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"INTERNATIONAL LAW IN THE 21ST CENTURY: THE ROLE AND IMPACT OF THE UNITED NATIONS AND OTHER INTERNATIONAL ENTITIES"

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MESSAGE AS MEDIUM IN SIERRA LEONE

Diane Marie Amann*

We attacked everybody.
We feared nobody.
We were very bold.
Everybody is knowing our tempers.

This virtual haiku of war comes from a fellow named Josep Sonah, whom a Boston Globe report described as a nineteen-year-old veteran of the Sierra Leone civil war.1 Sonah's four statements reflect the reasons that the nearly decade-old war in Sierra Leone has become notorious among armed conflicts.

We attacked everybody: The campaign, particularly that of the Revolutionary United Front (RUF), the most significant of several rebel groups, was a campaign of terror against civilians. It included arson, mutilation, and summary executions. An estimated 20,000 persons were abducted, and many have never been returned to their homes. Some were impressed into labor, others used as human shields. There were systematic rapes, numbering in the thousands, of girls as young as five, women as old as seventy-five. The displacement of a million people, one-quarter of the country's population. And the hallmark of this conflict, the chopping off of the hands of those said to have cast votes for President Ahmed Tejan Kabbah in 1996.2

We were very bold: Sierra Leone is known for the use of child soldiers, many of whom also were child victims. Estimates of the number of child soldiers range between 5,000 and 10,000. One-tenth of the rebels who waged a devastating assault on Sierra Leone's capital, Freetown, in January 1999 are believed to have been children. Children were recruited by both sides of the conflict, by pro-government militias and by rebels. At nineteen, Josep Sonah

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was an old soldier. Children as young as seven served in combat. Some came to fight out of desperation or disaffection, but remained because of terror and drugging. Others were kidnapped and forced into service. Many had no choice but to stay because they had RUF tattoos, and their families would not take them back.³

_Everybody is knowing our tempers:_ Sierra Leone is also unsettling in that there appears to be little explanation for the longevity and brutality of the war. The conflict appears to have no source in, for instance, ethnic or religious division. The RUF and other rebel groups lack both ideology and popular support. They simply exploit alienation among young people, and then enforce continued service through intimidation. Their motivations appear to be to continue to profit from illegal diamond trading, and to continue to experience the joy of doing evil.⁴

_We feared nobody:_ Sierra Leone is notorious for giving amnesty to the people who did these things. Amnesty was granted not once, but twice: first in 1996, in talks at Abidjan, Côte d’Ivoire, and again in 1999, at Lomé, Togo.⁵

Recently I have been studying expressive theories of law, and I find them very helpful in considering events in Sierra Leone. Expressive theories look not so much at whether a law deters or whether a law punishes, but at the message we get from a law. The message understood, rather than the message intended, is critical. Expressivism tells us that a harmful message in itself causes harm; therefore, when we evaluate whether an action done was good or bad, we should look at the message that the action was understood to convey.⁶ I am going to do that now, looking first at the Lomé Agreement and then at the post-Lomé proposal for a Special Court for Sierra Leone.

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Preceding the Lomé Agreement were eight years of civil war, peppered with coups d'état. At one point, in March 1996, Sierra Leoneans chose Kabbah, a lawyer and former United Nations Development Program official, to be the first democratically elected President in thirty years. Kabbah immediately negotiated a ceasefire with Foday Saybana Sankoh, the leader of the RUF. On November 30, 1996, the two signed a peace agreement, known as the Abidjan Accord.\(^7\)

The Abidjan Accord promised an end to the fighting, followed by disarmament, demobilization, and reintegration of combatants into Sierra Leonean society. Numerous agencies, among them a Demobilization and Resettlement Committee, a Socio-Economic Forum, and a National Commission on Human Rights, were to be established to coordinate reconstruction. Political prisoners and prisoners of war were to be released. The RUF was to begin functioning as a legitimate political movement, and all its soldiers were to enjoy amnesty:

To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement.\(^8\)

The RUF failed to meet disarmament deadlines, and the Abidjan Accord soon foundered. Low-ranking members of the military staged a coup in May 1997. Nigerian-led troops, organized under the auspices of the Economic Community of Western African States (ECOWAS), deposed that junta in February 1998. President Kabbah, who had been in exile in neighboring Guinea, resumed power.\(^9\)

In January 1999, the RUF waged a destructive attack on Freetown that resulted in 6,500 dead, thousands kidnapped or maimed, and tens or hundreds of thousands left homeless. ECOWAS troops again drove the rebels back. Eventually Sankoh, a prisoner condemned to death for treason against Sierra Leone, was released in 2000.\(^7\)

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7. On these events, see Sierra Leone Country Report, supra note 2, at intro.; Norimitsu Onishi & Jane Perlez, How U.S. Left Sierra Leone Tangled in a Curious Web, N.Y. TIMES, June 4, 2000, at 6 § 1; James Rupert, Civilian Rule Overturned in Sierra Leone, WASH. POST, May 26, 1997, at A21 [hereinafter Rupert, Civilian Rule]. For specific provisions discussed infra, see Abidjan Accord, supra note 5.
Leone, was brought to Lomé, where he and the government again signed a ceasefire in May 1999. Peace talks continued there, culminating six weeks later in the Lomé Agreement.  

In many respects the Lomé Agreement resembled the Abidjan Accord. It too promised disarmament, demobilization, and reintegration, and included speedy timetables for this process. It included even more sweeping plans for reconstruction, among them victims' and refugees' programs, educational institutions, a Human Rights Commission, a Truth and Reconciliation Commission, a National Election Commission, and a Constitutional Review Committee. It also talked about transforming the RUF from a political movement into a political party.

It spoke as well about amnesty. Again, unnamed combatants and collaborators received pardons for their pre-Lomé actions. Then the Lomé Agreement took a remarkable turn, granting the following, by name, to RUF leader Sankoh: “In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.”

The Lomé Agreement did not just free Sankoh from liability. It rewarded him, appointing Sankoh, by name, chairman of the new Commission for Management of Strategic Resources, National Reconstruction and Development. This reputed trafficker in diamonds, Sierra Leone’s main source of wealth, was to oversee the entire industry. Sankoh also was accorded the status of Vice President of Sierra Leone, answerable only to the President.

United Nations Secretary-General Kofi Annan lauded it as “a great step forward for Sierra Leone.” He admitted that the Lomé pardons were “difficult to reconcile with the goal of ending the culture of impunity,” but suggested that he had alleviated that problem by addition of what United Nations officials have variously termed a “proviso,” “statement,” or “reservation.” I must mention that although I am certain this addition exists, I have not been able to find it attached to printed or on-line versions of the Lomé Agreement. The only evidence I can find is in press reports or in United Nations documents, such as the following passage, in which Annan reported to the United Nations Security Council that he had instructed his “Special Representative to enter a reservation when he signed explicitly stating that, for the United Nations, the amnesty

10. On these events, see Sierra Leone Country Report, supra note 2, at intro. For specific peace accord provisions discussed, see Lomé Agreement, supra note 5.

11. See Lomé Agreement, supra note 5, at art. IX(1).


13. See id. para. 7 (calling this addition a "proviso"); id. para. 54 (calling it a "reservation"). See also S.C. Res. 1315, 55th Sess., 4186th mtg., at pmbl., U.N. Doc. S/Res/1315 (2000) [hereinafter Resolution 1315] (stating that United Nations representative had “appended” a “statement” after “his signature”).
cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law." Thus, Annan indicated that there was an international way out of the agreement even as he expressed a preference first to let Sierra Leone try to effect the amnesty.

United States officials maintained that the pardons of Sankoh and others were essential to the deal, though several of the United States State Department officials most concerned with human rights and humanitarian issues reportedly opposed giving Sankoh a government post. The amnesty outraged nongovernmental organizations; others, however, faulted opponents for holding Western, privileged viewpoints not suited to the needs of Sierra Leone. Among many people within Sierra Leone, there was resignation. An example is the following quote from sixty-eight-year-old Johnny Crowther. He had spent half his life savings to build a cement-block house; rebels destroyed it during the January 1999 attack on Freetown. Eight months later a New York Times reporter found Crowther breaking what was left of his house into stones that he could sell. Asked about the amnesty, Crowther said: "We just have to forget, really, we just have to forget. Nothing else. I have no power. Our leaders say we must forget. Am I going to refuse our leaders? We just have to unite together and build the country back up together. Finished, finished, that is all."

What was the message of Lomé? There was an ostensible message of reconciliation — admirable expressions, both in the preamble and in the provisions of the Lomé Agreement, of desires to move forward, to reconcile, rebuild, reintegrate. That message, however, was supplanted by the message that the amnesty provision conveyed. That provision contained a specific and,
as far as I can tell, unique grant of pardon to a named individual, Foday Sankoh. That individual was suspected of the most heinous crimes, of forcing others to commit unspeakable acts. He had flouted an earlier promise to disarm in exchange for amnesty. To pardon Sankoh, in that particular context, told the world that, at least in Sierra Leone, all talk of the new era of accountability was just that, just talk. That atrocities will not be punished. That perhaps, if they are effective enough, atrocities may even be rewarded. The subtextual message was, the West does not really care, and does not have the political will to do what really needs to be done in Sierra Leone.

Foday Sankoh, at least, got those messages. With regard to disarmament, he stalled, he objected, he dissembled, much as after the signing of the Abidjan Accord. When United States Secretary of State Madeleine Albright came to Freetown to see him, he showed up hours late for the meeting. He made harsh public statements regarding the post-Lomé process; in dealings with Annan, however, Sankoh reaffirmed his support for the peace process. Attacks on civilians resumed in October 1999, just a few months after Lomé, and almost as soon as Sankoh returned to Freetown. By May 2000, as we all know, everything fell apart. Five hundred United Nations peacekeepers were seized by the RUF. Sankoh was arrested; nonetheless, peacekeepers remained in RUF custody for several months before they were released, sometimes by negotiated agreements and sometimes by commando operations. Disarmament “came to a standstill,” Annan reported in mid-2000, and “the situation in Sierra Leone remained tense and volatile under conditions that resemble civil war.”

The international community now has a chance to do better. There is a proposal for a Special Court for Sierra Leone. In June 2000, Sierra Leone wrote Secretary-General Annan a letter asking for such a court. Two months later, a Security Council resolution instructed the Secretary-General to negotiate an agreement establishing a Special Court. On October 4, 2000, Annan submitted

18. *See Onishi & Perlez, supra note 7.*


23. *See Resolution 1315, supra note 13, pmbl.*

24. *Id.*
a proposed agreement and draft statute to the Security Council.25 The proposal, for a hybrid court that would comprise both international and Sierra Leonean judges and would apply both international and Sierra Leonean law, is now under consideration.

The contents of the draft statute address the four notorious features of the Sierra Leone civil war that I mentioned at the outset. Respecting the campaign of terror against civilians, the statute would set up a unit to address the needs of victims and witnesses. It would require the court to balance a defendant’s fair-trial rights against the needs for protection of victims and witnesses. It calls for judges, investigators, and other staff who are trained in issues related to juvenile justice and sexual violence. It includes three articles that would permit prosecution for international crimes; specifically, Article 2 relating to crimes against humanity; Article 3 relating to violations of the law of internal armed conflict; and Article 4 relating to other serious violations of international humanitarian law. With regard to the violence that women suffered during the conflict, two of the international articles specifically allow prosecution for rape, sexual slavery, enforced prostitution, forced pregnancy, and all other sexual violence. Furthermore, Article 5, which covers Sierra Leonean law, permits prosecution for certain abuses and kidnappings of girls.

With regard to the phenomenon of child soldiers and child victims, the statute has two approaches. First of all, it permits prosecution not only for abuse of girls, as mentioned above, but also for conscription of children under fifteen for use in combat. Second, and most notably, the statute provides for a Juvenile Chamber to prosecute child soldiers. This decision posed a “moral dilemma,” according to the Secretary-General’s report, between the desire of the people of Sierra Leone to call war criminals to account regardless of age and the concern of human rights organizations that prosecution would undercut rehabilitation.26 Annan said that the proposed statutory language aimed to balance these concerns, should the Council, “weighing in the moral-education message to the present and next generation of children in Sierra Leone,”27 decide to pursue prosecution. It is contemplated that the cases of defendants who were between fifteen and eighteen when the alleged crimes occurred might be referred to the Sierra Leone Truth and Reconciliation Commission, when it begins operation. Annan’s draft leaves that decision, however, to the discretion of the prosecutor. Those cases referred to the Special Court might be conducted

25. See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 52d Sess., U.N. Doc. S/2000/915 (2000) [hereinafter Secretary-General’s Special Court Report]. The proposed Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, as well as the draft Statute of the Special Court for Sierra Leone [hereinafter Special Court Statute], are attached to this report.

26. Secretary-General’s Special Court Report, supra note 25, para. 32, at 7.

27. Id. para. 38, 8.
in camera, in anonymous proceedings. A finding of guilt would result in a "disposition" entailing no prison time, but rather orders to participate in community service, counseling, schooling and vocational training, or disarmament and reintegration programs.28

Such rehabilitative options begin to address the third feature of the Sierra Leone conflict; that is, the disaffection and despair that contributed, at least at the beginning, to the war.

Finally, respecting the fourth feature, amnesty, the Special Court statute minces no words. It states: "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution."29 It says, simply, that the amnesty does not apply. It also incorporates a new message about accountability. The clock for prosecution starts on November 30, 1996, the date of the Abidjan Accord. The statute contains no finishing date for the court, as is the case with the International Criminal Tribunal for the former Yugoslavia.30 This indicates that the Special Court is to keep watch over those who should commit crimes within its jurisdiction in the future.

The message of the draft statute for the Special Court, then, is far stronger than that of the Lomé Agreement. It promises accountability. It allows flexibility to accommodate some of the features characteristic of the Sierra Leone conflict.

It remains to be seen if the Special Court will be established. The initial Security Council resolution suggested funding by voluntary contributions.31 The Secretary-General's report questions the adequacy of this method, and estimates that the court will cost twenty-two million dollars to operate the first


29. Special Court Statute, supra note 25, at art. 10.


31. See Resolution 1315, supra note 13, para. 8.
year.\textsuperscript{32} That is an extremely conservative number, less than a quarter of this year's budget for either of the ad hoc tribunals.\textsuperscript{33}

Despite financial and other obstacles, the Special Court ought to be attempted. I mentioned at the beginning that one of the notorious features of the Sierra Leone conflict was amputation, at first of the hands those who had dared to vote. The practice was not unique to this conflict. Belgian colonizers had chopped off the hands of Congolese who resisted harsh conditions at the rubber plantations.\textsuperscript{34} The perpetrators of those atrocities never were punished. A century later, Foday Sankoh's RUF borrowed that tactic of dominance, infused it with new meaning, and used it for a new round of terror. Punishing those responsible for atrocities in Sierra Leone, by conveying a concrete message of accountability, may begin to break that cycle of violence.

\textsuperscript{32} See Secretary-General's Special Court Report, \textit{supra} note 25, at paras. 57-63, 68-72.


\textsuperscript{34} \textit{See ADAM HOCHSCHILD, KING LEOPOLD'S GHOST 164-66 (1998) (describing practice, so widely reported "that people overseas began to associate the Congo with severed hands"); BARBARA KINGSOLVER, THE POISONWOOD BIBLE 144, 432 (1998) (referring to this practice, and to "the whacked-off ghost hands of all those rubber workers," in novel treating the end of colonialism in the Congo); Onishi, Looted Home, \textit{supra} note 2 (linking Belgian and RUF practices).}
LESSONS FROM THE NGO CAMPAIGN AGAINST
THE SECOND REVIEW OF THE WORLD BANK
INSPECTION PANEL: A PARTICIPANT’S
PERSPECTIVE*

Daniel D. Bradlow**

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I. INTRODUCTION

This case study of the Non-Governmental Organization (NGO) campaign against the second review of the World Bank’s Inspection Panel is intended as an example of the impact international civil society can have on international financial institutions (IFIs). It also serves to highlight three important lessons about the relationship between civil society and the IFIs, particularly the World Bank (Bank) and the International Monetary Fund (IMF or Fund), and their member states.

The first of the three lessons is that the IFIs are slowly developing administrative procedures that create limited but important opportunities for NGOs to influence policy and rule-making in the IFIs. The second lesson is that power relations in the Bank and the IMF are developing in a troubling direction. The G-7 countries, and particularly the United States, are exercising power without responsibility in these institutions in the sense that they can influence the Bank and the Fund to adopt policies that will have no impact on their citizens or on anyone to whom they are directly accountable. The third lesson is that the tension that exists in these organizations between the NGOs and their member states is largely attributable to the fact that they have different visions of development.

* This paper is based on a presentation made as part of a panel on “The Impact of International Civil Society on the World Bank, the IMF and the WTO” International Law Association’s International Law Weekend, New York, October 27, 2000.

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In order to make the case for these findings, the next section of this paper, after a short explanation of the Inspection Panel (Panel), will describe the campaign that the NGOs mounted around the second review of the Panel and the outcome of the campaign. The third section of the paper will discuss the lessons that can be learned from this case study.

II. THE CASE STUDY

A. Background on the Inspection Panel

In 1994, the World Bank's Board of Executive Directors voted to establish the Panel.1 Its motivation for doing so was that it was under pressure from NGOs, the United States Congress, and others to take steps to correct the problems that had been exposed in some high-profile cases of problematic Bank projects. The Bank's executive directors had also expressed some concern about the Bank's performance and were looking for ways to improve it.2

Briefly, the Panel has been empowered to respond to Requests for Inspection (Requests) from any affected people, except a single person, who claim that they have been or are threatened with material injury or harm because of the failure of the Bank staff and management to act in compliance with the Bank's operating policies and procedures.3 The Resolution establishing the Panel provides for a two step process for handling such requests for inspection. In the first step, the Panel reviews the Request and the management response to the request to see if it meets all the eligibility requirements4 and to decide whether or not the Panel should recommend that it conduct an investigation to the Bank's Board of Executive Directors (Board). The Board makes the final decision about whether or not to authorize an investigation. The Request, the Management response, the Panel recommendation and the Board decision are all made publicly available. In the second stage the Panel conducts the investigation and submits its findings to the Board. The Management is entitled to submit a response to the Panel report. The Board then decides how to respond. The Panel report, the management response thereto and any Board decision on the report are all made publicly available.


4. The eligibility criteria are in Paragraphs 12-14 of the Resolution, supra note 1.
When the Panel was established, it was the first formal mechanism through which non-state actors could attempt to hold an international organization directly accountable for its actions. NGOs hailed its establishment as an important milestone in their campaign to make the Bank more accountable and responsive to those who are supposed to be the beneficiaries of its operations.

During the first three years of its existence, the Panel received ten Requests for Inspection. Most of these cases were controversial and they resulted in growing opposition to the Panel process in the Board.\textsuperscript{5} There were several causes for this controversy. First, even though the goal of the initial stage of the process is only to determine eligibility and not the more difficult issues of harm and causation, it had become, in practice, very complex. In fact, the Panel's report included almost all the findings and issues one would expect to see included in a final investigation report. It should be noted that, from the perspective of the Requester, this was not bad because it meant that there was a strong likelihood that the filing of a Request would lead to a field visit by the Panel. This tended to generate publicity and an "on the record" report about the project and the Requester's concerns with it. However, from the Board's perspective the Panel's detailed initial report called into question the need for a full investigation.

The second reason that the Panel was becoming so controversial was that the Bank Management used its response to the Request as an opportunity to deny its responsibility for any of the harm alleged in the Request. In addition, it used the time from the filing of the Request, until the Panel submitted its recommendation to the Board, to work with the borrower to develop an action plan that was designed to correct the problems that the Requester had identified with the project. The plan was developed without consultation with the Requester. It also often involved unauthorized communications between the Management and the Board about the Request that the Panel was considering. These communications were not provided for under the Resolution or the Operating Procedures of the Panel. They also undermined the perceived fairness and independence of the Panel process, at least in the eyes of outside observers.

The result was that the Board, when it considered the Panel's recommendation, was confronted with the following information: a detailed Panel report that found harm and eligibility but did not fully analyze the issue of causation; a Management response that denied it was responsible for the problems in the project; and an action plan in which the borrower agreed to undertake certain actions to correct the problems with the project.

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\textsuperscript{5} For an overview of the Panel's first years, see L. Udall, \textit{The World Bank Inspection Panel: A Three Year Review} (Oct. 1997, Bank Information Center). \textit{See also} \textit{The World Bank Inspection Panel: The First Four Years} (Alvaro Umana ed. 1998); Shihata, supra, note 2.
combined effect of these documents was to create the impression that the only remaining issue to investigate was what the borrower had done that had caused the harm to the Requester.

Confronted with this information, the Board members from part II countries (that is representing the countries that actually borrow from the Bank) argued that this was not consistent with the purpose of the Panel, which was to investigate problems attributable to the acts or omissions of the Bank's staff and management. They usually opposed Panel recommendations to investigate. Bitter fights ensued between those Executive Directors who supported the recommendation (usually from Part I countries) and those who opposed it. The result was that the Board failed to authorize full-scale investigations like those envisaged in the Resolution establishing the Panel. Instead, it authorized very limited follow up investigations to the Panel report, for example a desk review or a Panel review of the implementation of the action plans.

These compromises satisfied no one. The affected people and their NGO representatives felt that they were not getting what they were entitled to under the Resolution. The borrower countries and their representatives on the Executive Board felt that they, rather than the Bank staff and Management, were becoming the real targets of the Panel. In many ways, they felt that the function of the Panel was becoming to assign blame rather than to correct problems in the implementation of the Bank's operational policies and to solve problems in Bank projects. The Board felt frustrated that a mechanism that had been designed to help reduce their problems in dealing with difficult projects was instead generating more conflict in the Board. In fact, the only partially satisfied party was the original target of the Panel—the staff and management—who were successfully avoiding investigations that may have revealed problems in their operations and conduct.

