporarily halted because of the failure to recognize that any codification must be accompanied not only by structural reform, as discussed, but also be a wide-ranging campaign of public education and discussion.141 That discussion must be carried to the local level, which is where most people encounter the criminal justice system. At that level, there must be a series of town hall-type sessions, seminars, school programs, and even debates in civil society to not only understand the new Codes, but to recognize a new morality implicit in the Codes. In this aspect of the reform, as with the infrastructural reforms, the international community plays a key role but a role that must be directed by the Haitian actors at every stage.142

The Haitian people are accustomed to seeing flowery and enlightened prose in new laws emanating from Port-au-Prince.

139. KEEPING HAITI SAFE, supra note 9, at 11.
140. Stotzky, The Truth about Haiti, supra note 62, at 8.
141. Salas, supra note 54, at 44–45.
142. Stotzky, The Truth about Haiti, supra note 62, at 34.
What they are not accustomed to seeing is any attempt to ask their opinion about the changes and what those revisions mean for rebuilding the society according to a more humane and value-based model. Those discussions may raise the hopes and consciousness of the people enough to defeat endemic cynicism and give the reforms a chance to work. “[S]uch a consciousness, if fully rooted, constitutes the most permanent and efficacious barrier against the enemies of human dignity.”

The discussion of moral principles that govern us as citizens is an exciting one and should be even more exciting in a country like Haiti, which is only now seeing the importance of the dialogue. The debate in connection with this project entails not only parsing out the provisions, particularly the human rights guarantees, but also delving into the social constructs that inform the Codes. The concepts of “due process of law” can be placed in juxtaposition to the deprivations wreaked by the state’s coercive methods, which have, for years, dominated the political agenda. Notions of justice, truth, and impartiality should be resurrected to allow a sort of cleansing process, much like many nations have attempted in truth commissions.

In “advanced” democracies, elected representatives of the people, the media, the executive, and the courts normally lead the discussion. In Haiti, the discussion will be more difficult quite simply because that foundation of trust or confidence in the wisdom of leaders is almost entirely absent. The channels of participation must be widened. The debates must be sharpened, the discourse more rational. The deterioration of political parties hinders such discourse. The preference of the corporate interests in having their discussions with the government in private is a major disadvantage to both the Haitian people and a democratic reform process. The international community must be included but controlled. The draw of the charismatic leader is often dangerous as it leads to over-confidence among a people starving for honest and competent leadership. Finally, the tradition of dictatorship has in essence stifled the voice of all but a few of the Haitian people. The major motivating factor for this silence, which is the fear of the people in speaking out, must be overcome.

143. Id. at 9.
Haiti has never been a deliberative democracy. One can easily understand why, given the almost unfathomable series of indignities inflicted on the Haitian people. How can one rationally discuss a legal system when privation and need abound? How can the government expect support and cooperation from the people when the legitimacy and moral justification of the government is itself largely rejected? When public servants are perceived as corrupt and authoritarian, how can any legislative work-product gain popular acceptance? How can the international community be trusted when, for so long, other countries have exploited Haiti, its people and its land for profit? These are all impressive theoretical mountains to climb.

In Haiti, the criminal law and procedure system is more important than what appears on the surface. A popular discussion can succeed if the people agree that the system can be changed and that, at the end of the process, Haiti can take its place as a country governed by the rule of law. Popular discussions have happened before in Haiti. This time, that focus could be human rights and the criminal justice system. With the attention of the population and the government focused, the international community will finally understand that the Haitian people will not simply adopt the foreign vision of democracy. It is up to the Haitian people themselves to dictate the terms of their future. In the meantime, it is important for the international community to assist the reform process in a concrete way, but also to celebrate the dedication of the Haitian lawyers who still work today to institute a reform that is fundamental to rebuilding their country.

LESBIAN, GAY, BISEXUAL, TRANS, AND INTERSEX RIGHTS IN THE CARIBBEAN: USING REGIONAL BODIES TO ADVANCE CULTURALLY CHARGED HUMAN RIGHTS

Toni Holness*

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INTRODUCTION

With a rising reputation for violent homophobia and an equally disturbing record of homophobic violence, the Caribbean—its music and its culture—seems to grow less synonymous with Bob Marley’s lyrical “one love” and more reminiscent of hate. International human rights advocates seeking to safeguard the human rights of sexual minorities in the Caribbean have come to expect cultural resistance from government leaders, perpetrators of human rights abuses, and even local populations. The Caribbean’s apprehension to Lesbian, Gay, Bisexual, Trans, and Intersex (“LGBTI”) rights advocacy is deeply rooted in the region’s tragically oppressive colonial experience, and often advocates disparage this cultural resistance as a cumbersome and irritating barrier to ensuring human rights. As an initial matter, this paper recognizes the value of cultural resistance and presupposes the region’s apprehension to be a healthy and indispensable survival mecha-
nism. Having been enslaved, inhumanely subordinated, and stripped of its dignity, the Caribbean simply must guard its autonomy closely. To be effective, human rights advocates must respect the region’s autonomy, and instead of attempting to subdue this cultural resistance, advocates must strategize efforts that take account for cultural sensitivities and resistances. This article proposes one such strategy—the use of regional bodies to advance LGBTI rights in the Caribbean.

This Article considers the use of regional bodies as an avenue for advancing LGBTI rights in the Caribbean, and more broadly, the use of regional bodies for advancing other culturally charged human rights advocacy. The purpose of this Article is not to glorify the Caribbean’s regional bodies, but rather to be purely pragmatic—it responds to the challenges facing international LGBTI advocates seeking to make real change on the ground and thereby safeguard the fundamental human rights of LGBTI communities in the Caribbean.

Part I of the Article demonstrates the importance of LGBTI human rights advocacy in the Caribbean by taking stock of the dire and often worsening realities for LGBTI communities in the Caribbean. Part II gives the reader a broader context within which to consider the arguments advanced by discussing other manifestations of culturally charged human rights abuse and the accompanying philosophical debate around cultural relativism and universalism. Parts III and IV discuss the inadequacies of direct advocacy targeting LGBTI hostile states and the shortcomings of global LGBTI advocacy, respectively. Part V demonstrates the advantages of employing regional bodies to advance LGBTI rights in the Caribbean. Part VI addresses the anticipated counter-argument against regionalism—the concern for regional insularism, which theoretically may allow the region to insulate itself against outside interference and thereby become even more entrenched in its homophobic ways and immune to outside advocacy efforts. Part VII of the Article proposes avenues for international advocates to support LGBTI human rights through regional entities in the Caribbean. Finally, Part VIII recognizes the limitations of the research and concludes.
I. CURRENT STATE OF LGBTI RIGHTS IN THE CARIBBEAN

LGBTI movements in Latin America have reportedly enjoyed an “astonishing record” of recent success. However, despite Latin America’s success, its regional neighbors in the Caribbean have seen less progress for LGBTI communities. At least thirteen of the Caribbean Community’s (“CARICOM”) fifteen states continue to criminalize same-sex conduct under anti-sodomy statutes, and the region shows particular resistance to any foreign suggestions to repeal these laws. In addition to clinging to its homophobic laws, the Caribbean continues to resist any social or cultural human rights advocacy. To exacerbate the problem, as sexual freedoms in the Caribbean and the wider global south continue to suffer, the resources necessary for defending human rights are dwindling.

Homophobia in the Caribbean manifests itself in at least three contemporary modalities: law, music, and mob violence. Many former colonial territories in the Caribbean retain a colonial legacy of the British Imperial anti-sodomy law. For example, sections 76, 77, and 79 of the Jamaican Offences against the Person Act are derived from the British Imperial law and criminalize sex between consenting adult men. This colonial legacy will be discussed further in subsequent sections. The region’s characteristic reggae music has gained notoriety for its homophobic lyrical content, which sometimes advocates violence against the LGBTI community. Many reggae artists have been boycotted by international rights groups and in some cases the music genre has itself been blacklisted.

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3. See id. at 41.
4. Id.
5. Id.
6. Id. at 5.
7. See generally Human Rights Watch, This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism (2008) [hereinafter Human Rights Watch, This Alien Legacy].
10. See Join GLAAD in Calling on the Recording Academy to Denounce Music that Promotes Murder, GLAAD (Jan. 29, 2010),
Of greatest concern to LGBTI rights advocates are the frequent instances of violence against LGBTI persons in the Caribbean. In Jamaica, homophobic violence has increased and the government has often espoused an apologist view, permitting homophobic violence to continue unchecked. A 2004 Human Rights Watch report documented numerous accounts of mob violence against perceived gay Jamaicans, noting that instead of protecting victims of violence, the Jamaican police force sometimes participates in the violence. For example, one afternoon in 2004, a mob chased and reportedly chopped, stabbed, and stoned to death a suspected gay man. Nearby police officers first beat the victim with batons and then urged others to beat him as well.

II. A BROADER DISCUSSION OF CULTURALLY CHARGED HUMAN RIGHTS ADVOCACY

This Article advocates the use of regional bodies as an avenue for furthering LGBTI rights in the Caribbean. Importantly, this Article sits within a broader realm of literature concerning culturally charged human rights advocacy toward the global south and human rights abuses perpetrated in the name of culture. The next few paragraphs explore the intersection of human rights abuses and cultural norms by honing in on two controversial cultural practices: female circumcision and stoning.

At the outset, the competing notions of cultural relativism and universalism must be addressed. The universalist school of thought embraces a baseline set of human rights principles from which no cultural or religious group may deviate.
universalist advocates, instruments such as the Universal Declaration of Human Rights ("Universal Declaration") symbolize a fundamental baseline of inalienable rights.\textsuperscript{16}

Opposite the universalist doctrine sits the cultural relativist camp, which emphasizes the right to cultural and religious autonomy, even if that autonomy protects practices that would otherwise be considered human rights abuses.\textsuperscript{17} At its extreme, this doctrine holds that cultural variations are exempt from legitimate criticism by persons outside that particular cultural group.\textsuperscript{18} Cultural relativists typically view instruments such as the Universal Declaration to be non-universal and mere codifications of distinctively Western and Judeo-Christian cultural biases.\textsuperscript{19} Cultural relativists regularly accuse universalists of imposing neo-imperialist standards on non-Western communities and thereby re-dominating developing nations by imposing yet another set of alien norms.\textsuperscript{20} Whereas universalists can be expected to label the cultural relativists as apologist and ineffective in tackling human rights abuses.

Consider now the application of both schools of thought to the harsh and often fatal realities of female circumcision and stoning practices. Female circumcision and stoning practices force advocates to strategize efforts to address human rights abuses when these abuses are carried out in the name of religious or cultural freedom.

Turning to the issue of female circumcision,\textsuperscript{21} gender rights advocates and universalists advocate for the elimination of the

\textsuperscript{16} Id.


\textsuperscript{18} Id.

\textsuperscript{19} Id.


\textsuperscript{21} Zsaleh E. Harivandi, \textit{Invisible and Involuntary: Female Genital Mutilation as a Basis for Asylum}, 95 Cornell L. Rev. 599, 601 (2010) (defining female circumcision as the practice of cutting the genitalia of women and girls). Note that the term is a loaded one as it is usually used by proponents of the practice. Other terms, such as ‘genital mutilation’ or ‘female genital cutting’ refer to the same practice and are used by opponents of the practice. Because this Article’s focus is pragmatic and not ideological, the use of ‘female circumcision’ does not imply that the practice is or should be accepted.
practice, holding it to be in direct contravention of fundamental human rights.\textsuperscript{22} However, the practice continues to be defended largely on the grounds of cultural identity, custom, and indigenous traditions.\textsuperscript{23} The universalist approach to targeting genital mutilation has been largely ineffective because of its hard-line stance against the practice. For example, when the United Nations initiated a campaign to address genital mutilation in the 1980s, the Inter-Africa Committee (“the Committee”) was formed from among twenty-one African states with the purpose of abolishing the practice.\textsuperscript{24} The Committee’s hard stance against the practice rendered its efforts fruitless.\textsuperscript{25} Even upon its formation, the Committee was warned against “untimely haste, which would result in rash legal measures that would never be enforced.”\textsuperscript{26} Subsequently, a majority of the Committee’s measures have failed.\textsuperscript{27}

The experience of the Committee is not uncommon; the World Health Organization and the United Nations Children’s Fund (“UNICEF”) re-ignited the Committee’s efforts in 1997 by issuing a joint statement calling upon states parties to take all effective and appropriate measures to abolish the practice.\textsuperscript{28} Following the statement, the U.N. issued a three-year campaign to eliminate the practice in 1998.\textsuperscript{29} Like the Inter-Africa Committee, these efforts were largely ineffective—in some cases the sweeping statements against circumcision had no impact, but in other countries the campaign incited defensiveness and protest.\textsuperscript{30}

\textsuperscript{22} See, e.g., World Health Organization Fact Sheet No. 241—Female Genital Mutilation, http://www.who.int/mediacentre/factsheets/fs241/en/ (last visited Mar. 26, 2013) In this fact sheet, the WHO seems to take the universalist approach, stating “FGM is a violation of the human rights of girls and women.”

\textsuperscript{23} Amnesty International, What is Female Genital Mutilation? §1, 4–5 (1997).

\textsuperscript{24} Susan A. Dillon, Comment, Healing the Sacred Yoni in the Land of Isis: Female Genital Mutilation is Banned (again) in Egypt, 22 Hous. J. Int’l L. 289, 300 (2000).

\textsuperscript{25} Kirsten Bowman, Bridging the Gap in the Hopes of Ending Female Genital Cutting, 3 Santa Clara J. Int’l L. 132, 154 (2005).

\textsuperscript{26} Dillon, supra note 24, at 300.

\textsuperscript{27} Bowman, supra note 25, at 154.

\textsuperscript{28} World Health Organization, Eliminating Female Genital Mutilation: An Interagency Statement 3, 8 (2008).

\textsuperscript{29} Dillon, supra note 24, at 301.

\textsuperscript{30} Bowman, supra note 25, at 154–55.
However, the cultural relativist camp cannot be credited with any more success in the struggle to safeguard the rights of women in communities practicing female circumcision. One advocate for the organization Women Living Under Muslim Laws critiqued the relativist position, pointing out that “everything can be tolerated in the name of culture.” 31 One scholar notes that cultural relativism can be, and has been, employed to defend torture, slavery, and other now-universally disparaged human rights abuses. 32 In short, the strategy of cultural relativists is more or less a non-strategy, since these advocates, at their extreme, believe that cultures have the right to exist in a vacuum, without outside interference. Moreover, cultural relativism perceives culture to be a static concept that must be preserved in its original form in order to retain authenticity. However, anthropologists agree that cultural norms are dynamic systems that are no less authentic despite their evolution to embrace human rights norms. 33 In fact, many communities that once practiced female circumcision now denounce the practice. 34 Therefore, the experience of female circumcision advocates evidences the need for a more nuanced advocacy strategy toward safeguarding culturally charged human rights.

Stoning practices offer a similar example. In several Muslim communities, death by stoning is a legitimate punishment for religious offenses, most often adultery. 35 The punishment is executed in what is likely the harshest manner imaginable. The offender is often a woman accused of having an extramarital

33. Id. See also Amber Rose Maltbie, When the Veil and the Vote Collide: Enhancing Muslim Women’s Rights Through Electoral Reform, 41 MCGEORGE L. REV. 967, 967 (2010) (“In the last two decades, centuries-old monarchies in the Middle East have begun to shift toward more open societies by integrating democratic rights into their laws. In an exciting move by a number of these parliaments and monarchs, women have been granted suffrage throughout the region. Qatar, Bahrain, Oman, Kuwait, and, to a limited extent, the United Arab Emirates (UAE), have each granted suffrage to women since the beginning of the Twenty-First Century.”).
35. Id. (noting that stoning is still a legal form of capital punishment in some states).
affair or conducting another form of intimate betrayal, purportedly against her husband, family, and community.\textsuperscript{36} The woman is brought to an open area, a town square, sporting arena, or marketplace and lowered into a hole in the ground. Only her head remains exposed.\textsuperscript{37} Onlookers, sometimes including the woman’s father, brothers, cousins, uncles, and neighbors, are invited to implement God’s punishment by hurling rocks at her head until she is lifeless.\textsuperscript{38}

Communities that engage in stoning defend the practice on the grounds of religious and cultural autonomy, and will readily demonstrate the procedural and systematic judicial mechanisms through which guilt is determined and punishment is exacted.\textsuperscript{39} In some instances, female community members endorse the practice; one scholar noted that even mothers whose daughters had been stoned to death expressed no remorse, believing that their daughters deserved their fatal punishment.\textsuperscript{40}

Universalists take a strict stance against honor killings, denouncing the practice as intolerable in all instances and advocating for a categorical ban against the practice as a violation of the universal principles of human rights. This sweeping advocacy, although brave and resolute, may ultimately prove ineffective. The drafting of the Universal Declaration gives us an example of such sweeping advocacy, and the aversion of Muslim leaders to the instrument illustrates the ineffectiveness of a hardline advocacy strategy. During the drafting of the Universal Declaration, representatives from Islamic states opposed those clauses averse to Islamic traditions, such as polygamy.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{36} See Shannon V. Barrow, \textit{Nigerian Justice: Death-by-Stoning Sentence Reveals Empty Promises to the State and the International Community}, 17 EMORY INT’L L. REV. 1203–04 (Fall 2003) (vividly describing the stoning ritual).
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Rachel A. Ruane, \textit{Murder in the Name of Honor: Violence against Women in Jordan and Pakistan}, 14 EMORY INT’L L. REV. 1523, 1568 (2000) (“Increasingly, government actors are using cultural relativist claims to avoid responsibility for private acts of violence against women.”).
\item \textsuperscript{40} Radhika Coomaraswamy, \textit{Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women}, 34 GEO. WASH. INT’L L. REV. 483, 496 (2002).
\item \textsuperscript{41} Jaclyn Ling-Chien Neo, \textit{“Anti-God, Anti-Muslim and Anti-Quran”: Expanding the Range of Participants and Parameters in Discourse over Women’s Rights and Islam in Malaysia}, 21 UCLA PAC. BASIN L.J. 29, 37 (2003).
\end{itemize}
The Saudi Arabian delegate altogether abstained from the final vote because he, and many other Muslim leaders, viewed the Universal Declaration as Western ideology and non-inclusive of Islamic traditions. From this result it is clear that, like genital mutilation, the universalist approach may be similarly ineffective in addressing stoning and other culturally charged human rights abuses.

As was the case with genital mutilation, the relativist approach to stoning is again ineffective and ignores the evolving nature of culture and religion. A relativist advocate would tolerate stoning as the autonomous religious and cultural practice of Muslim communities. This approach is largely ineffective because first, it espouses tolerance to the point of inaction. Second, cultural relativism ignores the malleable and evolving nature of religion and culture. The Muslim religion is in fact evolving toward intolerance of stoning, and this evolution does not erode the religion’s authenticity. In fact, many liberal Muslims consider stoning and other forms of violence to be un-Islamic. For example, Iran enacted a ban on stoning and many Muslim leaders see the practice as an embarrassment to the religion, recognizing the need to evolve with social changes. Therefore, the relativist approach ignores the legitimate malleability of religious traditions, and in doing so, may be failing the human rights community, particularly victims of human rights abuses.

The preceding discussion demonstrates the nuances of culturally charged human rights advocacy and the challenges accompanying both universalist and relativist approaches. The experience of anti-genital mutilation and stoning advocates evidence these difficulties. The preceding discussion also demonstrates the nuances of culturally charged human rights abuses and the minefield of political incorrectness and cultural backlash facing advocates. Therefore, it is clear that advocates hoping to advocate effectively against culturally charged human rights abuse must be strategic in their efforts. The remainder of this Article discusses various advocacy strategies and argues that regional bodies are best situated to account for the nuances of culturally charged human rights abuses. In particular, the

42. Id.
43. Kielsgard, supra note 34, at 471–72.
44. Id. at 471.
Caribbean Court of Justice and the Inter-American Commission of Human Rights are the best forums for addressing LGBTI human rights abuses in the Caribbean.

III. SHORTCOMINGS OF DIRECT ADVOCACY TOWARD LGBTI HOSTILE STATES

Before discussing the advantages of regional bodies for advancing human rights norms, we must first consider the shortcomings of direct advocacy by international LGBTI advocates targeting state leaders and homophobic or transphobic agencies or persons in a country.

International direct advocacy targeting LGBTI hostile actors often fails for at least two reasons. First, direct advocacy can be, and often is, readily rejected as cultural imperialism. Consequently, the LGBTI norms being advanced through international direct advocacy are categorically rejected as foreign norms, alien to the local population. Many LGBTI-hostile communities consider LGBTI rights advocacy to be a form of cultural imperialism. For example, Ghanaian government officials have advanced the cultural relativist argument in resistance to LGBTI rights advocacy, claiming “Ghanaians are unique people whose culture, morality and heritage totally abhor homosexual and lesbian practices and indeed any other form of unnatural sexual acts.”

Many Jamaicans also respond to pressure from LGBTI rights movements by viewing such demands as “foreign.” This perception of cultural imperialism had real effects for the Caribbean’s LGBTI population when the United Kingdom Privy Council demanded an elimination of local anti-gay laws. Caribbean states refused to comply with the Privy Council ruling, arguing that homosexuality was

46. Nelson, supra note 9, at 255.
immoral and “against their culture and religions.” As such, LGBTI advocacy aimed directly at local Caribbean populations has failed and will likely continue to be ineffective in bringing about actual change.

The second drawback of direct advocacy is its potential to compromise the efforts of local LGBTI advocates and invite retaliation against local LGBTI communities. Direct advocacy efforts from the international community targeting local Caribbean populations have a strong potential to muddy the waters by branding the LGBTI movement as a foreign agenda. Belizean LGBTI advocates suffered exactly this blow just as their advocacy efforts were taking flight in 2012. Local advocates campaigned against the Belizean criminal code, which criminalizes homosexual conduct. Simultaneously, London-based LGBTI activists launched a campaign targeting Belize and a host of other states in which consensual same sex conduct was criminalized. The local Belizean community quickly took notice of the foreigners’ presence and launched a vociferous counter campaign. Religious opponents of the LGBTI movement said “The people of Belize will not surrender our constitution, our moral foundations, and our way of life to predatory foreign interests.” As a result, the foreigners’ campaign stunted the Belizean LGBTI rights movement by tainting the movement as a foreign import, rather than a grassroots Belizean effort.

Yet another example of failed direct advocacy occurred in Jamaica in 2009 when a United States-based LGBTI lobby group launched a campaign to boycott Jamaican products, such as Red Stripe Beer. The campaign’s purported purpose was to pressure the Jamaican government to show greater respect for the rights of sexual minorities. The Jamaica Forum for Lesbians, All-Sexuals, and Gays (“J-FLAG”), the nation’s leading advocacy voice for sexual minorities, criticized the boycott as inef-

49. Id.
51. Id.
52. Id.
54. See id.
fective and ignorant to the local dynamic. Among other factors, J-FLAG noted that Red Stripe had actually supported the LGBTI community by withdrawing corporate support for homophobic entertainers. In fact, J-FLAG had advised the United States-based campaign against moving forward with the boycott, but the U.S. activists chose to disregard the interests of the local LGBTI community. In a statement against the boycott, J-FLAG described the foreign campaign’s toll on local advocacy efforts:

The misguided targeting of Red Stripe does tremendous damage to a process of change that we began almost 11 years ago. The boycott call has now left us not only with our persistent day to day challenges but with a need to engage Red Stripe and attempt damage control as a result of actions that we did not take.

Like the Belizean experience, foreign advocacy directly targeting Jamaica was not only ineffective, but actually reversed the progress of local LGBTI advocacy efforts.

Although regionally dissimilar, Ugandan LGBTI activists experienced similar setbacks when an Internet hacking group, Anonymous, hijacked a Ugandan government website and posted on it a pro-LGBTI message, including:

Your violations of the rights of LGBT people have disgusted us. ALL people have the right to live in dignity free from the repression of someone else’s political and religious beliefs. You should be PROUD of your LGBT citizens, because they clearly have more balls than you will ever have.

Val Kalende, a well-known Ugandan LGBTI activist expressed concern for “the manner in which Anonymous claim to speak on behalf of Uganda LGBT activists with no consultation

55. See id.
56. See id.
57. See id.
whatsoever.” Furthermore, Kalende noted, “Those well-meaning interventions can cause severe backlash for activists on the ground.” Another online comment criticized the Internet hack because Anonymous “presumed to place themselves—outsiders with little at stake—as the protector and [defender] of Uganda’s LGBT community.”

The experiences of Belizean, Jamaican, and Ugandan LGBTI advocates demonstrate the limitations of international direct advocacy aimed at LGBTI hostile states and therefore demand that foreign advocates employ other advocacy strategies for supporting local LGBTI rights.

IV. SHORTCOMINGS OF GLOBAL LGBTI HUMAN RIGHTS ADVOCACY

LGBTI advocacy efforts on the global scale prove ineffective for the same reasons that universalist approaches generally come up short—the global LGBTI rights dialogue continues to be dominated by the few elite voices of Western Europe and the United States. As a result, global human rights bodies enjoy limited buy-in from the developing world. The developing world’s lack of engagement was perhaps first evident in the drafting of the Universal Declaration. The Saudi Arabian delegate to the U.N. criticized the Universal Declaration for including “only the standards [recognized] by Western civilization.” As a result, the Universal Declaration is largely viewed as being comprised of Westernized norms, foreign to the developing world. Similarly, LGBTI rights advocacy on the global scale will also receive little buy-in from the developing world, which already views LGBTI rights to be foreign norms.

V. ADVANTAGES OF USING REGIONAL BODIES TO ADVANCE LGBTI RIGHTS IN THE CARIBBEAN

Taking account for the above-discussed limitations of direct LGBTI advocacy and global LGBTI advocacy, regional bodies


61. Id.


63. Ling-Chien Neo, supra note 41, at 37.
are more suitable forums for advancing LGBTI rights for at least four reasons. First, the lower membership rates of regional bodies substantially reduce collective action obstacles and therefore allow state participants to reach consensus agreements more quickly. Second, cultural similarities among regional neighbors make it easier for neighboring states within a region to reach a consensus agreement for moving forward with human rights progress. Third, participants in regional bodies enjoy more equitable power dynamics, which in turn creates a more balanced power dynamic for collectively bargaining for human rights advances. Finally, the geographic accessibility and low transaction costs of regional bodies allow local LGBTI communities to play a more instrumental role in advocating for the human rights protections that affect their lives.

A. Collective Action Obstacles Are Substantially Reduced with the Lower Number of State Participants

Regional organizations necessarily enjoy a smaller membership pool than global bodies, such as the United Nations. This lower membership renders regional bodies more ideal for advancing culturally sensitive human rights advocacy. Legal scholars have long studied the collective action obstacles associated with large group involvement. There are at least three easily identifiable advantages of using smaller regional bodies instead of larger, global organizations to advance culturally charged human rights. First, fewer participants mean fewer voices at the negotiating table and therefore fewer interests that must be reconciled to produce a consensus result. Particularly with regard to policy decisions, the presence of fewer participants implies less discordance among member opinions and therefore a greater probability of reaching an agreement.64 Second, organizations with fewer members experience lower rates of free ridership. The term free rider refers to a participant who fails to contribute to the group’s work, but nonethe-

64. See Jed S. Ela, Law and Norms in Collective Action: Maximizing Social Influence to Minimize Carbon Emissions, 27 UCLA J. ENVTL. L. & POL’Y 93, 97 (2009) (“[W]hen it comes to social norms solving collective action problems, it seems that size matters: smaller groups are better, while the largest ones may be hopeless.”).
less benefits from the group’s progress. In smaller groups, the participation and contribution of individuals is more readily apparent and measurable. Therefore, in smaller groups, members are more likely to genuinely participate and contribute to the organization’s mission. Smaller membership rates also boost the ability of members to coerce noncompliant members into complying.

Although the notion of freeriding is typically discussed in the realm of international trade or security, it is also possible to have free riding in the human rights arena. An emerging consensus recognizes that respect for human rights norms cultivates measures of stability, such as conflict-prevention and market participation. Accordingly, the failure to uphold human rights norms while benefiting from the resultant stability of other states’ compliance constitutes a form of free riding. Therefore, a state’s failure to respect LGBTI rights, while enjoying the stability it cultivates is a form of free riding. A very concrete example of this exists in immigration law. Some LGBTI-friendly states grant refuge to individuals who suffered persecution on the basis of their LGBTI status. The home countries from which these persecuted individuals are driven indirectly benefit from the receiving country’s respect for

65. A “free rider” is someone who “obtains an economic benefit at another’s expense without contributing to it.” BLACK’S LAW DICTIONARY 676 (7th ed. 1999)


67. Id.

68. For example, non-participating states free ride (i.e., benefit from without contributing to) international trade and security measures. See, e.g., Kenneth Anderson, United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations, 10 CHI. J. INT’L L. 55, 68 (2009) (discussing the free-ridership problem facing NATO).


70. Id.

In this sense, the home country free rides on the LGBTI rights compliance of other nations.

This and other manifestations of human rights free riding are less likely in smaller groups, which are better able to monitor compliance. For this reason, smaller, regional bodies are more ideal for advancing LGBTI rights advocacy, as compared with universal bodies such as the United Nations.

Third, smaller groups enjoy lower transaction costs and members perceive greater rewards than do members of larger groups. Even at first glance, the logistical cost of organizing the international community far exceeds the costs of organizing the members of a regional group. These costs include communication expenses, such as telephone costs and in-person conferences, which are typically lower when states need only travel to neighboring countries, as opposed to the U.N. headquarters. With regard to the perceived benefits, members of smaller groups also perceive a greater stake in the outcome of the negotiations because there are fewer participants. Therefore, smaller groups generally enjoy greater success in reaching policy agreements and this likelihood of success can be employed to the advantage of international human rights advocacy. Looking specifically to the various regional organizations that are available to advocates attempting to advance LGBTI rights in the Caribbean, we can consider the Organization of American States (“OAS”) and CARICOM. The OAS boasts the participation of all thirty-five independent countries of the Americas. CARICOM enjoys the participation of twenty members and associate members. The OAS is headquartered in Washington, D.C., and has as its judicial arm the Inter-American Commission on Human Rights (“IACHR”). CARICOM’s judicial organ is the Caribbean Court of Justice (“CCJ” or “Caribbean Court”),

73. Id.
74. Laughlin, supra note 66, at 484.
discussed in more detail in Part VI below. Therefore, for our discussion, the IACHR and CCJ are most relevant. Given their focus on human rights and their lower membership rates, these bodies present more ideal forums for advancing LGBTI rights, compared with the U.N.

B. Regional Similarities Make it Easier to Negotiate Common Ground and Reach Human Rights Agreements

Although the sheer numbers speak to the advantage of smaller regional bodies, the sociocultural commonalities among regional neighbors also render regional bodies more amenable to reaching culturally charged agreements. Similarities in ethnic, cultural, and religious beliefs, as well as shared histories and socio-political resemblances bolster the capacity of regional neighbors to reach agreements, especially regarding culturally charged matters such as LGBTI rights. In the Caribbean, the religious and legal similarities of the region’s states are particularly relevant.

The shared colonial history of Caribbean countries is an appropriate starting point. With regard to LGBTI rights, this shared colonial history brought a shared inheritance of homophobic laws. As of 2008, more than eighty nations criminalized consensual homosexual conduct and more than half of these countries inherited their anti-sodomy laws from former colonial powers.78 The specific provision at issue here is Section 377 of the British penal code, which states:

Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.79

Section 377 was “a colonial attempt to set standards of behavior, both to reform the colonized and to protect the colonizers against moral lapses.” 80 It became a model penal code for the British territories, influencing Asia, the Pacific Islands, Africa, and almost all former British colonial territories. 81 Many of these British territorial laws went as far as to prescribe

78. HUMAN RIGHTS WATCH, THIS ALIEN LEGACY, supra note 7, at 4–5.
79. Id. at 18.
80. Id. at 5.
81. Id.
death for sodomy.\textsuperscript{82} Although the penal systems of the respective territories of the British Empire varied somewhat, most are rooted in Section 377 and homophobic laws persisted even after countries gained independence from the British Empire.\textsuperscript{83} Ironically, some Caribbean cultures generally deride remnants of colonialism, but nonetheless embrace their colonial penal laws “as if the colonial masters were still looking on, as if to convey legitimate claims to being civilized.”\textsuperscript{84}

Alongside the legislative legacy of colonialism came a religious legacy. This religious, primarily Christian, legacy is especially relevant in light of the faith-based justifications for homophobia. Colonial powers forcefully used religion as a means of subordinating the peoples of the Caribbean and other colonized territories. Not only was Christianity imposed upon Caribbean peoples, but in fact, their African-based religions were actively persecuted as an integral part of the Trans-Atlantic slave trade.\textsuperscript{85} For example, in Haiti, African magic was strictly prohibited under colonial order, which drove the Voodoo religion underground; it was practiced at night to avoid punishment.\textsuperscript{86} Slaves found practicing Voodoo were subject to beating, hanging, or imprisonment.\textsuperscript{87} Additionally, legislation in Barbados imposed execution or exile for the practice of African religions until the nineteenth century.\textsuperscript{88} The religious oppression and forced conversion to Christianity has severely disadvantaged the LGBTI population of the Caribbean. Some historians have noted that particularly in the former British territories, “Christian-based homophobia has damaged many cultures in which sexual contacts and relationships between men and between women used to be tolerated and even accepted.”\textsuperscript{89} For example,


\textsuperscript{84} Nelson, \textit{supra} note 9, at 260–61.


\textsuperscript{86} Id. at 218.

\textsuperscript{87} Id.

\textsuperscript{88} Id.

in Uganda, now notorious for homophobic violence, many Ugandans have reported that homosexuality has been historically tolerated in their villages.90

It should also be noted that Christian influences are not entirely distinct from the colonial legislative legacy. In fact, the Christian Bible largely laid the foundation for British common law91 and continues to influence perceptions of homosexuality.92 Judicial decision making, as recently as the late-nineteenth century, deferred to Christianity as the source of law.93 The legal term “sodomy” is itself a Biblical reference to the cities of Sodom and Gomorrah, which were allegedly destroyed by God as an act of purging sexual deviation.94

It is important to note here that although indigenous forms of homophobia may have predated colonialism, documentation and historical records evidencing historical indigenous homophobia remain elusive. Moreover, the earliest record of homophobia may be the homophobia espoused by slave-owners who incentivized heterosexuality for the profitable purpose of procreation to produce more slaves. Even this early homophobia is sourced in colonialism and is not indigenous to the Caribbean.95 Therefore, without concrete evidence of indigenous homophobia, this Article assumes that homophobia is not indigenous to the Caribbean.

The benefits of regional, cultural, and religious similarities became evident in Brazil’s 2003 attempt to pass a Resolution on Human Rights and Sexual Orientation in the U.N. Commis-

91. James Wilets, Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective, 60 ALB. L. REV. 989, 1028 (1997) (“In Asia and Africa the extensive list of countries with sodomy laws can be traced back to the lingering effects of colonialism and Christianity, Islam, and Marxist-Leninism.”).
94. See Genesis 19:1–38.
95. Nelson, supra note 9, at 258.
sion on Human Rights ("The Brazil Resolution").\textsuperscript{96} The Brazil Resolution simply reaffirmed preexisting international legal rights for sexual minorities; it did not seek to add any new rights to existing international jurisprudence. The resolution expressed "deep concern at the occurrence of violations of human rights all over the world against persons based on . . . their sexual orientation," and stressed that "human rights and fundamental freedoms . . . should not be hindered in any way on the grounds of sexual orientation."\textsuperscript{97}

The global discord on LGBTI rights was one of the primary forces causing the demise of the resolution. Islamic and Christian-influenced states, including the Holy See, formed a vociferous alliance opposing the measure based on religious grounds.\textsuperscript{98} Therefore, Brazil's attempt to establish a global LGBTI rights instrument failed largely because of the religious discord of the world's nations. Regions like the Caribbean do not experience such religious diversity and are therefore better able to reach an agreement on LGBTI rights without having to overcome such extreme religious diversity.

The Caribbean's shared sociocultural characteristics enhance the region's ability to reach consensus LGBTI human rights agreements for at least two reasons. First, Caribbean states experience largely the same contemporary cultural manifestations of homophobia—homophobic music and mob violence. The shared homophobic indicators allow advocates to narrowly tailor human rights strategies to address the region's shared social ills. The myriad and diverse homophobic manifestations occurring worldwide force international advocates to take a more dilute, broad-based or catchall advocacy approach in order to address all forms of homophobia. The particularized homophobic expressions of the Caribbean allow advocates to narrowly tailor their efforts to address these specific social expressions and thereby design and execute a more effective LGBTI rights campaign. A regional advocacy strategy that employs bodies such as the Inter-American Commission on Human

\begin{itemize}
\item \textsuperscript{96} U.N. HUMAN RIGHTS COMMISSION, RESOLUTION ON SEXUAL ORIENTATION AND HUMAN RIGHTS 3 (Apr. 25, 2003), http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/213-1.pdf.
\item \textsuperscript{97} Id.
\end{itemize}
Rights and the Caribbean Court can dedicate itself exclusively to targeting homophobic music and violence. Whereas an international body, like the U.N., is forced to cast a wider, more dilute strategic net, in order to address the many sources and manifestations of worldwide homophobia.

In addition to the contemporary expressions of homophobia, the Caribbean’s shared colonial legacy of anti-sodomy laws presents another, more historic and entrenched, common denominator. At first glance, the region’s anti-sodomy laws paint a dismal picture for LGBTI advocates. However, the imperialistic source of the laws can and has been employed as an advocacy strategy. Time and again, J-FLAG and other advocacy groups strive to raise local awareness of the culturally imperialistic nature of the laws—demonstrating that these laws, far from indigenous, were actually implanted by the former British rulers. Therefore, the region’s shared source of anti-sodomy laws offers advocates the opportunity to take a tailored approach to address the singular root of the region’s homophobic laws—the British imperial legacy.

C. Regional Bodies Enjoy More Equitable Power Dynamics, Which Promote Collective Bargaining

The vast power differential among the world’s nations creates a coercive environment in which to conduct global negotiations regarding human rights. Regions, however, especially Latin America and the Caribbean, enjoy greater socioeconomic likeness. To understand the gravity of global economic disparity, one need only consider that the world’s richest 250 persons control as much wealth as the world’s poorest 2.5 billion.99 Consider also that economic disparity between countries has increased in the last century.100 One measure of global socioeconomic disparity is the United Nations Development Program’s (“UNDP”) Human Development Indicator (“HDI”).101 The HDI

101. FRANCES P. HADFIELD, RECENT CUSTOMS LITIGATION DEVELOPMENTS AND THEIR IMPACT ON THE ADMINISTRATIVE PRACTICE n.3 (Feb. 25, 2010), available
of a nation is a composite measure of life expectancy, educational attainment, and income. The HDI is considered a breakthrough measurement because of its capacity to represent both social and economic development in a single statistic. Even a cursory look at the UNDP’s graphical representation of the world’s HDIs shows that the world’s nations vary widely in socioeconomic progress (see Appendix I). However, the HDI trends for Latin American and Caribbean nations seem to progress in lockstep, resulting in a more balanced socioeconomic power dynamic (see Appendix II). The Latin American-Caribbean region enjoys far less economic disparity as compared with the world.

Latin America and the Caribbean’s socioeconomic similarities make the region a better forum for LGBTI advocacy because it enjoys a more level playing field. In contrast, the stark power differences between the world’s nations undermines global human rights advocacy in at least two respects. First, less powerful, developing nations have little or no ability to enforce compliance. Second, developing nations do not enjoy the same level of participation in the international norm-development process due to structural biases. These two factors weaken whatever human rights advances global bodies are able to achieve.

Regarding non-compliance, global human rights mechanisms subject developing nations to enforcement by more powerful countries, but leave these nations toothless to demand compliance by powerful countries. With developing countries making up the majority of the world’s states, scholars have noted the clear dysfunction of a system that deprives the majority of members from obtaining compliance from other members. For example, the United States often promotes the enforcement of treaties abroad, but refuses to demand compliance within its own borders. Note also that smaller bodies are better able to

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103. Id.


detect non-compliance and police its membership into conformity.\textsuperscript{106} Therefore, regional bodies have greater policing capacity as a result of both their socioeconomic similarities as well as their smaller membership size.

In addition to heightened police power, regional bodies enjoy greater buy-in from their states parties, due largely to fewer bureaucratic obstacles that often hinder small-country participation on the global scale. Consider, for example, the World Trade Organization ("WTO"), which enjoys a membership of 153 nations.\textsuperscript{107} As of 2004, not a single country designated as "least developed" had sought to resolve a trade dispute using the WTO’s dispute settlement system.\textsuperscript{108} This low participation rate from developing countries is not because these countries do not need the settlement process, it is due to the structural difficulties posed by an organization of such vast magnitude.\textsuperscript{109} Regional bodies, such as the IACHR and Caribbean Court, pose fewer bureaucratic obstacles to developing nations and are more accessible and promising avenues for human rights advocacy.

Therefore, regional bodies are more advantageous for advancing LGBTI rights because these bodies enjoy a more balanced power dynamic, which fosters greater compliance enforcement and these bodies are also more accessible to developing states.

\textbf{D. Regional Bodies Give the Domestic LGBTI Community a Greater Voice in the Movement Toward LGBTI Equality}

Regional bodies, more localized in nature, are more advantageous for furthering LGBTI rights because local bodies allow LGBTI persons themselves to play a more central role in advancing global LGBTI equality. This notion is based simply on the principle of proportionality—the fewer members a group has, the greater proportion of the group’s decision is credited to each player. Accordingly, smaller regional bodies give LGBTI

\begin{footnotesize}
\begin{enumerate}
\item Medrado, supra note 104, at 324.
\item \textit{Id.} at 325.
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communities a proportionally larger stake in the bodies’ decision-making. This amplified role of local stakeholders—including homophobic stakeholders—is necessary to ensure a successful and sustainable human rights campaign.

The importance of local stakeholder involvement came to light in the global campaign to end female circumcision in some African communities. Anti-circumcision campaigns have largely failed because they neglect to incorporate domestic African stakeholders. Without consulting the local stakeholders, anti-circumcision campaigns effectively alienate the communities that engage in the practice and therefore create a confrontational and ineffective dynamic between the advocates and the targeted communities.

In a very concrete sense, the engagement of states and local populations is integral to furthering culturally charged human rights advocacy, such as LGBTI rights. The failure of the Brazil Resolution, discussed in Part V.b. above, was partially due to Brazil’s failure to engage with states prior to its introduction. Brazil introduced the resolution in the final days of the Human Rights Commission’s 2003 session, with virtually no prior warning to member states. A number of states, who might otherwise have supported the instrument, abstained from the voting process simply because they had not been engaged in the drafting process. Had Brazil introduced the instrument to a regional body, engaging the region’s most relevant states for LGBTI advocacy as well as engaging the LGBTI populations of those states, the resolution may have enjoyed greater success. Therefore, the LGBTI advocacy community risks similar alienation and eventual demise if the Caribbean’s LGBTI hostile states and LGBTI communities are not engaged in the advocacy process.

To briefly conclude, the smaller size and local nature of regional bodies render them more accessible to local stakeholders and therefore establish more promising avenues for pursuing community-centered advocacy strategies toward LGBTI equality in the Caribbean. Through a community-centered approach,

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111. Id.
112. Garvey, supra note 98, at 670.
113. Id.
LGBTI advocates can avoid alienating the relevant local community and therefore engage in a more interactive and promising dialogue and proceed more effectively toward LGBTI equality.

VI. THE INSULARISM PROBLEM

Perhaps the most common, and anticipated, counterargument against this Article lies in the potential immunity that accompanies regionalism. Specifically, if LGBTI rights are left to the regional realm, there may be no internal pressure to enact and enforce LGBTI rights, particularly within a relatively homophobic region. In this respect, opponents of regionalism may argue that only global strategies can counteract regional homophobia.

However, the Caribbean experience with human rights norm development does not indicate a threat of insularism. The Caribbean Court’s death penalty jurisprudence speaks to the issue of regional insularism. The Caribbean Court, created in 2001, is an independent adjudicatory body governed by the Agreement Establishing the Caribbean Court of Justice.114 The Court’s very purpose centered on breaking away from the United Kingdom Privy Council, which was the final court of appeals for English-speaking Caribbean countries.115 Caribbean citizens and politicians viewed the establishment of the CCJ as a symbolic breakaway from the former colonial power.116 For many, the CCJ symbolized the “end of the final vestiges of colonialism” in the English-speaking Caribbean.117 Another major impetus for the Court’s formation was the Privy Council’s decision in Pratt and Morgan v. Attorney General for Jamaica, in which the Privy Council held that a prolonged delay in issuing appellate decisions in death penalty cases was unlawful.118 The Pratt decision was the first of a line of Privy Council decisions

115. JAMAICANS FOR JUSTICE, supra note 47.
117. Id. at 200–01.
118. Pratt & Morgan v. Attorney General for Jamaica, [1993], 3 W.L.R. 995 (Jam.).
critical of the Caribbean’s death penalty record. Therefore, when the CCJ was formed in the interest of fostering regional autonomy, human rights advocates feared that the CCJ would amount to no more than a “hanging court,” to delegitimize the Privy Council’s anti-death penalty jurisprudence. For human rights advocates, the CCJ represented the region’s “antidote to the Privy Council’s supposed hostility towards the death penalty.” It was therefore surprising when the CCJ, in one of its very first decisions, upheld a challenge to the death penalty, in what appeared to be the same tradition of the Privy Council. Therefore, regionalism in the Caribbean does not appear to have fallen prey to any insularism that would permit unfettered human rights abuses.

VII. RECOMMENDATIONS

This Article concludes that regional bodies are more advantageous for culturally charged human rights advocacy and more uniquely tailored for LGBTI rights advocacy in the Caribbean. Taking account for this conclusion, the next few paragraphs make three recommendations to LGBTI advocacy communities seeking to advance LGBTI rights in the region.

A. Strengthen the Democratic Mechanisms Available to the Caribbean LGBTI Community

Progress within the Latin American community is largely credited to the utilization of “democratic openings.” Together with Latin America’s example, the earlier discussed advantages of working within smaller, more similar regional groups, suggest that LGBTI advocates may realize substantial progress by strengthening the democratic mechanisms already

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122. Id.
123. HUMAN RIGHTS WATCH, supra note 2, at 34.
available to the Caribbean’s LGBTI population. These mecha-
nisms include the OAS, IACHR, CARICOM, and the CCJ.

LGBTI advocates may consider bolstering the resources
available to these bodies, whose missions include providing an
eexample of independent judicial decision making that is “wor-
thy of emulation by the courts of the region.” By supporting
the independence of the IACHR and Caribbean Court, advo-
cates can improve at least two avenues available for the Carib-
bean’s LGBTI community seeking redress from homophobic
human rights violations.

With regard to the relative value of supporting the IACHR
and the Caribbean Court, the Caribbean Court is more advan-
tageous in at least two respects. First, it enjoys closer geo-
graphic and cultural proximity to the population at issue, the
Caribbean LGBTI community. Second, unlike the IACHR, the
Caribbean Court exercises both original and appellate juris-
diction. The IACHR is generally a forum of last resort, with the
exception of certain types of cases.

B. Provide Greater Resources for LGBTI Individuals Seeking
Redress in Regional Courts

On the other side of litigation, LGBTI advocates can also
support the Caribbean’s LGBTI population by lending re-
sources to individuals or groups attempting to access the
Courts (either the IACHR or the Caribbean Court). A recent
Human Rights Watch report notes that resource-shortage is a
major obstacle for the Caribbean’s LGBTI population. For
example, many domestic groups lack “resources to support
lawyer’s fees.” External support can take a range of forms,
including development and distribution of “how to” manuals for
individuals petitioning the courts that include procedural

124. See Caribbean Community (CARICOM) Secretariat,
http://www.caricom.org/jsp/community/member_states.jsp?menu=community
http://chooseavirb.com/ccj/wp-content/uploads/annualreports/2008-9/1-
Mission&Vision.pdf.
127. HUMAN RIGHTS WATCH, supra note 2, at 42.
128. Id.
guidelines for litigating in international courts and indexes of international case-law relevant to LGBTI rights litigation.

For those advocates seeking a more interactive role in LGBTI litigation, there are many opportunities for lending pro bono legal assistance. Several organizations already exist for the very purpose of connecting attorneys with communities in the developing world.129 Pro bono legal assistance in the researching and drafting of court filings would certainly be helpful to the Caribbean’s LGBTI populations who may not have access to expensive legal resources. Legal support can even occur more independently, with the filing of *amici curiae* briefs in support of existing cases being heard by the Courts. Logistically, advocates may also raise financial support for the LGBTI community to assist with the travel costs and other expenses associated with international litigation.

Although advocates may consider supporting information campaigns aimed at raising awareness about the Commission and the CCJ, such an effort should be pursued cautiously. A public information campaign by foreigners supporting these bodies risks associating the bodies with foreigners and therefore stripping the Commission and CCJ of their domestic advantages. Therefore, with the exception of the information campaign, support for individuals petitioning regional bodies presents a promising avenue for foreign LGBTI advocates to support the efforts of the Caribbean’s LGBTI community.

C. Collaborate More Closely with the Caribbean’s LGBTI Population

Finally, the most crucial element in LGBTI advocacy toward the Caribbean is the engagement of the Caribbean’s LGBTI community in the planning phase of advocacy strategies geared toward improving their livelihoods. The engagement of the domestic population offers advocates a window into the cultural nuances that must be considered in designing an effective human rights campaign. For an example of the benefits of local involvement we can turn our attention once more to the case of

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female circumcision. A Texan, Mollie Melching, designed a successful advocacy program toward abolishing female circumcision in Senegal.\textsuperscript{130} Before designing the program, Melching lived in Senegal for twenty-three years.\textsuperscript{131} During her in-country residency, Melching consulted hundreds of communities and finally found that story-telling and proverbs were an ideal avenue for advancing her cause.\textsuperscript{132} Melching’s program is conducted in Wolof, the local language, and is run by Senegalese citizens.\textsuperscript{133} The campaign does not directly criticize female circumcision, but instead emphasizes the health risks associated with the practice.\textsuperscript{134} The program’s success is self-evident: thirty-one Senegalese villages now renounce female circumcision and the campaign is being implemented in another 250 communities.\textsuperscript{135} Melching has since been invited to develop similar programs in other parts of West Africa.\textsuperscript{136}

Melching’s experience evidences that there is a role for foreign advocates in the advancement of culturally charged human rights. However, her experience also confirms that engagement with the target community is crucial to designing a campaign that is cognizant of the cultural undertones that must be accounted for, if the campaign is to be effective.

CONCLUSION AND LIMITS OF THE RESEARCH

The conclusions drawn here are subject to at least three limitations. The first limitation concerns the enforcement of LGBTI rights norms. At the moment, the enforcement powers of the Caribbean Court and the IACHR remain unclear. Therefore, use of these regional bodies to advance LGBTI rights may be undermined by the bodies’ inability to enforce its rulings. Note, however, that the enforcement powers of international bodies, such as the U.N., are also uncertain. Therefore, the regional bodies’ lack of enforcement power may not necessarily be prejudicial, especially in light of the U.N.’s shared shortcoming.

\textsuperscript{130} Bowman, \textit{supra} note 25, at 159.
\textsuperscript{131} \textit{Id.}
\textsuperscript{133} Bowman, \textit{supra} note 25, at 158.
\textsuperscript{134} \textit{Id.} at 159.
\textsuperscript{135} Dillon, \textit{supra} note 24, at 305.
\textsuperscript{136} Bowman, \textit{supra} note 25, at 159.
Second, the term LGBTI has been used very loosely throughout this Article. Although the LGBTI community is the focus of this research, discrimination against the LGBTI population is understood to reflect a broader sentiment of hate toward sexual minorities. The LGBTI population, its sub-communities, and offshoots, make up a diverse body with diverse interests and needs. Therefore, the conclusions drawn here may not necessarily be generalizable to all sexual minorities.

Finally, the recommendations made are not intended to be exhaustive of all avenues available to advocates using regional bodies to advance LGBTI rights.

Taking account for the above limitations, this research concludes that, relative to global advocacy and direct advocacy, regional bodies are more advantageous for promoting culturally charged human rights norms. More narrowly, bodies such as the Inter-American Commission on Human Rights and the Caribbean Court of Justice are more advantageous for LGBTI rights advocacy in the Caribbean.
APPENDIX I: GLOBAL HDI TRENDS
APPENDIX II: LATIN AMERICA AND THE CARIBBEAN HDI TRENDS
PROVIDING A FOUNDATION FOR WEALTH CREATION AND DEVELOPMENT IN AFRICA: THE ROLE OF THE RULE OF LAW

John Mukum Mbaku*

INTRODUCTION

Africa of the mid-to-late twentieth century was a continent afflicted with many ills—extremely inefficiently managed economies; high levels of political and bureaucratic corruption; capriciousness and arbitrariness in the delivery of public goods and services; rampant military intervention in politics; violent and destructive ethnic mobilization, some of which resulted in brutal civil wars; ecosystem degradation; and generally very poor economic performance.1 Such an environment could hardly

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have been considered attractive to domestic investors, let alone those from outside the continent. The political and economic uncertainties brought about by these events led not only to Africa’s failure to attract foreign investment, but also to capital flight as domestic savers sought investment opportunities in more stable economies abroad.²

In the mid-1980s, however, grassroots pro-democracy movements emerged in many African countries. Riding on the wave of the global struggle for change that had begun in the Iberian Peninsula in the mid-1970s, the pro-democracy movements successfully toppled various civilian and military dictatorships, paving the way for significant improvements in governance.³ Later, buoyed by the collapse of the brutal and inhumane apartheid system in South Africa, ⁴ Africa’s pro-democracy movements successfully established an enabling environment

2. See IMF, EXTERNAL DEBT AND CAPITAL FLIGHT IN SUB-SAHARAN AFRICA (S. Ibi Ajayi & Mohsin S. Khan eds., 2000) (examining the continent’s twin evils of capital flight and increasing external debts and offering reasons for such a state of affairs); Léonce Ndikumana & James K. Boyce, Africa’s Revolving Door: External Borrowing and Capital Flight in Sub-Saharan Africa, in THE POLITICAL ECONOMY OF AFRICA 132–51 (Vishhnu Padayachee ed., 2010) (showing that political instability in Africa is a major cause of capital flight). Note that capital, as used here, includes both financial and human capital. During the last several decades, many highly skilled and educated Africans have exited their economies and migrated to Europe, North America, the Middle East, and various parts of East Asia, notably Australia and New Zealand, in search of opportunities to make more effective use of their skills and, at the same time, avoid being subjected to the vagaries of authoritarian rule in their home countries.

3. See generally THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003) [hereinafter TRANSITION TO DEMOCRATIC GOVERNANCE] (providing a detailed analysis of Africa’s transition to democratic governance, which began in the mid-1980s); POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES (Julius O. Ihonvbere & John Mukum Mbaku eds., 2003) (examining Africa’s transition to democratic governance with specific emphasis on the experiences of a number of countries).

4. See, e.g., PATTI WALDMER, ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA (1997) (providing an eyewitness account of events leading to the demise of one of the most brutal and inhumane governmental regimes ever devised by man); RICHARD TAMES, THE END OF APARTHEID: A NEW SOUTH AFRICA (examining critical milestones in the evolution and demise of the apartheid system in South Africa).
for the continent’s transition to democratic governance.\textsuperscript{5} Thus, Africa’s political economy in the twenty-first century has been significantly different from that which characterized the continent in the previous century. While many problems remain, investors—both domestic and foreign—are beginning to see the continent as an emerging market for both trade and investment. After many decades of extremely poor governance and dismal economic performance, thanks to reforms developed and implemented during the last four decades or so, Africa is poised to become a global center for significant economic activities. According to the World Bank, as many as thirty-six governments in sub-Saharan Africa have significantly improved their economies’ regulatory environments, leading to increased trade and investment.\textsuperscript{6}

Additionally, the reforms that have taken place in the continent since the mid-1980s have paved the way for the growth of a robust civil society, which is gradually taking an active part in governance—in fact, in countries such as Ghana and South Africa, civil society has become an important check on the government.\textsuperscript{7} And, in Egypt and Tunisia, civil society and its organizations were responsible for toppling long-serving autocratic rulers and paving the way for these countries to accelerate their transition to democratic governance and the rule of law.\textsuperscript{8}

\textsuperscript{5} For a thorough review of some of the changes that opened up political spaces for participation by popular forces, and hence enhanced the continent’s transition to more effective governance systems, see \textsc{Multiparty Democracy and Political Change: Constraints to Democratization in Africa} (John Mukum Mbaku & Julius O. Ihonvbere eds., 2006).


\textsuperscript{7} See Emmanuel Gyimah-Boadi, Mike Oquaye & F.K. Drah, \textsc{Civil Society Organizations and Ghanaian Democratization} (2000) (examining the role of civil society in Ghana’s democratization); \textsc{The State of the People: Citizens, Civil Society and Governance in South Africa, 1994–2000} (Bert Klandermans, Marlene Roefs & Johan Olivier eds., 2001) (detailing the role played by citizens and their organizations in the transformation of South Africa from the apartheid-induced dictatorship to participatory and inclusive democratic governance).

\textsuperscript{8} Ashraf Khalil, \textsc{Liberation Square: Inside the Egyptian Revolution and the Rebirth of a Nation} (2011) (discussing, inter alia, the role of non-governmental organizations and civil society organizations in Egypt’s recent “revolution”); Ignacio Garcia Marin, \textsc{Political Participation, Democracy and Internet: Tunisian Revolution} (2011) (drawing lessons from the use of
Along with the rise of civil society, which is helping improve governance in the continent, there have been discoveries of significant natural resources in various countries that are likely to provide the catalyst for growth. In addition to Ghana, Kenya and Uganda have discovered considerable deposits of petroleum and arrangements are already underway to exploit these resources and make the proceeds available for investment in various sectors of national economies. Finally, many developed countries have taken a renewed interest in investing in Africa. For example, since 1998, the People’s Republic of China (“PRC”) has significantly increased its volume of trade and investments in Africa. In addition, China’s former president, Hu Jintao, made several official trips to the continent and many African heads-of-state have been brought to China to consult with the PRC’s business and political leaders, including Salva Kiir Mayardit, president of South Sudan, Africa’s latest independent country. Significant contact between Africa and the PRC during the last several decades has resulted in China emerging as Africa’s biggest trade and investment partner. According to Ching, “[t]he speed with which China has engaged with the continent is breathtaking, with two-way trade rising about 30 percent each year so far in the 21st century, reaching a record [US]$166 billion in 2011.”

Recently, the United States has indicated an interest in improving its trade relations with Africa. Members in both houses of Congress introduced the “Increasing American Jobs Through Greater Exports to Africa Act of 2012,” (HR 4221/SB 2215) a bill designed to increase U.S. economic engagement with the

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12. Id.
continent of Africa. These developments—which increased Chinese trade with the continent and the recent interest of the U.S. Congress to improve the country’s trade relations with Africa—augur well for wealth creation and the eradication of poverty in the continent.

Despite what appears to be an august environment for trade and investment in Africa, it is important to recognize that the type of economic growth that results in development—that is, growth that produces significant improvements in human conditions, especially for the poorest 20% of the population—cannot take place in Africa under the existing institutional environment. Granted, since the mid-1980s, there have been significant social, economic, and political transformations in the continent. In fact, governance systems have improved in most of the continent. Yet, as recent events in Egypt, Tunisia, and Libya have shown, most African countries have yet to deepen and institutionalize democracy and hence, provide themselves with legal and judicial systems that guarantee the rule of law. For one thing, Africans, like their counterparts in other parts of the world, are not just interested in increases in the gross domestic product—they want to participate in the creation of that wealth and receive their equitable share of all the proceeds of economic growth. They want to live in peace with their neighbors; they want to get married and raise families; they want to live free of government tyranny; they want to use their talents and resources to create the wealth that they need to meet their obligations; they do not want their values infringed upon by either state or non-state actors; and they want to be able to govern themselves. What they want is human development,

13. S. 2215, 112th Cong. (2012); H.R. 4221, 112th Cong. (2012). It is important to note that this bill died in committee in 2012. In addition, the Senate version of the bill states that its goal is “increasing United States exports to Africa by at least 200 percent in real dollar value within 10 years.”

14. Charles Manga Fombad has studied constitutional reforms in Cameroon. Specifically, he has examined the reforms that produced the 1996 Cameroon Constitution (officially known as Law No. 96-06 of 18 January 1996 to Amend the Constitution of 2 June 1972) and concluded that their outcomes were not institutional arrangements that enhanced the rule of law or significantly improved governance. He added that “[t]he [1996] constitution has rendered in one sweep the future of Cameroon’s fledgling democracy bleak.” In addition, Fombad argues that “[a]nother glaring disappointment is the failure of this constitution [i.e., the 1996 Constitution], like its predecessors, to formally recognise and protect Cameroon’s bi-jural legal heritage.” Charles
not just increases in GDP. Unfortunately, most African countries, including those such as Egypt, Tunisia, and Libya that have recently gone through “revolutions,” have not yet transformed their political economies well enough to create institutional environments capable of promoting and sustaining significant improvements in human development. To promote genuine and sustained human development in Africa, each country must undertake necessary reforms to provide itself with institutional arrangements that guarantee the rule of law. Specifically, each country must engage its citizens in democratic constitution-making to produce institutional arrangements that adequately constrain civil servants and political elites, provide the wherewithal for the effective management of ethnic and religious diversity, and promote entrepreneurial activities and the creation of wealth, especially among historically marginalized and deprived groups. Such a set of institutional arrangements is characterized by a general adherence and fidelity to the rule of law.\(^\text{15}\)

Manga Fombad, *Judicial Power in Cameroon’s Amended Constitution of 18 January 1996*, 9 LESOTHO L.J. 1, 10 (1996) [hereinafter Fombad, *Judicial Power in Cameroon’s Amended Constitution*]. Fombad also states that “[a]lthough the amended Constitution professes to institute, for the first time, what it terms ‘judicial power,’ this is largely ineffective because of the President’s unlimited powers to appoint and dismiss judges.” CHARLES MANGA FOMBAD, CONSTITUTIONAL LAW IN CAMEROON 31–32 (2012) [hereinafter FOMBAD, CONSTITUTIONAL LAW]. In 2008, Cameroon’s National Assembly amended the constitution again, but the outcome was not an improved set of rules. For one thing, the new constitution paved the way for the President of the Republic, Paul Biya, to become president-for-life—Article 6(2) abolishes the two-term limit imposed by the 1996 Constitution and allows the President to run for re-election indefinitely. Law No 2008/001 of 14 April 2008 to Amend and Supplement Some Provisions of Law No. 96-06 to Amend the Constitution of 2 June 1972 (“Constitution of Cameroon 2008”), art. 6(1). In addition, Article 53(3) of the same constitution grants the President of the Republic immunity from prosecution for any criminal acts committed by him while in office. Law No. 2008/001 of 14 April 2008 to Amend and Supplement Some Provisions of Law No. 96-06 of 18 January 1996 to Amend the Constitution of 2 June 1972 (“Constitution of Cameroon 2008”).

15. See, e.g., MBAKU, INSTITUTIONS AND DEVELOPMENT, supra note 1, at 267–302 (emphasizing the importance of institutions to development in Africa). Here, “human development” involves much more than increases in the national output. Certainly, the increased wealth associated with the higher GDP may, under the appropriate institutional environment, provide the additional resources needed to significantly improve national standards of living. Whether such economic growth would lead to improvements in the standard
This research seeks to accomplish the following objectives: (i) emphasize the need to complete Africa’s transition, which began in the 1980s, and produce within each country governance structures that guarantee the rule of law; and (ii) show that while there have been significant institutional changes in the continent during the last several decades, genuine human development in Africa requires the institutionalization, in each country, of the rule of law.

The methodology that is employed in this study is James M. Buchanan’s\textsuperscript{16} constitutional political economy model, which analyzes how societies formulate, select, and amend the rules that regulate their sociopolitical interactions. Rules, which Ad-
am Smith called “laws and institutions,” have a significant impact on, and to a great extent determine the outcomes that result from sociopolitical interaction. Brennan and Buchanan argue that while rules enhance the ability of individuals to maximize their values, which may include engaging in wealth-creating activities, they do so in a context in which they do not prevent others from doing the same. That is, in providing citizens with the tools to organize their private lives and maximize their values, rules also serve the “negative function of preventing disastrous harm.”

Throughout the continent, although governance systems have improved significantly, many citizens still face rules that empower their governors to oppress, exploit, and infantilize them. This is due partly to the fact that the process through which these rules were selected was top-down, elite-driven, and non-participatory. Such a non-democratic approach to constitution-making produced rules that were not locally-focused and did not reflect the values and interests of each country’s relevant stakeholders. Of course, because they were not selected by the people themselves, these rules were not relevant to the problems that the various groups in each African country faced on a daily basis, and hence, could not help them organize their private lives. Instead, the rules served primarily the interests—specifically for primitive accumulation—of the ruling classes.

Peaceful coexistence and wealth creation in Africa, in particular, and human development in general, require state re-
construction and reconstitution through democratic constitution-making to produce institutional arrangements that guarantee the rule of law. This study dissects the elements of the rule of law and shows how critical they are to the management of ethnic diversity and therefore to the promotion of peaceful coexistence, the creation of wealth, the eradication of poverty, and the advancement of human development in Africa.

I. FRAMING THE PROBLEM

A. Colonialism and Its Institutions

After the annexation and colonization of an African territory by a European nation, the colonizer proceeded to impose institutional arrangements that it hoped would significantly enhance its ability to exploit Africa’s large endowments of resources for the benefit of the metropolitan economies. Effective colonization required the colonial power to restructure the critical domains (economic, cultural, and bureaucratic) and impose new legal and judicial institutions on the colonies. This process was expected to enhance the ability of the European colonial elites to subjugate and rule each colony’s population groups, and to provide the institutional structure within which metropolitan-based mercantile firms could help exploit the resources of the new territories and Christian missionaries could sell their version of salvation to “heathen natives.”

21. See generally Sir Alan Cuthbert Burns, History of Nigeria (Allen and Unwin 1963) (examining British colonization of Nigeria); Harry R. Rudin, Germans in the Cameroons, 1884–1914: A Case Study in Modern Imperialism (1968) (detailing the founding of the German colony of Kamerun and the subsequent exploitation of its resources by German entrepreneurs).

22. For example, when the French took over the administration of the eastern part of the former German colony of Kamerun, they faced significant opposition from various kingdoms that existed in what is now generally referred to as French Cameroons. One such kingdom was Bamoun, whose sovereign, Sultan Njoya, had developed a script for the kingdom’s language and used it to produce tracts on laws and customs, as well as a volume that outlined a “new religion based on Islam, Christianity, and Bamoun traditional religious practice.” John Mukum Mbaku, Culture and Customs of Cameroon 73 (2005) [hereinafter Mbaku, Culture and Customs of Cameroon]. Sultan Njoya subsequently established royal schools throughout the kingdom and instruction was offered using the new script. Additionally, a printing press was established to produce materials for education and social dialogue. However, after World War I, Bamoun became part of French Cameroons. As part of their colonial policy, the French introduced a new educa-
To minimize the costs of exploitation of resources, it was necessary for a European power to devise an effective mechanism to manage ethnic and religious diversity in its colonies. The colonizer could have taken advantage of existing traditional approaches to conflict resolution or helped the new colony develop democratic institutions, which would have provided the institutional mechanism for colonial population groups to live together peacefully. Instead, the colonizers used their comparative advantage in the employment of violence to force the African system and proceeded to destroy the kingdom’s traditional forms of instruction: French Christian missions took over administration of schools; French became the only legal language of instruction in schools; and a curriculum based on French culture and civilization was introduced and subjects relevant to the local populations were disallowed. In addition to destroying the king’s printing press and effectively halting the creation of knowledge relevant to local development, the French colonial authorities forcefully removed Sultan Njöya and sent him to Yaoundé (then, the capital of French Cameroons), where he died in isolation and away from his people. Id. See also John Mukum Mbaku, Copyright and Democratization in Africa, 7 BYU INT’L L. & MGMT. REV. 51, 53–54 (2011).

Shortly after annexation of territories in the Cameroon River District in 1884, the German colonial government sought to accord the territories a locus standi in the German legal system. However, there was no constitutional discourse within the colonies, nor were the colonial inhabitants granted an opportunity to either refuse association with Germany, or to determine the terms of the arrangement. Instead, Bismarck brought the matter to the German Reichstag when he introduced a bill on January 12, 1886. The bill was subsequently passed on April 10, 1886. In addition to the fact that citizens of the colony of Kamerun were never consulted during the process of writing this “colonial constitution,” subsequent amendments to the law were undertaken entirely in Germany—the bill was actually developed or drafted by a committee that was significantly influenced by a German planter in Kamerun, Adolf Woermann. The new “constitution” vested enormous powers in the Kaiser. This “concentration of authority in [the hands of the Kaiser] was the legal device through which [German] traders sought to be as unhampered in administering and exploiting the colonies as they had been in acquiring them.” RUDIN, supra note 21, at 127–129, 159. Hence, as was typical of other colonizers of Africa, the Germans established a colony on the Cameroon River District in 1884 called Kamerun and introduced laws and institutions that helped them maximize their objectives. According to Adolf Woermann, the leading German trader in Kamerun, these objectives where “increasing German trade, English opposition to German traders generally and especially in the court of equity, the need of protecting trade against natives, the fear of the French and their high discriminatory duties, and the fear of the Congo treaty made by Portugal and England.” Id. at 33. Note that the term “metropolitan” as used throughout this Article refers to the country that owns the colony, sometimes also referred to as a “mother country.”
can peoples of different ethnicities and religions together to "form a single political and administrative unit." In the African colonies with significant concentrations of European settlers, the colonial government, with the help of colonists (most of whom were miners, farmers and planters), forcefully removed many African groups from their ancestral lands. The African groups were then resettled in what came to be known as "reservations," in order to provide more land for European economic activities.

But, what was the main objective of colonialism? It was the maximization of the economic and political interests of the metropolitan economies and those of Europeans resident in the colonies—namely, settlers or colonists. Colonialism was an


24. For example, Southern Rhodesia (now Zimbabwe), South West Africa (now Namibia), and the four colonies—Cape of Good Hope, Natal, Orange River Colony, and Transvaal—which united to form the Union of South Africa in 1910. Id.


26. In each colony, there were three major groups of Europeans. First, settlers or colonists were individual migrants from the various European countries that intended to make the colony their permanent home. Of course, if the colony was French, the majority of European settlers would usually be French. Second, there were colonial administrators—the various military and civilian elites that were sent to the colonies by the colonizer of record to administer the colony's affairs. And third, there were Christian missionaries. Most of the colonial settlers were planters, miners, industrialists, and traders. In the British and French colonies, the interests to be maximized were those of Britain and France, and of their citizens resident in the colonies respectively. Similarly, in the French colonies, the interests that dominated colonial policies were those of metropolitan France and French citizens located in the colony. It is important to note that in some European colonies in
insidious, cruel, despotic, and exploitative pact imposed on Africa and Africans by Europeans.\textsuperscript{27} Colonial institutions were instruments of that exploitation and violence. For example, in his study of the police in colonial Nigeria, Tamuno concluded that the rise of crime and civil disorder provided the impetus for the establishment of instruments of violence, such as the police, by the United Kingdom.\textsuperscript{28} Tamuno argued that increased levels of violence, brought about by “dynastic disputes” and interethnic conflicts contributed significantly to a rise in criminal activities and “had an important bearing on the origin, development and role of [the] modern police [in Nigeria].”\textsuperscript{29} This characterization places the police force among the group of institutions that were supposed to maintain law and order and enhance peaceful coexistence in the colonies.\textsuperscript{30}

Africa, not all Europeans resident in the colonies supported the policies of the colonizer of record. For example, in the South African colonies that eventually united to form the Union of South Africa in 1910, there were regular conflicts between Afrikaners—Europeans of Dutch-German-French ancestry—and the colonial government in London over various issues, the most important of which included property rights in land and the treatment of Africans, or “native tribes.” Some of these disagreements resulted in wars between Afrikaners and the British colonizers, such as the Anglo-Boer war of 1899–1902. See generally C.H. Thomas, ORIGIN OF THE ANGLO-BOER WAR REVEALED (2nd ed., Echo Library 2006) (1900); S.B. Spies, THE ORIGINS OF THE ANGLO-BOER WAR (1972).

\textsuperscript{27} Robert Fatton, Jr., Liberal Democracy in Africa, 105 POL. SCI. Q. 455, 457–58 (1990). Fatton argues that the Europeans imposed themselves and their institutions on Africans, and that the latter were never part of what has sometimes been referred to as a “mercantile pact,” but were forcefully brought into the arrangement. \textit{Id}. That arrangement produced, for Africans, years of humiliation, degradation, and infantilization. \textit{Id}.


\textsuperscript{29} \textit{Id}.

\textsuperscript{30} In addition to the fact that such a characterization of the police and other colonial institutions misstates the appropriate role of these institutions, it also does not make an allowance for the examination of the role that colonialism played in the rise of a significant part of the social and political violence that came to envelop the colony. Colonialism was a brutal, exploitative, and humiliating system, designed specifically to enhance the ability of Europeans to exploit both Africans and their resources. It was inevitable that a system conceived in violence and implemented similarly would necessarily increase the various forms of violence in the colonies. Most of this so-called political and social violence was actually resistance by indigenous groups to the activities of the European interlopers. John Mukum Mbaku and Mwangi
The characterization of the police and other colonial institutions as instruments of law and order is part of the mistaken belief by apologists for European conquest of Africa that colonial occupation was actually a “civilizing” mission “designed to prevent African societies from degenerating into anarchy.” Proponents of this view argue that European laws and institutions were designed to provide the colonial government with the wherewithal to “civilize” Africa’s perpetually warring factions and help improve their quality of life, as well as provide them with the benefits of the European brand of Christianity.

Viewed from this perspective, colonialism was far from being cruel or despotic; instead, it was a benevolent and development-enhancing enterprise.

On the contrary, colonialism was not a benevolent enterprise designed to benefit Africans. It was a violent and insidious effort by the Europeans to conquer Africans and exploit their resources for the benefit of the metropolitan economies. For example, according to Hugh E. Egerton, an expert on British imperial history, the “motives which prompted the European nations upon the field of colonization were in the main two, viz, the desire to win converts for the church, and the desire to win wealth for themselves.” Lord Frederick Lugard, who was responsible for administering Britain’s policy of indirect rule in colonial Nigeria, posited that the colonies represented important sources of primary commodities for Britain’s domestic industries and markets for excess output from metropolitan factories. Of course, to win converts for the church and provide opportunities for Britons to enrich themselves, the government of Great Britain could have sought to establish diplomatic relations with various African kingdoms and states, with the latter allowed to maintain their independence. Once established, such inter-state relations, as they are today, would have allowed Christian missions to come to the African states and peacefully seek converts for their churches, and British entre-


31. *Id.*

32. *Id.*


preneurs and traders would also have been able to seek opportunities to enter into mutually beneficial exchanges with their African counterparts. Of course, at this time in their histories, most European countries, including Britain, were practicing “mercantilism” and not “capitalism” as we understand it today, or as advocated by Adam Smith.35 Hence, the concept of mutually beneficial trade exchanges would have been alien to existing practices at the time, since the popular approach was for each European country to acquire wealth at the expense of other countries and, notably, the colonies. Nevertheless, the British chose to employ violent conquest to achieve their objectives in Africa.

The late African political scientist and social commentator Professor Claude Ake argued that the colonial project was motivated primarily by the internal contradictions of capitalism as it was then practiced in the European countries.36 He stated that:

[t]he transplanting of capitalism arises from those contradictions which reduce the rate of profit and arrest the capitalization of surplus value. Confronted with these effects, it was imperative that the capitalist, forever bent on profit maximization, would look for a new environment in which the process of accumulation could proceed apace. Capitalists turned to foreign lands attacked and subjugated them and integrated their economies to those of Western Europe.37

Those who initiated the colonial project never pretended to be engaged in mutually beneficial trading arrangements between Africans and themselves. Even the European settlers who intended to make Africa their permanent home never pretended to treat Africans as co-equals in trade.38 Instead, they planned to seize African lands and their other resources and force Africans to assist them in extracting profits for the benefit of the

35. SMITH, supra note 17.
37. Id. at 19.
38. As argued by Crowder, the colonial state maintained armed troops in the colony, not for the defense of the territory against external aggression, but to control the “native tribes” and enhance the ability of the colonial officers to maintain peaceful coexistence and help the colonizer’s citizens resident in the colony to engage in their economic activities. Michael Crowder, Whose Dream Was It Anyway? Twenty-Five Years of African Independence, 86 AFR. AFF. 7, 12 (1987).
metropolitan economies and the colonists. Take, for example, the view expressed by then French Governor of Algeria, General Bugead, in 1841, when he declared that “[w]henever the water supply is good and the land fertile, there we must place colonists without worrying about previous owners. We must distribute the lands [with] full title to the colonists.”39 The French, like other European colonizers, used their superior military and police force to seize lands belonging to African groups and establish their colonies.40 Of course, French settlers were not the only ones who viewed force and violence as a legitimate way to deal with Africa and Africans. Earl Grey, a well-known British colonial officer, summarized the views of his fellow settlers in southern Africa towards African populations when he declared that whenever and wherever there was conflict between English settlers and any African group, especially over land, the interests of Africans must be categorically ignored and that “facilities should be afforded the white colonist for obtaining the possession of land theretofore occupied by the Native tribes.”41 Throughout this period, the “Native tribes” were viewed by the European colonial elites, farmers, planters, miners, prospectors, and missionaries as peoples whose only function was to serve the interests of the Europeans. To function effectively and productively in the new role chosen for them by the conquerors, the “Native tribes” had to be converted to Europe’s brand and concept of Christianity—this was the job of the Christian missions. To serve the needs of the European entrepreneurial class, Africans had to forsake their customary and traditional pursuits and take up wage employment in European business enterprises, including performing domestic services in European households.42 In addition, Africans had to

41. Magubane, supra note 23, at 71.
42. During the colonization of Cameroon by Germany and France, for example, both European countries actually forced Cameroonians to work for enterprises belonging to European planters, farmers, miners, traders, and the colonial government. The Germans, who colonized Cameroon before the French, imposed a forced labor system on the “native” populations. In order to deal with the problem of labor shortages, the German government in the
voluntarily give up their lands to the Europeans, or lose them through forced alienation.43 Finally, self-actualization for Africans had to be based on each individual aspiring to achieve the European cultural ideal.44

Professor Fatton describes colonial institutions as primarily “structures of exploitation, despotism, and degradation.”45 Considering that “the colonial state was conceived in violence ra-

colony of Kamerun imposed a tax on all native peoples that could only be settled in German marks. On July 1, 1903, the colonial state in Kamerun imposed a head tax of 3 marks per year on all men and unmarried women resident in the colony. As argued by Rudin, “[t]he requirement that every grown person, man or unmarried woman, capable of performing work must pay the tax shows the connexion of the tax with the labor problem.” If a “native” person was unable to pay the tax, the law prescribed that the offending individual perform work to cover the amount of the tax. RUDIN, supra note 21, 321–45. The French used forced labor (corvée) extensively in the construction of railroads and the roads linking major cities. According to the French system, all males were required by law to provide the colonial government with ten days of free labor per year. The French corvée consisted of penal labor, prestation labor, and military labor. Of these three, prestation was the most economically important. The French imposed a labor tax in Cameroon that was similar to the one that had been established by the Germans: all males between the ages of 18 and 60 years were forced to pay an annual “tax” under which each person was required to provide a minimum of ten days of free labor every year. Individuals affected by this tax could pay the colonial government the equivalent of those labor services in currency. Most “natives” usually did not have the currency to pay, and hence were forced to work on either private or public projects, sometimes for more than ten days. VICTOR T. LEVINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE 104–10 (1964). See also Mbaku & Kimenyi, supra note 30, at 288.

43. For the forced expropriation of African lands by French colonists in North Africa, with special emphasis on Algeria, see generally BRACE, supra note 39. Consider the statement by French Governor of Algeria, General Bugead: “[w]henever the water supply is good and the land fertile, there we must place colonists without worrying about previous owners. We must distribute the lands [with] full title to the colonists.” Also note that similar sentiments about the expropriation of lands belonging to African ethnic groups were expressed by other colonizers in Africa, including the British. Id. at 48. See generally Bernard M. Magubane, THE POLITICAL ECONOMY OF RACE AND CLASS IN SOUTH AFRICA (1979).

44. See generally LEVINE, supra note 42 (examining, inter alia, French colonial policy in the U.N. Trust Territory of Cameroons under French administration; note, especially, France’s policy of association—politique d’association).

45. Fatton, Jr., supra note 27, at 457.
ther than by negotiation," the laws and institutions that facilitated this process had to themselves be instruments of violence. First, the laws were imposed externally by the colonialists without any input from Africans. Second, the laws and institutions were designed specifically to disenfranchise Africans and enhance European control of the colonies. Third, the languages of the colonial powers were introduced for use in social, economic, and political discourse. Fourth, a new religion, Christianity, was introduced to replace African traditional religions. Finally, African ethnic groups were forcefully brought together to form easily controlled and administered, economic and political units called colonies.

Given the fact that Europeans were determined to use the coercive apparatus of the state as a tool for the allocation of colonial resources, institutions of law and order, such as the police and the judiciary, evolved as instruments of violence to enhance the ability of the Europeans to “conquer, control, subjugate and exploit Africans.” Within each European colony in Africa, there were never the types of benevolent public institu-

46. Crowder, *Whose Dream*, supra note 38, at 11. According to Crowder, the level of violence employed by the Europeans to create colonies in Africa was often quite extraordinary: “This violence was often quite out of proportion to the task in hand, with burnings of villages, destruction of crops, killing of women and children, and the execution of leaders... Any form of resistance was visited by punitive expeditions that were often quite unrestrained by any of the norms of warfare in Europe.” *Id.* at 11–12. See also *MICHAEL CROWDER, WEST AFRICA UNDER COLONIAL RULE* (Hutchinson 1981) (describing the colonial enterprise as it functioned in the West African colonies).

47. Mbaku & Kimenyi, *supra* note 30, at 282–83. Mbaku and Kimenyi examine the emergence of the police force in the British colony of Nigeria and show how it was developed, specifically as an instrument of violence, to enhance British exploitation of the resources of the new colony for metropolitan development needs. The police force that emerged in the colony of Nigeria, they argued, was never a benevolent public institution dedicated to maintaining law and order and ensuring the peace. For a contrary view, see *SIR CHARLES JEFFRIES, THE COLONIAL POLICE* 198–99 (1952). Jeffries argues that the colonial police was a benevolent institution whose main function was to “act impartially in the interest of the community as a whole, to preserve and re-establish the rule of law and order.” Ahire, however, questions Jeffries’ assertions, and argues that anyone who sees the colonial police as a “legal and constitutional imperative ignores the fact that the police in these [colonies] were established by force, despite indigenous resistance to them.” *Philip T. Ahire, Policing and the Construction of the Colonial State in Nigeria, 1860–1960, 7 J. THIRD WORLD STUD.* 151, 156 (1990).
tions that were expected to maintain law and order, and en-
hance the ability of each of the colony’s population groups to
live together peacefully, maximize their values, and create the
wealth that they needed to meet their needs. Instead, what
came to characterize governance in the colonies were mainly
institutions designed to enhance European exploitation, infant-
ilization, and denigration of Africans, all for the benefit of the
metropolitan economies.

B. Independence and the Hope for a New Governance Dispensa-
tion

Independence was expected to grant Africans several bene-
fits, the most important of which was the “opportunity to rid
themselves of not only the Europeans, but also of their laws
and institutions and then, develop and adopt, through a dem-
ocratic process—specifically, a people-driven, bottom-up, partic-
ipatory, and transparent institutional reform process—
institutional arrangements based on their own values, aspira-
tions, traditions, and customs.” The hope of the African mass-
es, who during colonialism had been subjected to horrendous
violence, “infantilized[,] stigmatized by their color, and with
no recognizable rights,” was that the new post-independence
laws and institutions would provide the wherewithal for peace-
ful coexistence of each new country’s diverse population groups,
restore their fundamental rights, and create opportunities for
self-actualization. This would provide an enabling environment
for the development and nurturing of an indigenous entrepre-
neurial class to create the wealth needed to confront mass pov-
erty. New post-independence institutions were also expected to
adequately constrain civil servants and political elites, so that
they would serve only the national interests and not engage in

48. Robert Peel, who created the modern police force in the United King-
dom, considered the police a benevolent institution whose main function was
to prevent crime and suppress evil. See CHARLES REITH, A SHORT HISTORY OF
THE BRITISH POLICE 109 (1948) (discussing, inter alia, Peel’s creation of the
force and crediting “the unique relationship with the public which the police
have created and are at constant pains to maintain” as the “basic secret of
the success and efficiency of the British police.”). See also ERIC J. EVANS, SIR

49. Mbaku & Ihonvbere, Introduction: Issues in Africa’s “New” Global Era,
in TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA, supra note 3, at 2.