It is important to recognize that despite these criticisms, the Panel process was producing real benefits for the requesters. Often it offered them the first opportunity to raise their concerns with senior officials of the Bank who would listen to their complaints. In some cases, they were able to gain compensation for affected people. In others they managed to get either the borrower or the Bank to implement promised project elements that were of particular interest to affected people, or to increase spending on issues of importance to them. These results were sometimes precipitated by the site visit by Panel and on other occasions were the result of the action plan or the management response to the filing of the Request.6

As a result of these problems, the Board decided to initiate a review of the Panel process in late 1997. After receiving papers from and consulting with

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management and the Panel, the Board, in early 1998, appointed a Working Group to recommend a solution to the Board. The Working Group, which consisted of six Executive Directors—three from part I countries (that is the capital contributing countries) and three from part II countries—after difficult discussions prepared a report that recommended changes to the Panel process, that it believed would both improve the Panel process and correct the current problems. This report was distributed to the Board in December 1998 and was scheduled for consideration by the full Board in late January 1999. Before this could happen, the report, which was supposed to be confidential, was leaked and obtained by some Washington-based NGOs. It was also obtained by some journalists, who wrote about the report.

When the NGOs reviewed the leaked Working Group report they reacted with alarm. They felt that the Working Group’s proposals, instead of resolving the problems with the Panel, were more likely to make the position of the Panel untenable. They argued that it would effectively strip the Panel of any meaningful function.

The NGOs identified three major problems with the Working Group proposal. The first was that the Working Group proposed, to limit the Panel’s role in the first phase of the process to consideration of the issue of eligibility and to preclude investigation of any other factual issues at this stage. However, at the same time it proposed to allow the Bank’s Management to submit a plan showing what it would do to bring itself into compliance with the Bank’s operating policies and procedures with its response to the Request for an Investigation. The net effect of this proposal would have been to allow the Management to provide the Board with its view of the facts and the solution to the problems it was alleged to have caused before the Board had received a report from the Panel based on an independent investigation of the facts of the case. In other words, the Working Group seemed to be endorsing the management’s “informal” practice of submitting an action plan to the Board before it had reviewed the Panel’s recommendation. From the NGO perspective, this seemed to be formalizing precisely that management practice which the NGOs saw as a major cause of the problems with the Panel process.

The second problem was that the Working Group proposed that the Board should accept the Panel’s recommendation regarding the Request without discussion except with respect to “technical criteria” relating to eligibility. However, the working group report did not define technical criteria, leaving this up to the discretion of each board member. This was troubling because the eligibility criteria contained in the Resolution establishing the Panel contains some obviously “non-technical” criteria.7 For example, it requires requesters to show that the “rights or interests” of the requesters “have been or are likely

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7. Resolution, supra note 1.
to be directly affected by the acts or the omissions of the Bank." This is clearly a factual issue that goes to the heart of the merits of the Request. Consequently, the NGOs were concerned that the absence of a definition of "technical criteria" opened a huge loophole which any Executive Director who was opposed to an investigation would exploit, or through which the management could lead the Board to reject an investigation.

The third problem was that the report sought to set a standard for determining harm that compared the current situation of the requesters to what it would have been if there had been no project as opposed to what it would have been if there had been full compliance with all the Bank's operating rules and procedures. This would make it more difficult for the Requesters to show harm. It also seemed to reduce the burden on the management to comply with all the applicable operating rules and procedures.

There were other problems with the report. These related to the flexibility of the deadlines for the Panel to submit its recommendation to the Board and limits on the Panel contacts with the media during a Panel process.

B. The NGO Campaign Against the Working Group Report

The Washington-based NGOs, knowing that the Board had scheduled a meeting for late January 1999 to discuss the Working Group report, reacted swiftly to the report. Acting through the United States Treasury and the United States Executive Director at the Bank, they demanded that the Board publicly release the report and asked for consultations with the Board to discuss the report. Faced with the fact that the report had been leaked and had engendered such a strong response, the Board decided to delay its scheduled January meeting. This was done so that the Working Group could meet informally with an invited group of NGO representatives and one academic to discuss the report that the NGOs supposedly had not seen. This meeting was unprecedented in that it was the first time that a committee of the Board had discussed its report with outsiders before it formally presented the report to the whole Board.

As a result of this meeting, the Board decided to publicly release the Working Group report, and call for public comments on the Report. It also scheduled a Board meeting for March 16, 1999. In response to these developments, the NGOs and the one academic who had attended the meeting, began distributing information about the report and encouraging people to submit comments to the Bank. There were also a number of unfavorable press reports. In addition, the NGOs and the one academic began lobbying the Executive Directors. In the event, the Bank received twenty-two comments.

8. Id.
9. The author was the one academic participating in this meeting.
10. During this time, the author met personally with almost all the Executive Directors representing
from United States, Mexican and Brazilian NGOs, and from a number of private individuals. These comments were from all sides of the issue. In addition, members of the United States Congress sent a letter to the President of Bank opposing the Working Group's proposal.

As a result of these efforts, and concerned about the impression that the Board was trying to undermine the Panel, the Working Group took an unprecedented step. It once again delayed the meeting of the Board, scheduled for March 16, 1999, and invited representatives of civil society, including a number of groups that had submitted Requests for Inspection, to attend, at Bank expense, an informal meeting with the Board of Directors. The purpose of the meeting, which was held on March 24, 1999, was to discuss the Working Group Report. This meeting was the first time that the Board had agreed to meet to discuss a policy matter with NGOs and other representatives of civil society.

The meeting was attended by all the Executive Directors or a representative from their offices. It was co-chaired by the Dean of the Board, the Russian Executive Director, and a representative of the NGOs, Kay Treakle of the Bank Information Center. It was also attended by the members and staff of the Panel. The meeting was remarkably cordial. It was dominated by a frank discussion of the NGO concerns with the Report. The Board members discussed their need to balance different interests in their report and in the design of the Panel procedures. They also sought to assure the NGOs that their goal was not to undermine the Panel. In fact, a number of Directors made a point of expressing their support for the Panel. After the meeting, some NGOs submitted a second round of comments to the Board.

In April 1999, the Working Group completed the final version of their Report and presented it to the Board, which duly adopted it. This final version contained some significant modifications from the first version of the Report. The changes represented an important victory for the NGOs in that they addressed some of the NGOs key concerns. In addition, the Report adopted a number of the proposals that had been made in the comments that had been submitted to the Bank.

The effect of the Final Report is to reduce the first phase of the proceedings to a relatively simple determination of whether or not, on the face of the documents, the requester has stated an eligible claim. This should be clear on the basis of the documents submitted by the Requesters and should not require any detailed field investigation by the Panel. In cases where the Panel has made a positive recommendation for an investigation, the Board should adopt the

Part II countries.

11. The author was one of the individuals who submitted comments. A copy of the author's comments are available from the author. See Shihata, supra note 2, at 193-96, for a biased discussion of these public submissions.
recommendation without discussion, unless there are technical issues that can be raised.

Importantly, the Working Group defined the "technical criteria" that could trigger a Board discussion of the Panel's recommendation. The "technical criteria" are limited to such clearly verifiable facts as whether or not the affected party consists of two or more people; the request includes an assertion of serious violations by the Bank; the request asserts that the subject matter of the request has been brought to the attention of Bank management and management has failed to respond; and the matter is not precluded from being the subject of a Panel investigation because it relates to issues of procurement, a substantially disbursed loan, or the Panel has already investigated the complaint.

The second important change was that the final report eliminated any reference to the Bank Management submitting a compliance plan to the Board. It was replaced by the language of the Resolution, which requires management to provide the Panel with "evidence that it has complied or intends to comply with" the Bank's operating policies and procedures. The Panel then decides if the evidence submitted is adequate. The Management is now only allowed to submit an action plan together with its response to the Panel report on its investigation during the second phase of the proceedings. It is no longer allowed to submit an action plan during the first phase of the Panel proceeding.

Another notable change was that the final report insists on the strict observance of time deadlines by all parties. The Working Group also stipulated that the Panel needs to keep a low profile when conducting its work and should limit its contacts with the press. Finally, the Board decided that the Bank must engage in more effective outreach to educate the public about the Panel and should release information on the Panel proceedings in the language of the requesters.

It is important to note that the Board retained the original Working Group's recommendation on the standard for determination of harm.

III. LESSONS FROM THE SECOND REVIEW

There are four key lessons that can be learned from this case study. The first is the value to international organizations of having clear rulemaking procedures that allow for public comment before the rule is actually finalized. While the Board did not originally choose to follow this procedure in regard to the Working Group report, the Bank Management seems to have adopted an informal rule making procedure in other cases. This informal procedure is that the proposed rule or policy is published on the World Bank website and public

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12. This definition was similar to the one contained in the comments the author submitted to the Bank. A copy of these comments is available from the author.
comments are invited. The final rule or policy is only decided after the end of this comment period.

The Bank has followed this rule in regard to some particularly contentious social and environmental policies, for example its policy on indigenous people. Interestingly, some other international organizations have followed the Bank's example. The International Finance Corporation adopted this approach in developing its social and environmental policies. The International Monetary Fund, albeit under some public pressure, utilized a similar procedure in developing the guidelines for its newly established independent Evaluation Office.

The problem with this informal approach to rulemaking is precisely that it is informal and can be used on an ad hoc basis. Thus, the Working Group was not required to follow this procedure and only did so under the threat of NGO protests. The use of outside pressure to force the Bank to follow its informal procedures suggests that the Bank would be well-served by formalizing the procedure. It would add an element of predictability and transparency to its rulemaking that would have a positive impact on its governance.

The second lesson is that NGOs, particularly Washington-based NGOs and their transnational allies, have sufficient influence that they are coming to play a growing role in policymaking in the Bank. While their role is still limited to specific issues, it is clear from the case of the second review of the Inspection Panel that they are gaining influence and the ability to play a role in policymaking in regard to those issues of most interest to them. Other examples of where they have played an influential policymaking role are in the design and creation of the new Compliance Advisor/Ombudsman in the International Finance Corporation; the development of the Bank's policy on indigenous people, and in the IMF Board's decision to establish a permanent independent Evaluation Office.

The third lesson is that even though the NGOs have gained some influence in policymaking in the Bank and the IMF, their influence is still dependent on their national governments' being willing to support them. This can be seen from the fact that the United States Treasury and United States Executive Director played an important role in persuading the Working Group and the Bank's Board to meet with the Washington based NGOs. They also helped persuade the Bank to post the first draft of the Working Group report on the Bank's website and invite comments on it. The United States was able to gain support from other Part I countries for these positions. It is not clear that the NGO campaign against the Working Group report would have been as successful without the support of these governments.

The final lesson is that this case study is one of a growing number of examples of increasing conflict between developing country governments and, primarily, Northern NGOs. It is intriguing that these two groups, both of which
are seeking to change the current international economic system, from the current one that is dominated by the G-7 countries, are in conflict with each other rather than tactical allies. In fact, in regard to issues like the Inspection Panel, the NGOs find their allies among the G-7 powers, who are the primary beneficiaries of the system they are trying to change, rather than among the developing countries.

There are two reasons that seem to explain the current tension between the developing country governments and the NGOs. The first is that they are the protagonists for two competing visions of development. The developing country governments advocate a traditional view of development. According to this view, the development process is primarily about economic growth and the economic aspects of development can be treated separately from the social, environmental, political and cultural aspects of life. It sees development projects (such as dams, roads, telecommunications systems, mining projects or building a new factory) as discrete, well defined events. The responsibility of the project sponsor and the project contractors, who supply the goods and services required by the project, can be analyzed only in economic, technical and financial terms. The non-economic, that is, social, environmental, political and cultural impacts of the project, are the prerogative of the sovereign in whose territory the project is being constructed. The project sponsor and contractors can treat these issues as externalities and its primary responsibility in this regard is to defer to the sovereign’s decision on these issues.

The NGOs, on the other hand, view development as an integrated process in which the economic, social, environmental, political, cultural, and technical dimensions of development projects and policies are all so intertwined that they must be considered together as part of one complex holistic process. According to this view of development, development projects should be seen as episodes of social, economic, environmental, cultural and political transformation that form part of an ongoing process of change. In this process, all actors must account for all the impacts of their own actions. This suggests that this view involves a reduction of the authority of the sovereign who, in reality, is only one out of many actors in the development process. Since each actor is responsible for all the consequences of their actions, it may not be prudent for the other actors to defer to the views of the sovereign in regard to dealing with the impacts of a particular project.

The second reason is that it is relatively cheap and easy for the governments of the G-7 countries to support the NGOs in their efforts to reform the Bank. The work of the Bank has no direct impact on the citizens of the G-7

countries and therefore is unlikely to influence the outcome of any elections in the G-7 countries. Furthermore, these governments can show that they are doing something to deal with the difficult social and environmental issues that affect all societies without actually having to engage in a full debate about the domestic implications of these issues. This means, in effect, that the G-7 countries are able to exercise power without responsibility in relation to the Bank and the IMF.

IV. CONCLUSION

The campaign around the second review of the Inspection Panel was an important victory for the NGOs. They were able to block proposed changes in the Panel proceedings that would have substantially undermined the legitimacy and efficacy of the Panel. In addition, they were able to get the Bank’s Board of Directors to agree to unprecedented consultations with them. They were also given some role in the rulemaking process relating to the Panel. Interestingly, this is not an isolated episode of NGOs playing a policymaking role in the international financial institutions. They have, on occasion, played a similar role in the International Finance Corporation and the International Monetary Fund.

This case study, however, also serves to highlight that, to some extent, the influence of the NGOs is dependent on the inordinate power that the G-7 countries have in these institutions. In addition, it indicates that the tension that exists between the NGOs and the developing countries is attributable to their very different views of development and to the existing power relations in the international financial institutions.
ECONOMIC AND SOCIAL ACTORS IN THE WORLD TRADE ORGANIZATION

Steve Charnovitz

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The World Trade Organization (WTO) is an international organization composed of Members that are states or customs territories.1 Like every international organization, the WTO connects in some ways to the individuals, which inhabit the states. The main impact of the WTO on the individual springs from the substantive disciplines of the trading system. For example, eliminating quotas can change the structure of production and employment within a country. But the WTO also has an important connection to individuals through its procedural disciplines applying to Members, and through other means. This article looks at the broadening rights and opportunities for natural and corporate persons. I will survey the key issues and present some policy recommendations. The connections between the WTO and private actors can be divided into two types: those with economic actors and those with social actors. Economic actors pursue their self-interest. Such actors include exporters, importers, producers, merchants, and workers.2 They may be individuals, companies, corporations, trade associations, or labor unions. Social actors pursue their visions of the public interest. These actors are multifarious. A typical actor is the non-governmental organization (NGO), but social actors can be religious leaders, academics, and scientists. Business associations and labor unions can also be social actors, whether or not one counts them as an NGO. A social actor need not be a group; an individual can be a social actor.


2. Governments can also be economic actors - for example, state trading entities.
Admittedly, this typology is fuzzy. The pursuit of self-interest cannot be disentangled from the pursuit of public interest. Social actors can act with economic motives and economic actors can act with social motives.

Nonetheless, the distinction is a useful one. When a person lodges a complaint about the way an agency deals with him, he is performing a different function than when he offers a prescription for how a law should be changed. In my view, the social actor is distinguished from the economic actor by the nature of the activism rather than the identity of the actor. Thus, a nonprofit business association can act in both ways. It can act narrowly as an economic actor and also broadly as a social actor.

My presentation has three parts. Part I looks at the interaction between the WTO and economic actors. A much shorter Part II looks at the interaction between the WTO and social actors. Part III analyzes both relationships briefly and presents a few recommendations for new WTO policies.

I. THE WTO AND ECONOMIC ACTORS

The WTO agreements are a code of obligations and rights for member governments. None of these obligations apply directly to individual actors. With one exception, no rights exist for economic actors within the WTO. Yet as we will see, the rights and obligations apply to economic actors indirectly.

Many economic actors do very well by the WTO. The biggest gain from the Uruguay Round of trade negotiations (1986-94) came in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement requires each member government to award private rights to individual "right holders" from other countries. TRIPS specifies a broad range of such rights embracing copyrights, trademarks, geographical indications, and patents. These are substantive rights that are forcing changes in every country's law. Another big gain for economic actors emerged in the General Agreement on Trade in Services (GATS). The GATS requires governments to grant non-


4. Agreement on Trade Related Aspects of Intellectual Property Rights, art. 1.3, reprinted in World Trade Organization, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Cambridge University Press, 1999), available at http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter TRIPS Agreement]. See also id. art. 8.2. The drafters anticipated that these rights would also be granted to nationals because it would be politically difficult for a government to give greater rights to aliens than to citizens.
discriminatory treatment to "service suppliers" of other WTO member countries.\(^5\)

The innovator and service provider do not acquire these substantive rights directly from the WTO, but rather from governments via the implementation of their WTO obligations. Thus, if the promise is not fulfilled, an economic actor does not have a cause of action at the WTO. Its only recourse would be to petition the government denying the right, or lobby its own government for diplomatic protection.\(^6\)

Some WTO agreements transmit obligations indirectly to economic actors. For example, the Sanitary and Phytosanitary (SPS) Agreement requires governments to "take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories" comply with the SPS Agreement.\(^7\) The Agreement on Technical Barriers to Trade (TBT) also conveys indirect obligations. It requires governments to take such reasonable measures as may be available to them to ensure that non-governmental bodies comply with certain TBT rules.\(^8\) In addition, the TBT Agreement sets up a Code of Good Practice for the Preparation, Adoption, and Application of Standards.\(^9\) Governments are directed to "take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies . . . accept and comply with this Code of Good Practice."\(^10\)

A. Enhancing Domestic Rights

To assist economic actors in gaining the benefits of the WTO Agreement, governments established numerous procedural and administrative requirements

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5. General Agreement on Trade in Services, General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, Annex IB, art. II:1 [hereinafter GATS Agreement].


8. Agreement on Technical Barriers to Trade, art. 3.1, reprintedin World Trade Organization, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (Cambridge University Press, 1999), available at http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter TBT Agreement]. See also id., art. 8.1 & Annex 1, ¶ 8. These non-governmental bodies might also be viewed as social actors.


10. Id. at art. 4. See also id. at art. 8; id. at art. 14.4 (discussing procedures for conformity assessment by non-governmental bodies and dispute settlement).
to be met within member countries. These rules are sometimes referred to as "transparency," but they are broader than that term suggests. They are due process obligations giving an economic actor the right to submit comments to agencies and to appeal rulings.

The idea of using a trade treaty to mandate procedural economic rights did not originate in the Uruguay Round.\(^{11}\) It was always part of the General Agreement on Tariffs and Trade (GATT), written in 1947. For example, GATT Article X:3(b) requires each party to maintain "judicial, arbitral or administrative tribunals or procedures for the purpose, \textit{inter alia}, of the prompt review and correction of administrative action relating to customs matters," and further requires such tribunals to be independent of the administering agency.\(^{12}\) Another provision in GATT Article X calls for the prompt publication of trade regulations in order to enable both governments and "traders" to become acquainted with them.\(^{13}\)

Recently, GATT Article X was the subject of a landmark WTO panel decision in the Argentina Bovine Hides case.\(^{14}\) The panel found that Argentina was violating GATT Article X:3(a), which requires governments to administer trade regulations in a "uniform, impartial, and reasonable manner . . . ."\(^{15}\) At issue was a regulation that permitted two domestic leather and tanning trade associations to observe Customs agency inspections wherein products are classified for an export tax assessment.\(^{16}\) The plaintiff European Communities (EC) called this regulation a violation of GATT Article X because the presence of the trade associations inhibited the export of raw hides.\(^{17}\) One problem was that the export procedures gave downstream slaughterhouses access to confidential business information. The WTO panel was called upon to interpret GATT Article X provisions which, surprisingly, had not received much attention during the previous five decades.\(^{18}\) Noting that Article X uses the

\(^{11}\) The principle goes back at least as early as 1923 with the International Convention relating to the Simplification of Customs Formalities, Nov. 3, 1923, 30 L.N.T.S. 373. Article 4 of the Convention directs parties to publish customs regulations in such a manner as to enable "persons concerned" to become acquainted with them and to avoid the prejudice which might result from the application of customs formalities of which they are ignorant. \textit{Id.} Article 5 directs parties to enable "traders" to procure official information in regard to customs tariffs. \textit{Id.}

\(^{12}\) General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194, art. X:3(b) [hereinafter GATT]. The GATT is now incorporated and updated in the WTO Agreement, Annex IA.

\(^{13}\) \textit{Id.} at art. X:1.


\(^{15}\) \textit{Id.} ¶¶ 11.101, 12.2.

\(^{16}\) \textit{Id.} ¶¶ 2.30-2.31, 2.39.

\(^{17}\) \textit{Id.} ¶¶ 11.22, 11.36, 11.87, 11.89, 11.95.

\(^{18}\) World Trade Organization ed., 1995). The issue of GATT Article X arose in a few WTO cases, but no violations were found. In the United States Cotton
terms "traders" and "importer," the panel held that the Article X discipline requires more than treating all governments the same.\(^1\) After considering what information the trade associations were gaining access to, the panel held that Argentina's regulation was not being administered in an impartial and reasonable manner.\(^2\) The implication of the holding is that Argentina is being unreasonable to its exporters, who may suffer injury from the presence (during inspections) of private actors with competitive economic interests.\(^2\) Although the panel does not vindicate the due process right of the exporter directly, its holding for the EC is centered on a finding that Argentina is disadvantaging its domestic economic actors.

The advance in jurisprudence in this case is subtle, and so let me clarify it. Every WTO dispute has private actors lurking behind it.\(^2\) Nevertheless, the typical dispute is couched in state-centric terms—that is, the claim is that one government is failing to fulfill the WTO obligations it owes to another. Argentina Bovine Hides can be viewed in that normal way too. Yet the panel could only reach its legal conclusion by finding that the Government of Argentina was being unreasonable to someone, and in this case, it was to its exporters. In most WTO disputes in which a victim appears in the story, that victim resides in the plaintiff country. This case is different because the EC exercises its GATT cause of action against Argentina for, in effect, victimizing a domestic economic actor in Argentina.

In requiring parties to accord limited procedural rights to economic actors, the original GATT laid the foundation for the broader rights now championed in WTO agreements. Like the GATT, the WTO does not accord rights directly to individuals, but rather mandates that member governments do so. Although

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21. \textit{Id.} ¶ 11.93, 11.98.

a few commentators have pointed to this important legal development—most notably the perspicacious Ernst-Ulrich Petersmann—this dimension of WTO law has often been left to the specialists for each trade agreement.23

In at least three WTO agreements, the guarantee of individual economic rights is central. Consider the agreements on antidumping, subsidies, and intellectual property. The Antidumping Agreement requires governments: (1) to initiate antidumping investigations upon an application by (and on behalf of) a domestic industry; (2) to give all interested parties notice and an ample opportunity to present evidence and to defend their interests; (3) to give public notice upon initiating an investigation; (4) to provide judicial review of antidumping decisions; and (5) to give interested parties the right to seek review of the continued need for an antidumping duty, and to terminate the duty if no longer needed.24 The Agreement on Subsidies and Countervailing Measures (SCM) contains analogous provisions regarding countervailing duties.25 Part III of the TRIPS Agreement assigns to governments numerous procedural obligations toward the holder of private rights.26 For example, governments must enable an individual right holder to institute administrative or judicial proceedings to block the importation of a good lacking an authentic trademark or copyright.27 In effect, TRIPS defines illicit trade and commits governments to ban it at the behest of an economic actor.

The attention to economic actors is less central in other WTO agreements, but still very important. Consider the agreements on services (GATS), safeguards, customs valuation, rules of origin, and TBT. The GATS requires governments to maintain "judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative


26. TRIPS Agreement, supra note 4, at arts. 41-62.

27. Id. at art. 51.
decisions affecting trade in services." 28 The GATS also requires governments to work in cooperation with relevant intergovernmental and non-governmental organizations towards the adoption of common international standards for qualifications of service providers. 29 The Safeguards Agreement requires governments, when commencing a safeguard investigation, to give public notice and to hold hearings in which importers, exporters and other interested parties can provide evidence and respond to the presentations of other parties. 30 The Customs Valuation Agreement requires governments to establish in law the right of the importer to appeal a determination of customs value. 31 An appeal must lie to a judicial authority and be without penalty. The Agreement on Rules of Origin provides that an exporter or importer may ask a government for a determination of the origin of a good. 32 This is to be provided as soon as possible but no later than 150 days. The TBT Code of Good Practice calls for a sixty-day comment period on new standards by "interested parties." 33 The standardizing body is directed to "take into account" the comments, and to reply if requested. 34

In a lecture to the American Society of International Law in 2000, Anne-Marie Slaughter presented a "liberal theory of international law" in which she contended that the "primary function of international law is not to create international institutions to perform functions that individual states cannot perform by themselves, but rather to influence and improve the functioning of domestic institutions." 35 Professor Slaughter does not point to the WTO as an example of such a function, but it would seem to fit her liberal theory. By installing new due process requirements, the WTO enhances the domestic rule of law. Governments become more accountable to domestic and foreign economic actors.

28. GATS Agreement, supra note 5, at art. VI:2(a).
29. Id. at art. VII:5.
33. TBT Code of Good practice, supra note 9, ¶ L.
34. Id. ¶ N.
B. Enforcing WTO Rules Domestically

The WTO sets rules for governments, but does not require governments to allow private actors to enforce WTO obligations in domestic courts. To my knowledge, no government does so. Professor Petersmann has been a tireless advocate of strengthening trade rules by allowing adversely affected citizens to invoke and enforce GATT/WTO guarantees in domestic courts. Meinhard Hilf is another scholar who promotes such a reform. He points out that "domestic courts would offer the best guarantee of protection of interests and rights of individual operators, thus making the entire GATT system more effective." In July 2000, the International Law Association Committee on International Trade Law recommended that WTO Members:

- strengthen the legal and judicial remedies of their citizens and residents (natural and legal) if the latter are adversely affected by violations of precise and unconditional WTO guarantees of freedom and non-discrimination, especially where such violation of WTO rules has been ascertained in a legally binding manner by rulings of the [WTO Dispute Settlement Body] DSB.

C. Enforcing WTO Rules at the WTO

Another way to strengthen the rule of WTO law would be to allow economic actors to invoke WTO dispute settlement on their own. Several commentators have advocated this approach. At present few, if any, WTO Members would feel confident enough about their record of implementation to subject themselves to this new source of criticism.

36. Petersmann, supra note 23, at 120.
The closest the WTO gets to private invocation is the Agreement on Preshipment Inspection (PSI), which is the exception referred to at the beginning of Part I. Preshipment inspection verifies the quality, quantity, price, and customs classification of goods. Some governments mandate that goods be inspected before shipment. The Agreement on Preshipment Inspection obligates those governments to require the inspection entity to make available a grievance procedure for exporters.\(^{41}\) Then, two working days after such a grievance is lodged, either the exporter or the inspector may refer the dispute for review by an "Independent Entity."\(^{42}\) The WTO established the Independent Entity in 1995, in conjunction with the International Federation of Inspection Agencies and the International Chamber of Commerce.\(^{43}\) If such referrals occur, the Independent Entity will set up an arbitral panel whose decisions are binding on the exporter and inspector.\(^{44}\) The role of the panel is to decide whether the parties have complied with the PSI Agreement.\(^{45}\)

This review procedure gives an economic actor—the exporter—a procedural right of action under WTO rules. The exporter's claim would be that the agent of the importing government (i.e., the preshipment inspector) is violating the PSI Agreement. The WTO member government in the country of intended importation is one step removed from being a party to the dispute.

The arbitrations under the Independent Entity are separate from the arbitrations (or adjudications) carried out through the WTO Dispute Settlement Body (DSB). The DSB considers only disputes between WTO member governments. Nevertheless, some WTO panels have looked through the governmental veil to see the economic actors who are the real stakeholders in the dispute.

The leading case is United States Section 301. The panel held that a controversial United States trade law did not violate WTO rules.\(^{46}\) In reaching that decision in 1999, the panel explained that:

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\(^{41}\) Agreement on Preshipment Inspection, Agreement Establishing the World Trade Organization, General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, Annex 1A, art. 2 [hereinafter PSI Agreement].

\(^{42}\) Id. at art. 4.

\(^{43}\) Press Release, WTO, Operation of the Independent Entity Established under Article 4 of the Agreement on Preshipment Inspection (Feb. 9, 1996) (on file with author). The PSI Agreement states that the Independent Entity will be constituted jointly by an organization representing preshipment inspection entities and an organization representing exporters. The IFIA and the ICC were quickly identified as those organizations, but they were not willing to constitute the new Entity on their own without exemption from legal liability. Therefore, the Independent Entity was set up by the WTO.

\(^{44}\) PSI Agreement, supra note 41, at art. 4(h).

\(^{45}\) Id. at art. 4(f).

[T]he GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals. However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish . . . . The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators.47

In line with the panel’s reasoning, one can view economic actors as the beneficiary of the WTO contract. The trading system will build on this insight in the future, as economic operators push governments to comply with their WTO obligations.

The lack of formal procedures for economic actors to participate in WTO dispute settlement has led to pressures to permit amicus curiae briefs. At the compliance stage of the Australia Salmon dispute, the “Article 21.5” panel accepted a brief from the Concerned Fishermen and Processors in South Australia, but did not discuss the brief in finding continuing violations by Australia.48 (The decision went against the interests of the Concerned Fishermen.) In the United States Hot-Rolled Lead dispute, the Appellate Body accepted briefs from two trade associations, but then declared that it did not find it necessary to take their briefs into account.49 As of December 2000, the state of WTO law is that non-governmental persons do not have the right to submit an amicus curiae brief to a panel, although they may try to do so.

The lack of a right to intervene as an interested third party or to submit an amicus brief was most glaringly absent in the Australia Leather case. In that WTO dispute, the United States government was successful in characterizing an Australian government grant to the leather producer Howe and Company as

47. Id. ¶ 7.72, 7.73, 7.76.
48. Australia - Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada, Report of the Panel, Feb. 18, 2000, WT/DS18/RW, ¶ 7.8. DSU Article 21.5 permits the plaintiff government to ask that a panel be convened to review whether the defendant government has complied with the recommendations of the WTO Dispute Settlement Body.
49. United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, May 10, 2000, WT/DS138/AB/R, ¶ 42. The Appellate Body held that it had the legal authority to accept the briefs. It did not actually say that it had “accepted” the briefs, but implied that it had in declaring that it did not find it necessary to take the briefs into account.
a prohibited export subsidy, in violation of the SCM Agreement. The panel did not give Howe any opportunity to argue that the grant was not an export subsidy. That incapacity is not unusual. The WTO has adjudicated several export subsidy cases all of which have stakeholders who are not heard from in the proceedings. What was unusual, and troubling, in the Leather case was Howe’s absence during the compliance review proceedings. The “Article 21.5” panel ruled that Australia had failed to comply because it had not required Howe to repay the subsidy to the government. This was the first time any GATT or WTO panel issued a judgment that would require a private actor to pay money to a government. Given the important precedent being set in this case, which might be characterized as a WTO-required expropriation, it was unfortunate that the panel did not offer Howe a right to reply. The DSU gives every panel the authority to seek information from any individual or body that the panel deems appropriate.

In summary, notwithstanding its state-centric nature, the WTO interacts with private economic actors in significant ways. In TRIPS and GATS, governments are mandated to treat economic actors according to substantive rules. In several WTO agreements, governments are mandated to accord private actors various procedural rights. In the PSI Agreement, the exporter can avail itself of arbitration at the WTO. All of these advances are important. Yet in many other areas, economic actors are still excluded from WTO law and implementation.

II. THE WTO AND SOCIAL ACTORS

The status of social actors at the WTO is better in some ways than the status economic actors enjoy, but worse in most others. It is better because the WTO Agreement permits direct involvement by NGOs in WTO affairs. It is worse in that social actors did not achieve the gains that economic actors did in the Uruguay Round.

Constitutionally, the WTO can be open to social actors. The WTO Agreement (Article V: 2) says that “The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the
WTO."\(^{54}\) This provision was implemented in 1996 by the General Council, but its Guidelines provide for only very shallow participation by NGOs.\(^{55}\) The main consultation so far has been a series of symposia organized by the WTO Secretariat at which selected NGOs were invited to speak. NGOs are also able to seek accreditation to attend WTO Ministerial Conferences as observers. About 915 NGOs did so and attended the Seattle Ministerial in 1999.

The WTO has several councils, committees, and bodies, but social actors are not allowed to participate in them. Thus, the TRIPS Council does not consult medical NGOs concerned about drug patenting; the Committee on Agriculture does not consult farm NGOs concerned about food security; and the Textiles Monitoring Body does not consult development NGOs concerned about continued protectionism in textiles. In the DSB, the opportunities for social actors as a friend of the court are about the same as for private actors—that is, very limited to nil. Even the WTO Trade Policy Review Mechanism, which appraises government trade policies, does not solicit input from social actors.

Social actors do have one advantage over private actors however. Most private actors cannot apply for accreditation to attend WTO Ministerial Conferences. Thus, exporters, importers, and service suppliers cannot apply, although associations of these private actors can apply (and do).

Although most of the WTO provisions that mandate procedural rights at the national level pertain only to economic actors, there are two instances where such rights pertain to social actors. These are in the Antidumping and SCM agreements. The Antidumping Agreement directs governments to give interested parties the right to participate in domestic antidumping proceedings, and states that when the target product is commonly sold at the retail level, "representative consumer organizations" shall have an opportunity to provide information relevant to the ascertainment of dumping, injury, and causality.\(^{56}\) SCM has a similar provision with respect to subsidization, injury, and causality.\(^{57}\) While it is possible to characterize consumer NGOs as economic actors, they are better conceived as social actors because the interest of the consumer is a general interest, not a special interest.

III. ANALYSIS AND RECOMMENDATIONS

Even with its fuzziness, the distinction between economic and social actors is helpful in showing how WTO law weaves in non-state actors. The economic actors got new rights as market participants. The social actors got a special door

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54. WTO Agreement, supra note 1, at art. V.2.
55. Guidelines for Arrangements on Relations with Non-Governmental Organizations, July 18, 1996, WT/L/162 [hereinafter NGO Guidelines].
56. Antidumping Agreement, supra note 24, at art. 6.12.
57. SCM Agreement, supra note 25, at art. 12.10.
to the WTO, but the door is almost always closed. So one might say that the WTO is more solicitous of *homo economicus* than *homo politicus*.

But that is too simplistic an explanation. The economic actors obtained more from the Uruguay Round because they were better organized and asked for more. In asking for more responsive administrative procedures at the national level, the economic actors aligned themselves with an existing norm of the GATT system (i.e., Article X). Social actors could follow this same track in the next trade round. Strengthening due process for social actors could be justified as a WTO goal because regulatory procedures that provide for public participation may be more stable and less susceptible to special interest influence. Consider the following example: The SPS Agreement calls for the harmonization of standards and the acceptance of foreign standards as equivalent in certain circumstances. These goals are more likely to be achieved when each government has a fair, inclusive standard-setting procedure that allows economic and social actors to participate. Presently, the transparency provisions in the SPS Agreement apply only to state actors.

When one looks at the international level, economic actors are no better positioned for influencing WTO results than are social actors. Both lack formal opportunities to participate. With respect to the WTO's legislative and executive functions, the case for participation by social actors seems stronger than for economic actors. That's because as an international agency, the WTO should be more open to hearing assertions of public interest than individual interest. With respect to the WTO's judicial functions, the prospect of giving private groups a right of action seems remote. If that were to occur, economic and social actors should have an equal right to participate after qualifying for standing. As *amici*, economic and social actors should have similar access.

NGO participation is being debated at the WTO, but most governments resist opening the doors. Such exclusivity is justified on the grounds that government actors are the only legitimate participants in the WTO. Governments are elected by "The People," while NGOs are merely selected by their members. The fact that the WTO does not require its Member Governments to be democratic (and many are not) is considered too undiplomatic to mention in WTO debate.

The claim that an individual may lack legitimacy to speak is an authoritarian idea. The right of an individual to speak for oneself, to form associations, and to petition government is a natural right that undergirds democracy. To suggest that when governments meet together to bargain, social

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58. See SPS Agreement, *supra* note 7, at arts. 3.1, 4.1.
59. See *id.* at Annex B, art. 7 (Transparency of Sanitary and Phytosanitary Regulations).
actors consequently lose their voice is both illogical and anti-democratic. The creation of an international organization cannot deprive individuals of their voice to the governments that run the organization. Indeed, the personality of an international organization includes being open to some extent to public input.

In 1945, the drafters of the United Nations Charter recognized this truism when they wrote Article 71 which provides that the Economic and Social Council "may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence." Some commentators view Article 71 as enshrining a new principle of law. But in my view, Article 71 was merely reflective of customary international law—namely, that in establishing international organizations with legislative or executive functions, governments have an obligation to provide a channel for NGOs.

The continued influence of state-centrism among the delegates to the WTO is understandable. These delegates work for governments. Furthermore, they may prefer not having to compete intellectually with non-government actors. What is surprising, though, is how state-centrism continues to distort the thinking of academics and even social actors. Let me give two recent examples. In September 2000, a group of academics sent a letter to 535 college presidents criticizing the "Anti-Sweatshop" campaigns on college campuses. The letter states: "Little attention has been given to whether the views of the Anti-Sweatshop campaign are representative of the views of governments, non-government organizations and workers in the poor countries." But why should it matter whether the anti-sweatshop campaigners are representing the views of developing country governments who are tolerating, if not promoting, the sweatshops? (The professors' point about foreign NGOs and workers has merit.) In December 2000, the United States labor federation (the AFL-CIO) wrote the Office of the United States Trade Representative to offer views on the ongoing United States negotiations with Singapore for a free trade agreement. The AFL-CIO opposed inclusion of an investor-to-state dispute resolution system, explaining that "Investors ought not to be able to bypass their own governments to determine when a dispute merits international arbitration...." To hear such a constipated view from the AFL-CIO is particularly startling given the longtime role of the American labor movement in championing

62. The other institutions considered in this panel session, the World Bank and the International Monetary Fund, are not really contrary practice because when they were set up in 1944, they were conceived as financial institutions. Today, both the Bank and the Fund are more open to NGO input than is the WTO.
63. Nancy Dunne, Professors take on campus protestors, FIN. TIMES, Oct. 4, 2000, at 12.
opportunities for NGOs to bypass their governments in international organizations.

Change will come to the WTO. If I may offer a prediction, I think that social and economic actors will gain significant participatory rights at the WTO within the next decade. Both NGOs and the private sector are far better positioned to influence the trading system in 2000 than they were in 1990. Furthermore, the trends inducing that change will continue. The most important trends are the increase in international transactions and the widening of WTO law. Each new WTO agreement brings new private actors into the trading system, all asking the same initial questions as to how they can participate. Eventually, the resistance of the WTO to greater cooperation and consultation with NGOs will melt away.

In closing, let me offer three suggestions for what can be done to improve the interface between the WTO and the private and non-profit sectors. First, we ought to begin thinking about an Optional Protocol for the WTO wherein parties would agree to WTO jurisdiction for disputes lodged by private actors. A minimum number of governments would be required to ratify the accord. One might wonder why any government would ratify. The answer is the same as for analogous protocols in human rights treaties. Governments do so to demonstrate and lock in their commitment to international rules.

A second suggestion is that the WTO negotiate an Agreement on Public Participation in National Trade Policymaking. This idea follows from the statement in the WTO’s NGO Guidelines: “Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policymaking.”

In drafting such a Protocol, inspiration could be drawn from the 1976 Tripartite Consultation Convention (No. 144) of the International Labor Organization and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. One might also recall the recommendation by the GATT’s Leutwiler Group (in 1985) that governments consider setting up “advisory groups made

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65. The WTO Dispute Settlement Understanding permits using WTO dispute settlement for "plurilateral" agreements, which apply to parties inter se. DSU Agreement, supra note 3, at art. 2.1.


67. NGO Guidelines, supra note 55, ¶ 6.

up of influential and active representatives of the main stakeholders in international trade—business, finance, labour, and consumers."  

My final suggestion is that the WTO set out a place on its website to solicit comments from the public on pending decisions, declarations, and agreements. Eventually, there should be one website posting such notices for all international organizations—in other words, a global "Federal Register." So far, however, only a few international organizations regularly seek public comment, such as the World Bank and the North American Commission on Environmental Cooperation. That will surely change early in the 21st century.

69. GATT, TRADE POLICIES FOR A BETTER FUTURE 37 (1985). Today more stakeholders would be acknowledged.
In this brief essay, I want to link our panel’s focus on civil society—and related issues of inclusion and participation—with the broader conference theme of international law and organizations as we enter the 21st century. In short, what can a focus on inclusion and participation tell us about the World Trade Organization (WTO) as it enters the new millennium?

I believe that a focus on inclusion and participation suggests a three-part thesis about the WTO. First, the WTO is in a time of fundamental transition. Second, the strategies used to date to address this transition have been, at best, ineffectual, and at worst, counterproductive. Third, the transition issues reveal the limits of current WTO practices and strategies. Successful approaches to transition issues will require not only new political strategies, but also new understandings of the trade regime.

I can do no more than outline this thesis here. To do so, I will explore a few simple sounding questions: “who,” “what,” and “where.” “Who” is a question about constituents: who has a meaningful voice, and who is excluded from the trade system? “What” is a question about competence: what subject areas fall within the trade system? “Where” is a question about coherence: where does WTO law and doctrine fit within the larger international law universe?

Each of these questions implicates civil society, and issues of inclusion and participation. The “who” question focuses directly on Non-Governmental Organization (NGO) participation at the WTO. The “what” and “where” questions focus on issues that NGOs have pressed upon the WTO. As we will see, in each area, there are significant pressures for the WTO to be less closed or isolated, and more inclusive, open, or integrated. In each area there are moves towards these goals, but upon examination, it is not clear whether progress is real or illusory.
I then want to explore a final question: "How?" How are these transition issues related? How come they seem so intractable? How might they be solved?

I

The "who" question asks who has a meaningful voice in the WTO. Until recently, there was a short and simple answer to this question—the United States and the Europeans. But, after the Uruguay Round, increasing pressure from both inside and outside the WTO signaled that this was no longer an adequate answer.

Inside the WTO, developing countries raised concerns about the nature and quality of their participation. The procedural concern was that developing nations had been largely excluded from the most important Uruguay Round negotiations. The substantive concern was that the Uruguay Round Agreements favored developed nations at their expense. Developing nations saw an asymmetry between the very limited progress on developed nations' Uruguay Round commitments on textiles and apparel, and the increasing pressure on them to timely implement their Uruguay Round commitments. By 1999, this asymmetry made the Uruguay Round's "grand bargain" look more like a "bum deal."

Developing nations resolved not to be effectively excluded from the process again. In retrospect, the protracted debates over selection of a new WTO Director General signaled that developing nations were no longer willing to conduct business as usual. The procedural demands that developing nations raised at Seattle underscored how important this issue had become. There are also, of course, external pressures, from NGOs and other sectors of civil society. Here, the concern has less to do with the quality of participation than with near-total exclusion, and related concerns about WTO transparency.

In Seattle, these internal and external trends coalesced. In the streets, NGO theatrics captured public and media attention. In the suites, developed and developing nations were unable to reach agreement on either procedural or substantive issues. On the procedural front, developing nations rejected the United States proposals for working groups. On the substantive front, there was deep disagreement over the scope of a new round, including the possible inclusion of, for example, labor and environmental standards and reform of anti-dumping rules.

Since Seattle, much time has been spent on how to improve the quality of developing nations' participation. There have been numerous meetings, proposals, and reports. But many thoughtful observers question whether much progress has been made.
On the NGO front, there has been substantial activity and some important progress. However, this limited progress is often oversold. An example here is the ostensible opening of WTO dispute resolution to NGOs. In this regard, the most dramatic development was the Shrimp-Turtle Appellate Body (AB) report holding that Panels had legal authority to receive amicus briefs from NGOs. This is widely heralded as an important breakthrough in NGO participation at the WTO.

But it may be too soon to conclude that this doctrinal development should be celebrated. It is instructive to look at actual practice. Prior to the Shrimp-Turtle dispute, NGOs had submitted amicus briefs in two disputes. In each case, the panel simply refused to consider these submissions.

In Shrimp-Turtle, the panel followed this pattern and concluded that NGO briefs were inadmissible as a matter of WTO law. However, the panel then invited the parties to append NGO briefs to their own, which the United States did. While the AB explicitly rejected the panel’s legal determination, it expressly approved the panel’s decision to permit parties to append NGO briefs to their own and adopted a similar procedure itself. The AB then specifically asked the United States to state whether it “agree[d] with or adopt[ed]” the NGO arguments. It then “focused” solely on the NGO arguments that were already in the United States submission.

Since the AB report, amicus briefs have been submitted in a handful of disputes. In one case, a panel actually appeared to have relied on an amicus submission. This occurred, however, not in determining the merits of the dispute, but rather in a later compliance proceeding.