50. Fatton, Jr., supra note 27, at 458 (semicolon omitted).
corruption, rent seeking, and other forms of opportunism to illegally secure income and wealth for themselves.51

The post-colonial state was expected, by its citizens, to devote all its policies to national integration, nation building, and the improvement of the welfare of all citizens. These were the issues that gave impetus to the decolonization project—the need to rid the colonies of the Europeans and their opportunistic policies, and hand over the apparatus of government to Africans who would then spearhead the effort to develop and modernize the new countries. To accomplish these objectives, government would be “controlled and directed not by center elites and their [foreign] benefactors, but by popular forces with significant allowance made for the full and effective participation of the relevant stakeholder groups—those whose lives would be governed or affected by these institutions.”52

Unfortunately, this view of the post-colonial state was shared primarily by the masses who were not in a position to effect the changes necessary to produce development-oriented and constitutionally-limited states. This is evidenced by the types of behaviors in which the continent’s post-independence bureaucrats and political elites preferred to engage. In the post-independence period, corruption and rent seeking had become endemic in virtually all African countries. Most of these opportunistic activities represented efforts by ruling elites to subvert national laws to enrich themselves at the expense of the rest of the people. Given the fact that such elites approached decolonization and independence as an opportunity for them to capture the evacuated structures of colonial hegemony, and use them to redistribute income and wealth in their favor, they did not make any effort to ensure that the critical domains were properly transformed; nor did they insist on democratic constitution-making either in the pre- or post-independence period.53

52. Id. at 2.
53. For example, during the struggle for independence in the U.N. Trust Territory of Cameroons under French administration, many of the territory’s political elites, including Ahmadou Ahidjo, who became the country’s first president, were willing to forego any efforts at state reconstruction and institutional development (i.e., they were willing to postpone effective constitution-making) and gain independence. See generally MBAKU, INSTITUTIONS AND DEVELOPMENT, supra note 1, at 119. The hope was that once independence
In fact, all of the former French colonies in sub-Saharan Africa except Guinea accepted the offer made by the then French president, Charles de Gaulle, of free association as autonomous republics within the French Community (Communauté française), and as a consequence, did not engage their populations in democratic constitution-making, choosing instead to use the French Constitution of 1958 as the foundation for their laws and institutions. Such a process effectively deprived the citizens of the francophone countries in sub-Saharan Africa of the opportunity and right to select their own laws and governance institutions. In each new country, the law was supposed to help Africans organize their private lives, provide them with mechanisms to peacefully resolve conflicts arising from sociopolitical interaction, including those from trade and other forms of exchange, and adequately constrain the state so that its custodians—namely, civil servants and political elites—could not behave with impunity. Instead, what they got were various forms of laws and institutions inherited from the colonial state, all of which were incapable of promoting law and order and providing the enabling environment for the creation of wealth. These

was achieved and governance structures were in the hands of indigenous elites, the latter would engage the people in democratic constitution-making to produce appropriate—namely, democratic—institutional arrangements for governance. That, unfortunately, never happened. In fact, in the case of Cameroon, the 1960 Constitution, which was based on the Constitution of the French Fifth Republic and whose compacting did not involve any robust constitutional discourse, remains the foundation of the country’s 1972, 1996, and 2008 constitutions. The latter is the country’s present constitution. Throughout its existence as a sovereign country, Cameroon has never undertaken democratic constitution-making. Instead, the country’s political elites have engaged in opportunistic institutional “reforms” to produce laws and institutions that have allowed them to monopolize the supply of legislation and effectively plunder the national economy for their own benefit. See generally LeVINE, supra note 42.

54. LeVine questions the “appropriateness of modeling the Cameroun constitution so closely on that of the [French] Fifth Republic.” Although France’s 1958 Constitution—the Constitution of the French Fifth Republic—was designed “in the context of the constitutional crisis that brought De Gaulle to power,” the “circumstances surrounding the writing of the Cameroun constitution were not in any way analogous to those existing in France in 1958.” LeVINE, supra note 42, at 224–27. See also Victor T. LeVine, The Fall and Rise of Constitutionalism in West Africa, 35 J. MOD. AFR. ST. 181, 184–85 (1997) [hereinafter LeVine, The Fall and Rise of Constitutionalism].
laws and institutions, after all, were instruments of oppression used by the Europeans during the colonial period to enrich themselves at the expense of the inhabitants of the colonies. The African elites who captured the apparatus of government at independence turned these same European-inspired laws and institutions into instruments of plunder, and proceeded to use them to oppress and infantilize the masses as well as enrich themselves, just as the Europeans had done.55

C. The Policy Imperative in Africa Today

While African countries currently face a plethora of problems, the most important are how to (1) manage ethnic and religious diversity and provide for peaceful coexistence; (2) create the wealth that these countries need to deal with poverty and improve national living standards; (3) establish entrepreneurial sectors capable of providing a solid foundation for economic growth and development; (4) minimize corruption, rent seeking, financial malfeasance—particularly in the public sector—and deal effectively with other forms of political opportunism, which have emerged as important constraints to governance and economic transformation; (5) promote the protection of fundamental and human rights; and (6) significantly improve the continent’s participation in the international economy and global affairs.

One can argue that for Africa to effectively and fully deal with these problems requires the cooperation of the international community. That may be true, especially given the influence of international organizations such as the World Bank56

55. As argued by Fatton, “The rapid disintegration of the inherited parliamentary model generated the rise of personal rule shaped by the idiosyncrasies of the ruler and his entourage rather than by effective political institutions and regulations.” In fact, most of the inherited political systems in Africa degenerated shortly after independence into authoritarian systems that effectively allowed the ruling elites to create and use patron-client networks for resource extraction and self-enrichment. Fatton, Jr., supra note 27, at 459–60.

56. The International Bank for Reconstruction and Development (also called the World Bank) and the International Monetary Fund (“IMF”) are generally referred to as the Bretton Woods Institutions because they were founded at Bretton Woods, New Hampshire, United States, in 1944. While the IMF’s main mission was to ensure that global trade was not interrupted and to provide financial assistance to countries to deal with temporary balance of payments problems, the World Bank was tasked with promoting eco-
and International Monetary Fund, as well as the developed market economies of the West, which, along with their multinational companies, continue to dominate investment in the African countries. Additionally, in recent years, the PRC has significantly increased its involvement and influence in the African economies. However, effective economic, political, and social development in Africa requires that Africans take ownership of their problems and seek appropriate ways to deal with them. They must recognize that eliminating poverty in the continent and significantly improving the living standards of the people must be based on and informed by full participation of all Africans in the policy design and implementation process. Africans cannot rely on the benevolence of external actors in order to realize the solutions to these problems. Specifically, each African country must engage its citizens in the process of state reconstruction to provide institutional arrangements that economic growth and development in the post-World War II period, primarily in the poor and developing countries that emerged from colonial rule in the post-war period. The IMF has been involved in many projects in Africa. The most important of them have been the structural adjustment programs ("SAPs"), which were designed to enhance the ability of African countries to service their external debts and improve macroeconomic performance. See generally Mbaku, Institutions and Development, supra note 1, at 141–75 (discussing, among other things, the impact of the IMF’s structural adjustment programs on economic development in Africa in the mid-1980s and early 1990s); Kevin Danaher, Introduction, in 50 Years is Enough: The Case Against the World Bank and the International Monetary Fund 1, 2 (Kevin Danaher ed., 1994) (arguing that despite the fact that the Bretton Woods institutions were given clear and well-defined mandates, they nevertheless proceeded to pursue other objectives, which included trying to integrate economies of the developing countries into the “capitalist world economy”); Structural Adjustment, Reconstruction and Development in Africa (Kempe Ronald Hope, Sr. ed., 1997) (arguing that the approach to development and balance-of-trade adjustment taken by the World Bank and the IMF is not appropriate for the African countries). The World Bank is a major supporter of economic development in Africa. In 2010, the Bank committed US$11.5 billion in loans to development projects in Africa. See News Release, World Bank Group, Unprecedented Support from the World Bank to Help Africa Recover from the Crisis (July 1, 2010).

57. See Danaher, supra note 56; Mbaku, Institutions and Development, supra note 1, at 161–63.

(1) can enhance the effective management of ethnic and religious diversity, as well as ensure the peaceful coexistence of all population groups; (2) establish and maintain a fully functioning private sector, which will create the wealth that is needed to deal with mass poverty and help eradicate poverty; (3) minimize all forms of political opportunism, especially corruption, rent seeking, and public financial malfeasance, all of which are major constraints to economic growth and wealth creation; (4) ensure that the people’s fundamental and human rights are constitutionally guaranteed and fully protected; and (5) enhance Africa’s participation in and influence on international trade and global affairs.

While the objectives of this research have already been stated, it is important to note two things. First, that this paper calls attention to the need for Africans to revisit existing approaches to wealth creation and economic growth, as well as poverty alleviation and eventual eradication in Africa. And second, this paper shows that while international cooperation is important for success in fighting poverty and improving living conditions on the continent, Africans must recognize that international support—for example, through foreign investment, development aid, and grants—is a necessary, but not sufficient condition. Sufficiency mandates that each African country provide itself with institutional arrangements that guarantee the rule of law. Thus, part of Africa’s effort to eliminate poverty and enhance human development must involve the development, through a democratic constitution-making process, of institutional arrangements that guarantee the rule of law.

As mentioned earlier, this study employs a constitutional political economy model, which posits that rules have a significant influence on and to a great extent determine outcomes resulting from sociopolitical interaction in any society. Constitutional political economy deals with the rules that constrain the “economic and political relationships among persons” within a country or community. Laws and institutions provide individuals living in a society with the wherewithal to organize their private lives and maximize their values—for example, by

59. The eighteenth century Scottish social philosopher and pioneering political economist, Adam Smith, called these rules, “laws and institutions.” See Smith, supra note 17, at 106.

60. Brennan & Buchanan, supra note 18, at 7.
engaging in mutually beneficial exchanges or undertaking entrepreneurial activities to create the wealth that they need. These institutions function within a context in which they do not constrain or prevent others from achieving their own objectives.\textsuperscript{61} Brennan and Buchanan argue that in enhancing the ability of individuals to maximize their interests, rules also serve the “negative function of preventing disastrous harm.”\textsuperscript{62}

Throughout the continent, Africans are confronted with governmental systems that exploit, denigrate, pauperize, and infantilize them. Part of the problem comes from the fact that many Africans live in countries or societies with rules that they either do not understand, or the existence of which they are not aware.\textsuperscript{63} In many African countries, only a select group of individuals, primarily urban-based elites who control the government, take part in the selection of the laws and are familiar with them. These ruling elites regularly subvert the laws to redistribute income and wealth in their favor. In the process, they violate the fundamental human rights of their fellow citizens.\textsuperscript{64} Effective laws, those that enhance peaceful coexistence and promote wealth creation, are those that adequately constrain the state and prevent civil servants and political elites from engaging in the various forms of opportunism, such as rent seeking, corruption, and financial malfeasance. Of course, the majority of citizens must voluntarily accept and respect these laws; otherwise, policing to enforce compliance would be a very difficult and odious task.\textsuperscript{65} For most citizens to accept

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\textsuperscript{61} Id. at 14.
\textsuperscript{62} Id.
\textsuperscript{63} For example, throughout the continent, many poor people are regularly denied access to services at public hospitals because they are not able to pay the bribes demanded by doctors, nurses, and other hospital staff. This takes place despite the fact that there are laws against such conduct by staff at public institutions, including hospitals. Of course, civil servants are able to easily act with impunity because existing laws do not adequately constrain them. See MBAKU, CORRUPTION IN AFRICA, supra note 1, at 87–116 (examining corruption and its impact on African economies).
\textsuperscript{64} See, e.g., MBAKU, INSTITUTIONS AND REFORM IN AFRICA, supra note 1 (examining, inter alia, the monopolization of the supply of legislation by center elites and the impact of that approach to institutional reforms on African economies).
\textsuperscript{65} Of course, not all citizens have to voluntarily accept and respect the law. The critical point is that in order to enhance policing, it is important that a majority of citizens voluntarily accept and respect the law. The minority that does not can be dealt with and forced to comply by the country’s coun-
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and respect the laws, the laws must reflect their values, customs, and traditions, their aspirations, interests, and worldview, and must be relevant to the problems that they must deal with on a regular basis, providing them with necessary tools to organize their private lives. Such laws and institutions can only be produced through a bottom-up, participatory, inclusive, and people-driven institutional reform process.

The creation of the wealth that is needed to confront poverty and improve the living standards of Africans requires that each country develop and adopt institutional arrangements that guarantee the rule of law. This study will examine the elements of the rule of law and show its relevance to the creation of wealth, and hence, the minimization of poverty in Africa.

II. THE RULE OF LAW

A. Introduction

Throughout history, legal philosophers have worked hard to define the concept called the “rule of law.” British jurist and legal philosopher Albert Venn Dicey is credited with providing the logical foundation on which the modern definition of the concept of the rule of law is based. He argued that the rule of law must embody three important concepts: first, the law is supreme; second, all citizens are equal before the law; and third, a recognition and acceptance of the principle that the rights of individuals must be established through court decisions.66

On November 16, 2006, the Rt. Hon. Lord Bingham of Cornhill KG delivered the sixth lecture in honor of Sir David Williams at the Center for Public Law, University of Cambridge, titled “The Rule of Law.”67 In that lecture, Lord Bingham stated that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of interacting agencies, such as the police and the court system. Voluntary compliance significantly minimizes the costs of policing and is extremely important for the African countries because they have limited resources to devote to enforcement. See MBAKU, CORRUPTION IN AFRICA, supra note 1, at 13–14.

of laws publicly and prospectively promulgated and publicly administered in the courts.” He set out eight sub-rules, which he argued underlie the general principle of the rule of law. These sub-rules are:

1. “the law must be accessible and so far as possible intelligible, clear and predictable”;

2. “questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion”; 

3. “the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation”;

4. “the law must afford adequate protection of fundamental human rights”;

5. “means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve”;

6. “ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers”;

7. “that adjudicative procedures provided by the state should be fair”; and

8. “the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.”

In a 2009 article, Professor Stein argued that the most important aspect of Lord Bingham’s definition of the rule of law is that “the law is superior, applies equally, is known and predictable, and is administered through a separation of powers.” Professor Stein then goes on to provide his own definition of the rule of law. He argues that a country governed by institutional arrangements that guarantee the rule of law is characterized by the following:

68. Id. at 5.
69. Id. at 6–29.
71. Id. at 301.
1. The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.

2. The law is known, stable, and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined and government discretion sufficiently limited to ensure the law is applied non-arbitrarily.

3. Members of society have the right to participate in the creation and refinement of laws that regulate their behaviors.

4. The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession.

5. Judicial power is exercised independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases.\(^72\)

The American Bar Association (“ABA”) has also shown an interest not only in tackling the issue of defining the rule of law, but also in helping promote its implementation outside the United States. The ABA has taken a leadership role in the movement to help transition countries reform, transform, and reconstitute their legal systems. Finding a workable definition for the rule of law is part of that effort.\(^73\) The ABA, however, argues that “[t]he rule of law does not depend upon a U.S.-style separation of powers... The key point is that every form of government has to have some system to ensure that no one in the government has so much power that they can act above the law.”\(^74\) The rule of law consists of several elements, but the most important of them, especially in Africa where bureaucratic corruption has become endemic and political elites and civil servants behave with impunity, is that no one, not even the people who hold leadership positions in government, including the executive, judiciary officers, and legislators, is above the law—the law is supreme.

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72. Id. at 302.
74. Id. at 4.
Joseph Raz, who studied legal philosophy at Oxford University under H. L. A. Hart, and later became a Professor of Philosophy of Law at Oxford, provided a definition for the rule of law that encapsulates eight basic guiding principles, namely:

1. All laws should be prospective, open, and clear.
2. Laws should be relatively stable.
3. The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
4. The independence of the judiciary must be guaranteed.
5. The principles of natural justice must be observed.
6. The courts should have review powers over the implementation of the other principles.
7. The courts should be easily accessible.
8. The discretion of crime-preventing agencies should not be allowed to pervert the law.75

Law Professor Erwin Chemerinsky, a well-known expert on constitutional law, argues that although he agrees with the guiding principles advanced by Professor Raz, he nevertheless believes that these principles “do not really provide much guidance.”76 According to Chemerinsky, “Raz’s idea that laws should be relatively stable gives no indication of when it is appropriate to change laws, whether by overruling precedent or revising statutes.”77 He argued further that in order to formulate a practical and workable definition for the rule of law, one must consider or address a specific set of propositions. These are:

1. The rule of law requires the formation of general laws according to set procedures.
2. Laws must be general, prospective, and clearly stated.
3. The government must obey the laws in its actions.
4. Government must not infringe the rights of individuals.

76. Id.
77. Id.
5. The government must follow fair procedures in depriving a person of life, liberty, or property.

6. The government must treat likes alike and unalikes unalike.

7. The government must provide a fair system to resolve private disputes.

8. An independent judiciary is essential to the rule of law.\(^78\)

In recent years, the United Nations has also become interested and involved in the movement to formulate a definition for the rule of law. According to the U.N.,

'[t]he ‘rule of law’ refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'\(^79\)

For most countries around the world, including the highly developed democracies, the rule of law is an ideal that they hope and seek to achieve, but it is not unusual to find highly advanced democracies that are struggling to guarantee the rule of law within their legal systems. The American Republic—the United States of America—which came into being in 1776, was governed for many years by a constitution that failed to protect the fundamental and human rights of all its citizens. Although the new country’s constitution was specifically designed to protect the rights of its citizens, slavery was widely practiced throughout most of the country. In fact, the U.S. Constitution

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78. Id. at 6–9.

expressly sanctioned the institution of slavery—slavery and the slave trade were legal in the United States until 1808.80

B. The Elements of the Rule of Law

The heart of the rule of law is that “the government must obey the law in its actions.”81 This view flows directly from the belief that the law is supreme. Justice Anthony M. Kennedy, Associate Justice of the U.S. Supreme Court, has stated that “[t]he Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all of its officials.”82 The supremacy of law is the first element of law that is identified for the purposes of this article.

A country is not likely to be able to “maintain the rule of law if its citizens do not [accept] and respect the law.”83 If, in a country, the majority of citizens do not accept and respect the law, it would be very difficult for the government agencies whose job it is to maintain law and order to successfully perform their duties. Policing for compliance, for example, would be extremely costly and the government would likely be forced to devote a significant portion of national income to compliance activities, a process that can reduce expenditures on important sectors of the economy such as health and human capital development. Hence, the second element of the rule of law is that the majority of citizens must accept and respect the law.

The U.S. Supreme Court has contributed significantly to the development of modern rule of law jurisprudence. In United States v. United Mine Workers,84 a case that was decided in 1947, the U.S. Supreme Court held that:

In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed

80. U.S. CONST, art. I, §9. Slavery was eventually abolished in the United States and the country’s Constitution was duly amended to afford descendants of slaves equal protection under the law.
81. Chemerinsky, supra note 75, at 6.
83. A.B.A. Division of Education, supra note 73, at 5.
to determine for himself what is law, every man can. That means first chaos, then tyranny.\textsuperscript{85}

Many of the definitions of the rule of law proffered by various scholars, and examined above, share the U.S. Supreme Court’s assertion in \textit{United States v. United Mine Workers}\textsuperscript{86} that “[t]here can be no free society without law administered through an independent judiciary.”\textsuperscript{87} For example, among Professor Chemerinsky’s eight key propositions to be addressed in an effort to formulate a practical definition for the rule of law is: “An independent judiciary is essential to the rule of law.”\textsuperscript{88} In arguing that “[t]he ‘rule of law’ refers to a principle of governance in which all persons, institutions and entities, public or private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, . . .”, \textsuperscript{89} the United Nations also acknowledges judicial independence as an essential and critical element of the rule of law.

Thus, the third element of the rule of law is \textit{judicial independence}. In many African countries, even where the constitution specifically makes allowances for separation of powers and guarantees judicial independence, the judiciary is still subject to, or controlled by, the executive branch of government. In many of these countries, the executive employs the judiciary as an instrument to control citizens and enhance the regime’s ability to monopolize power. Little emphasis is placed on the administration of justice.\textsuperscript{90}

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\textsuperscript{85} Id. at 312.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Chemerinsky, supra note 75, at 8.
\textsuperscript{90} Consider the case of the Republic of Cameroon. According to the country’s constitution—Constitution of the Republic of Cameroon 2008—judiciary independence is expressly guaranteed. However, the same constitution vests the president of the republic with the power to guarantee the independence of the judiciary. \textit{Constitution of the Republic of Cameroon}, arts. 37(2), 37(3). Cameroon, of course, is not the only country in Africa with such an approach to “judiciary independence.” According to Article 69 of the Gabonese Constitution, “La Président de la République est le garant de l’indépendance du pouvoir judiciaire.” (“The President of the Republic is the guarantor of the independence of the judiciary.”) \textit{Constitution de la République Gabonaise},
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Law functions effectively only if citizens are aware of, understand, and appreciate the law. Governments can help citizens understand and appreciate the law through broad-based education programs undertaken at schools and in community-based adult education centers. Such programs, however, should only be designed to supplement, but not replace, participatory and inclusive constitution-making. First, citizens must be provided the facilities to participate fully and effectively in constitution-making. Second, the enactment of laws in the post-constitutional society should be open and transparent, making allowances for as much participation as possible. Finally, the “laws [must be] applied predictably and uniformly,” and not capriciously or arbitrarily. The fourth and fifth elements of the rule of law are openness and transparency, and predictability.

According to the ABA, as a legal principle, the rule of law developed in the United States “around the belief that a primary purpose of the rule of law is the protection of certain basic rights.” In similar fashion, the decolonization projects of the 1950s and 1960s in Africa were based on the desire of Africans, first, to rid themselves of the European-induced laws and institutions, and, second, to replace them with institutional arrangements designed by Africans themselves. The hope was that each country would develop and adopt laws and institutions that would enhance the ability of its diverse citizens to live together peacefully and create wealth to deal with poverty and improve living conditions.

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91. A.B.A. Division of Public Education, supra note 73, at 5.
92. Id.
93. In a 1987 paper, Michael Crowder examined political economy in Nigeria as just one example of a country that failed to live up to the hopes of its citizens and those who believed that the new state would use its independence to provide structures capable of enhancing peaceful coexistence and sus-
tutional arrangements were expected to adequately constrain the state, effectively preventing civil servants and political elites from engaging in corruption, rent seeking, and other forms of opportunism; and to guarantee the protection of fundamental and human rights, as well as provide citizens with the wherewithal for self-actualization. Of course, the new laws and institutions were also expected to adequately constrain non-state actors so that they could not infringe on the rights of their fellow citizens, especially those who had historically been marginalized and abused, such as women, and ethnic and religious minorities. ⁹⁴

Instead, constitution-making in the pre- and post-independence periods was elite-driven, top-down, and non-participatory. ⁹⁵ The outcome of such a rules selection process
tainable development. Crowder states that he chose Nigeria “as an example of the disillusion that has attended the first twenty-five years of independence not only among the former colonial rulers who transferred power but also among those who inherited that power, because it contains a quarter of the population of the African continent. Its experience has unhappily not been atypical but rather the norm for the majority of African countries.” Crowder, Whose Dream, supra note 38, at 8.

⁹⁴ See Mbaku & Ihonvbere, Introduction: Issues in Africa’s Political Adjustment in the “New” Global Era, in TRANSITION TO DEMOCRATIC GOVERNANCE, supra note 3, at 1–2 (arguing that “[m]any Africans, especially the historically marginalized and deprived (e.g., women, rural inhabitants, ethnic minorities, and those forced to live on the urban periphery), believed that independence was an opportunity to rid themselves of not only the Europeans, but also of their laws and institutions and then, develop and adopt, through a democratic process—a people-driven, bottom-up, participatory, and transparent institutional reform process—institutional arrangements based on their own values, aspirations, traditions, and customs”).

⁹⁵ In the French colonies, for example, constitution-making degenerated into the adoption of the constitutional platform offered to these colonies by General Charles de Gaulle. It was only Guinea that voted against de Gaulle’s offer of association as autonomous political units within the French Community. In British colonies, constitution-making was carried out primarily in London and away from the people—the African peoples were represented by urban-based African elites, many of whom were actually chosen by the colonial government, instead of by the people. In the colonies with significant populations of settlers, the settlers dominated and sometimes controlled constitution-making. See, e.g., LeVine, supra note 42, at 183–85 (examining constitution-making in the U.N. Trust Territory of Cameroons under French administration); DENNIS V. COWEN, THE FOUNDATIONS OF FREEDOM: WITH REFERENCE TO SOUTHERN AFRICA 43–82 (1961) (providing insight into constitutional discourse in the colonies that united in 1910 to form the Union of South Africa).
was institutional arrangements that failed to adequately constrain the state and did not provide each new country’s diverse population groups with the mechanisms for peaceful coexistence. Specifically, these post-independence laws and institutions, especially in the francophone countries, created so-called imperial presidencies with power concentrated in the center, and failed to protect the fundamental and human rights of citizens.96 Thus, the sixth element of the rule of law is the protection of the fundamental rights of citizens.

III. THE RULE OF LAW AS A FOUNDATION FOR DEVELOPMENT IN AFRICA: OVERVIEW

A. Introduction

The struggle against poverty and deprivation in Africa is actually a fight to create wealth—that is, a fight to establish within each country viable and fully functioning entrepreneurial communities. With increased wealth, and given the appropriate institutional environment, Africans can invest in human development. The additional resources can be used to increase spending on nutrition, especially for infants and children; education, especially at the primary and secondary levels; clean water; women’s health, especially on prenatal care; and the social overhead capital that is needed to enhance each country’s ability to create more wealth.

Fighting poverty and improving living conditions, especially for historically marginalized groups and communities,97 are the most important public policy priorities for African countries. During most of the post-independence period, African countries have relied heavily on resource flows from abroad, especially in the form of official development assistance, as well as food aid, to deal with poverty and poverty-related problems.98 The most

97. Such groups and communities include women, infants and children, rural inhabitants, the urban poor, and ethnic and religious minorities.
98. For a critique of foreign aid’s effectiveness as a tool for the fight against poverty, see Doug Bandow, The Fallacy of Foreign Assistance Programs as Instruments of Economic Growth and Social Stability: The Case of
effective way for Africans to deal with poverty, especially on a sustainable basis, is for each economy to significantly improve its capacity to create wealth. That capacity includes, and is dependent significantly on, the existence within each country of institutional arrangements that guarantee the rule of law.  

B. The Supremacy of Law

By far the most important obstacles to the creation of wealth and improvement of the human condition in Africa are bureaucratic and political corruption, rent seeking, public financial malfeasance, and other forms of opportunism perpetuated by civil servants and political elites, usually in an effort to extract extra-legal income for themselves and their benefactors. During the last several decades, these behaviors have become endemic in many African countries. These growth-inhibiting
behaviors have actually stunted the emergence of the type of productive—that is, private—sector capable of producing enough wealth to meet the needs of the people. In fact, corruption remains a very serious obstacle to entrepreneurship, especially among historically marginalized and deprived groups. The pervasiveness of corruption and other forms of political opportunism in the African countries is due to the fact that the laws and institutions that emerged in these countries in the post-independence period did not adequately constrain the state, allowing civil servants and political elites to act with impunity. Specifically, the constitutions of these countries did not guarantee the supremacy of law, nor did they provide mechanisms, such as the separation of powers, to realize those guarantees in practice. As a consequence, there were no viable and effective mechanisms available to citizens to adequately check the excesses of the government.101

101. MBAKU, CORRUPTION IN AFRICA, supra note 1, at 156–64. In the immediate post-independence period, military officers in some African countries argued that they could remedy what they believed was an untenable political and economic situation and significantly improve governance. Specifically, they argued that the military, built on a foundation and tradition of discipline, was the only institution capable of bringing warring ethnic and religious groups together and securing the peace, as well as ridding the public sector of opportunistic and recalcitrant civil servants and politicians, and establishing a professional, efficient, and fully functioning bureaucracy in each country. For example, the leaders of the military coup that brought Nigeria’s First Republic to an end argued that they intervened to rid the country of dishonest, incompetent and corrupt civil servants and politicians, and “restore respectability to the Nigerian civil service.” MBAKU, INSTITUTIONS AND REFORM IN AFRICA, supra note 1, at 123. In an address to the nation shortly after the January 15, 1966 coup that brought the military to power, Major Chukuma Kaduna Nzeogwu, the coup’s leader, identified the following as the people who had destroyed the country and whose removal from office was critical for the maintenance of an efficient and viable bureaucracy: “political profiteers, swindlers, the men in the high and low places that seek bribes and demand ten percent, those that seek to keep the country divided permanently so that they can remain in office as ministers and V.I.P.’s of waste, the tribalists, the nepotists, those that make the country look big for nothing before international circles, those that have corrupted our society and put the Nigerian political calendar back by their words and deeds.” Pita Ogaba Agbese, With Fingers on the Trigger: The Military as Custodian of Democracy in Nigeria, 9 J. THIRD WORLD STUD. 220, 227 (1992). Between 1966 and 1999, Nigeria was ruled primarily by military elites, virtually all of whom came into power through extra-constitutional means. Each group of military leaders that seized the apparatus of government repeated Maj. Nzeogwu’s proc-
In the 1920s, John Dickinson studied administrative tribunals and common-law courts in the United States, and concluded that the law serves as an important mechanism for citizens to check the exercise of government agency. The ability of citizens to adequately check on the government is critical for the maintenance of the rule of law. As argued by British legal philosopher Albert Dicey, the rule of law comprises “firstly, the supremacy of law as opposed to arbitrariness or even wide discretion by governments; second, the equality of all persons before the law; and third, in England, principles establishing the rights of individuals developed by case law through centuries in that country.” Both Dicey and the many legal scholars and practitioners that came after him, especially in the Anglo-American spheres of influence, believed that in order for the rule of law to exist in a country, all citizens, including those who serve in government, must be subject to laws agreed upon in an earlier period. Under such a legal regime, the country’s citizens, whether they are members of the government or non-state actors, are subject to the country’s “known and standing” laws. Thus, governance institutions under such a legal regime do not grant civil servants and political elites wide discretion to either make their own laws, or subvert existing ones, to generate extra-legal income for themselves. These elites, like other citizens, must respect existing laws and be subject to them.

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103. Dicey, supra note 66.
104. Id. at 181.
105. Id.
106. Id.
According to Dickinson, in a legal system characterized by the supremacy of law, “every citizen is entitled, first, to have his rights adjudicated in a regular common-law court, and secondly, to call into question in such a court the legality of any act done by an administrative tribunal.” Throughout most of post-independence Africa, governments have operated with impunity, with those who are supposed to serve the public interest—the so-called state custodians—considering themselves above the law. In the words of Dicey, the existence of the rule of law in a country means “that no man is above the law, but that every man, whatever his rank or condition, is subject to the ordinary law of the realm, and amenable to the jurisdiction of the ordinary tribunals. . . . With us, every official, from Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.”

But, is not supremacy of law a concept that is uniquely a “central and most characteristic feature of . . . Anglo-American juristic habit”? In the mid-1980s and early-1990s, there were mass demonstrations throughout Africa. Led by grassroots organizations, these anti-government riots were designed to oust authoritarian regimes and bring about people-driven institutional reforms to enhance the deepening and institutionalization of democracy. Implicit in these agitations for political transformation was the belief that the only way to bring about the peaceful coexistence of each country’s diverse population groups, as well as provide an enabling environment for the cre-

107. Dickinson, supra note 102, at 34–35.
108. Id. at 35.
109. Id. at 34.
110. Id. at 32–33.
111. See generally Transition to Democratic Governance, supra note 3 (outlining Africa’s transition-to-democracy movement of the mid-1980s and early 1990s). Of course, on December 17, 2010, a Tunisian street vendor set himself on fire in protest of his harassment by local government operatives. This act of self-immolation re-awakened the desire of citizens of several North African and Middle Eastern countries for democracy and the rule of law. This re-awakening produced mass demonstrations, some violent, that led to the ouster of many of the region’s long-serving authoritarian regimes and set the stage for institutional reforms to deepen and institutionalize democratic governance. Unfortunately, such people-driven, participatory, and bottom-up institutional reforms were never undertaken and the struggle to bring about the rule of law in these countries remains a work in progress.
ation of wealth, was to introduce into each country institutional arrangements that guarantee the supremacy of law.\(^\text{112}\) If the law is supreme, implying that citizens, including those who serve in the government, do not consider themselves above the law, then citizens would be able to more effectively challenge and scrutinize the behaviors of those who govern them. Where citizens are able to question the actions of civil servants and politicians, the latter will find it quite difficult to engage in corruption and other growth-inhibiting behaviors like rent seeking, and as a result, public impunity would be minimized. Such a process can significantly enhance accountability.\(^\text{113}\)

In a study of Cameroon, Nantang Jua was unable to find a single instance in which the government’s anti-corruption programs had ever successfully brought a high-ranking civil servant or political elite to justice.\(^\text{114}\) He determined that:

\[\text{[t]he Financial Disciplinary Committee of the Ministry of Public Service occasionally prosecutes low-ranking government officials such as postmasters, school bookkeepers and, from time to time, a few men of managerial rank. This can be seen as a device that, in a quest to enhance its legitimacy, the state uses to satisfy society’s clarion call that sanctions be meted out on deviating bureaucrats. That higher-level bureaucrats are largely immune from trial by the Disciplinary Committee is evidence that Cameroon has an attenuated patrimonial administrative structure in which public discussion and/or criticism of the alleged acts of some members of the ruling class is still taboo.}\(^\text{115}\)

\(^{112}\) See generally Transition to Democratic Governance, supra note 3.

\(^{113}\) See generally Mbaku, Corruption in Africa, supra note 1.


\(^{115}\) Id. at 166. It is important to note, however, that some high-ranking officials were supposedly prosecuted and imprisoned for engagement in corrupt activities. These individuals were grouped into two main categories—“sacrificial lambs” and “fall guys.” As determined by Mbaku, “sacrificial lambs’ members of the incumbent ruling coalition who are carefully selected and then run through a phony and opportunistic anti-corruption program in which the individual’s ‘conviction’ is a forgone conclusion. Such conviction is followed by the imposition of ridiculously long prison sentences or exile. However, no genuine effort is made to recover the stolen public resources. This process usually satisfies the people’s desire for sanctions against civil servants who have abused the public trust.” Eventually, the disgraced civil servant is later “rehabilitated,” brought back into the government
Despite the fact that since the 1990s Cameroon’s political economy has changed significantly and the country now has a functioning multiparty “democratic” system of governance, the rule of law, specifically supremacy of law, remains elusive. In fact, “journalists who venture into investigations of the so-called ‘untouchables’ have found their newspapers seized by the government, their lives threatened, or worse—many of them have ended up in prison.”\textsuperscript{116} For example, the late Pius Njawé, considered Cameroon’s foremost independent journalist and publisher of \textit{Le Messager}, was fined and imprisoned by the Biya regime for publishing, in his newspaper, an article seeking answers to the simple question: “Is President Biya Sick?”\textsuperscript{117}

Cameroon, like many other countries in Africa, has not been able to provide itself with a legal system in which the law is supreme. As a result, most high-ranking civil servants and political elites in these countries consider themselves above the law and act with impunity. Citizens are unable to hold those who govern accountable, and corruption is pervasive, effectively constraining investment in productive activities, leading to the failure of Cameroon and the other African countries in the same situation to create the wealth that they need to confront poverty and deprivation, and to improve national living standards.

In the 1980s, Gould and Mukendi conducted a study of corruption in Zaire, and determined that wealthy and politically-connected individuals considered themselves above the law. Under the legal system existing in Zaire at the time, these highly-placed individuals, all of whom were politically well-connected to the regime of President Mobutu Sese Seko, considered themselves “untouchables” and hence, not subject to

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\textsuperscript{116} MBAKU, CORRUPTION IN AFRICA, supra note 1, at 97–98.

\textsuperscript{117} Lyombe Eko, \textit{Hear All Evil, See All Evil, Rail Against All Evil: Le Messager and the Journalism of Resistance in Cameroon}, in \textsc{The Leadership Challenge in Africa: Cameroon Under Paul Biya} 123 (John Mukum Mbaku \& Joseph Takougang eds., 2004).
the country’s known and standing laws.\textsuperscript{118} Thus, it was rare to find a high-ranking civil servant or politician, or an individual of high wealth status in Zaire who was either subject to the law or who did not consider himself or herself above the law. Such well-placed individuals were regularly involved in corrupt deals, but were rarely prosecuted. Even if they appeared before a court of law, they were not likely to be convicted because, as determined by Gould and Mukendi, adjudication of court cases was not based on established legal rules and the facts presented in court, but on the wealth and political status of the individual.\textsuperscript{119}

What Gould and Mukendi found in Zaire was not unique to that country. Throughout the continent, many civil servants and political elites continue to consider themselves above the law. Either because of the pervasiveness of corruption, or the fact that the judiciary in these countries is controlled by the executive, most of these high-ranking political operatives are rarely, if ever, brought to justice for their complicity in corruption and other forms of opportunism.\textsuperscript{120} As a consequence, growth-inhibiting behaviors—in short, corruption, rent-seeking, and financial malfeasance—are pervasive throughout many countries in the continent.\textsuperscript{121}

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\textsuperscript{119} Id. at 429–30.

\textsuperscript{120} See generally Fombad, supra note 100; Mbaku, Corruption in Africa, supra note 1, at 100; David J. Gould, \textit{Bureaucratic Corruption and Underdevelopment in the Third World: The Case of Zaire} (1980); Corruption, Consequences and Control (M. Clarke ed., 1983); Corruption and the Crisis of Institutional Reforms, supra note 1.

\textsuperscript{121} For example, during the time he was president of Nigeria (1993–1998), Sani Abacha stole US$2–$5 billion from the Nigerian economy. Mobutu Sese Seko, who was head of state in Zaire/Democratic Republic of Congo from 1965 to 1997, is reported to have stolen as much as US$5 billion. Robin Rhodes, \textit{Introduction, in Global Corruption Report} 11 (Transparency International ed., 2004). On May 3, 2012, Salva Kiir, president of South Sudan, Africa’s newest country and one of the continent’s poorest, sent a letter to seventy-five high-ranking current and former government officials accusing them of stealing as much as US$4 billion from the national treasury. David Smith, \textit{South Sudan President Accuses Officials of Stealing $4bn of Public Money, Guardian} (June 5, 2012), http://www.guardian.co.uk/world/2012/jun/05/south-sudan-president-accuses-officials-stealing. Even without conducting an empirical study to determine
In the struggle to create the wealth that Africans need to address mass poverty and deprivation, it is very important that each African country undertake necessary reforms to provide institutional arrangements that guarantee the supremacy of law and force all citizens—including those who hold high-ranking positions in the government, as well as those who are financially well-to-do—to subject themselves to the law. Unless this is done, corruption and other growth-inhibiting behaviors will continue to frustrate these countries’ ability to deal effectively with poverty.

C. Voluntary Acceptance of and Respect for the Law

The American Bar Association, which has taken a leadership role in the promotion of the rule of law in developing and transition countries, has stated that “[i]t is very difficult for a nation to maintain the rule of law if its citizens do not respect the law.”122 While citizens can be forced to obey the law through government coercion, usually with the help of the police and military forces, such a legal system is extremely costly and difficult to maintain or sustain.123 However, if the majority of citizens voluntarily accept and respect the law, they are more like-

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122. A.B.A. Division of Public Education, supra note 73, at 5.
123. Nigeria is a good example of a country that has been unable to maintain an efficiently functioning and effective legal and judicial system. In fact, during the last several decades, the Nigerian legal system has been so ineffective that citizens have resorted to vigilantism as a way to protect themselves and their property, as criminals take over the streets and neighborhoods. See generally David Pratten, Introduction: Perspectives on Vigilantism in Nigeria, 78 Afr. J. INT’L AFR. INST. 1 (2008). See also Domesticating Vigilantism in Africa: South Africa, Nigeria, Benin, Côte d’Ivoire, and Burkina Faso (Thomas G. Kirsch & Tilo Grätz eds., 2010); Policing Developing Democracies (Mercedes S. Hinton & Tim Newburn eds., 2009).
ly to comply, significantly minimizing the costs of compliance. As stated by the ABA, “[t]he rule of law functions because [the majority of citizens] agree that it is important to observe the law, even if a police officer is not present to enforce it.”

Of course, the main question for an African country struggling to institutionalize the rule of law is: how can the government create an atmosphere in which citizens will accept and respect the law? The answer lies in what the country’s laws are and how they are enacted. First, the laws enacted and adopted by the country must be those that citizens can obey, and obey willingly. As stated by U.S. suffragist and advocate of women’s rights, Elizabeth Cady Stanton, “[t]o make laws that man cannot and will not obey, serves to bring all law into contempt. It is very important in a republic that the people should respect the laws, for if we throw them to the winds, what becomes of civil government?”

If, however, the laws that exist in a country are those that citizens cannot or are unwilling to comply with, the country’s counteracting agencies—typically, the police and the judiciary—face an uphill battle in trying to force compliance. Within such an institutional environment, maintaining law and order would either be extremely difficult or virtually impossible, especially for countries with limited resources to devote to law enforcement. Where the laws are extremely complex or difficult to understand, or are not relevant to the lives of the people and the problems they face, the people are less likely to respect and willingly obey them.

124. A.B.A. Division of Public Education, supra note 73, at 5 (emphasis added).
125. Id. (quoting Elizabeth Cady Stanton, Tenth National Women’s Rights Convention (May 10–11, 1860)).
126. Except for customs and traditions, laws in most African countries today are often adaptations of those left behind by the colonial government. In addition to the fact that the constitutions of all francophone countries in sub-Saharan Africa, except Guinea, are based on the Constitution of the French Fifth Republic (1958), many of the penal codes in these countries are actually based on those that were in existence during the colonial period. By accepting Charles de Gaulle’s offer of free association as autonomous republics within the Communaute française (French Community), the francophone sub-Saharan African countries effectively deprived their citizens of the opportunity to engage in robust constitutional discourse and produce laws and institutions that reflected their values, interests, aspirations, and customs. Such laws, had they been selected by each colony’s relevant stakeholders, would have been those that they were willing and able to obey, and which were relevant to their lives.
Second, citizens see the law as a tool that they can use to organize their private lives—for example, to start and run a business for profit, acquire and dispose of property, get married, engage in contracting, protect one’s values from encroachment by either state or non-state actors, or otherwise engage in productive activities to create wealth. The law can also serve as an important instrument used by groups and communities, especially ethnic and religious groups, to protect their beliefs and practices from government interference. Most African countries have extremely diverse populations.\footnote{Cameroon has more than 250 ethnic groups, South Africa, at least 10, and Nigeria, more than 250. See M\textsc{baku}, \textit{Culture and Customs of Cameroon}, \textit{supra} note 22, at 5; F\textsc{unso S. A\textsc{folayan}}, \textit{Culture and Customs of South Africa} (2004); T\textsc{oyin F\textsc{alola}}, \textit{Culture and Customs of Nigeria} (2001).} At independence, some groups—such as ethno-regional coalitions in West, East, and Central Africa, and religious groups in North Africa—captured control of the evacuated structures of colonial hegemony. Many minority ethnic and religious groups came to believe that public policy in their countries was controlled and dominated by the politically-dominant groups—that is, those that now controlled the apparatus of government—and that the minority groups were being systematically marginalized, deprived, and effectively pushed out to the economic and political periphery.\footnote{This was the main argument given by the Ibo-dominated Biafrans when they sought to secede from the Federal Republic of Nigeria and form their own sovereign state. The Ibos argued that they had, since independence in 1960, been marginalized and discriminated against by the ethno-regional coalition (the Hausa-Fulani/Yoruba) that controlled the central government in what was then the capital city, Lagos. \textit{See}, e.g., R\textsc{alph U\textsc{wechue}}, \textit{Reflections on the Nigerian Civil War: Facing the Future} (2004) (providing a rigorous examination of the Nigerian civil war, which came directly out of the struggle by Biafra for secession and independence); A\textsc{lfred O\textsc{biora U\textsc{zoekwe}}}, \textit{Surviving in Biafra: The Story of the Nigerian Civil War} (2003) (providing an account of the war by a survivor of the conflict).}

In a country where the rule of law functions effectively, ethnic and religious groups (or, for that matter, any group at all) that consider themselves marginalized or deprived do not have to resort to violent and destructive mobilization in order to improve their condition. They can, on the other hand, utilize the law to assert their rights. They can, for example, bring legal action against offending parties, whether these are state- or
non-state actors, or present members of the group as candidates for election to important positions in the country’s political system.

Citizens are more likely to accept and respect the law if representatives that they choose are the ones responsible for designing and adopting those laws. Making certain that the process through which the laws are made is participatory and inclusive achieves at least two critical objectives: first, that the resulting laws are locally-focused and therefore relevant to the lives of the people whose behaviors the laws are expected to regulate, reflecting their values; and second, that the laws are those that the people understand, respect, and are able and willing to obey. If the laws are externally imposed, they are not likely to reflect the people’s values, nor would they be relevant to their lives.

Consequently, the third way to enhance the ability of Africans to accept and respect their laws is to make sure that the process through which laws are enacted in each country is open and transparent, and that citizens who so desire can participate fully: either directly, by participating in the political process, for instance by getting elected to a legislative position; or indirectly, by influencing the political system through voting, or using available public and private mechanisms to voice their opinions and try to shape public policy outcomes. Openness and transparency help the people know what the law is, understand the law, and make certain that the law reflects their values and is relevant to their lives, effectively enhancing compliance. Additionally, if the law-making process is open and transparent, citizens will be able to understand and appreciate the reason why a specific law has been enacted and why they must obey it.129

The decolonization and immediate post-independence periods were supposed to offer Africans opportunities to engage in democratic constitution-making so that they could choose their own laws and institutions. Unfortunately, constitution-making in virtually all African countries at this time was top-down, elite-driven, and non-participatory, depriving citizens of each country of the opportunity to develop institutional arrangements capable of providing them with appropriate governance mechanisms. What these countries ended up adopting were

129. A.B.A. Division of Public Education, supra note 73, at 5.
laws and institutions that did not reflect local realities, the specificities of each country, or the values critical to the majority of each country’s relevant stakeholders. Basically, the non-participatory and non-inclusive, and to a certain extent, secretive,\textsuperscript{130} approach to constitution- and law-making in these countries produced institutional arrangements that the majority of citizens did not know or understand, and were therefore unwilling to accept or obey. In post-independence Cameroon and indeed, in many other African countries, citizens came to see national laws and institutions as part of an illegitimate legal regime designed to oppress and exploit them for the benefit of the ruling elites and their foreign benefactors.\textsuperscript{131}

Finally, to make sure that citizens accept and respect the laws, the laws must be relevant to their lives and the problems that they face on a regular basis. Citizens must see the law as an instrument that they can use to deal effectively with everyday problems, including organizing their lives and peacefully resolving conflicts, including those that arise from trade and other forms of free exchange. If, however, citizens view the laws and institutions as “alien” impositions, used by the political elites to oppress and exploit them, they are more likely to refuse to recognize these laws, let alone obey them. Within such a context, compliance becomes very difficult—the police

\textsuperscript{130} For example, in the U.N. Trust Territory of Cameroons under French administration, the constitution for the independence of the territory was “compacted” by the Consultative Committee, created by Law No. 59-56 of October 31, 1959. In addition to the fact that the committee was not elected by Cameroonian, it carried out most of its work in Paris and the final text was a thinly disguised copy of the French Constitution of 1958. In fact, the Union des populations du Cameroun (UPC), the “country’s largest and most important indigenous political party and one that represented a significant part of national political opinion, was denied participation in the constitution-making process.” Excluding the UPC from participating in the constitution-making process effectively “eliminated a significant portion of national political opinion from constitutional discourse.” MBAKU, INSTITUTIONS AND REFORM IN AFRICA, supra note 1, at 81.

\textsuperscript{131} See MBAKU, CORRUPTION IN AFRICA, supra note 1, at 64–74 (discussing the endemic nature of corruption and other forms of political opportunism in post-independence Africa and how this situation has been made possible by laws that failed to adequately constrain the state); LeVine, supra note 42, at 187–88 (examining the failure of West African countries to undertake democratic constitution-making to provide themselves with locally-focused laws and institutions—that is, laws and institutions that reflect the people’s values and are relevant to their lives).
and other enforcement agencies may be totally overwhelmed and simply unable to perform their constitutionally assigned functions, effectively allowing society to degenerate into chaos and violence.  

D. Judicial Independence

It is virtually impossible to maintain the rule of law in a country if its judiciary does not operate independently of the other branches of government. Judicial independence is a multifaceted concept that specifically requires that judicial officers be granted “security of tenure,” “financial security,” and “institutional independence.” According to Judge Louraine C. Arkfeld, a one-time chair of the ABA Judicial Division Rule of Law and International Courts Committee, the following are the five critical principles of judicial independence:

- Decisional independence allows fair and impartial judges to decide cases pursuant to the rule of law and the governing constitutions unaffected by personal interest or threats or pressure from any source.

- Institutional independence recognizes the judiciary as a separate and co-equal branch of government charged with administering justice pursuant to the rule of law and as a constitutional partner with the executive and legislative branches authorized to manage its own internal operations without undue interference from the other branches.

132. During Ahidjo’s term as president of a unified Cameroon (1961–1982), he devoted a significant amount of the country’s limited resources to cultivating and sustaining extremely repressive and oppressive police agencies. These agencies, notably the BMM (Brigade Mixte Mobile) and Sedoc (Service d’études et de la documentation), were used effectively by Ahidjo to torture and force the people to conform to dysfunctional and anachronistic laws, all of which were designed to empower Ahidjo and his ethno-regional client network. Thus, while Ahidjo was able to maintain peace in Cameroon, this was not done through providing citizens with laws that they could voluntarily obey and which enhanced their ability to organize their private lives and live peacefully with their neighbors. Peaceful coexistence in Ahidjo’s Cameroon, like that during the colonial period, however, was achieved through the employment of extreme and brutal force by the state. See Abel Eyinga, Government by State of Emergency, in GAULLIST AFRICA: CAMEROON UNDER AHMADOU AHIDJO 100 (Richard A. Joseph ed., 1978).

133. Valente v. The Queen [1985] 2 S.C.R. 673, paras. 27, 40, 47. This is the case by the Supreme Court of Canada that set the standard for judicial independence in Canada.
Fair and impartial courts require competent judges who have been selected for their merit, who represent the diversity of their community, and who are provided with access to the law and continuing legal education provided by nonpolitical sources.

An independent judiciary must have adequate resources including a budget that provides for adequate facilities and equipment, security, and just compensation for judges. In developing countries, the ability to provide security protections for judges is essential to their ability to decide without fear.

There also must be a system of accountability for judges including a judicial code of ethics as well as a process for citizens to file complaints against judges for illegal or unethical conduct and an impartial disciplinary system that allows for a range of sanctions and removal of errant judges.\(^\text{134}\)

Judicial independence, as argued by the ABA, is built on a foundation in which judges are fair and impartial, there is separation of powers (the judiciary is a separate and co-equal branch of government), the selection of judges is based on merit and these judges represent the diversity of their communities, the judiciary and the judges who serve in them are granted enough resources and security, and judges are accountable to the U.S. Constitution.\(^\text{135}\)

In framing the U.S. Constitution, the founders of the American Republic made certain that judicial independence was provided for and guaranteed. As part of the effort to entrench judicial independence in the constitution, the framers made certain that all federal judges are guaranteed life tenure and their compensation is protected against diminution. According to Article III(2) of the U.S. Constitution:

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for

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135. Id.
their Services a Compensation, which shall not be diminished during their Continuance in Office.\textsuperscript{136}

As argued by Chief Judge Abner J. Mikva of the U.S. Court of Appeals for the District of Columbia, “[i]f the judges are given a role of reviewing the actions of the political branches as against a written constitution and its protective features, judicial independence must be built into the constitution itself.”\textsuperscript{137} Judge Mikva then concludes by saying that a truly independent judiciary “must be protected from any institution or group capable of creating pressure. This means not only the ancient power of sovereigns to dismiss judges at their pleasure, but also the more subtle ability of officials to interfere with the administration of justice.”\textsuperscript{138}

Of course, the constitutions of virtually all African countries have some provision guaranteeing the independence of the judiciary.\textsuperscript{139} For example, the Constitution of the Republic of South Africa (1996) states, at § 165, that:

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

\textsuperscript{136} U.S. CONST., art. III(2).


\textsuperscript{138} Id. at 622–23.

\textsuperscript{139} African constitutions that expressly provide for judicial independence include Ghana (Articles 125 & 127); Namibia (Article 78); Uganda (Articles 126 & 128); Zambia (Article 91); and Egypt (Articles 165 & 166). For a discussion of judicial independence in Africa, see H. Kwasi Prempeh, \textit{Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa}, 80 TUL. L. REV. 1239, 1304–7 (2006).
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.\footnote{140}

The independence of the judiciary has been recognized by South Africa’s Constitutional Court in several cases, holding that “judicial independence . . . is foundational to and indispensible for the discharge of the judicial function in a constitutional democracy based on the rule of law.”\footnote{141} In its ruling, the Constitutional Court endorsed the view expressed by the Supreme Court of Canada in \textit{R v. Valente}\footnote{142} that the minimum requirements for judicial independence are “security of tenure,”\footnote{143} “financial security”\footnote{144} free from “arbitrary interference by the Executive in a manner that could affect judicial independence,”\footnote{145} and “institutional independence with respect to matters of administration bearing directly on the exercise of the judicial function . . . [and] judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.”\footnote{146}

In addition, South Africa’s Constitutional Court has also held that:

[t]he Constitution thus not only recognizes that courts are independent and impartial, but also provides important institutional protection for the courts. The provisions of section 165, forming part of the Constitution that is the supreme law, apply to all courts and judicial officers, including magistrates’ courts and magistrates. These provisions bind the judiciary and the government and are enforceable by the superior courts, including this Court.\footnote{147}

Through its various rulings, the Constitutional Court of South Africa has made clear that judicial independence has two important dimensions: individual independence, providing that when adjudicating cases, judicial officers must be independent and impartial; and institutional independence, meaning specific structures and guarantees must be provided so that judicial

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\footnotetext[140]{S. Afr. Const., 1996.}
\footnotetext[142]{\textit{Valente v. The Queen} [1985] 2 S.C.R. 673.}
\footnotetext[143]{\textit{Id.} para. 27.}
\footnotetext[144]{\textit{Id.} para. 40.}
\footnotetext[145]{\textit{Id.}}
\footnotetext[146]{\textit{Id.} paras. 47, 52.}
\footnotetext[147]{\textit{Van Rooyen v. The State} (2002)[5]SA 24[CC], para. 18.}
\end{thebibliography}
officers and the courts are adequately protected against interference from external actors. Such external actors include the other branches of government, notably the executive, who are likely to come before the judiciary.\footnote{148}

Cameroon is one country that has failed to guarantee judicial independence. The country’s constitution guarantees judicial independence—“[j]udicial power shall be exercised by the Supreme Court, Courts of Appeal and Tribunals,”\footnote{149} and “[t]he Judicial Power shall be independent of executive and legislative powers.”\footnote{150} Nevertheless, the constitution also declares that “[t]he President of the Republic shall guarantee the independence of judicial power. He shall appoint members of the bench and for the legal department.”\footnote{151} By assigning one branch of government the power to guarantee the independence of another, the framers of Cameroon’s Constitution could not have been thinking of true judicial independence and separation of powers. According to C. M. Fombad, “[a] careful analysis of the constitutional provisions,”\footnote{152} “show[s] that the 1996 amendment did not add anything substantive to the pre-existing practice which would lend any credence to the existence of a separate and independent judiciary in Cameroon.”\footnote{153}

According to Fombad,\footnote{154} all of Cameroon’s post-independence chief executives—the country has had only two heads-of-state since reunification in 1961—have enjoyed absolute power and control over the judiciary branch through the control of the ap-

\footnote{148. This can be seen in the Constitutional Court’s decisions in De Lange v. Smuts and Van Rooyen v. The State. See also AMY GORDON & DAVID BRUCE, THE TRANSFORMATION AND THE INDEPENDENCE OF THE JUDICIARY IN SOUTH AFRICA (2006).}
\footnote{149. CONSTITUTION OF THE REPUBLIC OF CAMEROON, art. 37(2).}
\footnote{150. Id. art. 37(3).}
\footnote{151. Id.}
\footnote{152. Cameroon’s 1996 Constitution was an amended version of the 1972 Constitution. Part of the objectives of those who developed the amendments was supposedly to improve the constitution’s formal restraint mechanisms and prevent arbitrary exercise of government agency. The amendments formally introduced the concept of the separation of powers, judicial independence, and freedom of expression. See CONSTITUTION OF THE REPUBLIC OF CAMEROON, arts. 37(2), (3). However, as already discussed, these efforts have not been effective in fostering the separation of powers, in particular, and the rule of law, in general, in Cameroon.}
\footnote{153. Fombad, supra note 100, at 247. See also Fombad, Judicial Power in Cameroon’s Amended Constitution, supra note 14.}
\footnote{154. Fombad, supra note 100, at 247–48.}
pointment and promotion of judiciary officers, and budgetary allocations to the judiciary. In addition, Fombad determined that shortly before the elections of 1996 and 1997, President Paul Biya issued a decree doubling the salaries of judicial officers, and raised, by almost 200%, the compensation rates for justices of the supreme court who have the authority to certify the results of each election, including the presidential election.\footnote{Id.}

Since reunification and the formation of what is now the Republic of Cameroon, the country’s constitution has not provided for the effective separation of powers. As a consequence, the universally accepted elements of the rule of law do not actually exist under the terms of Cameroon’s 1996 Constitution—the guarantee of security of tenure, financial security, and institutional independence of the judiciary have all been left to the vagaries of the political process, and specifically to the discretion of the president of the Republic, another branch of government. This, of course, is in line with the imperial presidency that was created by the adoption of the Gaullist model of government in the former U.N. Trust Territory of Cameroons under French administration, when it gained independence on January 1, 1960.\footnote{See generally LEVINE, supra note 42 (detailing constitution-making in the U.N. Trust Territory of Cameroons under French administration). The Trust Territory gained independence on January 1, 1960, and took the name République du Cameroun.} That model of government remained in effect when the Republic of Cameroon united with the former U.N. Trust Territory of Southern Cameroons under British administration, on October 1, 1961, to form what is now present Cameroon.\footnote{Id.; MBAKU, INSTITUTIONS AND REFORM IN AFRICA, supra note 1 (detailing, inter alia, the struggles of Africans to provide themselves with institutional arrangements that adequately constrain the state); John Mukum Mbaku, Cameroon’s Stalled Transition to Democratic Governance: Lessons for Africa’s Democrats, 1 AFR. ASIAN STUD. 125, 125–26 (2002). Note that the polity that emerged from the unification of the former U.N. Trust Territory of Southern Cameroons under British administration and the then République du Cameroun was a federation called the Federal Republic of Cameroon (République Fédérale du Cameroun) with Ahmadou Ahidjo as president. A new constitution was adopted in 1972 and effectively abrogated the federation, turning the latter into a unitary state. In 1984, Paul Biya, who had succeeded Ahidjo as president in 1982, changed the name of the country to Republic of Cameroon (République du Cameroun), the name that the country has re-}
E. Openness and Transparency

In the effort to improve conditions for wealth creation and human development in Africa, three aspects of openness and transparency are important. First, it is important that the process through which the constitution is compacted is transparent and open so that the participation of each of the country’s relevant stakeholders is maximized. Second, post-constitution law-making must be open and transparent, so that even those who do not actively participate in the political process are aware of how laws are made and why certain laws are selected. Finally, the design and implementation of public policies is a critical element in the fight against behaviors such as rent seeking and corruption, which have been found to be major constraints to wealth creation and economic growth in Africa.158 Making certain that the government conducts the people’s business openly and in a transparent manner159 signifi-

158. For a study of corruption and other forms of opportunism in Africa, see MBAKU, CORRUPTION IN AFRICA, supra note 1. As argued by Gerring and Thacker, “[o]penness and transparency, which we may understand as the availability and accessibility of relevant information about the functioning of the polity, is commonly associated with the absence of corruption. Since corruption, by definition, violates generally accepted standards of behavior, greater transparency should discourage corrupt actions, or at least facilitate appropriate mechanisms of punishment (legal, administrative or electoral).” John Gerring & Strom C. Thacker, Political Institutions and Corruption: The Role of Unitarism and Parliamentarism, 34 BRIT. J. POL. SCI. 295, 316 (2004).

159. This includes making sure that information about government activities is presented to the people, and done so in a relatively accessible form and manner. Note that while putting information on government websites may at first appear to be an effective way to maintain transparency in government operations, this method may not be adequate in a country where most citizens do not have access to the Internet. Hence, adoption of a given technology to enhance transparency should be context-specific—that is, the ability of the people to use the technology should be considered before adoption. Also to be considered is the language or languages in which the information would be provided to the people. In Africa, most countries have adopted European languages (French in former French and Belgian colonies; English in former British colonies, etc.) as so-called “official languages,” and these are used widely in government and commerce. Unfortunately, most of the citizens in these countries are not fluent in these foreign languages. Consequently, for purposes of making certain that citizens have access to government operations, the government should provide information in languages that are accessible to the people.
cantly reduces corruption and other forms of political opportunism. Most important, especially for African countries, is the fact that openness and transparency in the design and implementation of public policies significantly enhance participation, and hence, improve the chance that policies that reflect the values, interests, and aspirations of all of the country’s relevant stakeholder groups will result. Where openness and transparency are maintained, groups such as ethnic and religious minorities that believe that given policies do not adequately reflect their values and interests are not likely to resort to violent and destructive mobilization, especially if as a result of the government’s open approach to policy, these groups either had the opportunity to participate fully and effectively in the design process, or were aware of how the laws were made and why.

In studies of good governance, the concepts of “openness” and “transparency” are considered to be closely linked, but are not synonymous. Openness and transparency, as they relate to the government, can be understood as “the availability and accessibility of relevant information about the functioning of the polity.” According to Lord Nolan, “transparency is said to require that ‘holders of public office should be as open as possible about all decisions and actions they take.’” Regardless of how transparency is defined or conceived, most scholars and practitioners generally agree that “transparent decisions must be clear, integrated into a broader context, logical and rational, accessible, truthful and accurate, open (involve stakeholders), and accountable.” Additionally, “[a] transparent decision record should provide enough information to allow an interested person to ‘verify claims made’ or otherwise reconstruct both the process and rationale for the decision.”

In general, transparency enhances the ability of an individual who is interested in a public policy, or thinks or believes a

160. See, e.g., Gerring and Thacker, supra note 158, at 316.
161. Id.
164. Id. at 36 (citing LAURIE GARRETT, BETRAYAL OF TRUST: THE COLLAPSE OF GLOBAL PUBLIC HEALTH (2000)).
decision might affect them, to understand and appreciate how that decision was made or arrived at and why.\textsuperscript{165} Transparency, then, is very important where governments make decisions that affect the lives of citizens, for example, public policies on health and safety.\textsuperscript{166} In fact, in Africa, where a significant number of countries have governments that are not representative of their diverse populations,\textsuperscript{167} making certain that public decisions are made through transparent processes can significantly minimize the distrust that many ethnic and religious groups have for their governments, especially those that have been historically marginalized and pushed to the economic and political periphery. Thus, if a minority ethnic or religious group argues that government policies are significantly influenced by, and essentially benefit the ethno-regional groups that dominate and control the government, an open and transparent approach to the design and implementation of public policies would, at a minimum, (1) provide opportunities for these heretofore marginalized groups and communities to participate; and (2) also allow them to witness and understand how decisions affecting their lives are made.\textsuperscript{168} This is especially critical for African countries, most of which have extremely diverse

\begin{footnotes}
\item[165] Drew & Nyerges, supra note 163, at 33.
\item[166] This includes, especially, policies on environmental health. For example, decisions made by government agencies, such as the U.S. Environmental Protection Agency (“EPA”) that regulates industrial pollution, can have significant impacts on the health of citizens. Hence, those decisions must be made in an open and transparent manner. See, e.g., CRAIG E. COLTEN & PETER N. SKINNER, THE ROAD TO LOVE CANAL: MANAGING INDUSTRIAL WASTE BEFORE EPA (1996) (exploring the tragedy of Love Canal before the formation of the EPA and how openness and transparency may have averted the disaster or at the very least, minimized its impact on the town and its environs).
\item[167] For example, in Cameroon, the Anglophones have persistently complained of political and economic marginalization at the hands of the Francophones who have dominated the government since reunification in 1961. In fact, since 1961, the presidency of the Republic has been monopolized by Francophones, and some ministries, especially defense and territorial administration, have never been headed by an Anglophone. See generally Piet Konings & Francis B. Nyamnjoh, President Paul Biya and the “Anglophone Problem” in Cameroon, in THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA 191 (John Mukum Mbaku & Joseph Takougang eds., 2004) (examining Anglophone marginalization); Piet Konings & Francis B. Nyamnjoh, The Anglophone Problem in Cameroon, 35 J. MOD. AFR. STUD. 107, 207–08 (1997).
\item[168] Drew & Nyerges, supra note 163, at 33.
\end{footnotes}
populations and have encountered significant ethnic-induced violence during the last several decades. Much of this violence has been perpetuated by groups that believe the public policies were designed in secret, and were aimed at marginalizing these groups.

Since independence, many African countries have had governments that have not been representative of their diverse populations. In such polities, openness and transparency, especially in the design and implementation of public policies, can minimize the distrust that some ethnic and religious groups have for their governments. Some parts of the population of the country often believe that national policies are designed to benefit members of the ethno-regional groups that dominate


170. Such groups include the indigenous ethnic groups in Liberia, which argued that the government of the country had been dominated and controlled by the Americo-Liberians since 1847. The Americo-Liberian hegemony, the indigenous groups argued, had developed public policies, usually without the participation of members of indigenous ethnic groups, which had effectively impoverished the indigenous peoples and pushed them to the economic and political periphery. This was one of the reasons advanced by Master Sergeant Samuel Kanyon Doe, a member of the Krahn ethnic group, when he overthrew the government of William R. Tolbert, an Americo-Liberian. Doe subsequently executed Tolbert and members of his cabinet and assumed the presidency of Liberia. Shortly after the coup, “[t]he majority of Liberians welcomed the coup.” MUTWOL, supra note 169, at 51. Such perceived marginalization at the hands of a central government that was dominated by people from other groups was the motivation behind the attempt by the Igbos to secede from the rest of Nigeria, and with other minority groups, form the Republic of Biafra. See generally ALEXANDER A. MADIEBO, THE NIGERIAN REVOLUTION AND THE BIAFRAN WAR (1980).

171. For example, the Anglophones of Cameroon. See Konings & Nyamnjoh, supra note 167.
and control the government exclusively. Transparency and openness in the design and implementation of public policies will provide opportunities for minority groups to participate in, as well as enhance their ability to understand how government decisions affecting their lives are made.

Today, corruption is one of the most important constraints to wealth creation and economic growth in Africa. While there

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172. For example, the groups that engineered the civil wars that brutalized the citizens of Liberia, Rwanda, and Sierra Leone, gave as reason for their actions the marginalization of their own groups at the hands of a central government dominated by other groups. For example, in overthrowing the government of Liberia on April 12, 1980, Master Sergeant Samuel Kanyon Doe sought to bring to an end the Americo-Liberian hegemony that had exploited and marginalized the country's indigenous groups since 1847, including Doe's Krahn ethnic group. In fact, shortly after Doe executed the overthrow of the government of William R. Tolbert, “[t]he majority of Liberians welcomed the coup; the indigenous people especially rejoiced that they had finally attained the power and full rights that had been denied to them for far too long.” MUTWOL, supra note 169, at 51.

173. See, e.g., Drew & Nyerges, supra note 163. Note that although Doe, as well as the leaders of the events that led to civil wars in Liberia and Sierra Leone, and the Rwanda genocide, may have used supposed or perceived marginalization of the groups to which they belonged as the reason for their actions, as history has since proved, these individuals were opportunists seeking ways to capture the government so that they could use its structures to enrich themselves. Their intentions, as proven by the actions that they took once they had control of the apparatus of government, were not to right any perceived or actual wrongs and make governance and resource allocation more efficient and equitable. In the case of Liberia, for example, this is evidenced by the level of brutality visited on the various population groups in the country, as well as the wanton destruction of private property and the country’s social overhead capital—schools, roads, power lines, and other infrastructure—by the Doe regime. See, e.g., KIEH, JR., supra note 169 (presenting an alternative to the dominant view that the Liberian civil war was caused by historical conflicts between the country’s various ethnic groups; instead, he argues that the war was a result of the failure by those who established the Liberian state in 1847 and successive governments to provide the state with institutional arrangements that would have enhanced the ability of all groups to live together peacefully and maximize their values).

174. See generally Fombad, supra note 100 (presenting studies of corruption and how the latter affects the economies of several African countries). Note that corruption is not only an obstacle to economic growth, but it is also a constraint to human development. For example, in their efforts to enrich themselves through corrupt practices, civil servants in many African countries often allocate public goods and services arbitrarily and capriciously, favoring those citizens that are willing and able to bribe them. As a consequence, the poor, virtually all of whom do not have the resources to supply
are many ways to clean up corruption and minimize its impact on wealth creation, the most important are openness and transparency, especially in government operations. As argued by Gerring and Thacker,175 “[s]ince corruption, by definition, violates generally accepted standards of behavior, greater transparency should discourage corrupt actions, or at least facilitate appropriate mechanisms of punishment (legal, administrative or electoral).”176 Generally, even in countries where corruption is endemic, the public usually does not condone corrupt behavior, especially within the bureaucracy. In fact, the productive sector—that is, the private sector, which is responsible for creating wealth—sees bureaucratic corruption as a serious obstacle to the profitability of its enterprises. Ordinary citizens, on the other hand, consider the corrupt behaviors of civil servants and political elites as a form of interference with their ability to organize their lives and improve their welfare.177 Some scholars have argued that “[c]orruption often results from a lack of accountability and participation.”178 Hence, legal and institutional schemes that enhance citizen participation and force more accountability of the governing to the governed, and by implication, to the constitution, can help significantly in the fight against corruption.179

Public sectors in many African economies are notorious for having extremely high levels of corruption.180 In the provision

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175. Gerring & Thacker, supra note 158.
176. Id. at 316.
177. For example, corruption can make it virtually impossible for citizens, especially the poor and historically marginalized groups, such as women, to have access to welfare-enhancing public services like prenatal care; clean drinking water; education, especially at the primary level; basic health care; and police protection. See generally Mbaiku, Corruption in Africa, supra note 1.
179. See id.
180. Studies that have determined corruption to be endemic in the public sectors of African economies include Mbaiku, Corruption in Africa, supra note 1; Hope & Chikulo, supra note 100; Corruption: Causes, Consequences and Control (Michael Clarke ed., 1983); David J. Gould, Bureaucratic Corruption and Underdevelopment in the Third World:
of public services for example, civil servants in many African countries are known to act arbitrarily and capriciously, favoring those individuals who pay them bribes. In these economies, openness and transparency can serve two important, separate but related purposes. As argued by Stirton and Lodge, “[t]he first is to ensure that public service providers respect both the positive and negative rights of individuals.” They argue further that “[t]his instrumental justification for transparency of public services comes close to Bentham’s principle for good governance: ‘The more strictly we are watched, the better we behave.’” The second purpose, argue Stirton and Lodge, “relates more directly to democratic theory, which values participation by individuals in the decisions that affect them.” Young argues that participatory approaches to democratic theory hold that democracy is a hollow set of institutions if they only allow citizens to vote on representatives to far away political institutions and protect those citizens from government abuse. A fuller democracy in principle means that people can act as citizens in all the major institutions which require their energy and obedience.

Stirton and Lodge argue further that “[t]ransparency, on this view has moral value because it enhances individual autonomy by involving citizens directly in the process of making decisions which affect their lives and interests” and “enhances individual autonomy to the extent that transparent institutions are pre-

The Case of Zaire xii–xiii (1980); Corruption and the Crisis of Institutional Reforms, supra note 1.
181. See, e.g., MbaKu, Corruption in Africa, supra note 1, at 102–05.
183. Id.
184. Stirton & Lodge, supra note 182, at 476. Economists have long known and argued that participation in the design of policies by people at the local level is critical because those people have more information about demand and supply conditions at the local or community level than the elites at the center of the government. See, e.g., Institutions and Reform in Africa, supra note 1, at 203–07 (arguing, inter alia, that effective policy design requires access to time-and-place information that is more available to individuals at the local level than those at the center).
dictable, allowing individuals to order their own private choices knowing the way that these are affected by public decisions.”

In the view of Koppell, “[t]ransparency is the literal value of accountability, the idea that an accountable bureaucrat and organization must explain or account for his actions.” Additionally, “[t]ransparency is most important as an instrument for assessing organizational performance, a key requirement for all other dimensions of accountability.”

Citizens, including those of the African countries, place a high value on transparency and openness in the operation of their governments—citizens are interested in knowing how policies are designed and implemented, especially those which have a direct impact on their lives. Considering the negative impact that corruption has on the lives of many people, and considering also the fact that transparency tends to minimize engagement in corrupt behaviors, it is no wonder that citizens are interested in transparency.

Transparency is also a critical element of a trustworthy governmental regime. As argued by Fairbanks, Plowman, and Rawlins, where government communicators undertake their operations in a transparent and open manner, such an approach is likely to garner significant support for the government. Specifically, the benefits of transparent communication practices by the government include “increased public support, increased understanding by the public of agency actions, increased trust, increased compliance with agency rules and regulations, an increased ability for the agency to accomplish its [sic] purpose and a stronger democracy.”

In order for

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186. Stirton & Lodge, supra note 182, at 476.
188. Id.
189. TI, the Berlin-based non-governmental organization that studies global corruption and provides tools for countries to use in fighting corruption, has branches in most countries, including those in Africa. In the African countries, TI’s branch offices monitor openness and transparency in government and try to help governments deal with openness and accountability issues. See generally Transparency International, Global Corruption Report 2012 (2012).
191. Id. at 33.
government communicators to achieve transparency, they “must adopt practices that promote open information sharing. These include working to enhance agency relationships with the publics they serve through responding to public needs, seeking and incorporating feedback and getting information out to the public through a variety of channels.”

From their study of transparency, Fairbanks, Plowman, and Rawlins also conclude that “[t]ransparency in the decision making process, quells the fear that decisions in government agencies have been made as a result of undue political or industry influence because the process is open to the public.” They also determined that transparency in government operations produces “a feeling of trust in [one’s] government and the ability to realize a comfort in understanding that [one is] being treated equally with others and that the government is working in [one’s] best interest.” For Africa, this is an important and critical point—effective management of ethnic and religious diversity requires that all groups within the country feel that they are being treated equally and that the process of designing and implementing public policies is not being used to marginalize them. Of course, one way to restore a feeling of trust among a country’s diverse population groups in their government is to make certain that public operations are as transparent as possible.

One of the most important outcomes of the top-down, elite-driven, non-participatory approach to constitution-making is that many of today’s governance systems in the African countries do not offer citizens the wherewithal to hold their civil servants and political leaders accountable. In these countries, those who serve in government are neither accountable to civil society, nor to the constitution. As the struggle to improve governance in the continent continues, it is important for Africans to recognize that an effective way to enhance accountability is to mandate transparency in the performance of public-sector activities. First, transparency can force civil servants and political elites to be accountable to the citizens that they

192. Id.
193. Id. at 28.
194. Id. at 28–29.
serve, and second, transparency “can also act as an incentive for people to participate in collective action and it facilitates the spread of innovation and technical change.”

An African country interested in improving governance and minimizing public-sector opportunism by implementing transparency in, say, government communications, should consider the following. First, in all its activities or operations, the government must adopt a policy that values “open, honest and timely” communication with citizens and must avoid the manipulation of information, a process that has become part of the survival strategy of many authoritarian regimes in the continent. Second, all individuals who communicate on behalf of the government—civil servants, political elites, and other agents of the government—should adopt “practices that promote open information sharing.” Third, the government, while taking into consideration issues of privacy, should work closely with bureau managers to “create an organizational structure that supports transparency.” And fourth, all government communicators should be provided with enough access to time, staff, and monetary resources. One must note, however, that although openness and transparency are desirable qualities in a democratic government, care must be taken so that the private rights of citizens are not violated. While it is critical that the law provides public communicators with the tools to enhance openness and transparency, the law should also constrain these communicators in order to make certain that they or their activities do not violate the privacy rights of citizens.

Since the emergence of the Internet as a viable mode of communication, the “e-government” model has been recommended as an effective way, even for money-strapped developing countries, to improve transparency. According to Pina, Torres and Royo:

196. Ahrens & Rudolph, supra note 178, at 216.
197. Fairbanks, Plowman & Rawlins, supra note 190, at 33.
198. Id.
199. Id. at 34.
200. Id. at 32.
The interactivity of the Internet is expected to make governments more responsive to the needs and demands of citizens. More information delivered in a more timely fashion to citizens is expected to increase the transparency of government and to empower citizens to monitor government performance more closely. E-government is therefore viewed as a positive channel for enhancing trust in governments through government accountability and by empowering citizens.202

The e-government model has the potential to significantly improve transparency and openness, and hence, accountability in the governments of developed countries such as the United States and those of the EU. However, one must note that in many African countries, where the Internet is still in its embryonic stages, and only a few privileged groups and individuals are able to access it, this potential for transparency has yet to be exploited.203 An important way for the government to improve transparency is to make certain that all its agencies and departments develop websites and publish information about their operations on these websites so that citizens can easily access this data. In order for this to materialize in Africa, however, each African government must first provide the appropriate infrastructure for enhancing the ability of each citizen to have full and effective access to the Internet. Additionally, governments should accelerate their efforts to improve access to education, especially at the primary level, so that the population—notably members of historically disadvantaged groups, including women and girls, rural inhabitants, and minority ethnic groups—can accumulate the human capital needed to enhance their ability to benefit from the new information technology. As part of the process to improve access to education, the government should make sure that facilities are provided in the rural areas, as well as to adult learners, so that they can


203. According to INTERNET WORLD STATS, USAGE AND POPULATION STATISTICS FOR AFRICA, the percentage of Internet users in Africa in 2012 was 7%, compared to 93% for the rest of the world. Within the continent, the country with the highest percentage of Internet users was Nigeria, at 28.9%, followed by Egypt (17.8%), and Tunisia (7.2%). INTERNET WORLD STATS, INTERNET USAGE STATISTICS FOR AFRICA, http://www.internetworldstats.com/stats1.htm (last visited Mar. 16, 2013).
participate fully and effectively in the new knowledge-based economy. Of course, given the fact that most people in the African countries are not literate in their country’s national language,\textsuperscript{204} it may be necessary for the government to provide information to citizens in their own languages. Thus, a decentralized form of information provision, which empowers local or sub-national governments to develop and maintain the public websites on which information about government operations can be placed, may be advisable.

In the struggle against those factors that constrain wealth creation in Africa, such as corruption and rent seeking, openness and transparency can serve as important tools. In addition to the fact that openness and transparency significantly increase and improve accountability, and hence, minimize corruption and rent seeking, transparency and openness also enhance the participation of citizens in governance; a process that enhances the ability of the government to effectively fight corruption.

\section*{F. Predictability}

As the ABA\textsuperscript{205} and several legal scholars and philosophers\textsuperscript{206} have argued, a very important element of the rule of law is that the law must not be administered arbitrarily and capriciously. It is important that citizens be able to “expect predictable results from the legal system.”\textsuperscript{207} By “predictable results,” the ABA means that “people who act in the same way can expect the law to treat them in the same way.”\textsuperscript{208}

In countries in which the common law is the foundation for the legal system, “courts contribute to the rule of law through their authority to make common law rules and to interpret legislation and constitutions; those actions shape the legal environment in which citizens order their economic and personal

\textsuperscript{204} For example, English in former British colonies and French in the former colonies of France and Belgium.

\textsuperscript{205} A.B.A. Division of Public Education, \textit{supra} note 73, at 5.

\textsuperscript{206} Stein, \textit{supra} note 70, 298; Lord Bingham, \textit{supra} note 67.

\textsuperscript{207} A.B.A. Division of Public Education, \textit{supra} note 73, at 5.

\textsuperscript{208} \textit{Id.}; Chemerinsky, \textit{supra} note 75, at 6–8. Note Chemerinsky’s formulation: “The government must treat likes alike and unalikes unalike.”
affairs.” When courts make law, unlike legislatures and administrative tribunals, they are “not subject to democratic processes that ensure citizens’ participation in the creation of new rules or the alteration of existing ones.” Courts employ the informal norm of stare decisis to promote and advance critical elements of the rule of law, such as stability and predictability. If a country’s legal system follows the norm of stare decisis, then that country’s courts will not reject legal authority established by the ruling of an earlier court if the facts presented in the extant case—the case currently waiting to be decided—are analogous to those of the case whose decision produced the legal authority. By maintaining fidelity to precedent and the informal stare decisis norm, courts significantly enhance the stability and predictability of the law.

U.S. courts have recognized the critical role played by adherence to precedent, contributing to legal stability in the United States. In a U.S. Supreme Court decision, John R. Sand & Gravel Company v. U.S., the Court held that

even if the Government cannot show detrimental reliance on our earlier cases, our reexamination of well-settled precedent could nevertheless prove harmful. Justice Brandeis once observed that ‘in most matters it is more important that the applicable rule of law be settled than that it be settled right.’ To overturn a decision settling one such matter simply because we might believe that decision is [no] longer ‘right’ would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability.

In certain circumstances, however, it might be necessary to forego adherence to precedent for public policy reasons—that is, if the courts determine that doing so would further important societal objectives. What is important to note here is that while adherence or fidelity to precedent is important for achieving legal stability, the latter must not be achieved or se-

210. Id.
211. Id.
212. Id.
214. Id. at 139.
cured at the expense of making the law so rigid and unbending that it becomes “impervious to changing societal norms and practices.” Judges, then, should be granted the discretion to occasionally decline to follow precedent in order to meet certain well-defined societal needs or objectives. Of course, if judges do opt to ignore or not follow precedent, and as a consequence create new law, they must appreciate the fact that the new law they create will invariably produce a new set of constraints, separate from those that had been created by the previous and now overruled law, by which citizens must now abide. Additionally, judges must recognize that frequent changes in the law, through judges’ failure to follow precedent, can create an unstable legal regime, severely constraining the ability of citizens to use the law to organize or order their private lives.

Stare decisis is an effective, although informal, norm that can be used by judges to improve and enhance stability of the legal system. Nevertheless, judges can and do overrule existing precedent in an effort to make certain that the law continues to evolve and maintain its relevance to citizens’ lives and values. If, however, judges “frequently change the status quo by overruling precedent, it produces an unstable legal environment that creates greater difficulty for citizens to predict the legal consequences of their actions or transactions in the future.”

Judges must balance maintaining legal stability, a desirable goal in any society, with the need to make sure that the law does not remain stagnant and is dynamic enough to meet evolving societal needs. Because legal stability is an important element of the rule of law, it is critical in Africa’s fight against corruption and other growth-inhibiting behaviors. As argued by Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit, “the laws must not be arbitrary.”

G. The Protection of Human Rights

Constitution-making and the practice of constitutionalism in the United States have, historically, been based on the belief by the Founding Fathers and subsequent leaders and social reformers that the Constitution and the laws derived from such a

216. Id.
document would guarantee and protect citizens’ fundamental rights. In a similar fashion, many of the Africans who fought for or supported and sustained the decolonization project believed that the post-independence dispensation would be built on a foundation of respect for human and fundamental rights. Specifically, many Africans believed that the immediate- or post-independence government would engage each country’s diverse population groups in democratic constitution-making to produce and adopt institutional arrangements capable of constraining the state, protecting human rights, enhancing peaceful coexistence, and promoting entrepreneurship and the creation of wealth, especially among historically marginalized and deprived groups and communities, such as women, rural inhabitants, minority ethnic groups, and the urban poor.

218. See, e.g., A.B.A. Division of Public Education, supra note 73, at 5.
219. In its struggle against apartheid in South Africa, for example, the African National Congress (“ANC”) insisted that its struggle was strictly against “white supremacy” and not against white people. The ANC argued that it was seeking to establish a government in South Africa that would respect and guarantee the rights of all peoples—black, brown, and white. For example, the manifesto of the ANC’s armed wing, Umkhonto we Sizwe, issued on December 16, 1961, justifies armed struggle as follows: “In these actions, we are working in the best interests of all the people of this country—black, brown and white—whose future happiness and well-being cannot be attained without the overthrow of the Nationalist government, the abolition of white supremacy and the winning of liberty and full national rights and equality for all the people of this country.” AFRICAN NATIONAL CONGRESS, MANIFESTO OF UMKHONTO WE SIZWE (16 Dec. 1961), available at http://www.anc.org.za/show.php?id=77. In addition, at his trial in 1964, Nelson Mandela, then a high-ranking official of the ANC, the organization that was fighting to overthrow the apartheid government of South Africa, made the following statement: “During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities . . . It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.” Nelson Mandela, Statement from the Dock at the Opening of the Defense Case in the Rivonia Trial, Pretoria Supreme Court, South Africa, 20 Apr., 1964, available at http://rfksafilm.org/html/speeches/mandela.php.
220. See generally John Mukum Mbaku, Constitutionalism and the Transition to Democratic Governance in Africa, in TRANSITION TO DEMOCRATIC GOVERNANCE, supra note 3, at 103–36.
Throughout the post-independence period in Africa, the indigenous elites who captured the evacuated structures of colonial hegemony did not undertake the type of constitution-making and institutional reforms that would have produced legal and judicial systems capable of ensuring the rule of law and guaranteeing the protection of human rights. On the contrary, most of the continent’s post-independence political elites engaged in top-down, elite-driven, opaque, and non-participatory approaches to constitution-making, resulting in laws and institutions that were not capable of protecting the fundamental rights of citizens. 221 In addition, post-independence law-making was also top-down, non-participatory, and monopolized by elites at the center, many of whom lacked the legitimacy to rule and legislate because they did not secure their positions through popular and free elections.