In every other case in which amicus briefs or other materials have been submitted, it appears that they have had little or no impact. For example, in the course of the European Community challenge to a portion of the United States Copyright Act, the United States Trade Representative (USTR) asked the American Society of Composers, Authors and Publishers (ASCAP) for information in response to a series of queries from the panel. A law firm representing ASCAP responded, by letter, to the USTR, and forwarded a copy of this letter to the panel. The panel stated that while “it did not reject outright the information contained in the letter,” it did not rely on the letter “for our reasoning or our conclusions.”

3. Award of Arbitrator, Australia - Measures Affecting Importation of Salmon, WT/DS18/9 (Feb. 23, 1999).
4. Report of Panel, United States-Section 110(5) of the US Copyright Act, WT/DS160/R, ¶ 6.8
In India's challenge to the European Union's imposition of antidumping duties on certain Indian bed linens, the panel received an unsolicited amicus brief from the Foreign Trade Association supporting India's arguments. The panel's entire discussion of this submission, found in a footnote, reads as follows: "We did not find it necessary to take the submission into account in reaching our decision in this dispute."\(^5\)

In the British Steel case, the United States asked the panel to open up the hearing to outside observers. This request was denied. The panel also refused to accept an amicus brief submitted by the American Iron and Steel Institute (AISI) on the grounds that it had not been timely filed.\(^6\) On appeal, amicus briefs were submitted by AISI and the Specialty Steel Association of America. The European Union, Mexico, and Brazil argued that the AB had no authority to accept these briefs; the United States argued that such authority existed. The AB stated:

> We are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision.\(^7\)

The most recent—and the most telling—developments on this front have come in the Asbestos Case. At the panel stage of this dispute, five NGOs submitted amicus briefs. The European Community incorporated by reference two of these briefs, which the panel considered. The other three NGO briefs were rejected, again with minimal discussion.\(^8\)

The European Community appealed the decision. When it became apparent that many NGOs wanted to submit briefs in this action, the AB issued a "communication" setting out a procedure whereby interested entities could file a petition for leave to file a written brief with the AB. In response, the WTO's General Council scheduled a special meeting to discuss this communication and the larger issue of NGO participation. At this meeting, a large majority of WTO

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members who spoke criticized the AB for issuing this communication. The Chair of the General Council stated that he would forward a note to the AB urging it to exercise "extreme caution" on this issue. The AB denied each of the seventeen applications for leave to file an amicus brief that had been filed in the case.

So, on the doctrinal front, there is an apparent advance—panels and the AB now clearly have legal authority to accept NGO submissions. But, paradoxically, the resulting practice is actually a step backwards for those who urge greater NGO involvement. In practice, NGO submissions are frequently rejected. In those few instances when they are even considered, they typically are considered only when adopted by a party. In these cases, NGOs do not participate as independent actors, but rather as "appendages" to the parties' submissions. In practice, they participate at the sufferance of the parties to the dispute. But, by effectively turning NGOs from independent actors into entities that simply echo government arguments, the panels eliminate the potential advantages of NGO participation.

Moreover, this process reinforces many of the conventional argument against NGO participation—that NGOs most appropriately participate at the domestic level, that states are free to adopt or reject NGO positions, and that NGOs should not have "two bites at the apple" by participating at the international level. While doctrinal developments deprive NGOs of a powerful rhetorical argument about the closed nature of WTO dispute resolution, actual practice effectively keeps NGOs excluded from WTO dispute resolution.9

In short, despite substantial activity, there is a real question whether meaningful progress has been made on the inclusion front. Do we, in practice, have only the illusion of inclusion?

II

Let me now turn from the "who" question to very briefly touch upon the "what" question. What issue areas are properly in the trade regime? What topics are—or should be—properly considered in other fora?

There is substantial debate over whether certain "social" issues, such as environment or labor, should be within the WTO. NGOs have, of course, played a key role in these debates. While a full discussion of this controversial topic is outside the scope of our focus on civil society, I suggest below why this debate—forcefully raised by civil society—is unlikely to reach closure anytime soon. For present purposes, however, the salient point is that NGOs have put

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9. This is particularly disturbing when one considers the access the other types of non-state actors have to WTO dispute resolution proceedings. See, e.g., Jeffrey L. Dunoff, The Misguided Debate Over NGO Participation at the WTO, 1 J. OF INT'L ECON. L. 433 (1998) (outlining the considerable roles that business entities play in WTO dispute resolution).
this issue on the table, and absent progress toward a consensus on this question, negotiations on a new WTO round are unlikely to make significant progress.

III

There is a third important transitional question, "where?" Where does WTO law fit into the broader international law universe? This is a question about coherence. Again, NGOs have been at the center of the debate, urging the WTO to account for non-trade law and values. Once again, there is apparent movement on this front, as recent WTO panels have been much more likely to invoke non-WTO law. The question, as above, is whether, in this context, appearances are deceiving.

Again, the Shrimp-Turtle dispute provides a good example. The AB reviewed relevant provisions of several international environmental instruments in interpreting General Agreements on Tariffs and Trade Article XX. This was unprecedented, and the environmental community and other NGOs have largely celebrated this move. Again, this appears to be a move from a relatively insulated legal regime toward a more open regime.

But the underlying question is whether the incorporation of non-WTO law will be a "selective" incorporation? For example, as long as the AB was invoking international environmental law in this dispute, why did it not examine whether complainants had any duties under international environmental law towards endangered sea turtles? Why did it not directly address whether the United States embargo was either authorized or required by international environmental law—even though this issue was squarely presented in an NGO amicus brief? So, the critical question here is whether panels will use all or only some non-WTO law. More pointedly, with future panels rely on non-WTO law where to do so does not interfere with the goal of market access and trade liberalization, but fail to do so where non-WTO law impedes these objectives?

So, in the "who," "what," and "where" issues there is tremendous pressure from civil society to be more inclusive, more open, and more integrated. In response, there has been much activity apparently designed to move towards this goal. But, in each case, progress may be more apparent than real. Again, the open question is whether all the activity represents real progress or merely the illusion of inclusion?

IV

The "who," "what," and "where" questions illustrate the nature and scope of the issues facing the WTO as it enters the new century. Now let's explore another question: "how?" How are these issues related? How come they seem so difficult? How might they be solved?
Let me suggest three ways these transition questions are related. First, each of the three questions are not only central to the WTO’s transition, but also raise fundamental questions about nature of the international legal order. Consider again the question of what issues belong in the trade system. On one level this is a question about the competence and limits of the WTO. But on a deeper level, this question is a profound challenge to the current conventional vision of public international law. We usually view international law as consisting of a series of substantive fields (e.g., trade, human rights, environment, etc.) that exist as independent and autonomous areas, each subject to its own practices, norms, and institutions.

But this way of organizing the field is historically contingent. Today trade is a hugely visible area of international law. However, in the 1960s, leading casebooks considered trade to be outside the mainstream of international law, and, in 1971, the French Society of International Law sponsored its famous debate on whether international economic law was part of international law or an autonomous discipline. All of this suggests that there is nothing necessary or natural in current doctrinal divisions. Elsewhere, I have argued that the “who” and “where” questions also raise foundational international law issues. So one way that the transitional issues are related is that they transcend the trade context and raise foundational questions about the international legal order.

There is a second way that the three questions are related. Each of them reveals and subverts a fundamental myth about the trade system. Given space constraints, I will again give just one example. Consider again the question of who participates in the WTO. In this context, many invoke the “fact” that the WTO is an intergovernmental body as a justification for not providing NGO access to WTO processes. It is surely true that, as a formal textual matter, the WTO is an intergovernmental body. But, again, it is helpful to shift our attention from doctrine to actual practice.

There can be little doubt that non-state actors have long played very significant—albeit informal and unofficial—roles in both the legislative and dispute resolution processes. Consider, for example, the role of the software and pharmaceutical industries in driving the intellectual property agenda in the Uruguay Round negotiations. Or, how firms like American Express and AIG shaped the negotiations over what would eventually become the General Agreement on Trade in Services.

Non-state actors also play significant roles in dispute resolution. Indeed, a number of WTO disputes—including the Kodak-Fuji dispute and the Reformulated Gas dispute—are only nominally between WTO parties, and can

11. Report of Panel, Japan - Measures Affecting Consumer Photographic Film and Paper,
be more fruitfully understood as components of complex international corporate battles.\footnote{12}

Close examination of the role of civil society reveals that the truism that the WTO is an intergovernmental body is formally accurate, but in practice largely a myth. The "what" and "where" questions likewise reveal myths about the trade system. The underlying question is whether these myths serve some purpose. Or, at this point, do they instead frustrate efforts to move ahead on the WTO transition issues?

Let me briefly outline a third answer to the question of how the "who," "what," and "where" questions are related. In a nutshell, what is at stake in these issues is fundamentally different from what is at stake in more traditional trade issues. Let me try quickly to explain what I mean here.

The conventional wisdom about trade disputes runs along the following lines: Nation A restricts trade in goods from nation B. If B prevails in WTO dispute resolution, A is supposed to remove the offending trade measure. While A "loses" the particular dispute, the conventional understanding is that A "wins" because removing the trade restriction increases welfare.

But for many of the most controversial of the current disputes, this conventional understanding of the "win-win" nature of disputes is inapposite. Consider disputes over intellectual property rights in the traditional knowledge of indigenous peoples; over trade in GMOs; over the "multifunctional" nature of agriculture; over trade in cultural products; or over the role of civil society at the WTO. Why are these disputes so highly charged, and why do they seem so intractable?

I wonder if it is because participants in these disputes do not understand them to be about maximizing welfare. Rather, they understand these disputes to be about the social and moral standing of competing communities, whether regional or racial, cultural or economic. Groups directly involved in these debates often understand their resolution as a signal about their political and social standing. The traditional consequentialist logic of trade law and doctrines is unlikely to adequately capture this important "expressive" dimension of these issues.\footnote{13}

Identifying the ways that these three questions—the "who," "what," and "where" questions—are related also shows how hard they are to solve. If they

12. For an extended discussion, see Dunoff, supra note 9.  
each reveal myths of the system; if they each reveal how our conventional consequentialist rhetoric is insufficient; if they all raise foundational international law questions; then the resolution of these issues will be exceedingly difficult. How should these issues be addressed?

Given space limitations, let me simply suggest here that the primary institutional mechanism used to date is inadequate. Who has decided whether WTO panels should use non-WTO law? The answer has come from dispute resolution panels. Who has decided whether NGOs should participate in dispute resolution processes? Again, the panels have been, de facto, the body to answer this question. This is problematic in several respects.

I’ll mention just one. Consider institutional roles and politics. When a domestic legislature confronts difficult issues like, for example, how to balance conflicting trade and environmental interests, it is perfectly appropriate for that body to declare that it has resolved a value conflict, and made policy, through majority vote. But the same is not true of WTO panels. They are not policy-making bodies. Instead, they are supposed to apply law to fact to decide according to principle, not politics. Indeed, WTO dispute resolution would be delegitimated if it were seen as a forum for the political resolution of value conflicts.

But this poses an unavoidable obstacle to successful panel resolution of questions like the “who,” “what,” and “where” questions. Why? Precisely because these transition issues are so contested. While numerous issues are contested, the transitional issues are today contested in a way that appears to take them outside of the legal domain, and squarely into the political domain. Now, paradoxically, it has been sustained and effective NGO advocacy that has made these issues so contested; but it is precisely this contestedness that would make it difficult for panels to address these issues in ways that seem consistent. But inconsistency in these areas would signal that politics—not law—is at play. And for institutional reasons, panels should rarely send that signal.

In other words, these transitional issues threaten to overwhelm WTO dispute resolution. While the WTO dispute resolution system is, of course, a tremendous achievement, the plea here is to be cognizant of its limitations. Where does all this leave us? Let me conclude with two thoughts about transitions.

First, in transitional times, procedure is substance. There are strong procedural elements to the “who,” “what,” and “where” questions. These are all a search for ways to surface the appropriate voices and values. In this sense, at least in the short term, it may be less important that the resolution of any of

14. For more on the ways that the new trade agenda threatens to overburden WTO dispute resolution, and what to do about this, see Jeffrey L. Dunoff, The Death of the Trade Regime, 10 EUR. J. INT’L L. 733 (1999).
the questions is "correct" in some substantive sense, than that the resolution ensure that all the relevant interests are identified and taken into account.

Finally, we should not be surprised by the ubiquity. The ancient Greek philosopher Heraclitus said that "one cannot step into the same river twice." There is a useful insight here about the constancy of change. We should not be surprised to see that the WTO is in transition. Like people, legal rules and institutions have life cycles. They are born because of a practical need. If well-designed, they flourish for a time. But changing conditions pose new challenges. When the tensions between a rule and social necessity finally become too intense, the rule dies. It is replaced by another rule that is destined to experience the same fate. So it may be that we will come to see that for the WTO—and the other international bodies we will discuss at this conference—to be in a time of transition is more a norm than an aberration, and more an opportunity than a crisis.
Reconstruction of countries emerging from conflict is at the heart of development. Since 1980, almost half of all low-income countries have experienced conflict, and nearly every country in Africa has either experienced major conflict, or borders on a country which has. Conflict has brought Yugoslavia into poverty, and in Bosnia and Herzegovina, postwar incomes were about one-fourth of 1990 incomes. Real per capita income in Lebanon in 1990 was estimated at one-third its 1975 level in dollar terms. Fifteen of the world's poorest countries have experienced significant periods of conflict since the 1980s.

What is post-conflict reconstruction? This is a process which supports the transition from conflict to peace in an affected country through rebuilding the socioeconomic framework of the society. Reconstruction does not refer only to reconstruction of physical infrastructure. What is needed is a reconstruction of the enabling conditions for a functioning peacetime society in the framework of governance and rule of law. The role of external agencies, including the World Bank (Bank) is not to implement this process but, rather, to support it.

Often, conflicts are linked to competition for scarce resources, and in this context development strategies can play a role in enhancing or reducing tensions. In the past five years the World Bank has made more than $400 million in grants from its surplus earnings to post-conflict governments and to the United Nations system. The World Bank is part of a Conflict Prevention and Post-Conflict Reconstruction Network, which consists of the United Nations, the International Monetary Fund (IMF), as well as bilateral donor agencies, humanitarian aid agencies, and foundations. This network met in
Ottawa in June 1999, and in New York last November, to exchange information, improve coordination, and strengthen partnerships. The Bank is involved in a collaborative effort with other members of the Conflict Prevention and Post-Conflict Reconstruction Network to provide a more coherent planning process that draws upon organizations' particular strengths.

Perhaps one of the greatest advantages the Bank can bring to post-conflict settings is its knowledge of comparable situations. Local stakeholders benefit from hearing how the special problems of transition worked, or did not work, in other countries that had similar problems. The Bank is generally not among the first humanitarian assistance organizations to begin programming in post-conflict countries. Therefore, Bank staff have the opportunity to survey what others are doing in order to selectively focus on sectors which are under-supported by other humanitarian assistance agencies.

Collaboration with the IMF on stabilization and other macroeconomic issues is also important. Early consultations between the United Nations agencies and the Bretton Woods institutions are important. For example, following the Dayton Peace Accords in Bosnia, donors agreed that Bank funds would be applied, along with other donor aid, to reinforce those cities that had shown ethnic tolerance. In Tajikistan, World Bank programs were targeted to areas specified in the peace accords, at the encouragement of stakeholders, including the government.

The Bank developed post-conflict experience in Sub-Saharan Africa, including Angola, Burundi, Liberia, and Rwanda. The Bank was also involved in two recent post-conflict situations, in the West Bank and Gaza, and in Bosnia and Herzegovina. In Bosnia, Kosovo, and West Bank/Gaza, mechanisms for cooperation with the United Nations system as part of the Conflict Prevention and Post-Conflict Reconstruction Network were set up.3 In El Salvador and in Nicaragua, the Bank became involved in the process at a later stage.

Financing of rehabilitation and reconstruction activities must be justified on economic grounds. The Bank focuses primarily on post-conflict

3. Other UN partnerships also exist with UNDP, UNICEF, WHO, UNESCO and UNFPA to slow the spread of AIDS.
reconstruction and subsequent development, although it may play an indirect role in other activity areas, i.e., providing technical input to peace negotiations, assessing the long-term implications of relief programs, etc. The Bank also does not provide relief assistance. However, the Bank does provide early information sharing with relief agencies on planning activities. Peace treaties require economic underpinning. At the Dayton talks on Bosnia, the Bank provided practical technical advice on budgets, economic incentives, and taxation arrangements.

Innovative and catalytic funds are available from the World Bank, United Nations High Commissioner Refugees, United Nations Development Programme, and certain bilateral agencies to address post-conflict needs, but they are not sufficient. The challenge is addressing the gaps within our institutions and funding systems. A key step is developing a consistent and coherent assistance strategy. Roles should be defined based upon capacity and comparative advantages, with principles to guide allocation and use of resources, with a common strategy, and agreed sequence and plan. Allan Gerson recently concluded a study for the Council on Foreign Relations, in which he recommended that the collaboration between the United Nations, the Bank, and Non-Governmental Organizations (NGO) be institutionalized into a “Peace Transitions Council.”

The Bank must follow legal, mandate, and administrative restrictions in post-conflict situations. The Bank does not play a direct role in conflict prevention due to the following three provisions of the Bank’s Articles of Agreement relating to political influences upon its lending, decision-making, and the allegiance of its staff and officers:

a) The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations. (Article III, Section 5(b));
b) The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I. (Article IV, Section 10);
c) The President, officers and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties. (Article V, Section 5(c)).
The World Bank cannot seek to influence the political course of events in post-conflict settings. In this aspect, the World Bank is less flexible than many bilateral funders. The basic principle is that Bank financing should not be based upon, or conditioned by, political or military goals. Rather, the financing of rehabilitation and reconstruction activities must be justified on economic grounds. The World Bank must also obtain agreement among the Bank’s governing members before allocating its net income to fund the Bank’s post-conflict programs. Also, the Bank’s Board is consulted on crucial decisions regarding Bank involvement.

There are essentially five stages the World Bank employs in its assistance to a country as it moves out of conflict:

1) A watching brief in conflict countries in which there is no active portfolio;
2) Preparation of a transitional support strategy as soon as resolution is in sight;
3) Transitional early reconstruction activities, proceeding as soon as field conditions allow;
4) Post-conflict reconstruction (under emergency procedures); and
5) Return to normal lending operations.

When no active lending portfolio exists in a country due to conflict, the World Bank maintains a Watching Brief to track circumstances. It serves four purposes: a) to forewarn the Bank about the likely time when operations can restart; b) to improve understanding of special political risks, and economic and social needs that occur in conflicts; c) to identify areas of comparative advantage where the Bank should plan to work; d) and to examine and compare potential counterparts that the Bank should work with.

The Watching Brief is a process for organizing existing information about a country and involves communication with potential partners. The process may involve consultations, workshops, and negotiations. The Watching Brief also establishes thresholds for entry into technical assistance, or resumption of regular operations. They include absence of systematic violence, signing of a peace agreement by conflicting parties, re-entry of other organizations, (UNDP and foreign embassies), return of foreign direct investment. External triggers include recognition by neighbor governments of national governments.

As soon as resolution is in sight, a transitional support strategy is prepared. There needs to be an effective counterpart for the Bank, and evidence of strong international cooperation. The transitional support strategies typically cover a two year period, and are based on social assessments, which are carried out flexibly to target time-sensitive needs that are specific to the phase of the peace or reconstruction effort. The assessments also recognize sources of social conflict and tension, engagement with civil society, increased focus on governance, and a frank exploration of the costs of both random and organized
violence. Creativity and political sensitivity are needed to design programs that reinforce peace, population return, and social rebuilding.

Violence may recur in the fragile post-conflict situation; hence it is difficult to draw a definite line between the "humanitarian" and "development" components of rehabilitation and reconstruction. There is often a need for simultaneous relief, rehabilitation, and development interventions. Resource mobilization for development assistance requires round tables, consultative groups, and country-specific trust funds. Development interventions often require a planned response because of procurement and disbursement mechanisms. Operational linkages are being established among the humanitarian agencies and the development agencies. Also, debt arrears may delay the full participation of international financial institutions.

Many times, the Bank's comparative strength is in household survival strategies, informal trade, rebuilding infrastructure critical to market access, and informal credit systems. Much of the Bank's work has been in rebuilding physical infrastructure such as roads and buildings. There are also operations designed to promote economic adjustment, including targeted employment creation programs. Promoting employment can provide jobs to ex-combatants, displaced persons, and other people affected by war. Educational and medical systems need to be kept operating.

The challenge of moving war-torn countries from a situation of dependence to one that is self-sustaining and engaged in the world economy depends upon a comprehensive assistance strategy. The process needs to be inclusive, involving active participation of the government and civil society. Other vulnerable and marginalized groups need to be involved such as women, children, the elderly, ex-combatants, and displaced populations.

Some of the other areas in which the Bank has broad experience include issues involving governance, participatory approaches, and social policy. In the past decade, the Bank has become increasingly involved in governance issues, which are defined as the management of public resources on behalf of all citizens with fairness and openness. For example, there are more than 300 Bank-financed projects containing components for legal and judicial reform. In a pilot anticorruption program, the World Bank Institute worked with teams

4. The definition of governance used by the Bank in Sub-Saharan Africa - From Crisis to Sustainable Growth: A Long Term Perspective Study (November 1989), is "the exercise of political power to manage a nation's affairs."


6. Corruption is defined as the abuse of public office for private gain, a definition also used by the IMF.
representing seven countries in Africa to formulate governance programs in those countries.\textsuperscript{7}

Another important function, which the Bank serves, is analyzing and disseminating information on issues and lessons learned. The Bank manages a knowledge dissemination network (Web pages and other sources), maintains a database on issues related to post-conflict activities, brings together Bank staff from different regions to share lessons in reconstruction strategies, and develops best practices. Much remains to be learned about reconstruction; the Bank has no panacea for the international management of violent conflict. Bank operations in countries emerging from conflict are not "business as usual," there are risks involved:

1) The nature, intensity and origin of the hostilities;
2) Weak institutional capacity; and
3) Security risks.

In conclusion, the World Bank plays a complementary role to the United Nations and other members of the Post-Conflict Reconstruction Network. The Bank will engage in areas in which it has a comparative advantage, such as physical reconstruction, institutional and social development, and donor coordination. The Bank's presence may help to leverage or open up other areas of assistance and mobilize the resources of other agencies-bilateral, multilateral, or private.

THE INCREASING ROLE OF INTEREST GROUPS IN INVESTMENT TRANSACTIONS INVOLVING INTERNATIONAL FINANCIAL INSTITUTIONS

Mark Kantor*

I would like to welcome you to our panel on the Increasing Role of Interest Groups in Investment Transactions Involving International Financial Institutions. Our objective today is to discuss the growing impact on international investment transactions of local and international interest groups—organizations such as business associations, consumer, environmental and human rights groups, community activists and labor associations. As will become apparent from the presentations, the role of interest groups has grown in parallel with the increased participation of international financial institutions (IFIs) as financing sources for these investments. Our panel will focus on individual projects in which IFIs participate, not (as other panels are addressing during this conference) on the impact of interest groups on change within the institutional frameworks of those financial institutions.

For many years, multilateral development organizations like the World Bank Group, the Asian Development Bank and the Inter-American Development Bank focused their efforts on the public sector. Indeed, the Articles of Agreement of the World Bank limit World Bank loans and guarantees solely to public sector entities. Since the early 1990s, however, multilateral institutions have become important contributors to the financing of private sector investments in emerging markets. The International Finance Corporation and the Multilateral Investment Guarantee Agency have led this reorientation within the World Bank Group, and the World Bank itself has placed a carefully circumscribed toe in the waters of privately financed infrastructure though its partial-risk guarantee program and through sector adjustment loans intended to assist privatizations. Faced with fewer charter constraints, the Asian Development Bank and the Inter-American Development Bank also moved in the mid-nineties to provide direct debt and equity support for private sector projects in areas considered central to economic and social development in member countries.

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National governments also refocused their financial support in the 1990s towards the private sector in emerging markets, particularly to support purchases of goods and services exported from their own markets. National export credit agencies (ECAs) such as United States Eximbank, CoFACE, ECGD, JBIC and Hermes and investment promotion agencies such as the United States Overseas Private Investment Corporation (OPIC) have become substantial providers of guarantee and loan assistance to privately owned infrastructure projects and other investments in emerging market economies.

The participation of multilateral and national IFIs in private direct investment transactions has carried with it an increasing voice for local and international interest groups in those transactions. The growing role of interest groups is not surprising in hindsight. Multilateral financial institutions have been under great pressure to open their own processes to these groups, as have ECAs in various countries. The involvement of an IFI in a private transaction creates a natural platform for interest groups to seek a more forceful role in structuring and implementing the investment.

Examples of recent investment transactions in which interest groups are playing prominent roles abound. For example, the Chad-Cameroon petroleum development and pipeline project has achieved considerable attention, as environmental and development non-governmental organizations (NGOs) and community groups have challenged the role of the World Bank, the European Investment Bank and several ECAs in providing support for the project.

The Chad-Cameroon project is a $3.5 billion oil field development and oil pipeline project to develop the Doba oilfields in southern Chad and transport the oil by means of a 1070 km pipeline to a marine terminal at Kribi on the Atlantic coast of Cameroon. The project was approved by the World Bank in June 2000, but remains mired at this time in controversy over a number of issues, including the alleged diversion towards arms purchases by Chad of part of an initial payment by the project sponsors. The principal international sponsors are Exxon Mobil, Petronas and Chevron, and both Chad and Cameroon will also participate as equity investors in the project. The World Bank and the European Investment Bank propose to lend approximately $115 million to these governments to finance acquisition of the equity interests. In addition, about thirty-seven percent of the cost of constructing the project will be raised as loans from IFIs or in the commercial bank debt markets, with virtually all of that indebtedness covered by political risk or comprehensive support provided by ECAs or funded directly by IFIs.

The World Bank also anticipates providing loans of $17.5 million to Chad and $5.77 million to Cameroon to finance "capacity-building" for the purpose of enabling those governments to maintain adequate oversight of the project and its effect on the affairs of the host country. The International Development Association (IDA), the World Bank's lending arm for the poorest countries, will
provide further capacity-building support of $23.7 million and $5.8 million, respectively, in equivalent credits. The impact on Chad will be especially pronounced. As the World Bank has stated, "Chad's capacity weakness is of particular concern. This weakness is all-encompassing and greater than in most sub-Saharan countries, reflecting the impact of almost three decades of civil strife . . . ." Once revenues commence, the project could bring Chad revenues of about $200 million each year for the next quarter-century, resulting in a doubling of the country's budget. The capacity-building loans are intended to finance the building of the institutional capability within the two governments to effectively absorb and allocate the large anticipated in-flows. Taking together all forms of IFI assistance, official credit support is thus directly necessary for raising about forty percent of all project costs, and additional World Bank loans are financing reforms to mitigate the adverse impact of the projected flood of revenues on weak government institutions in the host countries.

Local and international NGOs have criticized the proposed oil field and pipeline project severely for a number of reasons and in a number of forums. Environmental and social objections include concerns over the loss of livelihoods and resettlement of rural peoples; loss of biodiversity; the impact of leaks from underground pipelines; and the impact on coastal areas of a heavily-trafficked marine terminal. Broader criticisms include the risks to Chad and Cameroon of relying on oil production to fuel development, the risks of non-transparency and corruption resulting from large flows of hard currency into destitute economies, the potential for re-igniting the civil war in Chad and the clash between "traditional peasant culture and the expatriate oil business way of life." As broad as these criticisms may be, the range of organizations raising these questions and criticisms has been equally broad, including over eighty local and international NGOs. Those NGOs have employed several platforms to encourage debate over these issues: formal presentations to the World Bank, the European Investment Bank and those ECAs with organized program for public comment; open letters to the World Bank and others; lobbying campaigns aimed at national government representatives to the World Bank or aimed at Western legislators; a sustained campaign to bring media attention to bear on the project; and flooding of the sponsors, the financial advisor and


various public organizations with mail and e-mail messages objecting to the project.

As a consequence of this clamor, a number of actions occurred. Two original sponsors, Shell and ELF, withdrew from the project amid speculation that the strong opposition to the project influenced their decisions. The pipeline location itself was modified significantly. A host of local consultation meetings occurred. Faced with criticism of its own procedures in approving the project, as well as the impact of the project on the host countries, the Bank determined to establish an International Advisory Group (IAG) that would monitor implementation of the project, although disagreements between NGOs and the Bank still exist over membership on the IAG and the Terms of Reference for the panel.

Of special importance, the World Bank, the host governments and the project also structured a system of controls over project disbursements and revenues intended to assure future transparency in the use by Chad and Cameroon of those monies. For example, under the revenue management program for Chad, the government of Chad has agreed to an extraordinary level of extra-governmental involvement in control over its portion of project revenues. Petroleum revenue from the project will be channeled through the project's audited offshore accounts and ninety percent of Chad's portion of that revenue (once released to Chad by the project company) will be transferred to special accounts of the Chad Treasury maintained at two designated commercial banks acceptable to the World Bank. Disbursements from those accounts will only be made in accordance with pre-agreed development objectives set out in the revenue management program and approved by the Chad Parliament, and must be reviewed in advance by an Oversight Committee composed of representatives of the Chad Government, the Chad Parliament, a local NGO and a trade union representative. The Oversight Committee will issue quarterly reports and all audits and reports of the Oversight Committee will be published. The special accounts will be audited by auditors acceptable to, and with terms of reference agreed by, the World Bank, and the World Bank and the IMF will conduct periodic joint expenditure reviews. A separate investment fund covering the remaining ten percent of Chad's project revenues will be subject to similar auditing and oversight arrangements, as well as investment criteria pre-agreed with the World Bank. These control and audit procedures were established by means of legislation enacted by the Chad Parliament, not merely contracts and government decrees, to maximize support across all political institutions. The commitment of the government of Chad to the principles underlying these procedures, however, has been called into controversy by the alleged diversion to military expenditures of a portion of a twenty-seven million advance payment, even though the procedures have yet to be put into place.
I have handed out an excerpt from ExxonMobil's project web page summarizing the scope of public consultation by the Chad-Cameroon project with local communities, local and international NGOs and resulting actions.\(^3\) NGOs, though, continue to criticize the project's consultation process as inadequate. Regardless of one's personal view of the project or the efficacy of its consultative process, the twenty-two pages from this excerpt demonstrate that a large quantity of project time, resources and planning has been devoted toward addressing the issues raised as a result of the activities of the NGOs, community activists and the media. The impact of interest groups on the time and resources of the project, its private sector participants and the IFIs is apparent. Moreover, this short summary also illustrates the leverage for NGOs created by IFI involvement in the project. It is hard to imagine such a process for a petroleum project just 10-15 years ago.

In addition to focusing on individual investment transactions, of course, these interest groups are also engaged in active lobbying and negotiating campaigns to dramatically change the institutional frameworks of IFIs. It is very difficult to draw a conceptual line between the pressure on IFIs to institutionally accommodate interest group concerns and the pressure on individual IFI-supported investments to restructure themselves in response to interest group concerns. Lobbying for institutional change is, of course, intended to result in changes in how IFIs treat individual projects, and lobbying about individual projects will necessarily carve new channels within the institutions that result in institutional changes as well as changes to the targeted projects. There is, however, a very practical difference. The practicing bar, particularly private sector lawyers, are finding the day-to-day activities of their clients in individual investment transactions are being affected by these interest groups, and therefore the nature of the work undertaken by project participants is beginning to change in a significant fashion. These investors now develop environmental impact, community development and public affairs programs as essential components of their project development activities.

Why are these changes occurring now? First, as the Chad-Cameroon story illustrates, the direct participation of IFIs in the financing of individual private sector investments creates formal and informal platforms for NGO involvement that did not previously exist. As IFIs continue to shift their attention toward promoting the private sector in weak economies, the opportunities for interest groups to use IFI leverage will continue to grow.

Another development in international economic relations is also likely to accelerate the involvement of NGOs in individual transactions. The web of international agreements on commercial matters now extends far beyond the

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purchase and sale of goods and services, and related tariff and non-tariff barriers. The Agreement on Trade-Related Investment Measures (TRIMS) and the investment-related provisions of NAFTA are examples of increased multilateral involvement in individual investment transactions. Although neither the WTO dispute settlement understanding nor NAFTA dispute resolution procedures permit direct NGO intervention in disputes over breaches of TRIMS or NAFTA commitments, NGOs are increasingly adept at pressing national governments to incorporate interest group views into positions taken by those governments on those disputes. And pressure continues to grow for direct participation of NGOs in dispute procedures under those agreements. Three recent NAFTA disputes, one involving issues of environmental licensing in Mexico, the second claiming expropriation in light of a large award of punitive damages by a Mississippi jury in civil litigation and the third seeking damages for the ban by California of the gasoline additive MTBE, have highlighted for many United States activists the importance of finding a means of participating in NAFTA dispute proceedings involving individual investments.4

More generally, the provisions in NAFTA and the General Agreement on Trade in Services (GATS), and subsidiary understandings such as the Reference Paper on Telecommunications Services, requiring Member States to maintain transparency, impartial administrative tribunals and review of such matters as tariff and pricing, anti-competitive conduct of certain service monopolies and the like encourage the development of host government institutions accessible to NGOs as well. For example, to head off a United States complaint to the WTO that Mexico has violated GATS telecommunications commitments by permitting the former public telecoms monopoly, Telmex, to charge high interconnection tariffs, the Mexican government has proposed among other matters to make available additional resources to COFETEL, Mexico’s telecommunications regulatory agency. This GATS-encouraged enhancement of the resources and independence of a national regulatory agency should result in the growth of another forum for interest group involvement in decisions (in this case, the pricing of telephone services and the availability of consumer choices) affecting individual telecommunications investments.

Further, notions of privatization are deeply affecting the structure of international investments in emerging markets. Many high-profile privatization transactions of public infrastructure or sensitive industries now combine private and public participants in transactions that politicians and public affairs

specialists fondly call "public-private partnerships." The participation of private investors and public authorities in the same transaction assures the interest of local and international groups in the public sector decision-making process regarding the project. As public and private participants become intertwined within the confines of a single project, interest group access to the public sector parties creates opportunities for NGO access to decisions made by the private sector participants as well.

The impact of interest groups on individual investment transactions will only increase over the next decade, as these groups gain experience in using newly provided platforms and in mobilizing attention and resources to focus on particular projects. By way of illustration, the International Program of Friends of the Earth, a prominent and aggressive environmental protection organization, includes ten staffers (underpaid as they may be) following the environmental impact of individual IFI-supported investment project worldwide. Accordingly, the day-to-day activities of the private sector participants in these projects, and their counsel, are rapidly changing to address the de facto involvement of new parties in structuring the project.

Let me now introduce our panelists to continue to explore these issues. Barry Metzer is a partner with Coudert Brothers and former General Counsel of Asian Development Bank. Barry has extensive experience with international projects and investments, both as a result of his many years at Coudert Brothers and as a result of his service at the Asian Development Bank. Jon Sohn, our second panelist, is an International Policy Analyst/IFI Campaigner at Friends of the Earth, where he focuses on international financial institutions, primarily ECAs, such as OPIC and US Eximbank. He was formerly Counsel and Environmental Program Officer at OPIC. Amelia (Amy) Porges, our third speaker, is Of Counsel at Powell, Goldstein, Frazer & Murphy, where she focuses on international business matters. Before joining Powell Goldstein, Ms. Porges was Senior Counsel for Dispute Settlement at the Office of the United States Trade Representative. Please join me in welcoming our panelists.
A retrospective look at the 1999 war in Kosovo is in order. What Bishop Butler called a “cool calm hour” is now upon us and we are well placed to make some comments, however brief, on the authority and modalities of intervention by North Atlantic Treaty Organization (NATO) and the United Nations in what had formerly been an autonomous province of Serbia, and to make some comments on efforts made in the aftermath of the intervention by way of holding individuals accountable for atrocities committed.

The Kosovo war of 1999 must be seen against the background of the disintegration of the Socialist Federal Republic of Yugoslavia (SFRY), a state that had been severely affected by the foreign debt crisis of the 1980s. The precipitous recognition by Germany of both Slovenia and Croatia, coupled with the subsequent recognition of these two states by western powers, virtually guaranteed that the Republic of Bosnia Herzegovina would explode and that the region of Krajina in Croatia would erupt in violence and ethnic cleansing by Croats of Serbs. Several factors in addition to the recognition contributed to the turmoil in the former Yugoslavia, and these included the country’s foreign debt crisis, the absence of democratic institutions, fervent nationalism, and the

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2. See the comments of Ivo Daalder that it was well understood by the United States that the disintegration of Yugoslavia would probably be violent as well as his comment that “political settlement in the former Yugoslavia was doomed by Germany’s oft-repeated intention to recognize the independence of Slovenia and Croatia unconditionally.” See Ivo Daalder, Fear and Loathing in the Former Yugoslavia, in The International Dimensions of Internal Conflict 50, 63 (Michael E. Brown ed., 1996). See also the comments of Stevan Lilic, University of Belgrade Law School and 1993 Visiting Researcher, University of Pittsburgh, when he said “As argued by many experts on the matter, the premature recognition of certain republics of the former Yugoslavia as independent states (Slovenia, Croatia, and Bosnia, and Herzegovina) was the cause of, or at least helped to create, the existing conflicts in the former Yugoslavia, particularly in Bosnia.” See Stevan Lilic, Remarks on Yugoslavia: A Case Study of International Consequences of Independence Movements, 87 ASILPROC 205, 213 (1993).
absence of any regional solution to the problems developing in the SFRY.\(^3\)

When Bosnia Herzegovina exploded in 1991-1992 tragedy ensued with Serbs ethnically cleansing and seizing control of parts of the country and culminating in the horrific events in Srebrenica in 1995 in which 7,000 Bosnian Muslims were slaughtered by Serbs in a United Nations safe haven. In the same year the Croatian army drove Serb forces from Krajina and compounded the misery by cleansing the area of 200,000 Serbian inhabitants.\(^4\)

The failure to incorporate regional considerations into the Dayton Peace Agreement of 1995, an agreement which resulted in the cessation of hostilities in Bosnia Herzegovina, meant that Kosovo was left out of the equation. The effect of this was that the frustration among Kosovar Albanians, which had been building in Kosovo since 1989 when Serbian President Slobodan Milosevic pressured the Kosovo Assembly into abolishing the province’s autonomous status, simply increased. Kosovar Albanians who became progressively disillusioned with the peaceful approach adopted by their leader Ibrahim Rugova in dealing with Serbia, threw their support behind the Kosovo Liberation Army (KLA). This organization was, as Falk says, “dedicated to waging an armed struggle to achieve an independent Kosovo” and by 1996 it carried out “a variety of violent provocations that provided an ongoing pretext and rationale for harsh Serb security measures.”\(^5\)

From 1996 to 1999 hostilities tended to escalate between Serbians inside and outside of Kosovar and Kosovar Albanians. Even with the presence of the Kosovar Verification Mission (KVM) mandated by the United Nations and headed by Ambassador William Walker, forty-five Kosovar Albanians were massacred in Racak on January 15, 1999. This attack on alleged civilians was ‘the final warning bell’ and initiated considerable political activity in European capitals and in Washington. The upshot was the convening of talks in France at Chateau Rambouillet under the auspices of the Contact Group. The terms of the agreement struck at Rambouillet were, it appears, excessive as made evident by Appendix B, article 8 which gave NATO unimpeded access throughout the Federal Republic of Yugoslavia (FRY). In the event, the exaggerated conditions of the drafted agreement meant that a dark shadow was cast over the line of authority pursued by NATO in justifying its subsequent military intervention. It therefore seems unsurprising that the FRY delegation did not agree to the terms of the Rambouillet Agreement. On March 18, 1999, the talks, having shifted to the Kleber Centre in Paris, were suspended when the Serbian

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3. For an excellent discussion of these and other points, see Woodward, supra note 1.
4. According to MccGwire, “The Croatian modus operandi was so effective that the Serbs adopted the same approach when they occupied Kosovo in March 1999.” See MccGwire, supra note 1, at 3.
delegation "refuse[d] to budge." On March 19, the KVM withdrew from Kosovo and on March 20, Yugoslav armed units launched an offensive against the Kosovar Albanians. Finally, on March 24, NATO airstrikes began.

So much for a brief historic background to NATO intervention in Kosovo. What line of authority is there to support this intervention? And what modalities did NATO use to intervene in Kosovo?

The starting point of this discussion is the United Nations Charter. NATO's own North Atlantic Treaty turns us towards this document for it says in its Preamble: the Parties to this Treaty reaffirm their faith in the purposes and principles of the United Nations Charter and their desire to live in peace with all peoples and all governments. More needs to be said later about NATO, its treaty, and the Charter. For the moment it suffices simply to hold the Charter front and center in any discussion of NATO's authority for military engagement in Kosovo.

Under the Charter there are only two permissible uses of force in international relations, both found in Chapter VII, Article 51. The first is enforcement action by the Security Council aimed at maintaining international peace and security, and the second is self-defense if an armed attack occurs against a Member of the United Nations. The second of these justifications cannot function as a rationale for NATO involvement in Kosovo, and therefore only the first remains as a way of making right the conduct of NATO.

Even allowing that the purposes of the United Nations as given in the Charter include not only maintaining peace and security but also achieving international cooperation in promoting and encouraging respect for human rights, they do not provide a wedge for legalizing NATO's unilateral action in Kosovo. The reason for saying this lies in Article 2(4) which prohibits threats


7. Article 51 reads in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." Clearly, NATO was not under attack and so it could not claim self-defense. Moreover, Kosovo was not a member of the United Nations and so the Province of Kosovo could not claim a right of self-defense under Article 51. Here, I take issue with the suggestion of Ruth Wedgwood that, in the context of Article 51, "surely self-defense of a population warrants as much consideration as defense of a political structure." See Ruth Wedgwood, NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia, 93 AM. J. INT'L L. 828, 833 (1999). Clearly, Article 51 applies only to the juridical state.

8. To concede this is to concede a lot, for as Charney has persuasively argued, though protection of human rights is among the purposes of the United Nations Charter, it is "subsidiary to the objective of limiting war and the use of force in international relations, as found in the express Charter prohibitions on the use of force. This interpretation is supported by the travaux preparatoires of the Charter." See Jonathan I. Charney, Anticipatory Humanitarian Intervention, 93 AM. J. INT'L L. 834, 835 (1999). Charney's view would seem to support the view that Article 1 (1) dominates Article 1 (3), i.e. that the objectives of peace and security dominate the objective of human rights.
or the use of force by any members against the "territorial integrity or political independence of any state," and in Article 2(7) which prohibits United Nations intervention in matters which are "essentially within the domestic jurisdiction of any state." Article 2(4) itself would seem to render illegal any unilateral action by any member state, acting alone or in concert with some other member states without the blessings of the Security Council, against the territorial integrity or political independence of any state. This would imply that NATO's military actions in Kosovo were illegal. And while Article 2(7) might well allow for United Nations intervention inside a state on the grounds that human rights violations are not solely a matter of domestic jurisdiction, this does nothing to justify unilateral NATO action, action which was undertaken without the blessings of the Security Council. And although Article 52 states that nothing in the Charter precludes regional arrangements for peace and security, these arrangements and activities must be "consistent with the Purposes and Principles of the United Nations." This means that Article 52 has to be read alongside of the "territorial integrity" provision of Article 2(4). And this would seem sufficient to make unilateral action by NATO in Kosovo illegal.9

Furthermore, Article 53 of the Charter does not afford a legal justification for NATO's intervention in Kosovo. First of all, though the article provides that the Security Council shall utilize regional arrangements for enforcement action under its authority, it also provides that no enforcement action shall be taken without the authorization of the Security Council. So even if NATO were a regional organization, the absence of any Security Council authorization for NATO intervention is sufficient to remove its legal justification in the case of Kosovo. But, as Bruno Simma has argued successfully, NATO is not a regional organization but an international one.10 In the result the requirement found in Article 53 is not 'formally applicable' to NATO.

Against the foregoing, it is difficult to see any authority based on the Charter for NATO military intervention in Kosovo. This is a conclusion that is

9. Something should be said here about Article 24 of the Charter. This article confers on the Security council "primary responsibility for the maintenance of international peace and security." The secondary responsibility impliedly referred to here applies, it would seem, to regional arrangements already discussed, which are in turn subject to the Purposes and Principles of the United Nations including Article 2(4), the territorial integrity provision. It would seem, therefore, that the effect of Article 24 is not to spawn other agencies which can maintain peace and security independently of the Security Council, but to structure the process of conflict resolution so that regional agencies attempt pacific settlements "before referring them to the Security Council." U.N. CHARTER art. 24, 25, available at http://www.icj-cij.org/icjwww/ibasidocuments/ibasicsextex/ibasicuchart.htm (last visited Mar. 17, 2001). There is nothing in any of this which implies that by conjoining Article 24 with Article 52 that regional agencies such as NATO have a legal right to initiate unilateral intervention.