It is generally believed, at least in the West, that the modern movement to protect human rights began with the signing of the Magna Carta in 1215 by King John of England, recognizing the rights of some of his subjects. According to Chapter 39 of the Magna Carta:

> No free man shall be seized or imprisoned, or stripped of his rights and possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force

221. For example, Ahmadou Ahidjo, the first president of the Republic of Cameroon, argued during the decolonization period that it was not necessary for the territory to engage in democratic constitution-making and that such an undertaking should be left for the post-independence period. Achieving independence, he argued, was more important than engaging the population in rules selection. However, like other former French colonies, the Ahidjo-led government accepted Charles de Gaulle’s offer of “association” as autonomous polities within the French Community and based the country’s constitution on the Constitution of the French Fifth Republic (1958). The country’s first constitution—Constitution of the Republic of Cameroon 1960—was intended to be temporary, yet remains the foundation of Cameroon’s present constitution. See generally LeVINE, supra note 42; LeVine, The Fall and Rise of Constitutionalism, supra note 54. Thus, after more than fifty years of existence as an autonomous political unit, the Cameroon state has not yet engaged its citizens in democratic constitution-making to reconstruct and reconstitute the dysfunctional state structure inherited from French and British colonialists.
against him, or send others to do so, except by the lawful
judgment of his equals or by the law of the land. 222

As argued by the ABA, the Magna Carta “planted the seed for
the concept of due process as it developed first in England, and
then in the United States. Due process means that everyone is
entitled to a fair and impartial hearing to determine their legal
rights.” 223 Countries whose legal systems are based on the An-
glo-American legal and cultural tradition look to the Magna
Carta as an important source of many elements of their legal
systems, especially those dealing with individual rights. Many
of the countries that came into being after World War II, how-
ever, consider the U.N. General Assembly’s adoption, in 1948,
of the Universal Declaration of Human Rights, as the founda-
tion for the modern movement to protect human rights. 224 Since
1948, the U.N. has adopted several other conventions and cov-
Covenants, all designed to enhance the protection of human
rights. 225

222. THE MAGNA CARTA, available at
http://www.fordham.edu/halsall/source/magnacarta.asp (last visited Aug. 2,
2012).

223. A.B.A. Division of Public Education, supra note 73, at 4 (emphasis in
original).

224. According to the United Nations, the Universal Declaration of Human
Rights (“UDHR”) is the foundation of international human rights law. The
“Universal Declaration,” the U.N. continues, “serves as a model for numerous
international treaties and declarations and is incorporated into the constitu-
tions and laws of many countries.” United Nations, A United Nations Priori-
ty: Universal Declaration of Human Rights,
http://www.un.org/rights/HRToday/declar.htm (last visited Apr. 24, 2013). In
addition, the U.N. states that the adoption of the UDHR in 1948 “marked the
first time that the rights and freedoms of individuals were set forth in such
detail. It also represented the first international recognition that human
rights and fundamental freedoms are applicable to every person, every-
where.” Id. Romuald R. Haule argues that “[a]lthough human rights had
their origin in natural law, it took a system of positive law to provide a defi-
cine and systematic statement of the actual rights which people possessed.”
Romuald R. Haule, Some Reflections on the Foundation of Human Rights—
Are Human Rights an Alternative to Moral Value?, 10 MAX PLANCK Y.B. UN
L. 367, 380 (2006). He states further that the “Universal Declaration became
the Magna Carta of humankind.” Id. at 390.

225. Some of them include the International Covenant on Civil and Political
Rights (1966); International Covenant on Economic, Social and Cultural
Rights (1966); Convention on the Prevention and Punishment of the Crime of
Genocide (1948); Convention for the Suppression of the Traffic in Persons and
of the Exploitation of the Prostitution of Others (1949); International Con-
Most African countries have signed and ratified these covenants and conventions. In addition, many of these countries have inserted, within their constitutions, clauses that supposedly guarantee the protection of human rights. Unfortunately, throughout the continent, these rights are regularly violated by both state- and non-state actors. Part of the reason why these rights are not being protected is that African countries have failed to provide themselves with the tools to do so—it is very difficult for the fundamental rights of citizens to be protected in a country whose legal system does not guarantee the rule of law. For example, if law is not supreme and those who serve in government consider themselves to be above the law, they are more likely to act with impunity and engage in activi-
ties that violate the rights of citizens. Civil servants in many African countries engage in opportunistic approaches to the allocation of public services, and in the process, deprive many citizens, especially the poor, from having access to welfare-enhancing and in many instances, life-saving services, such as police protection, clean water, basic health care, prenatal care, shelter, and nutrition, especially for children.

As part of the effort to improve national legal and judicial systems in order to provide an enabling environment for the creation of wealth, each African country must make certain that the new institutional arrangements guarantee citizens’ fundamental rights. Each African country must make certain that its “legal processes are sufficiently robust and accessible to ensure enforcement of [all] protections [of human and fundamental rights] by an independent legal profession.”

On May 25, 2011, the Organization for Economic Cooperation and Development (“OECD”) released its Guidelines for Multinational Enterprises (“OECD Guidelines”) as part of the effort to improve global governance and enhance the ability of multinational companies to operate in the global economy. The OECD Guidelines make specific reference to human rights and the Universal Declaration of Human Rights. Specifically, the Guidelines expressly demand that OECD-based multinational companies “[r]espect the internationally recognised human rights of those affected by their activities consistent with the host government’s international obligations and commitments.” However, despite the fact that during the last several decades, multilateral agencies such as the OECD, have provided several legal instruments to fight corruption and protect human rights, it must be reiterated that fighting corruption and protecting human rights in Africa is the responsibility of each African government. Thus, each country must provide an institutional environment that enhances the eradication of cor-

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229. See, e.g., MBAKU, CORRUPTION IN AFRICA, supra note 1, at 110.

230. Stein, supra note 70, at 302.

231. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (OECD, 2011), § II(2).
ruption and the protection of human rights. Such an enabling environment is built on a foundation of the rule of law.

IV. FURTHER INSIGHTS INTO THE RULE OF LAW AS A CATALYST FOR DEVELOPMENT IN AFRICA

A. Introduction

Many studies have been devoted to uncovering the reasons for Africa’s underdevelopment and inability to achieve high levels of human development.232 These studies have placed the constraints on economic performance and the failure to significantly improve living conditions for Africans into two categories—external and internal. 233 Identified as external constraints to Africa’s failure to develop are (1) natural disasters; 234 (2) the international financial system; 235 and (3) the economic policies of the Western developed countries such as the United States, European Union, and other members of the OECD.236

Internal constraints to development include (4) corruption; (5) highly ineffective economic infrastructures; (6) low domestic savings rates; (7) trade dependence; 237 (8) high population growth rates; (9) political instability; 238 (10) military interven-

232. See generally ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA, supra note 1; WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH, A LONG-TERM PERSPECTIVE STUDY (1989); Z. Ergas, In Search of Development: Some Directions for Further Investigation, 24 J. MOD. Afr. Stud. 303 (1986); Mbaku, INSTITUTIONS AND DEVELOPMENT, supra note 1, at 21–42.


234. Natural disasters include droughts, floods, and locusts.

235. Many Africans believe that the international financial system discriminates against exporters from the continent and makes it very difficult for the continent to participate gainfully in the global economy.


237. Most African countries carry out the bulk of their export and import trade with their former colonizers and little or no trade with their neighbors.

238. Here, political instability includes that caused by violent mobilization by ethnic and religious groups, which believe they are or have been marginalized by a central government dominated and controlled by other groups. Some of this ethnic-induced political instability includes civil wars in Liberia, Sierra Leone, Rwanda, Democratic Republic of Congo, Somalia, and Ethiopia. See generally Madiebo, supra note 170 (providing an eye-witness account of
tion in politics; and (11) external debts that these countries have not been able to service and repay. By the late 1970s, some scholars had begun to include, as a cause of underdevelopment in the continent, “policy mistakes made by well-meaning but poorly educated and incompetent officials.” The scholars called for greater emphasis to be placed on recruiting and bringing into the public sector individuals who were “better trained, honest, more disciplined and skilled” in order to provide a more enabling environment for economic growth and development. Many of these scholars believed that the main problem in Africa was the absence of effective public policies capable of enhancing investment in the productive sectors and advancing the creation of wealth. The suggestion was that more honest and competent individuals should be placed in the bureaucracies.

In many of these immediate post-independence debates about economic development in Africa, little or no emphasis was placed on institutions and their impact on entrepreneurship and wealth creation. However, along with the interest in the transition to democratic governance that began in the continent shortly after the collapse of the Soviet Union and the demise of socialism in Eastern Europe, many scholars began to study the impact of institutions on macroeconomic perfor-

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239. Mbaku, supra note 233, at 5; Mbaku, Institutions and Development, supra note 1, at 71–114; Ergas, supra note 232, at 304.  
240. Mbaku, supra note 233, at 5.  
241. Id.  
242. Id.  
243. Id.
This new literature on African development argued that “[t]he inability or unwillingness of entrepreneurs in the African countries to engage in wealth-creating activities can be linked to poorly developed, non-viable, and weak institutions that were adopted at independence.” In addition to the fact that the institutional arrangements adopted by African countries at independence were incapable of providing the wherewithal for the effective management of ethnic and religious diversity, they did not foster and promote entrepreneurial activities or promote wealth creation. Additionally, they failed to adequately constrain civil servants and politicians, and as a result, these economies were pervaded by corruption, financial malfeasance, rent seeking, and other forms of political opportunism.

Although part of Africa’s underdevelopment was attributed to the absence of effective leadership, later studies determined that while competent leadership is necessary, it is not a sufficient condition for sustainable economic growth and development. Each country must be provided with laws and institutions that “provide the appropriate incentive system for market participants” to engage in wealth creation and economic growth. These institutions are those that guarantee the rule of law.

244. See generally Mbaku, INSTITUTIONS AND REFORM IN AFRICA, supra note 1 (showing how the lack of effective institutions has contributed significantly to poor economic performance in the African countries); Mbaku, INSTITUTIONS AND DEVELOPMENT, supra note 1 (discussing the failure of development theory and the rise of public choice theory as a more effective mechanism to explain African underdevelopment). See also TRANSITION TO DEMOCRATIC GOVERNANCE, supra note 3 (discussing transition to democratic governance as a way to improve not only peaceful coexistence, but also wealth creation, and hopefully, economic development).
245. Mbaku, supra note 233, at 5.
248. Mbaku, supra note 233, at 5.
B. The Rule of Law as a Catalyst for Development in Africa

By far, one of the most important constraints to wealth creation and economic growth in Africa is corruption.249 Part of the reason why corruption is virtually endemic in many African countries today is the fact that the institutional arrangements in these countries have failed to guarantee the supremacy of law.250 Where the law is supreme, civil servants and political elites are effectively and adequately constrained, and are prevented from engaging in corruption and other growth-inhibiting behaviors. In Africa today, many of the continent’s political leaders, including civil servants, consider themselves above the law and regularly engage in various forms of opportunism to “enrich themselves at the expense of those they are supposed to serve.”251 In a study of corruption in Cameroon, Jua252 determined that “public discussion and/or criticism of the alleged acts of some members of the ruling class is still taboo.”253 In August 2012, just a little over a year since South Sudan became an independent country, it was already “engulfed in scandals over top officials allegedly looting the treasury.”254 This is due, of course, to the failure of the new nation to provide its various peoples with institutional arrangements that adequately and effectively constrain civil servants and pol-

249. MBAKU, CORRUPTION IN AFRICA, supra note 1, at 4.
250. Note that although some African constitutions purport to guarantee the supremacy of law, the practice is that some individuals, especially those who hold high-ranking positions in government, still consider themselves above the law. For example, Cameroon’s 1996 Constitution limited the president to two consecutive terms of seven years in office. Yet, in 2008, Paul Biya, who had already served two terms of seven years each in office as president, basically ignored the law and used his position in the party to have the constitution changed so that he could contest the presidency again. Thus, despite the fact that he had agreed in 1996 to the two-term limit, he was still willing to subvert the existing laws to maximize his interests.
251. MBAKU, CORRUPTION IN AFRICA, supra note 1, at 118–19.
252. Jua, supra note 114.
253. Id. at 166. Although this study was completed in 1991, the situation has not changed significantly. Fombad’s 2004 study found similar acts of impunity by civil servants and politicians. Charles Manga Fombad, The Dynamics of Record-breaking Endemic Corruption and Political Opportunism in Cameroon, in THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA 357 (John Mukum Mbaku & Joseph Takougang eds., 2004).
iticians—in other words, laws and institutions that guarantee the rule of law, and hence, force all citizens, including those who serve in the government, to remain subservient to the law. Unless this is done, corruption, rent seeking, and other forms of opportunism will remain pervasive, as civil servants and politicians continue to act with impunity, and entrepreneurs will find it extremely difficult to engage in those activities that create wealth.

Colonialism, as has been argued by many scholars,255 was not a mutually beneficial arrangement between Africans and the Europeans. Instead, it was a cruel, opportunistic, repressive, violent, and highly exploitative system designed to capture benefits for the metropolitan economies and the Europeans resident in the colonies.256 As a consequence, the laws and institutions that the Europeans established in each colony to help them manage the local populations and enhance their ability to appropriate African resources were not democratic, but were instead designed to keep the Europeans—the governors of the colonies—above the law.257 In fact, the Europeans who colonized Africa made no effort to either utilize already existing indigenous institutions—which in the past had proven quite effective and efficient in the peaceful resolution of conflict and the promotion of domestic production systems—or engage the African populations in either deepening existing institutions, or designing more effective systems of governance.258 Rather, Af-

255. See, e.g., Patton, Jr., supra note 27, at 457.
256. See id. at 457–58.
257. In the French colonies, for example, the policy of assimilation, and later, association, created two legal systems, one for “indigenes” and another for French citizens and those few Africans who had been assimilated to the French cultural ideal. Under this system, French citizens in the colonies functioned essentially above the law. See generally John D. Hargreaves, West Africa: The Former French States (1967); John D. Hargreaves, France and West Africa: An Anthology of Historical Documents (1969); Virginia Thompson & Richard Adloff, French West Africa (Greenwood, 1969). For a description of the dual legal system in the U.N. Trust Territory of Cameroons under French administration, see Victor T. LeVine, The Cameroons: From Mandate to Independence (Hoover Institution, 1964); LeVine, The Fall and Rise of Constitutionalism, supra note 54.
258. In a series of articles published in the Africa Peace and Conflict Journal, several authors argue that “indigenous cultural practices and traditional structures of leadership” can play a very significant role in enhancing peaceful coexistence and effective governance in Africa. Tim Murithi, Guest Editor’s Note, 2 Afr. Peace Conflict J. 1 (2009). Martha Mutisi examines
Ricoh traditional institutions were destroyed to make way for the introduction and sustaining of laws and institutions that enhanced European seizure, forceful possession, and exploitation of colonial resources for the benefit of the metropolitan economies.

At independence, many African countries failed to engage their populations in democratic constitution-making to secure more effective institutional arrangements to replace those left by the colonialists. For example, in the francophone countries, except for Guinea, national constitutions were based on the French Constitution of 1958, and not on robust national constitutional discourses. In addition to the fact that these top-down, elite-driven, and non-participatory approaches to constitution-making forced these countries to adopt institutional arrangements that did not reflect the people’s values and aspirations, they also failed to adequately constrain the state. Perhaps more importantly, throughout Africa, citizens came to see these constitutions, and the laws that were enacted under them, as foreign impositions designed to maximize the interests of the new leaders and their foreign benefactors. Few Africans came to accept and respect their post-independence laws and institutions. Even as late as the 1990s, francophone countries in Africa were still using the Constitution of the French Fifth Republic as the model for “constructing” their laws and institutions. For example, in a study of the post-Cold War democratization process in Mauritania, Ould-Mey determined that “[t]he July

Rwanda’s gacaca as an instrument for addressing legal issues associated with or arising out of the country’s genocide and concludes that the gacaca can play a significant role in restorative justice; Susan Kilonzo, Sussy Kurgat & Simon Omare take a look at “taboos” and how they can be used to effectively deal with natural resource management and conservation issues in Kenya. They conclude that taboos can serve just as well as formal legal mechanisms in helping minimize overexploitation and degradation of the environment. Martha Mutisi, Gacaca Courts in Rwanda: An Endogenous Approach to Post-conflict Justice and Reconciliation, 2 Afr. Peace Conflict J. 17 (2009); S.M. Kilonzo, S.G. Kurgat & S.G. Omare, The Role of Taboos in the Management of Natural Resources and Peace-building: A Case Study of the Kakamega Forest in Western Kenya, 2 Afr. Peace Conflict J. 39 (2009).


Yet, voluntary acceptance of and respect for a country’s laws significantly lower the costs of maintaining compliance. Because many Africans view their present legal and judicial institutions as alien impositions designed for the benefit of the ruling elites—and not for helping the people govern themselves, organize their private lives, and deal with daily problems and conflicts—they have rejected these laws and the civil servants and governmental agencies that enforce them. African countries can only resolve this problem, of the failure of the majority of citizens to accept, respect, and trust the law, by engaging in the type of institutional reconstruction that allows each country to replace the legal and judiciary systems inherited from the Europeans with structures that are more locally-focused and reflect the values, interests, aspirations, and customs and traditions of each country’s relevant stakeholder groups. This can only be achieved by engaging the people in democratic constitution-making—given the opportunity, then, the people will choose laws that they can respect, accept, and obey, and which would enhance their ability to live together peacefully and engage in those activities that maximize their values, including creating the wealth that they need to meet their obligations.

261. In a recent paper on compliance with the law, Levi, Tyler, and Sacks argue that “[g]overnments are most dependent upon the cooperation of their citizens under those circumstances in which they are least able to obtaining it via the mechanisms [of surveillance and sanctioning] or reward and punishment.” They argue further that although it is possible for a governmental regime to rule the country using only coercive force, ruling with “legitimate power makes governing easier and more effective.” Where citizens consider government legitimate, they are more likely to voluntarily accept and respect the government’s laws and regulations. Where government is considered by the citizens to be illegitimate, officials have to “expend more resources in monitoring and enforcement to induce sacrifice and compliance.” Thus, the “existence of legitimacy reduces the transaction costs of governing by reducing reliance on coercion and monitoring.” Margaret Levi, Tom Tyler & Audrey Sacks, Draft, The Reasons for Compliance with Law, Paper for the Workshop on the Rule of Law, Yale University, Mar. 28–29, 2008, http://www.yale.edu/macmillan/ruleoflaw/papers/ReasonsforCompliance.pdf.
The creation of wealth requires that a country possess a legal and judicial system that can provide the wherewithal for the resolution of conflicts arising from trade and other forms of mutually beneficial exchange. In order for the judicial system to function effectively in this capacity, it must be made a co-equal partner in governance with the other branches of government—typically, the executive and legislative—meaning, there must be judicial independence. If the judiciary becomes subservient to the executive, it is likely to be used by the latter to maximize its interests and those of its supporters. In response, groups within the country that consider themselves marginalized may resort to violent mobilization, a process that can exacerbate political and economic instability, and make it difficult for the country to attract the investment needed for economic growth and development.

As much as judicial independence is a critical factor in creating the appropriate institutional environment for wealth creation in Africa, many countries in the continent continue to have problems when it comes to the actual practice of this concept. While many constitutions in the continent actually "honor conventional separation-of-powers principles by organizing the

262. As an example, consider conflicts arising from the failure of one party to a contract to live up to or abide by the terms of the contract. Although many conflicts associated with private contracts are often resolved by the parties themselves, without the involvement of the judiciary system, many contract disputes end up in court. Individuals or businesses intending to invest in an economy usually consider the legal mechanisms for resolving conflicts arising from contract disputes as critical to their decision to commit funds to the economy in question. Studies by economists have shown that a country's legal structure and protection of property rights are very important for wealth creation. See James Gwartney & Robert Lawson, Economic Freedom of the World: 2004 Annual Report 35–37 (The Fraser Institute, 2004). In addition, the ability of a country to attract and retain the skilled labor resources—in other words, human capital—needed for productive entrepreneurial activities is dependent on, inter alia, the quality of its legal system. In fact, the poor quality of legal systems in many African countries is a major contributing factor to "brain drain," the migration of highly-skilled manpower from the African countries to the industrialized economies of the West and the failure of these economies to attract highly-skilled manpower from the developed economies. See generally Arno Tanner, Emigration, Brain Drain and Development: The Case of Sub-Saharan Africa (2005); The Brain Drain of Health Professionals from Sub-Saharan Africa to Canada (Jonathan Crush ed., 2006); J. M. Sibry Tapsoba, Brain Drain and Capacity Building in Africa (2000).
courts into a separate, self-managed branch of government with exclusive functions and jurisdiction,”263 judicial independence is rarely realized in practice in these countries. As argued by Prempeh,264 many African governments, pressured by “international donors and creditor nations to demonstrate their democratic credentials,”265 provide their countries with a “formal constitutional guarantee of judicial independence,”266 but in reality, “judicial independence remains vulnerable to political control.”267 Throughout the continent, many judiciaries are unable to maintain the independence guaranteed to them by the constitution because other critical aspects or elements of judicial independence are missing—such judiciaries usually lack the authority to control their own budgets, because the power of the purse is vested either with the executive or legislative branches. They also lack “security of tenure” and “institutional independence.”268 For example, as determined by Fombad in a study of the Cameroon judiciary, the president of the Republic not only has the power to “guarantee” the independence of the judiciary,269 but also directly controls all financial matters dealing with the judiciary.270 Prempeh states that the dependence of African judiciaries on the executive and legislative branches is worsened by “the fact that the judiciary has historically been severely under-resourced, leaving it with inadequate and outmoded technology, dilapidated and overcrowded courthouses and offices, and underpaid judges and staff.”271

So that there can be peaceful coexistence of each country’s diverse ethnic and religious groups, which is critical for engagement in those productive activities that create wealth and enhance human development, judicial independence must not only be guaranteed in the constitution, but the necessary institutional facilities must be provided so that the judiciary can realize that independence in practice. For example, as has been

263. Prempeh, supra note 139, at 1305.
264. Id.
265. Id. at 1304–05.
266. Id. at 1305.
267. Id.
269. CONSTITUTION OF THE REPUBLIC OF CAMEROON, arts. 37(2), (3).
271. Prempeh, supra note 139, at 1305.
made clear by South Africa’s Constitutional Court, the judiciary must be provided the minimum requirements for judicial independence, which are (1) “security of tenure”; (2) “a basic degree of financial security”; and (3) “institutional independence.”

Corruption and rent seeking are major constraints to the creation of wealth in Africa. One of the most effective ways to deal with corruption is to make certain that public policies are undertaken in an open and transparent manner. In addition to the fact that openness and transparency can significantly improve the efficiency of the public sector, they can also force civil servants and politicians to be more accountable to both the people and the constitution, thus, minimizing corruption, rent seeking, and other behaviors that stunt entrepreneurship and the creation of wealth. During the last fifty years, corruption has been pervasive throughout most African economies, making it very difficult for these countries to develop and sustain the robust private sector needed to anchor each country’s wealth creation effort. Perhaps, more important is the fact that corruption deprives those at the bottom of the economic ladder of the opportunity to participate gainfully in the economy, as well as gain access to welfare-enhancing public goods and services.

The protection of human rights is a critical factor in development. For example, throughout Africa, women and girls are regularly abused and deprived of their fundamental rights.

273. Van Rooyen v. The State, para. 29.
274. See generally MBAKU, CORRUPTION IN AFRICA; MBAKU, INSTITUTIONS AND DEVELOPMENT, supra note 1.
275. MBAKU, CORRUPTION IN AFRICA, supra note 1, at 109–10.
In addition to the fact that such abuse significantly degrades the quality of life for these citizens, it also deprives them of the opportunity for self-actualization—for example, the opportunity to develop the human capital that they need to participate fully and effectively in political and economic markets, including creating their own wealth; to access the credit that they need to engage in productive activities; to own real property, which is an important way to store one’s wealth for the future; and to travel, so that they can migrate to where their labor skills are needed the most, and earn competitive compensation packages for their labor services, or start and manage their own businesses. Throughout the continent, human rights abuses remain at the heart of why so many African women and girls are among the continent’s poorest and most materially deprived inhabitants. Hence, the protection of the fundamental rights of all citizens is critical for poverty alleviation and human development.277


277. See generally Human Rights, the Rule of Law, and Development in Africa (Paul Tiyambe Zeleza & Philip J. McConnaughay eds., 2004).
V. THE ARAB AWAKENING: THE CONTINUING EFFORT TO ENHANCE DEVELOPMENT IN AFRICA

After a Tunisian street vendor named Tarek al-Tayeb Mohamed Bouazizi set himself on fire as a protest against humiliation by government regulators, his subsequent death provided the impetus to what later became a new political, economic, and social awakening among ordinary Tunisians. This awakening, which was later referred to as the “Arab Spring,” manifested itself in a series of grassroots anti-government protests, which effectively overthrew the government of Tunisia’s authoritarian ruler, President Zine el-Abidine Ben Ali, on January 14, 2011.

The pro-democracy demonstrations that began in Tunisia after Bouazizi’s self-immolation, spread to other countries in North Africa and the Middle East. In Egypt, citizens took to the streets to demand the ouster of their president, Hosni Mubarak. Throughout this region, citizens awoke to a new way of thinking about human rights, governance, and development. They arose to demand that their governments respect their “basic social, political, and economic rights.” Before the masses of these countries took to the streets to demand that their rights be respected, their governments had routinely violated international law by prohibiting the rights to assemble and to freedom of expression guaranteed by international con-


281. Id.
ventions\textsuperscript{282} that had been ratified by these countries. Bouazizi’s frustration was shared by not just the masses of Tunisia, but by those in Egypt and other countries in the region. They sought the opportunity to govern themselves by determining, or at the very least participating in the determination of, their own laws, the choosing of their own leaders, and participating fully and effectively in the creation of wealth.\textsuperscript{283}

Generally, the Arab awakening resulted in the demise of brutal governmental regimes in Egypt, Libya, and Tunisia. Elections, considered relatively free by both domestic and international observers,\textsuperscript{284} have taken place in all three countries, and in Egypt and Tunisia, the government has been captured by Islamist political parties.\textsuperscript{285} Already, there are fears, especially by some groups in these countries, notably women and religious minorities, that even though these new regimes came to power through democratic processes, they are likely to reject
democratic governance as soon as they have consolidated their power.\textsuperscript{286}

But were the events that characterized the Arab awakening transformative enough to provide citizens of Egypt, Libya, and Tunisia with institutional arrangements capable of enhancing peaceful coexistence, promoting entrepreneurship, especially among historically marginalized groups, and adequately constraining the state so that its custodians would not continue to behave with impunity as they had done prior to the “revolutions”? The answer to the above question is that what happened in all three countries can better be described as “regime changes,” and not the type of transformative processes that could have produced truly democratic governmental institutions. For example, in Egypt, the Mubarak-imposed anachronistic, oppressive, exploitative, and elite-driven governance architecture remains firmly in place. Egypt’s revolution did not involve the type of bottom-up, inclusive, participatory, and people-driven institutional reconstruction that would have produced institutional arrangements capable of guaranteeing Egyptian citizens’ fundamental rights, greatly enhancing their ability to coexist peacefully and engage freely in productive activities to create the wealth that they need to deal with poverty and deprivation. First, the country’s first freely-elected parliament in sixty years was sacked by the Supreme Constitutional Court (“SCC”), an anachronism from the Mubarak era.\textsuperscript{287} By dissolving a democratically elected parliament, the SCC effectively quashed the most important achievement of the Egyptian “revolution.” Sec-

\textsuperscript{286} For example, as reported by Marc Fisher, several YouTube preachers in Tunisia are currently “offering a vision of Islam that rejects democracy and elections.” They preach that “[d]emocracy’s freedom is absolute,” and that “we don’t accept that. In our religion, freedom is limited to the freedom God gives you.” Marc Fisher, \textit{In Tunisia after Arab Spring, Islamist’s New Freedoms Create New Muslim Divide}, WASH. POST (Apr. 28, 2012), http://www.washingtonpost.com/world/in-tunisia-after-arab-spring-islamists-new-freedoms-create-new-muslim-divide/2012/04/28/gIQAN9yJoT_story.html.

\textsuperscript{287} All the judges in the Supreme Constitutional Court (“SCC”) were appointed by Hosni Mubarak. The SCC is considered a highly politicized body. \textit{See, e.g.,} Lama Abu Odeh, \textit{The Supreme Constitutional Court of Egypt: The Limits of Liberal Political Science and CLS Analysis of Law Elsewhere}, 59 AM. J. COMP. L. 985 (2011); James Feuille, Note, \textit{Reforming Egypt’s Constitution: Hope for Egyptian Democracy?}, 47 TEX. INT’L L.J. 237, 244 (2011).
ond, the Supreme Council of the Armed Forces ("SCAF"), a Mubarak-era institution, assumed the powers of the legislature, as well as some of the powers traditionally vested in the executive. In addition to the fact that the SCAF appropriated the power to legislate, it also made it clear to the new president, Mohamed Morsi of the Islamic Brotherhood movement, that in selecting a cabinet, he had to leave the post of defense in the hands of the military. When President Morsi announced his thirty-five member cabinet on August 2, 2012, Field Marshal Hussein Tantawi, who was also head of the SCAF, retained his position as the defense minister. However, on August 12, 2012, President Morsi ordered the retirement of the country’s two top military officers, including General Hussein Tantawi. The other military officer, who was head of the SCAF and the Defense Minister, was summarily sacked. Morsi then proceeded to “unilaterally [annul] constitutional declarations issued by SCAF that had taken the power to legislate out of Morsi’s hands.” Although Morsi, through his actions, successfully asserted civilian authority over the military, Egyptians have yet to engage in democratic institutional reforms to provide themselves with institutional arrangements that guarantee the rule of law. While Morsi’s actions have significantly increased his power base and that of his Freedom and Justice Party, they have neither advanced nor deepened

289. Id. El Deeb explains that the Supreme Council of the Armed Forces ("SCAF") “stripped [the new president] of significant powers and declared themselves as the country’s legislative authority after dissolving a parliament dominated by Morsi’s Islamic Muslim Brotherhood movement.” The SCAF has also appropriated the power to write the country’s permanent constitution, a job that should be performed either by the Egyptian people or their duly elected representatives.
sustainable democracy in the country. Moreover, they do not seem to have moved the country closer to acquiring legal and judicial systems undergirded by an adherence to the rule of law.

On November 22, 2012, President Morsi issued a decree that granted him immunity from judicial overview or oversight. Morsi, who had come into power with a reformist mission and had been expected by Egyptians to guide the country’s transition to democratic governance, was now engaging in practices common in the Mubarak dictatorship—he was acting arbitrarily and capriciously, and ultra vires. Morsi later agreed to limit the scope of his November 22, 2012 decree; however, his extra-constitutional actions did not bode well for the institutionalization of the rule of law in Egypt.

In January 2013, extremely violent demonstrations enveloped several Egyptian cities, notably, Port Said, Suez, and Ismailiya, after a court sentenced twenty-one football fans to death for the February 2012 riot that killed over seventy people. Many of the Egyptians taking part in the January 2013 demonstrations that followed the court decision argued that


294. Id. Condemnation of Morsi’s extra-constitutional act was swift and almost universal. Some opposition leaders argued that Morsi had established an “absolute presidential tyranny” and that “Egypt [was] facing a horrifying coup against legitimacy and the rule of law and a complete assassination of the democratic transition.” By engaging in such extra-constitutional acts, Morsi was announcing to his fellow citizens that Egyptian law does not bind government officials. In other words, his actions supported the view that Egyptian institutional arrangements do not guarantee the supremacy of law. Morsi already had executive and legislative powers, and through the decree that he issued on November 22, 2012, he effectively neutered the judiciary.


the courts had “scapegoated” the defendants for the events of February 2012. Morsi, who earlier had acted extra-constitutionally in an effort to amass more power for himself, and in doing so, had ignored the nation’s courts, was now appealing to the demonstrators to respect the decisions of the court. He subsequently declared a thirty-day curfew and invited the opposition to a national dialogue, but the offer was rejected as essentially cosmetic.\footnote{See Kingsley, supra note 296; Matthew Weaver, Egypt Crisis: Opposition Rejects Morsi’s Offer of Talks, GUARDIAN (Jan. 28, 2013), http://www.guardian.co.uk/world/middle-east-live/2013/jan/28/egypt-morsi-state-of-emergency-live.} Opposition leaders indicated that they would continue to encourage further protests unless President Morsi agreed to form a more inclusive government and discard the recently adopted constitution.\footnote{Weaver, supra note 297. Here, even a seemingly united opposition appears to be failing the Egyptian people, especially the youth who had risked their lives to secure the overthrow of the Mubarak regime. Instead of demanding that Morsi form a unity government—a proposal that, if accepted, would grant opposition elites seats in the government—opposition leaders should be pushing vigorously for the country to engage in a fully inclusive and robust national dialogue on constitution-making and the development of democratic institutions. Such a process-driven approach to institutional reforms should produce a constitution that reflects the values of all of the country’s relevant stakeholder groups, not just those of the Islamists that dominated and controlled the drafting of the Morsi constitution, which was adopted in December 2012. See Egypt Adopts New Constitution as Opposition Cries Foul, YAHOO! NEWS N.Z., http://nz.news.yahoo.com/a/-/world/15710581/egypt-adopts-new-constitution-as-opposition-cries-foul/ (last updated Dec. 26, 2012).} It now appears that what was once a dynamic, progressive, bottom-up, and people-driven effort to transform Egyptian institutions and entrench a governance system undergirded by the rule of law, has turned or degenerated into a top-down, elite-driven attempt to impose a Mubarak-type authoritarian system in the country. In fact, since November 2012, when Morsi issued his decree, reform in Egypt has essentially degenerated into a fight between the SCAF, the SCC, and President Morsi for political supremacy. No effort is being made to engage the country’s diverse stakeholder groups in the type of robust discourse that can produce laws and institutions capable of providing an effective foundation for democratic governance.

On January 30, 2013, amid threats from a military oblivious to its constitutional role, a unified Egyptian opposition invited President Morsi to form a government of national unity as a
way to halt further violent demonstrations.\footnote{299} However, even if such a unity government is formed (as of this writing, Morsi had rejected the opposition’s offer\footnote{300}) and the destructive mobilization is temporarily halted, the larger and more important problem of anachronistic and dysfunctional institutions will remain unresolved.

Many Egyptians, Tunisians, and Libyans are feeling a significant level of frustration about their revolutions.\footnote{301} That level...
of frustration may be related to the fact that these revolutions failed to achieve their ultimate objective: to reconstruct anachronistic and dysfunctional state systems, and provide the people with governance structures capable of effectively constraining state custodians and guaranteeing the protection of the fundamental rights of citizens, including the prevention of violence orchestrated either by state or non-state actors against minorities and other vulnerable groups. The revolutions failed to totally transform and reconstitute the critical domains—the political, administrative, and judicial foundations of the state—and as a result, citizens of these countries continue to face the same anachronistic institutions that had oppressed, infantilized, and exploited them for years. Given the opportunity, Egyptians would definitely have engaged in the type of constitution-making that would have subjected the military, including the SCAF, to civilian control and prevented it from engaging in the type of political manipulations that have allowed it to effectively hijack the country’s revolution and frustrate the people’s efforts to reform their institutions. Additionally, such robust and participatory constitutional discourse would have helped Egyptians provide themselves with laws and institutions that guarantee real separation of powers, and effectively prevent the type of extra-constitutional behaviors and usurpation of the functions of other branches of government that have been exhibited by President Morsi in his efforts to acquire more powers for himself.

Like other pro-democracy groups elsewhere in the continent, such as those that emerged across Africa in the mid-1980s and early-1990s, Egypt’s new democrats believed, albeit mistakenly, “that if they ousted the head of state its body would fall.”

rights of all Tunisians, including the Islamists, the decision to murder him instead of engaging him in dialogue was cowardly and brutish. See James Bone, Tunisia Protests after Assassination of Opposition Politician Chokri Belaid, TIMES (London) (Feb. 6, 2013), http://www.thetimes.co.uk/tto/news/world/africa/article3679904.ece.

302. After the Egyptian revolution, institutions that had effectively been used by the Mubarak regime to terrorize the people remain in place. In fact, the SCC, which dissolved the democratically-elected parliament, remains in place and so does the SCAF.

303. Kirkpatrick & El Sheik, supra note 293.

304. David D. Kirkpatrick, Revolt Leaders Cite Failure to Uproot Old Order in Egypt, N.Y. TIMES (July 14, 2012),
Although Egypt’s Mubarak, who for many decades had ruled the country with extremely efficient cruelty, is no longer in power, the institutional structures that supported his brutal dictatorship remain virtually intact. Hence, as admirable and as monumental as the uprising was, it was not a real transformative revolution; one producing more democracy-friendly laws and institutions. Today, the political, administrative, and judicial structures that significantly enhanced the ability of the ancien régime to oppress and infantilize the Egyptian people are still intact and are being used by the “new” leadership to frustrate the ability of Egyptians to deepen and institutionalize democratic governance.

What the Arab awakening did was offer citizens of the various countries the opportunity to undertake the reconstruction and reconstituting of the anachronistic and dysfunctional state structures inherited from the ancien régimes, and provide laws and institutions capable of adequately constraining the state and enhancing the ability of citizens to take a more active part in poverty eradication through entrepreneurship and wealth creation. Unfortunately, the revolutions in these countries were still-born, and state reconstruction remains a work-in-progress. Of course, one can consider the new governments in Egypt, Libya, and Tunisia as interim or transitional governments whose job it is to provide the people with the wherewithal to undertake democratic and effective state reconstruction. One problem with this approach is that without effective legal constraints on their activities, these new governments are not likely to engage the people in the type of robust dialogue that could lead to participatory, inclusive, and people-driven institutional reforms. For example, in Egypt, Morsi’s Islamic Brotherhood-dominated Freedom and Justice party has effectively hijacked the process of compacting the country’s permanent constitution and has produced a constitution that virtually all members of the opposition—especially the Coptic minority, as well as several youth, including those who engineered the uprising that ousted Mubarak—believe would enhance the ability of the Islamists to turn Egypt into a theocracy.  

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305. David D. Kirkpatrick & Mayy El Sheikh, Egypt Opposition Gears up after Constitution Passes, N.Y. TIMES (Dec. 23, 2012),
tian military remains as dominant as ever in the country’s political economy.\textsuperscript{306} Meanwhile, in Tunisia, Islamist preachers are pushing the Islamist-dominated government to adopt governance structures based on Islamic law.\textsuperscript{307}

VI. CONCLUSION

Today, Africans face three important policy priorities: (1) effectively managing ethnic and religious diversity in order to secure the peaceful coexistence that is critical for investment and the building and sustaining of wealth-creating capacity; (2) fostering the development of private sectors that are capable of producing the wealth that these countries need to deal effectively with poverty and deprivation, and provide a foundation for eventual eradication of poverty; and (3) minimizing corruption, rent seeking, and other growth-inhibiting behaviors.

These priorities are all interrelated. For example, the failure of African governments to manage ethnic and religious diversity has often resulted in destructive and violent mobilization by groups that perceive themselves as being marginalized by a central government dominated and controlled by other groups.\textsuperscript{308} The result has been significantly high levels of political instability, which have created economic environments that are not suitable for, or conducive to, investment and/or engagement by entrepreneurs in productive activities. Peaceful coexistence creates opportunities for mutually-beneficial exchanges between groups, which may include cultural exchanges and trade. Such exchanges can lead to innovation and the creation of new knowledge that can aid production and the peaceful resolution of problems and conflicts.

State actors, such as civil servants and politicians, are responsible for a significant amount of the corruption and rent seeking that takes place in the African countries today.\textsuperscript{309}

\textsuperscript{306} El Deeb, \textit{supra} note 288.

\textsuperscript{307} Fisher, \textit{supra} note 286.

\textsuperscript{308} Examples include Ibos in Nigeria, Ogonis in the Niger Delta of Nigeria, various indigenous groups in Liberia, and southerners in the Republic of Sudan.

\textsuperscript{309} See Mbaku, \textit{Institutions and Development}, \textit{supra} note 1, at 137–40; Mbaku, \textit{Corruption in Africa}, \textit{supra} note 1, at 12–13; John Mukum Mbaku,
Thus, to minimize the engagement of state actors in growth-inhibiting behaviors, it is necessary that the state be adequately constrained by the constitution. To adequately restrain the state, the law must be supreme—no citizen, regardless of their political, economic, or traditional standing in society, can be above the law. Judicial independence must also be assured, so that the executive does not turn judiciary structures into instruments of control and plunder. In addition, the laws chosen must reflect the values and aspirations of citizens, that is, the laws need to be locally-focused, and must also be laws that citizens can obey in order to enhance compliance and minimize the costs of policing. Furthermore, government operations must be conducted in an open and transparent manner to minimize corruption, enhance participation, and increase the people’s trust in the government. Finally, the rights of minorities must be protected—it is critical that the rights of minority ethnic and religious groups be protected, not just from state tyranny, but also from violence perpetuated against them by non-state actors.

The rule of law is a critical catalyst to Africa’s effort to deal effectively with poverty. Each country must engage its citizens in democratic constitution-making to provide laws and institutions that guarantee the rule of law. One must caution that what is being advocated here is not simple regime change as has occurred in many countries throughout the continent. In order to secure institutional arrangements that guarantee the rule of law, countries must engage in the type of robust state reconstruction that provides all of the country’s relevant stakeholders with the wherewithal to participate fully and effectively in institutional reforms. It is only through such a democratic process that a country can avail itself of legal and judicial frameworks that guarantee the rule of law, and hence, provide the environment for peaceful coexistence, wealth creation, and democratic governance.

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THE LIBERAL DISCOURSE AND THE “NEW WARS” OF/ON CHILDREN

Noëlle Quénivet *

“We are urging all governments and armed groups to end the military recruitment of children under 18 and to release those children already in service. There can be no excuse for arming children to fight adult wars.”

Statement by Mary Robinson, United Nations High Commissioner for Human Rights, Feb. 12, 2002

INTRODUCTION

The typical armed conflict of the last few decades has not been one where instruments of high technology such as unmanned drone and guided missiles has been used; rather, it has been fought by young people with AK-47s and machetes. The conflicts in the Democratic Republic of Congo, Sierra Leone, and Uganda illustrate the extensive participation of children in hostilities. Since the early 1990s, after Graça Machel’s

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2. In relation to the conflict in Sierra Leone, see AK-47: The Sierra Leone and Child Soldier, BBC NEWS (Dec. 6, 2005), http://news.bbc.co.uk/1/hi/world/europe/4500358.stm.

3. Harold Koh explains that “[j]ust as Rwanda was a ‘low-tech genocide,’ committed largely by machete, small arms constitute today’s real weapon of mass destruction.” Harold Hongju Koh, A World Drowning in Guns, 71 FORDHAM L. REV. 2333, 2338 (2003).

seminal report on the impact of armed conflict on children, a coalition of non-governmental organizations (“NGOs”) and individual activists has strongly argued against the use of children, defined as individuals below eighteen years of age, in armed conflict. A black African boy holding an AK-47 has become universally recognised as a symbol of child soldiering, a situation viewed by many as intolerable. It has been argued that a liberal society, which cherishes values such as universality of human rights, cannot possibly approve of children’s involvement in armed conflicts, since this is contrary to the values of the civilized world; “War Is Not Child’s Play” is one recent academic article that astutely reflects this view. This raises a number of questions. What distinguishes this African boy from the French, canonized heroine Joan of Arc? Also, why is the world’s attention focused on the plight of African children when both the United Kingdom and the United States of America continue to recruit children to join their armed forces? The way we look at children, more specifically children in conflicts, has changed over time; thus, examining the issue of child soldiering in a historical context appears expedient.

6. See Lindsay Stark, Neil Boothby & Alastair Ager, Children and Fighting Forces: 10 Years on From Cape Town, 33 DISASTERS 522, 524 (2009).
9. “The UK... remains among a group of fewer than 20 countries which continue to permit in law the recruitment of children into the armed forces from the age of 16 years. No other country in the European Union and no other UN Security Council permanent member state recruits from this age.” COAL. TO STOP THE USE OF CHILD SOLDIERS, CATCH 16–22: RECRUITMENT AND RETENTION OF MINORS IN THE BRITISH ARMED FORCES 8 (2011) [hereinafter RECRUITMENT OF MINORS IN BRITISH ARMED FORCES].
Moreover, childhood is defined by social policymaking predicated on many factors, including “ideas of what children are or normally should be.”

This, in turn, involves analyzing the subject matter from a socio-legal perspective.

Liberalism, which is based on the concept of human dignity and universal human rights, conceives of children’s involvement in armed conflicts as a violation of their human rights. Consequently, an international lobbying campaign, led by a number of human rights and humanitarian NGOs as well as the International Committee of the Red Cross (“ICRC”), has attempted to transform the moral value of disapproving children’s involvement in armed conflicts into a legal norm that problematizes their involvement. The main achievements of this campaign, favoring “[a] universal approach . . . perceiv[ing] all under-18 recruitment into armed groups as offensive, from under-18-year-olds enlisting in state armies with parental permission to young teenagers joining an armed group in order to defend their own social group to pre-teens abducted and desensitized to the act of killing,” have been the adoption of a series of hard and soft law instruments such as the Optional Protocol on Children in Armed Conflict, the creation of the United Nations Office of the Special Representative of the Secretary-General on Children and Armed Conflict, among others. This norm entrepreneurship—of transforming moral values into legal norms—has been such a success that it is

17. For a discussion on norm entrepreneurship, see id., at 113–14.
commonplace to consider child soldiering as an enormity and an affront to human dignity. Criticism against the opinion that child soldiering is unacceptable as such has been raised at times, but it has not been welcome. Nonetheless, the mainstream view that child soldiering is unacceptable not only fails to consider it from a historical perspective but also is insufficiently sensitive to local and regional cultures and traditions.

Additionally, liberals contend that law is “the best instrument for securing liberty, empowering humanity, and bringing about social change.” Yet, the current legal framework does not offer such a straightforward position as three legal regimes apply in relation to child soldiers: the human rights law regime that applies at any time (United Nations Convention on the Rights of the Child and the Optional Protocol), the international humanitarian law regime that only applies in times of conflict of an international (Geneva Conventions) and Addi-

tional Protocol I\textsuperscript{25}) or non-international nature (Common Article 3 of the Geneva Conventions and Additional Protocol II\textsuperscript{26}), and international criminal law which relates to the prosecution of individuals having committed crimes in times of armed conflict (Rome Statute of the International Criminal Court, also known “Rome Statute”\textsuperscript{27}).

Whilst it is true that human rights instruments condemn the participation and use of children in armed conflict, since 1977 little, if any, progress has been made in international humanitarian law in actually tackling the issue of child soldiering. And this is despite the work of ICRC and some humanitarian NGOs. A key underlying question remains: why should child soldiering between fifteen and eighteen years of age be universally banned?\textsuperscript{28}

This Article aims to radically rethink the notion of child soldiering in human rights and international humanitarian law in order to assess whether a change in the law is indeed necessary. With this view, it begins by exploring how and why the phenomenon of child soldiering has gained prominence in recent years. It then examines the current legal framework—including human rights law, international humanitarian law, and international criminal law—in relation to the recruitment, conscription, enlistment, and participation of children in armed conflict. This Article ends by critically analyzing international law in this area through the prism of two values that are essential to liberal thinkers: universality, the idea that liberal values apply across cultures, and autonomy, the idea that each individual is able to take decisions independently of third party interference. The Article concludes that the issue of child soldiering is more difficult to grasp than the liberal thinkers present it and that “the zero under 18” campaign\textsuperscript{29} launched by

\begin{itemize}
\item \textsuperscript{25} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].
\item \textsuperscript{26} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].
\item \textsuperscript{27} Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].
\item \textsuperscript{28} See Lee, supra note 21, at 8.
\item \textsuperscript{29} The idea behind the campaign is that no child under the age of eighteen should be allowed to be recruited or take part in the hostilities. This
\end{itemize}
the Special Representative on Children and Armed Conflict is unlikely to be successful because it fails to take into consideration the weight of history, politics, and culture. That being said, the Article’s aim is certainly not to portray child soldiering as a positive experience or excuse human rights violations that such children suffer once they have, even voluntarily, joined armed forces or armed groups.

I. THE CHILD SOLDIER PHENOMENON

Undoubtedly, moral and societal values reflect the times we live in. As Lisa McNee explains, the constructions of childhood “are products of a particular period and a particular cultural framework.” Until recently, the idea of children taking a direct and indirect part in armed conflicts was commonly accepted as an inevitable aspect of warfare. Yet, the rise of the human rights ideology and the emergence of the so-called “new wars” have led child soldiering to be condemned.

A. Historical Approach to Childhood and Children in Wars

Social scientists contend that the concept of childhood did not exist during the Middle Ages. The underlying belief was that as soon as children’s abilities grew, so did their participation in

campaign is based on the fact that although the UNCRC states that a child is anyone under the age of eighteen years old, this definition is repudiated in Article 38 that allows for the recruitment and participation of children aged fifteen and more. UNCRC, supra note 22, art. 38(3).

30. See Zero Under 18 Campaign, UNITED NATIONS OFF. SPECIAL REPRESENTATIVE TO SECRETARY-GENERAL FOR CHILD. & ARMED CONFLICT, http://childrenandarmedconflict.un.org/our-work/zero-under-18-campaign (last visited Apr. 4, 2013). One of the campaign’s objectives is to “[e]ncourage all States to raise the age of voluntary recruitment to a minimum of 18 years.” Id.


32. As Mary Kaldor summarizes, “the new wars involve a blurring of the distinctions between war (usually defined as violence between states or organized political groups for political motives), organized crime (violence undertaken by privately organized groups for private purposes, usually financial gain) and large-scale violations of human rights (violence undertaken by states or politically organized groups against individuals).” MARY KALDOR, NEW & OLD WARS 2 (2d ed. 2007).

33. James & James, supra note 11, at 26. It must also be noted that a child’s experience in medieval times highly depended on its social status.
society expand. The idea that a person reached adulthood at a certain fixed age simply did not exist at that time. One has to wait until the late 1990s to see when a consensus began to emerge, at least in regard to human rights law, which unequivocally declared that a child was anyone below eighteen years of age.34 Furthermore, in medieval times young people “were not granted any sort of special or distinctive social status.”35 By the fifteenth century, however, an awareness developed to the effect that children should be afforded some special consideration, as their social experience and interaction was different from that of adults.36 The first legal instrument to recognise the specificity of “childhood” was the Geneva Declaration of the Rights of the Child of 192437 followed by the more comprehensive Declaration of the Rights of the Child adopted in 1959 by the United Nations General Assembly38 and finally the United Nations Convention on the Rights of the Child.39

Despite the acknowledgment that children’s role and place in society was different, it remained common for them to partake in armed conflicts. Examples include “the drummer boys in the American Revolution,” “powder monkeys in the war of 1812, the Mexican war, and the Civil War [of the United States],” and the Hitler Youth during World War II.40 Closer to our time,

34. See UNCRC, supra note 22; see also Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor art. 2, June 17, 1999, 2133 U.N.T.S. 161.
35. James & James, supra note 11, at 26.
36. See id.
39. UNCRC, supra note 22.
40. Kristin Gallagher, Towards a Gender-Inclusive Definition of Child Soldiers: The Prosecutor v. Thomas Lubanga, 7 EYES ON ICC 115, 115 (2010–11). Twelve year old boys were recruited by Robert Baden Powell during the
during the Iran-Iraq war, Iranian president Rafsanjani declared that children as young as twelve should be fighting.\textsuperscript{41} Just as is the case today, military apprenticeship or military service was an attractive vocation, especially where a formal universal education system did not exist.\textsuperscript{42} In 1999 the Council of Delegates of the International Red Cross and Red Crescent Movement stated that it was “seriously alarmed by the increasing number of children involved in armed conflict and by the tremendous suffering endured by those children . . . .”\textsuperscript{43} Three years earlier, in 1996, Machel had published her report exposing the plight of children in armed conflicts.\textsuperscript{44} As Ah-Jung Lee aptly summarizes, “the global discourse is that children have no place in war under any circumstance . . . .”\textsuperscript{45} Despite this growing consensus, no one has yet actually addressed the loaded question of why child soldiering, defined for the working purposes of this Article as an individual below the age of eighteen who takes a direct or indirect part in hostilities, is so widely and flatly condemned. To answer this question, one must investigate two key developments that have occurred in recent decades that have radically changed mainstream perceptions of child soldiering, namely the growing impact of liberal human rights ideology and the emergence of “new wars.”

\textbf{B. Human Rights Ideology}

One key development in recent decades has been the growing impact of a human rights ideology that finds its foundations in liberal thought. Liberalism is committed to a society in which individuals can freely and autonomously pursue and realize their interests.\textsuperscript{46} Because liberals tend to view the individual as “inviolable” and human life as “sacrosanct,” violence is prohib-

\begin{itemize}
  \item \textsuperscript{41} See Gallagher, supra note 40, at 115–16.
  \item \textsuperscript{42} Mary Jonasen, Child Soldiers in Chad, 10 INTERSECTIONS 309, 311 (2009).
  \item \textsuperscript{43} Int’l Comm. of the Red Cross [ICRC], Children Affected by Armed Conflict, Council of Delegates Res. No. 8, pmbl. (Oct. 29–30, 1999).
  \item \textsuperscript{44} See generally Impact of Armed Conflict on Children, supra note 5.
  \item \textsuperscript{45} Lee, supra note 21, at 3.
  \item \textsuperscript{46} See GOODWIN, supra note 21, at 37.
\end{itemize}
ited barring the rare cases in which the liberal society is threatened.\textsuperscript{47} For liberals, individual human rights, such as those enshrined in the 1948 Universal Declaration of Human Rights (e.g., right to life, freedom from torture, freedom of speech),\textsuperscript{48} are fundamental in any given society. The advent of a human rights ideology that began with the adoption of the 1948 Universal Declaration of Human Rights, and a range of universal and regional human rights treaties has solidified the liberal position in law.

As a result of liberalism’s “rights-based approach,”\textsuperscript{49} issues relating to children have been entirely perceived through the prism of human rights. In fact, the first comprehensive report on the plight of children in armed conflict\textsuperscript{50} was based on a human rights law framework: the 1989 United Nations Convention on the Rights of the Child (“UNCRC”).\textsuperscript{51} The seminal work of Machel led to a discourse on which “child soldiering is an unambiguous violation of universal children’s rights.”\textsuperscript{52} The plight of children in armed conflict is viewed as child abuse and a violation of human rights law.\textsuperscript{53} Remarkably, “[o]ver the past 20 years, human rights law involving the rights and welfare of children has become increasingly focused on children participating in armed conflict.”\textsuperscript{54} That being said, it must be stressed that in an armed conflict a different body of law, namely international humanitarian law, acts as the law governing the specific subject matter of children in armed conflict.\textsuperscript{55} As a result,

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\textsuperscript{47} Id.
\textsuperscript{48} See UDHR, supra note 37, pmbl., art. 3, 5.
\textsuperscript{49} Lee, supra note 21, at 6 (noting that the “rights-based approach” refers to “humanitarian agencies conceptuali[zing] ‘child soldiering’ in terms of a clear violation of universal children’s rights and a breach of international humanitarian law”).
\textsuperscript{50} Impact of Armed Conflict on Children, supra note 5.
\textsuperscript{51} RACHEL HARVEY, CHILDREN AND ARMED CONFLICT: A GUIDE TO INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 14 (2003).
\textsuperscript{52} Lee, supra note 21, at 3.
\textsuperscript{55} Principle of \textit{lex specialis} means that a law governing a specific subject matter (e.g., international humanitarian law) overrides a law which only governs general matters (e.g., human rights law). For a discussion on the concept of \textit{lex specialis}, see generally Conor McCarthy, Legal Conclusion or Interpre-
\end{flushright}
children are protected via human rights and humanitarian law\textsuperscript{56} and attention should also be paid to international humanitarian law provisions.

\textbf{C. Emergence of New Wars}

A second key development in recent decades that has radically changed mainstream perceptions of child soldiering has been the emergence and subsequent proliferation of so-called “new wars.” A link can arguably be drawn between such wars and the proliferation of the recruitment and use of children in combat.\textsuperscript{57} These wars stand in stark contrast to contemporary international armed conflicts or previous wars of national liberation.

Three salient features of these “new wars” contribute to the increased involvement of children in them. Firstly, modern warfare “is an especially aberrant and horrific phenomenon”\textsuperscript{58} as such conflicts are typically characterized by the abandonment of all moral standards and the “lack of a clear delineation between war and peace . . . .”\textsuperscript{59} Distinctions between fighters and civilians are generally not made,\textsuperscript{60} and worse still, the civilian population becomes the target of systematic attacks carried out with extreme levels of brutality and violence (e.g., use

\textsuperscript{56} See Harvey, supra note 51, at 6–7.

\textsuperscript{57} “The Special Representative is of the view that the risk or likelihood of the realization of the crimes of conscripting or enlisting children under the age of 15 years into the national armed forces, is inevitably high due to the nature of some contemporary armed conflicts.” Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, ¶ 6 (Mar. 18, 2008); see also Topa, supra note 40, at 105.

\textsuperscript{58} Rosen, supra note 18, at 298.

\textsuperscript{59} Gallagher, supra note 40, at 116.

\textsuperscript{60} Harvey, supra note 51, at 5; see also Amy Beth Abbott, Child Soldiers—The Use of Children as Instruments of War, 23 Suffolk Transnat’l L. Rev. 499, 509 (2000); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Statement of Witness Elisabeth Schauer, at 6 (Apr. 7, 2009), http://www.icc-cpi.int/iccdocs/doc/doc662611.pdf.
of systematic rape, torture, ethnic cleansing, abductions, etc.). In such conflicts “opposing sides do not distinguish between children and adults,” for they are all part of the same communities. In fact, due to the nature and pattern of this type of warfare, an increasing number of children have become the primary targets of armed forces and opposition groups who abduct or forcefully recruit them into the military factions. As David Rosen argues, modern war is contemplated as an adult enterprise that exploits inherently “vulnerable, weak, and irrational children.” Children are deemed to be a ready and expandable commodity. Mary Jonasen also notes that “[a]s the number of available men to fight decreases, so does the age of potential recruits, from youth to younger and younger children.” The objectification of children is illustrated by the fact that boys are sent to the front and, if killed, simply replaced by other boys. Children are also regarded by military leaders as fearless, “cheaper to maintain within the ranks,” and “less

61. “The most common objective in [intrastate conflicts or internal power struggles in developing countries] is persecution, expulsion and the extermination of an ethnic group.” Jonasen, supra note 42, at 314.
66. Rosen, supra note 18, at 298; see also David Rosen, Social Change and the Legal Construction of Child Soldier Recruitment in the Special Court for Sierra Leone, 2 CHILDHOOD AFR. 48, 49 (2010) [hereinafter Child Soldier Recruitment].
demanding and easier to manipulate than adult soldiers.”

Children, who are known to be unaware of concepts such as mercy and sympathy until a later age, are often used to terrorize the population, thus increasing the overall level of violence and contributing to and reinforcing the cycle of violence.

A second salient feature of the “new wars” that has contributed to the increasing involvement of children in them is that, since these conflicts tend to occur in poor countries, they are typically fought with light weapons that are cheap to buy. The increased accessibility of small arms since the end of the Cold War and the decreased difficulty in using such weapons due to technological improvements have led to a higher number of children taking a direct part in hostilities. The conflict in Sierra Leone is a sad testimony to the institutionalized nature of conscription and use of children by armed opposition groups.

71. Gallagher, supra note 40, at 117.
73. See Jo Boyden, Children’s Experience of Conflict Related Emergencies: Some Implications for Relief Policy and Practice, 18 DISASTERS 254, 260 (1994); see also Gus Waschefort, Justice for Child Soldiers? The RUF Trial of the Special Court of Sierra Leone, 1 INT’L HUMANITARIAN L. STUD. 189, 189 (2010).
74. Koh defines “small arms and light weapons” as weapons that can be carried by an ordinary person, that are “capable of delivering lethal force” and that are “primarily designed for military use.” Koh, supra note 3, at 2334; see also David Southall, Armed Conflict Women and Girls Who Are Pregnant, Infants and Children: A Neglected Public Health Challenge. What Can Health Professionals Do?, 87 EARLY HUM. DEV. 735, 739 (2011).
75. Davison, supra note 68, at 138; see also Carol B. Thompson, Beyond Civil Society: Child Soldiers as Citizens in Mozambique, 80 REV. AFR. Pol. ECON. 191, 191 (1999); Anatole Ayissi & Catherine Maia, La lutte contre le drame des enfants soldats ou le Conseil de Sécurité contre le terrorisme à venir [The Struggle Against the Tragedy of Child Soldiers, or the Security Council Against Coming Terrorism], 58 REV. TRIM. DR. H. 341, 345–46 (2004) (Fr.); William P. Murphy, Military Patrimonialism and Child Soldier Clientalism in the Liberian and Sierra Leonean Civil Wars, 46 AFR. STUD. REV. 61, 74 (2003).
76. SINGER, supra note 65, at 45–49; HARVEY, supra note 51, at 66; Koh, supra note 3, at 2335; Meredith Turshen, Women’s War Stories, in WHAT WOMEN DO IN WARTIME: GENDER AND CONFLICT IN AFRICA 1, 7 (Meredith Turshen & Clotilde Twagiramariya eds., 1998).
77. See Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 1603 (May 18, 2012).
This has led to a corresponding increase in the “victimization of women and children” alike.78

Thirdly, a wide range of actors—national liberation movements, insurgents, partisans, rebels, local militia, terrorist groups, corporations, and others—are involved in the “new wars,” and in practice, it is often difficult to distinguish between these factions and understand their interrelationships. For example, an armed opposition group may use a local militia to “recruit” individuals to work in mines. The harvested natural resources are then sold to a corporation and the money received from the proceeds of the resources is used to buy weapons from a terrorist group. In this environment, children are an ideal weapon of war. Due to their young age, they “can . . . act relatively inconspicuously in war zones, observing troop deployments, dispositions of weapons and noting logistical arrangements without attracting undue attention.”79 As children are usually not suspected of being part of the hostilities, they are neither monitored nor stopped and searched whilst there are on duty. They are therefore an undeniable asset for these armed opposition groups, notably because they can provide information on enemies’ movements and activities and also work as a communication bridge for the groups.

Whilst liberal states such as the United Kingdom recruit children into their own armed forces80 and sometimes let them participate in conflicts (e.g., Iraq81), they decry the use of children in the “new wars”. Three main reasons can be adduced to elucidate this seemingly contradictory view and why the inter-

78. HARVEY, supra note 51, at 60.
80. For the United Kingdom’s viewpoint on its recruitment process, see JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY: ARMED FORCES BILL, 2010–12, H.L. 145, H.C. 1037, ¶ 1.50 [hereinafter, ARMED FORCES BILL, 2010–12]; see also Bartlet, supra note 40.
81. For example, between 2003 and July 2005, fifteen soldiers below the age of eighteen years old were deployed to Iraq. RECRUITMENT OF MINORS IN BRITISH ARMED FORCES, supra note 9, at 5. Five underage soldiers were also deployed between 2007 and 2010. UK Submission to the UN Universal Periodic Review, CHILD SOLDIERS INT’L ¶ 16 (Nov. 2011), http://www.childsoldiers.org/user_uploads/pdf/unitedkingdomsubmissiontouniversalperiodicreview13thsession2012771268.pdf [hereinafter CHILD SOLDIERS INT’L].
national campaign against child soldiering has focused on conflicts waged in non-liberal states. First, there is the acknowledgment that the “new wars” have fostered a culture of using and encouraging children to commit unspeakable acts of violence. International humanitarian law is systematically violated, and war crimes are chronically perpetrated by all parties to the conflict.\(^82\) However, liberal states tend to take a range of precautions to avoid such violations or at least lessen the occurrence of them, all the while being involved in conflicts.\(^83\)

Second, liberal states recognize that child soldiers, who are in large supply, both perpetuate the cycle of violence and lead to the escalation, prolongation, and geographical expansion of the conflict. Contemporary warfare as carried out by liberal states tends to adopt strategies that allow such conflicts to be geographically and temporally controlled,\(^84\) and also uses technologies that require high levels of skills, thus providing no particular incentive for them to use children. Finally and most importantly, the overwhelming majority of children entangled in such conflicts have not chosen a military path voluntarily. This tends to differ from the experience of such liberal states as the United Kingdom, where children appear to willingly opt for a career in the armed forces or had responded to a historical call in World War I.\(^85\)

These three main reasons explain why the focus of the international campaign against child soldiering has been on conflicts waged in non-liberal states.

II. THE LEGAL FRAMEWORK RELATING TO CHILD SOLDIERING

In order to understand the current movement towards banning child soldiering one must first examine the current legal framework in relation to recruitment, conscription, enlistment, and participation of children in armed conflict. International humanitarian law does not outlaw the recruitment and use of children between fifteen and eighteen years of age in armed conflict. Yet the ICRC, the guardian of the international humanitarian law treaties, contends that, “[d]espite the rules laid down by international law, thousands of children are today tak-

\(^82\) For examples, see conflicts in Uganda and the Democratic Republic of Congo.
\(^83\) See generally A.P.V. Rogers, Zero-Casualty Warfare, 82 IRRC 165 (2000).
\(^84\) For examples, see the conflicts in Kosovo and in Libya.
\(^85\) Lee, supra note 21, at 3.
ing an active part in and are victims of hostilities.”

In fact, it is human rights law that is at the forefront of the campaign against child soldiering. Therefore, although this Article examines these key issues by mostly concentrating on international humanitarian law, it also looks at international human rights law and, at times, international criminal law to provide a better understanding of the child soldier phenomenon.

Two key issues need to be addressed when examining the legal framework that relates to child soldiering and the liberal discourse: the recruitment (conscription and enlistment) of children and the participation and use of them in armed conflict. Whilst recruitment relates to the manner in which a child becomes associated with an armed group, the use relates to the way in which he/she participates in the conflict.

A. Recruitment of Child Soldiers

1. Definition of Recruitment

Children are recruited into armed forces and armed opposition groups in various ways; some are abducted, some are forcibly recruited, and others join voluntarily. International humanitarian law—Article 77 of Additional Protocol I, Article 4(3) of Additional Protocol II, and Rule 136 of ICRC’s Study on Customary International Humanitarian Law—groups

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87. It must be stressed that “the three alternatives (viz. conscription, enlistment and use) are separate offences.” Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 609 (March 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf; see also Alison Smith, Child Recruitment and the Special Court for Sierra Leone, 2 J. INT’L CRIM. JUST. 1141, 1147–48 (2004).


89. Additional Protocol I, supra note 25, art. 77.

90. Additional Protocol II, supra note 26, art. 4(3).

91. See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 482–85 (2006), available at
these different ways in which children join the armed forces or an armed group involved in hostilities under the single term “recruitment.” It also useful to remember that the term “recruitment” predates “enlistment” and “conscription,” and two concepts that are now covered by “recruitment.”

As the Commentary to Article 77 Additional Protocol I explains, whilst the obligation to refrain from recruiting children under fifteen is clear, the voluntary enrollment of children is neither explicitly mentioned nor prohibited. As there is no express prohibition of the voluntary enrollment of children under fifteen years of age, it seems to indicate that voluntary enlistment is allowed by law. In other words, international humanitarian law distinguishes between two forms of recruitment, active recruitment by the armed forces (known as conscription) and voluntary enrollment, but only bans the former in international armed conflict. By contrast, the Commentary to Article 4(3) Additional Protocol II stipulates that “[t]he principle of non-recruitment also prohibits accepting voluntary enlistment.” Rule 136 of the Study on Customary International Humanitarian Law does not elaborate on this, though it does refer to the Rome Statute which distinguishes between two forms of recruitment: conscription and enlistment of children under fifteen years of age. A further distinction is hereby introduced inasmuch as enlistment can be either compulsory or voluntary depending on which legal instrument is used. Yet, as the Commentary to the Rome Statute clarifies, “[c]onscription refers to the compulsory entry into the armed forces. Enlistment . . . refers to the generally voluntary act of joining armed forces.”


92. Waschefort, supra note 73, at 196.


94. Claude Pilloud et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 ¶ 3184 (Yves Sandoz et al. eds., 1987).

95. Id. ¶ 4557.

96. Rome Statute, supra note 27.

97. See id. arts. 8(2)(b)(xxvi), 8(2)(e)(vii) (addressing both international armed conflicts and non-international armed conflicts).
forces by enrollment, typically on the ‘list’ of a military body or by engagement indicating membership and incorporation in the forces.” A similar position was recently adopted by the International Criminal Court (“ICC”) Trial Chamber in the Prosecutor v. Lubanga case and the Special Court of Sierra Leone in the Prosecutor v. Taylor case. Again, a difference is made between compulsory and voluntary acts. It must also be stressed that the Rome Statute applies not only to armed forces but also to armed opposition groups.

Yet, the distinction between voluntary and compulsory recruitment fails to account for abductions, which are one of the chief means used—especially by armed opposition groups—to recruit children. Indeed, in the past few decades, abduction and kidnapping have become the main ways to forcefully include children in armed groups. In some countries, abduction of children has reached a level of automaticity. For example, during the second part of the 1980s, Resistência Nacional


101. Article 1 of the Rome Statute stipulates that it has “the power to exercise its jurisdiction over persons” and thus does not distinguish between members of armed forces or members of armed opposition groups. Rome Statute, supra note 27, art. 1. In contrast, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Optional Protocol”) differentiates between state actors and non-state actors in this regard, and specifically recognizes the duties of non-state armed groups. Optional Protocol, supra note 14, art. 4(1).


Moçambicana (“RENAMO”) systematically abducted children and forced them to participate in activities against the government of Mozambique. A method commonly used to forcefully recruit children is press-ganging, “where armed militia groups . . . roam the streets and public gathering places, including school gates, to round up individuals they come across.” Such groups also raid schools and orphanages. A notorious example is a 1996 event where the Lord’s Resistance Army (“LRA”) captured 136 girls from St. Mary’s College, an Aboke school in Northern Uganda. Similarly, in 2001, armed groups in Burundi abducted 300 children from schools and forced them to carry military equipment or help wounded soldiers.

With this view, the Special Court for Sierra Leone, whose statute refers to two types of recruitment, has interpreted “conscription” to include “acts of coercion, such as abductions and forced recruitment,” for the purpose of using children in hostilities. Undoubtedly, this “definition of conscription reflects its recognition of the changed nature of modern warfare.” The Special Court also explained that enlistment means “accepting and enrolling individuals when they volun-

106. See generally ELS DE TEMMERMAN, ABOKE GIRLS: CHILDREN ABDUCTED IN NORTHERN UGANDA (2d ed. 2001).
110. Referring to the judgment of the AFRC Case: “While previously wars were primarily between well-established States, contemporaneous armed conflicts typically involve armed factions which may not be associated with, or acting on behalf, a State. To give the protection against crimes relating to child soldiers its intended effect, it is justified not to restrict ‘conscription’ to the prerogative of States and their legitimate Governments, as international humanitarian law is not grounded on formalistic postulations.” AFRC Case, Case No. SCSL-2004-16-T, ¶ 734.
teer to join an armed force or group;”111 in other words, enlist-
ment does not involve an actual list of new recruits but also
“children enrolled by more informal means.”112 What it also
means is that whilst conscription is compulsory, enlistment
remains a voluntary act.

International human rights law instruments impose re-
strictions upon states related to recruitment in general. Article
38 of the UNCRC affirms that “State Parties shall refrain from
recruiting any person who was not attained the age of fifteen
years into their armed forces.” The prohibition on recruitment
of children under fifteen years of age is applicable both in
peacetime and in times of armed conflict, thereby leaving aside
the difficult question of qualification of the conflict. Moreover,
it does not distinguish between compulsory and voluntary re-
cruitment.113 Yet, the Optional Protocol to the Convention on
the Rights of the Child on the Involvement of Children in
Armed Conflict (“Optional Protocol”) does make this distinc-
tion,114 thereby espousing a perspective similar to the one pro-
pounded in international humanitarian law and leaving open
the definition of “voluntary.”115

2. How Voluntary Is “Voluntary”?

It is imperative to determine what makes an enlistment “vol-
untary,” since this is the distinguishing factor between con-
scription and enlistment116 not only in international humani-
tarian and human rights law117 but also between lawful and

111. Id. ¶ 735; see also Prosecutor v. Fofana (CDF Case), Case No. SCSL-04-
14-A, Appeals Judgment, ¶ 140 (May 28, 2008), http://www.scs-
l.org/LinkClick.aspx?fileticket=9xsCbIVrMiY%3d&tabid=194.
112. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Written Submis-
sions of the United Nations Special Representative of the Secretary-General
on Children and Armed Conflict, ¶ 9 (Mar. 18, 2008).
113. During the negotiations, such distinction was made but later aban-
doned. Claire Breen, When Is a Child Not a Child? Child Soldiers in Interna-
tional Law, 8 HUM. RTS. REV. 71, 83 (2007).
114. Article 3 of the Optional Protocol refers to voluntary recruitment. Op-
tional Protocol, supra note 14, art. 3.
115. See id. at 89; Breen, supra note 113, at 83.
116. See Alice Schmidt, Volunteer Child Soldiers as Reality: A Development
117. However, it must be borne in mind that the Rome Statute does not
refer to the degree of voluntariness in joining the armed groups. Thus, Alison
Smith notes that “the forcible or voluntary nature of the recruitment is not
unlawful recruitment under international humanitarian law. It is argued that the level of voluntariness can be assessed by examining two factors: whether a child appreciates the consequences of his/her decision and whether there are viable alternatives to joining the armed forces or groups.

In Western states, a minor must make a willing and informed decision with the consent of his or her parents or guardians.\textsuperscript{118} A range of safeguards exist to ensure that this is an informed choice\textsuperscript{119} by the child.\textsuperscript{120} This is congruent with state obligations under the Optional Protocol that stipulates that states are required to ensure that voluntary recruitment is genuine and not coerced (i.e., the informed consent of the recruits’ parents or legal guardians has been obtained and the recruits are well informed about the duties involved in the military service).\textsuperscript{121} In reality, in the United Kingdom, a fair number of young recruits come from the “least educated backgrounds”\textsuperscript{122} and are visited by army recruiters in economically deprived areas where these recruits reside.\textsuperscript{123} This certainly raises concerns as to the voluntariness of young people to join the armed forces.

\begin{itemize}
\item[(a)] Such recruitment is genuinely voluntary;
\item[(b)] Such recruitment is carried out with the informed consent of the person’s parents or legal guardians;
\item[(c)] Such persons are fully informed of the duties involved in such military service;
\item[(d)] Such persons provide reliable proof of age prior to acceptance into national military service.
\end{itemize}

Optional Protocol, supra note 14, art. 3.

\textsuperscript{118} See Armed Forces Act, 2006, c. 52, § 328(2)(c) (U.K.).
\textsuperscript{119} Elisabeth Schauer argues that a child, and even someone under twenty years of age, is not able to give informed consent to joining military. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Statement of Witness Elisabeth Schauer, at 90 (Apr. 7, 2009), http://www.icc-cpi.int/iccdocs/doc/doc662611.pdf.
\textsuperscript{120} The four safeguards specified in Article 3 of the Optional Protocol are:
\textsuperscript{121} See id.
\textsuperscript{122} Bartlet, supra note 40.
\textsuperscript{123} See Army ‘Targeting Poorer Schools’, BBC News (Dec. 4, 2006), http://news.bbc.co.uk/1/hi/wales/6199274.stm; see also Recruitment of Minors in British Armed Forces, supra note 9, at 11.
forces. Moreover, recruits must be able to leave if they wish to do so.\textsuperscript{124}

Article 3(1) of the Optional Protocol requires states to raise the legal age for voluntary recruitment to at least sixteen years of age. Upon ratification of the Optional Protocol, states must deposit a binding declaration setting out the standards in place to meet their legal obligations in pursuance of the Optional Protocol. The United Kingdom has adopted the minimum standard established in the Optional Protocol—recruitment from sixteen years of age onwards—and has failed to issue a declaration to abide by the higher standard of eighteen years of age. Further, the United Kingdom has deposited a declaration\textsuperscript{125} allowing for sixteen year olds to be deployed.\textsuperscript{126} Despite

\textsuperscript{124} This is a highly debated issue in the United Kingdom. Whilst a recruit has a right to discharge “at the end of the first month of training and before six months have elapsed since enlistment” once that period has elapsed discharge is at the discretion of the commanding officer. \textit{The Select Committee on the Armed Forces Bill, The Armed Forces Bill: Special Report of Session 2010–11}, H.C. 779, at Ev 76. As a result, the Joint Committee on Human Rights has expressed its concern that this lack of right to leave might be in breach of the Optional Protocol. \textit{Armed Forces Bill, 2010–12, supra, note 80, ¶ 1.58; see also Recruitment of Minors in British Armed Forces, supra note 9, at 3–4. See Comm. on the Rights of the Child, Concluding Observations on Kingdom of Great Britain and Northern Ireland, transmitted in consideration of reports submitted by States Parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, ¶¶ 16–17, CRC/C/OPAC/GBR/CO/1 (Oct. 17, 2008) [hereinafter Concluding Observations: UK].}

\textsuperscript{125} The Declaration reads:

The United Kingdom of Great Britain and Northern Ireland will take all feasible measures to ensure that members of its armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

The United Kingdom understands that Article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where:

a) there is a genuine military need to deploy their unit or ship to an area in which hostilities are taking place; and

b) by reason of the nature and urgency of the situation:

i) it is not practicable to withdraw such persons before deployment; or
repeated calls by NGOs and the Committee on the Rights of the Child,\textsuperscript{127} the United Kingdom has not amended its interpretative declaration, which has the effect of a reservation, to the aforementioned instrument. Although this provision of the Optional Protocol has been criticized for still allowing recruitment of children between sixteen and eighteen years of age,\textsuperscript{128} states insisted upon it to keep the armed forces available as a source of employment, training, and continuing education for those leaving school early.\textsuperscript{129} Additionally, it is argued that it would take a couple of years to train a soldier fully before sending him or her to a conflict theatre.\textsuperscript{130}

During wars of national liberation, a number of children willingly and strategically joined armed groups. Undoubtedly, ideological attraction plays a significant role in the involvement of children in such conflicts\textsuperscript{131} and this is why Additional Protocol I allows the direct participation in hostilities of children under fifteen years of age. The Commentary to the Additional Protocol I expounds that the Committee that designed this provision “noted that sometimes, especially in occupied territories and in wars of national liberation, it would not be realistic to totally prohibit voluntary participation of children under fifteen”\textsuperscript{132} as “[i]t is difficult to moderate [the children’s] enthusiasm and

\textsuperscript{ii)} to do so would undermine the operational effectiveness of their ship or unit, and thereby put at risk the successful completion of the military mission and-or the safety of other personnel.


\textsuperscript{126} See Armed Forces (Enlistment) Regulations, 2009, S.I. 2009/2057, art. 4 (U.K.); see also Concluding Observations: UK, supra note 124, ¶¶ 12–19.

\textsuperscript{127} Recruitment of Minors in British Armed Forces, supra note 9; see also Concluding Observations: UK, supra note 124, ¶¶ 10–11; CHILD SOLDIERS INT’L, supra note 81, ¶ 4.


\textsuperscript{129} Breen, supra note 113, at 71–72.

\textsuperscript{130} Id. at 90–91.

\textsuperscript{131} One may nonetheless question how “voluntary” this type of involvement is.

\textsuperscript{132} PILLOUD ET AL., supra note 94, ¶ 3184.
In such cases, the Commentary highlights that the authorities employing or commanding [children] should be conscious of the heavy responsibility they are assuming and should remember that they are dealing with persons who are not yet sufficiently mature, or even have the necessary discernment of discrimination. Thus they should give them the appropriate instruction on handling weapons, the conduct of combatants and respect for the laws and customs of war. This provision in international humanitarian law seems to allow recruiters, if prosecuted for recruitment of children under fifteen years of age, to raise the defense of consent by the child. However, the jurisprudence of various international criminal tribunals asserts that consent of an under fifteen year old child to taking part in the hostilities does not constitute a valid defense for a recruiter accused of recruitment. In other words, whilst a child can voluntarily join an armed group, his or her enlistment is a punishable offense under international criminal law.

In the “new wars,” children join armed groups and armed forces for a range of reasons. The main “push and pull factors” can be divided into three broad categories: (1) “environmental factors,” (2) “factors relating to the child’s personal...

133. Id. ¶ 3185.
134. Id.
136. “Given that both (voluntary) enlistment and (coerced) conscription are ways of committing the same offence, the question of consent loses its relevance for the purposes of conviction.” Roman Graf, *The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment*, 10 JICJ 945, 956 (2012).
137. For an excellent overview, see Rachel Brett, *Adolescents Volunteering for Armed Forces or Armed Groups*, 85 IRRC 857, 859–62 (2003) (claiming that there are “five major factors in the decision of youngsters to join armed forces or armed groups” without being coerced: “war, poverty, education, employment and family”).
138. For the origins of this expression, see Somasundaram, *supra* note 70, at 1268.
characteristics and histories,” and (3) “trigger events.” Factors include economic hardship and poverty, the lack of opportunities, a sense of belonging, ideological attraction, feelings of revenge, survival, the loss of parents and relatives able to protect them, the need to find a safe environment, the impression that one is able to act free of coercion, and thus be proactive rather than passive and victimized, fear of being abducted, etc. Children may also be sent by their families to defend the community or to find a basic source of income. In other cases, school curricula contain military elements, which contribute to the indoctrination of the children who may wish to join “willingly,” yet are arguably not fully able to understand the ideological nature of their decision or to adequately assess the implications of their decisions and actions. It is the combination of these factors that accentuates and amplifies the

139. Schmidt, supra note 116, at 52. Based on the conflicts in Sierra Leone and Liberia, William Murphy four categories of child soldiers: “coerced youth,” “revolutionary youth,” “delinquent youth,” and “youth clientalism.” Murphy, supra note 75, at 64–66.


141. WESSELLS, supra note 107, at 50.

142. Diane Taylor, I Wanted to Take Revenge, GUARDIAN (July 6, 2006), http://www.guardian.co.uk/world/2006/jul/07/westafrica.congo; Coomaraswamy, supra note 140, at 536.

143. HAPPOLD, supra note 140, at 13; WESSELLS, supra note 107, at 49.

144. SINGER, supra note 65, at 64 (noting that “children may decide they are safer in a conflict group, with guns in their own hands, than going about by themselves unarmed.”).

145. See Hughes, supra note 7, at 403.


147. “Societal attitudes, as advanced by community leaders, teachers and parents, and their peers can direct children to the conclusion that that the best way of . . . displaying maturity and becoming a full member of the collective is to join the struggle.” HAPPOLD, supra note 140, at 140; see also Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Witness Testimony DRC-OTP-WWW-0046, at 18 (July 9, 2009), http://www.icc-cpi.int/iccdocs/doc/doc713215.pdf; Child Solder Recruitment, supra note 66, at 51 (illustrating example of children enlisting in the Kamajors in Sierra Leone).

148. See de Silva, Hobbs & Hanks, supra note 146, at 130.
child’s willingness to take a part in the hostilities. Voluntary recruitment in this specific context is defined as not being abducted or physically forced to join a party to the conflict, as a “coerced choice.” In her written submission to the ICC in the Lubanga case, the Special Representative stressed that “[t]he line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict.”\textsuperscript{149} Whilst the Special Representative prefers to ignore the relevance of the variety of push and pull factors that lead a child into soldiering, others claim that along a continuum starting with informed consent and ending with abduction there are various degrees of choices.\textsuperscript{150} As Rachel Brett aptly notes, “the degree of choice varied,”\textsuperscript{151} and Alice Schmidt stresses, “children choose to join armed groups despite having alternatives that—under the given circumstances—are acceptable.”\textsuperscript{152} Also, a fair number of children who joined armed groups believed that they would be able to leave at any time or had no, or very little, idea of what war really entailed.\textsuperscript{153}

3. Conscription

Conscripting children under fifteen years of age is clearly prohibited under international humanitarian and human rights law treaties, customary international humanitarian law,\textsuperscript{154} and international criminal law.\textsuperscript{155} Article 2 of Optional Protocol outlaws the compulsory recruitment of persons under the age of eighteen years. Whilst conscription is clearly banned

\textsuperscript{149}. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, ¶ 14 (Mar. 18, 2008).

\textsuperscript{150}. Whilst in social sciences it might be possible to conceive of voluntariness along a continuum or spectrum, in law, a distinction must unfortunately be made unless all participation is deemed lawful or unlawful. For a discussion on the possibility to think of voluntariness along a continuum or spectrum, see Schmidt, supra note 116, at 55–57.

\textsuperscript{151}. Brett, supra note 137, at 863.

\textsuperscript{152}. Schmidt, supra note 116, at 54.

\textsuperscript{153}. Brett, supra note 137, at 863.

\textsuperscript{154}. See Henckaerts & Doswald-Beck, supra note 91, at 485.