10. See Bruno Simma, NATO, the UN and the Use of Legal Force: Legal Aspects, EUR. J. INT'L L. 10 (1999). Suggestions in conversation by Professor Mary Ellen O'Connell encouraged me to reconsider this aspect of the Charter and the relevance of it to the Kosovo conflict.
not eroded by three resolutions passed by the Security Council under Chapter VII prior to NATO’s bombing campaign or by one resolution passed after the cessation of hostilities. Here, I am referring to Resolution 1160 (March 1998), Resolution 1199 (September 1998), Resolution 1203 (October 1998) and Resolution 1244 (June 1999).11 None of these resolutions authorized NATO bombing, nor “retroactively legalized” them. The Council for its part, in addition to passing three resolutions to reign-in the FRY prior to the bombing and one resolution to authorize a peace mission after the cessation of bombing, on the third day of the bombing refused to condemn NATO bombing. By a vote of 12-3, the resolution proposed by Russia, India, and Belarus charging that NATO in its bombings violated Articles 2(4), 24, and 53 of the Charter, failed. And the Secretary-General, finding himself in the unenviable position of attempting to make credible the organization he headed notwithstanding its inaction when faced with a humanitarian catastrophe, went on to assert that it was tragic that diplomacy had failed but there are times when the use of force “may be legitimate in the pursuit of peace.”12 Regrettably, scour though we do these collective resolutions of the Security Council and the comments of the Secretary-General, there is nothing which legalizes and thereby authorizes NATO’s military intervention in Kosovo.

Some might be tempted to think that, regardless of the foregoing, the international legal system has changed owing to the erosion of state sovereignty and that this erosion is predicated on the growth of human rights, environmental concerns, and globalization. Those so thinking might conclude that there is no real legal impediment to NATO-like intervention in so-called sovereign states in defense of human rights. To this it seems fair to say that while state sovereignty may have experienced some diminution, those who make this claim tend to overplay their hand. Geoffrey Garrett has argued convincingly that the policy constraints on governments generated by global trade, multinationalization of production and the internationalization of financial markets are “weaker and less pervasive than is often presumed.”13 Moreover whatever erosion of state sovereignty that might have occurred it is difficult to

11. These resolutions dealt with, respectively: the imposition of an arms ban on the FRY and the withdrawal of special police units, the cessation of the use of force and the violation of human rights, the authorization of an observer force called the KVM, and authorization of an international civilian and security presence after the cessation of the war. Wedgwood, supra note 7, at 833; Chamey, supra note 8, at 835; Kosovo: A Human Tragedy: United Nations Efforts Aim to Alleviate Suffering of 80,000, U.N. CHRONICLE, Jan. 1, 1999, at 5.

12. Id. Later before the General Assembly he added “the imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences” is an “equally compelling interest.” Press Release, United Nations, Secretary General Presents His Annual Report to the General Assembly (Sept. 20, 1999) (on file with author).

see a consensus emerging at the international level authorizing this kind of intervention. The absence of widespread state practice and *opinio juris* as well as the condemnation of the General Assembly of specific interventions, e.g., India’s intervention in East Pakistan in 1971 to protect Bengalis, make clear that such consensus does not now exist. In addition, it seems that important international players such as Russia and China, and possibly some NATO countries as well, would oppose a development of international law in such a direction. One may fairly conclude from this that no new general law or customary law of intervention has emerged nor is likely to in the near future.

The legality of NATO’s military intervention in Kosovo aside, what can be said of the modalities of NATO’s involvement? The modalities of this military involvement included initially the use of “smart weaponry” which was “confined to military targets,” but when this failed to produce the desired results NATO extended its targets. This resulted in damage to manufacture enterprises, power supply, transportation facilities, agriculture and forestry, water management, construction industries, trade, catering, and banks. Over 27,000 sorties (including sorties of B-52s) were flown and 23,000 bombs (including cluster bombs and depleted uranium ordnance) and missiles, 35% being smart weapons, were dropped. It is believed that a quarter of the SAM radar sites were destroyed and there have been reports of “significant collateral damage to civilian facilities including two hospitals and several schools.” The dollar value of the total damage is estimated by European Union officials to be in the neighborhood of United States $30 billion and by Yugoslav officials to be between United States $30 and 100 billion.

I want now to pass on to consider a different aspect of the war in Kosovo. Previously I focused on the authority, if any, NATO had in intervening in what was otherwise an internal conflict. In what follows, I wish to look at the efforts made to bring about peace and security in Kosovo as well as the efforts to secure accountability for the atrocities the intervention intended to end.

14. Germany would probably oppose such development. See the comments on Germany’s reluctance to make NATO’s decision to intervene a precedent in Bruno. Simma, supra note 10, at 13.

15. This does not augur well for what I call the Blair Doctrine: acts of genocide can never be a purely internal matter, and reform of the Security Council needs to reflect the “propriety of intervention to stop genocide.” See Michael J. Glennon, The Charter: Does It Fit?, U.N. CHRONICLE, Jan. 1, 1999, at 33.

16. Falk, supra note 5, at 851.


18. See also McGwire, supra note 1, at 10.


20. See McGwire, supra note 1, at 11.

On June 3, 1999, a peace plan was brokered which was expanded on a week later in United Nations Resolution 1244. This resolution included three principles: 1) the deployment of an international security and civil presence (KFOR) in Kosovo under United Nations rather than NATO auspices; 2) the omission of any reference to KFOR's right to unrestricted passage and unimpeded access to Serbia; and 3) the omission of any reference to a referendum to decide Kosovo's future. More now needs to be said about the first of these points.

Security Council Resolution 1244 provided for the presence of 50,000 KFOR international troops. Their deployment has for the most part met with success, for it has brought peace and a measure of security. But it has faced and continues to face difficulties. Retaliation by Albanian Kosovars against Serbs and Gypsies has been an issue with which KFOR has had to contend. Some have claimed that this has "made a mockery of any attempt to build a multi-ethnic Kosovo." There is still concern that extremists, called the Liberation Army of Presevo, Medvedja and Bujanovac (UCPMB), are "bent on stirring up trouble in southern Serbia." In addition, there has been considerable displacement of Serbs from Kosovo; "it appears that well over 164,000 Serbs fled Kosovo since early June 1999." Perhaps the condemnation on August 4, 2000 by the Interim Administrative Council for Kosovo of the recent spate of violence there is sufficient to make clear that what exists in Kosovo is an uneasy peace and incomplete security. That this is still very much a problem was made evident in an open meeting between Dr. Bernard Kouchner, the head of UNMIK, and the Security Council. There he said on September 27, 2000 that the situation of non-Albanian communities is the biggest problem in Kosovo. He maintained "Serbs and Roma, in particular are often still excluded from daily life and are under great personal security risks."

Unease and apprehension remain in Kosovo notwithstanding the very great efforts of KFOR and UNMIK to make the situation better. The issue of peace and security now

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27. It is obvious why this unease and apprehension should remain. Sher has remarked "There have been more than 330 serious ethnic crimes in Kosovo since January 2000, two-thirds committed by ethnic Albanians against Serbs and other minorities." Julian Sher, Ethnic Albanians Use Web in Fight Against Serb Control, GLOBE & MAIL, Oct. 12, 2000, at A14.
treated, I should like to turn attention to the issue of justice and the role of the International Criminal Tribunal for the Former Yugoslavia.

The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) was unanimously adopted on May 25, 1993 through Resolution 827 of the Security Council acting under Chapter VII of the United Nations Charter. The Tribunal’s statute conferred jurisdiction of subject matter over the following crimes: Article 2: Grave Breaches of the Geneva Conventions of 1949, Article 3: Violations of the Laws or Customs of War, Article 4: Genocide, and Article 5: Crimes Against Humanity. According to Article 8, the territorial jurisdiction of the ICTY shall extend to the territory of the former Yugoslavia and apply to actions carried out since January 1, 1991. National courts and the ICTY are to have, according to Article 9, concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law, though according to Article 9(2) the Tribunal shall have primacy over national courts.

Resolution 827 established the ICTY. The legal issues surrounding the authority of this tribunal are the following: 1) does the Security Council have authority to establish tribunals?; and 2) even if the ICTY has authority over humanitarian law in the former Yugoslavia as it applies to the independent republics which have exercised their right to self-determination under the Constitution of the SFRY, does the ICTY have authority over humanitarian law inside Serbia, i.e. inside Kosovo? The answer to the first of these questions is generally thought positive. The second question is more problematic not because the terms of the Statute of the ICTY leaves any doubt about its authority, but because the ICTY has justified its authority to try individuals in Bosnia Herzegovina on the grounds that Serbia enforced the Dayton Agreement of 1995. And clearly the Dayton Agreement has nothing to do with the Kosovo war apart from contributing to its development.

But there is no need to predicate the Tribunal’s authority in the former Yugoslavia on the Dayton Agreement for it can be predicated on Security

28. There are issues worth discussing here. As Bodley points out, “Chapter VII makes no explicit provision for the establishment of international tribunals. A literal reading of the Chapter permits the conclusion, therefore, that the Security Council was acting ultra vires in creating the International Tribunal. This was precisely the argument put forward by the Federal Republic of Yugoslavia (Serbia and Montenegro) against its establishment.” See Anne Bodley, Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia, 13 N.Y.U.J. INT’L L. & POL. 417, 428 (1999). But it would appear that the Security Council did act within its mandate by satisfying Article 39 of the Charter “in determining that the international humanitarian law violations in the former Yugoslavia constituted a threat to peace and security. It then properly invoked Article 41 to employ measures short of the use of armed force in attempting to restore international peace and security.” Id. at 440.

29. Bodley points out that in its 1996 submission to the United Nations Yearbook, the ICTY said: “By signing the [Dayton] Accord, the parties thereto, the Federal Republic of Yugoslavia (Serbia and Montenegro) . . . have formally recognized the Tribunal . . . .” Id. at 449.
Council Resolution 827. In this way the problem of the authority of the ICTY in Kosovo vanishes which it does not do if the Dayton Agreement is relied upon. This agreement was meant to apply to problems in Bosnia Herzegovina. It has no bearing on Kosovo and certainly does not give authority over humanitarian law to the ICTY in Kosovo. What gives authority to the ICTY is Security Council Resolution 827.

As indicated above, the Statute of the International Criminal Tribunal for the former Yugoslavia gives the tribunal jurisdiction of subject matter over grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity. However, the distinction in international law between international and non-international (internal) armed conflicts means that some of these have application in Kosovo and some do not. The Kosovo war was an internal armed conflict: internal because it took place in an autonomous or formerly autonomous province of Serbia and armed because it was so declared by the ICTY on July 7, 1998. Therefore, the Tribunal’s jurisdictional subject matter in Kosovo is limited to crimes committed in an internal armed conflict. Accordingly, grave breaches of the

30. See the comment made by Human Rights Watch, “International humanitarian law makes a critical distinction between international and non-international (internal) armed conflicts, and a proper characterization of the conflict is important to determine which aspects of international humanitarian law apply.” Humanitarian Law Violations in Kosovo, supra note 24.


32. Humanitarian Law Violations in Kosovo, supra note 24, at 89. This is important because the ICTY Statute says that the Tribunal shall have the power to prosecute persons for crimes committed in armed conflict, whether the conflict is international or internal.
Geneva Conventions are not within the purview of the Tribunal in Kosovo for such breaches presuppose an international conflict.\textsuperscript{33}

It is, however, within the purview of the Tribunal to prosecute cases arising from the Kosovo war based on Article 3: Violations of the laws or customs of war, Article 4: genocide, and Article 5: crimes against humanity. In the matter of violations of the laws or customs of war, the Tribunal could turn to Common Article 3 of the Geneva Conventions of 1949, which is really a convention within a convention, and could turn to Protocol II which supplements Common Article 3.\textsuperscript{34} In the matter of genocide, the Tribunal could in turn assert that "customary law establishes universal jurisdiction over genocide"\textsuperscript{35} and maintain that the International Court of Justice has claimed that the principles behind the Genocide Convention "are recognized by civilized nations as binding on States, even without any conventional obligation."\textsuperscript{36} And in the matter of crimes against humanity, the Tribunal could confidently maintain that since Nuremberg, crimes against humanity have been universally enforceable against authorities inside the state in which they were committed. So notwithstanding the internal nature of the Kosovo armed conflict, the Tribunal has three arrows in its quiver.

It is from this quiver that on May 22, 1999 Louise Arbour Prosecutor of the International Criminal Tribunal pulled out two arrows and, pursuant to her authority under Article 18 of the Statute of the Tribunal, charged Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, and Vlajiko Stojiljkovic with crimes against humanity and violations of the laws or customs

\textsuperscript{33} A similar point in a different context is made by two commentators. In discussing Tadic, they have remarked, "In order for grave breaches to have been committed, the conflict in the Prijedor region would have to be characterized as an international armed conflict." See Marco Sassoli & Laura M. Olson, \textit{International Decision: Prosecutor v. Tadic}, 94 AM. J. INT'L L. 571, 572 (2000).

\textsuperscript{34} Common Article 3 is the only part of the Geneva Convention that applies to internal armed conflicts. This article protects persons who take no active part in the hostilities and expressly prohibits violence to life and person; in particular murder, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity; and the passing of sentences and the carrying out of executions without proper judicial involvement. Protocol II, which also applies to internal armed conflict, prohibits the following: orders that there shall be no survivors; acts of violence against all persons captured; torture; pillage and destruction of civilian property; and the desecration of corpses.

\textsuperscript{35} See Diane F. Ortentlicher, \textit{Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime}, 100 YALE L.J. 2537, 2565 (1991). It is crucial that jurisdiction be rooted in some customary law basis since the Genocide Convention, Article VI claims that persons charged with genocide shall be tried in the state in which they have committed the act or by an international tribunal which has its jurisdiction accepted by the contracting parties. The FRY has not accepted the ICTY's jurisdiction in Kosovo. This would mean that acts of genocide could only be tried in the FRY, hardly an acceptable position for either the Kosovar Albanians or the United Nations.

of war. Three of these were for crimes against humanity including deportation, murder, and persecutions. One of these was for a violation of the laws or customs of war, namely murder. To date, there have been no convictions in this case. Indeed, down to March 21, 2000, very little had happened by way of indicting persons for violations of humanitarian law in connection with the Kosovo conflict. Of the thirty-seven indictments against individuals by the ICTY, only one of these had any connection with Kosovo.

It seems that in response to a perceived need to handle more cases related to war and ethnic crimes in Kosovo, by way of supplementing the work done by the ICTY, the United Nations Mission in Kosovo headed by Dr. Bernard Kouchner decided in the spring of 2000 to “create an internationally run court to try war and ethnic crimes in the province.” The new court, called the Kosovo War and Ethnic Crimes Court, was to be a specialized agency with “precedence over local courts” and would have a mandate to cover war crimes committed by Serbs during the war and to try Albanians for abductions and killings of Serbs after and during the war. The Court was to be comprised of an international judge, an ethnic Albanian, and a Serb. It appears however that up to the present, nothing has come of Dr. Kouchner’s suggestion. Nothing is said of it in UNMIK Regulations for 2000, and this would imply the Court has yet to be established.

Although the above suggests a slow start to prosecution of war crimes in Kosovo, with most attention given to the “big fish” (Milosevic et al), some attention is now being given to the “small fry.” The approach UNMIK is now taking in this matter is trying individuals for war crimes in district courts with internationally appointed prosecutors. Evidence for this is found in the commencement of a trial, of a man charged with committing acts of genocide, in Mitrovica district court with the international prosecutor Michael Hartmann. In trying an individual for this offense, the court reached into the quiver referred

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to above and pulled out the third arrow, the crime of genocide.\textsuperscript{42} By early September, 2000, UNMIK had appointed three prosecutors (Hartmann of Germany, Garland of the United Kingdom, and one other) and seven international judges (including Ingo Risch of Germany)\textsuperscript{43} in Kosovo.\textsuperscript{44} In addition, a two-day seminar organized by the Kosovo Judicial Institute (run by OSCE) took place in Pristina on September 5, 2000 to introduce Kosovo judiciary to international humanitarian law.\textsuperscript{45} On August 10, 2000, UNMIK appointed 139 local judges and prosecutors bringing the total to 405.\textsuperscript{46} And on September 5, 2000, UNMIK dismissed the director of the Mitrovica Detention Center from which fifteen Kosovo Serbs, most charged with war crimes, escaped.\textsuperscript{47} What all of this suggests is that UNMIK is attempting to use domestic courts topped up with a few international judges and prosecutors to facilitate the prosecution of cases dealing with humanitarian law.\textsuperscript{48} In this way, the action of UNMIK to utilize domestic courts for the prosecution of war crimes complements the work of the ICTY.

The foregoing has explored two different kinds of intervention by the international community in Kosovo, first military intervention by NATO and secondly legal intervention in the form of the ICTY. The first was judged by me to be illegal and the second legal. As for the effectiveness of these two forms of intervention, one may say the following.\textsuperscript{49}

It appears that over the short-run NATO achieved what it wanted in Kosovo: it stopped the displacement of persons, rapes and atrocities. Accordingly, it appears as if NATO intervention was effective. However, this might be a less compelling virtue than first meets the eye. If, for instance, it

\begin{itemize}
\item \textsuperscript{42} Other events in Kosovo under UNMIK have occurred recently that reflect on a changing judicial environment there. Dr. Bernard Kouchner has recently announced the appointment of an additional 139 judges and prosecutors and 309 lay judges “as part of his effort to improve the functioning of the judicial system in Kosovo.” See Kosovo News, at http://www.un.org/peace/kosovo/news/kostor.htm. (last visited Mar. 17, 2001).
\item \textsuperscript{43} See id.
\item \textsuperscript{44} Kosovo Swears In New International Prosecutor and Judge, at http://www.un.org/peace/kosovo/news/99/sep00_1.htm (last visited Mar. 17, 2001).
\item \textsuperscript{45} See Kosovo News, supra note 42. The focus of the seminar was on the legal concepts of war crimes, crimes against humanity, genocide and individual criminal responsibility. UN Mission Rejects Belgrade-Organized Elections in Kosovo as “Farce”, at http://www.un.org/peace/kosovo/news/99/sep00_1.htm (last visited Mar. 17, 2001).
\item \textsuperscript{46} Kosovo Swears In New International Prosecutor and Judge, supra note 44.
\item \textsuperscript{48} Cases pertaining to humanitarian law are coming before the domestic courts of Kosovo. See Kosovo Hosts Seminar On International Humanitarian Law, at http://www.un.org/peace/kosovo/news/99/sep00_1.htm (last visited Mar. 17, 2001).
\item \textsuperscript{49} The effectiveness of United Nations intervention in Kosovo is a separate topic to be treated on another occasion.
\end{itemize}
could be shown that the Serbian attack on Kosovo was intended as a pre-emptive strike in anticipation of NATO bombing, especially in light of the Rambouillet Agreement, then NATO intervention would turn out to be effective in bringing to a close the very actions it helped cause. So the virtue of effectiveness might turn out to be gratuitous and hardly deserving of praise. Preliminary evidence suggests, however, that this interpretation of events is incorrect. Serbian practice in Bosnia provides inductive support for the proposition that Serbian forces were capable of committing atrocities without being under the threat of NATO bombing. But admittedly the evidence is incomplete with respect to Kosovo and one will not know with certainty the answer to the counterfactual—what the Serbs would have done in Kosovo if NATO had not threatened bombing—until archival records are examined in Belgrade in future years. The evidence that one does have suggests that this counterfactual would be answered: the Serbs would have done exactly what they did though on an even larger scale. With this in mind the effectiveness of NATO intervention can be provisionally asserted.

One may also say that over the short-run the ICTY did not achieve very much apart from the indictment of Milosevic and his associates. In the result and taking into consideration only what has thus far transpired, the military intervention has proven to be illegal but effective, while the legal intervention has proven to be legal but ineffective. With these in mind, I wish to conclude with a consideration of two residual issues.

First, in assessing NATO’s intervention, arguably unilateral intervention in Kosovo,\textsuperscript{50} one cannot help but be struck by the dissonance between NATO’s actions and the preamble to the North Atlantic Treaty which reads: the Parties to this Treaty reaffirm their faith in the purposes and principles of the United Nations Charter and their desire to live in peace with all the peoples and governments. And one cannot help but be struck by the dissonance between NATO’s actions and Article 7 of the Treaty which states: “This Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.”\textsuperscript{51} It is worth noting that, though western writers made virtually nothing of it, this dissonance was noted
\footnotesize{\textsuperscript{50} Wedgwood takes issue with the claim that NATO’s actions were unilateral when she alleges that NATO is “close to an objective regime.” She reasons “NATO’s decision deserves greater deference than purely unilateral action.” Wedgwood, supra note 7, at 833. It is difficult to see how this line of reasoning would not have applied to the Warsaw Pact when it acted in 1968 in Czechoslovakia.}

\footnotesize{\textsuperscript{51} ESCOTT REID, TIME OF FEAR AND HOPE app. 2 (Toronto: McClelland and Stewart, 1977).}
separately first by Yugoslav authorities and then by France at the NATO fiftieth anniversary in Washington in April 1999.  

Secondly, given the illegality of NATO's actions, is there room for the argument that its actions were nonetheless justified on moral grounds, say on grounds of justice? Those answering in the affirmative would presumably argue that NATO had to intervene to prevent another Bosnia and to prevent regional instability. Since there was deadlock in the Security Council, no relief could be expected from that quarter and the result was that NATO was the only game in town. Therefore, NATO action was morally justified. But this argument is persuasive only if a capacious utilitarianism or far-sighted consequentialism is employed to measure the long-term effects of NATO action. Setting aside lingering doubts concerning NATO action in the first place, objections turning on the severity of the Rambouillet Agreement and on the premature withdrawal of KVM personnel, a capacious utilitarianism would demand that any moral assessment of NATO's actions be forward-looking and directed at the commitments of the United Nations and KFOR to Kosovo in the future. What I am suggesting here is that a moral assessment of NATO's actions requires a careful analysis not only of what harm it prevented in the short run but of what harm it prevents in the long run.