\textsuperscript{155}. The Rome Statute provides that “conscripting or enlisting children into armed forces or groups constitutes a war crime in both international and non-international armed conflicts.” Id. at 483 (citing Rome Statute, supra note 27, art. 8(2)(b)(xxvi), 8(2)(e)(vii)).
with regard to children under fifteen years of age, the question is whether it is also banned with regard to children between fifteen and eighteen years of age. Again, international human rights law raises the minimum age of permissible recruitment while other relevant branches of international law specify an age of fifteen.

Conscription is traditionally viewed as the prerogative of the state to require its nationals to take part in some form of national services, in this case, military service.\(^\text{156}\) By definition, conscription is compulsory and, thus, coerced. Failure to comply with conscription often leads to imprisonment.\(^\text{157}\) The great majority of states do not conscript individuals under eighteen years of age and the Optional Protocol specifies a minimum age of eighteen or more. Yet, despite the existence of legal safeguards set by states to combat forced recruitment, inefficiency, corruption, and structural inadequacies mar the system; “[a]s a result, forced recruitment occurs even in states where legislation is in place to prohibit compulsory military service before the age of eighteen.”\(^\text{158}\) One of the reasons for this is that many states do not properly document the age of people, which has the effect of facilitating the recruitment of minors as a state can always argue that it was not aware that the child was under eighteen years of age.

As explained earlier, conscription, in its contemporary understanding, encompasses abductions, forced recruitment, and forced military training.\(^\text{159}\) The Trial Chamber of the Special Court of Sierra Leone explained in the *Armed Forces Revolutionary Council* (“AFRC”) case that conscription should be interpreted as “encompass[ing] acts of coercion, such as abductions and forced recruitment . . . committed for the purpose of


\(^{157}\) For examples, see situations in Germany until 2011, and also those in Finland and Russian Federation.


using them to participate actively in hostilities.”

Even if children are not actually used in the conflict, their abduction with the aim of using them is sufficient to sustain a conviction for conscription. The law in this area has been interpreted such that it applies to non-international armed conflicts.

Although it is clear that no children under fifteen years of age under international humanitarian law or under eighteen years of age according to the Optional Protocol can be recruited, the reality is very different. Owing to the general lack of enforcement of such laws, e.g. punishment for armed groups when they recruit children, forced recruitment has become endemic in many of these conflicts (e.g., the conflict in Sierra Leone).

4. Enlistment

On the other hand, enlistment, which is understood as allowing individuals to enroll to join an armed force or group, is not clearly banned by international humanitarian law. To some extent, this lack of prohibition caters to the fact that not all children are forced into soldiering. As discussed earlier, many choose to join an armed group or a state’s armed forces of their own volition.

According to international humanitarian law treaties, enlistment is only banned in a non-international armed conflict. Enlistment in an international armed conflict is allowed. Indeed, under Article 77(2) of Additional Protocol I, if such children voluntarily enlist in the armed forces, there is no obligation upon the state to refuse the new recruit. The general prohibition of recruitment in non-international armed conflicts under Article 4(3) of Additional Protocol II is to be welcomed because the great majority of cases of child recruitment today take place within the context of non-international armed conflicts. That being said, customary international humanitarian law.

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160. AFRC Case, Case No. SCSL-2004-16-T, ¶ 734.
161. RUF Case, Case No. SCSL-04-15-T, ¶ 1700.
162. Id., ¶ 194.
164. AFRC Case, Case No. SCSL-2004-16-T, ¶ 735.
165. See Additional Protocol I, supra note 25, art. 77(2).
law bans enlistment in all conflicts, whilst the UNCRC and the Optional Protocol ban enlistment of children without referring to the type of conflict involved.

An important aspect of the prohibition of enlistment is that international humanitarian law is binding upon armed forces and armed groups. In contrast, the UNCRC, as a human rights law treaty, can only bind a state’s armed forces. As many contemporary conflicts are of non-international nature and pit armed opposition groups against each other, it is imperative that there are provisions relating to non-state actors. Hence, the Optional Protocol adopts a more demanding position, asserting that “[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.” Still, one of the main flaws of Article 4 of the Optional Protocol, and any human rights instruments in general, cannot bind non-state actors as they cannot sign up to the agreements in the first place. The device used to ensure compliance of armed opposition groups with human rights law is by virtue of national law inasmuch as States are, in pursuance of the Optional Protocol, required to criminalize forced recruitment carried out by armed opposition groups. Remarkably, the U.N. Secretary-General explains in *Children and Armed Conflict* that armed opposition groups are to be held to the same standards as those of the state in which they are fighting. Indeed,

167. Neither Article 38 of UNCRC nor Articles 1 through 4 of the Optional Protocol refers to the type of conflict involved.
as Matthew Happold notes “[w]hereas it is generally agreed that [non-state armed groups] have obligations in international humanitarian law, it remains disputed whether they are bound by international human rights law . . . .”174

As a result, it is generally agreed that, as a matter of customary international law, the recruitment of children under the fifteen years of age into armed forces and armed groups, whether in international or non-international armed conflict, is prohibited. No distinction is made as to whether recruitment was compulsory or voluntary. There might be an emerging norm barring the compulsory recruitment of children under eighteen years of age, but this does not seem to be universally accepted at the moment.175

B. Use and Participation of Children in Armed Conflict

In addition to the recruitment, conscription, and enlistment of children, international law also regulates children’s participation in armed conflict. The type of legal framework that is applied in regulation of children’s participation in such conflict, whether it be international humanitarian law, human rights law, international criminal law, or a combination of these, will determine which kinds of participation are prohibited.

The 1977 Additional Protocols were the first international legal instruments to regulate the participation of children under fifteen years of age. According to Article 77(2) of Additional Protocol I, children are barred from “tak[ing] a direct part in hostilities” in international armed conflict.176 In contrast, Arti-

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174. Happold, supra note 169, at 374.

175. Whilst some armed opposition groups agree that no child below the age of eighteen years old should be recruited, others prefer to set a lower threshold. For the discussion on the position of armed opposition groups on the recruitment of children, see generally Jonathan Somer, Engaging Armed Non-State Actors to Protect Children from the Effects of Armed Conflict: When the Stick Doesn’t Cut the Mustard, 4 J. HUM. RTS. PRAC. 106 (2012).

176. The Commentary to Article 51(3) Additional Protocol I explains that “direct’ participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy
Article 4(3)(c) of the Additional Protocol II does not use the adjective “direct,” thus encompassing indirect functions such as “gathering information, transmitting orders, transporting munitions or foodstuffs or committing acts of sabotage.” This distinction in terminology prompted the ICRC to comment that since “[t]he intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict,” indirect participation in international armed conflict should also be ruled out. A resolution adopted at the 26th International Conference of the Red Cross and Red Crescent in 1995 reinforces this position: “parties to conflict . . . take every feasible step to ensure that children under the age of 18 years do not take part in hostilities,” thereby refraining from using any adjective such as “direct” or “indirect” before “take part.” The Abo Turku declaration, which is considered to encapsulate minimum standards of humanity, also stresses that children should not take part in acts of violence, thereby setting a higher standard than the “direct participation” expression enshrined in Additional Protocol I.


178. “The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services.” PILLOUD ET AL., supra note 94, ¶ 3187.


national Humanitarian Law confirms that the expression “participat[ion] in hostilities” encompasses both direct and indirect acts that affect the enemy forces.\(^{181}\)

International human rights law also prohibits children’s participation in armed conflict. Article 38 of the UNCRC prohibits the *direct* participation of children under fifteen years of age in hostilities.\(^{182}\) The Optional Protocol uses similar wording but stipulates that the age be eighteen years.\(^{183}\) Notwithstanding, one may argue that due to the wording used (i.e., “do not take *direct* part in hostilities”) these provisions seem to allow for, or at least do not preclude, indirect participation in hostilities.\(^{184}\)

In this sense, there is congruence among the UNCRC, the Optional Protocol, and international humanitarian law instruments in the sense that they all forbid direct participation in hostilities. Arguably, the relevant provision in Additional Protocol I that governs international armed conflict should be interpreted as to align it with customary international humanitarian law.\(^{185}\) Therefore, it is argued that the *lex specialis* (i.e., the Additional Protocol I and customary international humanitarian law) goes further than human rights law in relation to the *types* of participation by children in armed conflict that it prohibits.

Additional Protocol II, by virtue of the *lex specialis* character of international humanitarian law, supersedes the UNCRC and its Optional Protocol for those cases of non-international armed conflict governed by it, which means that all forms of participation are prohibited since Additional Protocol II bans all forms of participation. Nevertheless, to the extent that Additional

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:\(^{181}\) See HENCKAERTS & DOSWALD-BECK, supra note 91, at 485–88.

\(^{182}\) As previously explained, the UNCRC does not bind non-state entities such as armed opposition groups. A notable exception is the Sudan People’s Liberation Movement and the South Sudan Independence Movement which in July 1995 committed themselves to the UNCRC (Save the Children Sweden, 1996).

\(^{183}\) See Optional Protocol, supra note 14, art. 1.

\(^{184}\) Seneviratne, supra note 171, at 43.

Protocol II will not apply because of non-international armed conflict’s inability to reach the threshold set out in Article 1(1), then Article 38 of the UNCRC and Article 1 of the Optional Protocol will be the only legal instruments that will apply in a non-international armed conflict that falls within the scope of Common Article 3 of the Geneva Conventions.\textsuperscript{186} Consequently, one must refer to the norms established in customary international humanitarian law that prohibit both the direct and indirect participation of children in non-international armed conflict. Again, human rights law is less restrictive than international humanitarian law; however, the difference lies in the set age because the Optional Protocol prohibits the direct participation of children under eighteen years of age.

Whilst binding legal instruments such as treaties and customary international law, whether relating to international humanitarian law or human rights law, are of utmost importance, it is crucial to examine non-binding instruments as they often show a trend in international law. In the instance, non-binding instruments such as the Paris Commitments adopted in February 2007\textsuperscript{187} and the 1997 Cape Town Principles\textsuperscript{188} have broadened the definition of a child taking part in the hostilities. Both instruments deal with children below eighteen years of age in armed conflict. Yet, they differ in their approaches. Paragraph 6 of the Paris Commitments employs the expression “us[ing] them to participate actively in hostilities,” which indicates that participation must take a direct

\textsuperscript{186} As the threshold of applicability for non-international armed conflicts in Additional Protocol II is high, the overwhelming majority of non-international armed conflicts fall within the scope of Common Article 3 of the Geneva Conventions.


form—though “active” is considered to be broader than “direct.” The term “used” seems to indicate that the focus shifts away from the children (i.e., children take part in the hostilities) and turn to those who are making them take an active part in the hostilities (i.e., individuals “use” children). Moreover, the choice of the word “use” rather than “participation” denotes an objectification of the child that clearly impacts on how recruitment is perceived from the perspective of those recruiting children rather than of the children themselves.

Going a step further, the 1997 Cape Town Principles concentrate on the concept of a child soldier, making no distinction between direct/active and indirect participation. Under the Principles, a child soldier is defined as “[a]ny person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.” Machel also argues for such a definition in her 2001 follow-up book, and it certainly seems to better reflect the myriad of tasks in which children are involved. But does this mean that all forms of participation in hostilities turn children into child soldiers?

A growing body of international criminal law deals with the use of children under fifteen years of age in armed conflict. According to the Rome Statute, it is a crime to compel children to

189. For the distinction between “direct” and “active,” see Waschefort, supra note 73, at 194–95, 197–98.
190. As Janet McKnight elucidates, the distinction between direct and indirect participation was abandoned. See McKnight, supra note 54, at 119.
191. Cape Town Principles, supra note 188, at 8 (under the heading “Definitions”).
193. See discussion below for the types of activities in which children are involved.
194. Janet McKnight explains that “[p]arties disagree on whether international law is meant to protect only child combatants that directly participate in battle or whether such protection extends to all children involved in the conflict.” McKnight, supra note 54, at 115.
participate in armed conflict. 195 During the negotiation process, it was argued that the expression “participate actively,” 196 as enounced in the Rome Statute in Articles 8(2)(b)(xxvi) under the context of international armed conflict and 8(2)(e)(vii) under the context of non-international armed conflict, 197 covers not only direct participation in combat activities but also military-related activities such as “scouting, spying, sabotage, and the use of children as . . . couriers . . . .” 198 This also includes such activities as taking supplies to the front line. 199 The word “using” reinforces the wish of the drafters of the Rome Statute to prohibit the participation of children in hostilities in general, rather than in combat only. Activities “unrelated to the hostilities such as food deliveries to an airbase [or] the use of domestic staff in an officer’s married accommodation,” 200 however, do not qualify as participation in hostilities. 201 This infers that

196. In international criminal law, the word “actively” rather than “directly” is used. In IHL both “directly” and “actively” are used. Due to space constraints, it is not possible to elaborate here on the difference in terminology. For an in-depth discussion on this subject, see Waschefort, supra note 73, at 194–95, 197–98.
197. See Rome Statute, supra note 27, art. 8(2)(b)(xxvi), (2)(b)(e)(vii). Here, it must be noted that the threshold of applicability for non-international armed conflicts is lower since it does not require that the conflict fall within the purview of Additional Protocol II. The crime of using children in armed conflict may also be committed in Geneva Convention Common Article 3 conflicts.
199. The Special Court for Sierra Leone added that carrying looted goods is also tantamount to active participation in the hostilities. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 1546 (May 18, 2012).
201. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 262 (Jan. 29, 2007), http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf. However, in the Taylor case, the Special Court for Sierra Leone explained that if “a clear link between the [food-finding] mission and the hostilities” can be demonstrated, this constitutes active participation in the hostilities. Taylor, Case No. SCSL-03-01-T, ¶ 1479.
domestic labor, cooking, and other similar activities are therefore not prohibited by international law. Although these activities are “vital for group survival in terms of logistics,” they do not appear to fall within the scope of the prohibition. That being said the Trial Chamber in the Lubanga case appears to have widened the remit of the prohibition as it replaced the test of active participation by one relating to exposure to danger.

An unintended consequence of broadly-defined “active participation” in hostilities is that children might then become legitimate targets for military operations, as the Trial Chamber of the Special Court for Sierra Leone stated in the Revolutionary United Front case and the Taylor case, and as the ICC stated in the Lubanga case. For this reason, one must be mindful not to give too broad an interpretation to the concept of “active participation in hostilities,” and apply it in an international humanitarian law context since this would correspondingly reduce the number of children who would be legally protected from direct attack. For example, the use of children to commit crimes against civilians is deemed to constitute active participation in hostilities, a position that is understandable as


203. “The decisive factor in deciding whether an indirect role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target.” Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 820 (March 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

204. See Graf, supra note 136, at 963–64.


206. Taylor, Case No. SCSL-03-01-T, ¶¶ 1459, 1604.

207. “All of [children’s] activities [that support combatants], which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target.” Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 628 (March 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

208. Waschefort, supra note 73, at 200.
such acts of violence are directly linked to hostilities. The Trial Chamber in the *Lubanga* case explained that “[t]he decisive factor, therefore, in deciding if an ‘indirect’ role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.” In other words, a sweeping statement that a child is “used in hostilities” because any of his or her activities actively contribute to the hostilities is ill advised. As long as children are involved in conflict, it might not be sensible to broaden the concept of a child soldier in international humanitarian law too far and refer to “active” rather than “direct” participation in hostilities. This reveals that the current liberal approach of the international community towards the child soldier phenomenon (e.g., definition such as the one enshrined in the Cape Town Principles) is at odds with international humanitarian law and the realities of war; this concept appears to be better grasped by international criminal tribunals.

III. THE DISCOURSE CONDEMNING CHILD SOLDIERING: A “POLITICS OF AGE”

David M. Rosen argues that “the ‘problem’ of child soldiers . . . derives not from any new phenomenon of young people being present on the battlefield but, rather, from an emerging transnational ‘politics of age’ that shapes the concept of ‘childhood’ in international law.” As demonstrated earlier, the child soldier phenomenon is not new; in the past, those young people taking part in the hostilities were not branded “child soldier” but “brave young men” or young “heroes.” The key explanation for this seems to be the adoption of a human rights discourse, especially a discourse of children’s rights, rather than an international humanitarian law framework. This discourse stems from the liberal Western values that define childhood

212. See *Lee, supra* note 21, at 3.
213. As Nancy Kendall explains, “international definitions of childhood and vulnerability have been critiqued as rooted in Western ideas about individuals and their relationships.” Nancy Kendall, *Gendered Moral Dimensions of Childhood Vulnerability*, 2 CHILD. AFR. 26, 27 (2010).
as a long period of innocence and fun,\textsuperscript{214} and it aims to spread such values universally. Moreover by taking a human rights approach to the issue of child soldiering, the liberal discourse becomes a humanitarian one that indistinctively strips children of their autonomy and thus ability to be agents of their own lives and portrays them as innocent victims.

\textbf{A. Universality}

The first main factor for this change in the liberal discourse is a re-conceptualization of childhood as “a particular generational and cultural space.”\textsuperscript{215} The current state of international law models is based on the assumption that “childhood is different from adulthood and that it requires special protection,”\textsuperscript{216} for children are perceived “as defenceless, unable to protect themselves and therefore dependent” on others.\textsuperscript{217} International humanitarian law takes two seemingly contradictory approaches in this regard. On the one hand, it offers special protection to children (new-born,\textsuperscript{218} children under seven,\textsuperscript{219} children under twelve,\textsuperscript{220} children under fifteen,\textsuperscript{221} and

\begin{footnotesize}
\begin{enumerate}
\item Hart, \textit{supra} note 10, at 219–20 (noting that under the United Nations Convention on the Rights of the Child, a childhood is intended to last until the age of eighteen); Pupavac, \textit{supra} note 53 (noting that “a prerequisite for the Western protective model of childhood [is] . . . ‘happiness, love and understanding.’”).
\item James & James, \textit{supra} note 11, at 31–32; see also Happold, \textit{supra} note 169, at 361 (arguing that “perceptions of the boundaries and dimensions of childhood have changed.”).
\item Kendall, \textit{supra} 213, at 27; Breen, \textit{supra} note 113, at 73; McNee, \textit{supra} note 31, at 20 (quoting Mary Galbraith, \textit{Hear My Cry: A Manifesto for an Emancipatory Childhood Studies Approach to Children’s Literature}, 25 \textit{LION & UNICORN} 187, 190 (2001)); Recruitment of Minors in British Armed Forces, \textit{supra} note 9, at 9–14. Moreover, the way we see children and “the ways we behave toward them . . . shape” a child’s experience as a child and his/her involvement with the adult world. James & James, \textit{supra} note 11, at 27.
\item See Geneva Convention IV, \textit{supra} note 24, art. 17 (noting “maternity cases”).
\item See \textit{id.} art. 14 (prescribing access for children under seven and their mothers to hospital and safety zones); see also \textit{id.} art. 38(5) (mothers of children under seven years benefit from preferential treatment).
\item See \textit{id.} art. 24 (wearing of identification to preserve their identity in case they are separated from their parents).
\end{enumerate}
\end{footnotesize}
children under eighteen\textsuperscript{222}). On the other, the Geneva Conventions, the Additional Protocols, and customary international humanitarian law do not differentiate between children and adults who take a direct part in the hostilities. When children are involved in hostilities, they are considered as combatants in international armed conflicts or persons taking a direct part in the hostilities\textsuperscript{223} who can be targeted.\textsuperscript{224} And if captured, the children benefit from the treatment of prisoners of war in international armed conflicts\textsuperscript{225} or if in non-international armed conflicts, they can be captured and prosecuted for taking part in the hostilities.\textsuperscript{226} What international humanitarian law prohibits is the recruitment of children, thus pointing the finger at those who recruit them. Children as such are not violating international humanitarian law by taking a direct part in the hostilities. Whilst this indicates that international humanitarian law is rather blind to the notion of childhood, in contradiction to adulthood, once children are participants, this position fails to acknowledge that international humanitarian law seeks to prevent the participation of children under fifteen years of age in armed conflict in the first place and, thus, in-

\textsuperscript{221} See id. art. 14 (prescribing access for them and their mothers to hospital and safety zones); id. art. 23 (provision of relief supplies); id. art. 24 (child welfare facilities); id. art. 38(5) (preferential treatment).

\textsuperscript{222} See id. art. 68(4) (protection against the death penalty); Additional Protocol I, supra note 25, art. 77(5); Additional Protocol II, supra note 26, art. 6(4).

\textsuperscript{223} Stuart Maslen, Kinder sind keine Soldaten—politische und rechtliche Aspekte des Phänomens Kindersoldaten [Children Are Not Soldiers—Political and Legal Aspects of the Phenomenon of Child Soldiers], in FRIEDRICH-EBERT-STIFTUNG & UNICEF, supra note 65, at 23, 25.

\textsuperscript{224} When children participate in hostilities, they “lose their inviolability as non-combatants; indeed, they become ‘legitimate’ military targets, individuals whose death or disablement result in that weakening of the armed forces of the enemy which is the only legitimate aim in war.” GUY GOODWIN-GILL & ILENE COHN, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 70 (1994).

\textsuperscript{225} The Commentary on the Additional Protocols explains that “[t]heoretically prisoners of war may be very young or very old.” PILLOUD ET AL., supra note 94, ¶ 3194.

\textsuperscript{226} Individuals, whether adults or children, who take part in hostilities in non-international armed conflicts can, under domestic law, be detained and prosecuted for taking part in the hostilities. See David M. Rosen, Who Is a Child? The Legal Conundrum of Child Soldiers, 25 CONN. J. INT’L L. 81, 88–90 (2009).
distinctively disapproves of their involvement in hostilities.\textsuperscript{227} In other words, international humanitarian law distinguishes between childhood and adulthood, and it follows the international trend set in recent years by international human rights law.

The key is to demarcate the Rubicon between childhood and adulthood. Technically, there are two ways to do this: either to set a specific age for adulthood or to link adulthood to certain skills and abilities. As Schmidt argues, “[i]n liberal thought, chronological age draws a clear demarcating line between childhood and adulthood,”\textsuperscript{228} which is a position found also in the international legal and humanitarian discourse. The new political agenda propagating the “straight eighteen” position\textsuperscript{229} aims to set up a new cultural and legal norm that will lead to a single international definition of childhood as beginning at birth and ending at age eighteen.\textsuperscript{230} The most common age for individuals to obtain special protections under international humanitarian law is fifteen years of age.\textsuperscript{231} A literal interpretation\textsuperscript{232} of the relevant provisions demonstrates that international humanitarian law considers a child to be anyone under eighteen years of age.\textsuperscript{233} Rosen argues that this holds “open the possibility that the concept of ‘childhood’ could be extended beyond [the age of fifteen].”\textsuperscript{234} Moreover, “[t]o adopt a general notion of ‘child’ in the absence of a definition, as being relevant only those under 15 years of age, would be detrimental to the

\begin{itemize}
  \item \textsuperscript{228} Schmidt, supra note 116, at 57.
  \item \textsuperscript{229} “[I]nternational advocacy has now created a human rights framework, that raises the minimum age for recruitment and participation in hostilities from fifteen to eighteen.” Coomaraswamy, supra note 140, at 536; see also Lee, supra note 21.
  \item \textsuperscript{230} See Rosen, supra note 18, at 296–97; see also Matthew Happold, \textit{Child Soldiers: Victims or Perpetrators?}, 29 U. LA. VERNE L. REV. 56, 69–70 (2008).
  \item \textsuperscript{231} See HENCKAERTS & DOSWALD-BECK, supra note 91, at 479–82.
  \item \textsuperscript{233} The Conventions refer to “persons under 18 years of age” and “children under 15” thereby implying that there are children above fifteen years of age. See id. at 803–04; Fox, supra note 13, at 31.
  \item \textsuperscript{234} Rosen, supra note 18, at 301.
\end{itemize}
interest of the child and thus not in conformity with the spirit underlying international humanitarian law.”

Nevertheless, the Commentaries to the relevant treaty provisions do not seem to entirely support this standpoint. The Commentary to Article 14 of the Fourth Geneva Convention explains that the age of fifteen was set to match the “physical and mental development of children,” though Article 77 of Additional Protocol I concedes that “some flexibility is appropriate, for there are individuals who remain children, both physically and mentally, after the age of fifteen.” Therefore, it is difficult to rigidly conclude for purposes of international humanitarian law that a child is simply anyone under eighteen years of age.

Furthermore, whereas international humanitarian law does not prohibit the recruitment and participation of children above fifteen years of age, the ICRC, together with the National Red Cross and Red Crescent Societies, considers that no children under eighteen years of age should be recruited or used in hostilities. This, of course, follows the Optional Protocol and the latest position in international human rights law that define children as persons younger than eighteen years of age. For example, the 1995 Plan of Action Concerning Children in Armed Conflict shows that the International Movement of the Red Cross and Red Crescent militates in favor of no recruitment and no use of children under the age of eighteen.

Should international humanitarian law follow a policy that is congruent with international human rights law? This would be difficult to achieve because, interestingly, some of the opponents to the straight eighteen approach are liberal states such as the United States of America and the United Kingdom even though they have ratified the Optional Protocol.

235. Helle, supra note 232, at 804.
237. PILLOUD ET AL., supra note 94, ¶ 3179.
238. Plan of Action, supra note 227, at 1 (“Commitment 1: To promote the principle of non-recruitment and non-participation in armed conflict of children under the age of 18 years.”); see also ICRC, Peace, International Humanitarian Law and Human Rights, § 1.5, Council of Delegates Res. No. 8 (Nov. 27, 1997).
239. Plan of Action, supra note 227, at 1.
The straight eighteen approach appears to contradict established cultural and local norms. Given that international human rights law is based on universal ethical standards, some claim that the straight eighteen approach does not acknowledge local and regional cultures and traditions, including differing views as to who is a child and who is an adult. Hence, a contextual approach that pays heed to “the culturally constructed” and developed ideas and “practices of childhood versus adulthood” might be more appropriate in this area. Remarkably, this is also the approach taken by Article 1 of the UNCRC, since this provision states that adulthood can be reached before eighteen years of age if majority is attained earlier in a specific state, thus allowing states to set an age for majority that is in line with cultural and social norms. Contextualists, who interpret the law by paying particular attention to the social and cultural context in which norms are applied, contend that the cut-off age between childhood and adulthood needs to be challenged. Initiation rites, culturally scripted phenomena that are not determined by an abstract age, are the true markers of the passage into adulthood. Conspicuously, there is a difference between the categorizations and definitions made by local communities and those established by the international legal discourse.

240. “[S]ome basic human goods span the considerable diversity of modern cultures and support a set of ethical standards that are universal at least for the world as we know it and human beings as we know them.” Amy Gutmann, The Challenge of Multiculturalism in Political Ethics, 22 PHIL. & PUB. AFF. 171, 193 (1993).

241. See generally Rosen, supra note 18; Child Soldier Recruitment, supra note 66.

242. Fox, supra note 13, at 43.

243. UNCRC, supra note 22.

244. See generally Rosen, supra note 18; Child Soldier Recruitment, supra note 66.

245. “One of the most important of these differences was that communities did not view 18 as the age at which children suddenly transitioned to adulthood.” Kendall, supra 213, at 32; see also Child Soldier Recruitment, supra note 66, at 52.

246. See McKnight, supra note 54, at 125. This discourse informs and is fed by “researchers [who] tend to assume a ‘universal decontextualized model of child development.’ That is, researchers tend to forget that ‘childhood, adolescence and adulthood are . . . socially defined statuses which include social expectations that differ across cultures.’” ED CAIRNS, CHILDREN AND POLITICAL VIOLENCE 166 (1996); see also Lee, supra note 21, at 8.
Anthropological research underwrites this assertion, stressing that “there are a multiplicity of childhoods, each culturally codified and defined by age, ethnicity, gender, history, location, and so forth.” Since law is applied within a specific context, ignoring such context whilst drafting universal norms inevitably leads to discrepancies between the state of the law and its application. The importance of cultural legitimacy of international human rights norms is overlooked.

While the efforts of the NGO community to limit the extent and number of individuals embroiled in armed conflicts must be praised, it should be stressed that NGOs and political groups discount the “more varied and complex local understandings of children and childhood found in anthropological research.” Article 1 of the UNCRC acknowledges this assertion by leaving states some leeway in deciding when majority is attained. The definition of a child soldier under UNCRC clashes with local understandings of the involvement of young people in armed conflicts. For example, anthropologists point out that “[i]t is a misnomer in many parts of Africa to call a 14-year-old carrying an AK-47 a child soldier since local people may regard that young person as an adult” and that childhood and military life are not necessarily understood as either incompatible or contradictory. Moreover, the demography of African countries, where the population is mainly comprised of children—individuals under eighteen—helps to explain the fact that children there often take on earlier adult responsibili-

247. Rosen, supra note 18, at 297.
248. See Jonasen, supra note 42, at 316.
249. Rosen, supra note 18.
250. “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” UNCRC, supra note 22, art. 1.
251. See Rosen, supra note 18, at 297.
253. For example, “[t]he Dinka of the Sudan initiated boys into warriorhood between ages 16 and 18.” Rosen, supra note 18, at 297.
ties and are more politically and socially aware than their counterparts in the West. African children are also often entrusted with responsibilities that Western liberal culture may consider as an abuse of their rights even though they are acceptable under certain cultural contexts. For example, children may assist “relatives on market stalls and in small family businesses.” Street vending and running errands are also common tasks given to children. Also, in this context, adolescence is defined as “a pre-adult phase.” Nonetheless, it must be borne in mind that the danger to which children are exposed as soldiers can hardly be “justified by arguments based on cultural and regional variations regarding the maturity of child soldiers.”

The approach adopted by international humanitarian law is one that seems to align better with the views of contextualists because it sets the age of childhood in relation to recruitment and participation in hostilities at fifteen rather than eighteen years of age. As the Commentary to Additional Protocol II explains, “[t]he moment at which a person ceases to be a child and becomes an adult is not judged in the same way everywhere in the world. Depending on the culture, the age may vary between about fifteen and eighteen years.” Aware of the significant cross-cultural variation in the ages of childhood, the drafters of Additional Protocol II could not agree to raise the age of recruitment and participation to eighteen years of age because national legislations were too divergent.

258. Id.
259. Stark, Boothby & Ager, supra note 6.
261. PILLLOUD ET AL., supra note 94, ¶ 4549.
262. Id. ¶ 4556.
variations in relation to child soldiering. Consequently, the age of fifteen was adopted as the lowest common denominator.

B. Autonomy

When a rights-based approach is adopted in relation to child soldiers, one has to address the concept of autonomy upon which the liberal human rights enterprise is founded. In a modern world led by liberal thoughts, the individual is conceived as someone who has the capacity and autonomy to act. The individual, who is viewed as independent and self-sufficient, is taken to be an essentially rational actor, someone who is able to contribute to a society that values his or her capacity to act. Autonomy literally means living by one’s own law; it is the ability to make certain decisions for oneself without undue interference from others. According to liberal thought, “[t]he individual is . . . attributed with knowledge of his own best interests and the ability to pursue them rationally.”

This discourse, however, is difficult to apply to children who are viewed as not having fully developed autonomy even though the UNCRC clearly spells out in its Article 12 that “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” It is at this point where the liberal discourse seems to contradict itself; on the one hand liberals wish chil-

263. See id. ¶ 3179 (noting that “[t]he age of puberty varies, depending on climate, race and the individual,” thereby again taking into account the broader context); Breen, supra note 113, at 79.
265. Goodwin, supra note 21, at 37.
266. Marc-Henry Soulet, La vulnérabilité comme catégorie de l’action publique [Vulnerability as a Category of State Intervention], 2 PENSEE PLURIELLE 49, 50–51 (2005).
267. Goodwin, supra note 21, at 37.
268. UNCRC, supra note 22, art. 12(1).
dren to enjoy their autonomy and their rights but on the other hand, they—probably influenced by a more humanitarian discourse—regard children as innocent human beings whose safety and rights should be protected and promoted and whose needs must be adequately addressed. Liberals often view children as victims, as vulnerable individuals who need to be helped by adults as adults appear to know best what their interests are. As a result, the discourses of children as victims and individuals as autonomous agents of their own fate clash. As Alice Macdonald summarizes, “[t]he emergence of individual agency threatens discourses of victimhood.” Yet, liberals have tempered their claims of autonomy and rights to emphasize the protection of children and the principle of the best interests of the child as enshrined in Article 3(1) of the UNCRC. This can be explained in the following manner: Some liberals tend to believe that those “who reject [the liberal] human-rights culture should change their ways” and that “this culture is a morally superior way of life.” Thus, liberals wish to extend their ideas on a universal level, and this means intervening and engaging in a discourse of the others borders on paternalism. In their eyes, children are not autonomous in-


270. Alice Schmidt explains that “[l]iberal views, which dominate at least the western, developed world, essentially see children as innocent, weak and in need of protection rather than as agents of their own and significant contributors to social and political life.” Schmidt, supra note 116, at 57.


272. UNCRC, supra note 22, art. 3(1). Unfortunately the United Nations Committee on the Rights of the Child has so far refused to provide a precise definition of the term or to outline the common factors of the best interests of the child. The term “best interests of the child” broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances (e.g., age, level of maturity, presence or absence of parents, his/her environment and experiences).


274. As Goodwin explains, “the liberal desire to fuse political and human rights suggests an element of moral imperialism . . . .” GOODWIN, supra note 21, at 337; see also Schmidt, supra note 116, at 59 ("It seems . . . that liberal notions of childhood are applied at will by some or at least whenever it is
dividuals, endowed with the ability to make decisions; on the contrary, children are vulnerable individuals. There are several reasons that explain this position.

First, a liberal approach tends to regard children as being unable to make conscious and informed decisions, especially when this concerns their participation in armed hostilities. After all, the Western society identifies childhood with innocence and play. It is widely understood that children have a limited capacity to understand the world. This inability plays against the child in the liberal discourse inasmuch as he or she is coaxed into recruitment and used in hostilities because he or she is obedient, easy to manipulate, and lacks fear when engaged in battle.275 It is also easy to indoctrinate a child.276 It is not difficult to convince a child to take part in hostilities without the child fully understanding the consequences of his or her acts.277 Ethics, culture, and society are often used to legitimize the use of child soldiers;278 defending one’s people and homeland from violent aggression or political oppression279 and being able to provide for one’s family.280 They are fighting for a cause “that is portrayed as being in their political and economic best interests.”281 But does this mean that children are not psychologically able to make informed decisions? At this juncture, it must be underlined that whilst the international community often shows young children taking part in the hostilities, “ado-

276. “Both advocacy literature and media accounts routinely refer to child soldiers as having been ‘programmed,’ in the sense of being trained to function like robots or members of a cult.” Child Soldier Recruitment, supra note 66, at 50.
277. Pilloud et al., supra note 94, ¶ 4555; see also de Silva, Hobbs & Hanks, supra note 146, at 130–31.
279. “[C]hildren were not plucked from . . . a normal childhood to fight in a conflict they neither wanted nor understood, but were compelled to fight to preserve the lives of their families, community, and culture.” Jonasen, supra note 42; Hughes, supra note 7, at 402; see also Abbott, supra note 60, at 517–18.
280. See Davison, supra note 68, at 140; Hughes, supra note 7, at 403.
281. De Berry, supra note 2, at 98.
lescents make up the vast majority of child soldiers worldwide. Their understanding of the situation is undoubtedly different from the one of an eight year old. The conflicts in Sierra Leone and Liberia have demonstrated that this distinction between younger and older children was even institutionalized as the younger ones between nine and thirteen years old of age were enrolled in the “Small Boy Units” while adolescents were not classified as boys anymore but full-fledged soldiers, often in charge of younger children.

Also, if children are not able to make informed decisions, then one may ask how much children nowadays differ from those who took part in past conflicts. One possible answer is that whereas past conflicts could be easily understood as one state fighting against another state, the “new wars” are incredibly difficult to understand, even for adults. The recruitment of seventeen years old children in the British forces appears acceptable to the public as it appears that he will likely be fighting in a conventional war. Further, Western society believes that this individual is deciding to take on a career in the armed forces. Yet, a child of the same age engulfed and in-

282. Schmidt, supra note 116, at 54; Williams, supra note 128, at 1074. The term “adolescents” describe young individuals undergoing “a transitional period during which a young person is no longer a ‘child’ in the commonly understood sense, but not yet an ‘adult’ although increasingly expected to take on adult tasks and roles.” Brett, supra note 137, at 858 n.4.
284. Murphy, supra note 75, at 74.
285. As Mary Jonasen explains in relation to children in conflicts, “some critics ask how contemporary child soldiering differs in the current context from past comparisons.” Jonasen, supra note 42.
286. For example, see the UK’s position: “In order to compete in an increasingly competitive employment market, the Services need to attract young people aged 16 and above into pursuing careers in the armed forces. In doing so, the armed forces provide valuable and constructive training and employment to many young people, giving them a sense of great achievement and worth, as well as benefiting society as a whole.” Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Initial Reports of States Parties Due in 2007. United Kingdom of Great Britain and Northern Ireland, ¶ 18, U.N. Doc. CRC/C/OPAC/GBR/1 (Sept. 3, 2007). That being said, Jason Hart argues that “[a]ccording to emerging norms, 18, 19 and 20 year olds should be studying at universities to lay the foundations for their future lives, not dying in a road-
volved in a “new war” in another state raises eyebrows even though, as Roger Rosenblatt argues, “[a] kid fighting with a bunch of rebels is far more apt to know why he is doing it than a recruit of a national guard.” 287 Fighting in an armed group or even in the armed forces of a non-liberal and democratic state is perceived to be a judicious career path. 288

Perhaps, at the very least, the liberal discourse seems to miss the point that with age and experience, children are able to acquire the ability to understand the world and thus become active agents of their own lives. Indeed, “[a]lthough, in many areas of the world, people are deemed to be intellectually and emotionally mature at earlier ages, eighteen years of age appears to be the most widely accepted point at which individuals are no longer considered children.” 289 For example, “[i]t is generally accepted that from the age of 15 the development of a child’s faculties is such that there is no longer the same need for special, systematic measures.” 290 Therefore, international humanitarian law appears to be more in line with this reality than international human rights law, which sets eighteen years of age as the end of childhood. In other words, international humanitarian law takes it that children beyond fifteen are capable of autonomy.

Reverting to the issue of the “new wars” and bearing in mind that it might indeed be difficult for children to understand the intricacies of such conflicts, one can reasonably ask whether international humanitarian law’s approach is appropriate. International humanitarian law is principally built on the idea of traditional armed forces, and the bulk of the law pertains to international armed conflicts and non-international conflicts between armed forces and armed opposition groups. 291 Is international humanitarian law, particularly its provisions on child soldiers, outdated? It might be, but even though customary in-

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288. This position is redolent of earlier liberalism that believed that there was a “family of civilized nations” that was allowed to teach other nations. See EDWARD KEENE, INTERNATIONAL POLITICAL THOUGHT: A HISTORICAL INTRODUCTION 170, 192 (2005).
290. Dutli, supra note 177, at 422.
291. See HARVEY, supra note 51, at 8.
ternational humanitarian law covers additional types of conflicts, particularly non-international armed conflicts in which two armed opposition groups fight against each other, it still allows for the recruitment and use of children above fifteen years of age. In fact, customary international humanitarian law cannot be altered unless those taking part in the hostilities—both state and non-state actors—change their behavior or practice and also consider that by doing so, they are bound by a legal norm. As of now, there is no solid evidence that states and armed opposition groups consider the recruitment and participation of children between fifteen and eighteen years of age to be a violation of international humanitarian law.

A second reason why liberals have tempered their claims of autonomy and rights and emphasized the protection of children and the principle of the best interest of the child can be explained by the persistent and unceasing discourse of children as victims and vulnerable individuals, especially within the context of armed conflict. The mainstream liberal view is that children cannot properly be considered perpetrators of violent acts and that their actions must be understood by looking at the wider social context; “the neo-liberal approach often involves viewing children as passive victims that must be saved through legal protections.” On the other hand, the reality is much grimmer.

Indeed, many children are full participants in the armed conflict. Their participation ranges from helping out with cooking or managing the camp to committing atrocities. In many of these conflicts, after being forced to perform ritualistic killings, such as killing their family or their relatives, children are provided with some rudimentary training on how to

292. Additional Protocol I, supra note 25, art. 77; Additional Protocol II, supra note 26, art. 4(3); Henckaerts & Doswald-Beck, supra note 91, at 482–85.
294. Hart, supra note 10, at 220.
295. See Schmidt, supra note 116, at 60.
297. Human Rights Watch, supra note 69, at 19, 27.
operate weapons. They gradually enter a process of military socialization that aims to transform them into killing machines, a practice that can be witnessed in various African states. The Taylor judgment is replete of sad examples of crimes committed by children. Generally, children who live in such an environment tend to lose their personality and identity, as well as any connection to the real world. Furthermore, by living in such a violent world—where disorder and arbitrariness are commonplace—they lose touch with any concepts of morality that may have been inculcated to them before they joined the armed groups. Indeed “[c]hildren participating in hostilities are a deadly threat, not only to themselves, but also to the persons whom their impassioned and immature nature may lead them to shoot at.” African conflicts show that many children, trapped in a world of sustained and orchestrated violence, turn into merciless killers, becoming


301. See, e.g., Taylor, Case No. SCSL-03-01-T, ¶¶ 1462, 1565 (listing the crimes perpetrated by the children).


303. See Faulkner, supra note 79, at 495; see also Zia-Mansoor, supra note 255, at 397.


305. Dutli, supra note 177, at 421.

306. Maslen, supra note 223, at 24; see Faulkner, supra note 79, at 495; Innocents et coupables, supra note 302, at 65.
“horde[s] of insensate killers”\textsuperscript{307} that are still portrayed in the liberal discourses as innocent individuals.\textsuperscript{308}

Children should not only be seen as reluctant participants in armed conflicts but also as active agents. It is imperative to understand the reality on the ground in order to be in a position to fully appreciate the hurdles faced by those trying to set new legal norms. The current international discourse decontextualizes child soldiers from the social, political, and economic context that regulates their lives.\textsuperscript{309} One might question whether children trapped in such a situation are still able to genuinely consent to their participation in the conflict, or are simply the means to an end for the armed group. It is reported that child soldiers often feel empowered through their experiences of fighting,\textsuperscript{310} bearing arms,\textsuperscript{311} and killing.\textsuperscript{312} For some, being in an armed group means enhanced opportunities, autonomy, and respect.\textsuperscript{313}

At this stage, the concept of “agency” must be introduced. The liberal discourse is uneasy with regard to the application of the concept of “agency” to children, for its “focus on the rights of autonomous actors does not . . . account for individuals—

\begin{thebibliography}{10}

\bibitem{307} Faulkner, \textit{supra} note 79, at 499.
\bibitem{308} Romeo Dallaire . . . recalled how one of his soldiers was faced with a situation in Somalia during which he was fired upon by young children using AK-47s . . . . [T]he soldier in question experienced almost unimaginable emotional and moral torment at the prospect of having to return fire at ‘innocent’ children. Ultimately, however, the soldier had to protect those around him, including a church full of villagers; he fired back.
\bibitem{309} Brosha, \textit{supra} note 10.
\bibitem{310} Schmidt, \textit{supra} note 116, at 63.
\bibitem{311} Possession of a weapon often “conferred a certain status” within the group. R.A. DALLAIRE ET AL., \textit{supra} note 300, at 13.
\end{thebibliography}
specifically children—whose autonomous identity is not yet fully formed."314 Agency is a form of autonomy that focuses on the capacity to conceive and act upon projects and values, including those outside of one’s own experiences.315 Agency, as explained by Alcinda Honwana, “concerns events of which an individual is the perpetrator, in the sense that the individual could, at any phase in a given sequence of conduct, have acted differently. Whatever happened would not have happened if that individual had not intervened.”316 Thus, the agent must have transformative capacity—“the power to intervene or to refrain from intervention.”317

Are children agents of their own lives, that is, do they have the capacity to make informed choices? The simple answer seems to be in the affirmative, at least to a large extent. For example, “[i]n all conflicts, children can take, and some choose to take, an active role in supporting violence. Children make calculated decisions during armed conflict about how to access shelter, food, medicine, and best ways to keep themselves and their family members safe.”318 This shows that some children do in fact manipulate situations in order to turn them into opportunities. Alcinda Honwana refers to “tactical agency,” “a specific type of agency that is devised to cope with the concrete, immediate conditions of their lives in order to maximize the circumstances created by their military and violent environment.”319 Similarly, Schmidt contends that children, as actors in a conflict, make rational choices based on the “[limited] in-

317. Id. at 48.
319. Honwana, supra note 316, at 49.
formation they possess and their [limited] ability to weigh one choice against another . . . .”

Notwithstanding this, it could also be argued that a child soldier’s actions are constrained by his or her weak position, and that in reality, he or she is acting in relation to a specific event rather than looking at the long-term consequences of his or her actions. It might thus be argued that these children are indeed not autonomous. Furthermore, whilst children may exercise their agency, they do so without a moral compass and ethical guidance. To illustrate the point, it is worth noting that some child soldiers attain positions of command in armed groups and become leaders by actively participating in the hostilities and committing the worst atrocities (e.g., committing murders, punishing and executing fellow child soldiers, press-ganging other children into armed groups). The liberal approach to autonomy presupposes a conception of a morally autonomous agent. Again, this can hardly be applied to child soldiers. Another factor that needs to be taken into account is the age and maturity of a child. A child soldier can be a teenager as well as an eight-year-old. As such, in the context of child soldiers, it is indeed a fine line between victimhood, autonomy, and agency. The reality is thus more complex than the one portrayed in the liberal discourse.

CONCLUSION

Drawing again on the comparison between the African boy soldier and Joan of Arc—the French heroine and Catholic Saint—the phenomenon of child soldiering must be understood in its historical context, bearing in mind the rise of the human rights ideology that has led the world to look at child soldiering through the prism of children’s rights rather than through international humanitarian law.

Children are shaped by their experiences but are “also shaped by the nature of the childhood that they experience.” Liberals, however, seek to produce a social construction of

320. Schmidt, supra note 116, at 60.
321. Innocents et coupables, supra note 302, at 75–76.
322. TACDANSO, supra note 312, at 29, 41.
324. James & James, supra note 11, at 30.
childhood that reinforces a social legal order in which adults are autonomous individuals protecting the innocent child,\(^{325}\) who is endowed with a range of rights, the most significant of these being that all actions should be taken for the child’s best interests.\(^{326}\) This paternalistic stance ensures that children who willingly take part in hostilities will be deemed to have lost control of their possibly limited agency. In this view, fighting is for adults only.

Broadly speaking, international law seeks to protect children from becoming child soldiers. For instance, the recruitment, conscription, enlistment, and use of children in armed conflict are clearly prohibited, but at the same time, international law acknowledges that children can be full participants in hostilities. The current trend in international law, however, is trying to remove all children from the battlefield, thus revealing international law’s unwillingness to concede that children might be able to make autonomous decisions; “[r]ecruitment, whether enforced or voluntary, is always against the best interests of the child.”\(^{327}\)

That is not to say that child soldiering is a positive experience or that the fact that they volunteer can be used to justify the appalling treatment that ensues. Whilst children should be allowed to decide their involvement in hostilities on their own, this choice needs to be informed and viable alternatives need to be presented to such children. Experience shows that even children who suffered terribly at the hands of the armed forces often chose, once released or demobilized, to return to the mists of war.\(^{328}\) Indeed, if they take part, whether directly or indirectly, in the hostilities, it is likely that once the conflict is over, these children will be unable to be regarded “as active agents, as productive people in society”\(^{329}\) even though it is proven that “children’s agency [is] conducive to rehabilitation and dealing with trauma and fear.”\(^{330}\) They will have “to play the part of innocent victims” to benefit from international aid and the pro-

\(^{325}\) See Schmidt, supra note 116, at 57–58.
\(^{326}\) Freeman, supra note 269, at 5.
\(^{327}\) Coomaraswamy, supra note 140, at 542.
\(^{328}\) Williams, supra note 128, at 1083.
\(^{330}\) Schmidt, supra note 116, at 61.
grams set up in the framework of disarmament, demobilization, and reintegration processes.\textsuperscript{331} If they fail to do so, the only other viable alternative is to return to what they know: war. Therefore, “[f]undamental to any effort to address child recruitment is the acquisition of insight into the roles, responsibilities, and competencies of children themselves.”\textsuperscript{332} Without understanding why children join or become participants in armed conflicts, the international campaign to prevent the recruitment of child soldiers is bound to fail. To ensure that fewer children take part in conflicts, a whole range of measures—“preventive, suppressive, educational and rehabilitative in nature”\textsuperscript{333}—must be enacted. More crucially, these measures must be designed under the influence of what children have to say so as to give them a voice in the debate on the recruitment and participation of children in armed conflict.

\textsuperscript{331} See McKnight, supra note 54, at 127–28.
\textsuperscript{332} Hart, supra note 10, at 224; see also Schmidt, supra note 116, at 65.
\textsuperscript{333} Guiding Principles, supra note 86, at 5.
TWO AND A HALF HURDLES BETWEEN EUROZONE DEBTS AND U.S. COURTS: HOW RECENT DISTRESSED FOREIGN DEALS COULD SOON BE UNWOUND DOMESTICALLY

Timothy S. Springer*

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INTRODUCING THE TWO AND A HALF HURDLES FROM THE EUROZONE TO U.S. COURTS

The recent financial unrest in Europe has created significant distressed opportunities. Buyers with free capital have been able to obtain significant quantities of distressed assets at free fall pricing. In a typical arms-length transaction, these buyers would leave without further concern for the viability of their counterparties. But these parties may soon find themselves reacquainted with their sweetheart deals if their counterparties fail to weather financial depressions and seek bankruptcy protection before the waves subside.

When storms settle and economies improve, assets whose values were temporarily distressed often experience a sudden rebound in value. Such price fluctuations create incentives for counterparties to reclaim assets that once seemed like broken glass, but now appear to be crown jewels. Fraudulent transfer laws, which date back to the Statute of Elizabeth in the sixteenth-century,1 allow courts to unwind transactions after the fact. Before June 2011, U.S. bankruptcy courts regularly used fraudulent transfer provisions in the U.S. Bankruptcy Code (“the Code”)2 to reach domestic transactions with little fanfare.3 But recent shifts in domestic jurisprudence may affect U.S.

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1. 13 Eliz., c. 5 (1571) (Eng.).
3. See Meoli v. Huntington Nat’l Bank (In re Teleservices Grp.), 456 B.R. 318, 320–21 (Bankr. W.D. Mich. 2011) (“For over twenty-five years, my colleagues and I have operated with the understanding that we were properly constituted judges . . . I have entered countless orders as final without a second thought about the legitimacy . . . .”) (emphasis added).
bankruptcy courts’ ability to exercise both jurisdiction and constitutional authority over domestic and foreign transfers.

This Article discusses the link between the debt crisis in the Eurozone and a potential flood of future litigation to unwind foreign transactions in U.S. courts. Specifically, this article will address the two and a half hurdles litigants must overcome to reach foreign transactions with U.S. bankruptcy law. Part II will briefly describe how economic forces created these distressed opportunities in the Eurozone. Part III will discuss how improving global economies create incentives for fraudulent transfer actions in U.S. courts and analyze a recent example. Part IV will outline how the 2005 Amendments to the Code, an ensuing circuit split over extraterritorial jurisdiction, and the Supreme Court’s watershed decision in *Stern v. Marshall* have created the two and a half hurdles. Finally, Part V will offer arguments for litigants to overcome or to defend the hurdles to U.S. adjudication.

I. Reason for Concern: Distressed Opportunities in the Eurozone

A. Economic Woes in the Eurozone

As a harbinger of the 2008 financial crisis, Warren Buffet was famously quoted as saying: “It’s only when the tide goes out that you can see who’s swimming naked.” The financial tides accompanying the aftershocks of the 2008 financial depression uncovered considerable concern for the bare balance sheets across the Eurozone. A severe debt crisis stemming from the banking and property bubbles led to liquidity constraints, defaults, and downgrades across the Eurozone; most notably in Greece, Ireland, Cyprus, Portugal, and Spain. Persistent fiscal profligacy led to two separate sovereign bailouts for Greece, in a union too big to fail. The ripple effects of these financial woes

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6. See id. Aside from pejorative characterizations, “too big to fail” means that the aggregate gross domestic product (“GDP”) of a country is smaller
have reached private sector sources of liquidity, forcing both private and public financial institutions alike to seek liquidity from a consortium of international investors. These efforts are to fill an estimated balance-sheet shortfall of €1 to 1.3 trillion for Europe’s major banks. In January 2012, one expert estimated that the Eurozone needed approximately €3 trillion of fresh capital to create sufficient liquidity.

To correct the gap between book value and the actual value of the bad assets, the Eurozone must face a significant deleveraging process. Europe has three basic options for deleveraging: (1) raise money, (2) print money, or (3) default and deflate. The third option of markdowns provides immediate relief, but carries significant consequences, including potentially reigniting global financial panic. The European Central Bank (“ECB”) appeared to have adopted the second option by the spring of 2012, when it began flooding Europe’s banks with more than half a trillion euros of fresh capital. Despite the increased lending and artificially-fixed low rates, many of Europe’s major banks have refused to accept funds, opting instead

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10. See Stephen G. Moyer, Distressed Debt Analysis: Strategies for Speculative Investors 207 (2005). Deleveraging is the process by which a company or country reduces the amount of debt or “leverage” from its balance sheet. Id.
11. Wallis Interview, supra note 8. Under the “default and deflate” option, Europe could have gambled systemic risk either by immediately marking the bad assets’ values down to market value or by accepting an estimated 20% deflation annually for three to five years. Id. Either result would have the opposite outcome of the first two options: a decreasing money supply. Id.
12. Id.
for private investment and off-balance sheet restructurings.\textsuperscript{14} If the situation deteriorates and remedial measures prove insufficient, the United States could even take drastic measures to insulate and protect itself, which would leave Europe more vulnerable to take the leverage hemlock alone.\textsuperscript{15}

In coordination with the ECB’s central funding efforts, the Eurozone countries have also completed member-funded bailouts of troubled Eurozone countries.\textsuperscript{16} The second round of bailouts for Greece in February 2012 staved off another potentially chaotic liquidity crisis that would have threatened defaults by other member nations, such as Spain and Italy. German Finance Minister Wolfgang Schaulbe called for significant austerity measures and reforms amidst concern that increasing financial ties with Greece would threaten “[Germany’s] ability to pay for pensions and health care in an aging society.”\textsuperscript{17} Germany insisted throughout the negotiations that Greece adopt austerity measures, tighten public spending, and improve on tax collection.\textsuperscript{18} Leaders of the twenty-five EU governments agreed on January 31, 2012, to provide Greece with approximately €130 billion (US$171.5 billion) of aid, which included assistance from the International Monetary Fund.\textsuperscript{19} In return, the Greek Parliament agreed to significant austerity measures, yielding to the German-led charge for tighter fiscal discipline.\textsuperscript{20} These measures included “steep cuts in private-sector wages, sacking 15,000 public-sector workers and drumming up another [three] billion euros in government-spending cuts [in 2012].”\textsuperscript{21}


\textsuperscript{15} See Wallis Interview, \textit{supra} note 8. One such drastic measure could involve nationalization of key U.S. banks to consolidate U.S. balance sheets amidst the turmoil created by a potential immediate deleveraging in Europe. \textit{Id.}


\textsuperscript{17} Marcus Walker et. al., \textit{Germany Warns Greece on Aid Funds}, WALL ST. J., Jan. 30, 2012, at A7.

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} Granitsas, \textit{supra} note 7, at A1.

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.}
The measures have caused considerable strife in both the Greek Parliament, where parties were expelled “for not toeing the party line,” and the streets of Athens, where protestors continued to oppose any cuts in Greece’s public spending. The spending cuts continued for 2013 budgets amid negotiations to reduce Greece’s debt to “manageable levels.” As in Greece, austerity measures across the Eurozone were met with similar hostilities as workers organized strikes in Spain and Portugal. Cyprus too was forced to agree to overhaul its public finance system and restructure its two biggest banks in return for €10 billion ($13.05 billion) bailout from its international creditors. Although the negotiations remained precarious at the time, EU leaders accepted the Nobel Peace Prize on December 10, 2012, for their efforts.

In addition to the bickering among Eurozone countries over austerity and liquidity measures, the Eurozone faces a number of other ancillary barriers that threaten to hinder already weak economies. Amidst these liquidity disruptions—and perhaps because of the constraints—the Eurozone now faces the prospect of exporting its pool of skilled labor, as many former European colonies in Latin America have started to lure skilled professionals. The 2014 World Cup of soccer and 2016 Olympic Games are creating considerable opportunities in Brazil, as

22. Id.
25. Torry, supra note 5, at A12.
the country scrambles to build accommodations, venues, and airport terminals. Meanwhile, the Eurozone faces economic contractions, with GDP falling 1% to 1.5% in the fourth quarter of 2011 and “[a] steady unemployment rate across the region . . . [rising to] the highest level since the first quarter of 2001.” Demonstrating a trend across the Eurozone, almost 60% of the “37,000 Spanish citizens who left the country in 2010 . . . emigrated to countries outside the European Union.”

If this trend continues, members of the EU must overcome declining economic growth and increasing global competition with a diminishing skilled work force.

B. Applying Traditional Definitions of Distressed Assets to the Eurozone

The confluences of the liquidity crisis, infighting over austerity measures, and increased financial ties across the Eurozone have created distressed opportunities for buyers with free capital. Distressed opportunities exist in many forms; in fact, “[t]here is no universally recognized definition of distressed debt.” Four general definitions often guide the term, including (1) third-party ratings, (2) liquidity availability, (3) debt spreads, and (4) debt and equity nominal trading values.

Rating agencies, the most common prognosticators of financial strength, are third-party companies that independently assess investment quality. The three major rating agencies, which together control more than 90% of the market, include Standard & Poor (S&P), Moody’s Investor Services, and Fitch IBCA. Ratings affect a company’s ability to raise capital as ratings below a certain level prevent certain investors, such as pension and endow-

28. See id.
32. Organization for Economic Co-operation and Development [OECD], Competition and Credit Ratings Agencies, at 5–6, DAF/COMP (2010) 29 (Oct. 5, 2010), available at http://www.oecd.org/regrefrom/sectors/46825342.pdf. The three major rating agencies, which together control more than 90% of the market, include Standard & Poor (S&P), Moody’s Investor Services, and Fitch IBCA. Id. at 12.
ment funds, from investing in the company’s debt or equity securities. But the rating agencies have been severely criticized for their failure to assess companies’ financial viability accurately, most notably in the wake of Enron and the structured investments leading to the 2008 financial crisis.34

Unfortunately, without sufficient oversight, ratings may be driven—or at least delayed—by politics as much as financial strength.35 For instance, the long-expected Eurozone downgrades in 2012 were received with little significant reaction in the markets.36 S&P and Fitch lowered ratings across the Eurozone in January, and Moody’s followed suit in February 2012, lowering the ratings of six European nations, and additionally warning that the United Kingdom may also face downgrades.37 The downgrades continued throughout 2012 as major banks began to boost their cash reserves.38

Compared to the holistic purview of ratings, a liquidity approach considers discrete events that cause a company or a country to be unable to meet its financial obligations. Such situations may be created when “cheap credit, and not value-added products, drives a nation’s economy or a company’s production.”39 When market forces, trade partners, or critical decisions withdraw, or even simply interrupt, the means of immediate liquidity, debt becomes distressed due to a lack of short-term viability. For example, before investment banks changed structures to borrow directly from the U.S. Federal Reserve, Bear Stearns became distressed (and ultimately deceased) when counter-parties withdrew all forms of liquidity.40

37. FitzGerald & Bernard, supra note 36; Gauthier-Villars & Forelle, supra note 36.
39. Wallis Interview, supra note 8.
The two remaining definitions of distressed require a more analytical approach. A cost-of-debt approach defines a security as distressed when the spread between the risk-free rate and the company’s debt exceeds 1000 basis points. The “risk-free rate” is the rate that investors would expect to earn in a theoretical risk-free environment for a given period, often estimated to be the yield on U.S. Treasury Bills. According to this approach, the major Eurozone debts would have been nearing distressed levels as early as September 2009. The same determination would result under the trading values approach, which considers the nominal trading value of a security. Typical hallmarks of financial distress under this approach include a de minimis equity value or debt trading at a significant discount. Under this definition, Greece’s sovereign debt would have qualified as distressed in December 2011 because estimated recovery for bondholders was thirty-two cents on the euro.

C. Examples of Distressed Deals Already Made in the Eurozone

The traditional definitions of distressed debt demonstrate that the Eurozone was likely distressed for a significant period before the rating agencies issued downgrades. During this unannounced period of distress, several lucrative transactions closed. On one such occasion, Ireland’s most wealthy citizen, Sean Quinn, chose to invest heavily in the Anglo Irish Bank

41. MOYER, supra note 10, at 7 (citing Jean Helwege & Paul Kleiman, Understanding Aggregate Default Rates of High Yield Bonds, CURRENT ISSUES ECO. & FIN., May 1996, at 1, 5–6 (1996)).


43. MOYER, supra note 10, at 7. A typical equity marker would be a stock trading for less than US$1 per share, and a typical debt indicator would be a discount of 40% or greater from face value. Id.


45. See Barley, supra note 42; Gauthier-Villars & Forelle, supra note 36.
Corporation ("Irish Bank"). After the situation failed to improve, Mr. Quinn was left bankrupt, and a number of international investors purchased Irish Bank’s distressed assets. Kennedy Wilson, a global real estate investment and services firm based in the United States, purchased $1.6 billion of distressed residential housing developments from Bank of Ireland’s portfolio. U.S.-based State Street Global Advisors increased its assets under management by $36 billion when it purchased Bank of Ireland Asset Management for $57 million. Similarly, U.S.-based real estate giant CB Richard Ellis purchased ING Real Estate Investment Management from the ING Group of the Netherlands.

Even for buyers within the Eurozone, distressed deals for state-owned assets created new opportunities. In June 2011, Germany-based Deutsche Telekom AG increased its ownership in Greece’s Hellenic Telecommunications Organization SA by 10% for €400 (approximately $590 million). In comparison, Deutsch Telekom had spent nearly €4 billion since 2008 to acquire its existing 30% stake. Likewise, Fraport AG, a German company that owns or manages twelve airports around the world, announced interest in acquiring a 55% stake in Athens International Airport. Further, Czech power company CEZ AS indicated in April 2011 its interest in acquiring an equity position in Greece’s largest power supplier, Public Power Corp., as Greek officials sought to reduce debt levels through state-owned asset sales.

47. Id.
49. Id.
50. Id.
51. In fairness to the analysis presented in Part III(B), CBRE likely requires only a traditional, and not extraterritorial, application of 11 U.S.C. § 541 for U.S. bankruptcy court jurisdiction.
53. Id.
54. Id.
55. Id.
II. INCENTIVES IN FRAUDULENT TRANSFER LITIGATION AND HOW SUCH INCENTIVES MAY CAUSE EUROZONE DEALS TO REPLICATE RECENT HISTORY

A flurry of Eurozone distressed transfers creates a potential problem for foreign investors if two situations were to occur. First, the distressed party selling the assets would have to not survive either the immediate liquidity crisis or the broader economic rebalancing. This failure may initially take the form of an out-of-court restructuring, but could later result in a bankruptcy filing in U.S. courts under Chapters 11 or 15 of the Code. Second, the crisis that caused the opportunity reverses, and the market re-prices the asset at non-distressed levels. After such a recovery, the hindsight view of the original transaction appears significantly stilted—as if the distressed buyer pilfered the spoils of the unwilling seller and stole the crown jewels.

Although this characterization of the distressed transaction tends to inflate the original balance of power, such a hindsight view often leads critics to impugn the actions of the “vulture investor.”56 Vultures, a pejorative term for distressed purchasers, “are so named because they have a predilection for businesses that are dead or dying. . . . [Vultures are] betting that a company on its knees will once again stand up and resume walking.”57 The opinion of two such critics offended by a vulture’s success is particularly important: the now-bankrupt seller and its creditors. Significant rebounds in asset prices may lead the distressed seller, or the distressed seller’s creditors, to feel taken advantage of or even cheated. This potential situation may even discourage distressed purchasers from completing out-of-court transactions for fear that this unique form of “seller’s remorse” will incentivize avoidance actions.58

Fraudulent transfer laws would appear, at least initially, to allay these reservations.59 The party seeking avoidance must

57. Id.
58. See MOYER, supra note 10, at 201.
show that the consideration exchanged did not constitute “reasonably equivalent value” under an actual, quasi, or constructive fraudulent transfer theory. Each of these theories calculates “reasonably equivalent value” as it existed at the time of the transfer. Accordingly, a court must calculate value using industry valuation practices as of the time of the transfer. Such an analysis would likely preclude any recovery, even in distressed situations, because comparable transactions would usually provide a baseline for “reasonably equivalent value.” But the potential to recover valuable assets with successful avoidance actions provides an incentive to test the bounds of reasonably equivalent value.

The last three economic cycles have presented remarkably similar iterations of the situation described. None is more indicative of the incentives behind avoidance actions than ASARCO LLC v. Americas Mining Corporation. Before becoming what the Fifth Circuit described as “one of the most successful bankruptcies in the United States in history,”

60. See ASARCO, 396 B.R. at 337.
61. See id. at 355–57.
62. “During the globalization era, [the] . . . three bubbles and bursts . . . were Reagan’s junk-bond bubble, Clinton’s dot-com bubble, and Bush’s mortgage and housing bubble.” Chih Kwan Chen, The Rise and the Self-Destruction of the Globalization Scheme, FORCASTGLOBALECONOMY.COM § 6 (last updated Feb. 16, 2013), http://forcastglobaletonomy.com/ReviewForecast01/ReviewForecast01.htm. Describing the events leading to the late 1980s correction, vulture investor Harry Freund said, “[p]rices had gone up, everybody was rushing into [restructuring], and the values that we used to were not evident. Everything was just flooded with money, and ignorant money. Summer of 1989 there was an implosion . . . .” ROSENBERG, supra note 56, at 23.
63. See ASARCO, 396 B.R. at 278.
Americas Smelting and Refining Company’s (“ASARCO”) bankruptcy case was perhaps the largest and most complex environmental reorganization to date.66

For much of the twentieth-century, ASARCO was the leading copper producer in the United States.67 In 2005, faced with “[l]ow copper prices, labor strikes, environmental liabilities, asbestos claims,” and significant bond debts from a leveraged buyout, ASARCO sought Chapter 11 bankruptcy protection in the Southern District of Texas.68 The centerpiece of the eventual “100-cent plan”69 was ASARCO’s successful fraudulent conveyance claim against its parent corporation, Grupo Mexico, S.A.B. de C.V. (“Grupo”).70 ASARCO’s bankruptcy counsel, Baker Botts LLP, brought the avoidance action against Grupo to recover the “crown jewel” of ASARCO: a controlling equity interest in the Southern Peru Copper Company (“SPCC”).71 Low copper prices had depressed the value of the SPCC interest in 2001 after Grupo formed a no-asset company, Americas Mining Corporation (“AMC”), and pursued a leverage buyout of the interest.72

In short, the SPCC transaction was fraught with complications stemming from ASARCO’s perilous financial condition and AMC’s/Grupo’s tactics to force a deal. Among these complications were that (1) ASARCO had stopped paying various creditors and had technically defaulted on its US$450 million revolver by October 2001;73 (2) Grupo had maneuvered to prevent the advising investment banks from soliciting other offers.

68. Id.
71. Id. at 297–98, 304.
72. Id. at 302–03.
73. Id. at 305–06.
for the SPCC equity;\textsuperscript{74} (3) certain ASARCO board members had been asked to resign after withdrawing their consent for the SPCC transaction;\textsuperscript{75} and (4) valuation opinions from several investment banks were conflicted on the enterprise value of the transaction.\textsuperscript{76} In fact, after one restructuring advisor attempted to withdraw its fairness opinion, ASARCO's pre-bankruptcy restructuring counsel predicted the eventual fraudulent transfer lawsuit.\textsuperscript{77} Despite the myriad of complications, the SPCC transaction closed on March 31, 2003.\textsuperscript{78}

During the period starting the day after the SPCC transaction closed until the time of the fraudulent transfer proceeding, copper prices improved dramatically, rising from approximately US$0.71 per pound to more than US$3.50 per pound.\textsuperscript{79} The substantial improvement in copper prices buoyed the estimated value of the SPCC equity interest from an estimated US$811.4 or US$853 million, to well over US$3 billion.\textsuperscript{80} Incentivized by the prospect of recovering the “crown jewel” asset, Baker Botts brought the fraudulent transfer proceeding to recover the SPCC interest on behalf of ASARCO’s creditors.\textsuperscript{81} Following a four-week bench trial, the district court entered a voluminous, 186-page opinion and order unwinding the SPCC transaction.\textsuperscript{82} The court concluded that the price paid for the SPCC interest constituted “reasonably equivalent value,” which defeated the constructive fraudulent transfer theory,\textsuperscript{83} but that the SPCC

\textsuperscript{74} Id. at 308.
\textsuperscript{75} Id. at 313–14.
\textsuperscript{76} Id. at 307.
\textsuperscript{77} Id. at 312–13.
\textsuperscript{78} Id. at 313.
\textsuperscript{79} Id. at 303, 357.
\textsuperscript{80} See id. at 350, 355 (calculations made by author based on figures provided by the court).
\textsuperscript{81} Id. at 315.
\textsuperscript{82} Id. at 278–433.
\textsuperscript{83} Id. at 364. Over a span of forty pages, the court analyzed “reasonably equivalent value” extensively using three different common valuation methods: (1) Stock Price Valuation, (2) Market Transaction Multiples, and (3) Discounted Cash Flow. Id. at 342. A stock price valuation applies a premium or discount to the historical trading averages of a public equity, but requires an efficient market to serve as a viable value indication. Id. at 342–45. Although the transaction multiple method is a common industry practice, it was not a good indication of the SPCC equity value because the complexities of the case eliminated the field of comparable transactions. Id. at 352–57, n.68. The
transaction was still avoidable as an “actual” fraudulent trans-
fer.84

In addition to the incentive for debtors in avoidance actions, 
ASARCO provides an example of the incentive for the counsel 
of the debtor in possession to bring avoidance proceedings or 
take other actions to augment the estate.85 The Fifth Circuit 
affords bankruptcy courts the discretion to enhance attorneys’ 
fees in the rare and exceptional case where counsel accomplis-
hes a substantial recovery for their clients that would not 
have otherwise occurred without their efforts.86 Based on the 
“significant hurdles” faced and the “rare and extraordinary” 
results produced,87 the bankruptcy court in ASARCO awarded 
Baker Botts a US$4 million fee enhancement for its successful 
avoidance of the SPCC transaction.88 Other firms received simi-

court relied on the Discounted Cash Flow analysis, which considers the fu-
ture cash flows of an investment, to arrive at a valuation and applied a dis-
count rate to arrive at present value. Id. at 357–62.
84. Id. at 386. In addition to the statutory badges, the court considered 
suggested badges of fraud, including: (1) pilfering the “crown jewel” asset, (2) 
order of payment from proceeds, (3) remaining past due obligations left un-
paid, (4) ability to pay other creditors, and (5) competitive bidding and sale to 
highest bidder. Id. at 374–78.
85. See In re ASARCO LLC, No. 05-21207, 2011 WL 2974957, *35–37 
86. CRG Partners Grp., L.L.C. v. Neary (In re Pilgrim’s Pride Corp.), 690 
F.3d 650, 652–53 (5th Cir. 2012) (affirming a fee enhancement of 16%); Lawl-
er v. Teofan (In re Lawler), 807 F.2d 1207, 1213–14 (5th Cir. 1987) (affirming 
fee enhancement at factor of 1.7 over the lodestar); Rose Pass Mines, Inc. v. 
Howard, 615 F.2d 1088, 1092 (5th Cir. 1980) (enhancing fees by 16%); Wolf v. 
Frank, 555 F.2d 1213, 1218 (5th Cir. 1977) (enhancing fees by 33%); but cf. 
“arbitrary” fee enhancement of 75% in an action brought under 42 U.S.C. 
§ 1983). The bankruptcy court in ASARCO distinguished Perdue, saying that 
“a civil-rights case that does not even contain the word ‘bankruptcy’” should 
not displace “decades of established bankruptcy jurisprudence.” In re 
ASARCO, 2011 WL 2974957, at *36. The Fifth Circuit likewise rejected Per-
due as an absolute bar to fee enhancements in bankruptcy, noting in another 
matter in the ASARCO case that “enhancements are possible in situations 
not delineated by Perdue.” Pilgrim’s Pride, 690 F.3d at 664.
88. Id. at *37. Baker Botts’ total fees for the ASARCO case, including the 
fee enhancement, exceeded US$117 million. Id. at *41. The court calculated 
the fee enhancement by applying a 10% increase to the 58,781.2 hours alone 
that Baker Botts’ attorneys spent on the SPCC fraudulent transfer litigation.
lar fee enhancements for asbestos litigation in which claimants received a settlement of almost US$1 billion.89 These fee enhancements were upheld by the district court90 and were pending a decision on appeal to the Fifth Circuit at the time of publication.91

**ASARCO** demonstrates that foreigners facing litigation in U.S. courts may risk losing their sweetheart deal and having damages or fee enhancements assessed.92 Depending on the assets exchanged in distressed Eurozone transactions, improvements in the broader economic climate or even intermittent liquidity fixes may create similar financial incentives as rising copper prices did in **ASARCO**. Likewise, the size of the transactions discussed in **ASARCO**, presumably comparable to those in the Eurozone, provide significant incentives for debtors and their creditors to challenge the two and half hurdles.

### III. The Two and a Half Hurdles to U.S. Adjudication of Foreign Fraudulent Transfers

Distressed Eurozone opportunities, counterparty failures, and improving economics may all serve to create incentives similar to those in **ASARCO** to bring avoidance actions. The opportunity appears to be ripe, but the question remains: Can U.S. bankruptcy courts exercise both jurisdiction and constitutional authority to act? First, litigants must demonstrate that the failures of the 2005 Amendments to the Code, which added Chapter 15, allow courts to shun cooperation in cross-border

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Id. at *37 n.103. The debtor in possession originally approved a fee enhancement for Baker Botts of US$22.64 million, but the bankruptcy court reduced the award upon challenge of the reorganized debtor. Sealed Brief for Baker Botts, LLP at 35, ASARCO LLC v. Jordan Hyden Womble Culbreth & Holzer, PC (In re ASARCO LLC), No. 12-40997 (5th Cir. Feb. 19, 2013).


91. See ASARCO LLC v. Jordan Hyden Womble Culbreth & Holzer, PC (In re ASARCO LLC), No. 12-40997 (5th Cir. filed Sept. 24, 2012).

insolvencies, contrary to statutory guidance. Empirical evidence suggests this argument creates only a "half hurdle." After they prove that Chapter 15 does not preclude U.S. adjudication, litigants must prove that the Code otherwise allows courts to reach foreign transactions. A split over whether bankruptcy courts may apply the Code extraterritorially has developed since the addition of Chapter 15 in 2005. As of yet, the Supreme Court has denied the opportunity to settle the dispute. Thus, the extraterritoriality hurdle would require carefully choosing the proper forum and then successfully arguing that U.S. courts’ jurisdiction under the Code extends beyond the territorial borders of the United States.

The final hurdle to adjudication in U.S. bankruptcy courts is whether these courts have constitutional authority to determine fraudulent transfer actions of foreign property. The Supreme Court’s 2011 decision in *Stern v. Marshall* revived a formalist approach to the separation of powers regarding bankruptcy courts’ constitutional authority. While litigants have struggled to reconcile its impact on domestic fraudulent trans-

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96. See French, 549 U.S. at 815.
fer actions,99 Stern also provides the final hurdle for U.S. bankruptcy courts to reach foreign transactions without offending Article III.

A. The Half Hurdle of Chapter 15 of Title 11.

Congress created the first hurdle to U.S. courts' jurisdiction with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).100 Among other significant changes to the Code, BAPCPA added the much-anticipated Chapter 15, which created new protocols for handling cross-border insolvency cases.101 Chapter 15 integrated many of the changes proposed by the United Nations Commission on International Trade Law (“UNCITRAL”) in its Model Law on Cross-Border Insolvency.102 UNCITRAL’s Model Law was intended to encourage a universalist approach to cross-border insolvencies and to promote continuity and predictability between courts in different countries.103

Before BAPCPA’s passage, many U.S. bankruptcy scholars argued that international bankruptcies should not incorporate a universalist principle.104 Professor Lynn LoPucki has advocated for a territorialist approach, which would limit a country’s judicial powers to enforcement only within its territorial

101. Id.
borders.105 While supporting a theory of universalism, another prominent U.S. bankruptcy scholar, Professor Jay L. Westbrook, has acknowledged that “it seems unrealistic to think that universalism will be accepted absent roughly similar laws.”106 UNCITRAL’s Model Law would appear to address Professor Westbrook’s later qualification by creating harmonious laws among different territorial jurisdictions. But to affect a truly universalist change, all jurisdictions that might be forced to cooperate by cross-border insolvencies must have first adopted either the Model Law or laws otherwise comparable.107

As of January 2012, only nineteen countries have adopted the Model Law, with China and India conspicuously absent from the list.108

The United States has begun harmonizing its bankruptcy procedures with other international jurisdictions,109 but Chapter 15 does not provide a clear answer to U.S. courts’ ability to reach distressed Eurozone transactions. BAPCPA and Chapter 15 improved U.S. recognition of proceedings and the ability of U.S. courts to apply foreign law to U.S. proceedings.110 But “neither Chapter 15 nor any other part of the Code extensively covers the opposite question—the degree to which U.S. courts can apply U.S. bankruptcy provisions abroad.”111

Empirical evidence suggests that Chapter 15 may not be “as universalist as its proponents claim it to be.”112 In fact, the evidence suggests that Chapter 15 may be an ineffective solution “to resolve conflicting priority rules between the United States and foreign proceedings.”113 In one sense, “Chapter 15 . . . does not significantly further cooperation because it applies only to

105. Id.
107. See id.
111. Id.
112. Leong, supra note 94, at 8.
113. Id. at 9.
debtor already subject to a foreign proceeding.”¹¹⁴ Chapter 15 also requires that a U.S. court determine whether its case is ancillary to a “foreign main proceeding,”¹¹⁵ which the Code defines as “a foreign proceeding pending in the country where the debtor has the center of its main interests.”¹¹⁶ U.S. courts have “recognized foreign proceedings in almost every Chapter 15 case” since BAPCPA’s passage in 2005,¹¹⁷ but empirical data indicates the courts have still withheld jurisdiction over some assets even after recognition in a vast majority of cases—77.3% to be precise.¹¹⁸ In only 9.1% of cases did the U.S. court entrust to foreign courts all distribution of estate assets where U.S. creditors were at stake.¹¹⁹

The Fifth Circuit recently affirmed one example of a U.S. bankruptcy court applying U.S. law in contradiction to foreign law. The bankruptcy court in In re Vitro, S.A.B. de C.V. refused to enforce a confirmed concursus plan from a Mexican court.¹²⁰ The Mexican plan would have paid equity classes before more senior debt classes—a clear violation of the Absolute Priority Rule¹²¹—and released from claims by Vitro’s creditors several third party subsidiaries in the United States that were not a part of the bankruptcy case.¹²² In affirming the bankruptcy

¹¹⁴. Developments in the Law, supra note 110, at 1300.
¹¹⁶. Id. § 1502(4).
¹¹⁷. Leong, supra note 94, at 7.
¹¹⁸. Id. at 8, 14–15, fig.1. The 77.3% figure comes from two categories. First, Leong’s findings show U.S. “courts granted entrustment in only 45.5% of cases where foreign proceedings were recognized.” Id. at 7. Second, “[w]hen such entrustment was granted, 31.8% of cases were accompanied by qualifying factors,” which included imposing U.S. priority laws or requiring assurances such priority distribution schemes would be followed. Id. at 1.
¹¹⁹. Id. at 14.
court’s denial of confirmation,123 the Fifth Circuit has provided an example of U.S. courts applying U.S. law and shunning foreign law.

The empirical and substantive evidence of U.S. courts retaining control illustrate the inability of Chapter 15 to address whether U.S. courts can apply U.S. bankruptcy laws extraterritorially. Even in situations where a Eurozone debtor is subject to a foreign proceeding, the current trend since BAPCPA’s passage indicates that U.S. courts would not willingly part with jurisdiction without some baseline qualifications.124 Where no such proceeding exists, litigants in future avoidance actions involving Eurozone distressed assets will therefore face only a “half” hurdle to convincing a U.S. court to apply jurisdiction in light of Chapter 15. But litigants must subsequently address the more daunting hurdle—explaining the statutory and constitutional authority for extraterritorial jurisdiction in bankruptcy courts amidst the confusion surrounding questions left unanswered by Chapter 15.

B. The U.S. Circuit Split Over the Extraterritorial Application of Title 11

Following the passage of BAPCPA and Chapter 15, U.S. courts have maintained the ability to apply U.S. law to issues involving foreign-based property. Courts are generally faced with two questions before they are able to apply U.S. law outside of its territorial borders: (1) Can the statute be applied extraterritorially, and (2) Does such an application violate principles of international comity?125 For U.S. courts to reach distressed Eurozone transactions, litigants must prove both that Congress intended for the federal law to apply extraterritorially and that the intrusion into international affairs does not violate comity between U.S. law and Eurozone law.126

123. Ad Hoc Group of Noteholders, 701 F.3d at 1069. The Fifth Circuit affirmed on the grounds that “the Bankruptcy Code precludes non-consensual, non-debtor releases,” and thus did not reach the question of whether the concursus plan “would be manifestly contrary to the fundamental public policy of the United States.” Id.
124. See id.
126. See id.
1. Analysis of Statutory Jurisdiction

It is well settled that “Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”127 In addition, it is presumed that “when it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.”128 A presumption thus exists “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”129 This presumption may be overcome by some “clearly expressed purpose” to apply the law extraterritorially,130 demonstrated by the three-factor test the Supreme Court announced in Foley Brothers, Inc. v. Filardo.131 This test provides that the courts must review the statutory language, the statute’s legislative history, and any administrative interpretations of the statute.132

Section 541 of the Code defines what property and interests belonging to a debtor constitute the bankruptcy estate over which the court has custody.133 Applying the Foley Brothers factors, the operative language of § 541 provides that as of the commencement of a case under Title 11, the estate “is comprised of all the following property, wherever located and by whomever held.”134 Congress amended § 70a of the Bankruptcy Act, the predecessor of § 541, in 1952 to include the phrase “wherever located.”135 The House Report connected with the amendment explained that the phrase makes “clear that a trustee in bankruptcy is vested with the title of the bankruptcy in property which is located without, as well as within, the

128. Id. at 258 (quoting Argentine Republic v. Amerado Hess Shipping Corp., 488 U.S. 428, 440 (1989)).
129. Id. at 248 (quoting Foley Bros., 336 U.S. at 285).
130. Foley Bros., 336 U.S. at 286.
131. Id. at 285–88.
132. Id.
134. Id. § 541(a) (emphasis added).
United States." Legislative reports from the 1978 reforms give less specific guidance, seemingly incorporating by reference all property included under § 70a of the Bankruptcy Act. Congress's failure to retreat from the 1952 report in either 1972 or any of the subsequent amendments would appear to indicate a tacit adoption. The third Foley Brothers factor does not apply in a § 541 analysis because no agency interpretations are available.

Despite the apparent extraterritorial application of § 541 using the Foley Brothers factors, courts remain split as to whether § 541 may apply extraterritorially to incorporate foreign-based property. The dispute centers around whether the widely recognized extraterritorial application of § 541 also includes the trustee's avoidance powers under § 548. The academic community has articulated eloquent arguments for both sides of the debate. Nonetheless, the Supreme Court has not
yet spoken, instead rejecting the opportunity to settle the circuit split over the Code’s extraterritorial application.142

As a result, courts remain split over whether the language of § 541 incorporates foreign transferred property pre-petition.143 The Fifth Circuit has twice held that the trustee’s strong-arm powers under Title 11 may be applied extraterritorially through § 541, either because the estate retains an equitable interest in fraudulently transferred property,144 or because the estate regains an equitable interest in fraudulently transferred property following a § 550 recovery order.145 Although the Fifth Circuit’s logic has been criticized as circular,146 at least one court has concluded that because fraudulent transfers involve transitory law, such actions may be brought wherever personal jurisdiction has been established.147

2. Analysis of International Comity

In addition to concerns about § 548 importing extraterritoriality from § 541, litigants must also address principles of inter-

142. French, 440 F.3d 145. It is possible that the Supreme Court has yet to rule on extraterritoriality in this context for fear that such a ruling would violate the separation of powers. See Welch, supra note 138, at 559 n.51. Also of note, the Supreme Court denied certiorari in French before deciding Morrison v. National Bank of Australia, 130 S. Ct. 2869 (2010), a case in which the Supreme Court “swiftly swept away a half-century of lower courts treating the issue of extraterritorial reach of the securities law as a question of subject matter jurisdiction.” Jared L. Kopel et al., Current Topics on Securities Litigation, in 1850 PRACTISING L. INST., CORP. L. & PRAC. COURSE HANDBOOK SERIES 365, 391 (2010).
143. Compare Cullen Ctr. Bank & Trust v. Hensley (In re Criswell), 102 F.2d 1411, 1415–16 (5th Cir. 1997), and Am. Nat’l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.), 714 F.2d 1266, 1273 & n.7, 1275–76 (5th Cir. 1983), with Welch, supra note 138, at 563 (citing Barclay, 347 B.R. at 718) (“Irrespective of the extraterritorial application of § 541, foreign transferred property is not within the estate.”).
144. See Cullen, 102 F.3d at 1415–16.
145. See MortgageAmerica, 714 F.2d at 1273 & n.7.
146. See Welch, supra note 138, at 563–64 (stating that the argument that fraudulently transferred property is within bankruptcy court’s in rem authority “simply assumes what it seeks to prove. Without adopting this circular argument, extraterritorial jurisdiction cannot be premised on notions of domestic jurisdiction”).
national comity. Courts look to factors such as, (1) the regulations and laws of the potentially conflicting foreign territory; (2) the connection and economic activities between the parties and this territory; (3) the likelihood of conflict of laws; and (4) the foreign territory’s interest in regulating the transaction. At least one court has required that an actual conflict between foreign and domestic law exist in order to violate international comity. Moreover, Chapter 15 would appear to settle concerns about international comity and provide statutory cover for courts to reach Eurozone transactions, at least on its face, especially if the foreign jurisdiction has adopted UNCINTRANS’s Model Law and embraced universalism.