Relevant to the foregoing observation are the following comments of two military figures with experience in the Balkans. The remark of retired Admiral Leighton W. Smith Jr. who commanded the NATO forces in Bosnia in 1996 is in order. He said in the spring of 2000 "I don't think we are going to get out of Kosovo for a while unless we are willing to allow the Kosovar Albanians to declare independence and take over Kosovo in its entirety and run all the Serbs out, and then forment trouble in Macedonian which I am convinced they will do." And the former supreme commander in NATO in Europe, General Wesley Clark, said while talking generally of the NATO mission in the Balkans, "But that mission requires a vital political component, a long-term strategy for the region." So if the effect of NATO's intervention is to set the stage for an apologetically and rhetorically clothed exit that results in more civil strife, regional instability and ethnic cleansing, the moral argument from justice seems paper thin.


53. At least for NATO supporters, it is important that there be a conjunction of reasons here to block critics of NATO from saying the West's indifference to the tragedy in Rwanda in which 800,000 people perished is evidence of racism.

54. George C. Wilson, Kosovo Has Been Hard on NATO, INT'L HERALD TRIB., Apr. 21, 2000, at 6.

A capacious utilitarianism requires something quite different to make acceptable the interventionist argument on moral grounds. What it requires is a long-term commitment, or at least the willingness for a long-term commitment, from the United Nations and KFOR and possibly NATO for peace and security in Kosovo. Those who shun this and wish to exit in a moment of triumphalism grounding their convictions on justice are in effect echoing the views of the deontological tradition in ethics, a tradition which emphasizes non-negotiables like truth, promise-keeping, and justice. The high-minded who are fond of rights-talk probably fall well within this tradition. But there remains the utilitarian tradition of Hume, Bentham and John Mill and J.S. Mill, and this tradition looks at things in terms of where they might lead. It is this tradition which I am suggesting needs once again to be heard in the case of Kosovo. A capacious utilitarianism or far-sighted consequentialism would hold off delivering its final moral judgment of NATO’s intervention in Kosovo, waiting to see where NATO and KFOR go from here.
WHY BARAYAGWIZA IS BOYCOTTING HIS TRIAL
AT THE ICTR: LESSONS IN BALANCING DUE
PROCESS RIGHTS AND POLITICS

Mercedeh Momeni*

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I. INTRODUCTION

On October 23, 2000, an eagerly anticipated joint trial, dubbed “the media trial,” began at the United Nations International Criminal Tribunal for Rwanda (ICTR or Tribunal), in Arusha, Tanzania.¹ One of the accused, Jean Bosco Barayagwiza, a former high-ranking Rwandan government official and a founding member of the hate-radio, Radio Television Libre des Mille Collines (RTLM), along with Ferdinand Nahimana, the ex-director of the RTLM, and Hassan Ngeze, ex-editor of the infamous Kangura newspaper were scheduled to appear in court. As he made his opening statement, the prosecuting attorney compared these alleged genocidaires to Nazi propagandist Heinrich Himmler. However, Barayagwiza (the accused) was absent from court.² He had issued a statement, “refusing to associate himself with a show trial” in which he claimed the proceedings were inherently unfair because “the ICTR was manipulated by the current Rwandan government and the judges and the prosecutors were the

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1. The trial began after several delays and postponements, the last of which was on September 18, 2000.
2. Hassan Ngeze was also sitting outside the courtroom, in protest of the incomplete translation of his newspaper’s articles, to be used as evidence against him and other discovery issues.
hostage[s] of Kigali." More recently he has demanded political prisoner status from the International Committee of the Red Cross.

Barayagwiza is not the first accused to claim ICTR proceedings are "unfair." He has, however, come closest to avoid having to answer charges made against him by the Tribunal's Prosecutor. On November 3, 1999, the ICTR Appeals Chamber dismissed the indictment against him, "with prejudice," and ordered his immediate release (November decision) because it found that Barayagwiza's procedural rights had been repeatedly violated. Shortly thereafter, the Rwandan government threatened to completely sever relations with the ICTR. The Tribunal's fear of the Rwandan threats becoming a reality was in all likelihood, partly the reason for its poorly reasoned, but properly concluded, reversal of the November decision, on March 4, 2000 "March decision."

In this essay I will discuss how the Tribunal and other actors created a situation where an alleged architect of the 1994 Rwandan genocide was almost released without a trial on the merits and how such a scenario may possibly be avoided in the future. In section II, I will examine how this particular accused person's case took some four and one half years to come to trial. I will then briefly outline the logical gaps in the November and March decisions and the effects of the controversy on the credibility of the international justice in section III. As a supporter of the Tribunal, I will conclude by offering a few recommendations on how to avoid such a potentially disastrous situation in the future, in section IV.

II. FROM RWANDA TO ARUSHA: BARAYAGWIZA'S JOURNEY TO A TRIAL ON THE MERITS

After the 1994 Rwandan genocide, Jean-Bosco Barayagwiza fled to the Republic of Cameroon. According to the findings of the ICTR Appeals Chamber, the Accused and approximately a dozen other Rwandans, including Nahimana, were arrested in that country on April 15, 1996.


7. Supra note 5, at app. A, (chronology of events).
and Belgian authorities. Nevertheless, the ICTR’s Office of the Prosecutor (OTP) requested that the Accused be provisionally detained under Rule 40 (Provisional Measures) of the ICTR Rules of Procedure and Evidence (RPE)\textsuperscript{8} only two days later. On May 6, 1996 the Prosecutor sought a three-week extension for the detention of the Accused in Cameroon and ten days later he\textsuperscript{9} sought the transfer of four of the Rwandans detained by Cameroon, excluding Barayagwiza. At the end of May 1996, the Court of Appeals in Cameroon issued a decision to adjourn without consideration of the Rwandan government’s extradition request based on the pleadings of the Cameroonian Deputy Director of Public Prosecutions who grounded his arguments on Article 8(2) of the Tribunal’s Statute (ICTR primacy over national courts).\textsuperscript{10}

Thereafter, Barayagwiza wrote to the Tribunal’s Prosecutor complaining about his detention in Cameroon. On October 15, 1996 the Prosecutor responded that he was not being held in Cameroon at his behest. Over four months later, the Cameroonian court rejected Rwanda’s extradition request, and ordered Barayagwiza’s release, but he was immediately re-arrested upon a request from the OTP. On March 3, 1996, an ICTR judge signed an order, pursuant to Rule 40 \textit{bis} (Transfer and Provisional Detention of Suspects), which required Cameroon to transfer the Accused to the Tribunal’s Detention Unit in Arusha. The Accused was finally shown a copy of the Rule 40 \textit{bis} order, which included the general nature of the charges against him, on March 10, 1997, almost a year after his initial arrest. On September 29, 1997, more than six months after the March transfer order, and some sixteen months after his initial arrest, Barayagwiza filed a writ of \textit{habeas corpus}, which apparently has not been heard as of the writing of this essay. It is interesting to note that at that point the OTP still had not submitted an indictment against the Accused for confirmation. This only took place on October 22, 1997, the day after the President of Cameroon signed a decree ordering the Accused’s transfer to Arusha. Thus, the Appeals Chamber found that, based on the record, from March 4 through October 22, 1997 the Tribunal took no action with regard to the Barayagwiza matter.\textsuperscript{11}

When Barayagwiza was finally transferred to Arusha, on November 19, 1997, the Tribunal’s winter judicial recess was imminent. Most of the judges were preparing to leave Arusha and some were not scheduled to return until

\begin{itemize}
\item \textsuperscript{9} Richard Goldstone, of South Africa. was the ICTR Prosecutor until October 1996, at which time Louise Arbor began her tenure.
\item \textsuperscript{11} November decision, \textit{supra} note 5, ¶ 44.
\end{itemize}
February of the following year. Therefore, in scheduling an initial appearance—the common law equivalent of an arraignment—for Barayagwiza, the Tribunal’s Registry not only had to address the usual scheduling difficulties of identifying dates suitable for the OTP and the Defense Counsel, but also may have faced a shortage of judges. The accused finally made his initial appearance on February 23, 1998, after spending nineteen months in the Cameroonian jails, during the bulk of which time he was not formally made aware of the charges against him, and an additional three months in the Tribunal’s detention facilities, despite the fact that Rule 62 of the RPE required this proceeding to take place “without undue delay.”

The day following his initial appearance, on February 24, 1998, the Accused filed an Extremely Urgent Motion seeking to nullify his arrest, which was not heard by the Trial Chamber until September 11, 1998. A decision dismissing the motion was issued on November 17, 1998. The Accused appealed the decision some ten days later and the Appeals Chamber, after receiving additional submissions from the parties, issued an order, on June 3, 1999, directing the Prosecutor to specifically address six questions regarding the delays, and to provide supporting documentation.12

The Appeals Chamber then ordered Barayagwiza’s release on November 3, 1999, finding that “the combination of delays at virtually every stage of the Appellant’s case”13 made the case so egregious that it had no choice but to dismiss the indictment with prejudice to the Prosecutor as to avoid putting the Accused through a revolving door of being re-arrested by the Prosecutor.14 The Appeals Chamber simultaneously ordered the immediate release of the accused, while directing the Registrar to make necessary arrangements to deliver Barayagwiza to the authorities of Cameroon,15 with one Judge filing a separate opinion and another appending a declaration to the November decision on this matter, the relevant substance of which is discussed infra.

The order for a return to Cameroon caused Barayagwiza to file a motion for review of the modalities of his release.16 He complained that there was no reason for him to be returned to Cameroon, as he had no legal status, family or business there, nor did he have any means to support himself.17 That motion was quickly withdrawn when the Prosecutor asked to be heard on the same
The Prosecutor also filed a motion for review and reconsideration claiming she had "new facts," which would alter the November decision. Therefore, the Accused remained in the custody of the Tribunal.

The November decision also set into motion a flurry of filings from the parties and angry and highly publicized protest from not only the Government of Rwanda, but also from many others in the international community, such as the European Union, Human Rights Watch and a number of academics. The Rwandans announced that they would suspend cooperation with the Tribunal and officially condemned the decision at the United Nations. They did allow the OTP to continue its operations in Kigali, but did not grant the Tribunal's then new Chief Prosecutor a visa to enter the country for some time. Simultaneously, interventions were made by international justice NGOs to mend relations. They convinced Rwanda to remain engaged with the Tribunal, by inter alia, filing a request to appear as amicus curiae to address the Tribunal on the modalities of release, if that question was reached.

By mid-February the Prosecutor produced "new facts" supported, in part, by a Cameroonian judge's explanations of the politics of the transfer process from Cameroon to Arusha. To further prove her case that Barayagwiza was not simply forgotten, the Prosecutor produced a United States State Department affidavit to show that attempts to transfer Barayagwiza was an on-going process for which the OTP had sought outside assistance, in the form of U.S. intervention. These claims were all made in an effort to show that the lengthy delays should not have been attributed to the Prosecutor. The Rwandan amicus curiae memorial was filed also by the time the Appeals Chamber heard oral arguments in Arusha.

On March 31, 2000 the Appeals Chamber ruled that because the new facts showed that "the violations suffered by the [Accused] and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the
[November] Decision is founded,"26 the November decision should be "altered."27 Therefore, it rejected Barayagwiza’s application for release, and decided that for the violations suffered the Accused would be entitled "to a remedy to be fixed at the time of the judgment at first instance."28

In August 2000, Barayagwiza’s case was joined with three others involved with Rwanda’s hate media and allegedly responsible for the genocide,29 one of whom pled guilty.30 This trial was scheduled to begin on September 18, 2000, but faced delays yet again, this time as a result of the numerous motions filed by the defense.31

III. A BRIEF ANALYSIS OF THE NOVEMBER AND MARCH DECISIONS

At the outset, I should note that I do not intend to recount all the factual findings and legal reasoning behind these decisions, because Professor William Schabas has published an analysis of the November and March decisions, in which he examines the issues in dispute and the findings, in sufficient detail.32 So, I will briefly outline the points relevant to my argument that this and future international criminal tribunals should take due process rights more seriously.

A. The November Decision

In the November decision, the Appeals Chamber found that: 1) the failure to hear Barayagwiza’s writ of habeas corpus and the delay in considering and deciding his extremely urgent motion; 2) the period of his provisional detention having been too long-spanning some eighteen months; 3) the failure to promptly inform the accused of the charges against him; and 4) the protracted wait to answer charges against him - 96 days after his transfer to Arusha, all combined amounted to such an egregious breach of his due process rights that the Prosecutor should no longer have the authority to try him.33

26. Id. ¶ 74.
27. Id.
28. Id. ¶ 75.
29. In addition to Nahimana and Ngeze, mentioned in the introduction of this essay, the Prosecutor joined Georges Ruggiu, an Italian-Belgian RTLM announcer who resided in Rwanda prior to and during the 1994 genocide.
30. Georges Ruggiu pleaded guilty to incitement to genocide and crimes against humanity and agreed to testify for the Prosecutor in the media trial. He was sentenced to 12 years imprisonment in June 2000. Prosecutor v. Ruggiu, Case. No. ICTR-97-32-I.
31. Hirondelle Report, Defence Motions Delay Start of Media Trial (2000) (reporting that a number of motions filed by Nahimana and Barayagwiza would need to be ruled upon before the trial could begin).
33. Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify
At this juncture in the discussion, the outcome of this decision, in terms of whether the accused should have been tried by the Tribunal, is unimportant. What is of consequence is that the majority failed to give appropriate weight to the gravity of the crimes allegedly committed, vis-à-vis the gravity of the due process violations, since the order was not based on the merits of the case, and that the majority apparently did not sufficiently consider: 1) the logistical requirements of his release;34 2) whether the Accused could subsequently be tried in another jurisdiction; 3) the impact of his release on the reconciliation process;35 and 4) to a lesser degree, the inevitable fallout with the Government of Rwanda, without whose cooperation the Tribunal would have to suspend its operation. Although as the Appeals Chamber noted in the March decision, Rwanda’s non-cooperation would have to be addressed by the United Nations Security Council, based on Article 28 of the ICTR Statute.

Therefore, the Chamber’s decision was inadvisable for the circumstances of this particular case. That is to say, given the information available to the Judges at that juncture, the Chamber could have addressed specifically to which jurisdiction the Accused should be delivered upon his release, so that perhaps he could be given a fair trial, since the reason for release were procedural. Alternatively, the Chamber could have found other means by which to sanction the Prosecutor, and others responsible for the due process violations, and to allow for compensation should the Accused be found innocent after a trial on the merits.

B. The March Reversal

In the March decision, which contained a brief four-and-one-half page analysis of the merits of the Prosecutor’s claims, the Appeals Chamber “altered”36 its November decision. It found the Accused’s due process rights had been violated, however, based on the “new facts” presented by the Prosecutor, these violations were neither grave, nor were the Prosecutor omissions offensive. Therefore, the Appeals Chamber decided that:

34. The majority based its decision to return Barayagwiza to the authorities of Cameroon based on Rule 40 Bis of the RPE which states that the accused “shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made.” R.P.E. supra note 8. In the circumstances of this particular case it was inadvisable to order the return Barayagwiza to Cameroon, as that state is not a signatory to the 1949 Genocide Convention. As such, he could have evaded justice there because Cameroon would not have been under an obligation to try him.

35. The United Nations Resolution establishing the ICTR explicitly recognizes reconciliation as a purpose for the establishment of the Tribunal.

36. Id. ¶ 51.
For the violations of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgment, at first instance, as follows: a) If the Appellant is found not guilty, he shall receive financial compensation; b) If the Appellant is found guilty, his sentence shall be reduced to take into account the violation of this rights. 37

There are two primary concerns I would like to raise with regard to the March decision. First, the so-called new facts offered by the Prosecutor did not meet the two-prong test that a party must satisfy in order to introduce such facts under the RPE. Second, the remedy offered by the Appeals Chamber is problematic.

First, with regard to the introduction of new facts, in order to compel the Chamber to review or reconsider a final decision, a party must show that the facts were not available to the party at the time of the proceedings "nor would they have been discovered through the exercise of due diligence" 38 and that "if it had been proven, [the fact] could have been a decisive factor in reaching a decision . . . ." 39 In the March decision, the Appeals Chamber remarked, "In the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120 [the first prong of the above mentioned test] as directory in nature." 40 Feeling bound by the interest of justice, the Appeals Chamber simply disregarded the fact that the OTP was aware of the "new facts" in question prior to filing its response to the Barayagwiza's initial appeal. In fact, the OTP had even failed to exercise due diligence in providing answers to the questions the Appeals Chamber judges had raised about the events of the due process controversy, prior to rendering the November decision. Instead the OTP only felt obligated to perform its duty diligently after the Appeals Chamber ordered the release.

In effect, in the March decision, the Appeals Chamber distorted its own rules in an effort to achieve the desired result, that is, to allow the Prosecutor to proceed with the case while acknowledging that "the appeal process . . . is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing." 41 The March decision simply claimed that the ICTR statute does not explicitly address the situation presented and cites

37. Id. ¶ 75.
38. ICTR supra note 8, R. 120.
39. ICTR supra note 8, R. 120.
40. March decision, supra note 6, ¶ 65.
to clearly distinguishable cases noting that it “does not cite these examples as authority for its actions in the strict sense.”

Second, the remedy offered for the violations is no remedy at all. Deciding that the sentence shall be reduced if the Appellant is found guilty is already standard procedure. With regard to “compensation if he is found not guilty,” it is interesting to note that first, it is unclear what sort of compensation is contemplated here; and second, nothing in the ICTR Statute or Rules provides for such measures. Only in October 2000 did the ICTR President send a letter to the United Nations Secretary General, to be forwarded to the Security Council, proposing an amendment to the Statute to allow for compensation to remedy situations of wrongful arrest and/or conviction, violation of rights, deprivation of liberty and the like.

Furthermore, political considerations apparently also influenced the alteration of the November decision despite the judges’ insistence that the revision of the decision was in light of the new facts and that political considerations had no role in their deliberations. The majority’s decision, as well as the separate statements of Judges Vohrah and Nieto-Navia, openly acknowledge the Rwandan threats of non-cooperation. In fact, the majority remarked that “the Tribunal is an independent body whose decisions are based on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the [UN] Security Council.” To this Professor Schabas has written “Me thinks they insist too much,” although he acknowledged “the volume of new facts sheds a very different light on the nature of the prosecutorial abuse.” The outcome, that release was not warranted because the nature of the due process violations Barayagwiza suffered were not as grave and as attributable to the Prosecutor, is an appropriate one nonetheless.

It is unfortunate that the majority’s decision is generally not well reasoned and lowers certain procedural standards. Furthermore, a number of other questions remain outstanding in the March decision. For example, it fails to answer why the habeas petition filed three years ago, which is still before the Tribunal, is now irrelevant to the violation of due process rights of the Accused when it was treated previously as an egregious violation. Additionally, the new facts did not show that the Prosecutor had fulfilled its obligation to timely inform the Accused of his rights. They simply showed that Barayagwiza knew

42. Id. ¶ 69.
43. Id. ¶ 75 (3)(b).
45. November Decision, supra note 5.
46. Schabas, supra note 28, at 568.
47. Id.
the nature of the charges against him in Cameroon in 1996, although not through the actions of the OTP.

Ultimately, the March decision's conclusion is correct—the procedural violations suffered by the accused did not outweigh the crimes with which he is charged. However, in order to deter the Prosecutor from engaging in such negligent behavior, the Tribunal did have alternatives. It could have released the Accused into the custody of another jurisdiction where he would have been given a fair trial, including Rwanda or Belgium, or it could have sanctioned the prosecution team responsible for this case, through personal fines or reference to their national bars. Instead the Appeals Chamber rendered a weakly reasoned decision setting bad precedent.

III. WHAT ARE THE IMPLICATIONS OF THE BARAYAGWIZA CONTROVERSY FOR THE CREDIBILITY OF THE TRIBUNAL?

What procedural delays mean for the credibility of the Tribunals and, by extension, for furthering the rule of law internationally, is that opponents of such institutions become armed with examples of why international justice will not work. This also sets the stage for Barayagwiza and other accused persons to have an excuse to boycott "unfair" trials, halting the wheels of justice. When the Tribunal puts itself in situations where it is faced with non-cooperation from Rwanda, and forces the Appeals Chamber to render decisions with negative implications for the reconciliation process, it damages not only its own reputation, but also hampers the pursuit of international justice by extension.

Although it has accomplished more than the International Criminal Tribunal for the former Yugoslavia in many ways, it is no secret that the ICTR has had its share of judicial, prosecutorial and administrative troubles. Some of these troubles are attributable to the logistical difficulties—due to a lack of infrastructure in Arusha—and others to the exceedingly unclear lines of responsibility within the Tribunal, which results in a severe lack of accountability in this 700 plus person bureaucracy. This lack of accountability has led to insufficient support for the work of the judicial chambers. One of the violations cited in the November decision was the 96 days that the Accused was forced to wait to make his initial appearance. This, as the Appeals Chamber later discovered, was a scheduling problem, which I will discuss below.

48. For example, the ICTR has arrested over 40 persons who presided over the 1994 genocide, both at a national or regional level. The former Rwandan Prime Minister, Jean Kambanda, pled guilty to genocide in 1998 and was cooperating with the Prosecutor. The ICTY is still struggling to capture many suspects at the top of its wanted list.

49. The original Registrar and Deputy Prosecutors of the Tribunal were forced to resign due to serious questions of competence and a lack of efficiency in their respective offices.
In fact, an expert report regarding the problems of support for the work of Chambers, issued in July 2000, noted that "there is evidence of poor communication, blurred lines of responsibility, a lack of training at crucial levels and some tensions in terms of relationships, all of which serve to frustrate the overriding objective of providing efficient, effective and expeditious support to the judiciary and Trial Chambers."\textsuperscript{50} It is also interesting to note that for the six years it has been in existence, the ICTR has never had an effective Deputy Registrar, whose duties include, \textit{inter alia}, the proper operations of court management, which includes scheduling hearings. Indeed, the position has been left unfilled for prolonged periods of time, which points to hiring difficulties.

How was the Barayagwiza case affected by this lack of proper support? There are two possible problem areas that could be considered here. Fault was primarily placed with the OTP in the November decision. But the Appeals Chamber also acknowledged that the Registry, and Chambers contributed to the delays as well. Furthermore, as mentioned above, in the March decision Cameroon was also apportioned some responsibility for the delay in the transfer.