3. Alternative Options to Overcoming the Extraterritoriality Hurdle

If litigants are unable to overcome the presumption against extraterritoriality using the Foley Brothers factors, one option remains—prove that the presumption never arose. First, the presumption does not arise if the transfer occurred in the United States. As many transactions touch several territorial jurisdictions simultaneously, some courts avoid the presumption if the United States was the “center of gravity.” Likewise, the presumption does not arise if the property recovered was already considered part of the estate, either through an action under 11 U.S.C. § 549, or by a convincing argument extending the inclusion date for the property before the petition date.

149. Diaz-Barba, 2010 WL 2079738, at *11.
150. Id. at *7 (citing Omega S.A. v. Costco Wholesale Corp., 541 F.3d 982, 987 (9th Cir. 2008)).
152. Diaz-Barba, 2010 WL 2079738, at *4, *10 (determining that no presumption arose because, although transfer occurred post-petition, the transferee was debtor’s alter ego, the transfer applied nunc pro tunc, and the transferred property was considered part of the estate).
153. See West v. Freedom Med., Inc. (In re Apex Long Term Acute Care—Katy, L.P.), 465 B.R. 452, 464 (Bankr. S.D. Tex. 2011) (concluding that property transferred during the preference period was effectively property of the
Litigants may also argue that the presumption against extraterritoriality does not arise in bankruptcy proceedings because bankruptcy is materially different from other legal contexts and requires special consideration. In French, one judge concurred to emphasize his view that the Supreme Court’s “strong presumption against extraterritoriality” remained “intact” after the panel’s decision. Judge Wilkinson distinguished prior precedent because, in the context of anti-discrimination or hourly wage laws, “ease of administration is not the raison d’être, and congressional intent for extraterritorial application is considerably less clear.” As a result, litigants must argue that bankruptcy should be considered separately, and not be grounds “to set forth general pronouncements on extraterritoriality.”

Finally, litigants seeking to reach Eurozone transactions may be able to use the Affiliate Rule to file in a circuit willing to exercise jurisdiction extraterritorially. This rule allows a company to file either in the jurisdiction of its principal place of business, or in that of an affiliated company. Of course, the rule cannot be used offensively to establish business in a favorable jurisdiction solely for the purpose of filing bankruptcy, but it “is the rare case, indeed, in which a debtor’s business does not have some international aspect.” In the age of global business operations, the Affiliate Rule casts a wide-enough net to reach most major U.S. jurisdictions for bankruptcy filings.

If successful in overcoming the hurdles of Chapter 15 and extraterritoriality, litigants will have gained access to, at the minimum, U.S. district courts. But the final hurdle will deter-

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155. Id. at 155.
156. Id. (emphasis added).
157. Id.
159. Id. § 1408(2).
160. See In re Reichmann Petroleum Corp., 364 B.R. 916, 921 (Bankr. E.D. Tex. 2007) (denying venue transfer where assets were acquired solely for purposes of manipulating venue).
161. Stratton, supra note 151, at 44 (emphasis added).
mine if litigants can obtain expedited treatment under the “rocket dockets” of U.S. bankruptcy courts.

C. Questions of Bankruptcy Courts’ Constitutional Authority after Stern v. Marshall

Once a litigant convinces a court to exercise jurisdiction extraterritorially, the Supreme Court’s watershed decision in *Stern v. Marshall* 162 may provide yet another constitutional hurdle. The *Stern* Court made clear that not every proceeding within a bankruptcy court’s jurisdiction is necessarily within its constitutional reach.163 In fact, although *Stern* considers the authority of bankruptcy courts, the decision “is not really a bankruptcy decision at all; it is a constitutional separation of powers decision.”164

Article III of the U.S. Constitution provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”165 Bankruptcy judges are not Article III judges; they lack the hallmark characteristics of life tenure and salary protection.166 Instead, bankruptcy judges’ powers come from Article I of the U.S. Constitution, which empowers Congress “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”167 As a result, bankruptcy courts exercising the judicial power of the United States would constitute one branch of the government aggrandizing its powers to the detriment of another branch, violating the separation of powers.168 Although money and job security may appear to be insignificant reasons for such a dis-

162. 131 S. Ct. 2594 (2011).
163. See id. at 2608.
166. Stern, 131 S. Ct. at 2600–01.
168. See INS v. Chadha, 462 U.S. 919, 974 (1983) (rejecting the one-house veto as unconstitutional because it aggrandized the powers of the legislative branch to the detriment of the executive branch, thus violating the separation of powers).
tinction, the Framers of the Constitution recognized that these two features protect the courts from tyranny.169

The Stern Court held a non-Article III court violated the separation of powers by entering a final order in a common law case reserved for Article III courts.170 Although the holding in Stern was self-limiting,171 “a maelstrom of opinions and articles have been written about the scope of Stern, ranging in tone from ‘much ado about nothing’ to ‘the end of the bankruptcy world as we know it.’”172 Caught squarely in the middle is whether bankruptcy courts have authority to enter final orders in fraudulent transfer actions.

1. Statutory Framework for Bankruptcy Courts’ Jurisdiction

To explain the implications of Stern, some discussion of the authority allocation between district courts and bankruptcy courts is necessary. Article I of the U.S. Constitution empowers Congress to create laws regarding the debtor-creditor relationship in bankruptcy.173 Congress exercised its Article I powers in 1978 to replace the then-existing Bankruptcy Act with the present Bankruptcy Code.174 Like other federal courts, bankruptcy courts’ jurisdiction is therefore “grounded in, and limited by, statute.”175 Following the Supreme Court’s decision in Northern Pipeline v. Marathon,176 Congress revisited the bankruptcy al-

169. See The Federalist No. 78 (Alexander Hamilton).
170. See Stern, 131 S. Ct. at 2609.
171. See id. at 2620 (“We conclude today that Congress, in one isolated respect, exceeded” its authority.) (emphasis added); see also In re Salander O’Reilly Galleries, 453 B.R. 106, 115–16 (Bankr. S.D.N.Y. 2011) (“Stern is replete with language emphasizing that this ruling should be limited to the unique circumstances of that case . . . .”).
location scheme and restructured jurisdictional allocations under Title 28.\textsuperscript{177}

Under the revised allocation framework, federal district courts have original and exclusive jurisdiction for all \textit{cases} arising under Title 11.\textsuperscript{178} Section 157(a) provides statutory authority for district courts to refer jurisdiction to the bankruptcy courts for those cases falling “under title 11 and \textit{any or all proceedings} arising under title 11 or arising in or related to a case under title 11.”\textsuperscript{179} By way of referral, bankruptcy courts have in rem authority over “all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.”\textsuperscript{180} District courts supervise referrals with the ability to withdraw the reference at any time by their own motions.\textsuperscript{181}

Even looking beyond the plain language of the referral statute, the Supreme Court has recognized that “Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.”\textsuperscript{182} Before her appointment to the Supreme Court, Justice Sotomayor defended this principle and noted that the Supreme Court and other courts “have broadly construed the jurisdictional grant in [the 1984 Act].”\textsuperscript{183} Moreover, the express “language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.”\textsuperscript{184}

Congress allocated original jurisdiction to bankruptcy courts to hear and determine proceedings concerning estate property

\begin{itemize}
\item \textsuperscript{178} 28 U.S.C. § 1334(a) (2006).
\item \textsuperscript{179} Id. § 157(a) (emphasis added).
\item \textsuperscript{180} Id. § 1334(e). \textit{See also} Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447–48 (2004) (“Bankruptcy courts have exclusive jurisdiction over a debtor’s property, wherever located, and over the estate.”).
\item \textsuperscript{181} 28 U.S.C. § 157(d).
\item \textsuperscript{182} Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).
\item \textsuperscript{183} Universal Oil Ltd. v. Allfirst Bank (\textit{In re} Millenium Seacarriers, Inc.), 419 F.3d 83, 99 (2d Cir. 2005).
\item \textsuperscript{184} Celotex, 514 U.S. at 308.
\end{itemize}
that arise in a bankruptcy case or under Title 11. Arising in” jurisdiction pertains to matters that could only arise in a case under Title 11. By comparison, “arising under” jurisdiction includes proceedings created by Title 11. Taken together, actions “arising in” or “arising under” comprise core proceedings within bankruptcy courts’ jurisdiction. Bankruptcy courts may hear and determine these core matters and enter final orders, which are subject to appellate review by the district court under a “clearly erroneous” standard of review.

2. Why Stern Creates a Problem for the Current Framework

Instead of “arising in” or “arising under” jurisdiction, Stern involved only the third type of original bankruptcy court jurisdiction under § 157(a): proceedings “related to” the bankruptcy. A proceeding invokes “related to” jurisdiction when the “action is related to bankruptcy [in that] the outcome could alter the debtor’s rights, liabilities, options, or freedom of action.” Put simply, “a civil proceeding is related to a [T]itle 11 case if the action’s outcome might have any conceivable effect on the bankrupt estate.” “Related to” jurisdiction stands on an opposite edge of the jurisdictional canyon from core proceedings allocated under § 157(b)(1). Proceedings invoking only “related to”—and not “arising in” or “arising under”—jurisdiction are not core proceedings. Absent consent of the parties under § 157(c)(2), the statute at most authorizes bankruptcy courts in “related to” proceedings to submit proposed findings of fact and conclusions of law to the district court for a de novo review.

186. See Wilborn v. Wells Fargo Bank (In re Wilborn), 609 F.3d 748, 752 (5th Cir. 2010).
189. See id. at 2604 (citing 28 U.S.C. § 158; BANKR. R. PROC. 8013).
190. Stern, 131 S. Ct. at 2605.
193. Cf. Stern, 131 S. Ct. at 2605 (defining core proceedings as “arising in” or “arising under” Title 11).
Stern involved a dispute over a considerable inheritance, and a widow’s attempt to recover in bankruptcy court for a tort claim against her late husband’s son. The tort claim was not predicated on the bankruptcy, meaning it neither arose nor was it tried exclusively in connection with a case under Title 11. Therefore, because of the conceivable effect on the estate, § 157(c) should have allocated jurisdiction over the purely state-law counterclaim under the “related to” or non-core framework. But because Congress included counterclaims by the estate in the non-exhaustive list of core proceedings in the 1984 Act, the bankruptcy court relied on this list to enter a final order.

The Stern Court rejected the defunct label under § 157(b)(2)(C) for state law counterclaims as core proceedings, but declared only this narrow sub-provision to be unconstitutional. Absent consent, which the Court determined was not given for the counterclaim, the bankruptcy court’s only authority under the § 157 allocation scheme was to submit proposed findings to the district court. Even assuming that the Court’s holding in Stern affected proceedings that did not invoke solely “related to” jurisdiction, a bankruptcy court may still hear and determine such matters after Stern with the consent of the parties. Chief Justice Roberts defined “core proceedings [as] those that arise in a bankruptcy case or under Title 11.” Thus the Court is referring to the only remaining original bankruptcy jurisdiction—”related to”—when it states, “parties may consent to entry of final judgment by [a] bankruptcy judge in non-core case.”

195. See Stern, 131 S. Ct. at 2601.
196. Id. at 2618; see also 28 U.S.C. § 157(a).
199. See Stern, 131 S. Ct. at 2602.
200. See id. at 2608, 2620.
201. See id. at 2614.
204. Stern, 131 S. Ct. at 2605.
205. Id. at 2607 (citing 28 U.S.C. § 157(c)(2)).
any other core proceeding under § 157(b), nor renounced bankruptcy courts’ ability to hear and submit proposals and conclusions under the § 157(c)(1) allocation scheme.\textsuperscript{206}

What the Stern decision has done is to revive arguments over significant dicta in the decision of Granfinanciera, S.A. v. Nordberg.\textsuperscript{207} The Supreme Court in Granfinanciera held that a foreign party subjected to a fraudulent transfer action retained the right to a jury trial under the Seventh Amendment because the proceeding was legal, not equitable, and because it closely mirrored a common law action.\textsuperscript{208} Although it decided the case on Seventh Amendment grounds, the Court indicated that the fraudulent transfer action was a private and not public right, despite arising under Title 11.\textsuperscript{209} The opinion in Granfinanciera echoed many of the Supreme Court’s earlier concerns in Marathon about non-Article III courts and the scope of public rights,\textsuperscript{210} although it specifically rejected any limitation that would have mandated that the federal government be a party in all cases involving public rights.\textsuperscript{211}


\textsuperscript{207} 492 U.S. 33 (1989).

\textsuperscript{208} Id. at 46–47, 50.

\textsuperscript{209} Id. at 56.


\textsuperscript{211} Compare Granfinanciera, 492 U.S. at 53–54, with Stern v. Marshall, 131 S. Ct. 2594, 2620–21 (2011) (Scalia, J., concurring) (suggesting that he would require the government to be a party for a fraudulent transfer to fit within the public rights exception).
3. How Lower Courts Are Grappling with Stern’s Implications

This revival of Granfinanciera, along with the maelstrom surrounding Stern, has created considerable consternation among bankruptcy courts and practitioners trying to grapple with its implications.212 In addressing Stern, lower courts of all levels have fallen into either the narrow, neutral, or expansive interpretive camps.213 Despite the self-limiting holding, one commentator advocating for an expansive view of Stern astutely summarized his camp’s general sentiment:

“Justice Breyer may not have been able to command a majority of the court and thus be ‘constitutionally correct,’ but he has definitely been right about one thing: Justice Roberts’s statement that as a ‘practical matter’ the Stern v. Marshall decision ‘does not change all that much’ was either tongue-in-cheek or decidedly incorrect.”214

Within the context of fraudulent transfers brought under the Code, the expansive camp may have an argument that the progeny of Marathon, Granfinanciera, and Stern preclude adjudication in bankruptcy courts.215

212. See Alaniz, Navigating Through the Post-Stern World, supra note 98, at 2–3; Springer, Supreme Court’s Answer, supra note 98, at 1.


214. Kuney, supra note 164, at 6 (emphasis added). Although the facts of Stern were limited to 28 U.S.C. § 157(b)(2)(C), the decision has broad implications on the other proceedings included in the non-exhaustive list under § 157(b)(2), including fraudulent conveyances. See id.

Several circuits have addressed *Stern* issues in bankruptcy and fraudulent transfer contexts.\(^{216}\) The Fifth Circuit held that *Stern* does not affect the jurisdictional allocation for magistrate courts,\(^{217}\) and later the circuit reemphasized its reasoning in a bankruptcy context.\(^{218}\) Additionally, the Seventh Circuit rejected bankruptcy courts’ authority in an “arising in” proceeding

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\(^{216}\) See, e.g., Exclusive Benefits Ins. Agency v. Arkinson (*In re Bellingham Ins. Agency, Inc.*), 702 F.3d 553, 561–65 (9th Cir. 2012) (holding “bankruptcy courts ha[d] [constitutional] authority [only] to hear and enter proposed findings of fact and conclusions of law in . . . fraudulent conveyance” claims against non-creditors under 11 U.S.C. § 548(a)(2) because such claims did not fall within the public rights exception); Waldman v. Stone, 698 F.3d 910, 920–23 (6th Cir. 2012) (holding bankruptcy court lacked constitutional authority to enter final judgment on state law fraud claims, but had authority to enter order disallowing and discharging the claims); Onkyo Eur. Elecs. GMBH v. Global Technovations Inc. (*In re Global Technovations Inc.*), 694 F.3d 705 (6th Cir. 2012) (determining that bankruptcy court had constitutional authority to rule on fraudulent transfer action and good faith transfer-fee defense under state law where defendants had filed a proof of claim); Lovald v. Falzerano (*In re Falzerano*), 686 F.3d 885, 887 n.2 (8th Cir. 2012) (declining to address whether *Stern* prevented bankruptcy court from issuing final order in turnover adversary proceeding); Pfizer Inc. v. Law Offices of Peter G. Angelos (*In re Quigley Co.*), 676 F.3d 45 (2d Cir. 2012) (holding bankruptcy court had jurisdiction and constitutional authority to issue injunction over asbestos-related suits pursuant to 11 U.S.C. § 524(g)); DiVittorio v. HSBC Bank USA, NA (*In re DiVittorio*), 670 F.3d 273 (1st Cir. 2012) (concluding *Stern* did not affect constitutional authority of bankruptcy court to render decision in adversary proceeding involving failure to state a claim and waiver of rights under a loan agreement); Ortiz v. Aurora Health Care, Inc. (*In re Ortiz*), 665 F.3d 906 (7th Cir. 2011) (holding bankruptcy court did not have constitutional authority to render final judgment in adversary proceeding for state law claims of improper medical patient disclosure because claims involved private rights).

\(^{217}\) See Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399, 409 (5th Cir. 2012). The statute allocating authority for magistrate courts is so similar to 28 U.S.C. § 157 in its application that a constitutional decision on one is often viewed as affecting the other. See Kuney, *supra* note 164, at 8; Alaniz, *Navigating Through the Post-Stern World*, *supra* note 98, at 20–22.

\(^{218}\) See CRG Partners Group, LLC v. Neary (*In re Pilgrim’s Pride Corp.*), 690 F.3d 650, 666–67 (5th Cir. 2012).
seeking damages provided for by a state statute regarding the disclosures of confidential medical records.\footnote{219}{See Ortiz, 665 F.3d at 915.} And the Ninth Circuit recently issued an expansive reading of Stern, holding that a fraudulent conveyance claim against a non-creditor brought under 11 U.S.C. § 548 did not fall within the public rights exception\footnote{220}{Exclusive Benefits, 702 F.3d at 561.} and that a bankruptcy court was authorized only to issue proposed findings of fact and conclusions of law.\footnote{221}{Id. at 565.}

If bankruptcy courts can adjudicate fraudulent transfers after Stern, it will likely be through the public rights doctrine, a judicially created exception to Article III adjudication.\footnote{222}{But see id. at 564 (rejecting a public rights argument in a § 548 case).} The exception is linked to Congress’s Article I legislative powers,\footnote{223}{See Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593–94 (1985).} Congress may except three types of powers from Article III determinations: (1) territorial courts, (2) courts martial, and (3) cases involving public rights.\footnote{224}{See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–67 (1982). Depending on the desired persuasion, parties may wish to describe public rights as a “doctrine” or “exception.” See id. at 67–69.} Cases falling within these three categories “may be removed from [Article] III courts and delegated to legislative courts or administrative agencies for their determination.”\footnote{225}{Id. at 70.} Although the public rights doctrine was first applied to a dispute between the government and an individual,\footnote{226}{Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 283–85 (1855).} it has since been recognized to include actions where the government is not a formal party.\footnote{227}{See Union Carbide, 473 U.S. at 585–86. Although the doctrine continued to be applied in similar procedural settings after Murray’s Lessee, the inquiry of whether a right is public, rather than private, is “not to mere matters of form but to the substance of what is required.” Id. at 586 (quoting Crowell v. Benson, 285 U.S. 22, 53 (1932)). Justice Scalia’s concurrence in Stern suggests that he would require the government to be a party for a fraudulent transfer to fit within the public rights exception. See Stern v. Marshall, 131 S. Ct. 2594, 2620–21 (2011) (Scalia, J., concurring).} Congress may create rights under a public regulatory scheme that bear “many of the characteristics of a public right,” even when the right is
asserted between individuals.\textsuperscript{228} Similarly, Congress may also “create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”\textsuperscript{229} When Congress creates such a statutory right, “it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.”\textsuperscript{230}

A plurality of the \textit{Stern} Court distilled the test for the public rights exception to find that Congress may allocate adjudication of public rights that “derive[] from a federal regulatory scheme” or are “integrally related to a particular federal government action.”\textsuperscript{231} But Article III would serve little “purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s ‘judicial Power’ on entities outside Article III.”\textsuperscript{232} Accordingly, the \textit{Stern} Court tempered any test for public rights with a broader historical test: “When a suit is made of the \textit{stuff} of the traditional actions at common law tried by the courts at Westminster in 1789, and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts.”\textsuperscript{233} Thus, jury trial rights attach when suits—both “the mundane as well as the glamorous”\textsuperscript{234}—involve the “stuff” of eighteenth-century common law actions, and Congress may not withdraw such suits from Article III judicial cognizance.\textsuperscript{235}

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\textsuperscript{228} Union Carbide, 473 U.S. at 589 (internal quotation marks omitted).
\textsuperscript{229} Id. at 594.
\textsuperscript{231} Stern, 131 S. Ct. at 2613 (citing United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323 (2011)).
\textsuperscript{232} Id. at 2609.
\textsuperscript{233} Id. (emphasis added) (citations omitted) (quoting Northern Pipeline, 458 U.S. at 90 (Rehnquist, J., concurring in judgment) (internal quotation marks omitted)).
\textsuperscript{234} Id. (quoting Northern Pipeline, 458 U.S. at 86 n.39 (plurality opinion)).
\textsuperscript{235} See id. (quoting Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856)).
4. How the Questions Lingering After Stern Affect Potential Eurozone Litigation

Bankruptcy courts’ constitutional authority to adjudicate fraudulent transfer actions to finality after Stern is in doubt because the Supreme Court itself has characterized fraudulent conveyance actions as “quintessentially suits at common law.” Parties advocating an expansive approach must argue that Article III and the Seventh Amendment, as discussed in Granfinanciera, preserve a jury trial right in these legal actions based in common law. As a result, these parties will argue that Congress may not simply “federalize and inoculate against Article III challenge[s]” such traditional common law proceedings “by enacting [them] as part of the Bankruptcy Code.” Such arguments have been made successfully in the debate over fraudulent transfers and 11 U.S.C. § 548.

In comparison, the “narrow” camp must argue that the multiparty nature of bankruptcy cases and proceedings, as well as the fundamental differences between fraudulent transfer actions brought under § 544(b) and § 548 of the Code, provide a bright-line test. One crucial development has reemerged amid the post-Stern developments in the bankruptcy, district, and circuit courts as the silver bullet to bankruptcy court authority—the target of a fraudulent conveyance action filing a proof of claim. A proof of claim, in effect, tethers a defendant

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237. Kuney, supra note 164, at 6 n.64 (internal quotation marks omitted).
240. Section 548 gives a trustee standing to recover prepetition transfer under federal law. 11 U.S.C. § 548. In comparison, § 544(b) allows a trustee to avoid prepetition transfers using state law or other applicable non-bankruptcy law by stepping into the shoes of a creditor holding an allowable unsecured claim. Id. § 544(b). As a result, the trustee may invoke § 544(b) to take advantage of longer statutes of limitation under state law. See Goldstein v. Eby-Brown, Inc. (In re Universal Mktg., Inc.), 459 B.R. 573, 580 (Bankr. E.D. Pa. 2011) (noting distinction between § 544 and § 549, but concluding bankruptcy court had final-order authority).
to the bankruptcy court through 11 U.S.C. § 502(d), supplying "the bankruptcy court with authority to rule on the fraudulent transfer claim because the fraudulent transfer action becomes part of the debtor-creditor adjustment."242

Both camps may have to wait until the next constitutional challenge reaches the Supreme Court for unresolved questions from Stern to be settled.243 For now, foreign litigants dragged into U.S. bankruptcy courts may use Stern, the final hurdle to adjudication, as a sword. In particular, investment funds, investment banks, and other financial investors that are often the targets of suits by debtors may find the Stern lineage is best used offensively.244 Bankruptcy courts are known for efficiently handling heavy dockets and, in a practical sense, things move faster in bankruptcy court.245 As a result, Stern "has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court."246

While foreign counterparties may desire "elsewhere" to be in another country, any Stern analysis would presume that the court has already decided to exercise jurisdiction extraterritorially. As such, the Stern analysis affects only the division of labor between the U.S. federal district and bankruptcy courts, and not between courts in the United States and in the Eurozone. But as long as the debate over Stern and fraudulent transfers continues, foreign counterparties will face prolonged fights over constitutional authority;247 more time for decisions


243. See Springer, Supreme Court’s Answer, supra note 98.

244. See id. at 1; see also Robin E. Phelan et. al., The Peoples and the Courts Get Confuseder and Confuseder: Recent Ridiculous Rulings from Bankruptcyland 10 (Aug. 3, 2011) (CLE presentation to Dallas Bar Association) (on file with author).

245. For a recent example of this reality, see In re Baldwin, 700 F.3d 122, 129 (3rd Cir. 2012). The Third Circuit refused to issue a writ of mandamus to overturn a bankruptcy court order that limited both parties’ time to present evidence to 7.5 hours in a breach of fiduciary duty case, holding only “that a post-judgment appeal is adequate to assure meaningful review of the propriety of the time-limit order.” Id. See also Kuney, supra note 164, at 6 n.69.


247. See Kuney, supra note 164, at 6–8.
to be appealed, references to be withdrawn, or judgments to be entered after the bankruptcy court’s submission of proposed findings; and demands for jury trials. Although these additional steps were often simply assumed before Stern, they will now cause foreign litigants to expend more time, money, and resources defending themselves in courts in which they never intended to litigate.

CONCLUSION: ARGUMENTS FOR AND AGAINST THE TWO AND A HALF HURDLES

Each of these hurdles to U.S. adjudication will cause further argument and delay in cases, inevitably leading to more money spent. But arguments for and against adjudication that have been persuasive with many courts exist at each hurdle. Foreign counterparties must argue that the plain meaning of, and congressional intent behind, Chapter 15 provides a clear directive for U.S. recognition of, and cooperation with, foreign proceedings. In comparison, litigants seeking to obviate Chapter 15 will argue that (1) ambiguity exists related to the United States exporting its laws; (2) domestic creditor interests are best protected in U.S. courts; or (3) express qualifications requiring that U.S. law be applied elsewhere are necessary. Alternatively, counterparties may argue that distressed Eurozone transactions are so egregious as to invoke Chapter 15’s exception for “manifestly contrary to the public policy of the United States,” although this exception requires a high standard of proof.

248. See 28 U.S.C. § 157(c)(1), (d) (2006) (proposed findings and conclusions of law by bankruptcy courts require de novo review by district courts, and referrals to bankruptcy courts may be withdrawn at any time by the district court sua sponte “for cause shown”).
251. See Kuney, supra note 164, at 9.
252. See Developments in the Law, supra note 110, at 1293.
253. Leong, supra note 94, at 15.
Regarding the extraterritoriality hurdle, several U.S. circuits have yet to rule on the extraterritorial powers of bankruptcy courts under the Code. Litigants seeking U.S. adjudication should use the Affiliate Rule offensively to select a favorable—or at least neutral—circuit for filing. Such litigants must argue that the presumption never arose or, alternatively, that it has been overcome using the *Foley Brothers* factors. Foreign counterparties must argue that the plain language of 11 U.S.C. § 541 and other statutes does not provide clear evidence that Congress intended for the Code to apply extraterritorially.

Finally, parties litigating whether U.S. courts can adjudicate distressed Eurozone transactions must confront *Stern v. Marshall*. Foreign counterparties must argue that fraudulent transfers, whether brought under 11 U.S.C. § 544(b) or § 548, are “quintessentially suits at common law” and “paradigmatic private rights.” Courts will hear a melodic refrain that the *Granfinanciera* dicta indicates a right to Article III adjudication in fraudulent transfer proceedings. The chorus will echo that because fraudulent transfer proceedings invoke private rights, and thus require a jury trial, both Article III and the Seventh Amendment guarantee an audience before an Article III judge in an Article III court.

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most fundamental policies” of the host nation), *with* Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (*In re Vitro, S.A.B. de C.V.*), 473 B.R. 117, 133 (Bankr. N.D. Tex. 2012), *aff’d sub nom.* Ad Hoc Group of Noteholders v. Vitro S.A.B. de C.V., 701 F.3d 1031 (5th Cir. 2012) (concluding that a Mexican plan of reorganization that violated the Absolute Priority Rule and that extinguished guarantee claims of non-debtor subsidiary entities “manifestly contravene[d] the public policy of the United States and [was] also precluded from enforcement . . . ”).

256. For instance, although the Second Circuit has yet to rule on extraterritoriality, the Southern District of New York—one of the highest-volume bankruptcy dockets in the United States—has refused to apply 11 U.S.C. § 547 extraterritorially, which would tend to discourage the Second Circuit as a viable forum for an extraterritorial argument. *See* Maxwell Comm’n Corp. v. Barclays Bank PLC (*In re Maxwell Comm’n. Corp.*), 170 B.R. 800, 814 (Bankr. S.D.N.Y. 1994), *aff’d on other grounds, In re Maxwell*, 93 F.3d 1036 (2nd Cir. 1996).


258. *See* id. at 64.

Conversely, counterparties arguing that bankruptcy courts have constitutional authority must rely on the public rights doctrine to justify Congress’s allocation of adjudication to non-Article III courts. Counterparties must argue that the multi-party aspects of bankruptcy and the differences between federal and state fraudulent transfer laws signify that an action under § 548 is not of the “stuff” of 1789. Alternatively, counterparties may be forced to distinguish § 544(b) as having the “stuff” of 1789 and re-focus the argument on separating § 548. In either instance, counterparties will seek to silence the Gran-financiera hymn as inapposite dicta. U.S. courts are still in the midst of determining whether the Constitution permits adjudication of domestic property fraudulently transferred in bankruptcy courts after Stern. But Stern has significant implications on the adjudication of foreign proceedings as well—a prospect that U.S. courts may face in the near future.

This extended analysis of distressed Eurozone deals reaching U.S. courts requires a number of economic and jurisprudential events to occur. But as the ASARCO case demonstrates, litigants seeking strategic or tactical advantages are well incentivized to avail themselves of U.S. fraudulent transfer law. As austerity skirmishes give way to greater financial solidarity, the Eurozone will be both further protected, and yet paradoxically more exposed, to systemic and acute liquidity risks. Any number of financial scenarios may soon leave foreign counterparties subjected to opportunistic litigants preparing to challenge the two and a half hurdles to reach U.S. courts.

INTRODUCTION

With a new regulatory program for aviation industry emissions, the European Union has brought the tension between trade and climate change efforts to a head. The European Union’s measure, the Aviation Directive (“Directive”), incorporates aviation into the EU Emissions Trading Scheme (“EU ETS”). Under the Directive, aircraft operators must purchase greenhouse gas (“GHG”) emission allowances for any flight that lands or takes off from an aerodrome in the EU.

The EU incorporated aviation activities into the EU ETS based on its concern that GHG emissions from aviation (“aviation emissions”) would frustrate emission reductions made in other sectors. Aviation is a quickly growing industry, with 2.8

\[ \text{References} \]


5. Id. at 10–11.
billion passengers transported by air in 2011, a number that is expected to increase to 5 billion passengers by 2030. Aviation is also responsible for 35% of international trade by value, transporting US$5.3 trillion in cargo annually. While emissions from aviation currently contribute 2% of global carbon dioxide ("CO₂") emissions, this figure is projected to increase 300–700% by 2050.

In the face of failure within the International Civil Aviation Organization ("ICAO")—the international standard setting body for aviation—to regulate aviation emissions, the EU implemented the Directive to incorporate these emissions into the EU ETS. With the recognition that an EU-only program would be ineffective to address the aviation industry's overall impact on climate change, the EU included the regulation of emissions from non-EU airlines in the Directive for the complete length of flights, including the portions that are not over EU territory.


The Directive brings to the forefront the importance of the inclusion of aviation emissions in an international framework to address climate change and reflects the EU’s prominent role in pushing global climate change negotiations forward.\(^{11}\)

Dissension to the Directive centers on the debate over the degree to which a country can unilaterally impose environmental policies with extraterritorial effects.\(^{12}\) Several major economic powers, such as the United States, India, and China, have made their opposition to the Directive known through domestic legislation, escalating the conflict. China provisionally barred airlines from complying with the Directive, and suspended a US$14 billion deal with a European commercial aircraft manufacturer.\(^{13}\) Similarly, India directed domestic commercial aircraft carriers not to comply with the Directive.\(^{14}\) In November 2012, President Barack Obama signed the “European Union Emissions Trading Scheme Prohibition Act,” prohibiting U.S. aircraft operators from participating in the EU ETS.\(^{15}\) That same month, following a meeting of the ICAO Council, the EU agreed to temporarily “stop the clock” on the enforcement of the Directive, conditioned on the realization of a global market-based measure for aviation emissions at the 38th ICAO Assembly in 2013.\(^{16}\)

12. CENTER FOR INTERNATIONAL SUSTAINABLE DEVELOPMENT LAW (CISDL), LEGAL ANALYSIS ON THE INCLUSION OF CIVIL AVIATION IN THE EUROPEAN UNION EMISSIONS TRADING SYSTEM 8 (Verki Michael Tunteng ed., 2012) [hereinafter CISDL].
If the EU reinstates the Directive following the 38th ICAO Assembly, countries are likely to challenge the consistency of the Directive with World Trade Organization ("WTO") rules before the WTO Dispute Settlement Body.\textsuperscript{17} Since aviation involves trade in cargo, the aggrieved parties would likely allege that the Directive serves as an impediment to trade, in conflict with the General Agreement on Trade and Tariffs ("GATT"), a WTO agreement governing international trade in goods.\textsuperscript{18} This conflict is reminiscent of the environmental dispute in \textit{U.S.–Shrimp},\textsuperscript{19} where the Appellate Body held that unilateral environmental measures may be justified by the social and environmental exceptions contained within GATT Article XX.\textsuperscript{20}


\textsuperscript{17} \textsc{Nigel Purvis} \& \textsc{Samuel Grausz}, \textit{German Marshall Fund of the United States, Air Supremacy – The Surprisingly Important Dogfight over Climate Pollution from International Aviation} 3 (2012). The WTO’s Dispute Settlement Body was formed to resolve disputes between WTO Members “concerning their rights and obligations” under the WTO agreements. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. If members cannot reach mutual agreement on the dispute, the complaining party can request the establishment of a panel to examine the matter and make recommendations, which are subject to appellate review by the WTO’s Appellate Body. \textit{Id.} art. 1–19.


\textsuperscript{19} The report of a panel or the Appellate Body pertaining to a specific dispute is only applicable to the parties to that dispute, and even if adopted does not have binding precedential value. \textit{World Trade Organization, Legal effect of panel and appellate body reports and DSB recommendations and rulings: 7.2 Legal status of adopted/unadopted reports in other disputes}, http://www.wto.org/english/tratop_e/dispu_e/disps_settlement_cbt_e/c7e2p1_e.htm (last visited Mar. 15, 2013). However, the reasoning developed in these reports pertaining to the interpretation of WTO rules may be persuasive in subsequent cases. \textit{Id.}

\textsuperscript{20} Appellate Body Report, \textit{United States–Import Prohibition of Certain Shrimp Products}, ¶ 147, WT/DS58/AB/R (Oct. 12, 1998). While the preamble to the WTO agreement explicitly recognizes the need to “protect and preserve the environment,” environmentalists have historically found international trade rules to be a major obstacle to the implementation of environmental policies, even coining the WTO’s General Agreement on Trade and Tariffs (“GATT”) as “GATTzilla,” and characterizing the WTO as an organization
However, the Directive does not fall within the protection of Article XX because the re-routing of flights to evade full compliance with the measure, and the pass-through of compliance costs into the price of goods, will result in a net increase in GHG emissions. This will serve to undermine the relationship between the EU’s rationale for the trade-restrictive effects of the measure and its legitimate objective of GHG emission reductions. Failure of the Directive before the WTO will undercut the important role the EU plays as a driving force behind climate change negotiations, with disastrous consequences for the achievement of a global market-based measure for aviation emissions, and a global climate regime as a whole.

This Note argues that in light of these risks—the debilitation of the EU’s critical role as a climate leader and the jeopardization of a global climate regime, generally—the EU should fore-stall the extra-territorial application of the Directive, even if the 38th ICAO Assembly fails to make sufficient progress on a market-based measure, so as to allow for a multi-lateral agreement to be reached in the ICAO or another forum. Part I provides background on the Directive and how it may be challenged under WTO rules. Part II examines how the Directive is not justified under the exceptions of GATT Article XX, in light of the reasoning in the U.S.–Shrimp decision. Part III discusses that prioritizes trade liberalization at the cost of the environment. Id. pmbl.; Sanford Gaines, The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures, 22 U. PA. J. INT’L ECON. L. 739, 752 (2001). Alternatively, opponents to such environmental measures argue that concessions for environmental policies will be used as a façade for “increased trade protectionism of domestic industry,” and trigger “tit-for-tat trade restrictions.” Meltzer, supra note 7, at 117; GARY C. HUFBAUER ET AL., GLOBAL WARMING AND THE WORLD TRADING SYSTEM 13 (2009). Hufbauer provides a hypothetical example of tit-for-tat trade restrictions: the United States could enact performance standards or carbon taxes for certain imports from a country such as India, arguing that Indian industries have high GHG emissions. HUFBAUER ET AL., at 13. In response, India could “impose a duty on all imports from the United States,” arguing that the United States’ average CO₂ emissions are greater than the world average. Id.

21. Meltzer, supra note 7, at 140–45.
23. See Louise Van Schaik & Simon Schunz, Explaining EU Activism and Impact in Global Climate Politics: Is the Union a Norm- or Interest-Driven Actor? 50 J. COMMON MKT. STUDIES 169, 179–82 (2012); PURVIS & GRAUSZ, supra note 17, at 3.
the implications of this outcome for future efforts to combat climate change and recommends that the EU continue to defer the extraterritorial enforcement of its Directive until a multilateral environmental agreement is reached for aviation emissions.

I. BACKGROUND

A. The Expansion of the EU ETS

The EU emerged as a driving force for international climate policy during the negotiations of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (“Convention” or “UNFCCC”).[25] Under the Convention, the EU committed to reduce its emissions by 8% of 1990 levels by 2012,[26] a commitment it voluntarily revised in 2007 to 20% of 1990 levels by 2020.[27] To assist in achieving its Kyoto commitments, and to contribute to the international goal of limiting global temperature increases to 2° Celsius, the EU implemented its cap-and-trade scheme, the EU ETS.[28] The EU ETS seeks to reduce GHG emissions by capping the total volume of emissions from businesses in the energy-intensive industry and power sectors at a certain level.[29] These large emitters are then required to obtain “allowances” to cover each ton of CO₂ or CO₂-equivalent they release within the capped emissions amount.[30]


[27] Delbeke, supra note 26, at 2; Oberthür & Kelly, supra note 26, at 36.


Businesses can acquire allowances in several ways. First, the government allocates a set number of free allowances, the proportion of which decreases the longer the EU ETS is in operation.\footnote{Id.} The remaining allowances are then auctioned, where companies may buy additional allowances if needed to fully cover their emissions or sell their surplus allowances.\footnote{Id.} The EU ETS requires companies to monitor and report their annual GHG emissions to an accredited independent verifier.\footnote{Id.} A company is sanctioned if its emissions exceed the number of allowances it holds.\footnote{Id.} The EU reports that the EU ETS currently covers 45% of the total GHG emissions from the EU member countries.\footnote{Id.}

In accordance with the system established under the EU ETS, the Directive sets a cap on the permissible amount of aviation emissions. Airlines are then responsible for covering their annual emissions with tradable allowances.\footnote{Council Directive 2008/101/EC, supra note 1, art. 3(c).} The allocation of allowances is divided into trading periods.\footnote{Id.} During the 2012 trading period, emissions were capped at “97% of historical aviation emissions.”\footnote{Id., art. 1.3(s).} “Historical aviation emissions” are defined as “the mean average of the annual emissions in the calendar years 2004, 2005, and 2006 from aircraft performing an aviation activity listed in Annex I.”\footnote{Id., Annex IV(b).} The Directive defines “aircraft operator” as, “the person who operates an aircraft at the time it performs an aviation activity listed in Annex I or, where that person is not known or is not identified by the owner of the aircraft, the owner of the aircraft.”\footnote{Id., Annex IV(b).} Emissions are calculated by multiplying the fuel consumption of the flight by an emission factor that is taken from the Intergovernmental Panel on Climate Change (“IPCC”) guidelines.\footnote{Id., Annex IV(b).}

While the EU temporarily deferred enforcement of the Directive to non-EU aircraft operators, as of November 2012, pending the 38th ICAO Assembly, the Directive still applies to intra-EU flights.\footnote{Commission Proposal on Derogation from EU ETS, supra note 16, at 4–5.}
capped at 95% of historical aviation emissions. While 15% of allowances are distributed through the auction process, the remaining allowances are granted to aircraft operators free of charge. Aircraft operators that do not comply with the Directive are subject to a penalty of roughly €100 per missing allowance, and are still responsible for coming up with the missing allowances. If aircraft operators refuse to comply, they may be subject to a ban from operating in the EU.

There are three notable provisions of the Directive. First, to address “carbon leakage” and competitiveness concerns, the EU included non-EU airlines within the Directive and required airlines to obtain allowances for the full-length of flights landing in or taking off from the EU, including the portion of the flight outside of EU territory. Carbon leakage occurs when businesses transfer production to countries with more lax environmental policies to evade the costs of complying with an environmental regulation, thereby diluting the effectiveness of the measure’s objective to reduce carbon emissions. Competitiveness concerns arise when price increases as a result of increased environmental regulation lead foreign countries to substitute domestic goods for imported goods from the EU. In addition, if the Directive only applied to the part of the flight within the EU, an aircraft operator may adjust his or her flight plan to minimize the distance flown within the EU and evade compliance with the Directive. This would result in an overall increase in the length of the flight and the related GHG emissions. If unaddressed, carbon leakage and competitiveness

41. Id. art. 3(d)(3).
45. Meltzer, supra note 7, at 16.
46. Id.
47. Id. at 116–22.
48. Id. at 140.
49. Id. at 145.
issues would lead to a lack of net emissions reductions and serve as a major disadvantage to domestic industry.50

Second, the Directive contains several exemptions under which certain flights may be excluded from the regulatory scheme.51 First, the Directive contains a conditional exemption to allow for the optimal interaction between the Directive and measures adopted in non-EU countries to address aviation emissions.52 The conditional exemption provides for coordination between the two regulatory schemes, or exemption of the non-EU country’s aviation emissions from the Directive.53 Second, the EU commits to mitigate or eliminate obstacles to accessibility or competitiveness issues that may arise under the Directive.54 This commitment seeks to take into account countries that may be disproportionately disadvantaged by the operation of the Directive, such as countries dependent on tourism.55 Other activities excluded from the requirements of the Directive include aircraft operators that fly a de minimus number of flights per allowance period and flights relating to military operations, scientific research, public service, training, and the official duties of government officials.56

Third, to further contribute to the EU ETS’s objective to combat global climate change, the Directive pledges to allocate all revenues from the auctioning of allowances to climate change research, adaptation, and mitigation efforts in the EU and in other countries.57 In addition, the EU expresses its intention for the Directive to serve as a blueprint for emissions trading schemes in other countries, which will ultimately link with the EU ETS and serve as a stepping stone towards an international framework addressing aviation-related climate change activities.58

50. See Id. at 111–12, 116–18.
52. Id.
53. Id.
54. Id. art. 30.
55. See id. art. 30. An example of a country dependent on tourism is Barbados, where tourism accounts for 59% of the country’s GDP. Lorand Bartels, The WTO Legality of the Application of the EU’s Emission Trading System to Aviation, 23 EUR. J. INT’L L. 429, 433 n.31 (2012).
57. Id. at 22.
58. Id. at 5–6, 17.
While the EU frames the Directive as a building block for an international emissions trading scheme for aviation, its decision to regulate aviation emissions was made independent of any international decision making body. Historically, international discussions on the regulation of aviation emissions have been unfruitful. When the negotiation of the Kyoto Protocol failed to reach an agreement on how to address aviation emissions, future efforts to make GHG emissions reductions in this area were relegated to the ICAO.59 The ICAO lists environmental protection as one of its strategic objectives, but by 2004 it had made few developments on how to address aviation emissions and it appeared that an emissions trading system for aviation would not be pursued under the ICAO’s auspices.60 Dissatisfied with the slow progress of international negotiations, in 2008 the EU enacted the Directive.61

The ICAO expressed strong opposition to the Directive in a working paper that was supported by “26 of the 36 Member States on the ICAO Council.”62 The ICAO denounced the EU’s unilateral market-based system, holding the view that the Directive undermines the ICAO’s leadership in the field of international aviation and its ability to serve as a forum for effectively addressing aviation’s contribution to global climate change.

59. Article 2.2 of the Kyoto Protocol states, “The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization respectively.” Kyoto Protocol, supra note 25, art. 2.2.
62. CISDL, supra note 12, at 15.
The ICAO asserted that the Directive is not an effective tool to address aviation’s contribution to climate change, because it will instigate nations to develop competing market-based schemes, creating a “chaotic” system with adverse effects on efforts to reduce global emissions. In addition, the ICAO expressed its concern that the EU’s unilateral measure will not adequately consider the different conditions that exist in different countries, especially in developing nations. Indeed, the airline industry’s opposition to the Directive became even more apparent when U.S. airline carriers challenged the validity of the Directive before the European Court of Justice, a decision that addressed the ICAO’s role in regulating aviation emissions.

B. Legal Challenges to the Directive

The international aviation community initiated the first legal challenge to the Directive in the European Court of Justice. Airline industry leaders challenged the validity of the Directive, with a claim largely focused on the Directive’s inclusion of transatlantic aviation. The case looked at the relationship between EU law and international law, and the extent to which

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63. Inclusion of International Civil Aviation in the EU ETS and its Impact, supra note 42, at 4.2.
64. Id. at 3.2, 4.2.
65. Id. at 3.1.
66. CISDL, supra note 12, at 3.
67. Air Transp. Ass’n of Am. v. Sec’y of State for Energy & Climate Change, Case C-366/10, (2011), ¶¶ 1–2 (delivered Dec. 21, 2011) [hereinafter ATAA]. The Directive was challenged under the customary international law principles of State sovereignty and freedom to fly over the high seas, as well as the Chicago Convention, Open Skies Agreement, and Kyoto Protocol. ATAA, ¶ 158.
68. Id. ¶¶ 42–45. The claimants included the Air Transport Association of America (“ATAA”), a non-profit “trade and service organization,” and American Airlines, Continental Airlines, and United Airlines. Id. ¶¶ 2, 42. The International Air Transport Association and the National Airlines Council of Canada intervened on the side of the claimants, while five environmental organizations intervened on the side of the Defendant, including the Aviation Environment Federation, the British World Wildlife Fund for Nature, the European Federation for Transport and Environment, the Environmental Defense Fund, and Earthjustice. Id. ¶ 44.
the EU can unilaterally regulate aviation emissions in the absence of an international regulatory framework.\textsuperscript{69}

The court found that the Directive is not a mandatory provision on conduct of non-EU countries over international territory, but that it merely takes into account extraterritorial activities that have a substantial effect on the EU’s environmental interests.\textsuperscript{70} Focusing on the environmental protection objectives of the Directive, the court found that commercial operators must comply with EU law when they land or depart from an aerodrome within the territory of the EU.\textsuperscript{71} The court’s interpretation thus characterizes the Directive as an internal rule that has effects outside the EU, and not as a unilateral action.\textsuperscript{72}

\textsuperscript{69} Sanja Bogojević, \textit{Legalising Environmental Leadership: A Comment on the CJEU’s Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme}, 24 J. ENVTL. L. 345, 347 (2012). The Chicago Convention was not considered binding on the EU, since the EU is not a contracting party to the agreement. \textit{ATAA, supra} note 67, ¶¶ 57–71. The Kyoto Protocol was also not considered a basis for natural persons to challenge the validity of the Directive since it governs relations between states, and not individuals. \textit{Id.} ¶¶ 73–77. The court then considered the Open Skies Agreement. While the court found that the airlines could rely on certain provisions of the Open Skies Agreement to challenge the validity of the Directive, it found that the Open Skies Agreement does not preclude application of the Directive to flights that arrive or depart from aerodromes within the territory of the EU when such a measure is uniformly applied to EU airlines. \textit{Id.} ¶¶ 79–100, 131–57. Finally, the court considered customary international law, and held that although individuals can challenge an act of the European Union utilizing principles of customary international law, the court’s review is limited to a standard that requires the European Union to have committed manifest error in adopting the challenged act. \textit{Id.} ¶¶ 101–11, 130. The court did not find manifest error in the EU’s adoption of the Directive in light of the customary international law principles that (1) “each State has complete and exclusive sovereignty over its airspace,” (2) “that no State may validly purport to subject any part of the high seas to its sovereignty,” and (3) the “guarantee[] of freedom to fly over the high seas.” \textit{Id.} ¶¶ 111, 114–30.

\textsuperscript{70} See \textit{ATAA, supra} note 67, ¶¶ 125–30. It is not uncommon for a State to exercise its sovereignty extraterritorially; for example, anti-trust laws consider agreements outside the territorial jurisdiction of the regulating country. Opinion of Advocate General Kokott, \textit{supra} note 9, ¶¶ 145–49.

\textsuperscript{71} Bogojević, \textit{supra} note 69, at 350–51.

\textsuperscript{72} \textit{Id.} at 350–52. This is supported by the EU’s commitment in the Directive to continue to work towards a multilateral agreement and by the EU’s intention to have the Directive complement similar programs developed in other countries, as noted above in Part I.A. Bogojević, \textit{supra} note 69, at 348; Council Directive 2008/101/EC, \textit{supra} note 1, at 5, 17, art. 25.
The claimants’ second contention was that the application of a cap and trade scheme to aviation emissions should be negotiated and agreed upon within the ICAO, and not implemented through the unilateral action of one party. Their argument was based on Article 2.2 of the Kyoto Protocol, which expresses a preference for the ICAO to determine an appropriate approach to reducing aviation emissions. However, the European Court of Justice found that individuals cannot rely on the Kyoto Protocol to challenge the validity of a measure of the European Parliament. Third, the complainants argued that the Directive constitutes a “tax or charge on fuel” that is impermissible under the Open Skies Agreement. The court rejected this argument, and instead found that the emissions allowances are market-based measures.

In upholding the validity of the Directive, the European Court of Justice authorized the EU’s discretion to take unilateral environmental measures. The court’s decision marks the transition of international climate change governance into the “judicial realm,” a transition from global negotiations to re-

73. See generally ATAA, supra note 67; Opinion of Advocate General Kokott, supra note 9, ¶ 42.
74. ATAA, supra note 67, ¶¶ 45, 77; Opinion of Advocate General Kokott, supra note 9, ¶ 183; Kyoto Protocol, supra note 25, art. 2.2. In her advisory opinion, Advocate General Kokott argued that even if Article 2.2 expresses a preference that a market-based measure for aviation be developed in the ICAO, this does not bar the EU from implementing an independent program. Opinion of Advocate General Kokott, supra note 9, ¶ 186. In addition, Advocate General Kokott pointed out that while the ICAO 36th Assembly made a statement against unilateral action on aviation emissions, this was only a non-binding political declaration and the EU Member States that are parties to the ICAO reserved the right to use market-based measures. Id. ¶ 191.
75. ATAA, supra note 67, ¶ 77.
76. Id. ¶¶ 136–47; Opinion of Advocate General Kokott, supra note 9, at ¶¶ 35–36.
77. ATAA, supra note 67, ¶¶ 136–47. In addition, the court found the Directive is not a “customs duty, tax, fee or charge on fuel” because there is no direct link between the quantity of fuel consumed and the cost of allowance, the cost of allowance determined by market price upon initial allocation. Id. ¶ 142.
78. The EU’s Emissions Trading Scheme is a market-based measure in that it is based on supply and demand of emissions allowances. Bogojević, supra note 69, at 355. This is dissimilar from a tax that is “fixed in advance.” Id.
79. See generally ATAA, supra note 67.
Regional judicial disputes. The aviation community, dissatisfied with the ruling of the European Court of Justice, has threatened further legal action within the ICAO and the WTO. While the extra-territorial application of the Directive is suspended pending the outcome of the ICAO 38th Assembly, the EU clearly expressed its intention to reinstate the Directive if insufficient progress is made. In the event that the extraterritorial application of the Directive is reinstated in the absence of an international agreement, it is likely that an action would be initiated within the ICAO’s dispute-resolution process, the result of which would be appealed to the WTO.

C. Potential Challenges Under WTO Rules

The WTO was established in 1995 to facilitate trade between WTO Member nations. The WTO is a rule-based organization run by negotiated agreements, such as the GATT. Through these agreements, the WTO seeks to foster “mutually advantageous arrangements” that reduce trade barriers and eliminate discrimination in trade relations. These principles serve to “protect the value of trade concessions,” promote “free and fair competition,” and protect against “corruption of the multilateral trading system” caused by the unequal treatment of trading partners.

The WTO administers the rules and procedures of covered agreements and settles trade disputes through its Dispute Settlement Body. In the event of a conflict between member

80. Bogojević, supra note 69, at 356.
83. See Chicago Convention, supra note 9, art. 84; PURVIS & GRAUSZ, supra note 17, at 6.
85. GATT, supra note 18. In addition to the GATT, the WTO has agreements that govern trade in services, intellectual property, and the settlement of disputes. Id.
86. WTO Agreement, supra note 84.
88. DSU, supra note 17, art. 1–19.
states, an aggrieved party first engages in consultations with the country it alleges acted in contravention of a WTO agreement.\textsuperscript{89} If the countries fail to settle the dispute independently, the aggrieved party may then request that the WTO establish a panel to make a ruling on the issue, the decision of which can be appealed to the Appellate Body.\textsuperscript{90} If the panel or Appellate Body determine that a country’s specific trade measure does not conform to the WTO, the country must bring the measure into compliance.\textsuperscript{91} If the offending party fails to do so within a reasonable period, it will be subject to sanctions and the aggrieved party may be permitted to impose retaliatory measures.\textsuperscript{92}

While the Dispute Settlement Body cannot coerce nations to comply with its decisions, the system works through “peer pressure and the collective desire of all WTO Members to preserve the [multilateral trading] system.”\textsuperscript{93} In this way, the WTO is revealed to be an organization in which the principle actors are national governments seeking to maintain the balance between a liberal trading system and domestic autonomy.\textsuperscript{94} The WTO and the Dispute Settlement Body must therefore be sensitive to states’ interests in order to “maximize the political support for [its] decisions” and thereby maintain support for the WTO and its trade liberalization objectives.\textsuperscript{95}

If the application of the Directive to non-EU airlines is reinstated after the 38th ICAO Assembly, an aggrieved nation can request that the Dispute Settlement Body convene a panel. Since it is estimated that the Directive will cost airlines up to US$4.3 billion by 2015, airlines may deal with these costs by passing them onto consumers in the price of tickets for flights,

\textsuperscript{89} Id. art. 4.
\textsuperscript{90} Id. art. 5–6.
\textsuperscript{91} Id. Annex 2.
\textsuperscript{92} Id. art. 22.
\textsuperscript{93} CHOW & SCHÖENBAUM, supra note 87, at 52.
\textsuperscript{95} Id. While trade liberalization leads to productivity and welfare gains—for example, globalization has added between $800 billion to $1.5 trillion to the U.S. economy—it is often accompanied by concerns that domestic industry will be harmed by increased foreign competition. HOUSER ET. AL., PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS & WORLD RESOURCES INSTITUTE, LEVELING THE CARBON PLAYING FIELD: INTERNATIONAL COMPETITION AND U.S. CLIMATE POLICY DESIGN 4 (2008).
and in the price of goods transported by air.  

Due to the Directive’s effect on trade in goods, it is likely that the aggrieved nation or nations will cite to the GATT in their complaint. The pass through of the costs of compliance with the Directive, and the greater compliance costs for foreign airlines that fly greater distances than domestic airlines, will lead to a violation of the principle of non-discrimination, incorporated in the GATT through GATT Article I Most-Favored Nation (“MFN”) Treatment, and GATT Article III National Treatment.

MFN requires that any trade advantage a member gives to a product originating in another country must be “immediately and unconditionally” given to “like products” originating in the other WTO Member states. The MFN clause is triggered by the Directive’s conditional exemption for countries that adopt their own climate reduction strategies for aviation. If countries pass the cost of complying with the Directive into the price of cargo, two countries that import a like product—one that has received the exemption and one that has not—would pay different cargo rates. For example, consider a situation where Country A and Country B both import a like product into the EU. If the EU were to then exempt Country A from the Directive, Country A would face lower cargo rates for its product than Country B. This would result in differential treatment between the two countries, and call the consistency

96. If airlines pass the cost of compliance into the cost of tickets on commercial flights, this could result in an increase cost per passenger from $2.60 to $6.00. Meltzer, supra note 7, at 121.

97. Id. at 127. While the decision to pass compliance costs into the price of goods will be made by private companies, the EU is not relieved of its obligations under the GATT because the requirements of the Directive are what necessitate this private choice. See Appellate Body Report, Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef, ¶ 146, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000); see Meltzer, supra note 7, at 133.


100. Meltzer, supra note 7, at 137.

101. Id. at 137–38.

102. See id. at 138.

103. Id.
of the Directive with the MFN principle of unconditionality into question.104

The principle of non-discrimination is also found in GATT Article III, “National Treatment on Internal Taxation and Regulation.”105 The National Treatment provision requires that foreign goods be treated no less favorably than domestic goods, extending the principle of non-discrimination to the treatment of foreign goods once they enter the domestic market.106 GATT Article III:2 states that products imported by a contracting party “shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.”107 If the purchase of emissions allowances is considered an indirect tax or charge, then imported products may be considered taxed “in excess” of like domestic products, constituting de facto discrimination as a result of the greater distance the products are transported.108 In addition, GATT Article III:1 prohibits internal taxes, charges, laws and regulations, applied “so as to afford protection to domestic production.”109 The Directive explicitly references competitiveness concerns alongside its environmental objectives in enacting the measure.110 If a panel finds the primary purpose of the Directive is to protect domestic airlines from competition, the Directive would be found in violation of Article III:1.111

104. Id. at 137–38.
105. GATT, supra note 18, art. III, ¶ 2.
106. Id. art. III. National Treatment encompasses internal taxes and charges, including those imposed at the border, and internal regulations that govern the “conditions of sale and purchase,” including regulations that adversely effect the conditions of competition between the domestic and imported goods. See, Id. art. III; Report of the Panel, Italian Discrimination Against Imported Agricultural Machinery, ¶ 12, L/833 (Jul. 15, 1958); GATT B.I.S.D. (7th Supp.) at 60 (1958).
107. GATT, supra note 18, art. III, ¶ 2.
108. Meltzer, supra note 7, at 133–34. The European Court of Justice’s determination that the emissions allowances were not a tax or charge in Air Transp. Ass’n of Am. does not dictate whether the Directive will be found to be a tax or a charge under GATT Article III:2, since the European Court of Justice’s interpretation was made under a different agreement. Opinion of Advocate General Kokott, supra note 9, ¶¶ 35–38; Meltzer, supra note 7, at 130.
109. GATT, supra note 18, art. III, ¶ 1.
111. Meltzer, supra note 7, at 135.
The Directive is also inconsistent with GATT Article III:4.\footnote{112} GATT Article III:4 requires that “the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin.”\footnote{113} The purchase of a greater number of GHG emission allowances because of greater distances flown involves a cost on imported goods that is not imposed on like domestic goods, and therefore constitutes less favorable treatment in violation of Article III:4.\footnote{114} However, the Directive’s violation of GATT Articles I and III is not dispositive of its conformity with its WTO obligations. As a measure intended to address global climate change that is “otherwise inconsistent with GATT,” the environmental objectives of the measure may entitle it to justification under the General Exceptions of GATT Article XX for social and environmental measures.\footnote{115}

II. GATT Article XX AND THE AVIATION DIRECTIVE

A. The General Exceptions of GATT Article XX

The determination of whether a trade restrictive measure is justified under GATT Article XX requires a two-tiered analysis.\footnote{116} First, a panel will examine whether the measure falls within one of the ten categories of social and environmental exceptions of Article XX.\footnote{117} Second, if the measure is found to fall within one of the exceptions, it must also satisfy the requirements of the introductory clause to Article XX, the chapeau.\footnote{118} A measure violates the chapeau to Article XX if the application of the measure results in discrimination that is “arbitrary or unjustifiable,” and “between countries where the
same conditions prevail,” or where the measure constitutes a “disguised restriction on trade.”

The Directive falls within two of the GATT Article XX exceptions. The first is GATT Article XX(g), which exempts measures relating to the “conservation of exhaustible natural resources” that are “made effective in conjunction with restrictions on domestic production or consumption.” The Appellate Body in U.S.–Shrimp, “open[ed] the door to unilateral environmental measures under Article XX(g),” when it found that the United States’ unilateral “import ban on shrimp harvested” in a way that endangers certain species of sea turtles fell within the Article XX(g) exception. The Appellate Body’s interpretation allows countries to condition market access on compliance with unilateral environmental measures under GATT Article XX(g), yet it also marks the transition of the WTO’s disfavor of unilateral measures into the chapeau. This reflects the WTO’s concern that trade restrictive environmental policies will be used as a façade for trade protectionism.

Under GATT Article XX(g), for a measure to be considered “relating to” legitimate ends, the means must be narrowly focused and “reasonably related to [those] ends.” An “exhaustible natural resource” is something that has value and that is capable of being depleted either quantitatively or qualitative-
ly. For example, in *U.S.–Gasoline*, the panel found that clean air was an exhaustible natural resource as it had value and was capable of being depleted through pollution, which had a negative impact on air quality. “Exhaustible natural resources” may be living or non-living, and do not necessarily have to be finite. The final requirement of Article XX(g) is implementation in conjunction with similar domestic measures to guarantee “even-handedness in the imposition of [the] restrictions” domestically and on imports.

The objective of the Directive is to stabilize GHG emissions from international air transport to mitigate the effects of climate change, including risk to ecosystems, to food production, and to human health and security. The reduction of atmospheric concentrations of GHG emissions has a qualitative effect, in that it reduces secondary detrimental effects to the environment and human health. Therefore, the means of the Di-

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127. *United States–Import Prohibition of Certain Shrimp Products*, Appellate Body Report, supra note 20, ¶¶ 128, 131. It is unclear whether there is a jurisdictional requirement to invoking the Article XX exception. However in *U.S.–Shrimp*, the migratory species of turtle protected by the U.S. measure was considered to have a sufficient jurisdictional nexus with the United States for regulation, even when some of the species regulated under the measure never entered U.S. jurisdiction. *Id.* ¶ 133. The EU’s Directive has a jurisdictional nexus with the EU as it seeks to protect the “atmosphere,” which is part of the global commons. Bartels, supra note 55, at 450.

128. *United States–Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, supra note 116, at 20–21. *U.S.–Gasoline* interpreted this provision as “primarily aimed” at conservation goals. *Id.* The subsequent effects of the measure do not have to be immediate, as “a substantial period of time . . . may have to elapse before the effects attributable to implementation of a given measure may be observable.” *Id.* However, if a measure “cannot in any possible situation have any positive effect on conservation goals,” the Appellate Body considered it likely that the measure was not primarily aimed at achieving the stated goals to begin with. *Id.* at 21–22.

rective relate to its ends of climate change mitigation. The Directive is “even-handed,” in that it applies equally to all flights that land or depart from an aerodrome in the EU, regardless of whether they are international or domestic flights. Thus, the Directive falls under the Article XX(g) exception.

The Directive also falls under Article XX(b), exempting measures “necessary to protect human, animal or plant life or health.” For a measure to be necessary, the degree to which it materially contributes to reaching its objective is “weighed against its trade restrictiveness.” It does not have to be indispensable, but there must be no reasonable alternative that is more consistent with the GATT. Furthermore, even if a measure’s contribution is not “immediately observable,” but spread out over time, it may still be justified under Article XX(b) when such projections are supported by quantitative or qualitative evidence.

The Directive makes a material contribution to the reduction of GHG emissions in that it increases the price of allowances over time, providing an increasing economic incentive to minimize and reduce emissions. In addition, revenue from the sale of allowances is donated to efforts to fight and adapt to climate change, which further contributes to its goals. It remains to be seen whether opponents of the Directive will propose less trade restrictive alternatives that are more consistent with the GATT, and whether the Directive will prevail over these alternatives.

130. Id. ¶ 16, art. 1.
131. GATT, supra note 18, art. XX(b).
133. Korea—Measures Affecting Imports of Fresh Chilled and Frozen Beef, Appellate Body Report, supra note 97, ¶ 161. While there may be no reasonable alternative more consistent with the GATT, the country defending the measure does not have to identify and discount all potential alternatives. Bartels, supra note 55, at 451.
134. Brazil—Measures Affecting Imports of Retreaded Tyres, Appellate Body Report, supra note 22, ¶ 151. The Appellate Body in Brazil—Tyres further stated that, “the result obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change . . . may manifest themselves only after a certain period of time [and] can only be evaluated with the benefit of time.” Id.
135. Meltzer, supra note 7, at 143.
Opponents of the Directive argue that if airlines pass the cost of complying with the Directive directly into cargo rates, there is no incentive for airlines to reduce overall emissions, weighing against a finding that the measure relates to its conservation goals under Article XX(g).\footnote{Meltzer, supra note 7, at 141.} However, a panel may interpret this pass through as a transition of the Directive’s policy objectives into the price of goods—since the increase is still correlated to GHG emissions—thus maintaining the measure’s provisional justification under Article XX(g).\footnote{Id. at 144–45.} While the Article XX(b) “necessary” requirement is more stringent than the relationship of “relating to” in Article XX(g), both exceptions serve to justify the Directive.

B. The Chapeau to Article XX

Once the Directive is provisionally justified by one of the Article XX exceptions, the panel will examine the measure under the chapeau to Article XX. While U.S.–Shrimp established the permissibility of unilateral environmental measures under Article XX(g), the strict requirements of the chapeau remain a formidable obstacle and have been compared to the “eye of the needle” through which hardly any environmental measures will be able to pass.\footnote{Gaines, supra note 20, at 741, 773.} The chapeau to Article XX requires that application of these measures does not constitute:

(a) “arbitrary discrimination” (between countries where the same conditions prevail);

(b) “unjustifiable discrimination” with the same qualifier; or

(c) “disguised restriction on international trade.”\footnote{United States–Standards for Reformulated and Conventional Gasoline, Appellate Body Report, supra note 116, at 23.}  

Violation of any one of the three standards disqualifies the measure from justification under Article XX.\footnote{United States–Import Prohibition of Certain Shrimp Products, Appellate Body Report, supra note 20, ¶ 184. Under the chapeau, the party invoking the Article XX exceptions has the burden of showing that its measure is not applied so “as to frustrate or defeat the legal obligations of the holder of the right.” United States–Standards for Reformulated and Conventional Gasoline, Appellate Body Report, supra note 116, at 32.} The chapeau ensures that discriminatory measures that are considered “jus-
tified” under the Article XX exceptions are based on a non-protectionist rationale. 143 A court making a determination of arbitrary or unjustifiable discrimination will look at whether the cause or rationale for the discrimination bears a relationship to the legitimate objective of the measure.144

The first standard of the chapeau, arbitrary discrimination, looks at the procedures for implementing a measure, their flexibility, and the degree to which they take into account “the appropriateness of [the] programme for the conditions prevailing in the exporting country.”145 In U.S.–Shrimp, the Appellate Body found the U.S.’s certification process denied certification to any country that did not impose the exact shrimp trawling methods unilaterally prescribed by the United States, regardless of the effectiveness of alternatives.146 The rote application of these standards lacked procedural fairness as certification decisions were made without a formal notification or review process.147 The Appellate Body found that the rigidity and inflexibility of the U.S. certification “could result in the negation of rights of Members,” and therefore constituted arbitrary discrimination.148


144. Brazil–Measures Affecting Imports of Retreaded Tyres, Appellate Body Report, supra note 22, ¶¶ 226–27. While the effects of the discrimination are also a relevant factor, they are not dispositive. For example, in Brazil–Tyres, the Appellate Body found that the panel used the incorrect analysis to interpret the term “unjustifiable discrimination,” by focusing exclusively on the quantitative impact of the discrimination on achieving the environmental objective of the measure. Id. ¶¶ 229–30.


147. The U.S. certification process provided no opportunity for member countries “to be heard, or to respond to any arguments made against it . . . before a decision to grant or to deny certification [was] made.” Id. ¶¶ 177, 180–81. While a “list of approved applications [was] published in the Federal Register,” there was no opportunity to request review of, or appeal a decision of, denial. Id.

148. Id. ¶¶ 181, 184.
The determination of unjustifiable discrimination looks at the substance of the application of the measure. In *U.S.–Shrimp*, the Appellate Body found that the United States’ import ban constituted “unjustifiable discrimination” for several reasons. First, the Appellate Body found the application of the U.S. measure required countries to “adopt essentially the same regulatory program as the U.S.,” even if the members’ alternative programs served the United States’ declared policy goal. This rigid and inflexible standard failed to take into account the different conditions within the member countries, constituting unjustifiable discrimination. Second, the Appellate Body found unjustifiable discrimination in the United States’ failure to conduct across-the-board negotiations with member countries that exported shrimp with the purpose of reaching a multilateral or bilateral agreement prior to enforcing its ban. Lastly, the Appellate Body noted the application of the United States’ measure was unilateral in character, heightening its “disruptive and discriminatory influence” and “underscoring its unjustifiability.”

Under the third standard of the chapeau to Article XX, a measure must not constitute a “disguised restriction on international trade.” Three standards are used to determine if a member is using the GATT Article XX exceptions to intention-

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149. HUFBAUER ET AL., supra note 20, at 54.
151. See Id. ¶¶ 161, 165–66, 172; HUFBAUER ET AL., supra note 20, at 55.
152. United States–Import Prohibition of Certain Shrimp Products, Appellate Body Report, supra note 20, ¶ 166. While there was no requirement for the conclusion of an agreement, the United States needed to make “serious, good faith efforts” to negotiate such an agreement to meet the requirements of the chapeau. Appellate Body Report, United States–Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of the DSU by Malaysia, ¶ 123, WT/DS58/AB/RW (Oct. 22, 2001). In addition, the Appellate Body found it dispositive that the United States had not negotiated equally with all members affected by the ban and had not provided equal support in the form of transfer of TED technology to the countries involved. United States–Import Prohibition of Certain Shrimp Products, Appellate Body Report, supra note 20, ¶ 175.
154. GATT, supra note 18, art. XX.
ally “conceal the pursuit of trade-restrictive objectives.” First, the publicity test requires that the measure be publicly announced. Second, measures that constitute “arbitrary discrimination” and “unjustifiable discrimination” have been interpreted to lead to a determination that a measure is also a “disguised restriction on trade.” Third, the “design, architecture and revealing structure” of the measure may reveal a protectionist objective.

The underlying purpose of the three standards in the chapeau is to avoid the abuse of the “exceptions to substantive rules” of the GATT provided in Article XX. The clause thereby serves to balance a WTO Member’s legal right to invoke an Article XX exception, with the rights of other WTO Members. This balancing mechanism has been described as a sliding scale that is evaluated on a case-by-case basis and that, when used to strike a balance between trade and environmental concerns, has incorporated a preference for multilateralism.

C. Application of the Chapeau to Article XX to the Aviation Directive

The Appellate Body in U.S.–Shrimp recognized that unilateral environmental measures that serve one of the legitimate

155. Panel Report, European Communities–Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 8.236, WT/DS135/R (Sep. 18, 2000), quoted in Committee on Trade and Environment, GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g), ¶¶ 78–79, WT/CTE/W/203 (Mar. 8, 2002).
156. In EC–Asbestos, the panel considered the publication of the measure in an official journal of the member state to satisfy this requirement. European Communities–Measures Affecting Asbestos and Asbestos-Containing Products, Panel Report, supra note 155, ¶ 8.234.
157. United States–Standards for Reformulated and Conventional Gasoline, Appellate Body Report, supra note 116, at 25; GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g), supra note 155, ¶ 82.
162. Id. ¶ 159; Knox, supra note 94, at 56–57.
objectives in the GATT Article XX exceptions are not “a priori incapable of justification under Article XX.” The Appellate Body’s respect for the environmental policies of WTO Member countries was expressed in *U.S.–Gasoline*: “WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives, and the environmental legislation they enact and implement.” The Appellate Body found this interest to only be circumscribed by the substantive obligations of GATT and the other WTO agreements. However, while the Directive is provisionally justified under the Article XX exceptions of “conserving exhaustible natural resources,” and protecting “human, animal and plant life and health,” the application of the Directive constitutes arbitrary and unjustifiable discrimination under the chapeau.

Two scenarios identify implicit “arbitrary and unjustifiable discrimination” in the application of the Directive. The first scenario arises from the Directive’s method for regulating aviation emissions. Aviation emissions are calculated by monitoring fuel consumption for the full length of the flight between the EU and a non-EU country. The Appellate Body has found arbitrary and unjustifiable discrimination to exist when a WTO Member State’s justification for a discriminatory measure bears no rational connection to, or goes against the stated objective of, the measure that permitted it to fall under the GATT Article XX exceptions. Under the EU’s method for monitoring aviation emissions, two flights that travel the same distance can be responsible for a different number of allowances if one of the flights makes an intermediate landing outside the EU, as is

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165. *Id.*
167. *Brazil–Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, *supra* note 22, ¶ 227. The Appellate Body in *Brazil–Tyres* ruled that even though Brazil’s discrimination resulted from its compliance with a ruling from the MERCOSUR arbitral tribunal, even a rational decision can be characterized as “arbitrary or unjustifiable” if it is not related “to the legitimate objectives pursued by the” measure that lead it to fall within the GATT Article XX exceptions. *Id.* at ¶232.
done with connecting flights.\textsuperscript{168} This may even result in a direct flight being responsible for more emissions than an indirect flight that traveled a greater distance, but made an intermediate stop prior to entering the EU.\textsuperscript{169} This effect would result in arbitrary and unjustifiable discrimination because it erodes the relationship between the measure and its GHG reduction goals, and may even be used as a means for airlines to evade the measure, leading to a net increase in GHG emissions.\textsuperscript{170}

The second scenario arises if airlines choose to pass the costs of complying with the Directive into cargo rates, resulting in increased prices for goods that are flown greater distances.\textsuperscript{171} Since the Directive only considers the CO\textsubscript{2} emissions produced in the air transport of the good, this would constitute arbitrary and unjustifiable discrimination because the distance flown is not indicative of a good’s overall carbon footprint.\textsuperscript{172} For example, an aircraft operator transporting a good with a relatively large carbon footprint, but only for a short distance, would be responsible for fewer allowances than an aircraft operator transporting a good with a minimal carbon footprint that traveled a greater distance.\textsuperscript{173} Thus, the Directive disregards efficiency improvements that reduce GHG emissions in the production and processing methods of goods, which also contribute to climate change mitigation.\textsuperscript{174} Similar to \textit{U.S.–Shrimp}, this overlooks the EU’s declared objective to reduce global GHG emissions.

A determination of “arbitrary discrimination” also looks specifically at the procedures for implementing a measure and whether they take the conditions existing in other countries into account while continuing to serve the measure’s policy objective.\textsuperscript{175} When the application of a measure disserves the poli-
cy objectives asserted to justify its trade restrictive effect, it constitutes “arbitrary discrimination.” However, procedural and due process safeguards can weigh against a finding of “arbitrary discrimination.” For example, the elements of an opportunity for exporting members to be heard, and a notification and review process were considered to incorporate flexibility into a measure and responsiveness to the conditions existing in the other country. The operation of the Directive relies in large part on the direct participation and supply of information by aircraft operators. Under the Directive, aircraft operators submit applications for the free allowances granted by the EU, monitor their annual CO₂ emissions, and submit information on their annual emissions to an accredited verifier. In addition, the executive body of the EU, the European Commission, publishes an annual list of aircraft operators whose activities are covered by the Directive. The direct participation of aircraft operators in the operation of the Directive will serve to alleviate due process and procedural fairness concerns.

To avoid a finding of “unjustifiable discrimination,” a country imposing a unilateral environmental measure must conduct across-the-board negotiations towards a multilateral agreement. The EU is a major actor in negotiations for international climate policy, an area in which it supports multilateral

176. The U.S.–Shrimp Recourse to Article 21.5 indicates that the Appellate Body’s concern with the import ban was its “coercive” nature that disregarded the conditions and views of other member states. Gaines, supra note 20, at 797; Knox, supra note 94, at 57–58. Since certification under the program was not granted to countries that used measures “comparable in effectiveness” to the U.S. method for protecting turtles, the Appellate Body viewed the application of the measure to serve the policy objective of ensuring exporting members adopted the exact same regulatory program as the United States, and not the declared objective of protecting and conserving sea turtles. United States–Import Prohibition of Certain Shrimp Products, Appellate Body Report, supra note 20, ¶ 165.


179. Id.

180. Id. art. 18(a); European Commission, Questions and Answers on historic aviation emissions and the inclusion of aviation in the EU’s Emission Trading Scheme (EU ETS), at 27 (2013), available at http://ec.europa.eu/clima/policies/transport/aviation/faq_en.htm.

cooperation to address this global environmental problem. The EU plays a leading role in climate policy negotiations within the UNFCCC, and other multilateral forums including the ICAO, where it has observer status. The EU’s participation in negotiations within the ICAO and its continued efforts to advance the negotiation process fulfill the negotiation requirement.

Lastly, whether the Directive is considered a “disguised restriction on international trade” depends on the criterion adopted by the Appellate Body to make the determination. The Directive would likely not be considered a disguised restriction on trade under the “publicity test,” because the regulation was published in the Official Journal of the European Union. Second, if the Appellate Body collapses the determination of whether the Directive constitutes “arbitrary and unjustifiable discrimination” or a “disguised restriction on trade” into one analysis, the findings above would make it unnecessary to examine this element separately. Under the third criterion, the

183. Id. at 181; see Oberthür & Kelly, supra note 26, at 35–37. While all twenty-seven EU Member States are contracting parties to the Chicago Convention that established the ICAO, the European Union only has observer status. “Observer Status” is a means by which intergovernmental organizations can observe meetings of the WTO. See WTO Agreement, supra note 84, art. V; World Trade Organization, Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, ch. IV, WT/L/161 (Jul. 25, 1996).
186. The Appellate Body in U.S.–Shrimp found it was not necessary to analyze whether the U.S.’s import ban was a “disguised restriction on international trade,” since it was already found to constitute arbitrary and unjustifiable discrimination and therefore was not justified under Article XX. United States–Import Prohibition of Certain Shrimp Products, Appellate Body Report, supra note 20, ¶ 184. It is unclear whether the Appellate Body in U.S.–Shrimp held either that a measure constituting arbitrary and unjustifiable discrimination is a disguised restriction on trade, or that it is not necessary to look at the third standard under the chapeau since the measure already constitutes “arbitrary and unjustifiable discrimination.” While U.S.–Shrimp seems to take the former approach, the Appellate Body in U.S.–Gasoline took the latter. United States–Standards for Reformulated and Conventional Gasoline, Appellate Body Report, supra note 116, at 25 (considering a disguised restriction on international trade “as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under
Directive would not be considered a “disguised restriction on international trade,” since the “design, architecture and revealing structure” of the Directive incorporate the principle of non-discrimination and a commitment to a multilateral solution.\textsuperscript{187}

Therefore, if the Appellate Body considers this third element of the chapeau separately, it will find that the Directive does not constitute a “disguised restriction on international trade.”

With the deferment of the Directive’s application to non-EU airlines, it remains to be seen whether the Directive will incorporate sufficient flexibility and sensitivity to the conditions in other states to withstand scrutiny under the chapeau. This is because it is the application of the measure and not the EU’s expressed intentions that dictate whether the measure will constitute arbitrary or unjustifiable discrimination.\textsuperscript{188} However, the EU will not be able to avoid the “arbitrary and unjustifiable discrimination” that is implicit in the application of the Directive.

While the Appellate Body in \textit{U.S.–Shrimp} found the United States’ “rigid and inflexible” measure to constitute “arbitrary and unjustifiable discrimination,” the United States was able to bring its measure into conformity with the WTO by revising its guidelines.\textsuperscript{189} Therefore, if the EU were to revise the Directive to the guise of a measure formally within the terms of an exception listed in Article XX).

\textsuperscript{187} See generally Council Directive 2008/101/EC, supra note 1. The principles of non-discrimination are seen in the conditional exemption to the Directive. \textit{Id.} art. 25(a). In addition, the Directive expresses the EU’s continued commitment to working towards a multilateral agreement for aviation emissions. \textit{Id.} at 17.

\textsuperscript{188} See \textit{United States–Import Prohibition of Certain Shrimp Products}, Appellate Body Report, supra note 20, ¶ 160; \textit{European Communities–Measures Affecting Asbestos and Asbestos–Containing Products}, Panel Report, supra note 155, ¶ 8.226; \textit{GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)}, supra note 155, ¶ 65; Report of the Panel, \textit{United States–Prohibition of Imports of Tuna and Tuna Products from Canada}, ¶ 4.8, L/5198 (Dec. 22, 1981), GATT B.I.S.D. (29th Supp.) at 91 (1982), noted in \textit{GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)}, supra note 155, ¶¶ 80–81.

\textsuperscript{189} \textit{United States–Import Prohibition of Certain Shrimp Products Recourse to Article 21.5 of the DSU by Malaysia}, Appellate Body Report, supra note 152, ¶ 153. The United States made several changes to its original program in the revised guidelines in an attempt to take the different conditions in the exporting countries into account in the implementation of its measure. First, the United States amended its criteria for certifying exporting members programs to protect endangered sea turtles to accept programs that were “com-
rective to remedy the elements that constitute “arbitrary and unjustifiable discrimination,” it is likely an Appellate Body would consider the revised measure to fall within GATT Article XX. Yet even if the Directive is justified under GATT Article XX, the EU should refrain from imposing its program on non-EU airlines in the absence of a multilateral agreement on the regulation of aviation emissions.

III. MULTILATERALISM AND THE PRESERVATION OF THE GLOBAL CLIMATE REGIME

A. The Multilateral vs. Unilateral Approach

The WTO’s preference for multilateral environmental agreements\(^{190}\) is based on the nature of environmental problems, which transcend geographic boundaries and require the efforts of more than one country to provide effective solutions.\(^{191}\) Un-

parable in effectiveness” to the use of Turtle Excluder Devices. *Id.* ¶ 5. Second, the Revised Guidelines also allowed certification for exporting countries that trawl for shrimp in waters where there is no risk for capture of sea turtles, or whose means of shrimp fishing do not put sea turtles at risk, such as artisanal shrimp fishing methods. *Id.* ¶ 7.


191. *Cf.*, *United States–Import Prohibition of Certain Shrimp Products*, Appellate Body Report, *supra* note 20, at ¶ 168 (noting that the species of turtles the United States sought to protect in *U.S.–Shrimp* were migratory, so solely implementing a domestic measure would not have served the objectives of the
lateral environmental measures with extraterritorial effects run the risk of negating the rights of other WTO Members by disregarding the conditions existing in those countries, as well as their views on how to address the common environmental problem.\textsuperscript{192} When such unilateral measures are imposed by one of the larger economic powers, such as the United States in \textit{U.S.–Shrimp}, they can serve to effectively coerce less-powerful countries into adopting their standards.\textsuperscript{193}

A second concern with the authorization of the Directive, as a unilateral environmental measure, is its potential to lead to fragmentation of measures to address aviation emissions.\textsuperscript{194} This fragmentation, with different programs adopted by individual countries, will create a “political maelstrom,”\textsuperscript{195} and instigate repeat challenges within the WTO on whether the imposition of these measures on members, without their consent, is based on protectionist motives.\textsuperscript{196} Such challenges will create a period of uncertainty and increased tensions due to these competing regulatory measures, not only freezing any forward action in efforts to address climate change, but also undermining the effectiveness of these measures as tools to address environmental problems.\textsuperscript{197}

In contrast, a multilateral environmental agreement is an expression of consensus among international actors that can shift current conceptions of the value and importance of addressing global climate change.\textsuperscript{198} Through this shift, a set of

\begin{itemize}
\item \textsuperscript{192} United States–Import Prohibition of Certain Shrimp Products, Appellate Body Report \textit{supra} note 20, at ¶181; see Knox, \textit{supra} note 94, at 58.
\item \textsuperscript{193} See Gregory Shaffer & Daniel Bodansky, \textit{Transnationalism, Unilateralism, and International Law}, 1 \textit{TRANSNATIONAL ENVTL. L.} 31, 33–34, 37–38 (2012) (noting that the extraterritorial application of environmental standards by “dominant market actors” oftentimes leads other states to adopt similar standards, contributing to a “growing convergence of environmental laws” internationally); Gaines, \textit{supra} note 20, at 797.
\item \textsuperscript{194} \textit{Hufbauer Et Al., supra} note 20, at 96.
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} Shaffer & Bodansky, \textit{supra} note 193, at 40–41.
\item \textsuperscript{197} \textit{Id.} at 39–41.
\item \textsuperscript{198} Van Schaik & Schunz, \textit{supra} note 23, at 171. \textit{See also}, Cass R. Sunstein, \textit{Social Norms and Social Roles}, 96 \textit{COLUM. L. REV.} 903, 910 (1996) (arguing that laws expressing social values and shifting “social norms” can influence peoples’ personal conceptions of what is considered acceptable and the way those people value certain goods).
\end{itemize}
values and principles emerge that redefine what is considered the appropriate response to international environmental problems. Multilateral environmental agreements can stimulate the spread and acceptance of environmental legal norms in international environmental law, which then can then be “downloaded,” or replicated into national and regional regulatory programs. Even non-binding multilateral environmental agreements can play a role in developing “recognition of environmental values,” which in the WTO context can serve as guidance for panels and appellate bodies in their assessment of climate change measures. While unilateral environmental measures can contribute to the creation of environmental norms, they also tend to instigate “significant diplomatic tensions, resentment and concern.” Resistance to unilateral environmental measures can undermine their effectiveness and dilute or eliminate their ability to influence “norms of behavior.”

In response to criticism on the unilateral nature of the Directive, members of the European Commission expressed concern that other countries’ demands for a multilateral climate agreement merely disguise their efforts to prevent full implementation of the Directive and to forestall action in other forums, such as the ICAO. Proponents of unilateral environmental trade measures argue that such measures can be used as a tool to pressure other countries to change their policies; as one author has put it, “to deny a regime the benefits of unilateral measures.”

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199. Tseming Yang & Robert V. Percival, The Emergence of Global Environmental Law, 36 Ecology L.Q. 615, 617 (2009); Van Schaik & Schunz, supra note 23, at 171. Sunstein defines “norms” as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done.” Sunstein, supra note 198, at 914. These norms can also be codified into law. Id. at 914–15.


201. Id. at 646. In resolving disputes involving trade and the environment, the Appellate Body has historically examined the plain meaning of the text of the GATT, and when the text is unclear, resorts to substantive principles held in “environmental treaties and declarations” that have received widespread political support. Knox, supra note 94, at 3, 50–59.


203. Shaffer & Bodansky, supra note 193, at 40–41.

eral action is to deny the prospect of change.” Unilateral environmental measures are also a method for expeditiously pursuing solutions to environmental problems, such as climate change, in which quick and effective action is critical. In contrast, multilateral negotiations threaten to exacerbate the inexpediency with which environmental solutions are formulated, as the negotiation process is characteristically slow, expensive, politicized, and typically results in only aspirational standards rather than binding commitments. Therefore, a decision in the WTO to block the EU from including non-EU airlines in the Directive may effectively strip the EU of its ability to protect its domestic environment.

However, recent developments within the ICAO show that a global market-based measure for aviation emissions may be on the horizon. In 2009, the ICAO endorsed an action plan that included aspirational goals for fuel efficiency and metrics to measure progress. The following year, the 37th ICAO Assembly resolved to achieve a “global annual average fuel efficiency improvement of 2 percent until 2020” and encouraged member states to submit action plans on how to achieve this goal. The ICAO also resolved to develop a framework for market-based measures for international aviation to be reviewed at the 38th ICAO Assembly. Since the 37th Assembly, the ICAO has agreed to a CO₂ metric system and has formed a high-level group to address policy issues relating to the feasibility of a market-based mechanism for international aviation. Most recently, the ICAO reached an agreement on certification procedures to complement aircraft CO₂ emissions

205. Gaines, supra note 20, at 810.
207. Shaffer & Bodansky, supra note 193, at 32–33 (assuming that the EU’s proposal is non-discriminatory under WTO rules); Rietvelt, supra note 206, at 495.
210. Id. at 4, 13.
211. Id. at 6–8.
212. ICAO, New Progress on Aircraft CO₂ Standard. COM 15/12 (2012); ICAO, New ICAO Council High-Level Group to Focus on Environmental Policy Challenges, COM 20/12 (2012).
The practical steps the ICAO has taken towards a market-based mechanism for aviation emissions are indicative of an “alignment of political will” within the industry to come to an agreement on emissions reductions.

When considering whether the EU should continue to unilaterally enforce the Directive or defer to the multilateral process, the likelihood that the Directive will create environmental norms must be balanced against the likelihood that the measure will spur greater resistance and undermine the legitimacy of the global climate regime. Although the EU deferred the enforcement of the Directive to non-EU airlines to allow additional time for a multilateral agreement within the ICAO, the EU will reinstate the enforcement of the non-EU airline’s obligations under the Directive if the ICAO 38th Assembly does not make “clear and sufficient” progress on such an agreement. However, even if sufficient progress is not made at the 38th ICAO Assembly, the EU should refrain from reinstating the application of the Directive to non-EU airlines.

B. The European Union’s Role in the International Climate Change Regime

The EU should continue to suspend the extraterritorial application of the Directive, because instead of creating environmental norms, the Directive will put the legitimacy of the WTO at risk and undermine the utility of unilateral environmental trade measures as a tool to address environmental problems. While the EU has the potential to serve as a “norm entrepren-
neur” and transfer its environmental values to its trade partners, it has yet to “successfully upload these norms,” or their underlying principles “to the global level.” This was seen in the negotiation of the Kyoto Protocol and in the negotiations leading up to the Copenhagen Accord, where the EU played a leading role in driving negotiations forward, but failed to convince the other parties to the negotiations to adopt its positions on how to address global climate change.

The EU has a pattern of getting international actors to the negotiating table, but once there, exerting minimal influence in persuading other countries to buy into its position on global environmental governance. There are several explanations for the gap between the EU’s environmental goals and its ability to transfer these norms to other international actors. The first is a result of a conflict of values between the EU and other key actors in climate negotiations. The EU is a “norm-driven actor,” and shapes its climate policy around its concerns for protecting its “environmental, economic, and security-related” interests in the long-term, even if it is necessary to incur costs in the short-term. In contrast, countries such as the United States, Japan, and four of the larger developing economies, Brazil, South Africa, India and China (“BASIC”), are “interest-driven actors,” focused on protecting their short-term economic interests.

These ideological differences imbue uncertainty and distrust into the negotiating process that can lead parties to become suspicious of their opponents potential ulterior motives. This results in a politicization of climate change discussions that can lead to a stalemate when major actors become reluctant to

221. Van Schaik & Schunz, supra note 23, at 171; Oberthür & Kelly, supra note 26, at 42–44.
compromise their objectives.\textsuperscript{224} The uncertainty inherent in international negotiations is exacerbated by the unilateral actions of a single country when it is not clear if a self-interested goal is at play.\textsuperscript{225} However, the proponent of the unilateral measure can alleviate this concern when the measure includes some degree of sacrifice.\textsuperscript{226} Showing a “degree of sacrifice” in climate negotiations has been problematic for the EU, as seen with the Kyoto Protocol where the EU’s required GHG emissions reductions were less than one-third of the reductions that would be required of the United States if it ratified the agreement.\textsuperscript{227}

The shift in the political landscape of climate negotiations since the Kyoto Protocol also helps to explain the EU’s struggle to upload its norms to the global level. The United States and the EU played a dominant role during the formation of the UNFCCC, and the negotiation of the Kyoto Protocol, as the countries responsible for the majority of CO\textsubscript{2} emissions from developed countries.\textsuperscript{228} However, by the fifteenth Conference of the Parties to the UNFCCC in Copenhagen, the BASIC countries had joined the EU and the United States as major players at the negotiating table.\textsuperscript{229} China, in particular, has become an “indispensable actor in climate politics,” in that its CO\textsubscript{2} emissions are expected to exceed the U.S.’s emissions by 75% by 2030.\textsuperscript{230} In contrast, the EU hopes to cut CO\textsubscript{2} emissions by 40% of 1990 levels by 2030.\textsuperscript{231} The shift of the political order in climate negotiations tends to erode the EU’s influence over the process.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{225} Afionis, \textit{supra} note 223, at 349–50.
\item \textsuperscript{226} \textit{Id}.
\item \textsuperscript{227} \textit{Id}.
\item \textsuperscript{228} Lisanne Groen, et. al., \textit{The EU as a Global Leader? The Copenhagen and Cancun UN Climate Change Negotiations}, 8 J. CONTEMP. EUR. RES. 173, 180 (2012).
\item \textsuperscript{229} \textit{Id}.
\item \textsuperscript{230} Carlarne, \textit{supra} note 224, at 123–24.
\end{itemize}
\end{footnotesize}
Despite this, the EU still plays an important role in setting the climate agenda. While the EU is not always successful in delivering on its ambitious aspirations in climate change negotiations, it often gains a first-mover advantage by its ability to use its norms to define the problem at issue and propose a solution. In addition, the EU has been successful as a “blocking power” in preventing attempts to renegotiate established principles and goals in international negotiations. The EU is likely to continue to be a major player in international climate negotiations for several reasons. First, the EU retains a competitive advantage with its significant trading bloc of twenty-seven member states. This significance is driven home by the EU’s “trading and investment relationships” with the United States, which consist of “nearly 40 percent of world trade.” Second, the EU is seen as a balancing force in the future distribution of power between multiple nations, such as China, Russia, and the United States. And third, the EU is particularly suited to continue structuring climate negotiations and advocate for international cooperation due to the strength of its own domestic environmental policy.

The debate over the EU Directive is already highly politicized, as indicated by the challenge to the Directive before the European Court of Justice, and the U.S. legislation prohibiting U.S. airlines from complying with the Directive. In addition, the United States, India, China, and twenty other countries adopted the Moscow Joint Declaration to urge the EU to cease application of the Aviation Directive to non-EU aircraft operators and threatened future legal challenges before the ICAO
and the WTO. If the resolution of the conflict over the Directive is transferred to the WTO, the Appellate Body will be forced to decide on the balance between trade rights and measures to address climate change, a decision upon which its members have failed to come to an agreement.

A judicial resolution of the dispute over the Directive would create a lose-lose situation. If the WTO strikes down the Directive, it would receive severe disapproval from the EU and environmental organizations that support the Directive. In addition, a ruling against the Directive would undermine the EU’s role as a leader in climate policy, a role that has been crucial in driving international climate negotiations forward. If the Appellate Body were to uphold the Directive, however, the decision would be met with widespread opposition, undermining political support for the WTO as a trade institution and also undermining its legitimacy in balancing states’ interests. This may also instigate offended members to take action to exclude the EU from future efforts to reach a multilateral agreement. Both outcomes would serve as a major disruption in the continuation and success of climate negotiations, with catastrophic consequences for the climate.

CONCLUSION

Global climate change remains a formidable challenge, with the window for action quickly closing. While an international consensus has formed that global temperature increases must

239. The countries were even coined the “coalition of the unwilling,” by the media. Kotoky, supra note 13; Meeting on Inclusion of Civil Aviation in the EU ETS, supra note 81.
240. Knox, supra note 94, at 49.
241. PURVIS & GRAUSZ, supra note 17, at 7.
245. PURVIS & GRAUSZ, supra note 17, at 3.
be limited to 2°C Celsius to prevent “dangerous anthropogenic interference with the climate,” there still remains a significant gap between countries’ voluntary commitments and the reductions necessary to prevent global temperature increase above this threshold. Even though the EU’s Directive constitutes a step toward addressing this environmental challenge, it will ultimately serve as a setback in efforts to address global climate change.

Enforcement of the Directive on non-EU airlines will exacerbate the already severe tensions surrounding the measure, driving the dispute into the WTO for judicial resolution. Instead of creating positive environmental norms, the Directive’s failure before the WTO would undermine the use of unilateral environmental measures with extraterritorial effects as a tool for climate policy, as well as other non-climate related environmental measures. Though the WTO has yet to use GATT Article XX to balance international trade with efforts to combat climate change, it is unwise to use the Directive as a means to define this relationship. A multilateral environmental agreement for aviation emissions is on the horizon, and even if the 38th ICAO Assembly fails to establish a market-based mechanism for these emissions, the EU should abstain from the extra-territorial application of the measure to preserve the climate negotiation process.

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INADEQUACY OF TRIPS & THE
COMPULSORY LICENSE: WHY BROAD
COMPULSORY LICENSING IS NOT A
VIABLE SOLUTION TO THE ACCESS TO
MEDICINE PROBLEM

INTRODUCTION

Erectile dysfunction, cancer, and HIV/AIDS are not generally thought of as falling within the same class of medical illness. Erectile dysfunction is often characterized as a non-life-threatening condition, while cancer is labeled a lifestyle disease, and HIV/AIDS as an epidemic. Yet, medications for all three health problems have had their drug patents broken by a compulsory license under the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). The goal of TRIPS is to provide access to essential medications in cases of national public health emergency by granting a compulsory license of a patented medication. The drafters’ intent was to balance intellectual property (“IP”) rights with access to affordable medications. Yet the vagueness of TRIPS and its compulsory license provisions, specifically Articles 30 and 31, has caused much controversy and opposition. Consequently, TRIPS has not been utilized to its fullest nor has it been utilized as its drafters intended. It is doubtful, for example, that the drafters of TRIPS intended erectile dysfunction to be covered under the Article 31 public health emergency exception to patent rights, which allows third parties to manufacture a pa-

5. See Gratzer, supra note 3.
6. See id.
7. See id.
tentmedication without the consent of the patent owner. At the other end of the spectrum, HIV/AIDS is explicitly covered under this exception. Furthermore, as the number of cancer deaths increases, it has become less clear whether life-style disease medications should be covered. Thus, as these three brief examples illustrate, the scope of compulsory licenses must be better defined to properly balance the countervailing goals of IP rights with access to medicines, and to allow TRIPS to more successfully achieve these dual goals.

Balancing countervailing goals is never an easy feat, especially in international IP where countries vary in economic, social, and cultural terms. It follows, then, that providing access to affordable medicines has been a challenge for the international community, which must balance improving global health against the IP rights of patent holders of life-saving medications. Both interests are supported by parties having deeply entrenched goals with different primary priorities and different approaches. On the one hand, developing countries and non-profit organizations have a primary focus of ensuring access to affordable medicines for those in poverty. Developing countries often lack the capabilities and infrastructure to create IP, such as patentable drugs, and are thus primarily IP importers, and lack an incentive to protect IP. These countries favor weaker IP rights, which allow market entry of generic drug manufacturers and increased market competition. Market entry and competition lower drug prices, resulting in increased

8. See id.
9. See id.
15. Chow, supra note 11, at 12.
16. See Whobrey, supra note 12, at 625.
17. See id.
availability of affordable medications. On the other hand, developed countries and the pharmaceutical industry primarily focus on protecting their valuable IP, namely patented medications. Developed countries are primarily IP exporters and thus seek stronger IP rights to ensure protection both abroad and domestically. Similarly, pharmaceutical companies assert that strong IP rights are required to recoup their research and development costs—which can exceed $800 million for each successful drug—and to incentivize future innovation.

Although neither concern over global health nor IP are new issues in the international community, they were initially contemplated as separate and competing interests and were only brought together for the first time under TRIPS. International commitment to global health was highlighted as early as the 1940s with the formation of the United Nations, the World Health Organization, and the World Bank Group and has been reaffirmed repeatedly, appearing in the Millennium Development Goals established by the United Nations Millennium Declaration in September 2000. Likewise, protection of IP rights through international initiatives is not a novel concept; it is rooted in the 1883 Paris Convention, which was echoed with the formation of the World Intellectual Property Organ-

18. See id.
19. See Chow, supra note 11, at 453.
20. Id. at 12.
21. See id. at 8–9.
22. Id. at 10–11, 453.
zation ("WIPO")\textsuperscript{29} in 1967 and the Patent Cooperation Treaty\textsuperscript{30} in 1970. However, in 1994, when the World Trade Organization ("WTO")\textsuperscript{31} adopted TRIPS,\textsuperscript{32} the two competing interests clashed. TRIPS linked IP to trade, and trade affects access to medications.\textsuperscript{33} Though the TRIPS negotiations pitted developing and developed countries against each other,\textsuperscript{34} all 153 WTO member countries adopted TRIPS on April 15, 1994, which attempted to create strong international IP rights by setting basic standards.\textsuperscript{35} However, in an attempt to balance strong IP rights with access to essential medicines, TRIPS included certain flexibilities intended to support global health, particularly compulsory licensing and parallel importation,\textsuperscript{36} which will be discussed infra in Part I.B.

This Note will analyze whether TRIPS has successfully balanced its two competing goals of protecting IP and improving access to medicines. The analysis will illustrate several impediments to TRIPS in the approximately fifteen years after its implementation and will highlight special challenges concerning access to chronic disease medications. This analysis will show that TRIPS is an ineffective solution for the access to medicine problem. The Note will then suggest recommendations for amending TRIPS to better achieve its two policy goals, as well as suggest a supplemental market approach to TRIPS that will best ensure access to both communicable (i.e., infec-

\begin{footnotes}
\item 33. Chow, supra note 11, at 25.
\item 34. See Watson, supra note 13, at 149–150.
\item 36. The WTO, supra note 31; TRIPS Fact Sheet, supra note 35.
\end{footnotes}
tious) and non-communicable (i.e., chronic) disease medications.

In light of the treaty’s deficiencies, the amendment to TRIPS proposed here will require a three-tier pricing system and will also prohibit parallel importation. A supplementary market approach will be an alternative to compulsory licensing. The market approach for all practical purposes must be advantageous to pharmaceutical companies and developed countries, while still providing needed medications to developing countries. Under this approach, compulsory licensing should have a limited scope and interpretation, as the market alternative should be the dominant route to distribute medications. Part I will discuss the timeline and background of international IP initiatives and will end with a discussion of the relevant provisions of TRIPS. Part II will identify problems and recent impediments to TRIPS. Part III will survey special challenges in the area of chronic diseases. Finally, Part IV will propose recommendations to strengthen TRIPS and to better promote its dual goals in the face of increased hostility and dissatisfaction of all involved parties.

I. BACKGROUND

A. International IP Initiatives: Road to TRIPS

The first international IP agreement was the Paris Convention of 1883.\textsuperscript{37} Although it was a major step to address IP on a global scale, the Paris Convention lacked substantive standards for IP, and left member countries to structure their domestic IP laws as desired.\textsuperscript{38} For example, the Paris Convention did not impose a standard definition of patentable subject matter, resulting in inconsistencies where some countries excluded pharmaceuticals and biotechnology from patent protection.\textsuperscript{39} Lack of enforcement capabilities presented additional limitations to the Paris Convention.\textsuperscript{40} A more significant attempt at international harmonization occurred in 1967 with the creation of WIPO, a specialized agency under the United Nations.\textsuperscript{41}

\textsuperscript{37} Chow, \textit{supra} note 11, at 25.
\textsuperscript{38} Id. at 270.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 26.
However, like the Paris Convention, WIPO lacked a global enforcement mechanism. In 1994, the WTO adopted TRIPS, which is currently the leading international IP treaty and links IP to trade.

The key improvement that makes TRIPS a stronger treaty than past international IP regimes is its enforcement capability, established through “an elaborate Dispute Settlement Body” under the WTO. Due to this improvement, TRIPS is not a “toothless organization” and has “real powers to impose [trade] sanctions” on member countries that do not comply with the minimal substantive IP standards set forth in TRIPS. Further, TRIPS includes minimal standardized substantive rights for patent protection, lacking in past international IP agreements. For example, TRIPS prohibits denying patents

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42. See Chow, supra note 11, at 26. The WIPO international harmonization effort was much larger, containing 175 member countries, compared to only eleven member countries bound by the Paris Convention. See Kaminski, supra note 41, at 248; Chow, supra note 11, at 64.
43. Chow, supra note 11, at 25, 58.
44. Id. at 26.

When one member challenges another’s actions as violating a specific WTO agreement or principle, the issue is brought before the Dispute Resolution Body (DRB). The DRB holds proceedings and issues decisions . . . . If a country loses a dispute and does not cooperate and abide by the DRB’s decisions, the WTO has the power to authorize trade sanctions against the losing party.

Whobrey, supra note 12, at 628; TRIPS is a non-self-executing treaty, as articulated in Article 1.1, meaning each member country must enact domestic legislation to comply with the standards set forth in TRIPS. Chow, supra note 11, at 289; see TRIPS, supra note 32, art. 68 (establishing the TRIPS Council to monitor compliance by member countries with TRIPS and to interpret its provisions); see also Chow, supra note 11, at 292.
45. Chow, supra note 11, at 26, 58.
46. See id. at 271. Substantive minimum standards of patent protection in TRIPS include, but are not limited to:

[First,] countries must allow for the patenting of processes and may not deny patents based on the field of technology . . . . [Second,] TRIPS also delineates what exclusive rights a patent must entail and for how long, and puts limitations on when countries may enact exceptions or compulsory licenses to patents . . . . [Third, TRIPS] also requires countries to afford judicial review of any revocation or forfeiture of a patent.

Id.; see TRIPS, supra note 32, art. 27–34 (setting the minimal terms for patent protection).
“based on the field of technology” and thus requires all member countries to protect pharmaceutical and biotechnology patents.47 It also requires patent protection for a minimum of twenty years in member countries.48 Attempting to balance these stronger IP standards, TRIPS also includes exceptions, called TRIPS flexibilities, in order to appease the competing interest of global health.49

B. Relevant Provisions of TRIPS: TRIPS Flexibilities


Article 28 of TRIPS lays out the exclusive rights of patent holders, namely, the exclusive right to make, use, offer for sale, sell, or import the patented good.50 The patent holder also has the exclusive right to assign, transfer, or license the patent.51 The compromise and balance between strong IP rights and attempts to promote public health is seen generally in Article 8(1) and Article 27(2).52 Article 8(1) demonstrates that public health was a concern during the drafting of TRIPS, where it allows member countries to “adopt measures necessary to protect public health, nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”53 Article 27(2) excludes patentability of inventions that are “necessary to protect the ordre public or morality,” including those inventions that protect human life or health.54

47. Chow, supra note 11, at 271; TRIPS, supra note 32, art. 27(1). Prior to TRIPS over forty countries had no patent protection for pharmaceutical products. Josephine Johnston & Angela A. Wasunna, Patents, Biomedical Research, and Treatments: Examining Concerns, canvassing Solutions, 37 Hastings Center Report (SPECIAL REPORT), no.1, S1, S5 (2007).
48. TRIPS, supra note 32, art. 33.
49. See Bhatt, supra note 35, at 600. See also TRIPS Fact Sheet, supra note 35; Chow, supra note 11, at 336.
50. TRIPS, supra note 32, art. 28(1).
51. Id. art. 28(2).
52. See id. art. 8(1), 27(2).
53. Id. art. 8(1).
54. Id. art. 27(2).
2. Compulsory Licensing

Article 30 and Article 31 more clearly state the exceptions to the IP rights held by a patent owner and attempt to address the access to medicine concern of developing countries. These exceptions are often referred to as the “TRIPS flexibilities.”\(^{55}\) Article 30 allows member countries to provide “limited exceptions” to a patent holder’s exclusive rights,\(^{56}\) “provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”\(^{57}\) Article 31 offers a more detailed exception to a patent holder’s exclusive rights, specifically the compulsory license exception.\(^{58}\) This exception requires a third party to first attempt to negotiate a voluntary license with the patent holder before requesting a compulsory license through the third party’s government.\(^{59}\) However, Article 31 allows third parties to bypass the voluntary license negotiation in cases of “a national emergency or other circumstances of extreme urgency”\(^{60}\) or in cases of public non-commercial use.\(^{61}\) This emergency compulsory license exception is limited to requiring compulsory licenses to be “authorized predominantly” for domestic use.\(^{62}\)

3. Parallel Importation

In addition to the compulsory license, another significant TRIPS flexibility is the concept of parallel importation alluded to in Article 6.\(^{63}\) Parallel importation results from price discrimination, where a particular product is sold at different prices in different countries, and is based on the concept of ex-

\(^{55}\) Bhatt, supra note 35, at 600.

\(^{56}\) TRIPS, supra note 32, art. 28, 30 (Article 28 refers to the patent holder’s exclusive rights).

\(^{57}\) Id. art. 30.

\(^{58}\) See id. art. 31.

\(^{59}\) Id. art. 31(b).

\(^{60}\) See discussion infra Part II.A.3. TRIPS does not define “national emergency” or “extreme urgency”—a deficiency that will be discussed below.

\(^{61}\) TRIPS, supra note 32, art. 31(b). TRIPS requires “adequate remuneration” be paid to the patent holder in cases where a government does in fact grant a compulsory license. Id. art. 30(h).

\(^{62}\) Id. art. 31(f).

\(^{63}\) See id. art. 6.
haustion. Exhaustion, or the first sale doctrine, states that after a sale the prior possessor of a product relinquishes all rights to the product and the new possessor is able to distribute and import it at will. Opponents of exhaustion, including pharmaceutical companies, contend that it “decreases profitability and removes the incentive to sell drugs to poor countries at lower prices.” Further, there is a concern that some corrupt governments of developing countries may resell the discounted drugs received at higher profits to other countries, rather than provide the discounted drugs to their citizens in need. TRIPS neither bans nor authorizes parallel importation.

C. Response to TRIPS: International Clarification of TRIPS

1. The Doha Declaration

After developing countries raised concerns as to the scope of interpretation of the TRIPS flexibilities and its relation to the issue of access to medicines, the WTO issued a Declaration on TRIPS and Public Health at a conference in Doha, Qatar in 2001. The Doha Declaration reaffirmed the need to balance grave “public health problems afflicting many developing ... countries” with “intellectual property protection[, which] is important for the development of new medicines.” Further, paragraph four of the Doha Declaration states that TRIPS “should be interpreted and implemented in a manner supportive of WTO member’s right to protect public health and, in particular, to promote access to medicines for all” and that the flexibilities were provided “for this purpose.”

64. Chow, supra note 11, at 428.
65. Id. at 419.
67. Id.
68. See TRIPS, supra note 32, art. 6 (“[N]othing in this Agreement shall be used to address the issue of exhaustion . . . .”).
69. Chow, supra note 11, at 459.
71. Id. ¶ 1 (specifically recognizing public health concerns in “HIV/AIDS, tuberculosis, malaria and other epidemics”).
72. Id. ¶ 3.
73. Id. ¶ 4.
ration also affirms that each member country can determine the circumstances for granting compulsory licenses, the circumstances constituting a national emergency, and can establish its own policy on exhaustion.\textsuperscript{74} It specifically states that a public health crisis may include, but is not limited to, those “relating to HIV/AIDS, tuberculosis, malaria and other epidemics.”\textsuperscript{75}

Lastly, the Doha Declaration recognizes a problem created by Article 31(f) of TRIPS regarding the use of compulsory licenses.\textsuperscript{76} Article 31(f) restricts compulsory licenses to manufacturing goods “predominantly” in the domestic country.\textsuperscript{77} However, many developing countries do not have the manufacturing, infrastructure, or expertise to domestically produce pharmaceutical products and thus these countries would not be able to use the compulsory license flexibility.\textsuperscript{78} Paragraph six of the Doha Declaration recognizes this issue and requests the WTO Council for TRIPS\textsuperscript{79} to propose a solution.\textsuperscript{80}

2. Paragraph Six Decision

On August 30, 2003, the WTO General Council reached a solution to the problem recognized in paragraph six of the Doha Declaration.\textsuperscript{81} This solution, known as the “Implementation

\begin{itemize}
\item\textsuperscript{74} Id. ¶ 5.
\item\textsuperscript{75} Id. ¶ 5(c).
\item\textsuperscript{76} Vishal Gupta, \textit{A Mathematical Approach to Benefit-Detriment Analysis as a Solution to Compulsory Licensing of Pharmaceuticals under the TRIPS Agreement}, 13 CARDozo J. INT’L & COMP. L. 631, 643 (2005).
\item\textsuperscript{77} TRIPS, supra note 32, art. 31(f).
\item\textsuperscript{79} TRIPS supra note 32, art. 68 (establishing the Council for TRIPS to monitor the operation of TRIPS and members’ compliance with their obligations, and affords members the opportunity to consult the Council on related matters).
\item\textsuperscript{80} Doha Public Health Declaration, supra note 70, ¶ 6.
\end{itemize}
Decision” or “Paragraph 6 Decision,” created a waiver for Article 31(f) of TRIPS by which a country that lacks manufacturing capabilities may now import a specific pharmaceutical product.\footnote{82} However, the Paragraph 6 Decision contains a number of restrictions on this waiver, complicating the importation process.\footnote{83} In 2005, the WTO General Council voted to amend TRIPS to permanently include the Implementation Decision as Article 31bis.\footnote{84} The amendment will take effect after acceptance by two-thirds of the member countries.\footnote{85}

II. PROBLEMS AND IMPEDIMENTS TO TRIPS & ACCESS TO MEDICINES

A survey of a multitude of factors highlights the problems and impediments to successful use of TRIPS. These include: complicated procedural requirements, actual use of compulsory licensing, definitional ambiguities, limitations inherent in developing countries, retaliation by pharmaceutical companies and developed countries, and legal challenges to compulsory license laws and grants. As a result of these factors TRIPS has not been used to its fullest ability and has also not been used as its drafters intended. Consequently, the dual goals of balancing IP rights with access to essential medicines have not been fully achieved.

\footnote{82} Id. ¶ 2.
\footnote{83} Id. \(\lambda\) 2. The waiver applies only “for the purposes of production of a pharmaceutical product. . . .” Id. It also imposes several notification requirements and labeling requirements. \(\text{Id. \(\lambda\) 2(b)(iii).}\)
\footnote{84} TRIPS and Public Health: Members Accepting Amendment of the TRIPS Agreement, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last updated Jan. 5, 2012); see also Chow, supra note 11, at 464.
\footnote{85} TRIPS and Public Health, supra note 84. The deadline to accept the amendment has been pushed back to December 31, 2013. Id. As of February 16, 2013, forty-three of the 155 members have approved the amendment, including the United States. Id.; Understanding the WTO: The Organization Members and Observers, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatish_e/tif_e/org6_e.htm (last visited May 10, 2012) (listing all 155 members and observers of the WTO).
A. Problems

1. Complicated Procedural Requirements

Compulsory licensing is a complicated process requiring a number of procedural hurdles to be met prior to issuing the compulsory license.86 “Even if a developing country is ultimately successful in authorizing a compulsory license . . . the delays in authorization due to [the mandatory] judicial review [or other independent review] may discourage licensees from producing generic versions . . . as they will have less time to recover start-up costs.”87 Further, the Paragraph 6 Decision is not a streamlined procedure and is time-consuming, expensive, and has been rarely used.88 In addition, many countries have not

86. See generally Donald Harris, TRIPS After Fifteen Years: Success or Failure, as Measured by Compulsory Licensing, 18 J. INT’L PROP. L. 367, 390–392 (2011). TRIPS Article 31(a)–(l) states a long list of procedural requirements a country must satisfy prior to compulsory licensing, which include: “use [of the license] shall be considered on its individual merit,” “scope and duration of the use must be limited to the authorized purpose,” “judicial or other independent review of the use authorization,” use is “contingent on adequate remuneration” to the patent holder, which “must take into account the economic value of the authorization” and is “subject to judicial or other independent review.” Cynthia M. Ho, A New World Order for Addressing Patent Rights and Public Health, 82 CHI.-KENT L. REV. 1469, 1488 (2007) [hereinafter A New World Order]. But see id. (“Despite the long list of procedural requirements . . . compliance with these requirements has not generally been an issue.”).


The longer the issuance of compulsory licenses is delayed after patented drugs enter the marketplace, the less time licensees have to recover their start-up costs and the more difficult it is to achieve effective competition among multiple generic substitute suppliers.

Thus, if compulsory licensing is to be successful, expeditious licensing procedures are a necessity.


88. See generally A New World Order, supra note 86, at 1492–1493 (providing an overview of the procedures and requirements prior to allowing compulsory licensing of drugs for export under the Paragraph 6 Decision); Harris, supra note 86, at 389–392; Holger Hestermeyer, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES 261–272 (2007) (offering a more detailed overview of the Paragraph 6 Decision and its procedural requirements).
enacted domestic legislation to incorporate the Paragraph 6 Decision, making it non-operational. Canada was the first and only country to use the Paragraph 6 Decision to export a generic AIDS drug to Rwanda after issuance of a compulsory license. However, due to the complicated process (cumbersome to both the eligible exporting and importing countries), lack of incentives, huge costs, time commitment, and challenges in recovery costs, the director of public affairs for the generic drug firm stated that it would not use the Paragraph 6 system again. Fears that the procedures for the Paragraph 6 Decision are “so complicated that it will remain virtually unused until the WTO reforms the system to make it less cumbersome and more streamlined” were presented during the TRIPS Council’s October 2010 meeting.

89. A New World Order, supra note 86, at 1491–1492. Norway, Canada, India, and the EU are the only potential exporting countries that have formally informed the TRIPS Council that they have enacted domestic legislation to comply with the Paragraph 6 Decision. TRIPS and Health: Frequently Asked Questions—Compulsory Licensing of Pharmaceuticals and TRIPS, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm (2006).

90. Harris, supra note 86, at 389–390.

91. Id. at 389–391. It took more than four years to ship generic AIDS medications to Rwanda, where two years were spent negotiating between the generic drug manufacturer and the patent holders. Id. Concerns over the compulsory license being issued for too short a term—making it difficult for the generic drug maker to recover costs for investing in the manufacture of the medicines—further complicates the issue. Id. The scope and duration of a compulsory license is limited by Article 31(c), where the compulsory license must be terminated when the circumstances for the issuance of the compulsory license ceases. Hestermeyer, supra note 88, at 250. However, an important caveat is that the “legitimate interests of the beneficiary of the license must be adequately protected.” Id. This caveat is important because “the beneficiary of a license has to make investments before it can work the license and it would be difficult to find a beneficiary willing to do so if the license is liable to be terminated at any given moment.” Id.

92. Harris, supra note 86, at 391–392. Concerns over the limited use of the Paragraph 6 mechanism were also discussed at the March 2010 TRIPS Council meeting. Id. at 391; see also William New, WTO Paragraph 6 Meeting Aims At Improved Use Of Health Waiver, IP WATCH (Oct. 16, 2010, 5:20pm), http://www.ip-watch.org/weblog/2010/10/16/wto-paragraph-6-meeting-aims-at-improved-use-of-health-waiver/.
2. Actual Use of Compulsory Licensing

Few countries have made use of the TRIPS flexibilities.93 Over the approximately fifteen years that Article 31 has been in force, only a handful of countries have issued compulsory licenses under its authority, and only one country has issued a compulsory license under the 2003 Paragraph 6 Decision.94 The disuse of the TRIPS flexibilities and the United States’ and pharmaceutical companies’ negative reactions to South Africa’s 1997 attempt to provide cheaper HIV/AIDS medications led to clarification of TRIPS in the Doha Declaration.95 Eight years after Doha, and fifteen years after the signing of TRIPS, only fifty-two countries have issued compulsory licenses.96 Some countries, particularly Brazil, threaten using compulsory licenses as a negotiation tool to lower drug prices.97 However, it

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93. But see Savoie, supra note 87, at 237 (stating that although compulsory licensing has not been utilized extensively, there is a recent trend towards increased issuance of compulsory licenses by developing countries).

94. See generally Harris, supra note 86, at 387–390.


97. See Harris, supra note 86, at 387–388. Brazil’s use of its compulsory licensing provision as a negotiation tool has lowered HIV mortality rates by 50% in the 536,000 HIV infected Brazilians. Chow, supra note 11, at 454.
is the actual use of compulsory licenses that achieves the lowest prices, not mere threats.  

Since compulsory licensing is infrequently used, TRIPS has not effectively reduced the price of drugs on a broad scale, which is essential to increasing access to medicines. Newer, more effective drugs are six times more expensive than older treatments where the patents have expired. Further, when compulsory licensing is used, TRIPS limits generic manufacturers to producing only the quantities predefined in each compulsory license. This limitation “curbs the large-scale production that is required to deliver drugs cheaply.” Also, some argue the price of drugs after a compulsory license does not justify the massive intrusion on patent rights because the price is not low enough and is still out of reach for the poor. Moreover, actually granting a compulsory license is not necessary to lower the price of drugs. Market competition and negotiations between large pharmaceutical companies and generic drug manufacturers have proven to lower drug prices. For example, a price war and social pressure, not issuance of a compulsory license between the pharmaceutical company and the generic drug makers, led to AIDS medications being reduced

98. Tove Iren S. Gerhardsen, Brazil Takes Steps To Import Cheaper AIDS Drug Under Trade Law, IP WATCH (May 7, 2007, 1:50pm), http://www.ip-watch.org/weblog/2007/05/07/brazil-takes-steps-to-import-cheaper-aids-drug-under-trade-law/?res=1280&print=0. Negotiations between Thailand and Merck, and between Brazil and Merck, for the HIV/AIDS drug efavirenz show that the pharmaceutical companies offered their lowest prices after receiving a compulsory license. Id.

Brazil had achieved a price for efavirenz of $580 per patient per year earlier when it had threatened to use compulsory license. But this was too expensive compared with the price for generics (Thailand was offered $244 per patient per year after it issued a [compulsory license]), and thus Brazil has paid too much for too many years. . . .

Id. Also, when few or no licenses are actually issued, repeated, hollow threats of use erode the negotiating power of the compulsory license. Id.


101. Id.

102. Id.

103. Watson, supra note 13, at 154.

104. See generally AVERT, supra note 100.
from about $10,000 per person per year in 1996 to $295 in 2001.\textsuperscript{105} Further, compulsory licenses have been predominantly issued for health related emergencies of HIV/AIDS, and thus their use has been very limited in scope.\textsuperscript{106} In addition, despite compulsory licenses for HIV/AIDS drugs, 14.6 million people globally still lacked access to antiretroviral drugs at the end of 2009, which translates to a mere 36% coverage rate.\textsuperscript{107} In the 2011 Millennium Development Goals Report, the WHO stated that it had not reached its 2010 target for universal access to HIV/AIDS treatment.\textsuperscript{108} 91% of pregnant women in need of antiretroviral drugs live in largely impoverished sub-Saharan Africa.\textsuperscript{109} Of course, other diseases still run rampant in low and middle-income countries. For example, 90% of malaria deaths still occur in sub-Saharan Africa, and 85% of new tuberculosis cases occur in Asia and Africa.\textsuperscript{110}

3. Definitional Ambiguities & Ambiguities in Scope

Ambiguities in the interpretation of TRIPS due to the lack of substantive guidelines or definitions also hinder its effective use by increasing the risk of litigation.\textsuperscript{111} The Doha Declaration

\textsuperscript{105} Id.

\textsuperscript{106} See 't Hoen, supra note 96, at xvi–xvii; DeRoo, supra note 95, at 359. But see DeRoo, supra note 95, at 359–362 (discussing the Thai experience in the January 25, 2007, compulsory licensing of Plavix, a heart disease medication, under the public non-commercial use provision of TRIPS); but see, e.g., Beth Jinks & Suttinee Yuvejwattana, Thailand to Buy Generic Plavix in India, Snubs Sanofi (Update1), BLOOMBERG (July 5, 2007 12:13 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aQ3E3cABtPX-U.


\textsuperscript{108} MDG Report 2011, supra note 107, at 41.

\textsuperscript{109} Id. at 42.

\textsuperscript{110} Id. at 42, 46. But see id. at 47 (“[U]p to 6 million lives have been saved since 1995, thanks to an effective international strategy for the diagnosis and treatment of tuberculosis.”).

\textsuperscript{111} Gupta, supra note 76, at 640, 647, 649. See also Hestermeyer, supra note 88, at 247 (stating that members may take different views as to the in-
merely stated that individual countries have “the right to de-
terminate what constitutes a national emergency or other cir-
cumstances of extreme urgency” in deciding to grant a compul-
sory license, and thus did little to ameliorate the different inter-
pretive approaches of developed and developing countries. The flexible scope of compulsory licenses lends to abuse which
further instills resistance and suspicion from pharmaceutical

interpretation, but also that a member relying on one interpretation risks litiga-
tion from another member relying on a different interpretation); see also
Gupta, supra note 76, at 637 (“Though TRIPS sets forth minimum standards,
patent protection is not equivalent in each member state since each state can
independently interpret these standards.”).

[M]uch about the interpretation of Article 31 of the TRIPS Agree-
ment remains in doubt and while the right to access to medicine is a
useful argument to support a broader, more flexible interpretation, it
is merely one argument amongst several. It remains uncertain to
what extent it would carry the day in a dispute settlement proceed-
ing. Faced with the uncertainty about the interpretation . . . and
pressure exerted by developed countries . . . developing countries
have largely foregone imposing such licenses to alleviate health con-
cerns. Indeed, in the wake of the TRIPS Agreement many countries
have limited the provisions on compulsory licensing in their laws.

Hestermeyer, supra note 88, at 239–253. But see Johnston & Wasunna, supra
note 47, at S17 (noting that a lack of definitions allows member countries to
have flexibility to interpret TRIPS to meet their own social and cultural val-
ues).

112. A New World Order, supra note 86, at 1485. Controversy over the scope
of a public health crisis exists even after Doha, in which the United States
argues that the agreement’s officially-listed “HIV/AIDS, tuberculosis, malaria
and other epidemics,” are the only possible emergencies, in contrast to the
developing countries that argue for a broader interpretation. Id. at 1485 n.72.
See also Gupta, supra note 76, at 646–647 (“the absence of guidelines, limits
or direction as to the definition of [public health problem] will lead to incon-
sistent application of the provision and further tension,” as well as include
diseases “not within the Declaration drafter’s intent.”). Thailand’s compul-
sory license for the heart disease drug, Plavix, was criticized for not satisfying
the national emergency requirement, although it was ultimately granted un-
der the “public, noncommercial use” exception. See, e.g., A New World Order,
supra note 86, at 1486 n.76; see also Hestermeyer, supra note 88, at 246–247
(arguing that though “access to medicine supports a broad interpretation . . .
[n]evertheless, the provision is not very attractive for Members in such a sit-
uation, as they are reluctant to label their situation one of emergency because
of the effect that would inevitably have on likely investors and tourists.”).
companies. For example, Egypt’s compulsory license for Pfizer’s Viagra tarnishes the reputation of compulsory licensing because erectile dysfunction is clearly a less dire situation and one likely not intended to be covered by the public health exception of TRIPS. Such excessive abuse and over-use of compulsory licensing likely encourages pharmaceutical companies to aggressively resist valid uses of compulsory licenses to prevent over-expansion of scope. In addition to ambiguity in the scope of intended diseases, conflicting interpretations exist in the type of pharmaceutical products intended for compulsory licensing.

The scope of countries that should benefit from compulsory licensing remains another area of contention. Not limiting

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113. See generally McGill, supra note 78, at 87–97 (arguing inconsistencies in countries’ interpretation of when to grant compulsory licenses leads to negative consequences).

114. Id. at 89–90. Pfizer responded by stopping construction of a manufacturing facility in Egypt and many pharmaceutical companies have avoided investing in Egypt. Id.; Egypt’s aggressive compulsory licensing has contributed to a decrease in foreign direct investment “from $948 million in 1987 to $509.4 million in 2001-02.” Id.


116. Gupta, supra note 76, at 647. Developed countries define “products within the pharmaceutical sector” as products “required by a WTO Member while dealing with public health problems.” Id. In contrast, developing countries include “all medications and vaccines, including active pharmaceutical substances used in the prevention and treatment of disease and health care, as well as diagnostic products and products used to administer medicines and vaccines.” Id.

117. See id. at 648. Doha and the Paragraph 6 Decision in referencing “countries with insufficient or no manufacturing capabilities,” does not explicitly require that those countries must lack the “resources to purchase medicines from the manufacturer.” Id. This ambiguity may qualify “small, wealthy nations such as Luxembourg or Singapore” who simply choose not to manufacture certain drugs, even though it may not have been the drafters’ intention. Id. Other countries interpret Doha and the TRIPS flexibilities as applying to only “developing nations not capable of economically implementing such manufacturing technology . . . . Additionally, it remains unclear exactly what insufficient manufacturing capacity actually means.” Id.; see also Watson, supra note 13, at 154 (expressing fear that “middle-income nations will
The scope of countries that should benefit from compulsory licensing remains another area of contention. 117 Not limiting the scope of applicable nations may create a chilling effect on the types of drugs pharmaceutical companies choose to invest in and develop to avoid the potential for a compulsory license, which hurts developing nations most in need of help. 118 Interpreting the morality exclusion in Article 27(2) also proves difficult, as there is no universally accepted definition. 119

In addition to causing differing interpretations between countries, the lack of concrete definitions allows countries to alter their position to fit their self-interest and creates potential for abuse. 120 For example, despite the United States’ narrow interpretation of TRIPS flexibilities, the United States contradicted itself during the 2001 anthrax scare by suggesting use of a compulsory license for Cipro, a drug that combats the effects of
The vagueness of Article 30, which allowed a narrow interpretation to be given by the WTO dispute resolution panel, is a further impediment to increasing access to medicines.\textsuperscript{124} Calculating adequate remuneration for payment to the patent holder when a compulsory license is issued is another obstacle to successful use of TRIPS flexibilities and is further complicated by the requirement to take the economic value of the authorization into account, as TRIPS does not provide guidance to determine what is 'adequate' and what is the authorization's 'value.'\textsuperscript{125} The WTO members' inability to reach a decision regarding parallel importation created a “fundamental flaw” of ambiguity.\textsuperscript{126} In regard to compulsory licensing under the Paragraph 6 Decision, drugs made for export must be distinguishable by special labels, colors, or shapes to prevent trade diversion.\textsuperscript{127} However, lack of monitoring guidelines and repercussions makes the re-exportation issue troubling.\textsuperscript{128}

4. Limitations Inherent in Developing Countries

Another impediment to the successful use of the TRIPS flexibilities and the successful achievement of its dual goals is the endemic and inherent characteristics of developing countries.

\textsuperscript{124} See Hestermeyer, supra note 88, at 235 (arguing that the scope of Article 30 exceptions are “notoriously vague,” which could have allowed the Canada—Patent Panel to interpret it broadly in light of a right to access to medicines, but it failed to do so). \textit{See generally id.} at 234–239; WTO panel decisions are not binding to subsequent decisions. \textit{A New World Order, supra} note 86, at 1482 n.54. Nevertheless, subsequent parties and panels usually rely on the prior decision. \textit{Id.}

\textsuperscript{125} Hestermeyer, \textit{supra} note 88, at 247–249; TRIPS, \textit{supra} note 32, art. 31(h); Chow, \textit{supra} note 11, at 452–453 (listing possible methods to determining adequate remuneration). “For example, Thailand considers a royalty rate of 0.5% of the total sales to be compliant.” \textit{A New World Order, supra}, note 85 at 1488 n.90.

\textsuperscript{126} Hestermeyer, \textit{supra} note 88, at 234. \textit{See generally id.} at 230–234 (discussing parallel importation and the different interpretations amongst countries).

\textsuperscript{127} Implementation Agreement, \textit{supra} note 81, ¶ 2(b)(iii).

\textsuperscript{128} Gupta, \textit{supra} note 76, at 648–649.
Taking advantage of TRIPS flexibilities requires technical expertise, intergovernmental coordination, and legal sophistication, which are often lacking in developing governments.\footnote{129} Thus, TRIPS flexibilities often do not benefit the least developed countries most in need of help, and rather help middle-income countries such as India and Brazil.\footnote{130} Developing countries also lack proper disease diagnosis capabilities, which hinders their ability to request proper quantities and types of medications in a compulsory license.\footnote{131} Developing governments have been criticized for mass military spending when there are existing public health issues, and so they may need to reevaluate their priorities.\footnote{132} Developing countries and their citizens may choose to spend funds on food rather than medication, even if costs are reduced, if insufficient funds exist to cover both costs.\footnote{133} Additionally, some developing governments are corrupt and may resell medications at higher prices, rather than distributing the drugs to their citizens.\footnote{134} A “scrupulous

\footnote{129. Johnston & Wasunna, supra note 47, at S18–S19.}

\footnote{130. AVERT, supra note 100. “But the problem is that these options are limited to countries with political clout and financial stability and autonomy. As is all too often the case, it is the poorest countries already struggling to manage their HIV epidemics that are the least likely to benefit from the current system.” Id. See also Gerhardsen, supra note 98 (relating a statement by Merck that Brazil should not be granted a compulsory license for efavirenz “as the world’s 12th largest economy, Brazil has a greater capacity to pay for HIV medicines than countries that are poorer or harder hit by the disease.”).}

\footnote{131. See MDG Report 2011, supra note 107, at 44.}

\footnote{132. See Savoie, supra note 87, at 244 (Thailand has been criticized for granting a compulsory license for Plavix after increasing “military spending by thirty percent, to over one billion dollars, while cutting public health expenditures by twelve million dollars.”).}

\footnote{133. Margo A. Bagley, Legal Movements in IP: Trips, Unilateral Action, Bilateral Agreements, and HIV/AIDS, 17 Emory Int’l L. Rev. 781, 794 (2003) (noting that drug costs are not the only factor impacting access to essential medicines).}

\footnote{134. Whobrey, supra note 12, at 633.}

More African children are receiving the recommended medicines for malaria, but accurate diagnosis remains critical. Prompt diagnosis and treatment are needed to prevent life-threatening complications from malaria. However, accurate diagnosis is critical. The majority of childhood fevers, for example, are not due to malaria, and should not be treated with antimalarial drugs . . . . [P]atients [may be] receiving antimalarial medicines who do not, in fact, have the disease.\footnote{Id.}
clean hands approach” must be practiced to ensure drugs are actually distributed at the lowest profitable prices, and unfortunately such practices have been questionable.\textsuperscript{135} Further, lobbying pressure and conflicting interests may create abusive overuse of compulsory licensing where, for example, “the chairman of a large generic drug manufacturer was also the Chairman of the Health Committee in Egypt’s upper house of Parliament at the time the [Viagra] compulsory license was issued [in Egypt].”\textsuperscript{136}

\textbf{B. Impediments \& Threats}

\textbf{1. Retaliation by Pharmaceutical Companies}

Developing countries are cautious in using compulsory licenses to avoid alienating powerful pharmaceutical companies and business repercussions.\textsuperscript{137} Pharmaceutical companies “bring jobs and investments to developing countries.”\textsuperscript{138} After Thailand issued a compulsory license for Abbott’s HIV drug, Kaletra, Abbott stated it would not sell certain drugs in Thailand and withdrew seven new drug applications from Thai-

The incentives created by parallel importation encourages governments to favor profits over people, and since many governments in developing countries are unstable and may be prone to corruption, the general public in [least-developed countries] sees neither the critical medications nor realizes any benefits or improvements from the sale of the drugs.

\textit{Id.}

\textsuperscript{135} Jerome H. Reichman, \textit{Compulsory Licensing of Patented Pharmaceutical Inventions: Evaluating the Options}, 37 J.L. MED. \& ETHICS 247, 254 (2009). “The level of compensation was questionable in the Thais’ treatment of Plavix, the compulsory license on Viagra in Egypt was tainted by the appearance of impropriety and self dealing, and complaints about ‘shadow pricing’ in some Latin American countries merit serious attention.” \textit{Id.}


\textsuperscript{137} See Harris, \textit{supra} note 86, at 392–393. The forcefulness of the pharmaceutical industry’s response in Thailand and Brazil “may have a discouraging effect on smaller economies considering similar public health actions but lack the legal or political resources to defend themselves on the global stage.” Gerhardsen, \textit{supra} note 98.

\textsuperscript{138} Harris, \textit{supra} note 86, at 392. Brazil’s decision to grant a compulsory license for Merck’s HIV/AIDS drug could divert investments from Brazil. Gerhardsen, \textit{supra} note 98.
Pharmaceutical companies have also stated that compulsory licenses destroy the incentive to research and develop drugs to treat diseases affecting developing countries.\footnote{139. Cynthia M. Ho, \textit{Patent Breaking or Balancing?: Separating Strands from Fiction Under TRIPS}, 34 N.C. J. INT'L L. & COM. REG. 317, 444 (2009) [hereinafter \textit{Patent Breaking or Balancing?}].}

2. Retaliation by Developed Countries

In addition to retaliation by pharmaceutical companies, developing countries also fear retaliation by developed countries. The possibility of trade sanctions imposed by developed countries against developing countries eliminates the benefits of granting a compulsory license because any costs saved by the cheaper medications are offset by other economic sanctions.\footnote{140. Watson, \textit{supra} note 13, at 153; see Johnston & Wasunna, \textit{supra} note 47, at S17.}

For example, the United States' Special 301 Watch-List Reports lists countries with inadequate IP protection and allows imposition of trade sanctions against the offenders.\footnote{141. \textit{Patent Breaking or Balancing?}, \textit{supra} note 139, at 447–48. “On why Brazil has not issued a CL before [2007], ‘[t]he most obvious reason is the fear of an open conflict with the United States.’” Gerhardsen, \textit{supra} note 98. “The Thai case, and the recent 301 list report (IPW, US Policy, 30 April 2007), indeed shows that despite the Doha Declaration and all the commitments made, the US is ready to be extremely aggressive . . . .” \textit{Id.}} Threat of trade sanctions by the United States, which is Thailand’s biggest export market, forced Thailand to stop producing a generic version of the HIV drug, didanosine, and amend its domestic laws to restrict compulsory licenses and parallel importation.\footnote{142. \textit{Patent Breaking or Balancing?}, \textit{supra} note 139, at 448; Watson, \textit{supra} note 13, at 151–153 (Brazil, South Africa, and Thailand have all at some point been placed on the 301 Watch-List).}

Increase in border protection measures to prevent harmful counterfeit drugs may also be another form of retaliation by developed countries and is a barrier to access to medicines.\footnote{143. Johnston & Wasunna, \textit{supra} note 47, at S19.}

The 2003 European Union border regulations have led to the seizure of significant quantities of drugs, most of which origi-

Developed countries also deviate outside of TRIPS to bind developing countries to more extensive patent protections through bilateral and regional free trade agreements (“FTAs”).\footnote{In February 2009 a shipment of second-line generic ARV drugs was confiscated by Dutch customs authorities. The 49kg of abacavir sulfate tablets produced by an Indian company, Aurobindo, were bound for a treatment programme in Nigeria. The tablets were later released but the seizure highlighted tensions between the European Union’s rules on IP rights and World Trade Organization rules concerning the production of generic medicines.}\footnote{AVERT, \textit{supra} note 100.} Often these FTAs limit the use of TRIPS flexibilities, impose stricter IP standards, and contain data exclusivity provisions.\footnote{See \textit{generally} Hestermeyer, \textit{supra} note 88, at 289–292 (discussing the challenges posed by FTAs and BITs). TRIPS imposes only minimum standards of IP protection and explicitly allows countries to impose stricter IP regimes “as long as it does not contravene” TRIPS. Bagley, \textit{supra} note 133, at 792.} Appropriately, such agreements are commonly called “TRIPS-plus free trade agreements.”\footnote{Harris, \textit{supra} note 86, at 393–394. Provisions exceeding TRIPS standards are usually referred to as TRIPS-plus provisions. Hestermeyer, \textit{supra} note 88, at 289.}\footnote{Bhatt, \textit{supra} note 35, at 617–618.}\footnote{\textit{Id.} at 618. As of 2003, there were at least twenty-three bilateral and regional FTAs containing TRIPS-plus provisions and which affect more than 150 developing countries. Bagley, \textit{supra} note 133, at 792–93.} Despite the negative effect on access to medicines, developing countries agree to FTAs to appease and build a relationship with a powerful developed country hoping to gain benefits in other trade areas.\footnote{See Hestermeyer, \textit{supra} note 88, at 291.} Further, developing countries have less leverage to negotiate favorable terms in FTAs where the agreements are often between only two countries of unequal negotiating powers and thus the developing country lacks the support of other countries.\footnote{As of early 2013, the United States has FTAs with
Recently, on October 1, 2011, the United States signed the Anti-Counterfeiting Trade Agreement (“ACTA”) which has been highly criticized for exceeding TRIPS limitations to a significant degree, violating human rights, and severely affecting access to medicines.152

3. Legal Challenges

Legal challenges to domestic implementation of compulsory licensing laws and to compulsory license grants also hinder the effectiveness of TRIPS, as such challenges delay access to essential medicines and add costs to seeking a compulsory license. In 1997, with the support of the U.S. government, forty pharmaceutical companies sued the South African government claiming that the South African Medicines and Related Substances Control Amendment Act of 1997 violated TRIPS.153 Similarly, in 2000, the United States challenged the compulsory licensing provisions of the Brazilian Industrial Property Law


153. McGill, supra note 78, at 87–88. The Act attempted to allow generic production of patented antiretroviral HIV drugs. Id. However, public outcry eventually forced the pharmaceutical companies to withdraw the suit. Id. The United States also placed South Africa on its Special 301 Watch List and attempted to challenge the Act’s validity before a WTO panel before withdrawing due to public pressure. Watson, supra note 13, at 152.
in a petition to the WTO Dispute Settlement Body.\textsuperscript{154} As of 2012, Indian generic manufacturers Cipla and Natco face separate patent infringement lawsuits in the Delhi High Court by Bayer Pharmaceuticals for its patented cancer drug Nexavar.\textsuperscript{155}

### III. Special Challenges in Access to Chronic Disease Medications

A current shift in focus from infectious disease compulsory licensing to chronic disease compulsory licensing poses new implications for patent holders and those who seek access to such medicines.\textsuperscript{156} “Compulsory licensing practices, however, continue to expand from responding to purely national emergencies toward addressing everyday health care.”\textsuperscript{157} As the U.N. Secretary General Ban Ki-moon noted:

Commonly known as chronic or lifestyle-related diseases, the main non-communicable diseases are cardiovascular diseases, diabetes, cancers and chronic respiratory diseases. While the international community has focused on communicable diseases such as HIV/AIDS, malaria and tuberculosis, the four main non-communicable diseases have emerged relatively

\footnotesize{\bibliography{references}}
unnounced in the developing world and are now becoming a global epidemic.158

Developing countries are beginning to view “cancer as no less serious than HIV/AIDS.”159 Thailand’s 2007 compulsory license for the blood thinner Plavix (used to treat heart disease) was likely motivated by data estimating thirty thousand cancer deaths annually compared to twenty-one thousand AIDS related deaths in Thailand in 2006.160 Similarly, the Indian generic


In 2008, 36 million people died from non-communicable diseases, representing 63 per cent of the 57 million global deaths that year [and 80 per cent of those deaths occurred in the developing world]. In 2030, such diseases are projected to claim the lives of 52 million people . . . . While non-communicable diseases have traditionally afflicted mostly high income populations, current evidence shows that the spread of such diseases is associated with increasing levels of development. Death and disease from non-communicable diseases now outstrip communicable diseases in every region except Africa, where the rate of such diseases is quickly rising. By 2030, non-communicable diseases are projected to cause nearly five times as many deaths as communicable diseases worldwide, including in low- and middle-income countries.

Id. at 2; see David Brennan, former chief executive of AstraZeneca, Address on Behalf of AstraZeneca to the World Health Assembly (May 17, 2011), available at http://www.ifpma.org/fileadmin/content/Events/Other_IFPMA_Events/17_May_2011/David_Brennan_Speech_Luncheon_17May2011.pdf (WHO research shows that 90% of deaths from non-communicable diseases are in developing countries, and will increase by 17% by 2015. Africa is seeing the greatest increase by 27% compared to Europe’s 6% increase); see generally Raising the Priority of Non-communicable Diseases in Development Work at Global and National Levels, WORLD HEALTH ORGANIZATION, http://www.who.int/nmh/events/2010/ncd_facts_20100913.pdf (2010) [hereinafter Raising the Priority].


160. Johnson, supra note 115. In 2005, heart disease was estimated to be the second leading cause of death in Thailand. Porapakkham et al., Estimated causes of death in Thailand, 2005: implications for health policy, POPULATION HEALTH METRICS (May 18, 2010),
drug maker, Natco, cited over 24,000 Indian deaths per year in its compulsory license application for Bayer’s liver and kidney cancer drug, Nexavar.\footnote{OFFICIAL JOURNAL OF THE PATENT OFFICE, No. 32/2011, at 13349, Dec. 8, 2011 (India), available at http://donttradeourlivesaway.files.wordpress.com/2011/09/official_journal_12_082011_part_i.pdf [hereinafter Natco CL Request]. “In 2008 approximately 20,144 cases of [liver cancer] were reported in India, and more than 18,043 Indians died of [liver cancer].” Id. at 13347. “In 2008, about 8,900 Indians were diagnosed with kidney cancer, and about 5,733 died from the disease.” Id. at 13348. Natco argues that Bayer’s life-saving product is exorbitantly priced and of limited availability in India, and Indians “should be able to access this drug irrespective of their caste, creed, affordability etc.” Id. at 13352. Natco states that it can price the generic version “31 times cheaper than Bayer’s sorafenib tosylate [commonly known as Nexavar] or 3% of the price at which Bayer sells the drug in India.” James Love, Update on the Sorafenib Tosylate Compulsory Licensing Case in India, KNOWLEDGE ECOLOGY INT’L (Oct. 10, 2011, 4:32 PM), http://lists.keionline.org/pipermail/ip-health_lists.keionline.org/2011-October/001392.html.}

Developing countries, despite evidence of growing deaths from chronic disease within their populations, face special challenges in using compulsory licenses to combat chronic diseases as compared to infectious disease compulsory licensing. First, the Doha Declaration uses language of epidemics and infectious disease.\footnote{Doha Public Health Declaration, supra note 70, ¶ 5(c) (“[I]t being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.”).} Second, lack of public attention and misconception that chronic disease affects only wealthy countries removes pressure on pharmaceutical companies to provide such medications at affordable prices for populations in developing countries.\footnote{See McGill, supra note 78, at 88; see Savoie, supra note 87, at 239. Advocacy efforts supporting compulsory licenses have focused on access to HIV/AIDS medications. Id. Pharmaceutical companies are likely to avoid the public relations nightmare faced when they attempted to sue South Africa after its passage of the Medicine and Related Substance Control Amendment Act of 1997, intended to begin generic product of HIV drugs. Id.; see generally MDG Report 2011, supra note 107 (failing to include chronic disease as a development, but including infectious diseases); see Preventing Chronic Diseases a Vital Investment, WORLD HEALTH ORGANIZATION, http://www.who.int/chp/chronic_disease_report/contents/part1.pdf (2005) at 4,} Further, because chronic diseases can be combat-
ted by non-pharmaceutical means, it may be more difficult for developing countries to cite compulsory license use as necessary.164 Lastly, expanding the scope of compulsory licenses to chronic diseases will likely be met by even stronger resistance from pharmaceutical companies because the inclusion of “chronic, non-communicable diseases like cancer hits at the heart of the drug industry’s profit model.”165 For example, a dramatic decline in foreign direct investment and research establishments was seen in Thailand after it granted a compulsory license for a heart disease medication in 2007.166

IV. RECOMMENDATION & PROPOSAL

The shortcomings of TRIPS reveal that compulsory licensing is an ineffective solution to the problem of access to essential medicines. The impediments of TRIPS further illuminate the likely inability of TRIPS to effectively cope with the increasing global threat of chronic diseases. Drug prices need to be reduced in order to increase access to medicines. However, broad-range compulsory license use is not a viable solution because it jeopardizes the research and development structure of pharmaceutical companies.167 Pharmaceutical companies argue that

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8–10 (explains ten widespread misunderstandings about chronic disease and the reality).

164. See Raising the Priority, supra note 158, at 3–4 (noting that chronic diseases are preventable by life-style changes such as tobacco use, diet, physical activity, and alcohol use). In contrast, the “WHO recommends that countries use a combination of antimalarial medicines to reduce the risk of drug resistance” as the best treatment for the infectious disease of malaria. What is the best treatment against malaria? Why combine drugs?, WORLD HEALTH ORGANIZATION, http://www.who.int/features/qa/26/en/index.html (2009) (last visited May 10, 2012).

165. Johnson, supra note 115. See also Savoie, supra note 87, at 241 (“Medications for chronic diseases play a much larger role in pharmaceutical portfolios than do medications for infectious diseases such as HIV/AIDS.”). Pharmaceutical companies focus drug discovery on chronic disease because “patients look forward to months, even years, of treatment” and hence prolonged profits whereas infectious disease often only requires short-term therapy. Steven J. Projan, Why is Big Pharma Getting Out of Antibacterial Drug Discovery?, 6 CURRENT OPINION MICROBIOLOGY 427, 428 (2003).

166. McGill, supra note 78, at 91 (“Gross private investment growth fell from 10.6% to .5% in 2007, its lowest since 2000” largely due to the $10 billion decline in foreign direct investment in 2007).

167. DeRoo, supra note 95, at 354. “Given that pharmaceutical companies make a marginal profit of less than 20% across all their products the view
strict patent laws and high drug prices are necessary to recoup large research and development costs ("R&D"). Thus, to lower drug prices, the current business model of recouping R&D costs through profits should be adjusted. A new business model to recoup R&D costs, while lowering prices, should be approached through funding and incentives. R&D models built on public-private partnerships that help in financing and product development may help promote efficiency, access, innovation, and information sharing. Alternative sources of funding R&D through partnership efforts, rather than expanding the scope of compulsory licenses, should be used to lower drug prices and increase access. If alternative sources of

that pharmaceuticals are 'grossly overpriced' is at best naïve and for the development of novel [products] it is fatal." Projan, supra note 165, at 428. 168. Johnson, supra note 115.

Research and development averages between ten and fifteen years in the United States and is included as part of the twenty-year patent—meaning the average drug patent, once on the market, lasts about eleven years, according to the lobby group PhRMA. R&D for 2010 was about $67 billion, growing less than $11 billion between 2006 and 2010 . . . . Few drugs ever recoup their R&D costs, notes PhRMA, and even fewer ever reach the incredible earning potential of a drug such as Lipitor, which made nearly $11 billion in sales in 2010 but expired in the United States in 2011. Overall, drug companies are spending less on research and bringing fewer drugs to market than a decade ago.

Id. But see Bob Young & Michael Surrusco, Rx R&D Myths: The Case Against The Drug Industry's R&D “Scare Card,” PUBLIC CITIZEN, July 2001 (arguing that the pharmaceutical industry's claim that extraordinary profits are needed "to fund expensive, risky and innovative research and development [R&D] for new drugs" is misleading).

169. See Brennan, supra note 158 (relating a statement of interest made by the CEO of AstraZeneca regarding working together to create "commercially sustainable business models" that enable healthcare access to more people).

170. See Frederick M. Abbott, IP and Public Health: Meeting the Challenge of Sustainability 32 (GLOBAL HEALTH PROGRAMME, GENEVA, SWITZERLAND, WORKING PAPER No. 7/2011, Nov. 15, 2011). Such public-private organizations include the Bill & Melinda Gates Foundation, Drugs for Neglected Diseases initiative ("DNDi"), and the Medicines Patent Pool ("MPP"). Id.

171. See generally id.

172. See James Love, Will the UN backtrack on accessible medicine?, CENTER FOR HEALTH HUMAN RIGHTS & DEVELOPMENT, http://www.cehurd.org/2011/10/will-the-un-backtrack-on-accessible-medicine/ (Oct. 31, 2011) ("Developing countries cannot improve access to cancer drugs unless they grant more compulsory licenses on patents, or undertake more
funding are used, rather than the current business model of using profits to recoup R&D costs, then pharmaceutical companies should be more willing to lower drug prices and reduce resistance to compulsory licenses. A funding approach that relies less on recouping R&D costs will also encourage development of drugs that may primarily benefit developing countries because, despite the lower profit potential, a greater percentage of revenues will constitute pure profit and will not count against R&D expenses. Such a result will hopefully close the “10/90 research gap,” a disparity resulting from only 10% of the worldwide R&D being devoted to health problems that affect the poorest 90% of the world’s population.

Further, compulsory licenses should be limited in scope to increase legitimacy, decrease resistance and fear of retaliation, and decrease abuse. If the scope of compulsory licenses is better defined, then all players would have proper notice. More specifically, if pharmaceutical companies are re-assured that a compulsory license would not open a floodgate and destroy a wide-array of patents, they will be more willing to acquiesce. Similarly, better guidance will help the least developing coun-

173. See DRUGS FOR NEGLECTED DISEASES INITIATIVE, http://www.dndi.org/overview-dndi.html (last visited Dec. 20, 2011). DNDi is a public-private partnership that promotes research and development for neglected diseases that often afflict developing populations. Id.


175. The 10/90 research gap refers to the finding that only 10% of the US$55 billion global spending on health research is devoted to diseases or conditions that account for 90% of the global burden of disease. For each year of potential life lost in the industrialized world, more than 200 times as much is spent on health research as is spent for each year lost in the developing world.

176. Johnson, supra note 115 ("[D]rug companies fought so strongly over the licensing of HIV/AIDS drugs because they foresaw that the ‘national emergency’ line would not end at infectious diseases."); Nexavar to Storm India: Compulsory License Plea Filed, BIOSPECTRUM, http://www.biospectrumasia.com/content/020911IND17008.asp (Sept. 2, 2011) (last visited May 10, 2012) ("[E]xtensive use of compulsory licenses will in the long-term undermine and threaten the patent system.").
tries to invoke legitimate compulsory licenses and prevent abusive use of compulsory licensing, such as Viagra in Egypt and Cipro in the United States. Minimizing discretionary use will bring legitimacy to the compulsory license process. However, some flexibility in scope is necessary to allow adaptation of compulsory licenses to changing global disease threats.

TRIPS should therefore be amended to require WTO panels to take a more active role in compulsory license applications, as opposed to allowing complete discretion on the part of national governments. Since approving generic production of a patented medication already may take several years—due to the various obstacles discussed above—WTO panel decisions will not significantly prolong the process. To determine whether a compulsory license is necessary and the claimed disease is a true national public health emergency, the WTO panel should use an analysis akin to U.S. courts’ strict scrutiny test as applied to laws infringing on U.S. citizens’ Constitutional rights. The WTO panel should consider the national disease

177. See McGill, supra note 78, at 88-96 (arguing that the “[c]itizens of the most underdeveloped countries have suffered as a result of the discretionary allowances of the Doha Declaration.”).
178. Id. at 75 (“Unchecked discretion for compulsory licensing has made compulsory licenses a dirty word for economic development and erected a barrier between generic drugs and the least developed countries that need them.”).
179. See id. at 83 (arguing that “a pre-determined list of diseases that may benefit from compulsory licensing is not in the public’s best interest; diseases that threaten public health mutate, evolve, and present unforeseeable degrees of gravity, mortality, contagiousness, and treatability.”).
180. See id. at 97 (“An administrative body through the WTO with representatives from both developed and developing countries may be in a better position to determine when countries may issue a compulsory license” and give developing countries a louder voice).
182. See Reichman, supra note 135, at 254 (noting an argument for “[n]arrowly tailored licenses that focus on real public health needs and avoid the appearance of impropriety, and that also ensure consumers actually obtain lower prices.”).
183. See United States v. Carolene Products Co., 304 U.S. 144, 155 n.4 (1938). U.S. courts apply strict scrutiny where a fundamental U.S. Constitu-
burden as well as the country’s ability to cope, the marketed price of the patented medication compared to the proposed price of the generic, the consumer’s ability to pay, and market availability of the patented drug.\textsuperscript{184} The panel should also weigh the harm to the pharmaceutical company’s profit and future floodgate impact.\textsuperscript{185}

In addition to a strict scrutiny analysis by a WTO panel prior to the compulsory license, TRIPS Article 31(b)\textsuperscript{186} should be amended to require good-faith prior negotiations even during a public health emergency. This will also hopefully reduce the burden and amount of cases that reach the proposed WTO panel. Pharmaceutical companies and developed countries would be less resistant to compulsory licenses if they felt they had a say in license determinations. In fact, because negotiations prior to compulsory licensing are already in practice and expected,\textsuperscript{187} such an amendment would not be a drastic departure from current practice. A timeline for deal-making negotiations should be clearly established in TRIPS, limiting parties’ negotiation period to a set number of days before a compulsory license can be filed with the proposed WTO panel.\textsuperscript{188} After the deadline for negotiations expires, the WTO panel would then be

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\textsuperscript{184} See Reichman, supra note 135, at 254; see generally Natco CL Request, supra note 161.

\textsuperscript{185} See generally Brennan, supra note 158; See also Public Policy Position: Compulsory Licensing,\textsuperscript{186} MERCK (July 2008), http://www.merck.com/about/views-and-positions/compulsory_licensing2009.pdf.

\textsuperscript{186} TRIPS, supra note 32, art. 31(b).

\textsuperscript{187} See Chow, supra note 11, at 454–546. The United States withdrew the WTO challenge to Brazil’s compulsory licensing provisions of the Brazilian Industrial Property Law in exchange for Brazil’s agreement to hold negotiations with the United States prior to granting any compulsory license. Id. See also Natco CL Request, supra note 161, at 13358.

\textsuperscript{188} See Natco Pharma Applies for India’s First Compulsory License, ALL ABOUT PATENTS (Aug. 2, 2011, 9:14 PM), http://patentsind.blogspot.com/2011/08/natco-pharma-applies-for-indias-first.html. Indian patent law requires a three year waiting period after a patent is granted before a compulsory license may be filed. Id. See also Natco CL Request, supra note 161, at 13354.
compelled to step in and conduct its strict scrutiny analysis. Further, to prevent a party from stalling or refusing to negotiate, negotiations must be conducted in good faith, and the WTO panel should consider in its analysis whether good faith negotiations occurred. 

The narrowed scope of the compulsory license should be balanced with a market approach to provide access to a broad range of medicines. Global pharmaceutical companies should be encouraged to compete with generic drug makers through government incentives and sell needed patented medication using a three-tier pricing system. To encourage pharmaceutical companies to compete with generic drug manufacturers, governments should incentivize local manufacture by the global pharmaceutical company. The demand for generic drugs exists in developing countries, hence there is a marketplace and thus a profit potential as well. Local manufacture and

189. Natco’s December 6, 2010, letter requesting a license was turned down “point blank, without any discussion whatsoever” in a refusal letter sent three weeks later, on December 27, by patentee Bayer. Id. at 13358–59.
190. See Watson, supra note 13, at 154–57.
191. See generally KAPLAN & LAING, supra note 123. It is important to note that because generic production occurs only in countries that have manufacturing capability, global pharmaceuticals need only locally manufacture in middle-income developing countries where generic competitors exist. Id. Middle-income developing countries presumably have more political stability than low-income developing countries and so the risk of local manufacture is less, although inherently present. Id. Governments of middle-income developing countries, like India, Thailand, and Brazil, also have more ability to provide incentives for local manufacture. Id.

The global generic medicines market is worth over US$ 80 billion, about 30% of total sales . . . . In high-income countries, “originator” (patented) pharmaceuticals account for two-thirds of sales and the share of these in total sales grew substantially from 1990 to 2000. In low-income countries, these [“originator” (patented)] pharmaceuticals account for only about one-third of total sales. Generic pharmaceuticals represent almost two-thirds of total sales in low-income countries and about 60% of sales in middle-income countries. Branded generics are much more important than unbranded generics in sales. Some countries in transition have experienced a rapid change in the composition of their pharmaceutical sales, with generics rapidly being replaced by originator brands or by pharmaceuticals made under licence from originators.
competition by global pharmaceutical companies with generic drug manufacturers would reduce the problem of patent infringement, eliminate the need for broad scope compulsory licenses, and provide for a wider range of drugs accessible to developing countries. Local manufacture will also give pharmaceutical companies greater control of their product as well as provide developing countries with safer drugs. Global pharmaceuticals should be free to then open factories in developing countries and compete with local generic manufacturers, thus offering healthy market competition. However, since generic drugs are sold more cheaply, global pharmaceuticals will have to develop a differential pricing system to effectively compete with the generic drug makers.

Pharmaceutical companies should differentially price drugs in low-income developing countries, middle-income developing countries, and developed countries according to the national median urban income in the respective country category.

Id. at 31.

193. See Johnson, supra note 115.

[Importing inexpensive patented drugs and generics from other countries will erode safety standards . . . . And some experts note a massive influx of generic drugs could help mask increases in the counterfeit drug trade, already a multibillion dollar industry and expected to see a 90 percent jump in global sales from 2005 to 2010. The U.S. Food and Drug Agency estimates counterfeit drugs represent as much 30 percent of all drugs sold in some developing countries, but amount to less than 1 percent of drugs in the developed world.

Id. The majority of private manufacturers in India are “small-scale and have problematic quality assurance systems and procedures.” Kaplan & Laing, supra note 123, at 15.

194. See McGill, supra note 78, at 90–91. Global pharmaceuticals have previously built manufacturing facilities in developing countries. See id. Pfizer was in the process of constructing a manufacturing facility in Egypt before Egypt granted a compulsory license for Viagra. Id. Some companies have also set up research establishment in Thailand and more would have been built had Thailand not been aggressive in its compulsory licensing. Id.

195. See generally Whobrey, supra note 12 (suggesting a 2-tier pricing structure based on GDP).

Prices set at the urban population’s income levels, rather than the rural population, will be more economically feasible for global pharmaceutical companies. Further, a three-tier pricing system will allow pharmaceutical companies to balance lower prices in developing countries with the higher prices in developed countries. Because the majority of sales occur in developed countries, lower prices in developing countries will not be a significant burden on profits. Such reduced profits should be considered as “additional” profits that otherwise would not exist, instead of being negatively viewed as “reduced” profits. Moreover, to incentivize pharmaceutical companies to employ a three-tier pricing system, TRIPS must be amended to prohibit parallel importation and diversion of drugs. Governments and international organizations should regulate and police the re-importation issue, and the WTO should impose trade sanctions on repeat offenders.

Governments of both the developed and the developing countries should provide more incentives to global pharmaceutical companies to invest in a local factory. Such incentives could include: tax breaks, free land to build the factory, or government funds to build the factory. Both developed and develop-


197. See YADAV, supra note 196, at 5 (“It is important to note that differential pricing is not a panacea to ensuring access. For patients with affordability levels lower than the marginal cost of manufacturing, donor subsidies and government support will continue to be required.”).

198. See Kevin Outterson, Patent Buy-Outs for Global Disease Innovations for Low- and Middle-Income Countries, 32 AM. J.L. & MED. 159, 160 (2006) (80% to 90% of global sales of patented pharmaceuticals occur in the thirty wealthiest countries in the OECD. Patented pharmaceuticals could be offered at generic prices to middle and low income countries, which include more than 84% of the world’s population, with only a small reduction in global R&D cost recovery). “In 1999, the 15% of the world’s population who live in high-income countries purchased and consumed about 90% of total medicines, by value. . . . The market share of the USA alone rose from 18.4% of the world total in 1976 to over 52% in 2000.” THE WORLD MEDICINES SITUATION, supra note 192, at 31.


200. See Watson, supra note 13, at 156.
ing country governments can provide tax breaks to pharmaceutical companies in return for selling medicine at reduced prices for developing populations. Developed governments can base tax incentives on a gradient system, where tax deduction increases as the quantity of reduced priced drugs supplied to developing countries increases. Developing governments can give tax breaks for a set number of years to the pharmaceutical company. Thus, any burden is shared by all, the pharmaceutical companies, the developed countries, and the developing countries.

The pharmaceutical company would be allowed to make and keep more of the profits from selling their drug in the local market while using workers and labor from the local country.\textsuperscript{201} This suggested solution would allow the global pharmaceutical company to make a profit, while providing a public service of increasing access to safe medicine and stimulating the local economy by using their labor. As a result, a pharmaceutical company’s public relations image will also improve. By driving the generic drug makers out of business, global pharmaceuticals will not have to worry about enforcing their patent rights as the market will take care of it. Although, in this suggested solution, global pharmaceuticals would be making less profit in developing countries than in developed countries, they would still be making a profit and not incurring a loss, particularly when pricing is based on the urban population coupled with government and market incentives. Further benefits include improved goodwill and reputation, increased control, as well as reduced parallel importation and illegal competition.

Differential pricing is only feasible when coupled with official support, such as amending TRIPS to prohibit parallel importation.\textsuperscript{202} Potential for diversion of drugs from one market to another eliminates the incentive for companies to engage in differential pricing, leading to a single, world-wide uniform pric-

\textsuperscript{201} See Kaplan & Laing, supra note 123, at 15 (“India’s rich natural resources and manpower have not been fully exploited.”); see id. at 32 (noting, however, that few developing countries would have the PhD level skills and technical staff for many of the jobs required in the pharmaceutical industry).

\textsuperscript{202} See Yadav, supra note 196, at 6. “Despite its theoretical appeal and some notable successes, the use of differential pricing as a tool to improve access to medicines is not widespread. The primary causes include risks of physical arbitrage (lower priced product flowing back to the high income markets) . . . .” Id.; see Watson, supra note 13, at 157.
Banning parallel exports will increase the supply available to needy consumers because it removes the demand by distributors. Only the intended needy consumers will have access, and thus, as the drug will not be siphoned by distributors, the number of such consumers who will actually have access to the drug will increase. Re-importation should be policed and regulated. Countries should implement domestic legislation to comply with this amendment to ban parallel importation, and countries in violation should be punished with trade sanction. Further, violating countries would be harmed by backlash from pharmaceutical companies who would likely opt not to locally manufacture their product. Further, violating countries will also likely suffer a decrease in foreign direct investment.

Any solution will need to address the realities and challenges of compulsory licensing, including the differing priorities of IP and public health interests. An easy solution does not exist and every solution comes with its own set of additional challenges. For example, any amendment to TRIPS—whether to limit the scope of compulsory licenses by better defining “public health emergency,” creating WTO panels that employ strict scrutiny to assess the validity of a compulsory license request, requiring good faith prior negotiations, or banning parallel importation—is a difficult task. In fact, there has only been one amendment to TRIPS in the approximately fifteen years since its inception. An amendment to TRIPS requires acceptance by two-

203. See generally A. Bryan Baer, Price Controls Through the Back Door: The Parallel Importation of Pharmaceuticals, 9 J. INTELL. PROP. L. 109 (2001) (arguing a uniform pricing scheme would likely be set at a high price based on affordability and profit potential from developed countries).

204. See id. at 134.

205. See Watson, supra note 13, at 157.

206. See McGill, supra note 78, at 90 (describing how Pfizer responded to the Viagra compulsory license by halting construction of a manufacturing plant in Egypt).

207. See McGill, supra note 78, at 90–92. Foreign direct investment (“FDI”) in Thailand declined by $10 billion in 2007 as a backlash to widespread compulsory licensing of pharmaceuticals. Id. Similarly, FDI in Egypt dropped from $948 million in 1987 to $509.4 million in 2001-02. Id.

thirds of the WTO member countries, and the amendment will only affect those member countries having accepted the amendment.\textsuperscript{209} Furthermore, once an amendment is adopted, domestic legislation must be drafted and adopted in the individual countries.\textsuperscript{210} Moreover, amending TRIPS to better define “public health emergency” is in itself a delicate task, where a balance between removing ambiguity and retaining enough flexibility to adapt to changes is important. Defining and limiting “public health emergency” will eliminate ambiguity, decrease abuse, and decrease resistance from developed countries and the global pharmaceutical industry. However, even a more concrete definition requires enough flexibility to withstand changes in time and adapt to changes in trends. In addition, a market approach to supplement amendments to TRIPS also poses difficulties. For example, much coordination would be necessary among WTO member country governments, global pharmaceutical companies, and local generic manufacturers to prevent parallel importation, encourage local manufacture and healthy competition, and create a three-tier pricing scheme. Coordination and internal restructuring within the global pharmaceutical industry would also be required, which will likely be a time consuming and complicated process.

CONCLUSION

TRIPS has been important in making strides toward access to essential medicines for developing populations. Despite noble efforts, however, many still lack access to life-saving medications. The spirit of TRIPS and its dual goal of improving medical access while preserving patent rights should be continued and enhanced. Legitimacy cannot be sacrificed for efficiency and, accordingly, compulsory license use should be limited in scope to true public health emergencies with the help of WTO panel decisions. Market forces, such as government incentives, international cooperation and public-private partnerships between advocacy groups and pharmaceutical companies


\textsuperscript{210} Amending TRIPS, \textit{supra} note 208.
should be used as the dominant route to improving access to medicines and preserving patent rights.

Collaboration with pharmaceutical companies is the most commercially viable solution for balancing TRIPS' dual goals. Working against pharmaceutical companies by merely broadening compulsory license use is not realistically viable, as the many obstacles to compulsory license use has shown. With chronic diseases on the rise, TRIPS and pharmaceutical business models need to be adjusted to combat new global concerns. There is still a long road ahead to improving global access to medications and, although TRIPS was a major step, it cannot be the end of the road. New measures and methods need to be created and adopted to treat the expanding global threat of diseases.

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* B.S. in Biological Sciences, Cornell University (2009); J.D. Brooklyn Law School (Expected 2013). I would like to thank my parents, Dico and Mirna Halajian, and my brother Gary Halajian, for their constant love, support and encouragement. I would also like to thank Professor Irene Manta and Professor Derek Bambauer for their thoughtful comments and time devoted to assisting me in the writing of this Note. I also thank the staff and editors of the Brooklyn Journal of International Law for their skillful and diligent assistance in helping to prepare this Note for publication. All errors and omissions are my own.
NO UNIVERSAL TARGET: DISTINGUISHING BETWEEN TERRORISM AND HUMAN RIGHTS VIOLATIONS IN TARGETED SANCTIONS REGIMES

INTRODUCTION

On December 14, 2012, the White House enacted the “Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act,” a seemingly innocuous piece of international trade legislation with an unprecedented attachment (the “Bill”). The Bill’s formal purpose was to establish “permanent normal trade relations” with Russia, following Russia’s admission to the World Trade Organization (“WTO”). During negotiations, however, a certain title of the Bill—that section called “the Magnitsky Act”—dominated the floor. The Magnitsky Act empowered the U.S. president to “determine[] based on credible information,” that individual Russian citizens had violated international human rights, and to then place them on a blacklist—starting with Russian officials associated with the imprisonment and death of Russian


4. Peters, supra note 3.
lawyer Sergei Magnitsky. These violators were prohibited from entering the United States, and any of their existing assets within U.S. jurisdiction were frozen. The Kremlin responded with Yakolev’s Law, which included sanctions against U.S. citizens connected to mistreatment of Russian children adopted by Americans.

These pieces of legislation have created targeted sanctions: instruments of a state’s foreign policy “that are designed and implemented in such a way as to affect only those parties that are held responsible for wrongful, unacceptable, illegal, or reprehensible behavior,” including individuals, legal entities, and other non-state actors that violate international law. Targeted sanctions are “an alternative to comprehensive sanctions” that are directed at a state as a whole and “that affect entire populations.” Although targeting an individual foreign national is not a wholly unprecedented foreign policy measure (being widely practiced against suspected terrorists in the last couple decades), the application of such measures against suspected human rights violators represents a deviation from ac-

6. Throughout this Note, there is a semantical difficulty regarding the term “human rights violators” as generally used. On the one hand, because the individuals were not formally convicted after a fair hearing in accordance with their rights under international law (discussed in Parts I and II), their guilt ought not to be assumed, and they would be properly referred to as “alleged” violators. However, the state actors here treat the individuals as convicts by inflicting punishment upon them. Therefore “human rights violators” in this Note refers to these accused individuals, bearing in mind these different perspectives and specifying which perspective is relevant where appropriate.
7. Peters, supra note 3.
9. Id.
cepted principles of human rights and sovereignty in international law.

All types of economic sanctions have gained popularity since the 1990s. Sanctions are “the tool of choice for the [United Nations Security C]ouncil in addressing threats to, or breaches of, international peace and security around the world,” because they are seen as a nonviolent instrument of foreign policy. Not all international organizations use sanctions regularly, however. The WTO, for example, has sought to deter the use of sanctions by its member states by requiring them to pursue resolutions to conflicts through arbitration within the WTO itself.


14. Economic restrictions appeared, on their face, to be less harmful than military intervention. This idea was occasionally referred to as the “Wilsonian notion,” attributed to President Woodrow Wilson. Gary Clyde Hufbauer, Policy Brief 98-4: Sanctions-Happy USA, PETERSON INST. INT’L ECON. (July 1998), available at http://www.piie.com/publications/pb/pb.cfm?ResearchID=83. President Wilson’s opinion of sanctions was not wholly positive, however. As quoted by Professor W. Michael Reisman in a 2008 address, the president elaborated:

A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings oppression upon the nation, which in my judgment no modern nation could resist.


15. In comparison, WTO procedures favor “removal of trade barriers found to be inconsistent with covered agreements rather than imposition of a second trade barrier in retaliation.” ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 167 (2nd ed. 2008). Should a trade dispute arise, the Understanding on Dispute Settlement prohibits members from making an inde-
Recent international litigation has prompted analysts to reexamine the legality of targeted economic sanctions under accepted principles of international law. The methods employed by sending states—usually freezing an individual’s or entity’s assets within the sanctioning party’s jurisdiction, or denying a visa—generally lack the necessary elements to protect internationally recognized human rights principles and comply with customary international law. In the terrorism context, for example, U.N.-supported targeted sanctions that have frozen the assets of individuals associated with terrorism can directly violate the individuals’ due process rights. Following substantial amounts of international litigation, and with the advice of numerous academic conferences, the U.N. Security Council (the “Security Council”) attempted to preserve due process by creating procedures by which a targeted individual would have recourse against the U.N.-authorized sanctions regime. Several scholars believe that the efforts are “positive step[s] toward addressing the serious institutional problems that are inherent in the individual sanctions,” but “not commensurate
with the serious lack of due process and transparency inherent in [the targeted sanctioning as a whole].”

Although questions surrounding the legality of using targeted economic sanctions as a weapon against terrorism remains unresolved, the Magnitsky Act and Yakolev’s Law demonstrate that the use of targeted economic sanctions is expanding from the context of terrorism to that of human rights violations, producing new difficulties in the international legal sphere. This Note argues that collective targeted sanctions against suspected terrorists are theoretically and practically different from a state’s unilateral use of targeted sanctions against a foreign national suspected of violating international human rights law because the latter directly violates a state’s sovereignty as well as the individual’s due process rights. Therefore, international actors must approach the two situations differently, and thereby bring themselves into relative compliance with international law. Part I of this Note describes general sanctions regimes and targeted sanctions, their differences, and how the principles of universal jurisdiction, state sovereignty, and individual rights are implicated by the use of targeted sanctions. Part II argues that using targeted sanctions against individuals affiliated with a recognized state government (as opposed to non-state groups, such as terrorist organizations), infringes on the target state’s exclusive internal jurisdiction, in violation of international law. It also explains how targeted sanctions may, and often do, violate individuals’ due process rights. Part III suggests that, given its unique position in the international legal system, the U.N. is obligated to protect both types of rights, and further recommends that the U.N. protect those rights by regulating the use of unilateral targeted sanctions by member states.

I. BACKGROUND

To understand targeted sanctions, it is necessary to understand their origins, the principles of international law that permit or restrict their use, and the impetus behind the inter-

20. Adeno Addis, Targeted Sanctions as a Counterterrorism Strategy, 19 TUL. J. INT’L & COMP. L. 187, 197 (2010); see also True-Frost, supra note 17, at 1243 (concluding that, even if the U.N.’s new procedures for review do not actually ensure a fair hearing, people benefit from perceiving that their rights are protected).
national community’s ongoing struggle to find a perfect approach. Here, “general sanctions” will refer to the traditional concept of sanctions employed in the twentieth century: a combination of economic measures directed against a target government. Targeted sanctions (specific measures against individuals, as opposed to against the government) were originally one branch of these general sanctions regimes—in other words, one piece of the overall plan. They have since grown, as outlined below.

A. Description and History of Economic Sanctions

Sanctions—a major instrument of international relations— are varied, complex, and ill-defined. This Note focuses on economic sanctions, which Professors W. Michael Reisman and Douglas L. Stevick described as “involv[ing] a purposive threat or actual granting or withholding of economic indulgences, opportunities, and benefits by one actor or group of actors in order to induce another actor or group of actors to change a policy.” In theory, these measures would impose sufficient costs on the target state’s government to effect that change. Economic sanctions include trade restrictions, embargoes, blocks


22. See Michael P. Malloy, Economic Sanctions and U.S. Trade 11–16 (1990); see also Lowenfeld, supra note 15, at 850. Some scholars hold that if a state revokes a benefit it previously conferred, this too would constitute a sanction, while others consider this a neutral practice not within the purview of the term “sanction.” In a similar vein, the International Monetary Fund has denied states access to its funds for limited types of misconduct while maintaining that such denial is not an economic “sanction.” Id.

23. Sanctions may also consist of military (involving the use of armed force), diplomatic (political admonishments), or ideological (propaganda) measures. Reisman, supra note 14, at 10–11.

24. Reisman & Stevick, supra note 21, at 87.

25. A. Cooper Drury, Revisiting Economic Sanctions Considered, 35 J. PEACE RES. 497, 508 (1998); see also Michael Ewing-Chow, First Do No Harm: Myanmar Trade Sanctions and Human Rights, 5 NW. U. J. INT’L HUM. RTS. 153, 153 (2007) (criticizing the theory as “too simplistic a view that does not take into account the likelihood of such an event based on the history, culture and power differential of each country”).
on monetary loans, suspending economic assistance, and travel restrictions (such as visa bans).  

All sanctions begin with a plan by the sending state. Multiple sender states may unite to negotiate a multilateral agreement or collective decision in an international organization to enforce a regime of sanctions against a target state. With a few exceptions, collective sanctions regimes are on the rise. Since 2000, the EU has initiated and collaborated on more sanctions regimes than any other international organization; the U.N. comes in second, having played a major role in six out of seventeen major sanctions regimes since 2000. States may, though less frequently do, attempt to unilaterally sanction another state. 

i. General Economic Sanctions

Traditionally, general sanctions target the state as a whole in order to reach the target state’s government. The theory is that the sender’s actions will cause sufficient hardship in the target state, such that the target’s government will alter its behavior. The sanctioning measures were purportedly pre-

28. The furthest outlier is the United States, which uses unilateral sanctions more frequently than any other state, in addition to participating in multilateral and collective sanctions regimes. Hufbauer, supra note 14.
ventative, not punitive. Desired changes include removal of a leader or party, reorganization of governmental structure (usually toward democracy), cessation of nuclear testing, and greater protection for human rights, etc. For example, in response to the human rights abuses and seemingly nondemocratic elections in Haiti in 2000, the United States cut financial assistance to the country, and the EU temporarily halted economic aid. Aid was restored incrementally from 2004 to 2006, following the previous leader’s removal and the occurrence new elections. This “withdrawal of a current preference” is not violative of international law (and by some definitions, not a sanction at all).

General economic sanctions owe a large part of their popularity to the perception that they are peaceful, “seem[ing] to offer wholly non-violent and non-destructive ways of implementing international policy.” Also, they can be inexpensively executed and thus gain domestic support easily.

33. The U.N. General Assembly formally stated that “the purpose of sanctions is to modify the behaviour [sic] of a party that is threatening international peace and security and not to punish or otherwise exact retribution.” U.N. Secretary-General, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, ¶ 66, U.N. Doc. A/50/60-S/1995/1 (Jan. 25, 1995). This perspective, common among sending parties, is not widely held in the scholarly community, which tends to focus on the ad hoc, coercive nature of sanctions. See, e.g., Normand & Wilcke, supra note 32, at 305; and Vanessa Ortblad, Comment, Criminal Prosecution in Sheep’s Clothing: The Punitive Effects of OFAC Freezing Sanctions, 98 J. CRIM. L. & CRIMINOLOGY 1439 (2008) (criticizing the low evidentiary standards used to place individuals on terrorism blacklists in the United States).


35. This sanctions episode received a score of nine out of twelve on the Peterson Institute’s effectiveness scale, indicating the Peterson analysts consider it an unusually successful example of economic sanctions implementation. Hufbauer et al., supra note 29, at 1.

36. See MALLOY, supra note 22, at 18.

37. Reisman & Stevick, supra note 21, at 94.

38. Id. at 94. Another factor resulting in the increased use of sanctions may have been the increased activity of “single-issue constituencies” like nongovernmental organizations, known for demanding governmental attention to specific issues “when no equally focused countervailing force exist[ed]” and thus influencing foreign policy. Haass, supra note 26, at 3.
In practice, general sanctions suffer two major drawbacks. First, their success rates are dubious; answers to questions of their effectiveness range from “yes, approximately one-third of the time,” to “rarely,” and “no.” In past sanctions episodes, the targeted government often managed to substantially evade the measures taken against it, since “globalization . . . made it easier for target countries to tap international trade and capital markets and find alternative suppliers of goods and capital.” Unilateral sanctions are particularly ineffective. As of early 2013, any apparent success is hard to qualify and quantify, making the effects of economic sanctions difficult to assess.

Second, sanctions can cause harm to innocent civilians in the receiving state. Indeed, sometimes—often enough to incite anger in the international community—the receiving state’s
population suffers greatly despite senders’ attempts to protect basic necessities of life and provide humanitarian aid. Although not the norm, such devastating cases commanded international attention. Owing to the centralization of governmental power in many targeted nations, civilian populations can feel the sting of sanctions first and to the greatest degree because “[t]hose who have no voice in the allocation of resources are the most dependent on them.” These humanitarian problems have been dubbed “collateral damages.”

An infamous general sanctions regime that was both disastrously harmful and woefully ineffective was the U.N. and United States’ concerted attack on Iraq in the 1990s. In response to the Iraqi invasion of Kuwait and Iraq’s refusal to comply with previous Security Council demands, the Security Council imposed a near-total ban on Iraqi imports and exports. This ban lasted from 1990 to 1997, when trade restrictions were relaxed under the Oil-for-Food Program, only to be tightened again in 2001. Deprived of important trade, the Iraqi economy ground to a halt. Civilians faced unemployment, malnourishment, and disease while “the very wealthy, those politically connected to the regime, and the political leadership itself . . . remained largely immune to the shortages of food and consumer goods.” Limited humanitarian aid was “far from perfect and led to one of the most extensive outside reviews of any of the UN’s activities . . . .” The sanctions against

46. Weschler, supra note 11, at 37.
47. See Hufbauer & Oegg, supra note 12, at 315 (“[I]n terms of economic costs of sanctions to target countries, the comprehensive UN sanctions regime against Iraq is a clear outlier.”).
49. Normand & Wilcke, supra note 32, at 313; see also Eric D. K. Melby, Iraq in Council on Foreign Relations, Economic Sanctions and American Diplomacy, supra note 26, at 107, 112 (detailing the economic effects on Iraq).
50. Reisman & Stevick, supra note 21, at 92.
51. Melby, supra note 49.
53. Normand & Wilcke, supra note 32, at 310.
54. Id. at 311.
55. Id. at 311–15.
56. Weschler, supra note 11, at 37.
Iraq proved to be both harmful and largely ineffective at destabilizing the government of Saddam Hussein. In retrospect, this sanctions episode has been decried as blatantly violative of international law.

ii. The Advent of Targeted Sanctions

Targeted sanctions were an attempt to solve the problems of humanitarian “collateral damage” and general ineffectiveness prevalent in comprehensive sanctions regimes and broadly applied economic restrictions. As stated earlier, targeted sanctions “are measures that are designed and implemented in such a way as to affect only those parties that are held responsible for wrongful, unacceptable, illegal, or reprehensible behavior”—meaning individuals, legal entities, and other non-state actors. A refinement of the general sanctions concept, targeted sanctions are implemented by national legislation, authorizing the appropriate governmental body to freeze the assets of a selected individual and prohibit his travel within the sanctioning state.

Targeted sanctions, initially used in combination with other sanctioning measures, are theorized to substantially reduce the amount of collateral damage incidental to a general sanctions regime. Additionally, because targets are selected on the basis of an individual’s actions (for example, engaging in terrorism or piracy), targeted sanctions can be used to hold non-state actors accountable for their actions without emphasizing...

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60. de Vries, supra note 10.
61. See Andrew Hudson, Not a Great Asset: The UN Security Council’s Counter-Terrorism Regime: Violating Human Rights, 25 BERKELEY J. INT’L L. 203, 208–09 (2007) (referring to the multilateral 1267 procedures). Logically, unilateral targeted sanctions such as the Magnitsky Act and Yakolev’s Law are also implemented by national legislation.
63. Addis, supra note 20, at 192 n.22 (2010).
affiliation to a state or geographical region. Thus, targeted sanctions have been designed to allow sanctioning parties to manipulate the effects of a measure (such as financial controls) to simultaneously narrow its scope and increase its intensity.

In practice, however, the procedures associated with targeted sanctions are inadequate. This was particularly true of the U.N. Security Council’s Resolution 1267, which targeted individuals suspected of supporting terrorism (outlined in detail in Part I.B). Analysts and scholars sharply criticized the Security Council for this, and many academic conferences were convened to dissect the Security Council’s methods. Their major concern was a targeted individual’s right to due process under international law. Individuals who found themselves unexpectedly denied access to their property and deemed a terrorist brought numerous cases before national and regional courts in which they had standing, drawing international attention. In response, the Security Council created the office of an Ombudsperson to independently review the basis for each individual’s placement on the list. The establishment of this office moder-

68. Willis, supra note 45, at 675. The discussion regarding Security Council sanctions’ effects on human rights is expansive and ongoing. See, e.g., Padraic Foran, Why Human Rights Confuse the Sanctions Debate: Towards a Goal-Sensitive Framework for Evaluating United Nations Security Council Sanctions, 4 INTERCULTURAL HUM. RTS. L. REV 123 (2009) (arguing that human rights is an inappropriate justification for the implementation of sanctions); Hudson, supra note 61 (arguing that the 1267 procedures deny the right to a fair trial, and that the Security Council is bound to protect that right).
69. True-Frost, supra note 17, at 1187 n.8.
ately ameliorated the situation.\textsuperscript{71} Therefore targeted sanctions may be a step in the right direction,\textsuperscript{72} but their main feature—narrow applicability—is not sufficient by itself to prevent conflict with international law.

\section*{B. Current International Law on Targeted Sanctions}

\textbf{i. Security Council Resolution 1267: Collective Targeted Sanctions Against Suspected Terrorists}

In the late 1990s, as part of its ongoing sanctions regime against Iraq, the Security Council used targeted sanctions (as noted in Part I.A.i).\textsuperscript{73} With Resolution 1267,\textsuperscript{74} the Security Council created the Taliban Sanctions Committee ("Committee"), which maintains "the Consolidated List" of "members of the Al-Qaeda organization and the Taliban and other individuals, groups, undertakings, and entities associated with them."\textsuperscript{75} The legally binding resolution requires each member state to freeze the assets (located within the member state's jurisdiction) of listed individuals or entities and deny those individuals entry into the member state's territory.\textsuperscript{76}

The listing procedures are logical, but have become complicated as they have grown.\textsuperscript{77} As of late 2012, member states were tasked with proposing names for the Consolidated List to the Sanctions Committee, providing

\begin{quote}
\textit{as much detail as possible on the basis(es) for the listing, including: (i) specific information supporting a determination that the individual or entity is a member of a terrorist organ-}
\end{quote}

\begin{flushright}
\textsuperscript{71} True-Frost, \textit{supra} note 17, at 1189.
\textsuperscript{72} Addis, \textit{supra} note 20.
\textsuperscript{73} Hudson, \textit{supra} note 61.
\textsuperscript{77} This is a greatly simplified summary of the procedures. For an accessible summary with greater depth, see Willis, \textit{supra} note 45, or Kalyani Munshani, \textit{The Essence of Terrorist Finance: An Empirical Study of the U.N. Sanctions Committee and the U.N. Consolidated List}, 19 Mich. St. J. Int'l L. 229 (2010).
ization or associated with one]; (ii) the nature of the information; and (iii) supporting information or documents that can be provided,” as well as “details of any connection between the proposed designee and any currently listed individual or entity.78

Once names were added to the Consolidated List, a small team oversaw state compliance and reported back to the Committee.79 The Committee was required to provide ad hoc notice of an individual’s listing to the individual’s state, and the Security Council beseeched states to “take reasonable steps” to notify the individual himself.80 But initially, individuals generally had no notice of their addition to the list, nor was there a simple way to be removed from it.81

ii. The United States’ Magnitsky Act and Russia’s Yakolev’s Law: Unilateral Targeted Sanctions against Human Rights Violators

As implied, the primary purpose of the United States’ “Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012” was to remove the restrictions of the preexisting Jackson-Vanik Amendment and establish “permanent normal trade relations” with Russia.82 The old Jackson-Vanik Amendment was an outdated “Cold War relic,”83 but given recent incidents of corruption, political prosecution, and human rights abuses in Russia,84 Congress

80. Id.
81. Hudson, supra note 61, at 221.
83. David Harris, Op-Ed., End a Cold War Relic, N.Y. TIMES (July 15, 2010), http://www.nytimes.com/2010/07/16/opinion/16iht-edharris.html; see also Myers & Herszenhorn, supra note 3. In the years after the fall of the Soviet Union the restrictions were consistently waived. Yet their mere existence conflicted with U.S. international obligations when Russia became a member of the WTO, which requires free trade between its members. Harris, supra.
84. The Magnitsky Act portion of the Bill notes Russia’s ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights (“ICCPR”), and the U.N. Convention against Corruption, then alleges
was loathe to grant Russia any favors. The Magnitsky Act was a way for Congress to give with one hand while taking with the other.

The Magnitsky Act requires the president to submit to the appropriate congressional committees a list of each person who the President determines, based on credible information . . . is responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals seeking to expose illegal activity carried out by officials of the Government of the Russian Federation; or to obtain, exercise, defend, or promote internationally recognized human rights and freedoms . . . or acted as an agent or on behalf of a person in a manner relating to [those activities]. Specific senators and representatives may propose additional names, which are added after presidential review and submission to the committees. The list is to be unclassified and published publicly in the Federal Register (unless the president shows a need for classification to protect national security interests), but does not mention effecting notice to listed par-


85. The lingering support for Jackson-Vanik came from the U.S. Congress’s view of the amendment as “an all-purpose vehicle for expressing opposition to particular Russian policies.” Harris, supra note 83. The U.S. Executive Branch has opposed Jackson-Vanik since 1992, id., but it was not until the Magnitsky Act appeared that Congress was willing to repeal the amendment. See, Lavrov Calls Magnitsky Act “Demonstrative” Anti-Russian Move, RIA NOVOSTI (Feb. 10, 2013), http://en.ria.ru/russia/20130210/179328797.html. Russian foreign minister Sergei Lavrov commented, “I am strongly convinced that [the Magnitsky Act] was designed to show that life is not all honey [for Russia] after the Jackson-Vanik amendment was abolished.” Id.

86. Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act § 404. The implementation of targeted sanctions by Congressional action is different from other U.S. targeted sanctions, such as those against individuals associated with Somali piracy, which were established by executive order pursuant to the International Emergency Economic Powers Act. See Office of Foreign Assets Control, Somalia: What You Need to Know About Sanctions Against Persons Contributing to the Conflict in Somalia 2 (Sept. 20, 2010), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/somalia.pdf.

A listed individual is prohibited from entering the United States (or has his existing visa revoked). His assets are frozen; that is, “all transactions in all [of the listed individual’s] property and interests in the property” are “[frozen] and prohibit[ed],” to the extent that the property is under U.S. control. The president has discretion to remove an individual from the list if he finds that the individual did not engage in the aforementioned activities, if “the person has been prosecuted appropriately,” or if “the person has credibly demonstrated a significant change in behavior, has paid an appropriate consequence . . . and has credibly committed not to engage in [such activities].” The Act does not include any means for the individual himself to contest his listing, nor does it provide any guidance as to what constitutes sufficient “credible information.”

In direct response, the Russian government enacted legislation titled “On measures against individuals involved in violations of fundamental human rights and freedoms, the rights and freedoms of citizens of the Russian Federation,” known as Dima Yakolev’s Law. The beginning of the law is similar to the Magnitsky Act. Article 1 bans from entering Russia any U.S. citizen who violates fundamental rights and freedoms, is involved in the commission of “crimes against Russian citizens living abroad” either by direct participation or while acting in an official capacity, or violates the rights of Russian citizens by means of “unfounded and unjust sentences,” “undue legal persecution,” or “arbitrary decisions.” Article 2 imposes property-related restrictions like those of the Magnitsky Act. The list of offenders is to be compiled by “the federal executive branch responsible for the formulation and implementation of public pol-

88. Id.
89. Id. § 405.
90. Id. § 406.
91. Id. § 404.
93. Yakolev’s Law, supra note 92, art. 1.
94. Id. art. 2.
icy and legal regulation in the sphere of international relations.”

But Yakolev’s Law goes further than its American counterpart. The Russian law suspends the activity of all non-profit organizations that operate in Russia and receive support from U.S. entities (citizens or organizations) if the organization’s activities are deemed to threaten Russia’s interests. U.S. citizens are prohibited from occupying leadership roles in non-profit organizations as well. Most famously, it suspends the activities of adoption organizations and prohibits the adoption of Russian children by U.S. citizens. Yakolev’s Law contains no removal provisions, although it does provide for waivers under specific conditions, at the discretion of the aforementioned governmental body. Overall, the two documents are procedurally and substantively similar, creating a list of targeted individuals with few procedural safeguards and specious criteria for listing.

C. Principles of International Law Implicated by Targeted Sanctions

i. State Sovereignty and the Problem of Extraterritoriality

The objectives of sanctions regimes are antithetical to concepts of sovereignty in international law. Recent scholarship has recognized a distinction between state sovereignty (the rights and duties of states) and the emerging concept of individual sovereignty (the rights of people) under international law. At times, the two appear to be in contention with each other.

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95. Presumably the Ministry of Foreign Affairs, headed by Sergei Lavrov. Id.
96. Id. art. 3.
97. Id. art. 2, art. 3.
98. Id. art. 4.
99. Yakolev’s Law, supra note 92, art. 2.
100. Kendall Stiles & Wayne Sandholtz, Cycles of International Norm Change, in INTERNATIONAL NORMS AND CYCLES OF CHANGE 323, 335 (Wayne Sandholtz & Kendall Stiles eds., 2009).
101. Edith Brown Weiss, Rethinking Compliance with International Law, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 134, 139 (Eyal Benvenisti & Moshe Hirsch eds., 2004) (describing the rise of “individualist paradigm,” in which “the individual [is] the key participant and sovereign unit in the international system . . .
A state’s sovereignty, meaning a state’s “exclusive authority over their territory and population” and its equal position in regard to other states, is the foundational principle of traditional international law. One pillar of this sovereignty is a state’s exclusive internal jurisdiction—the right to prescribe, enforce, and adjudicate disputes arising from actions that have sufficient ties to the state itself, free from interference by another state. Thus, a state has territorial jurisdiction over persons, property, and events existing or occurring within its physical boundaries. This is the most common, and least controversial, means to assert authority.

A state may also exercise jurisdiction extraterritorially, provided it substantiates its claim with a recognized principle of international law. After World War II and throughout the Cold War, states largely favored the collective action of international law over extraterritorial action by individual states. In the last twenty years, however, some states have exhibited more isolationist tendencies, avoiding the mutual commitments of treaties and returning to extraterritorial means to combat international issues. Extraterritoriality has been called “the

It follows then that we are witnessing the demise of the sovereignty of states and the rise of the sovereignty of individuals and the protection of their rights . . .”). See also Stiles & Sandholtz, supra note 100, at 336.

102. Wayne Sandholtz, Explaining International Norm Change, in INTERNATIONAL NORMS AND CYCLES OF CHANGE 1, supra note 100, at 1, 20–21. Though this indubitably represents the standard concept of state sovereignty, it has been challenged. See, e.g., ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 311 (2005); Anne-Marie Slaughter & William Burke-White, The Future of International Law Is Domestic (or, The European Way of Law), 47 HARV. INT’L L.J. 327, 327–28 (2006) (noting that this Westphalian view of state sovereignty, in which states are “defined physical territories,” exclusive and isolated, may no longer be appropriate in the wake of globalization).


105. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 42 (2008); see id. at 83 (noting that “common law countries have put far more emphasis on the territoriality principle than [civil law countries]).

106. RYNGAERT, supra note 105, at 85.


108. Id. at 842–43.
greatest affront to democratic sovereignty,” because the sending state is effectively attempting to restrict the receiving state’s exercise of its internal authority.\textsuperscript{109}

That is not to say that all extraterritorial actions are impermissible; in fact, several theories exist to justify one state’s involvement in another state’s affairs, to some degree.\textsuperscript{110} For example, a state usually maintains some degree of control over its nationals acting outside its territory, a notion known as the “personality principle.”\textsuperscript{111} Treaties, being agreements between states prescribing the law between them, may formally confer adjudicatory authority, enforcement authority, or both, on one or more forums.\textsuperscript{112}

Neither aforementioned jurisdictional foundation is as controversial as the effects doctrine, which stipulates that a state may exercise authority over specific extraterritorial conduct that has “substantial, direct, and foreseeable effect[s]” in the state, provided the state acts reasonably in light of its own and other states’ interests.\textsuperscript{113} This “reasonableness test” supposedly prevents otherwise extraterritorial jurisdiction from running afoul of the territoriality principle.\textsuperscript{114} For example, the United

\footnotesize{109. Id. at 860. Some scholars contend that international law, as an alternative to extraterritorial national jurisdiction, is itself an attack on state sovereignty because it restricts states’ exercise of their independent authority. Id.

110. LOWENFELD, supra note 15, at 901.

111. The personality principle may be active (when the national is acting abroad) or passive (when the national is being acted upon—usually harmed—by a non-national abroad). It actually predated the territoriality principle as a basis for jurisdiction; the latter, however, surpassed the former in significance around the seventeenth century. RYNGAERT, supra note 105, at 47.

112. Treaties may confer adjudicative jurisdiction upon national courts explicitly, or “implicitly oblig[e] states to vest their courts with jurisdiction to hear claims based on such rules.” ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 35 (2011).


114. Cf. Lavers at 17. Professor J. Troy Lavers argues that the multifactor reasonableness test, as commonly applied in the United States, underemphasizes the importance of comity in international relations and “removes the requirement of a real and substantial link with the forum state.” Id. at 24. Thus the effects doctrine is not necessarily a safe harbor for states exercising extraterritorial authority.
States has argued that international business affects its domestic economy so greatly that U.S. financial and trade regulations should apply to foreign parties. This particular example of extraterritorial prescription has been ill-received by the international community, but the effects doctrine itself is “the linchpin to understanding the geographic reach of domestic laws.”

Another possible justification is the universality principle, which is commonly invoked to support human rights intervention. The universality principle reasons that, if a law is truly international, then it binds all states equally. One state’s assertion of that law in the territory of another state is not “extraterritorial,” because the law is the same in both locations. However, the shared jurisdiction is not unlimited. For example, Belgium attempted to use universality to charge foreign officials with war crimes, including Yasir Arafat, Fidel Castro, Saddam Hussein, and, eventually, George H.W. Bush and other U.S. officials. The U.S. government reacted strongly by effectively threatening Belgian interests. In this situation the Belgian court was applying “universal” international law,

118. Universal jurisdiction is used to justify prosecution of universal crimes, a list which currently includes piracy, genocide, torture, and “certain crimes of terrorism.” Anthony J. Colangelo, Universal Jurisdiction as an International “False Conflict” of Laws, 30 MICH. J. INT’L L. 881, 888–89 (2009).
119. Id. at 886.
120. Id. at 883.
121. See Ryngaert, supra note 105, at 9. “While States are entitled to prescribe laws that govern situations which may be located wholly or partly abroad under rules of prescriptive jurisdiction, it is generally accepted that they are not entitled to enforce their laws outside their territory, ‘except by virtue of a permissive rule derived from international custom or from a convention.’”
123. The United States’ argument was fairly coercive. Belgium is the host state for the North Atlantic Treaty Organization (“NATO”). Then-Secretary of State Colin Powell, one of the officials charged, pointed out that he and others would be risking arrest if they visited Belgium, therefore NATO would have to be relocated. Not wanting to lose its diplomatic position, the Belgian government amended its laws. Id.
but by convicting absent foreign nationals of those “universal” crimes, was extraterritorially asserting its authority to enforce and adjudicate that law.

Conflicting opinions exist regarding the role of territorial sovereignty in the international community, but it remains a valid and necessary element of international law. Some scholars support extraterritoriality and believe territorial sovereignty to be an outdated notion, citing globalization and the growth of human rights law as reasons to dismiss the idea. Yet states and international organizations often reaffirm territorial sovereignty’s importance as a principle in international law. For example, the U.N. limits its own influence “in matters which are essentially within the domestic jurisdiction of any state,” and the U.N. General Assembly has formally asked for the “repeal of unilateral extraterritorial laws that impose sanctions on corporations and nationals of other States.” From a domestic perspective, the U.S. judiciary often presumes federal legislation to be bounded by the territory of the U.S. Thus, when one looks at the bigger picture, the need for a “strong [territorial] nation-state”—the actor in international law that commands the most power and is the most accountable among other actors—is apparent.

126. See Parrish, supra note 116, at 1469–70; see also Jacob Katz Cogan, The Regulatory Turn in International Law, 52 Harv. Int’l L.J. 321, 322–23 (2011). But cf. Parrish, supra note 107, at 819–20 (contending that the view of extraterritoriality “as an inevitable . . . byproduct of globalization” is undesirable because it overlooks the negative effects of extraterritoriality).
129. John H. Knox, A Presumption Against Extrajurisdictionality, 104 A.J.I.L. 351, 351 (2010). Professor Knox explains that the presumption against extraterritoriality is an “offshoot of the Charming Betsy canon,” which stipulates that federal legislation should be interpreted so as not to conflict with international law, as long as the resulting interpretation is reasonable. If this is so, the reason laws are interpreted not to apply extraterritorially is because such an extraterritorial interpretation would conflict with international law. Id. at 352. This lends further support to the position that territorial sovereignty remains a respected element of international law.
ii. The Individual Rights to Property and Due Process

The list of human rights protected by international law has grown considerably since World War II. Targeted sanctions specifically implicate two individual human rights that are conferred by customary international law and recognized by numerous treaties and national legislatures. First is the substantive right to own property, free from interference. Second is the procedural right to a fair hearing. If an individual's property right is threatened or violated—or if an individual is charged with a crime under international law—that procedural due process right is triggered.

The long-recognized right to own property is codified in many treaties. The Universal Declaration on Human Rights ("UDHR") provides that "everyone has the right to own property alone as well as in association with others," and "no one shall be arbitrarily deprived of his property." The UDHR recognizes the right to a remedy upon violation of a legally const-

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131. See id. at 1114.
132. Universal Declaration of Human Rights [UDHR], G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III), at 74 (Dec. 10, 1948). This first piece of the "international bill of rights" was adopted in the U.N. General Assembly in 1948. The UDHR is praised as the basis of human rights in the world today. In addition to the states party to the UDHR, many are parties to other treaties that include principles from the UDHR, and many of those principles have been incorporated into domestic constitutions and legislation. Additionally, a number of the stipulated rights are treated as rights under customary international law. Hurst Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, 25 GA. J. INT'L & COMP. L. 287, 289 (1995). There exists a lively debate about the origins of the rights, whether they are truly universal, and which if any should be customary international law. See, e.g., Bruno Simma & Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 AUST. Y.B.I.L. 82 (1988) (advocating an approach to expanding international human rights law that does not rely exclusively on treaty law, but also custom and other consensual bases); Tai-Heng Cheng, The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?, 41 CORNELL INT'L L.J. 251, 255 (2008) (arguing that the rights should be re-evaluated, because negotiations were tainted by "attempts to co-opt the Declaration to the service of political goals"). The inclusion of UDHR principles in customary international law has additional significance regarding non-state actors, who might not otherwise be bound to respect those rights. See Adam McBeth, Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights, 30 HAMLINE J. PUB. L. & POL'Y 33, 60 (2008).
ferred right.\textsuperscript{133} The International Covenant on Civil and Political Rights (“ICCPR”), adopted by the U.N. General Assembly in 1966, likewise contains a provision codifying an individual’s right to due process if faced with a criminal charge, including specifically the rights to “a fair and public hearing by a competent, independent and impartial tribunal,” to notice of the charges against him, and to an opportunity to defend himself.\textsuperscript{134}

None of these agreements, however, create a venue for individuals to assert these rights. The classical view of international law, in which sovereign states are the principal actors, does not confer standing on individuals—they “lack the power to set in motion the machinery of international law for sanctioning violations of the obligations international law imposes.”\textsuperscript{135} The individual must rely on a state to defend his rights and, if the state is successful, he can only reap the benefits secondarily.\textsuperscript{136} Yet individuals may be prosecuted for violating international law (as seen in the prosecution of officials for war crimes in the Nuremberg trials).\textsuperscript{137} This creates an “asymmetry” in the system.\textsuperscript{138}

Most doors to adjudication of international law claims are closed to individuals. National courts are responsible for enforcing most of international law,\textsuperscript{139} but the ability of those courts’ to adjudicate—and individuals’ ability to access them—is limited by the courts’ jurisdiction.\textsuperscript{140} Treaties rarely specifi-
cally confer jurisdiction on national courts.\textsuperscript{141} Meanwhile the few international courts, such as the International Court of Justice (“ICJ”)\textsuperscript{142} and International Criminal Court (“ICC”), have very limited jurisdiction.\textsuperscript{143} To bring his claim, the aggrieved individual must navigate the complex system of international adjudicative jurisdiction—if the combination of theories, codified law, and exceptions can be called a system—to access an appropriate national or international forum, if one can be found.

II. APPLICATION OF THOSE PRINCIPLES TO TARGETED SANCTIONS

A. Unilateral Use of Targeted Sanctions by States in Violation of International Law

The three types of legislation outlined in Part I—the U.N. Security Council’s Resolution 1267, the United States’ Magnitsky Act, and Russia’s Yakolev’s Law—are fundamentally different examples of targeted economic sanctions. Although theoretically permissible under international law, the U.N.-supported, state-implemented targeted sanctions against terrorists constitute a dubious use of targeted sanctions, and arguments supporting unilateral targeted sanctions are even less tenable. Terrorist supporters present novel problems, such as the accountability of non-state organizations,\textsuperscript{144} but the misconduct of

\textsuperscript{141} Nollkaemper, supra note 112, at 35.
\textsuperscript{142} Only states may be parties in ICJ adjudications. Statute of the International Court of Justice art. 94, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.
\textsuperscript{143} Parrish, supra note 107, at 833 n.80 (citing Curtis A. Bradley & Jack L. Goldsmith, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham L. Rev. 319, 458 (1997)).
\textsuperscript{144} Sarah E. Smith, Blaming Big Brother: Holding States Accountable for the Devastation of Terrorism, 56 Okla. L. Rev. 735, 739 (2003) (describing terrorists’ lack of “political status” and imperviousness to traditional sanctions); see also National Research Council, Discouraging Terrorism: Some Implications of 9/11, at 16 (Neil J. Smelser & Faith Mitchell eds., 2002) [hereinafter Discouraging Terrorism]. Terrorism is comparable to piracy, the crime that the universality principle was originally conceived to combat. See Colangelo, supra note 118, at 898. Interestingly, “terrorism” is cited as having governmental roots, beginning with the French government and the French Revolution. Reuven Young, Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation, 29 B.C. Int’l & Comp. L. Rev. 23, 27–28 (2006).
human rights violators does not. Indeed, since the Nuremburg trials, there have been increasing instances of individuals held personally accountable for violations of international human rights. Therefore the governing principles of international law are firmly established, and need only be applied to the case at hand.

i. The Lack of Justification for Extraterritoriality

Differences in the criminal acts at issue generate relevant distinctions between unilateral and multilateral targeted sanctions. “The crime creates jurisdiction,” such that the legitimacy of extraterritorial prescription and enforcement often depends upon the prescription at issue. Both terrorism and human rights violations as described in the Magnitsky Act and Yakolev’s Law (torture and inhumane treatment) are recognized as crimes under international law. Therefore in all of those cases, the sanctioning parties are not prescribing the law in a foreign territory, but rather, merely seek to adjudicate and enforce those laws.

Due to the nature of the terrorist organization, it is uncertain whether targeting suspected terrorists necessarily runs afoul of state sovereignty. Definitions of terrorism focus on the individual perpetrator and his liability, rather than the state that (knowingly or unknowingly) hosts him. Such non-state organizations do not possess the “attributes of statehood,” therefore targeting individuals associated with those organizations is not necessarily violative of state sovereignty. To the extent

145. See Koh, supra note 137, at 2378.
146. Colangelo, supra note 118, at 891 (referring to jurisdiction under the universality principle).
147. Id. at 888; accord UDHR, supra note 132, at 73. The specific incidents described in relation to each statute are presumed, if true, to constitute a violation of human rights.
148. See Ryngaert, supra note 105, at 9–10 (outlining the differences between the three types of jurisdiction).
149. See Fassbender, supra note 76, at 4 (noting that “after the Taliban were removed from power in Afghanistan, there is no particular link between the targeted individuals and entities and a specific country”); see also Young, supra note 144, at 61–62, 64 (“Group action or involvement is not a requirement, but the act must be perpetrated by a sub-state actor.”).
150. Cf. Smith, supra note 144, at 739. That is not to say there is no connection between sovereign states and terrorist organizations, because the organizations necessarily exist within sovereign states. States that are themselves
that targeted sanctions (whether multilateral or unilateral) do threaten state sovereignty, the effects doctrine may justify their use. The substantial effects of terrorist attacks are often felt beyond the borders of the terrorists’ host state.  

Conversely, the human rights violators of the Magnitsky Act and Yakolev’s Law are identified by their activities within their home states. In this situation, the universality principle does not permit unilateral state action. As described in Part I.C, if the crime being prosecuted is truly international, the sending state’s exercise of authority seems to be not truly extraterritorial because it and the receiving state theoretically have identical laws. Thus, the sending state is not “thwarting choices by the target state that must remain free under international law.” However, prescription of law and enforcement of law thoroughly terrorist may exist, and “the flexibility involved in holding terrorist States accountable has also provided significant basis to shift the international community’s focus away from terrorists to their State sponsors.” Id. at 739. However, “it is logical that more States merely tolerate terrorist organizations than actively participate in State-sponsorship of terrorism.” Id. at 742. But cf. DISCOURAGING TERRORISM, supra note 144, at 23 (emphasizing state involvement with terrorist organizations to further the state’s own political ends). A state that supported terrorism would be itself in violation of international law, implicating international law on state-to-state relations, which is different from and beyond the scope of the argument presented here. 

“Although a significant proportion of terrorism is intrastate, terrorism is frequently international in character: by crossing borders (as in Kashmir), by the nationality of the participant and/or victim (as in September 11), or by target despite being geographically intra-state (for example, attacks on foreign visitors in Bali by Indonesia-based terrorists).” Young, supra note 144, at 31.

Both legislative acts specify the nationality of the individuals to be targeted for human rights violations. The U.S. legislation specifically targets persons who violate the human rights of “individuals seeking to expose illegal activity carried out by officials of the Government of Russian Federation; or obtain, exercise, defend or promote internationally recognized human rights and freedoms . . . .” Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112–208, § 404. Given the statute’s reference to numerous events in which the Russian government allegedly restricted those “recognized human rights and freedoms,” the obvious implication is that the statute applies to Russians. Alternatively, Senator Ben Cardin (a major proponent of the Bill) has stated that the statute has broader reach. “This bill is our standard,” he told the New York Times, and “[t]he world is on notice.” Peters, supra note 3.

See Colangelo, supra note 118, at 895.

Summarizing the ICJ’s criteria for defining “acts of prohibited intervention.” Teson, supra note 126, at 325.
are separate and distinct powers. Though both the United States and Russia appear to agree on the criminality of the alleged conduct by their respective nationals, each maintains a right to determine how to address the crime within its own borders. International law even appears to recognize a hierarchy of state interests in prosecution of universal crimes: states with territorial or national jurisdiction have “jurisdictional priority” to adjudicate and enforce international law, over states with universal jurisdiction.

Nor does the effects doctrine justify the unilateral actions. The crimes punished by the Magnitsky Act—the torture and death of Sergei Magnitsky and similar political dissidents—had no tangible effect on U.S. citizens, property, economy, or other interest. Whether abuse of Russian children by U.S. citizens on U.S. territory has a substantial effect on Russian interests is debatable; however, because Dima Yakolev was a Russian national, the personality principle could justify Yakolev’s Law as the state may protect its nationals abroad.

ii. Protection of the Individual Right to Due Process

By requiring targeted sanctions against suspected terrorists, Security Council Resolution 1267 created due process problems


156. Both the United States and Russia have held their citizens accountable for the crimes, to some degree. For example, two Russian doctors were indicted for their participation in the lack of medical treatment in prison that allegedly caused the death of Sergei Magnitsky. Andrew E. Kramer, Russian Acquittal Escalates Human Rights Feud with U.S., N.Y. TIMES (Dec. 29, 2012), http://www.nytimes.com/2012/12/29/world/europe/russian-acquittal-escalates-human-rights-feud-with-us.html. The Russian prosecutor dismissed charges against one, while the other was acquitted. Id. Dmitri (“Dima”) Yakolev’s adoptive American father was indicted for involuntary manslaughter in the United States—and also acquitted. Ellen Barry, Russian Furor Over U.S. Adoptions Follows American’s Acquittal in Boy’s Death, N.Y. TIMES (Jan. 4, 2009), http://www.nytimes.com/2009/01/04/world/europe/04adopt.html.

157. “Perhaps an appropriate model here . . . is a complementary jurisdiction similar to that contained in the Rome Statute for the International Criminal Court, which precludes jurisdiction by the ICC where States with territorial or national links to the crime prosecute in good faith.” Colangelo, supra note 118, at 900–1. See Rome Statute of the International Criminal Court art. 17, opened for signature July 17, 1998, 2187 U.N.T.S. 90.
and raised novel issues of U.N. accountability.\textsuperscript{158} As described in Part I.C, initially only an individual who had citizenship of, or was physically located in, a sanctioning state had a cause of action for his property deprivation by that government.\textsuperscript{159} One possible justification for this lack of process might have been that the consequences of terrorism qualified as “emergencies” under the ICCPR, which stipulates that an individual’s right to trial is not absolute and may be suspended in certain situations.\textsuperscript{160} However, the Ombudsperson represents, at the very least, U.N. recognition of the due process problem and an attempt to solve it.\textsuperscript{161}

Currently, no procedural protection for targets of unilateral sanctions exists. As described previously, an individual targeted by the Magnitsky Act or Yakolev’s Law has no ability to contest his placement on the government’s list.\textsuperscript{162} Since judicial standing requires a substantial connection with the adjudicato-

\textsuperscript{158} See supra Part I.C.ii.
\textsuperscript{159} Courts expanded their jurisdiction to include temporary residence in state-controlled camps abroad, perhaps to address this inequity. See, e.g., Al-Jedda v. U.K., App. No. 27021/08, 30 Eur. Ct. H.R. 637 (2011) (relating that a former immigrant to the United Kingdom, whose citizenship had been revoked, fell under U.K. jurisdiction by virtue of internment in U.K. military facility abroad); Boumediene v. Bush, 553 U.S. 723 (2008) (holding that internees at Guantanamo Bay, the U.S. detention center in Cuba, were subject to the U.S. Constitution and thus could bring federal habeas corpus petitions to contest their detentions).
\textsuperscript{160} True-Frost, supra note 17, at 1203; see ICCPR, supra note 134, at 53, 54. The European Court of First Instance took a similar position, stating that “the [individuals’] interest in having a court hear their case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified . . . .” Carmen Draghici, Suspected Terrorists’ Rights between the Fragmentation and Merger of Legal Orders: Reflections in the Margin of the Kadi ECJ Appeal Judgment, 8 WASH. U. GLOBAL STUD. L. REV. 627, 639 (2009). The European Community Treaty permits no derogation from the right, bringing the treaty into conflict with U.N. mandates. European courts and the international community remain divided regarding whose legislation takes supremacy. For a thorough discussion of the conflict as it relates to the Kadi case, see id. at 649.
\textsuperscript{161} But cf. True-Frost, supra note 17, at 1229–30 (contending that the U.N. did not intend to actually provide due process, but rather merely “signal” respect and desire to protect procedural rights, without allowing itself to be held accountable by individuals for breaches of international law).
\textsuperscript{162} See Part I.B, supra.
ry body, a targeted individual within his home state would struggle to access a foreign sender state’s court, and the travel ban would prevent him from entering the state’s territory. Furthermore, all removal decisions are wholly committed to the discretion of the same subdivision of government that initially listed the individual.

In modern practice, however, individuals have successfully brought claims arising from codified international law, such as a treaty obligation. Regardless of whether they are the primary actors, as some scholars contend, the individuals’ ability to seek redress under international law comports with the interpretation of international law in which individuals are recognized as legitimate actors. Thus international law on standing has changed significantly.

III. SOLUTION: GREATER REGULATION, OVERSIGHT, AND BINDING SECURITY COUNCIL ACTION

Provisions governing the use of targeted sanctions must be formally regulated by a legitimate, collective, international body and must be transformed from an expression of extraterritoriality to one of international law. International law presents a viable means to safeguard rights worldwide and ad-

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164. See id.
165. See supra notes 88–89, 93, 97 and accompanying text.
166. Here referring to claims brought to a judiciary for litigation, as it is most common, though sometimes other remedies are available. See generally NOLLKAEMPER, supra note 112, at 37.
168. Anne-Marie Slaughter, International Law in a World of Liberal States,
169. See Vazquez, supra note 135, at 1094–95. This can be inferred from much of the scholarship cited herein. As Professor Adeno Addis described, “[t]he Council reaches directly to individuals and private entities for purposes of sanctioning them, but without giving those individuals and entities a corresponding right of access to it for purposes of challenging the accuracy of the basis on which the designation is made.” Addis, supra note 20, at 195.
dress issues presented by globalization. 170 The alternative, “[e]xtraterritorial application of domestic law[,] threatens democratic sovereignty in a more profound way than international treaties and their institutions.” 171 Targeted sanctions may yet prove to be a valuable tool for influencing the behavior of select individuals with the power to effect the desired change. The Security Council should agree upon a regulatory scheme for unilateral targeted sanctions, one that accounts for the nature of the crime to be prevented or punished and that provides procedural protection to the targeted individual.

Unfortunately, it is probable that, left unchecked, stronger states will use targeted financial sanctions to pursue their unilateral foreign policy goals, because “[t]he efficiency of assertions of extraterritorial jurisdiction is a function of relative power . . . . Powerful States will be able to impose their legislation on weaker States, while weaker States will almost never be able to impose their legislation on more powerful States.” 172 A state’s claim that it is trying to protect the human rights of the people within the sanctioned state should not allow them to use means that are likewise in violation of international law.

A. The Basis for the U.N.’s Obligation to States and Individuals

For most, the U.N. was traditionally viewed as “an autonomous subject of international law,” free to exercise its discretion in legal actions. 173 In the last two decades, however, “a trend can be perceived widening the scope of customary law . . . . to include direct ‘governmental’ action of international organizations vis-à-vis individuals.” 174 The U.N.’s anti-terrorist sanctions “have a direct impact on the rights and freedoms of individuals.” 175 When the Security Council issued Resolution 1267, which required states to freeze the assets of foreign individuals believed to be supporting terrorism, the U.N. definitely ex-

170. Parrish, supra note 107, at 817 (describing the different perspectives of “Sovereignists” and “modern Internationalists”).
171. Id. at 859.
172. Ryngaert, supra note 105, at 34.
173. Fassbender, supra note 76.
174. Id. at 19; see True-Frost, supra note 17, at 1201. This change is apparent in other international organizations, such as the EU. Fassbender, supra note 76, at 18.
175. Fassbender, supra note 76, at 22.
panded its control over state action, incurring additional obligations to states and individuals.176

Resolution 1267 is not the only basis for U.N. responsibility regarding economic sanctions. From its creation, the U.N. delineated a role for itself that included affirmative efforts to establish and maintain peace internationally. The purposes of the U.N., outlined in Article 1 of the Charter, are as follows:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . . .177

The U.N. likewise committed itself to the protection of human rights by codifying those rights in the UHDR and mandating active protection of those rights in the “Responsibility to Protect” declarations.178 It expressed a commitment to defend civil and political rights under the ICCPR, which includes a number of procedural rights.179

The U.N. has power over more states and with regard to more issues than any other international organization. The Security Council has the power to definitively regulate state behavior, and broad discretion to determine when and how to do so.180 Its statutory grant of power allows it to take action where it finds “a threat to the peace, breach of the peace, or act of aggression,” the existence of which the Security Council itself determines.181 Once established, the Security Council crafts what

176. See id. at 19 (analogizing EU expansion and internalization of Member States’ rights to recent changes within the U.N. and concluding that “there is an increasingly broader basis for referring to the constitutional traditions and values common to the Member States of the United Nations as a source of U.N. law”).
177. U.N. Charter art. 1, para. 1.
179. See generally ICCPR, supra note 134.
180. LOWENFELD, supra note 15, at 854–55; see True-Frost, supra note 17, at 1200.
it considers an appropriate response, which is legally binding on U.N. member states. Despite the difficulty of reaching a consensus among its permanent members, the Security Council possesses a level of authority unrivaled in international law.

The U.N.’s obligation also stems from a lack of alternative defenders of rights, because it cannot be assured that self-interested states will implement the proper procedures and regulate themselves. The idea that states would willingly restrict their actions, presumably for no greater benefit than the diplomatic approval for not over-extending themselves, is implausible. As the use of unilateral targeted sanctions increases, states seem more eager to use these means to protect their interests. Additionally, states are not always open in their use of sanctions against one another, as Professors Reisman and Stevick have noted, “[u]nilateral sanctions are often used as a unilateral technique in international politics, though not necessarily explicitly.” The lack of openness in state relations in this area demands U.N. scrutiny, because “[e]nsuring a ‘level playing-field,’ with just benefits for every party and for the system as a whole, requires the imposition of norms and continued regulation.”

Finally, control of sanctions by an international organization is also necessary to increase sanctions’ general efficiency. Analysts notice that popularly-supported sanctions, such as collective and multilateral sanctions, are less likely to be circumvented and more likely to have the intended effect than unilateral sanctions, where targets have more alternative providers of the goods the sender is restricting. Indeed, some argue that unilateral sanctions are virtually useless, as discussed in Part I.A.

182. Id. art. 41.
183. See id. art. 48, para. 1.
184. “Traditionally States . . . have been regarded as the main potential violators of human rights.” Fassbender, supra note 76.
185. Lehrer, supra note 163, at 347.
186. Reisman & Stevick, supra note 21, at 87.
188. Lektzian & Souva, supra note 40, at 850.
Agreement can solve the problem of extraterritoriality, or at least mitigate its effects, whereas unilateral economic sanctions can themselves pose a threat to international peace and security. Because sanctions are coercive, they often provoke retaliation and escalation of disputes. Russia’s Yakolev’s Law, a direct response to the U.S.’ Magnitsky Act, is a perfect example of unilateral targeted sanctions exacerbating a strained relationship between two states. In comparison, multilateral treaties rarely cause such conflict, because they are the “product of negotiation and consent.” More direct U.N. involvement may be necessary for the success of international law overall.

B. Proposed Considerations for a Regulatory Approach

The simplest solution might be for the Security Council to impose severe restrictions, or an outright ban, on states’ use of unilateral targeted sanctions; however, this is both impractical and undesirable. Member states have already expressed concern over the Security Council’s expansion of its power into the realm of targeted sanctions, and the permanent members of the Security Council would have little reason to surrender this popular foreign policy tool. Therefore the regulations must, as international law often does, take smaller steps toward greater goals. Specificity and certainty on the target lists is a chronic problem with targeted sanctions. Therefore, regulations

190. “Two methods to render jurisdictional principles more efficient in delimiting spheres of competence, and thus to render the exercise of jurisdiction more reasonable at a more intricate level, could be conceived of. Either States agree upon a convention that precisely sets out on what ground, for what purpose, and under what conditions they could exercise jurisdiction.” RYNGAERT, supra note 105, at 135.
191. Parrish, supra note 107, at 857–58.
192. Id.
194. Parrish, supra note 107, at 857–58.
195. See Slaughter, supra note 168, at 503. “If, for instance, the primary actors in the system are not States, but individuals and groups represented by State governments, and international law regulates States without regard for such individual and group activity, international legal rules will become increasingly irrelevant to State behaviour.” Id. at 504.
196. True-Frost, supra note 17, at 1197.
197. Fitzgerald, supra note 62, at 41. A mutual definition of “terrorism,” as an international crime, also eludes the international community. National
ought to establish evidentiary standards for listing and minimum procedural safeguards for individuals. Ideally the Security Council would require member state compliance with the terms of the regulations; however, should that prove infeasible, the General Assembly or a committee thereof could compose a guidance document, to “create a framework for further transgovernmental cooperation.” This may even be preferable, because states, knowing they are not legally bound by the terms, may be willing to concede certain points. This would result in a more comprehensive and specific document that more accurately represents the views of the international community.

The first goal is substantive. It is imperative that the regulations distinguish between types of crimes (be they human rights violations, terrorist activities, or others) and types of suspected perpetrators. The drafters should agree, with as much specificity as possible, which types of individuals are deserving of targeted sanctions for which types of crimes. Since targeted sanctions supposedly work by inducing hardship on individuals, such that the individual will perform actions to effect the desired change, whether an individual has the ability to cause the change must be considered.

When considering the citizens of a recognized state, as in the cases of unilateral legislation examined here, the target’s role in sanctioned government is a crucial determinant of whether sanctioning the individual will be effective at influencing the receiving government. For example, governments that are and international actors ascribe varying levels of importance to the elements of the crime, with substantial overlap, but no meaningful consensus. For an informative summary of these issues, see generally Young, supra note 144.

188. Slaughter, supra note 168, at 530. “Increased interaction breeds mutual confidence, allowing further interaction to take place on the basis of imprecise and open-ended agreements, to be filled in good faith.” Id.

190. See supra note 25 and accompanying text.

200. See supra note 25 and accompanying text.

201. See Lektzian & Souva, supra note 40, at 849, 852.
more democratic rely heavily on public approval for their power, whereas political elites dominate less democratic governments. In theory the more democratic government would respond better to non-targeted, broad sanctions, while the “decisionmaking elites” of a less democratic government are appropriately singled out with targeted sanctions. Since the public holds its power in aggregate, there is little to be gained by targeting individual members of the public, such as average citizens and lower officials of a state. Therefore, regardless of whether the government is more or less democratic, the individual members of its public are inappropriate targets for sanctions.

The terrorist organization is a different animal. It is defined by its purpose, rather than physical location, and is comprised of only its members and assets. Its membership is united by common ideals and is in a sense voluntary, as compared to citizens who were merely born into a state. The organization is a close-knit community based on secrecy. Therefore, every individual member or entity is capable of having some effect on the terrorist organizations’ activities, and every individual or entity may be held accountable to some degree for acts of the organization as a whole. Additionally, if correctly applied, financial targeted sanctions deprive the organization of its means of executing undesirable acts—the prevention of which is the sanctions’ purpose. In fact, financial targeted sanctions seemed well suited for combating terrorist activity, because monitoring the assets may provide additional information regarding the activities of the terrorists themselves.

202. Id. at 852. The failure of general sanctions to affect the powerful elite is commonly criticized (as occurred in the case of Iraq). Interlaken I, supra note 67, at 6.

203. Lektzian & Souva, supra note 40, at 849.

204. See Cortright & Lopez, SEARCH FOR SECURITY, supra note 48, at 93.

205. Discouraging Terrorism, supra note 144, at 22–23.

206. Cf. id. at 16–17 (describing how terrorists are recruited from no particular class and, though they often have similar religious and educational histories, each terrorist’s path is different).

207. Cf. id. at 22–23.

208. See Fitzgerald, supra note 62, at 38 n.4 (quoting the general counsel of the U.S. Treasury Department as saying, “[t]he primary source of the stealth and mobility necessary [to conduct terrorist acts] is money . . . . If we stop the money, we stop the killing”).

209. Id. at 40–41.
The second goal is procedural: the regulations should include a means for targeted individuals to contest their listing. If a review committee similar to the office of the Ombudsperson were created, states could be required to submit to the committee their lists of targeted individuals for review, including a means for exception upon showing secrecy was necessary to protect national security interests. The committee could then notify the targeted individuals of the charges against them. Preference could be given for pre-deprivation notice, particularly if the alleged crime is a human rights violation. The sending state would also benefit from careful review, by saving the costs of overseeing compliance of its institutions. An exception could be made for exigent circumstances, because sometimes expedience is necessary, particularly in light of a credible threat of terrorist attack. In such cases, ad hoc review might comport with international law’s “emergency” exception to due process.

CONCLUSION

The current trend toward numerous and extensive blacklists of targeted individuals is a dangerous one, because procedures of current international law are failing to keep pace with state actors’ expanding unilateral assertions of authority. The relevant principles of international law—state sovereignty and individual rights—bar such expansion without appropriate procedural safeguards. Appropriate use of unilateral targeted sanctions may yet be feasible, but their legitimacy is dependent on particularized inquiries that consider the nature of the alleged crime and the role of the targeted individual. Furthermore, international actors must establish a unified approach in order to comply with international law, increase the potential effectiveness of their efforts, and not antagonize other states. The U.N. stands in the best position to instigate and oversee this process. If left unchecked, the unilateral targeted sanc-

210. See generally id. (describing the host of difficulties present in ensuring domestic parties comply with targeted sanctions).

211. Due to money’s liquidity, the asset freeze may be worthless if not executed immediately, before the target has an opportunity to transfer his funds. Cortright & Lopez, SEARCH FOR SECURITY, supra note 48, at 103 (emphasizing that even a few week’s delay to allow the target a chance to comply with the provisions, as has been Security Council policy, undermines the effectiveness of the sanction).
tions trend will do little to prevent terrorist attacks, less to protect human rights, and much to increase animosity between states—in general, they will contravene the very purposes of international law.

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THE COST RECOVERY ACT AND TOBACCO LITIGATION IN CANADA: A MODEL FOR FAST FOOD LITIGATION

INTRODUCTION

Obesity is a growing problem in Canada. One in four Canadian adults is obese, and the number of obese Canadians has doubled since the 1980s. Numerous medical conditions are associated with obesity, including diabetes, hypertension, heart disease, and cancer. As of 2001, obesity related illnesses cost approximately C$380 million annually in British Columbia alone. This represents approximately 4.5% of British Columbia’s total health care costs. The health care costs associated with these diseases across Canada has also increased from C$1.55 billion in 2000 to C$1.98 billion in 2008. Because Canada utilizes a universal health care system, these costs are foisted upon the public in the form of taxes.

Tobacco use is also a problem in British Columbia, where approximately C$525 million are paid to treat tobacco related illnesses. “If 10% of [British Columbia’s] smokers quit, they would save the [British Columbia] economy approximately $2.9 billion in costs over their lifetimes” in avoided medical care.
costs and productivity losses. The British Columbia legislature devised its own way of recouping health care costs associated with tobacco use when it passed the Tobacco Damages and Health Care Cost Recovery Act (“Cost Recovery Act”). The statute authorized British Columbia to initiate litigation against tobacco manufacturers to recoup health care costs paid to treat tobacco related illnesses. However, when British Columbia initiated a lawsuit against tobacco manufacturers under the Cost Recovery Act, the tobacco manufacturers implead the Canadian federal government. On July 29, 2011, the Supreme Court of Canada dismissed the tobacco manufacturer’s third-party claim. This left the tobacco manufacturers as the sole defendants in the lawsuit and potentially liable for billions of dollars in judgments or settlements. The Cost Recovery Act and the ensuing tobacco litigation initiated pursuant to the Act demonstrate a litigation model that has found some initial success in Canadian courts.

Historically, plaintiffs bringing claims against food retailers and manufacturers for contributing to their obesity have had to overcome causation and assumption of risk issues. This Note examines how the Cost Recovery Act and the modern litigation strategies developed in tobacco litigation provide a blueprint for health care cost recovery lawsuits that Canadian provinces could potentially initiate against manufacturers and retailers in the food industry.

9. Id. at 53–54.
10. See Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30 (Can.).
11. See id.
13. See id.
Part I of this Note will provide background on Canada’s universal health care system and the tenets of the Canadian Health Act that make the Cost Recovery Act advantageous to tobacco litigants. Part II will examine how development of tobacco litigation in the United States influenced Canada’s own tobacco litigation and what effect it might have on food litigation in Canada. Part III will compare the issues faced by plaintiffs in United States “fast food” litigation to the issues faced by plaintiffs in tobacco litigation, including assumption of risk and causation arguments. Part IV of this Note will examine the attributes of the Cost Recovery Act that rebut the causation and assumption of risk arguments, making the Act an attractive model for potential future food litigants in Canada.

I. HEALTH CARE IN CANADA

Canada’s universal health care system currently operates as a mix of private and public entities. Physicians work in private practice and bill provincial health insurance plans for their services. Hospitals are run by community boards or volunteer organizations, but they are administered by regional authorities as non-profit companies, and their operating budgets are determined by provincial health plans. Private insurance is effectively prohibited for coverage of any service provided for in provincial health plans and is mainly used for dental services and prescription drugs.

19. See id.
20. See Marenko Overview, supra note 7.
21. “Canada is also the only country that effectively prohibits private health insurance for hospital and physician services. Although private medical insurance is not banned specifically by the Canada Health Act, federal and provincial governments have historically interpreted the Act as intending to ban private insurance. While only six provinces legally prohibit private medical insurance for medically necessary services, all provinces have other policies in place that penalize providers who choose to bill privately for services. In practice, private insurance is generally only permitted to cover goods and services that are not covered by our universal government-run health insurance plan, mainly dental services and prescription drugs.” Mark Rovere, Why It’s Time Government Called “Time Out” on the Canada Health Act, FRASER INST. (Nov. 29, 2010), http://www.fraserinstitute.org/publicationdisplay.aspx?id=17023&terms=HOW+GOOD+IS+CANADIAN+HEALTH+CARE.
Canada’s health care system has been the subject of criticism and political debate.\textsuperscript{22} For instance, Canada’s health care system has been criticized for having long wait times before a patient can receive specialized care.\textsuperscript{23} Even though wait times have recently decreased, some Canadians still feel that they are too long.\textsuperscript{24} In addition, there has been debate over the long term sustainability of the provincial health care system amid recent decreases in federal funding.\textsuperscript{25}

Canada took its first step towards its current universal health care system in 1947 when Saskatchewan adopted a universal hospital care plan that featured province-wide coverage.\textsuperscript{26} By 1950, British Columbia and Alberta had adopted similar plans,\textsuperscript{27} and by 1961 all Canadian provinces and territories provided universal hospital coverage.\textsuperscript{28} In 1966, Canada’s federal government passed the Medicare Act, which provided federal funding to cover 50\% of the provinces’ health care costs and expanded the insurance coverage to include hospital and physician services.\textsuperscript{29} By 1972, all of Canada’s provinces and territories were providing the expanded coverage subsidized by the Medicare Act.\textsuperscript{30} However, in the late 1970s, the rising costs of medical care caused Canada to stop paying 50\% of the province’s health care costs.\textsuperscript{31} In the absence of federal health care reimbursement, provinces were no longer obligated to meet federal health insurance requirements and were allowed great-

\begin{footnotes}
\footnote{22. See Nelson, supra note 18, at 526.}
\footnote{25. See Nelson, supra note 18, at 526.}
\footnote{27. See id.}
\footnote{28. See Nelson, supra note 18, at 524.}
\footnote{29. See id.}
\footnote{30. See id. at 525.}
\end{footnotes}
er control over the administration of their health care systems. In order to cover the money that the federal government was no longer providing, some provinces implemented such controversial measures as collecting user fees and extra billing, which threatened some provincial citizens’ access to health care. In 1984, Canada passed the Canada Health Act, which reinstated the program for federal reimbursement of health care costs, created penalties for imposing user fees and extra billing, and imposed requirements for receiving federal reimbursement. The central tenets of the Canada Health Act are public administration, comprehensive coverage of “medically necessary” services, universal coverage of all provincial citizens, continuous coverage even if the citizen is outside of the province or the country, and reasonable access to services.

As will be demonstrated in Part IV, the Canada Health Act’s tenet of universal access and the role of the provinces in financing the health care system are important factors in making the Cost Recovery Act beneficial to tobacco plaintiffs.

II. TOBACCO LITIGATION IN THE UNITED STATES AND CANADA

Tobacco litigation in the United States has been described as taking part in three waves. The first two waves were largely unsuccessful for plaintiffs, as individual claimants struggled to make headway against a tobacco industry that refused to settle. However, the states found huge success during the third wave of litigation when they entered into the Master Settle-


33. See Makarenko Provisions, supra note 32.

34. Nelson, supra note 18, at 525.

35. See id.


ment Agreement with tobacco manufacturers. Tobacco litigation in Canada has mimicked this course of development, with British Columbia’s health care cost recovery suit ultimately finding success in the Supreme Court of Canada.

A. History of Tobacco Litigation in the United States

The first wave of tobacco litigation in the United States began in the 1950s and continued through the 1960s. During this era of tobacco litigation, individual plaintiffs found little success, in part because at the time tobacco companies could not have known about the health risks of smoking cigarettes. Another obstacle to plaintiffs’ success during the first wave of litigation was the need to prove specific causation. Even if a plaintiff proved that cigarettes were generally harmful and contributed to cancer and other illnesses, it was very difficult for a plaintiff to prove that her particular injuries were caused by smoking. The tobacco companies refused to settle any lawsuits during the first wave of litigation and forced plaintiffs to expend a great deal of personal resources in taking their claims to trial.

The second wave of tobacco litigation in the United States took place from the 1980s to the early 1990s, and was equally unsuccessful for the plaintiffs. This second wave was precipitated by an increased awareness in the American public regarding the dangers of cigarette smoking following the release of the U.S. Surgeon General’s Report on Smoking and Health in 1964. In 1965, Congress passed the Federal Cigarette La-

40. See Henderson & Twerski, supra note 36, at 70.
41. See Smith, supra note 37, at 6.
42. See id. at 10–11.
43. See Henderson & Twerski, supra note 36, at 70–71.
44. See id.
45. See id. at 71.
46. Smith, supra note 37, at 14–19.
beling and Advertising Act, which required that warning labels be displayed on cigarette packaging.48 Ironically, Congress’ efforts to educate the public regarding the dangers of tobacco would ultimately prove to protect tobacco manufacturers during the second wave of tobacco litigation.49 Tobacco manufacturers argued in Cipollone v. Liggett Group that the Federal Cigarette Labeling and Advertising Act and other statutes like it (the “Cigarette Acts”) preempted plaintiffs from claiming that the tobacco manufacturers had failed to warn them of the dangers of smoking.50 In 1992, the U.S. Supreme Court preempted all failure-to-warn tort claims based on state law that post-dated the Cigarette Acts.51 While the Court held that fraud and express warranty claims were not preempted, those claims were difficult to establish during the second wave era.52 The tobacco manufacturers continued their “no settlement” policy during the second wave of tobacco litigation, leaving individual plaintiffs little chance of success.53

The third wave of tobacco litigation began in the mid-1990s.54 At the beginning of the third wave, plaintiffs were poised to find success because documents produced from the tobacco manufacturers’ files during congressional hearings strengthened plaintiffs’ fraud claims that the manufacturers misrepresented the health hazards of smoking.55 In addition, plaintiffs began utilizing class action suits to pool resources.56 The third wave also featured state governments filing claims for recovery of Medicaid expenses paid to treat tobacco related illnesses.57 Mississippi was the first state to file such a claim in 1994, and

49. See Smith, supra note 36, at 14.
51. See id. at 525–27.
52. See Henderson & Twerski, supra note 36, at 73. In a fraud claim, the plaintiff would argue that the tobacco manufacturer fraudulently misrepresented the health hazards of smoking in their advertising. Cipollone, 505 U.S. at 527–29. Similarly, in breach of express warranty claims the plaintiff would argue that the tobacco manufacturer’s advertising statements affirmed that their products were not dangerous to the smoker’s health and therefore created an express warranty to the consumer. Id. at 525–27.
53. See Henderson & Twerski, supra note 36, at 74.
54. See id.
55. See id.
56. See Smith, supra note 37, at 18.
57. See id. at 22.
by 1998 all fifty states had filed a cost recovery lawsuit against tobacco manufacturers.58

In 1998, the tobacco manufacturers ended their long-held policy of refusing to settle and signed the Master Settlement Agreement (“MSA”) that ended the Medicaid reimbursement lawsuits and precluded the states from bringing any similar litigation against the tobacco manufacturers in the United States in the future.59 Florida, Mississippi, Texas, and Minnesota reached separate settlement agreements with the tobacco manufacturers.60 As part of the MSA, tobacco manufacturers agreed to pay the states US$206 billion over twenty-five years, with subsequent additional payments determined by the amount of cigarettes sold.61 In addition, the tobacco manufacturers agreed to fund public anti-smoking education efforts, disbanded organizations that promoted the industry’s interests—such as the Tobacco Institute—and ceased advertising targeted towards young people.62

While the MSA may have contributed to lower rates of tobacco consumption, it is not without its flaws.63 Some have argued that the MSA is an inefficient way of collecting a de facto cigarette excise tax.64 This criticism inherently implicates a question of legislative primacy: does the MSA “[sidestep] the democratic process” normally required to impose taxes?65 Others have suggested that it may violate the Social Security Act,66 federal anti-trust law,67 or the U.S. Constitution.68 Another important criticism of the MSA is that it does not dedicate money

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58. See id.
59. See id. at 23.
60. See Sloan & Chepke, supra note 38, at 166.
61. See id. at 161.
62. See id.
63. See id.
67. See Sloan & Chepke, supra note 38, at 179–82.
68. See id. at 174–79.
paid by tobacco manufacturers to smoking cessation programs or even to health care. The money that the states collect can be used for any purpose, including “infrastructure, prisons, or tax cuts.”

Despite its criticisms, the MSA represents an important development in United States tobacco litigation. Plaintiffs, in this case states seeking recovery of health care costs, were finally able to succeed against the tobacco industry. As the next section discusses, the development of tobacco litigation in Canada followed the same path—individual plaintiffs initially struggling, with provincial health care recovery suits later finding success.

B. History of Tobacco Litigation in Canada

Until recently, tobacco litigation in Canada has seen much less activity than in the United States, and has been much more favorable to defendants. The first tobacco suit in Canada, Perron v. R.J.R. Macdonald Inc., was filed in 1988 but was dismissed because the statute of limitations had expired. The next tobacco suit filed in Canada, Caputo v. Imperial Tobacco Ltd., asserted a class action claim in 1995 on behalf of “all residents of Ontario, whether living or now deceased, who have ever smoked cigarette products manufactured . . . by the defendants.” In 2004, the Caputo class was decertified because plaintiffs had “combined at least five, and possibly more, classes, not to mention innumerable subclasses, into one globally defined class for the purpose of seeking certification. In adopting this strategy, the plaintiffs had presented an action lacking a core of commonality.” In 1997, an individual claimant

69. See Smith, supra note 37, at 23.
70. Id.
71. See Smith, supra note 37, at 27; Cupp World, supra note 15, at 290–91.
73. Caputo v. Imperial Tobacco Ltd., 2004 CanLII 24753 (ON SC) (Can.).
74. Id. To satisfy the commonality requirement, plaintiffs must demonstrate “a single class sharing substantial ‘common issues,’ the resolution of which will significantly advance the claim of each class member.” Id. para. 45.
brought suit against tobacco manufacturers in Spasic v. Imperial Tobacco Ltd. and the case is still being litigated.\(^{75}\)

By the time the MSA was signed in the late 1990s, tobacco litigation in Canada was relatively undeveloped compared to American tobacco litigation; only three cases had ever been filed against tobacco manufacturers for tobacco related illnesses in Canada, with none of the plaintiffs finding success.\(^{76}\)

However, in 1997, the British Columbia legislature passed the Cost Recovery Act, which allowed British Columbia to sue tobacco manufacturers to recover provincial funds spent treating smoking related illnesses.\(^{77}\) In 1998, the British Columbia legislature amended the Cost Recovery Act to include language that directed courts to presume that exposure to tobacco products had caused the plaintiff’s illness if the defendant had breached any “common law, equitable or statutory duty or obligation owed to persons in British Columbia who have been exposed or might become exposed to the type of tobacco product.”\(^{78}\) Later that year, British Columbia filed the first cost recovery action brought by a provincial government against tobacco manufacturers in Canadian courts.\(^{79}\) However, the British Columbia Supreme Court struck down the Cost Recovery Act in 2000, on the grounds that the British Columbia legislature lacked the constitutional authority to target legislation at companies that were not headquartered in British Columbia.\(^{80}\)

The legislature subsequently amended the Cost Recovery Act to remove the unconstitutional extra-territoriality language.\(^{81}\) British Columbia filed R. v. Imperial Tobacco Canada Ltd. the day the amended statute was enacted.\(^{82}\) The tobacco manufacturers again challenged the constitutionality of the statute and argued that the amended Cost Recovery Act was ultra vires for extraterritoriality, contrary to the rule of law, and inconsistent


\(^{76}\) See Smith, supra note 37, at 26–28.

\(^{77}\) See id. at 28.

\(^{78}\) Id.


\(^{80}\) See JTI-MacDonald v. AG-BC, [2000] BCSC 0312 (Can.).

\(^{81}\) See Smith, supra note 37, at 29.

\(^{82}\) See Cupp World, supra note 15, at 292.
with judicial independence. In 2005, the Supreme Court of Canada upheld the amended Cost Recovery Act as constitutional. The court held that, because of the “strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia’s tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs),” the Cost Recovery Act was “meaningfully connected to the province” and therefore not unconstitutional for extraterritoriality.

In addition to the extraterritoriality challenge, the tobacco manufacturers challenged the Act for interfering with judicial independence, alleging that it interfered with the adjudicative role of courts. They argued that by forcing the court to presume that the injured British Columbians “would not have been exposed to the [tobacco] product but for the [breach of common law, equitable, or statutory duty] . . . and the exposure . . . caused or contributed to the disease,” the statute compelled the court to make “irrational presumptions.” The defendants attacked this section of the Cost Recovery Act because it eliminated one of their defenses.

The tobacco manufacturers also argued that the Cost Recovery Act was inconsistent with judicial independence because it “[subverted] the court’s ability to discover relevant facts.” They argued that the Cost Recovery Act hindered the court’s fact finding ability by not requiring the plaintiff to “identify

84. See British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473 (Can.).
85. Id. para. 37. The tobacco companies argued “that the rule of law requires that legislation: (1) be prospective; (2) be general in character; (3) not confer special privileges on the government, except where necessary for effective governance; and (4) ensure a fair civil trial.” Id. para. 63. However, the court held that “none of these requirements enjoy constitutional protection in Canada.” Id. para. 64.
86. Id. para. 48.
89. As will be discussed in Part IV, this section of the Cost Recovery Act addresses the tobacco manufacturer’s causation arguments.
particular individual insured persons, to prove the cause of tobacco related disease in any particular individual insured person, or to prove the cost of health care benefits for any particular individual insured person.” 91 Again, the defendants were attacking a section of the Cost Recovery Act that attenuated one of their strongest defenses—their assumption of risk argument.

The court noted that the Cost Recovery Act was “not as unfair or illogical” as the tobacco manufacturers claimed because the rules in the Cost Recovery Act “[reflected] legitimate policy concerns of the British Columbia legislature regarding the systemic advantages tobacco manufacturers enjoy when claims for tobacco-related harm are litigated through individualistic common law tort actions.” 92 The crucial question addressed by the supreme court was “not whether the Act’s rules [were] unfair or illogical . . . but whether they interfere[d] with the court’s adjudicative role, and thus judicial independence.” 93 The court found the statute was constitutional, despite the fact that it shifted the burden of proof and limited the tobacco manufacturer’s ability to compel discovery of an individual’s medical records, because it did not interfere with the court’s central function of adjudicating disputes. 94 In so holding, the Canadian Supreme Court affirmed two important sections of the Cost Recovery Act that lend themselves favorably to provincial plaintiffs in tobacco litigation. 95 The ruling also provided a judicial blueprint for upholding similar legislation in the future. 96 If Canada were to pass a statute similar to the Cost Recovery Act aimed at food litigation, the Canadian courts would have a strong precedent in upholding the statute from similar attacks.

C. The Canadian Supreme Court’s Decision in R. v. Imperial Tobacco Canada Ltd.

Though the tobacco manufacturer’s arguments failed to render the Cost Recovery Act unconstitutional in 2005, the manu-

93. Id.
94. Id. at para. 55.
facturers continued trying to limit their liability. Tobacco manufacturers would next attempt to divert blame by impleading the Canadian federal government.

In the 1950s and 1960s, as worldwide awareness of the health risks of smoking began to grow, Canada adopted a public health policy to encourage citizens to smoke light cigarettes. It was commonly believed at the time that light cigarettes were less harmful than regular cigarettes. Pursuant to this policy, the Canadian government advised and assisted tobacco manufacturers in developing strains of low-tar tobacco.

In light of Canada’s former policy, on June 6, 2007, the tobacco manufacturers filed a third-party claim impleading the Canadian federal government in *R. v. Imperial Tobacco Canada Ltd.*, British Columbia’s cost recovery suit. The tobacco companies argued that Canada should be held liable as a “manufacturer” under the Cost Recovery Act for the role it played

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98. *See* id.

99. In the 1950s, an emerging awareness of the dangers of cigarette smoking started to grow and Canada, recognizing the health risk, began funding research into the link between cigarettes and cancer. *See* British Columbia v. Imperial Tobacco Canada Limited, [2009] B.C.C.A. 540, para. 18 (Can.). In 1963, Canada began an anti-smoking program designed to “encourage people to limit or stop smoking, to take steps to inform the public of smoking risks and to conduct research into manufacturing a less hazardous cigarette.” *Id.* para. 19. In the mid-1960s, Canada determined that, despite the public awareness of the dangers of smoking, some people would continue to smoke. *Id.* para. 22–23. At the time, it was believed that cigarettes with lower levels of tar and nicotine (light cigarettes) were less harmful. *Id.*

100. Relying on this theory, Canada “gave advice, made requests or gave directions to cigarette manufacturers about the development and promotion of light and mild products” and helped to “develop strains of tobacco particularly suitable for use in light and mild products that were eventually sold to consumers in British Columbia.” *Id.* In 1973, the Canadian Minister of Health “announced that officials of Health Canada and Agriculture Canada along with the tobacco industry were endeavoring to develop strains of tobacco that would lower tar and nicotine levels in cigarettes.” *Id.* para. 24. Between 1979 and 1983, Canada developed several varieties of low tar tobacco. *Id.* para. 25. By 1983, 95% of tobacco available to manufacturers was developed by Agriculture Canada and “nearly all tobacco products consumed in British Columbia were manufactured from these varieties.” *Id.*

101. *See* Third Party Notice of Imperial Tobacco Canada Limited, British Columbia v. Imperial Tobacco Canada Limited, 2008 BCSC 419 (Can.).

102. Under the Cost Recovery Act, a “manufacturer” is defined as “a person who manufactures or has manufactured a tobacco product and includes a
in the development of low-tar tobacco. They also argued that if they were found liable to British Columbia for reimbursement of health care costs, they were “entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn.” In filing this third-party petition, the tobacco manufacturers were falling back onto the tactic of prolonging the litigation; a tactic that had proved successful for

person who currently or in the past (a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product, (b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons, (c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or (d) is a trade association primarily engaged in (i) the advancement of the interests of manufacturers, (ii) the promotion of a tobacco product, or (iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product.” Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, §1.

103. See R. v. Imperial, [2011] S.C.C. 42, para. 12–13. Regarding the tobacco companies’ argument that Canada qualified as a “manufacturer” under the Cost Recovery Act, the court held that the statute’s reference to “revenue percentage” and “market share” showed that the British Columbia “legislature did not intend to include the federal government as a potential manufacturer.” Id. para. 124–25. The court determined that “holding Canada accountable under the CRA would defeat the legislature’s intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry.” Id. para. 120.

104. See id. para. 2. The court dismissed the tobacco companies’ negligent design and failure to warn claims against Canada on the same theory of sovereign immunity that they applied to the negligent misrepresentation claim. Id. para. 105, 111. However, the court failed to reconsider the conduct at issue when deciding whether to dismiss those claims. Id. The court could have separated the two types of conduct, and applied the most appropriate conduct to each claim, which would have greatly affected the court’s analysis of the different conduct at issue. For instance, in deciding the negligent design claim, the court held that “the decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada’s health policy. It was a decision based on social and economic factors.” Id. para. 116. It is interesting to consider whether this claim would have been dismissed for policy considerations under Canada’s previously dominant “policy/operational test.” It could be argued that the decision to advocate light cigarettes as more healthy was a policy decision, and that developing and selling strains of tobacco were operational actions designed to carry out the overall policy of healthier smoking.
the tobacco industry in the past when plaintiffs with fewer resources were unable to maintain years of litigation.105

On July 29, 2011, the Supreme Court of Canada dismissed the federal government as a third party.106 In deciding whether to dismiss the tobacco companies’ claim for negligent misrepresentation, the court first examined whether policy concerns outweighed Canada’s duty of care in its role as advisor to the tobacco manufacturers.107 The court focused its policy discussion on Canada’s assertions regarding the health benefits of smoking light cigarettes over regular cigarettes, rather than Canada’s “role in developing and growing a strain of low-tar tobacco and collecting royalties on the product.”108 Canada argued that its statements were made in support of its policy decision to encourage healthier smoking habits and that “[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon

105. See Henderson & Twerski, supra note 36, at 74.
107. See id. para. 47. The court first determined whether the claim had a “reasonable prospect of success.” Id. para. 17. To determine the prospect of success, the court considered whether “the general requirements for liability in tort are met.” Id. para. 38. The first part of this test asks “whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff.” Id. para. 39. On this first issue, the court held that such a relationship did exist because “Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials.” Id. para. 53. The court went on to hold that “Canada’s regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement” made the tobacco manufacturers’ reliance on Canada reasonable. Id. para. 54.
108. Id. para. 67. In determining the conduct at issue for the negligent misrepresentation claim, the court found that the tobacco manufacturers had “merged the two types of conduct [Canada’s representation that low-tar tobacco was less harmful and Canada’s role in developing low-tar tobacco], emphasizing aspects that cast Canada in the role of business operator in the tobacco industry.” Id. The court held that “in considering negligent misrepresentation, only the first type of conduct—conduct relevant to statements and representations made by Canada—is at issue.” Id. By focusing solely on Canada’s statements regarding the health impact of low-tar tobacco, the court was able to effectively ignore the impact that Canada’s actions had on the issue of state immunity.
social, political or economic factors.”¹⁰⁹ The tobacco manufacturers argued that Canada’s assertions represented “operational acts” designed to carry out the overall policy to support healthier smoking habits.¹¹⁰

D. Sovereign Immunity in R. v. Imperial Tobacco Canada Ltd.

In reaching its decision in R. v. Imperial Tobacco Canada Ltd., the Canadian Supreme Court triggered a subtle but important shift in sovereign immunity doctrine.¹¹¹ Generally, in common law countries, “government policy decisions are not justiciable and cannot give rise to tort liability.”¹¹² However, “governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.”¹¹³ Accordingly, the court first looked to Canadian precedent to determine an appropriate test.¹¹⁴

The first test, the “discretionary decision” approach, “holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational.”¹¹⁵ The court noted that, because “many decisions can be characterized as to some extent discretionary,” this test “has the potential to create an overbroad exemption for the conduct of governmental actors.”¹¹⁶ While it can be tempered to “narrow the scope of the discretion,”¹¹⁷ this test did not

¹¹¹. Id.
¹¹². Id. para. 72.
¹¹³. Id. The court recognized the issue of policy considerations as “vexing,” noting that “much judicial ink has been spilled” analyzing the problem. Id. The court noted, “[o]n the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, ‘the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions.’” Id. para. 76 (citing Just v. British Columbia, [1989] 2 S.C.R. 1228, para. 1239 (Can.)).
¹¹⁵. Id. para. 73.
¹¹⁶. Id. para. 77.
¹¹⁷. Id.
become the predominant approach in Canadian jurisprudence.\textsuperscript{118}

The second test, the “policy/operational test” seeks to determine “which ‘true’ policy decisions are distinguished from ‘operational’ decisions, which seek to carry out settled policy.”\textsuperscript{119} While the policy/operational test became the dominant approach in Canada, it is not always easy to determine when a decision should be characterized as a policy decision or an operational decision.\textsuperscript{120} As the court noted,

Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision?\textsuperscript{121}

With this difficulty in mind, the court also considered the approaches to sovereign immunity in the United Kingdom,\textsuperscript{122} Australia,\textsuperscript{123} and the United States\textsuperscript{124} in determining an appropriate test for protected policy decisions.\textsuperscript{125}

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119. \textit{Id.}
120. See \textit{id.}, para. 78.
121. \textit{Id.}
122. In the United Kingdom, the House of Lords adopted a justiciability test in \textit{Barrett v. Enfield London Borough Council}. \textit{Id.} para. 79. This test seeks to determine “whether the court is institutionally capable of deciding on the question, or ‘whether the court should accept that it has no role to play.’” \textit{Id.} (citing \textit{Barrett v. Enfield London Borough Council}, [2001] 2 A.C. 550, 571 (appeal taken from Eng.)). The \textit{Imperial} court recognized that this test may be as unworkable as the discretionary decision and policy/operational approaches when it noted that the “long judicial voyage” ended with “a test that essentially restates the question. When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts.” R. v. Imperial, [2011] S.C.C. 42, para. 79
123. The two leading Australian cases on the issue, \textit{Sutherland Shire Council v. Heyman} and \textit{Pyrenees Shire Council v. Day}, both found a court split on which approach to take. \textit{Id.} para. 80. In \textit{Sutherland Shire Council v. Heyman}, Chief Justice Gibbs and Justice Wilson “adopted the \textit{Dorset Yacht} rule that all discretionary decisions are immune,” and “endorsed the policy/operational distinctions as a logical test for discerning which decisions should be protected.” \textit{Id.} Justice Mason adopted an approach which the \textit{Imperial} court dubbed a “core policy,” \textit{id.}, approach when he held that “the dividing line between [policy and operation] will be observed if we recognize that a public authority
The Imperial court synthesized their multinational tour of sovereign immunity law into three basic observations. First, because “even routine tasks . . . like driving a government vehicle” involve discretion, tests “based simply on the exercise of government discretion . . . [cast] the net of immunity too broad-
is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints.” Sutherland Shire Council v. Heyman (1985), 157 C.L.R. 424, para. 39 (Austl.). In Pyrenees Shire Council v. Day, the court was again divided with three justices adopting the Dorset Yacht rule and two justices adopting “different versions of the policy/operational distinction.” R. v. Imperial, [2011] S.C.C. 42, at para. 80.

124. In 1946, the United States waived immunity from tort claims in the Federal Tort Claims Act. Id. para. 81. The Act created exemptions for discretionary functions, excluding liability in tort for “any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a)(2006). In Berkovitz by Berkovitz v. United States, the Supreme Court held that the discretionary function exception “protects only governmental actions and decisions based on considerations of public policy,” because it “was Congress’ desire to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” Berkovitz by Berkovitz v. U.S., 486 U.S. 531, 536–37 (1988) (citing United States v. Varig Airlines, 467 U.S. 797, 814 (1984)). In 1991, the Supreme Court in U.S. v. Gaubert held that the “focus of the inquiry is . . . on the nature of the actions taken and on whether they are susceptible to policy analysis.” U.S. v. Gaubert, 499 U.S. 315, 325 (1991). In concurrence, Justice Scalia supported a policy/operational distinction as “relevant to the discretionary function inquiry,” but felt that the decision maker’s position of authority should influence the court’s discretionary function analysis. Id. at 335 (Scalia, J., concurring). Scalia wrote:

[N]ot only is it necessary for application of the discretionary function exception that the decision maker be an official who possesses the relevant policy responsibility, but also the decision maker’s close identification with policymaking can be strong evidence that the other half of the test is met—i.e., that the subject matter of the decision is one that ought to be informed by policy considerations . . . . This immunity represents an absolute statutory presumption, so to speak, that all regulations involve policy judgments that must not be interfered with. I think there is a similar presumption, though not an absolute one, that decisions reserved to policymaking levels involve such judgments—and the higher the policymaking level, the stronger the presumption.

Id. (Scalia, J., concurring).

ly.”\textsuperscript{126} Second, all jurisdictions support immunity from tort for “core policy” decisions.\textsuperscript{127} Finally, defining a core policy decision as “not operational” can be problematic because “decisions in real life may not fall neatly into one category or the other.”\textsuperscript{128} With these observations in mind, the court concluded that “core policy government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith.”\textsuperscript{129}

Applying this new “core policy” test to the negligent misrepresentation claim, the court asked “whether the alleged representations of Canada to the tobacco companies that low-tar cigarettes are less harmful to health are matters of policy, in the sense that they constitute a course or principle of action of the government.”\textsuperscript{130} The court dismissed the tobacco manufacturer’s third-party claim because Canada’s representations were “part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes.”\textsuperscript{131} In \textit{R. v. Imperial Tobacco}, the tobacco manufacturers were attempting to strategically muddy the waters of the litigation. Impleading the Canadian federal government benefited the tobacco manufacturers not only by potentially limiting their liability for repayment of the provincial medical costs, but also by prolonging any ultimate judgment on those central issues. By introducing complex legal questions unrelated to their own liability, the tobacco manufacturers were able to derail the litigation for over four years. However, the court’s decision refocused

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\bibitem{note126} \textit{Id.} para. 84.
\bibitem{note127} \textit{Id.} para. 85.
\bibitem{note128} \textit{Id.} para. 86.
\bibitem{note129} \textit{Id.} para. 90. The court noted that this “core policy” approach was not a “black and white test” because “difficult cases may be expected to arise from time to time here it is not easy to decide whether the degree of ‘policy’ involved suffices for protection from negligence liability.” \textit{Id.} Nevertheless, the court was confident that “core policy” decisions would be “readily identifiable.” \textit{Id.}
\bibitem{note130} \textit{Id.} para. 92.
\bibitem{note131} \textit{Id.} para. 95. The court noted that the “course of action was adopted at the highest level in the Canadian government . . . involved social and economic considerations,” and was “developed . . . out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease.” \textit{Id.}
\end{thebibliography}
the course of the litigation on the parties at the heart of the Cost Recovery Act—provincial plaintiffs seeking health care costs from tobacco manufacturers.\textsuperscript{132}

III. ISSUES IN FAST FOOD LITIGATION

In claims against food manufacturers or retailers, plaintiffs seeking damages for the food’s contribution to their obesity have faced difficult issues involving causation and assumption of risk.\textsuperscript{133} An examination of food litigation in the United States will demonstrate the issues involved in fast food litigation, including causation and assumption of risk arguments. As discussed in Part II, these are the same arguments that were utilized by the tobacco manufacturers in tobacco litigation.\textsuperscript{134}

One of the most well-known fast food litigation cases in the United States is \textit{Pelman v. McDonald’s Corp.}\textsuperscript{135} In \textit{Pelman}, two minors sued the fast food restaurant McDonalds claiming, among other things, that “McDonalds acted at least negligently in selling food products that are high in cholesterol, fat, salt and sugar when studies show that such foods cause obesity and detrimental health effects.”\textsuperscript{136}

One of the weaknesses of the plaintiffs’ claims in \textit{Pelman}\textsuperscript{137} is common to food litigation in general. The \textit{Pelman} court elegantly expressed this issue, asking “where should the line be drawn between an individual’s own responsibility to take care of herself, and society’s responsibility to ensure that others shield her?”\textsuperscript{138} The court held that “if consumers know (or reasonably should know) the potential ill health effects of eating at McDonalds, they cannot blame McDonalds if they, nonetheless, choose to satiate their appetite with a surfeit of supersized McDonalds products.”\textsuperscript{139} The \textit{Pelman} court dismissed the plaintiffs’ negligence claim, holding that “it is well-known that fast food in general, and McDonalds’ products in particular, contain high levels of cholesterol, fat, salt, and sugar, and that such

\textsuperscript{132} See generally id.
\textsuperscript{133} See \textit{Pelman v. McDonald’s Corp.}, 237 F.Supp.2d 512 (S.D.N.Y. 2003).
\textsuperscript{134} See \textit{Courtney}, supra note 17, at 99.
\textsuperscript{135} \textit{See Pelman}, 237 F.Supp.2d.
\textsuperscript{136} Id. at 520.
\textsuperscript{137} See \textit{id.} at 516.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 517–18.
attributes are bad for one.”140 In so holding, the Pelman court is essentially addressing a problem of assumption of risk.141 The plaintiff is barred from recovery if he or she knew that eating certain foods would lead to obesity, yet chose to continue eating them despite the risk of adverse health implications.142 This same issue has arisen in tobacco litigation where the health hazards of smoking have long been well known.143 Tobacco manufacturers have made the same argument that the food manufacturer made in Pelman: if a plaintiff knew about the health hazards of smoking and continued to smoke, they should be barred from recovery.144

The Pelman court pointed out another issue that plaintiffs face in food litigation when it noted that “a number of factors other than diet may come into play in obesity and the health problems of which plaintiffs complain.”145 Essentially, the Pelman court was addressing the issue of causation; that is, when an injury has several possible causes, courts may have difficulty assigning liability to one possible cause over another.146 For instance, in addition to diet, obesity can also be influenced by genetic factors.147 Therefore, McDonalds argued in Pelman that the plaintiffs’ obesity was hereditary, as opposed to being caused by eating McDonald’s food.148 Obesity can also increase the risk of heart disease;149 however, propensity for heart disease can be hereditary.150 Coincidentally, smoking also contrib-

140. Id. at 532.
141. See id.
142. See id.
144. See Courtney, supra note 17, at 99.
145. See Pelman, 237 F.Supp.2d at 539.
146. Id.
148. See Pelman, 237 F.Supp.2d at 539.
149. See Obesity Information, AM. HEART ASS’N (last updated May 5, 2011), http://www.heart.org/HEARTORG/GettingHealthy/WeightManagement/Obesity/Obesity-Information_UCM_307908_Article.jsp#.TqwwqJuIm0s.
utes to heart disease. Therefore, both tobacco manufacturers and fast food retailers could argue that a plaintiff's heart disease was hereditary, as opposed to being caused by smoking cigarettes or eating hamburgers.

Another causation issue that the Pelman court addressed was that “any number of other factors then potentially could have affected the plaintiffs' weight and health . . . the more often a plaintiff had eaten at McDonalds, the stronger the likelihood that it was the McDonalds’ food (as opposed to other foods) that affected the plaintiffs' health.” Unless an obese plaintiff only ate at one fast food restaurant in his or her life, any single fast food manufacturer will have an argument similar to the previous causation argument. In Pelman, McDonalds argued that the plaintiffs' obesity was not caused by McDonald's food, but rather by the food from a different fast food restaurant. Again, defendants in food litigation and tobacco litigation have the same argument at their disposal. For instance, the Newport cigarette company could have argued that a plaintiff's cancer was caused by smoking Marlboro cigarettes.

The Pelman court dismissed the plaintiffs' claims holding that the complaint failed “to allege with sufficient specificity that the McDonalds' products were a proximate cause of the plaintiffs' obesity and health problems.” In Pelman, issues of assumption of risk and proximate causation represented stumbling blocks for plaintiffs in food litigation. However, just as defendants in food litigation and tobacco litigation can use these arguments to rebut a plaintiff's claim, the Cost Recovery Act and the subsequent tobacco litigation can be used to overcome food and tobacco defendants' assumption of risk and proximate causation defenses.

153. See id. at 539.
154. Id. at 540.
155. See id.
IV. PROVISIONS OF THE COST RECOVERY ACT THAT ARE BENEFICIAL TO FOOD LITIGATION PLAINTIFFS

The current Cost Recovery Act contains several provisions that would benefit plaintiffs in food litigation by reducing their vulnerability to assumption of risk and causation arguments. The first provision specifically authorizes Canadian provinces to initiate cost recovery suits on behalf of patients treated for tobacco related illnesses.\textsuperscript{156} The Cost Recovery Act section 2(1) provides that “the government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.”\textsuperscript{157} Section 2(4)(b) provides that “in an action under subsection (1), the government may recover the cost of health care benefits . . . on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.”\textsuperscript{158}

This was an important provision for plaintiffs in overcoming the assumption of risk defense raised by tobacco manufacturers. There are two theories that address how cost recovery suits involving government entities rebut the assumption of risk argument in tobacco cases.\textsuperscript{159} The first theory posits that the suit places the assumption of risk “one step removed because the states were suing on behalf of smokers.”\textsuperscript{160} Because it is the provincial government that is bringing the lawsuit seeking reimbursement for health care costs, the cause of action is “one step removed” from the injured smoker who chose to use tobacco products.\textsuperscript{161}

The second theory of how cost recovery suits involving government entities rebut the assumption of risk argument in tobacco cases is the unjust enrichment theory.\textsuperscript{162} This theory differs from the “one-step-removed” theory in that it does not as-

\begin{itemize}
\item \textsuperscript{156} Cupp World, supra note 15, at 291.
\item \textsuperscript{157} Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, §2(1).
\item \textsuperscript{158} Id. §2(4)(b).
\item \textsuperscript{159} See Richard L. Cupp, Jr., State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?, 27 PEPP. L. REV. 685, 696 (2000) [hereinafter Cupp Domino]; see also Traylor, supra note 66, at 1097 n.107.
\item \textsuperscript{160} See Cupp Domino, supra note 159, at 696.
\item \textsuperscript{161} Id. at 689.
\item \textsuperscript{162} See Traylor, supra note 66, at 1097 n.107.
\end{itemize}
sume that “the states were suing on behalf of smokers.” Instead, it posits that, “the states were suing on behalf of taxpayers who bore the financial burden of Medicaid-covered smokers’ health care.” The unjust enrichment theory argues that these taxpayers “expended hundreds of millions of dollars in caring for their fellow citizens,” and tobacco manufacturers were “unjustly enriched to the extent that [the] taxpayers have had to pay these costs.”

Both the “one step removed” theory and the unjust enrichment theory serve to introduce a counter-argument to tobacco manufacturers’ assumption of risk argument. The two theories share the same underlying premise: regardless of whether the province was suing on behalf of the smokers or the taxpayers, it is the province that has the cause of action to recover health care costs. The injury suffered by the smoker (illness) is susceptible to the assumption of risk argument if the smoker knew about the health hazards associated with tobacco use. However, the injury suffered by the province (payment for medical care) would not be affected by the smoker’s knowledge. As was discussed in Part I, one of the central tenets of Canada’s health care system is universal access: even smokers who knew the health risks and still smoked are entitled to treatment. By assigning the injury to the province that paid the health care costs, the Cost Recovery Act has removed the smoker that was the target of the assumption of risk defense.

If a statute similar to the Cost Recovery Act were enacted to provide provinces with a direct cause of action against food retailers to recover medical costs associated with obesity, the same counter-argument could be used by plaintiffs in food liti-

163. Id.
164. Id.
165. Traylor, supra note 66, at 1097 n.107 (citing Complaint at 79 & 82 Moore ex rel. State v. Am. Tobacco Co., No. 94–1429 (Miss. Ch. Ct. Jackson County May 23, 1994)).
166. See, e.g., Cupp Domino, supra note 159, at 689; Traylor, supra note 66, at 1097 n.107.
167. See id.
168. See id.
169. See Nelson, supra note 18, at 524. Because the tenet of “universality” guarantees health care to all citizens, even Canadian smokers would be entitled to health care.
gation. If such legislation was enacted, provinces could rebut food retailers’ assumption of risk argument by responding that the province did not choose to eat foods high in fat and calories, rather they are seeking reimbursement for health care costs paid by provincial taxpayers to treat obesity related illnesses.

Another provision of the Cost Recovery Act that would be beneficial to food litigation plaintiffs in Canada is section 2(5)(a). If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis, it is not necessary to identify particular individual insured persons, to prove the cause of tobacco related disease in any particular individual insured person, or to prove the cost of health care benefits for any particular individual insured person. This section of the Cost Recovery Act also limits the discovery access to any individual patient’s testimony or medical documents, and allows the government to prove health care benefits through “a statistically meaningful sample of documents.” It also provides clear separation between the smoker’s physical injury, and the province’s financial injury in paying medical costs. By elucidating this distinction, section 2(5)(a) further attenuates the tobacco companies’ assumption of risk arguments as discussed above. In addition, this section generally “[eases] the government’s case against tobacco manufacturers” by lowering the burden of proof.

If legislation similar to the Cost Recovery Act were passed with a provision like section 2(5)(a), provinces could sue food retailers to recover health care costs associated with obesity without having to prove any individual consumer’s injury. If such legislation were passed, it would also certainly “ease the government’s case” against food manufacturers and fast food retailers.

Finally, the Cost Recovery Act also addresses the causation issues in tobacco litigation. Under the Cost Recovery Act, if

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173. Id. §2(5)(b)-(e).
175. Id.
176. See id.
the tobacco manufacturer “breached a common law, equitable
or statutory duty . . . the court must presume that the popula-
tion of insured persons who were exposed to the . . . tobacco
product . . . would not have been exposed but for the breach.” 177
In addition, if the court finds a breach, it must presume that
“the exposure . . . caused or contributed to the disease or risk of
disease.” 178 In other words, if there is a breach of duty, the
court assumes the causation requirement has been met. This
section of the Cost Recovery Act is important to provincial
plaintiffs in the tobacco litigation because it effectively nullifies
the tobacco manufacturer’s two strong causation arguments:
that the disease was caused by something other than smoking,
and that the disease was caused by the cigarettes of a different
tobacco manufacturer. 179 A similar provision could be passed by
a provincial legislature authorizing provincial health care cost
recovery against food manufacturers and retailers. In the fast
food litigation context, this would eliminate a defendant’s ar-
tument that a different factor (such as heredity) caused the
plaintiff’s obesity or heart disease, or that a different fast food
restaurant (such as Burger King) caused the plaintiff’s obesity.

These provisions in the Cost Recovery Act substantially as-
ssisted the provincial plaintiff’s case against tobacco manufac-
turers by eliminating the tobacco defendant’s assumption of
risk and causation arguments. 180 Similar legislation aimed at
food litigation in Canada would provide a great advantage to
provincial plaintiffs seeking health care cost recovery.

CONCLUSION

The pattern of litigation in the United States began with in-
dividual plaintiffs having little success against tobacco manu-
facturers with better resources. 181 As the litigation evolved to
include class action claims and cost recovery suits, plaintiffs
were able to find success in the MSA. 182 Canadian provinces
learned a valuable lesson from United States tobacco litigation
when the provinces initiated their own cost recovery suits

30, §3(1)–(2).
178. Id.
179. See id.
181. See Henderson & Twerski, supra note 36, at 74.
182. See Smith, supra note 37, at 23.
against tobacco manufacturers. The Cost Recovery Act and the subsequent tobacco litigation in Canada demonstrated a litigation model that has found initial success in Canadian courts. This litigation model also provides a blueprint for health care cost recovery lawsuits that Canadian provinces could initiate against manufacturers and retailers in other industries, such as the food industry.

By initially commencing health care reimbursement suits against food manufacturers, provincial plaintiffs will be able to immediately take advantage of the benefits of class action suits that the tobacco plaintiffs spent decades developing in the United States and Canada. And with strong precedent focusing cost recovery cases in Canadian courts on the central liability of the manufacturer, provincial plaintiffs may ultimately be successful in recouping health care costs paid to treat obesity-related illnesses.

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THE DRESSMAKER’S DILEMMA:
SEXUAL ABUSE, CORPORATE ACCOUNTABILITY, AND THE
CONVENTION FOR THE ELIMINATION
OF ALL FORMS OF DISCRIMINATION
AGAINST MIGRANT WOMEN IN
JORDAN’S QUALIFIED INDUSTRIAL
ZONES

INTRODUCTION

On June 17, 2011, a twenty-six year-old Bangladeshi woman, encouraged by the Institute for Global Labor and Human Rights (“IGLHR”), a U.S.-based advocacy group, filed a formal complaint with Jordanian authorities that she had been raped by Classic Fashion Apparel (“Classic”) factory’s top manager, Anil Santha.1 Mr. Santha was arrested that month under suspicion of raping the young woman three times since her arrival at the factory in March of 2011.2 Following the Bangladeshi woman’s complaint, several other female workers came forward charging similar acts of sexual harassment and abuse by Santha in 2010 and 2011 including one woman who had become pregnant from the assault.3 The controversy fueled worries about the future of the apparel manufacturing industry in

2. Id.
Jordan, since textile exports to the United States are a main source of national revenue.4

Classic, which produces clothing for major U.S. retailers—including Wal-Mart, Target, Macy’s, Kohl’s and Lands’ End—is Jordan’s largest garment exporter.5 With Classic having annual exports estimated at US$125 million, nearly 13% of Jordan’s one billion dollar garment exports industry,6 Jordan has a large stake in the success and continued performance of Classic’s business relationship with U.S.-based corporations. Thus, it did not come as a surprise when Jordanian investigators seemed reluctant to look into the veracity of the Classic rape allegations, perhaps out of fear for the economic repercussions of validating the claims.7 Notably, Mr. Santha was not prosecuted; rather, he fled to Sri Lanka, his native country, allegedly with the assistance of the Jordanian Ministry of Labor.8

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6. Id.

7. The Labor Ministry’s director of inspection and safety, Adnan Rabbaa, told the Jordan Times shortly after the IGLHR report was issued that, “[w]e formed an ad hoc committee comprising members of all concerned entities who have already started arbitrary interviews with the labourers in this particular company in order to verify the accusations in the report;” however, the committee’s findings have not yet been publicized. Jordan Probing Abuse Claims, DAILY MIRROR (June 13, 2011), http://www.dailymirror.lk/news/11907-jordan-probing-abuse-claims.html. Investigation of the situation by the National Center for Human Rights (“NCHR”), a non-governmental rights group found “no information to support the rape allegations,” alleging that there were contradictions in the victims’ testimonies. See No Proof of Rape, supra note 3. However, the NCHR did not provide examples of the alleged contradictions or explain investigators’ suspicions of the women’s statements. Id. When a reporter from the Associated Press visited Classic’s factory, supervisors from Classic, as well as Classic’s owner and managing director Sanal Kumar, presented six women for interview with the reporter. See Rape Case Turns Focus, supra note 5. All six women were roommates of the women who reported rape, and speaking under the constant watch of the factory supervisors, disclaimed any knowledge of rape in the factory. Id.

The case of Classic points to the difficulties of assessing liability for human rights abuses against women working as overseas contract workers ("OCW") or guest workers within a multinational corporation ("MNC") framework. While Jordan is invested in promoting corporate contracts within its borders, it does not have a system of oversight to regulate the practices of those MNCs that are complicit in labor and human rights violations. That both Mr. Santha and the woman who initially came forward to report the rape have left Jordan, further illustrates the difficulties of preventing and managing abuses among OCWs—a vulnerable population that is viewed as easily replaceable. Though the victims and perpetrators of sexual abuse in the workplace may disappear, the problems Jordan faces with regards to violations of female workers rights remain a salient issue.

Non-American foreigners own most of the factories in Jordan’s industrial zone and operate as subcontractors for MNCs. This legal separation between factories and MNCs allows companies, such as Macy’s, Kohl’s, and Lands’ End, to argue they have no control or responsibility over the abuses that occur within factories they do not own. Following the exposé of sexual abuse at Classic, the companies withdrew their business from the factory and wiped their hands clean of the situation. However, the seamstresses for whom abysmal work conditions, sexual harassment, and physical abuse are a daily reality are not aided by MNCs ceasing to do business with the factories.


12. Rape Case Turns Focus, supra note 5. “Days after news of the rape allegations emerged, U.S. retailers Kohl’s, Macy’s and Lands’ End stopped placing orders from Classic . . . . [W]ithin four weeks, Classic’s losses reached US$10 million, or 8 percent of its annual exports.” Id.
they rely on for employment. MNCs who employ sweatshop type labor, such as Wal-Mart and Target, should not escape liability for their complicity in the inhumane treatment administered therein; the manufacturing plants would not be in business were it not for MNC demand of their products. MNC dependence on cheap labor to maintain high profits has engendered a business model that favors absolute output, without regard for the quality of workers’ environment and supervision.

The Convention on the Elimination of Discrimination Against Women ("CEDAW" or "Convention") along with its Optional Protocol gives countries the tools to improve the condition of

13. See Debra Cohen Maryanov, Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain, 14 LEWIS & CLARK L. REV. 397, 412 (2010) ("Terminating the contract sends a clear message [to suppliers] . . . but also risks hurting the workers who may lose their jobs. Some labor organizations therefore recommend termination only when suppliers refuse to cooperate, and even then urge companies to seek alternative local suppliers to keep production in the country.").


15. HUMAN TRAFFICKING & INVOLUNTARY SERVITUDE, supra note 9, at 61–67 (Walmart), 20–24 (Target).

16. Maryanov, supra note 13, at 424 ("MNCs profit from sweatshop conditions and cause investment injuries by using profits to perpetuate the arrangement with . . . monitoring systems that discourage involvement by stakeholders to improve labor conditions."). See also Does I v. Gap, Inc., No. CV-01-0031, 2002 WL 1000068, at *3 (D.N. Mar. I. May 10, 2002) (concluding that “the plaintiffs have properly alleged an association-in-fact enterprise consisting of individual retailers and individual manufacturers” by alleging that the retailers used their collective “power through contracts, oversight, and economic pressure,” to require garment manufacturers to continue unlawful policies and practices that perpetuated sweatshop conditions in textile plants).


women in society. Jordan ratified almost all the provisions of the CEDAW in 1992; however, it did not adopt the Optional Protocol.\textsuperscript{19} The Optional Protocol would have given victims an additional complaint mechanism before the CEDAW Committee for claims alleging a violation of any of the rights set forth in the Convention.\textsuperscript{20} So, women suffering from workplace abuse are constrained to seeking help from factory personnel, non-profit organizations, or Jordanian law enforcement and officials. It is therefore imperative that Jordan create a system of law and order that will address the root causes of violence against women in the workplace.

Jordan’s current administration of the Convention,\textsuperscript{21} through the criminal prosecution of individual sex crimes, fails to pro-

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\textsuperscript{20} CEDAW Optional Protocol, supra note 18, art. 2. The Protocol also contains a process that empowers the Committee to initiate inquiries into “grave or systemic violations by a State of rights set forth in the Convention,” after receiving reliable information of such violations. Id. art. 8.

\textsuperscript{21} Jordan has not adopted the Optional Protocol. CEDAW Status, supra note 19. The Optional Protocol provides a mechanism for the CEDAW Committee to hold State Parties accountable for human rights abuses which moves beyond the reporting process and general comments. See CEDAW Optional Protocol, supra note 18. It contains a communications mechanism that allows individuals or groups of individuals under the jurisdiction of a State party to bring complaints to the CEDAW Committee alleging a violation of any of the rights set forth in the Convention. Id. art 2. The Protocol also contains a process through which the Committee is empowered to initiate an
tect female workers in sexually violent work environments in the MNC supplier context.22 The Jordanian government attempted to discharge its duties under the CEDAW by prosecuting Classic’s supervisor for rape,23 a charge that carried a fifteen-year maximum prison sentence.24 However, the imprisonment of one man fails to protect other women from the abusive factory conditions permitted by the MNCs employing factories like Classic.25

The CEDAW’s distinctive obligations call for systemic rather than individualistic sanctions. Therefore, to address this systemic problem, international response to the sexual abuse of female workers should include holding the “big fish”—the MNCs—accountable for the labor conditions that are conducive to these violations. Jordan is in a unique position to enforce human rights among companies it grants the privilege of doing business within its borders; it should not be considered to have met its obligations under the CEDAW until it addresses MNCs’ role in human rights violations against female workers. With-

inquiry into “grave or systemic violations by a State of rights set forth in the Convention,” after receiving reliable information of such violations. Id. art. 8.

22. See infra Part III.
23. See No Proof of Rape, supra note 3.
24. Rape Case Turns Focus, supra note 5.
25. Allegations of rape and sexual assault against female workers by Classic supervisors were brought to Wal-Mart and Target’s attention at least as early as 2008 when female workers went on strike to resist workplace abuses. Three Thousand Workers Strike in Jordan Sewing for Wal-Mart and Other Companies, INST. FOR GLOBAL LABOUR & HUMAN RIGHTS (Dec. 14, 2007), http://www.globallabourrights.org/alerts?id=0190. However, after alleging that their investigations showed no proof of these human rights violations, both corporations continued to not only use Classic’s products without any additional enforcement mechanisms of Classic’s code of conduct, but also continued to employ the supervisors repeatedly accused of heinous activity as subcontractors. See Responses by Textile Manufacturers and Clothing Retailers to Concerns about Working Conditions in Factories in Jordan, BUS. & HUMAN RIGHTS RES. CTR, http://www.business-humanrights.org/Documents/Jordanfactories (last visited Apr. 26, 2013) (featuring letters from Wal-Mart and Target Corp. dated Oct. 17, 2006, and Oct. 17, 2006, respectively); see also Ross, supra note 4. Similar reports of sexual abuse are seen as early as 2006, when the IGLHR reported that four young women were sexually abused by factory managers at Western Factory, a textile supplier plant for Wal-Mart, Kohl’s and GAP located in Jordan’s Qualified Industrial Zone (“QIZ”). HUMAN TRAFFICKING & INVOLUNTARY SERVITUDE, supra note 9, at 11.
out government oversight and civil sanctions, corporations are unlikely to prioritize human rights over profits.

Numerous instances of human rights abuses in Jordan\(^\text{26}\) demonstrate the need for additional protections of OCWs and a means of redress for sexual assault through a monetary punitive system.\(^\text{27}\) While the imprisonment of a lower-level worker will have no impact on how MNCs organize their labor and enforce workplace health and safety provisions, if Jordan were to impose civil liability on corporations through pecuniary sanctions and compensation to the victim, MNCs would be more likely to self-monitor for violations and enforce a stricter code of conduct to deter violations.\(^\text{28}\) Indeed, “[a]s a rational cost-benefit calculator, the company is [much more] likely to be responsive to a financial penalty.”\(^\text{29}\) The failure of the Jordanian government to effectively enforce women’s rights against these larger corporate entities to date has left female garment workers in factory settings vulnerable to repeated human rights abuses.\(^\text{30}\)

This Note will focus on one particular case illustrating the plight of female overseas contract factory workers in Jordan to reveal the ineffectiveness of the CEDAW enforcement in MNC factory environments, and to identify the problems inherent to Jordan’s relationship with MNCs and its lack of oversight thereof. This Note will then argue that to realize the goals of the CEDAW, Jordan should focus on deterrence of sex crimes against women in the workplace through a top-down enforcement mechanism, by placing liability for workplace abuses not only on individual offenders, but also on the MNCs benefiting from such practices.

Part I describes Jordan’s OCW labor system with regards to women in the textile industry. Part II identifies the Articles of the CEDAW relevant to female factory workers and the rights Jordan must protect under the CEDAW. Part III discusses why Jordan’s current treatment of workplace abuses in the MNC

\(^\text{26}\) See Sexual Predators, supra note 3, at 4; see also Human Trafficking & Involuntary Servitude, supra note 9.
\(^\text{27}\) See infra Part III.
\(^\text{29}\) Id.
\(^\text{30}\) See infra Part III.
supplier factory setting does not offer proper relief for victims or the female workforce in general and thus does not discharge Jordan’s duties under the CEDAW. Part IV suggests overall changes Jordan should make to better protect female workers—in the form of sexual harassment laws—and proposes to hold MNCs accountable for violations of such laws in order to end workplace abuse from the top down.

I. THE OCW SYSTEM AND FEMALE MNC TEXTILE INDUSTRY WORKERS

Jordan’s worker demographics consists of approximately 17.38% migrant OCWs (also known as guest workers), non-Jordanian nationals engaging in labor activities. Migrants move from one state to another, in large part due to the structural economic inequalities among states with respect to access, opportunity, and compensation. While Jordan provided much of the migrant labor to the region’s other Arab countries during the oil price increases of 1973 and 1974, recent economic agreements have reversed this trend and attracted OCWs to work within Jordan’s borders.

The influx of OCWs into Jordan has been heightened by the manual labor and production needs of Western-based companies that established manufacturing plants in the country. In 1997, the Qualified Industrial Zone Agreement (“Agreement”) was signed between Jordan and the United States, creating privileges for those factories that comply with the Agreement’s


requirements. Since 1998, Jordan has enjoyed duty- and quota-free access to the U.S. market, pursuant to the Agreement, for products made in the Qualified Industrial Zone ("QIZ"), production areas designated by Jordanian authorities and approved by the United States government. QIZ factories in Jordan are also exempt from almost all local Jordanian taxes including: "all income tax on corporate profits; all income and social services taxes on the salaries and allowances paid to non-Jordanian workers; all import and export duties on raw materials, parts, and finished goods for export; and all licensing fees as well as local building and land taxes." QIZ factories, owned mainly by foreigners, can also repatriate 100% of their profits to their country of origin. Since signing the QIZ Agreement, Jordan has since become a magnet for apparel manufacturing.

In 2001, Jordan made steps to further attract industries to use its labor when it entered into a free trade agreement with the United States ("USFTA"), allowing American companies to import goods from Jordan tariff-free. In addition, the USFTA...
allowed for the elimination of customs duties for garments produced in QIZs. In 1998, before the USFTA and QIZ were signed, Jordan’s exports to the United States barely reached US$17 million, but by 2006 those exports surpassed the US$1 billion mark. Garments currently account for almost 90% of Jordanian exports to the United States.

There are currently nine QIZs in Jordan and 114 investment companies located in these zones. Out of these investment companies, fifty-nine export their products to the United States and hold Qualified Product Request (“QPR”) certificates issued by the Ministry of Industry and Trade. Fifty-five

enforce with regards to labor violations. Marley S. Weiss, Two Steps Forward, One Step Back—or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond, 37 U.S.F. L. Rev. 689, 700 (2003). (“[The USFTA] epitomize[s] the superficial solution of adding externally-set international labor standards to the supranational enforceability of domestic ones, and incorporating labor provisions in the main body of the agreement . . . while nominally available, sanctions will virtually never be applied.”). See USFTA, art. 6(1), 6(3), 41 I.L.M. at 70 (“Each Party shall strive to ensure that its laws provide for labor standards consistent with the [specified] internationally recognized labor rights and shall strive to improve those standards in that light.”). Enforcing labor standards, and particularly the question of who should be enforcing them and who should be liable for violations, has been the subject of enormous litigation. The Alien Tort Claims Act (“ATCA”) is a powerful instrument of remedy against U.S.-based MNC violations of international human rights. See generally Marisa Anne Pagnattaro, Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act, 37 Vand. J. Transnat’l L. 203, 205 (2004). This federal statute may be used as a way of giving force to international agreements pertaining to labor standards by holding companies responsible for their treatment of foreign workers. See id. at 205; see also Mar yanov, supra note 13, at 417–22. However, the ATCA is not a substitute for domestic law, and Jordan must institute its own policies to protect women’s rights in the workplace as is required under the CEDAW.

40. Jordanian Ministry on USFTA, supra note 34.


42. Id.

43. Id.

44. Id.

of these companies operate as subcontractors for U.S.-based labels, with migrant workers accounting for 76% of the labor force in these subcontracting companies. In 2006, documented migrant workers totaled 36,149 out of the 54,077 workers in the 114 QIZ textile company factories. The majority of these guest workers were women.

Most clothing is made by guest workers from Bangladesh, Sri Lanka and China, who typically work under low-wage contracts. After conducting a survey of Jordanian women working in the QIZ in 2000, the Jordanian Ministry of Labor stated that, “the working conditions in the Qualifying Industrial Zones (QIZ) are of sub-standard levels as far as Jordanians are concerned.” In 2011, the IGLHR reported continued abuses committed by QIZ factory managers against Asian guest workers, including late payment of wages, withholding of passports, unsanitary lodging conditions, and police breaking up impromptu strikes.

cate after meeting content and place of origin requirements. Their products must “add[] value of not less than 35 percent of the total appraised value of the product [in Jordan].” In addition, the “QIZ products should be consigned directly from Jordan or Israel to the USA,” and must meet minimum input requirements from Jordan, Israel, and the USA and/or Palestine. See also supra note 11, at 12–13.

46. MINISTRY OF LABOUR REPORT, supra note 41, at 5–6.
47. Id. at 6.
48. Id.
49. Bustillo, supra note 1; Halaby, supra note 3. As of March 2012, there were approximately 335,000 migrant workers in Jordan. See INT’L LABOR OFFICE, DECENT WORK COUNTRY PROGRAMME 2012–2015: JORDAN, at 11 (March 2012) [hereinafter DECENT WORK PROGRAMME], available at http://www.ilo.org/public/english/bureau/program/dwcp/download/jordan.pdf. As many as 54,077 of those workers in 2006 were employed in the QIZ. INT’L LABOR OFFICE, DECENT WORK COUNTRY PROGRAMME, at 11 (Jordan 2006) [hereinafter Decent Work Programme 2006]. While Jordan’s labor law does not discriminate between Jordanian and migrant workers, there are increasing reports of violations and abuse of migrant workers’ rights. Id. With regard to women, abuses included the withholding of salary, long working hours without rest periods, the withholding of passports, and physical and sexual abuse. See Asia Pacific and Arab States Regional Programme on Empowering Women Migrant Workers in Asia: Jordan, U.N. WOMEN, http://www.migration-unifem-apas.org/jordan/index.html (last visited Apr. 26, 2013).
50. MINISTRY OF LABOUR REPORT, supra note 41, at 4.
51. See note 3 supra. “Unionized Jordanians may only strike with government permission; non-Jordanians, although allowed to join unions since 2008,
In 2006, the International Labor Organization (“ILO”), a specialized U.N. agency devoted to “promoting just working conditions,” reported that the Jordanian government had taken some measures to improve the protection of migrant workers’ rights. The ILO saw much room for improvement in Jordan’s existing infrastructure for protecting guest workers, and developed an “Action Plan” for the management of labor migration and the protection of migrant workers within Jordan’s borders. This Action Plan was based on the International Labor Organization’s non-binding multi-lateral framework on labor migration. However, the Action Plan has yet to receive official endorsement or enforcement by the Jordanian government.
Thus, Jordan currently lacks a method of monitoring factories in the QIZs, and relies on corporate entities to manage their own facilities. However, the numerous human rights violations by MNC conscripted factories reported by the IGLHR, such as those at Classic, illustrate a lack of enforcement of corporate codes of conduct and a lack of monitoring for the safety and health of female workers under male supervision in the workplace.

II. THE CEDAW’S APPLICABILITY

As one of the most widely ratified international human rights treaties, the CEDAW has the potential to be a powerful tool for empowering female factory workers. The CEDAW makes State Parties responsible for the discriminatory conduct of non-state actors, and obligates states to take affirmative steps to eliminate those practices. The CEDAW addresses systemic causes of discrimination and seeks to correct both discriminatory treatment, as well as the discriminatory effects of local stereotypes. Combined with this guarantee of substantive

56. Jordanian Ministry on USFTA, supra note 34. Of the currently thirteen QIZs in Jordan, only three are governmental while the rest are owned by the private sector. Id. Though the Ministry of Labor has a labor inspection and complaints mechanism, it has many institutional limitations, such as a limited number of labor inspectors, hampering its ability to check the 114 separate companies and facilities in the QIZ on a consistent basis for human rights abuses. MINISTRY OF LABOUR REPORT, supra note 41, at 5, 8.

57. See sources cited supra note 3.

58. There are only seven states in the world that have not ratified the CEDAW: Iran, Palau, Somalia, Sudan, South Sudan, Tonga, and the United States. CEDAW Status, supra note 19.

59. See CEDAW, supra note 17, art. 2(e).

60. See id. art 1. “[T]he concept of substantive equality has been defined as ‘directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political, and cultural participation in society.’” Jennifer S. Hainsfurther, A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers, 24 AM. U. INT’L L. REV. 843, 862 (2009) (quoting RATNA KAPUR & BREnda COSSMAN, SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA 176 (1996)). Substantive equality does not necessarily mean treating men and women identically; rather, it focuses on equal opportunity, access, and outcome. See id. at 868; see also Claire L’Heureux-Dubé, It Takes a Vision: The Constitutionalization of Equality in Canada, 14 YALE J.L. & FEMINISM 363, 368 (2002) (describing substantive equality as affording “equality of opportunity and of result, not just similar treatment for those similarly situated”).
equality, the state obligations detailed in Article 2, prohibiting discrimination against women, enable OCWs to claim that a state has violated its legal obligations under the CEDAW by failing to monitor private employers.\footnote{See CEDAW, supra note 17, art. 2(e).} Given that so many violations of female OCWs’ rights take place at the hands of private actors,\footnote{See Rebecca Cook, Accountability in International Law for Violations of Women’s Rights by Non-State Actors, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 93 (Dorina Dallmeyer ed., 1993) (“[W]omen’s exposure to discrimination and other denials of human rights will originate through acts of private persons and institutions, and will continue at this level as women mature to recognize parallel denials of rights directly attributable to state action that they encounter in the political, economic and other spheres of national life.”).} State Parties’ obligations under Article 2(e), discussed below, play an essential role in creating the States’ legal obligations towards women migrant workers under the CEDAW.

A. Overview of the CEDAW

The CEDAW contains a broad definition of discrimination against women, and describes a number of measures that State Parties must take to eliminate discrimination in areas such as participation in public life and the political process, education, employment, healthcare, economic and social life, and family relations.\footnote{See CEDAW, supra note 17, art. 1. (“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”). See also id. arts. 7–16.} Article 2 of the Convention condemns discrimination against women “in all [its] forms,”\footnote{Id. art. 2.} and Article 3 further requires State Parties to take appropriate measures “in all fields”\footnote{Id. art. 3.} to guarantee women’s enjoyment of human rights. Since the CEDAW does not distinguish between the rights of female citizens and non-citizens,\footnote{See generally CEDAW, supra note 17. The CEDAW refers to the rights of women generally, without any qualification based on citizenship.} it is truly a universal human rights treaty fully applicable to the plight of OCWs.
To interpret the broad spectrum of rights guaranteed under the Convention and to create rules of procedure giving effect to the Convention’s provisions, Part V of the CEDAW establishes the CEDAW Committee—a board of twenty-three experts selected by State Parties.\(^{67}\) The Committee is empowered to make general recommendations and suggestions after examining the annual progress reports by State Parties on the administration of the CEDAW.\(^{68}\) Although these general recommendations are not binding, State Parties are generally expected to follow them in order to fulfill their obligations under the treaty.\(^{69}\) The Committee also issues “Concluding Comments” to State Parties after they submit their progress reports, with specific recommendations for each country to undertake before the next reporting deadline.\(^{70}\)

**B. The Unique Obligations Imposed by the CEDAW**

Nearly all major human rights instruments—for example, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights—prohibit sex-based discrimination.\(^{71}\) However, the CEDAW is unique in that it deals with discrimination against

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\(^{67}\) *Id.* arts. 17–19.

\(^{68}\) *Id.* arts. 21, 18. Each State Party is required to submit a progress report to the Secretary-General within a year after the CEDAW’s entry into force and then at least every four years thereafter, or whenever the CEDAW Committee so requests. *Id.* art. 21. This reporting mechanism is rather weak, since responsibility falls primarily on the State Party to submit honest and thorough information regarding its own weaknesses and successes in protecting women’s rights. However, the CEDAW does allow for NGOs to present “shadow reports” to the Committee as a commentary on the State Party official report. *Id.* art. 18; see also *A Note About Shadow Reports, Stop Violence Against Women*, http://www.stopvaw.org/a_note_about_shadow_reports (last updated Nov. 1, 2003). Shadow reports by NGOs can provide reliable and independent information to the CEDAW Committee on the actual progress of the State Party in implementing and enforcing reform. *Id.*

\(^{69}\) See Hainsfurther, *supra* note 60, at 860.

\(^{70}\) See *id.* at 857.

women from a systemic standpoint. Article 2(e) of the Convention dictates that State Parties must “take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise.” This includes violence committed by private citizens. The CEDAW Committee established that a State Party is liable for failing to protect a woman from abuse by her husband, and proposed that a state must act “with due diligence to prevent and respond to such violence against women.” In addition, a State Party is also liable for the actions of corporations within its borders under the “due diligence” standard. The standard, which has been accepted by many international tribunals, dictates that:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation [of human rights] or to respond to it as required by the Convention.

A state has an obligation to “prevent, investigate, and punish” any violation of the rights in the Convention that occurs within

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73. See CEDAW, supra note 17, art. 2(e).
75. Id. ¶ 9.6(II)(f) (explaining that under the CEDAW, a state must “[i]nvestigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards.”).
77. Id. This court was addressing state liability for non-state actions with regard to violations of the American Convention on Human Rights. The CEDAW Committee has since adopted the “due diligence standard” with regard to the CEDAW. See infra note 79.
78. Id.
its jurisdiction. Thus, a state that fails to monitor and investigate MNC supplier factories, and fails to hold offenders accountable for abuses against women in the workplace, would fail under the due diligence standard of the CEDAW.

The CEDAW also protects the interests of women with provisions on gender-equality in the workplace. States Parties must take all appropriate measures to ensure the right of men and women to equal employment opportunities, and equal remuneration and treatment. State Parties must also work to prohibit dismissal on the grounds of pregnancy or maternity leave, and allow for maternity leave “with pay or some comparable social benefits without the loss of [employment, seniority or social allowances].” While the CEDAW appears to provide broad protections to women in the workplace, a major gap exists in that migrant women employed in QIZ factories are not protected by Jordan’s normal labor laws that institute these protections. This limitation on the scope of enforcement of the CEDAW was made as a concession by Jordanian authorities to encourage economic growth in the QIZ.

Although violence against women is not explicitly mentioned in the CEDAW text, in its 1992 General Recommendation, the Committee determined that gender-based violence is in fact “discrimination” within the meaning of the term, as broadly

80. CEDAW, supra note 17, art. 11(1)(b).
81. Id. art. 11(1)(d).
82. Id. art. 11(2)(a).
83. Id. art. 11(2)(b).
defined in Article 1. The Declaration on the Elimination of Violence Against Women, adopted by the United Nations General Assembly the following year, also recognized the relationship between violence and equality.

Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and the violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men . . .

Jordan has taken steps toward addressing violence and sexual abuse against domestic guest workers. However, similar measures have not been taken to address these issues in the public sector of the factory workplace. Sexual harassment, abuse, and rape in the context of worker-supervisor relationships is clearly within the purview of the Convention and thus Jordan is obliged to take measures to combat these types of violence. Yet, in spite of Jordan’s professed commitment to ensuring equal rights and protecting women migrant workers, and in spite of its obligation to address violence against women “in all fields,” there is no law within the Jordanian civil or penal code defining and forbidding sexual harassment in the workplace or in other public areas.

85. CEDAW Gen. Rec. 19, supra note 79, ¶ 6 (interpreting articles of the CEDAW that are relevant to violence against women and making recommendations to states to address this issue).
87. See DECENT WORK PROGRAMME, supra note 49, at 18.
88. See infra notes 115–16 and accompanying text.
89. See MINISTRY OF LABOUR REPORT, supra note 41, at 9 (discussing Jordan’s commitment to migrant worker’s rights through its UNIFEM project).
90. See Preserving Rights, JORDAN TIMES (Aug. 29, 2011), http://jordantimes.com/preserving-rights; see also AMIRA EL-AZHARY SONBOL, WOMEN OF JORDAN: ISLAM, LABOR & THE LAW, 114 (2003). The Committee of Experts on the Application of Conventions and Recommendations (“CEACR”), the legal body responsible for examining compliance by ILO member-states with the Convention recommended in 2010 that Jordan include “a clear definition of what constitutes sexual harassment in the workplace” and “take appropriate measures to raise awareness of and prevent and protect against sexual harassment in the workplace.” Although Jordan has apparently made amendments to the Labour Code (Act No. 48 of 2008), in particular section 29 that provides for sanctions in the case of sexual assault by an employer), the
C. Intersectionality Between Marginalized Status and Sexual Violence

The experience of female guest workers in Jordan must be understood not only through the eyes of a woman, but also from the perspective of an immigrant and ethnic minority. “[L]egal policies at the national and international levels continue to be framed with inadequate knowledge of, and responsiveness to, the distinct experiences of female migrants.” 91 Gender-based discrimination intersects with discrimination based on other forms of otherness, such as immigrant or foreigner status, race, ethnicity, religion, and economic status. These multiple forms of discrimination place migrant women in the QIZ in situations of double, triple, or even quadruple the disadvantage, marginalization, and vulnerability.

Human Rights Watch reports that in general, “many migrants silently accept the exploitation and deprivation of their rights because they view themselves as powerless and without effective remedy.”92 This vulnerability is due in part to the concentration of women migrant workers in certain occupations such as textile manufacturing—a sector that is not covered by Jordan’s normal labor codes.93 The kafala sponsorship system94 in the Middle East contributes to this vulnerability in that it makes each worker’s sponsor or employer almost completely

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91. Fitzpatrick & Kelly, supra note 32, at 48.
93. See note 84 supra and accompanying text.
responsible for the worker. A strong criticism of the kafala system is that, "[i]n combination with gaps in labor protections . . . the kafala system gives employers tremendous control over workers" since employees feel indebted to their sponsors for the mere opportunity to work. Jordan also mandates that employers in the QIZ be responsible for repatriating the migrant factory workers upon termination of their employment. Migrant workers who cannot afford the plane fare back to Bangladesh, Sri Lanka, or China therefore have no choice but to continue to work for their employer. These workers cannot leave until their employer unilaterally decides that they are no longer needed, or allows them to work for another employer. Otherwise, women may quit their jobs and be deported, likely without compensation for whatever abuses and wage theft were perpetrated against them at the factory. Therefore, women that want to work in Jordan may have to endure whatever conditions their employers place them in.

Notwithstanding the known risks to their safety and freedom, female workers have increasingly turned to jobs in low-wage factory settings. "Third World women have become the new 'factory girls,' providing cheap labor for globetrotting corporations." While a female assembly line worker in the

95. See Ministry of Labour, Instructions for the Conditions and Procedures of Bringing and Employing Non-Jordanian Workers in the Qualified Industrial Zones issued pursuant to Labour Law Art. 12, Regulation No. 36 (1997) (Jordan) [hereinafter QIZ Regulation of Fees], available at http://www.mol.gov.jo/Portals/1/qize.pdf. Both IGLHR’s 2008 and 2011 publications on factory abuse in Jordan reported employers withholding workers’ passports, forcing workers to work long hours without rest, working overtime without pay, inadequate food and housing conditions, among other abuses. The women subjected to such conditions reported feeling trapped without any form of redress, fearing termination and deportation if they complained. See generally SEXUAL PREDATORS, supra note 3.

96. See End ‘Sponsored’ Gateway to Human Trafficking, supra note 94.

97. See id. Human Rights Watch reports that most governments in the Middle East require workers to obtain their sponsor’s written consent before allowing them to take up new employment. See id.

98. See id.

99. See Lim, supra note 10, at 16.

100. Id. at 34–35 (discussing how the feminization of poverty affects the incentives to migrate and the role a woman’s lack of education may play in the decision to enter a demeaning work environment).

United States is likely to earn between US$5 and US$9.19 an hour. In Jordan, the minimum wage is between US$7 and US$8 a day. Some have pointed out:

Low wages are the main reason companies move to the Third World . . . Corporate executives, with their eyes glued to the bottom line, wonder why they should pay someone in Massachusetts on an hourly basis what someone in the Philippines will earn in a day. And, for that matter, why pay a male worker anywhere to do what a female worker can be hired to do for 40 to 60 percent less?

Female workers have historically been subject to inequality and abuses in the workplace. For that reason, the CEDAW plays a crucial role in guaranteeing their human rights are respected in such an exploitative environment. Women migrant workers are exposed to harassment, intimidation or threats to themselves and their families, economic and sexual exploitation, racial discrimination and xenophobia, poor working conditions, increased health risks, and other forms of abuse—including trafficking into forced labor, debt bondage, involuntary servitude and situations of captivity.

In Jordan, women guest workers are more vulnerable to discrimination, exploitation, and abuse relative not only to male migrants but also to native-born women. Until recently, migrant workers in Jordan were not permitted to join labor un-
ions, and currently, Jordan still does not allow migrant workers to strike against employers.\textsuperscript{107} Thus, women in MNC supplier factories lack negotiation power and are unable to react against abuse and breaches of their human rights unless some other agency assists in the complaint process. For this reason, female guest workers are among the most vulnerable persons in society to sexual harassment and rape.\textsuperscript{108} Additionally, because such women have limited standing in society, and limited access to the legal process, the need to protect them is much higher.

Fortunately, there is a growing international consensus to prevent and combat sexual harassment in the workplace, which is considered a form of violence against women.\textsuperscript{109} India's landmark case, \textit{Vishaka v. State of Rajasthan},\textsuperscript{110} is a beacon of hope for the human right to be free from sex-based violence by employers. The Indian Supreme Court held that the guarantee of equality for women should be interpreted in light of the principle that “[g]ender equality includes protection from sexual harassment and the right to work with dignity.”\textsuperscript{111} The \textit{Vishaka} court concluded that the complete absence of a sexual harassment law and damages remedy in Rajasthan violated global norms and constitutional human rights guarantees.\textsuperscript{112} The court reasoned that with sexual harassment laws in place, and enforced, more women may feel comfortable coming forward to report systemic abuses by private actors and states may move toward effective deterrence of such violations.\textsuperscript{113}

The CEDAW Committee has authored several Comments discussing the specific problems of migrant women. These Comments called upon states to “monitor closely the terms and

\textsuperscript{107} See \textit{World Report 2010}, \textit{supra} note 51.


\textsuperscript{110} \textit{Vishaka v. Rajasthan}, A.I.R. 1997 S.C. 3011 (India).

\textsuperscript{111} \textit{Id.} ¶ 10.

\textsuperscript{112} See \textit{id.} ¶¶ 10, 14.

\textsuperscript{113} See \textit{id.} ¶ 7.
conditions of contracts, conditions of work and salaries of women migrants, and devise strategies and policies for their full integration in the labour force and for elimination of direct and indirect discrimination.” The Comments recommended that in following these guidelines, states should “focus on the causes of women’s migration and to develop policies and measures to protect migrant women against exploitation and abuse.” In addition, states should “take more effective measures to eliminate discrimination against refugee migrant, and minority women and girls.” However, even these recommended measures fail to adequately address the problem of intersectionality faced by female migrant factory workers in Jordan, a concept that is integral to assessing liability for sexually-based human rights abuses.

Professor Kimberle Crenshaw, who writes extensively on critical race theory, reflected that, “battering and rape, once seen as private (family matters) and aberrational (errant sexual aggression), are now largely recognized as part of a broad-scale system of domination that affects women as a class.” In the specific context of rape and sexual harassment in the work place, where male employers exercise domination over female workers, there are many sex, gender, race, and ethnic stereotypes at play. Although the CEDAW and CEDAW Committee partly address these issues using notions of substantive and procedural equality, they fail to explicitly draw the connection between isolated crimes of sexual abuse and harassment, and the context of systemic discrimination and coercion that often makes such crimes possible. In the corporate factory setting,

this parallel is especially important because workplace rape and harassment gain their lifeblood from corporate complicity in those, among other, human rights violations.

The recognition of crimes once thought to be individualistic, as social and systemic, is an important shift towards holding MNCs responsible for the conditions in subcontractor factories that facilitate the sexual abuse this Note seeks to address. It is crucial to understand that while women suffer many of the same types of human rights violations, the experience of every woman whose rights the CEDAW seeks to protect is different. Such differences in experience may compound a woman’s vulnerability to, and degree of, abuse suffered. Accordingly, this increased vulnerability should be taken into account by State Parties when adopting measures to address these human rights violations and when assessing the degree of intervention required of states by the CEDAW. Female guest workers need special protection from Jordanian authorities to come forward and vindicate their rights, to avoid being shamed, silenced, deported, and forgotten.

III. CORPORATE ACCOUNTABILITY

In the private sector, MNCs have adopted codes of conduct in response to accusations of irresponsibility in monitoring garment factories. 118 Jordan only began inspecting private sector workplaces in 2004; it has less than eighty inspectors to enforce all labor laws in more than 55,000 companies and factories. 119 Like other developing countries, Jordan relies on corporate enforcement of internal codes of conduct in lieu of government oversight of supplier factories. 120 These codes of conduct are


119. SOLIDARITY CENTER, JUSTICE FOR ALL: THE STRUGGLE FOR WORKER RIGHTS IN JORDAN 33–34 (2005), available at www.solidaritycenter.org/files/JordanFinal.pdf. “One way to reduce gender and ethnic inequities in the workplace is through strong enforcement of labor law, using a system of consistent inspection. But Jordan’s labor inspection service is ineffective and not always enforced.” Id. at 33.

voluntary\textsuperscript{121} and have inherent shortcomings due their limited scope and lack of meaningful enforcement.\textsuperscript{122} For example, the language of MNC codes of conduct has historically been more aspirational than a hard and fast legal policy.\textsuperscript{123} However, MNCs have recently begun to use codes of conduct as contractual instruments, rather than idealistic goals, to set guidelines for their suppliers.\textsuperscript{124} Therefore, while MNCs have traditionally claimed innocence when a subcontractor committed a violation, given the shift in the understanding of codes of conduct as enforceable contracts, ignorance of a subcontractor’s noncompliance can no longer separate an MNC from the abuses it benefits from.

Human rights abuses in the MNC textile industry occur mainly within the supply chain.\textsuperscript{125} Therefore, the issue arises as to whether MNCs may be held responsible and liable for human rights violations of their supplier factories. Like many companies in the manufacturing sector, the MNCs utilizing the services of factories like Classic rely on a “triangle” manufacturing system.\textsuperscript{126} The recent economic developments in Jordan provide a perfect illustration of this system, where MNCs outsource labor-intensive products to subcontracted companies in newly industrialized, low-wage countries.\textsuperscript{127} This business strategy provides an inherent separation between MNCs (being the parent companies) and their subcontractors which are considered independent legal entities.\textsuperscript{128} This position of independence from the subcontractors allows MNCs to place the blame for human rights violations onto their supplier plants to protect

\textsuperscript{121.} For example, U.S. President Clinton announced a voluntary code of human rights principles for American companies operating abroad. See David E. Sanger, \textit{Clinton to Urge a Rights Code for Businesses Dealing Abroad}, N.Y. Times, Mar. 27, 1995, at D1.

\textsuperscript{122.} \textit{See} Compa & Hinchliffe-Darricarrère, \textit{supra} note 118, at 686–89 (discussing that while it is easy to draft a corporate code of conduct, “effective implementation is the real test” of the corporation’s commitment to human rights).

\textsuperscript{123.} Maryanov, \textit{supra} note 13, at 407–08.

\textsuperscript{124.} \textit{Id.}


\textsuperscript{126.} \textit{See id.} ¶ 56.

\textsuperscript{127.} \textit{See id.}

\textsuperscript{128.} \textit{See id.}
their own brand reputation—just as Macy’s, Kohl’s, and Lands’ End attempted to do in the Classic case. However, for the CEDAW to have legal teeth in Jordan’s QIZ factory context, MNCs must be held accountable for the work environments of their supplier factories since it is the MNCs that are effectively making the labor policies through their action and inaction.

The U.S. Court of Appeals for the 9th Circuit, in Doe I v. Unocal Corp., set a valuable precedent in the international community that a company can be liable for knowingly aiding and abetting a state actor to commit human rights abuses, such as forced labor, murder, rape, and torture, by providing “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”

129. See supra note 12 and accompanying text.
130. Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), rev’g in part and aff’g in part 110 F. Supp. 2d 1294 (C.D. Cal. 2000), vacated, 403 F.3d 708 (9th Cir. 2005).
131. Id. at 950. This case was brought in a federal district court against Unocal Corporation for the use of forced labor in Unocal’s gas pipeline project in Burma. The case is notable because of its two seemingly conflicting opinions. The first judge who presided in the case issued an opinion that established that Unocal, as an MNC, could be sued for violations of international law under the ATCA—specifically, for continuing to employ the Burmese military, even after knowing of the military’s use of forced labor. Id. The case was reheard and affirmed in part and vacated in part, and in a subsequent opinion issued by a different circuit court judge, the case was dismissed and the district court decision vacated. Doe v. Unocal, 403 F.3d 708. The district court decision upon remand from the 2002 decision found that Unocal’s actions were not sufficient to create liability, because Unocal had not affirmatively sought out forced labor for the pipeline. 110 F. Supp. 2d at 1310. The two opinions provide conflicting accounts of the kind of MNC conduct that is sufficient to trigger possible corporate liability. However, in the case of Jordan’s QIZ factories, it seems that MNCs affirmatively seek out companies with the lowest cost of labor in order to gain the greatest profit, however lower labor costs are correlative with lower labor standards and an increased number of human rights violations. See Miles Wolpin, Fair Labor Standards, Economic Well-Being and Human Rights as Costs of “Free-Trade,” Int’l Journal Peace Studies, n.10, http://www.gmu.edu/programs/icar/ijps/vol2_1/Wolpin.htm. “[L]ack of safe working conditions and independent unions in Mexico contribute to phenomenally low labor costs, thus creating an unfair trade advantage.” Id. (quoting Thomas Karter, Free Trade Agreement is President Bush’s Class Act, IN THESE TIMES, Nov. 1992, at 11, 16) (internal quotation marks omitted). “Since Mexico has much lower wages and a poor record of enforcing its often weaker environmental and consumer laws, U.S. businesses would have a strong incentive to move across the border.” Id. (quoting Public Health Achievements
Furthermore, even if the corporation has not actively participated in human rights abuses carried out by state actors, "a company that voluntarily enters a business environment, or stays there, when they know or should know that they are somehow benefiting from ongoing human rights violations, has, at least, a moral duty to take reasonable steps to prevent or stop the violations."\(^{132}\)

In the case of Jordan, reports of sexual abuse in MNC factories have been present since 2006.\(^{133}\) Furthermore, allegations of rape and sexual assault of female workers by Classic supervisors were specifically brought to Wal-Mart and Target’s attention at least as early as 2008, when female workers at the Ad Dulayl Industrial Zone went on strike to resist workplace abuse.\(^{134}\) However, neither corporation took an active position on the matter, and Wal-Mart in particular maintained that the allegations lacked evidentiary support.\(^{135}\) Wal-Mart and Target continued to use Classic’s products, without any changes to their codes of conduct or enforcement mechanisms, and even continued to employ the supervisors that were repeatedly accused of engaging in these heinous activities.\(^{136}\) Critics of MNC self-regulation have pointed out that MNCs find greater compliance in supplier plants when they schedule factory inspections in advance. This allows the plants to prepare viewing areas, and select and coach the workers that will be interviewed, as was the case in the 2011 Classic rape investigation.\(^{137}\) Indeed, inadequate monitoring of factories by the state and contracting MNCs creates an “environment of impunity”\(^{138}\) for subcontractor and supervisor abuse of workers.

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Endangered by North American Free Trade Agreement, PUB. CITIZEN HEALTH RES. GROUP HEALTH LETTER, Mar. 1993, at 8–9) (internal quotation marks omitted).

132. BEYOND VOLUNTARISM, supra note 71, at 132.

133. See, e.g., HUMAN TRAFFICKING & INVOLUNTARY SERVITUDE, supra note 9, at 16, 20.


135. See Bustillo, supra note 1.


137. See supra note 7 and accompanying text.

The corporate entities that knowingly continued to engage in business with Classic, despite the reported abuses, may be seen as aiding and abetting the sexual assault and harassment carried out by supervisors at the factory. Though the concept of corporate liability for aiding and abetting human rights abuses stemmed from U.S. cases, such as Unocal, the International Criminal Court and the International Criminal Tribunals for Rwanda and the former Yugoslavia have explicitly incorporated this standard into their statutes for liability of non-state actors. Thus, the crime of aiding and abetting has been applied in an international context, and it would not be a far reach for Jordan to institute a similar statute in its civil laws with respect to the sexual abuse and harassment of women in the workplace.

While a corporation technically cannot rape an employee, its role is analogous to knowingly supplying a perpetrator with the place, authority, opportunity, and funds to carry out rape, physical assault, forced labor, and other human rights abuses. Acknowledging corporations as tortfeasors is essential to

139. See infra note 142 and accompanying text.
141. See BEYOND VOLUNTARISM, supra note 71, at 55–58.
holding them accountable for their actions, or inactions, in order to promote the welfare of migrant women in Jordan and improve their work environment. The sexual and non-sexual abuses carried out at Classic were one of many factors that served to frighten the female workers at the factory, and coerce them into doing exactly as their supervisors demanded. Many of these demands, such as working overtime, and working without pay or rest, directly benefited the MNC contracting parties’ interests by keeping costs low and ensuring an efficient, obedient workforce.143

While criminal prosecutions are currently used to hold the factory supervisors charged with these abuses liable, they are an inadequate legal remedy. Since individual criminal prosecutions “focus attention on personal guilt and away from structural or systemic causes,”144 these trials do not address the full problem of discrimination. For example, as seen in the United States and abroad, even the death penalty does not deter violent behavior when the root causes of such behavior are systemic and societal in nature.145 Though criminal prosecutions are necessary to deter individuals from committing crimes against vulnerable populations, the CEDAW aims to address the root causes of violence against women. In the case of Jordan's QIZ factories, corporate complicity in abusive workplace environments is a main reason such violence against migrant women in the QIZ persists.146 Such abuse will sadly continue so

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143. See infra notes 146, 174–76 and accompanying text.
145. State v. Makwanyane 1995 (3) SA 391 (CC) at ¶ 120 (S. Afr.) (“Homelessness, unemployment, poverty and the frustration consequent upon such conditions are other causes of the crime wave.”).
146. The USFTA supports the claim that “economic well-being will be maximized by each country’s specialization in producing at the lowest possible cost those exports in which it has a ‘comparative advantage.’” See Wolpin, supra note 131. Jordan’s comparative advantage happens to be cheap labor.
long as MNCs continue to prioritize profits and consumer satisfaction over the human rights of the workers in the supplier plants.

There is no consensus in the international community as to whether a corporation may be held liable for international human rights abuses. While it is clear that non-state actors operating under the color of the law may be penalized for committing abuses, including aiding and abetting such abuses, corpo-

This directly impacts labor because standards are deregulated in order to increase capital and maintain this advantage.

The transnational corporations generally have had an edge over national unions. Labor is less mobile than capital (since labor is tied to a particular community or region), and can protest only within the boundaries of the nation-state. But capital is highly mobile because it can move from one nation to another in search of labor, raw materials, credit, and markets. Each move across national boundaries, therefore, strengthens transnational capital at the expense of the national labor unions, local communities, and the nation-state, leading to loss of jobs, decrease in tax revenues, and dislocation of the national economy . . . . At its essence, then, “free trade” is more about unrestricted profit maximization and capital mobility . . . than eliminating residual barriers to trade in goods and services [in order to enrich the economies of all nations involved in the treaty].

Id.

147. While there are cases in which corporate entities have been found guilty of crimes, there have been no civil cases against corporate entities for violations of human rights which do not fall under crimes of universal jurisdiction. For example, in the war crimes trials at Nuremberg, corporations were implicated for the crimes of their directors in United States v. Krupp, see Anita Ramasastry, Corporate Complicity: From Nuremberg to Rangoon—An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations, 20 BERKELEY J. INT’L L. 91, 112 (2002), and were implicated as criminal instrumentalities in United States v. Krauch, see id. at 106. Corporations may be held criminally liable under theories of agency, aiding and abetting, and accomplice liability. See generally Eric Engle, Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?, 20 ST. JOHN’S J.L. COMM. 287 (2006). However, in order to be held civilly liable before a U.S. court, corporations need to be acting under the color of the law, or be a “willful participant in joint action with the State or its agents.” See Ramasastry, supra, at 137. There is no cause of action for a corporation that is merely complicit in human rights abuses, independent of state action, for its own benefit. Under Article 2(e) of the CEDAW, the state may be held liable for failing to stop abuses against women by private actors. See supra note 74 and accompanying text. However, this does not provide victims of sexual abuse an actionable claim against the corporate entities themselves.
rations occupy an amorphous position. Indeed, over two centuries ago Edward, the First Baron of Thurlow, remarked that, “[c]orporations have neither bodies to be punished, nor souls to be condemned. They therefore do as they like.” 148 Recent U.S. litigation, questioning the principles of Dob v. Unocal, shows that the Baron’s observation still rings true and further obscures whether individuals have a cause of action against corporations. 149 However, U.S. MNCs are still subject to the law of their host nation. 150 The treatment of MNC liability under international and U.S. law sheds light on what Jordan can—and must—do in order to discharge its duties to respect, protect, and fulfill the rights of women in the factory workplace. The solution advanced must thus be broad enough to encompass the actions of contractors at all levels in the MNC supply chain, with a focus on changing both national and corporate fair labor enforcement mechanisms.

IV. WORKING TOWARDS ERADICATING SEXUAL ABUSE IN THE WORKPLACE

A. A Civil Cause of Action Against MNCs for Sexual Abuse Committed by their Subcontractors

After a visit to Jordan in November 2011, Rashida Manjoo, the UN Special Rapporteur on Violence Against Women, warned Jordanian authorities about the nation’s lack of efforts

148. Ramasastry, supra note 147, at 91.
149. Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (holding that Torture Victim Protection Act (TVPA) was not applicable to corporation); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (holding oil corporation sued for aiding and abetting violations of human rights by Nigerian government, and corporations in general, cannot be sued for violations of the “law of nations” under the ATCA), cert. granted, 132 S.Ct. 472 (2011). The U.S. Supreme Court recently upheld the Second Circuit’s decision in Kiobel. Kiobel v. Royal Dutch Petroleum Co., No. 10–1491, 2013 WL 1628935 (U.S. Sup. Ct. Apr. 17, 2013). The Supreme Court concluded that where there is only a weak connection to the United States, the perpetrators of serious human rights abuses committed abroad cannot be held to account using the ATCA. Id., at *6. However, the Supreme Court did not decide on the issue of whether U.S. corporations can altogether be held liable under the statute for human rights violations abroad.
150. See Engle, supra note 147, at 288.
to address sexual abuse and harassment. She noted that although many individuals she interviewed did not identify these as national problems, “it is necessary to acknowledge that sexual violence and sexual harassment occur both within and outside the family in every society.” Ms. Manjoo explained that, “the fact that certain subjects might be considered taboo within a society that largely describes itself as traditional, conservative, patriarchal and tribal might explain women’s silence with regard to these manifestations of violence.”

Contrary to Jordanian claims, sexual harassment is not a purely Western occurrence. Along with India’s Vishaka decision in 1987, other developing nations have begun to implement laws against sexual harassment as necessary to attain equal rights for women. In 2004, Morocco made an important change to its Labor Code, introducing the concept of sexual harassment in the workplace. In 2009, using Vishaka as precedent, the Bangladeshi High Court (“High Court”) issued a decision defining sexual harassment and the steps employers must take to protect against it. In its interpretation of the nation’s constitution, the High Court considered Article 11 of the CEDAW on equality in employment, and the CEDAW Committee’s General Recommendation No. 19 on violence against women. The High Court noted, “harrowing tales of repression and sexual abuse of women at their workplaces, educational institutions and other Government and Non-Governmental organizations,” and “recognized that equality in employment can be seriously impaired when women are subjected to gender specific violence.”

Jordan’s apparent denial of the problem’s existence does little to advance its women workers’ rights. By failing to address the

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152. Id.
153. Id.
154. See notes 110–13 supra and accompanying text.
156. See id.
157. See id.
158. Id.
159. Id.
sexual harassment and abuse of female workers, Jordan is effectively in violation of its duties under the CEDAW that require it to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.” Thus, Jordan is necessarily failing to exercise due diligence in ending abuses against women.

The CEDAW Committee issued a general recommendation addressing states’ obligations to solve the problem of violence against women. General Recommendation No. 19 noted that under the CEDAW states must take steps to provide the following:

(i) Effective legal measures, including penal sanctions, civil remedies, and compensatory provisions to protect women against all kinds of violence, including violence and abuse in the family, sexual assault and sexual harassment in the workplace.

(ii) Preventative measures, including public information and education programs to change attitudes concerning the roles and status of men and women.

(iii) Protective measures, including refuges, counseling, rehabilitation, and support services for women who are the victims of violence or who are at risk of violence.

In order to fulfill the positive rights propounded by the CEDAW, Jordan must institute laws against sexual harassment and create effective and confidential avenues for complaints against employers. Without doing so and enforcing such laws, Jordan is responsible for the actions of corporate bodies that facilitate human rights violations against women under the CEDAW’s Article 2(e) provisions. Jordan is in a position to enforce human rights standards among those companies privileged to do business within its borders.

160. See supra notes 73–77 and accompanying text.
161. See supra notes 78–79 and accompanying text.
162. B D R E A M S, supra note 92, at 64.
163. See supra note 73–77 and accompanying text. See also B D R E A M S, supra note 92, at 64 (citing the Declaration on the Elimination of Violence Against Women—the obligation of state governments to prevent, investigate, and punish acts of violence against women apply regardless of “whether those acts are perpetuated by the State or by private persons.”).
In addition to the substantive equality provisions, Article 2(c) recognizes the “strong symbiosis”\(^ {164}\) between the successful enforcement of laws protecting women’s rights and judicial action.\(^ {165}\) Sections (1) and (2) of Article 15 of the CEDAW elaborate on the legal status of women in their requirement that women receive equal status with men under the law, in the form of equal legal capacity and equal opportunity to exercise such rights in civil matters, such as court proceedings.\(^ {166}\) In light of these provisions, it is clear that in order to achieve substantive gender equality, Jordan must institute mechanisms for women to obtain legal redress through the courts for sexual abuse by workplace officials. Women must be able to obtain legal redress without fear of retaliation by employers, and without fear of the social or cultural repercussions that accompany discussion of a women’s sexual activity. To accomplish the latter, there must be a means of educating the public and working women in particular of women’s rights under domestic and international law.

By providing women workers protection in reporting abuses and an avenue of relief through the courts, Jordan would have a way to gauge which factories and corporations are committing violations. It can then more efficiently monitor those entities given its limited inspection capacity.\(^ {167}\) Moreover, corporations would be compelled to enforce human rights and the rights of women within factories to avoid scrutiny, liability, and bad press. But, it is not only due to “[p]overty, lack of resources, and weak governmental capacity . . . [that] developing countries [fail to] effectively enforce labor standards. Some also lack the political will to do so.”\(^ {168}\) In failing to institute such procedures to date, an underlying concern for Jordan is undoubtedly the effect of the reforms on its relationship with corporations and factory administrators.

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164. Arnold, supra note 19, at 1380.
165. See CEDAW, supra note 17, art. 2(c).
166. See id. art. 15(1)–15(2).
167. See note 119 supra.
B. The Effect of Protection Against Sexual Harassment on MNC Activity Within Jordan

Economic growth and social development are not mutually exclusive. “[M]arkets can flourish and sustainable economic prosperity can be achieved only if there is a democratic and effective State that provides, through rules and institutions, an enabling environment for private sector development and economic growth.”169 Thus, it is Jordan’s duty under the CEDAW, and to some extent under the USFTA, to consider female migrant workers’ rights and the workplace abuses documented against them when delineating guidelines for corporate industrial operations within Jordan’s borders. Such considerations entail not only the rights of women, but also the status and sustainability of MNC ventures.

Concededly, there is a significant imbalance in bargaining power between Western conglomerates and developing countries such as Jordan.170 Jordan has thus far taken an accommodating stance on the operations of MNCs in the QIZ for fear that companies will relocate to countries with even lower labor and human rights standards and laxer enforcement.171 One QIZ manager of a large supplier plant for Victoria’s Secret, NIKE, Calvin Klein, and Target explained that “any rises in production costs . . . would cause Tefron [a distributor for the above-mentioned American companies] to move operations to Egypt since garment companies are generally only interested in the ‘bottom-line.’”172 Female guest workers’ rights will not be vindicated if MNCs retreat entirely from using QIZ factory labor, or are unable to achieve a profit from conducting business in the QIZ; however, concerns about sexually violent work conditions cannot simply be ignored.

170. Id. at 2 (“the present form of globalization is largely shaped by the rules advanced by one part of the world – namely the most influential—and these rules do not necessarily favour developing countries and countries in transition.”).
171. See ELLIOTT, supra note 168, at 3 (“Labor ministry officials sometimes concede in private that foreign investors threaten to go elsewhere if they must deal with unions.”).
Most textile manufacturing plants in Jordan’s QIZs are owned by Asian investors. However, these factories largely supply products to American MNCs. Therefore, their operations are inseparable from the American MNCs’ economic ventures. The supply chain of MNCs is oftentimes highly complex, involving contractors, subcontractors, and perhaps even further subdivisions of labor in the subcontractor category. However, the overall cost structure of creating and selling a garment is set by the corporation, as are the factory codes of conduct. Addressing violations from the top down will inevitably result in greater scrutiny and enforcement of these codes of conduct, and lead to reduced human rights violations against women.

Though MNCs may not affirmatively assist or cause a lower-level employee to commit human rights violations, the MNC may passively allow the violation to occur in order to benefit from the coercive work conditions that result. If the company has not actually aided and abetted a state government in committing the abuses, it will not be held responsible under principles of international law, and victims will not be able to pursue charges against the company. While it cannot be said that the corporations operating in Jordan have explicitly demanded that state authorities maintain this status quo, the Jordanian government is effectively accommodating and protecting MNCs’ commercial interests in its failure to provide legal remedies for women suffering from sexual abuse in the workplace. In addition, compared to female migrant workers, the MNCs have far more leverage over Jordanian law-making through the threat to remove capital from Jordan’s economy if labor costs increase. However, even if there is no legal claim against corporations who do not act under the color of international law, there is still the notion that corporations are morally complicit for benefitting from human rights violations. Amnesty International commented that, “to accept the benefits of measures by governments or local authorities to improve the business

173. See supra note 11.
174. BEYOND VOLUNTARISM, supra note 71, at 132.
175. See id. “Beyond law, the idea that companies are morally complicit if they passively benefit from violations is gaining ground. The UN Global Compact (Principle 2) warns that ‘should a corporation benefit from violations by authorities . . . corporate complicity would be evident.’” Id.
climate which themselves constitute violations of human rights, makes a company party to those violations.”

Regardless of a victims’ ability to sue an MNC under international law, the victim can still pursue a claim against Jordan for failing to exercise due diligence in protecting her from violence at private hands. The best way for Jordan to discharge its duty to protect women is to spread liability to MNCs through civil sanctions under domestic law.

A large part of what makes Jordan attractive to MNCs is the lower cost structure and relaxed legal requirements for workers’ rights. As noted previously, MNCs by nature of their corporate outsourcing mechanisms are able to deflect liability for workplace abuses to the subcontractor factories where human rights violations actually occur. This structure reflects the low priority MNCs give to contracted workers and the standard of their working conditions. In the garment industry, a sector historically and culturally defined as “women’s work,” this low priority has allowed for the sexual abuse of employees that occupy a particularly vulnerable position in Jordanian society.

Individualized criminal liability for each factory manager or supervisor may be less complex to administer than civil liability of business enterprises, but it fails to reach the underlying infrastructure that condones violence against women as a form of labor coercion and sex discrimination. In comparison, a system of civil remedies for victims of sexual violence in factory settings that extends into the larger corporate infrastructure reaches these underlying structural concerns. Thus, Jordan

176. Id.
177. See supra notes 74–77 and accompanying text.
178. See Gobert, supra note 28. “When offenders are sentenced to prison, the government must bear the not inconsiderable expense of housing and feeding the offender, providing a secure facility, and employing the necessary personnel to maintain order and protect the public against escapes.” Id. In comparison, a fine against a business entity is relatively cost-free to administer and additionally generates the capital to provide compensation to the injured worker for the human rights offense. See id.
180. See supra notes 126–28 and accompanying text.
181. See ARNOLD & HARTMAN, supra note 179, at 27.
should impose joint and several liability against MNCs for the violations of its subcontractors. The doctrine of joint employer liability has promoted corporate accountability for the working conditions of garment workers in the United States\textsuperscript{182} and is a useful doctrine to promote female workers’ rights and safety up and down the supply chain.

MNCs are in the best position to positively impact working conditions in their QIZ supplier factories, and judicial action against the MNCs for failing to do so will spur much needed reform.\textsuperscript{183} Jordan must therefore hold them accountable through monetary civil liability for failure to monitor and enforce workplace safety standards and workers’ rights in supplier factories.

Financial penalties are necessary to incentivize MNCs to enforce their codes of conduct in good faith to prevent human rights abuses against women in supplier factories. “Whereas

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\textsuperscript{182} See Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003). In Zheng, the plaintiffs were all employed by a garment factory that sewed apparel as a subcontractor to various clothing manufacturers, including Liberty Apparel (“Liberty”). The workers brought an action for wage theft under both the Fair Labor Standards Act and state law against both the garment factory and Liberty, claiming that most of their work had been performed for Liberty. Id. at 63–64. The case proceeded against Liberty when the supplier factory was no longer a viable defendant. Id. at 64. Although Liberty had never directly employed the garment workers, the Second Circuit Court of Appeals denied its motion for summary judgment and remanded to decide whether Liberty had functional control of the garment workers. Id. at 69. The pertinent factors included: (1) whether the corporation’s premises and equipment were used for the plaintiffs’ work; (2) whether the contractor company had “a business that could or did shift as a unit from one putative joint employer to another;” (3) the extent to which plaintiffs performed a discrete line item job integral to the corporation’s process of production; (4) whether responsibility under the contracts “could pass from one subcontractor to another without material changes;” (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs’ work; and (6) whether plaintiffs worked exclusively or predominantly for the defendant corporation. Id. at 72.

\textsuperscript{183} See generally Larry Cata Backer, Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislature, 39 CONN. L. REV. 1739 (2007). The Global Compact suggests that MNCs have the authority to “enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption.” Id. at 1754–55. Since QIZ factories supplying to MNCs are contractually bound by MNC supplier standards, MNCs are better able to enforce those norms through inspection, audit, sanctions, and possible contract termination for failure to comply. Id. at 1755.
the greatest threat to an individual may be the loss of liberty, the greatest threat to a company is the loss of profitability. Because such a loss strikes at the essential purpose of the company, a fine holds the potential to be an effective deterrent.”

The negative publicity associated with a court decision or colorable claim against a corporation is likely to cause reputation-al harm that most corporations will try to avoid in the interest of protecting their public image and maintaining their stock prices. Judicial action and state sanctions against the corporation would spur the adoption of new corporate policies and enforcement practices for supplier plants that are designed to prevent future human rights violations. Thus, reforms in MNC internal monitoring and enforcement practices will not only help to reduce violence against female workers, but will also help to reduce the concern on the part of MNC shareholders that their investments will suffer losses, either through actual legal liability, or through negative media attention.

While imposing sexual harassment penalties may at first deter MNCs due to the increased liability costs for operating factories in the QIZ, the law will lead to overall healthy business practices and long-term profitability. Safe and just work environments enhance satisfaction and productivity of workers. They also lead to greater customer satisfaction and loyalty, and improved corporate character, thus promoting financial stability in the long-term. Good corporate reputation may also create lower production costs over time, as supplier plants will prefer to work with such businesses. In addition, safe and healthy work environments “enhance the preference satisfaction of employees and shareholders who do not wish to benefit from working conditions and wages that they regard as unjustly exploitative . . . [and] of consumers who do not wish to benefit from working conditions and wages that they regard as ethically wrong.” Increased productivity and employee loyalty may ultimately offset the cost of the implementing mechanisms that provide greater protection to female QIZ workers’ basic rights under the CEDAW.

186. See id.
187. See ARNOLD & HARTMAN, supra note 179, at 32.
CONCLUSION

Sexual abuse and harassment in the workplace are critical problems in Jordan’s QIZ. The prevalence of abuse against migrant women in factory settings points to persistent and systemic discrimination against women in society. The discrimination encountered by women in the QIZ is multiplied after considering the intersectionality of their vulnerabilities. The Jordanian government must bear this in mind if it truly seeks gender equality in the workplace, as the CEDAW requires. By instituting laws against sexual harassment, making marginalized women in the QIZ aware of their rights, and giving such women a cause of action in a court of law, Jordan can uplift both the status of women and encourage fair labor practices that are likely to increase the profitability of MNCs operating in the region. A cause of action must exist both criminally against individual offenders, as well as civilly against higher corporate bodies. The latter will ensure that a commitment to human rights in the workplace trickles down to supplier plants where violations, such as the ones at Classic, take place.

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