The Appeals Chamber was right to note that there were no clean hands in the matter. The Registry works alongside the OTP on transfers of accused persons. Obviously, the OTP left Barayagwiza detained in Cameroon for months before it made a serious attempt to transfer him, while it had transferred a number of other Rwandans with whom he was detained, and not until after the Accused had filed a writ of \textit{habeas}. Therefore, the OTP bears some responsibility. Perhaps the Registry could have been more insistent with Cameroon on expediting the transfer, also.

With regard to the delay in scheduling the initial appearance, the scheduling of the judicial calendar is the responsibility of the Court Management Section of the Office of the Registrar. However difficult a task it may be to find common dates on which all parties are available, an organized and persistent Registry official could ensure that all concerned are consulted for availability and the final approval is given by the appropriate judges for a hearing to take place, in a timely manner.

In the Barayagwiza matter, although it may be true that the Defense Counsel agreed to a February 3rd initial appearance date, one must ask the question, "why?" When the Accused was transferred in November 1997, the Judges were about to depart for their winter recess and some were not scheduled to return until February. Therefore, the long judicial recesses, which the Registry has had no difficulties in publicizing when it suits its purposes, have

also been a factor in contributing to the delays and the Barayagwiza case was no exception.\textsuperscript{51}

The situation also begs the question why the Registry does not find creative solutions to address the lingering problems of delays. For example, for the Barayagwiza initial appearance, if it was just some of the judges who were away late into February, why did the Registry not suggest that a substitute judge sit in with the rest of the appropriate chamber to hear the accused plead to the charges? If counsel was not available, why could the Registry not substitute temporary local counsel for the proceedings? Perhaps it is again a question of training and experience.\textsuperscript{52}

The ICTR is in a sense a victim of its own success. The Tribunal’s investigators have located and arrested over 40 of the indicted persons, most of whom are reputed to have been the true architects of the genocide, either nationally or within their own regions. Like Barayagwiza, the majority of the accused have been in detention for three years or more. The pace of trials has simply not kept up with the pace of arrests. As of the writing of this essay, only eight persons have been judged by the Tribunal, two of who, had pleaded guilty and thus avoided protracted and expensive trials. If the Tribunal is to dispense justice effectively and efficiently, it must avoid situations similar to Barayagwiza in the future.

\section*{IV. AVOIDING FUTURE BARAYAGWIZA SCENARIOS}

As a supporter of the Tribunal, there are three basic suggestions that I offer for preventing persistent and problematic procedural delays. First, structurally, the organization is set up to fail. There is no single head of the Tribunal, as there are in most domestic courts.\textsuperscript{53} For the purposes of this portion of the discussion, I am referring only to the Judicial Chambers and the Registry, as obviously, the OTP should be left independent in conducting its operations to avoid any appearance of impropriety. Although there is a President of the Tribunal, she is unable to interfere in the administration of the Tribunal. United Nations officials initially vested this power in the Office of the Registrar, who is responsible for all administrative, budgetary and recruitment matters. Thus, there is no ultimate authority and much slips through the proverbial cracks. The United Nations needs to clarify who is ultimately responsible and reform the Tribunal’s structure so that accountability is maintained and requirements for

\begin{itemize}
\item \textsuperscript{51} Although there is at least one judge in Arusha during recess, a suspect must make his initial appearance before a full chamber.
\item \textsuperscript{52} In the last year, serious efforts have been made to ensure that certain staff and even the Judges participate in various training seminars.
\item \textsuperscript{53} In most national courts, the judges have clear authority over the administrative arm of the court.
\end{itemize}
administering an effective operation are satisfied. Due process rights cannot be guaranteed otherwise.

Second, the Tribunal must clarify lines of responsibility not only between but also within each organ. Moreover, it must either ensure that personnel in all organs are persons highly experienced in the relevant fields of international criminal law, court administration and the like, or provide sufficient training for those who may need it. On this issue the expert report of July 2000 notes that "[t]here is overwhelming evidence that a number of those working in the Tribunal either do not understand the real purpose of the Tribunal or, for some of those who do, do not relate their individual routines and responsibilities to the achievement of that purpose, directly or indirectly." As in most large bureaucracies, at the Tribunal the buck rarely stops. Until recently, there has been very little accountability in any of the three organs, although those familiar with the Tribunal's history will recall that the first Deputy Prosecutor and the Registrar were asked to resign in 1997.

Recent media reports told of serious disarray in the OTP. In mid-2000 three senior trial attorneys were asked by the Chief Prosecutor to resign immediately, but "benefiting from the recourses available from the UN system, it turns out that they will, at worst, simply be distanced from the trials, awaiting the expiration of their contracts." In addition, another senior attorney associated with the media trial left the Tribunal for another United Nations post, just days before the trial was scheduled to begin, reportedly because the OTP was unprepared to begin the highly publicized trial. In protest, two others on the same team left the Tribunal. Instances of lack of accountability like these are not uncommon in other organs of the Tribunal and obviously slow the pace of the proceedings. When responsibilities are plainly carved out and well trained, or better yet, experienced personnel are in place, when a Barayagwiza situation arises again, the problem can be addressed at its source.

Finally, the Tribunal's rules must be clarified and amended to allow sanctions to be imposed against both the defense and prosecution and the judges should not hesitate in addressing unprofessional behavior. As it stands, Rule 46 of the RPE, speaks to the issue of misconduct "by counsel" and what the Chambers are empowered to do against counsel, in such cases. Although, at last, at plenary session in 2000, the judges agreed that "counsel" in Rule 46 refers to both parties, the implications in the text point primarily to the defense.

A few defense counsel have been referred to their national bars for misconduct in the past. More recently, the judges have been denying defense counsel fees for frivolously filed motions. As of the writing of this essay,

however, no Prosecutor has been subjected to Rule 46 sanctions. In order to ensure that a balance is maintained, especially in cases like the one in question, the judges should have and indeed exercise the option against both parties.

Should the Tribunal ever face a Barayagwiza situation again, where it is deemed that releasing the accused is not an option, after making finding of due process violations and before hearing the merits of the case it should then have alternatives for addressing the problem. It should be able to impose sanctions against the individual prosecutor or the prosecuting team for misconduct. For example, the prosecuting attorney could be held in contempt or monetary fines could be imposed. The prosecuting attorney could also be referred to his or her national bar. The efficacy of such an approach may be limited in a United Nations Tribunal, but the option should still exist. In the Barayagwiza controversy, it seems that division of responsibility was unclear and one could say there was negligence on the part of the OTP. But what if a situation arises where the misconduct is intentional? In this context, the judges have the tools with which to conduct proper trials with the accused person’s due process rights in tact. They must use these tools even handedly.

V. CONCLUSION

The Tribunal barely saved itself from embarrassment in the Barayagwiza case. The situation would not have unfolded as it did had the Tribunal’s three organs acted diligently, acknowledging that the due process rights of an accused were respected. If safeguards and policies exist and are enforced properly, the Tribunal can better ensure that due process rights are protected.

If the Appeals Chamber had truly desired to take the instant case out of the Prosecutor’s hands it could have arranged that Barayagwiza be transferred to a jurisdiction where he would face a fair trial. But it chose to keep the case at the ICTR, using faulty legal reasoning and lowering standards. It also was forced to negotiate a delicate standoff with the Government of Rwanda, whether it chooses to acknowledge this fact or not.

To avoid similar future circumstances, the ICTR must reform its structure, ensure that each section and each organ is clear about its responsibilities and that accountability is not swept under the rugs of the United Nations employment/staff rules, and finally hold the Prosecutor to the same standard as the Defense Counsel.
Andreopoulos notes that no crime matches genocide in the moral opprobrium that it generates. Constituting a criminal intent to destroy or cripple permanently a human group, acts of genocide shock the collective conscience of the world's community perhaps like no other act. While the commission of genocide dates to antiquity, it is in response to the atrocities
committed by Nazi Germany during the Second World War that the international community undertook the development of international laws designed to both prevent and punish acts of genocide. The authoritative legal statement on the issue of genocide is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force in 1951. The Convention's nineteen articles define genocide and establish the offense as an international crime. The product of a politicized codification process, the Genocide Convention has been criticized by legal scholars as a compromise convention that fails to both fully define the crime of genocide and provide the necessary legal institutions for its adjudication. The fact that no international prosecution for acts of genocide took place for more than four decades after the Convention's entry into force was viewed by many as an indication of the treaty's ineffectiveness. Since 1993, however, the international adjudication of both individuals and states alleged to have committed acts of genocide has taken place. As such, the impact of the Genocide Convention has increased significantly.

The focus of this article is the international adjudication of the crime of genocide. Cases brought before the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Court of Justice (ICJ) are presented. First, however, the concept of genocide is reviewed, followed by an assessment of the Genocide Convention.

II. THE CONCEPT OF GENOCIDE

The act of genocide is ancient, while the concept itself is contemporary. Chalk and Jonassohn note that we have no historical evidence of acts of genocide during the hunting and gathering stage of early man.\(^2\) Genocide emerged only after the world was divided into nomads and settlers, when conflicts over agriculture became increasingly destructive. In order to end the cycle of war, recuperation, and war seeking to avenge defeats, the victors began to adopt strategies of annihilation. After battle, the victors killed, sold into slavery, or dispersed the defeated populations. With the centralization of power in the hands of the state, along with an increased capacity to kill associated with revolutions in military technologies, the ability to commit mass murder on an unprecedented scale became more common, including acts targeted at individuals due to their group characteristics. Since 1900 most destructive acts of genocide have taken place, ranging from the Armenian genocide to the Holocaust to the killing fields of Cambodia. To state that genocide is a

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twentieth century phenomenon is misleading; however, to label the 1900s the century of genocide is accurate.

A. Typologies

A number of typologies have been used by scholars for analytical and comparative studies of genocide. Lemkin offered the first typology, differentiating incidents of genocide based on the intent of the perpetrator. Accordingly, the first type of genocide, which emerged in antiquity and continued until the Middle Ages, was the total, or near total, destruction of victim groups and nations. The second type of genocide, characteristic of the modern age, was aimed at the destruction of a culture without an attempt to physically destroy its bearers. Lemkin's third type of genocide is reflected in the Nazi-style genocide of the 1930s, which combined ancient and modern forms of genocide in targeting some groups for immediate annihilation and others for ethnic assimilation.

Others have offered typologies based on the type of society. Horowitz, for example, articulates eight types of societies, ranging from permissive to genocidal societies. Additional typologies of genocide are based on the type of perpetrators, the type of victims, the type of groups, the types of accusation, the types of results for the perpetrator society, and the scale of casualties. Chalk and Jonassohn, similar to Lemkin, provide a typology that classifies genocide according to the motives of the perpetrators. Motives, according to Chalk and Jonassohn, can be differentiated according to the following desires:

1) to eliminate a real or potential threat;
2) to spread terror among real or potential enemies;
3) to acquire economic wealth; or
4) to implement a belief, a theory, or an ideology.

Recognizing that more than one of the aforementioned motives may be at work, Chalk and Jonassohn categorize acts of genocide by determining which of the four motives was the dominant one. In their analysis, Chalk and Jonassohn conclude that while the first three types of genocide date to antiquity, the fourth type is more reflective of modern times. The commission of the act of genocide in order to implement a belief, a theory, or an ideology is clearly

3. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE (1944).
4. JESSIE BERNARD, AMERICAN COMMUNITY BEHAVIOR (1949); IRVING LOUIS HOROWITZ, TALKING LIVES: GENOCIDE AND STATE POWER (1980).
5. HOROWITZ, supra note 4, at 13-14.
6. CHALK & JONASSOHN, supra note 2.
7. LEMKIN, supra note 3.
8. CHALK & JONASSOHN, supra note 2.
9. Id.
10. Id.
distinct from types I-III. First, type IV genocides are targeted toward citizens of the perpetrator state instead of aliens. Second, while genocide to eliminate a threat (type I), spread terror among enemies (type II), or acquire economic wealth (type III) produce tangible benefits to the perpetrator state, ideological genocide (type IV) is carried out in spite of tremendous costs to the perpetrator state. Chalk and Jonassohn note that such costs to the state can be measured in economic, political, and development terms.

Kuper, as well, clusters genocide according to motive. His three categories of modern genocide include:
1) genocides designed to settle religious, racial, and ethnic differences;
2) genocides intended to terrorize a people conquered by a colonizing empire; and
3) genocides perpetrated to enforce or fulfill a political ideology.

Later, Kuper divides genocide into two main groups: domestic genocides carried out by a state on its territory against its own citizens and genocides arising in the course of international warfare. The four types of domestic genocide adopted by Kuper are:
1) genocides against indigenous peoples;
2) genocides against hostage groups;
3) genocides following upon decolonization of a two-tier structure of domination; and
4) genocide in the process of struggles by ethnic or racial or religious groups for power or secession, greater autonomy, or more equality.

The inability of scholars to reach a consensus on the most appropriate typology of acts of genocide underscores both the issue's complexity and the scholarly community's continued effort to reveal its primary sources. The lack of consensus also reflects diverging views on the very definition of genocide, a problem that continues to hamper the international adjudication of the crime of genocide.

B. Definitions

The term genocide became part of legal terminology only after World War II, although scholars note its first use by jurist Raphael Lemkin during the latter stages of the war. The term genocide was derived from the Greek word genos,
which translates to race or tribe, and the Latin *cide*, which translates to killing. Lemkin explained the concept as follows:

\[\text{[G]enocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.}^{17}\]

The inclusion of "nonlethal acts" such as actions aimed at the destruction of essential foundations of the life of national groups\(^{18}\) makes Lemkin's definition extremely broad, resulting in the articulation of several alternative definitions of the term. However, as Chalk and Jonassohn note, there is no generally accepted definition of genocide in the literature.\(^{19}\) Fein focused her attention on developing a broader and deeper sociological definition of genocide, as follows: "genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim."\(^{20}\) Like Remkin, Fein does not limit acts of genocide to activities carried out by the state, as many other scholars do. Horowitz defines genocide as: "A structural and systematic destruction of innocent people by a state bureaucratic apparatus."\(^{21}\)

Horowitz's definition does limit the range of perpetrators of acts of genocide to state bureaucratic apparatus. His definition expands the range of victims, which are defined in terms of their perceived innocence, making no reference to their collective characteristics. Harff and Gurr recognize that such a definition fails to differentiate state-sponsored murder for reasons other than

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\(^{17}\) \text{LEMKIN, supra note 3.}

\(^{18}\) \text{CHALK & JONASSOHN, supra note 2, at 9.}

\(^{19}\) \text{Id. at xvii.}

\(^{20}\) \text{HELEN FEIN, LIVES AT RISK: A STUDY OF VIOLATIONS OF LIFE INTEGRITY IN 50 STATES IN 1987 BASED ON THE AMNESTY INTERNATIONAL 1988 REPORT (1990).}

\(^{21}\) \text{HOROWITZ, supra note 4, at 17.}
group characteristics, termed politicides, from acts of genocide. Their definition, provided below, accepts Horowitz's limitation to state activities:

[G]enocides and politicides are the promotion and execution of policies by a state or its agents which result in the deaths of the substantial portion of a group. The difference between genocides and politicides is in the characteristics by which members of the group are identified by the state. In genocides the victimized groups are defined primarily in terms of their communal characteristics, i.e., ethnicity, religion, or nationality. In politicides the victim groups are defined primarily in terms of the hierarchical position or political opposition to the regime and dormant groups.

Chalk and Jonassohn define the term as follows: "Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator." This definition expands the range of perpetrators, limited by Horowitz and Harff and Gurr to a state's bureaucratic apparatus, by including other authorities. This definition fails, however, to include actions by individuals aimed at the destruction of groups based upon characteristics associated with the group. Charny defines genocide in such a way that allows for actions by non-state agencies to qualify. His definition reads as follows: "Genocide in the generic sense is the mass killing of substantial numbers of human beings, when not in the course of military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims." Charny's definition, however, is exceptionally broad with no reference to either the intentions of the perpetrator or the group characteristics of the victims, issues of central concern to Lemkin and the Genocide Convention.

What is clear from this review of the leading definitions of genocide is that both the range of perpetrators and the range of victims are as important as, if not more important than, the manner in which the destruction takes place. A result of the divergent views on the proper definition of genocide is an inability of the scholarly community to arrive at a consensus of what actions constitute genocide and the number of victims of genocide. Walliman and Dobkowski estimate, for example, that between nineteen and twenty-eight million people

23. Id.
24. Chalk & Jonassohn, supra note 2.
26. Id.
during the twentieth century were victims of genocide\textsuperscript{27} while Smith calculates that number to be sixty million.\textsuperscript{28} Undoubtedly, the debate over the proper definition of genocide will continue unabated. Any acceptable definition of the term, however, must include both the "intent to destroy" motive of the perpetrator as well as the "group characteristic" of the victims.

III. THE GENOCIDE CONVENTION

Codified in 1948, the legal framework for the Genocide Convention was provided by the United Nations General Assembly and the Economic and Social Council. The General Assembly, at its 47th plenary meeting on November 9, 1946, referred to the Sixth, or Legal, Committee a draft resolution submitted by the representatives of Cuba, India and Panama inviting a study of the possibility of declaring genocide an international crime. At its 24th meeting on November 29, 1946, the Sixth Committee decided to entrust a Sub-Committee with the task of drafting a unanimously acceptable resolution on the basis of various proposals submitted. The Sixth Committee, at its 32nd meeting on December 9, 1946, unanimously adopted the draft resolution. On the recommendation of the Sixth Committee, the General Assembly, at its 55th plenary meeting on December 11, 1946, unanimously adopted Resolution 96(I), which reads:

Genocide is the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred, when racial, religious, political and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of international concern.

The General Assembly, therefore, Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or other grounds - are punishable; Invites the Members States to enact the necessary


legislation for the prevention and punishment of this crime; Recommends that international co-operation be organized between States with a view to facilitate the speedy prevention and punishment of the crime of genocide, and, to this end, Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.29

The General Assembly reaffirmed the 1946 resolution on November 21, 1947 by resolution 180(II) and requested the Economic and Social Council to continue its work on the subject. The Council, empowered by the General Assembly to prepare a draft convention on the prevention and punishment of the crime of genocide, felt that the necessary studies should be undertaken in consultation with the Committee for the Codification of International Law and with the Commission on Human Rights. In view of the urgency of the question, the Economic and Social Council enlisted the services of the Secretary General, who was asked to enlist the assistance of Member States of the United Nations in preparing the draft convention. In 1948, the Economic and Social Council appointed an ad hoc committee consisting of seven members, including Raphael Lemkin, to revise the original draft. The ad hoc committee met from April 5-August 26, 1948.

When the drafting project was completed, the Council, after a general debate, decided by resolution 153(VII) on August 26, 1948, to send the draft to the General Assembly Third Committee for study and action. The General Assembly then referred the report to its Sixth Committee for consideration. The Sixth Committee devoted fifty-one meetings during two months to an examination and discussion of the draft convention. On December 9, 1948, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. On December 11, 1948 the representatives of twenty states signed the convention, which entered into force in 1951. To date, 127 states have ratified the treaty.

A. Preamble to the Genocide Convention

The Genocide Convention's preamble reflects both the accomplishments of the prior General Assembly resolution and sets the normative stage for the Convention's binding articles. The preamble states:

The Contracting Parties

*Having considered* the declaration made by the General Assembly of the United Nations in the resolution 96(I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

*Recognizes* that at all periods of history genocide has inflicted great losses on humanity; and

*Being convinced* that, in order to liberate mankind from such an odious scourge, international co-operation is required.

Hereby agree as hereinafter provided.30

**B. Articles of the Genocide Convention**

The Convention’s preamble is followed by nineteen articles which can be divided into three categories, as follows: substantive articles (I-IV); procedural articles (V-IX); and technical articles (X-XIX). Since it is the first nine articles of the Convention that are directly related to the adjudication of acts of genocide, those articles are reiterated and analyzed here.

**Article I.** The Contracting Parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.31

The first article establishes the fact that acts of genocide, regardless of the presence or not of war, constitute international crimes and also commits Parties to the Convention to undertake actions to both prevent and punish the acts. The recognition that an act of genocide constitutes a crime against humanity is rooted in Lemkin’s insistence that: “[T]o treat genocide as a crime that only concerns an individual nation makes no sense because by its very nature the author is either the state itself or powerful groups backed by the state . . . . By its legal, moral and human nature, genocide must be regarded as an international crime.”32

Article I was targeted for criticism by many, including the Committee on Peace and Law Through the United Nations, which concluded that “what is left

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31. *Id.* at art. 1.
of the Convention is a code of domestic crimes which are already denounced in all countries as common law crimes." While it may be true that acts of genocide are criminal on the domestic plane, the contribution that Article I makes is significant. Acts that the Convention defines or lists in the two articles that follow (Articles II and III), which hitherto if committed by a government in its own territory against its own citizens have been no concern to international law, are made a matter of international concern and are, therefore, taken out of the "matters essentially within the domestic jurisdiction of any state." While genocide by a state against its own citizens was morally condemned prior to the Convention, it was "generally recognized that a state is entitled to treat its own citizens at its discretion and that the manner in which it treats them is not a matter with which international law . . . concerns itself." Elevating the status of the crime of genocide to the international plane, therefore, is an important contribution of the Convention's first article.

The provisions codified in Article I, importantly, provide legal bases for third party intervention to prevent and punish the crime of genocide. The Convention does not, however, obligate states to intervene in response to the commission of the act of genocide as is commonly assumed.

Article II. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

As stated in Article II, the Convention's approach is that of individual crime and not of persecutions instigated by governments. For this and other reasons, the Convention's definition of genocide has sparked a heated scholarly debate over its utility and completeness. Andreopoulos articulates some of the shortcomings of the Convention's definition of genocide. First, the definition excludes political and social groups from those deemed worthy of protection. In addition, economic groups are not provided explicit protection under Article II. With the

35. LASSA OPPENHEIM & LAUTERPACHT HERSH, INTERNATIONAL LAW: VOLUME I (7th ed. 1948).
36. 1948 Genocide Convention, supra note 30, at art. II.
38. ANDREOPOULOS, supra note 1, at 2.
establishment of anti-capitalist ruling parties this century, the prospect of states liquidating property owners and others who believe in private enterprise was very real during the Convention’s drafting. The failure to include political, social and economic groups in Article II, therefore, is a serious omission, which can be explained only with reference to the political debate process by which the Convention was drafted. Also absent from the Convention’s provisions is a reference to “cultural genocide,” which Dadrian includes in his five types of genocide.\(^\text{39}\)

Second, the exact meaning of the intentionality clause in Article II remains evasive. Intent represents the psychological element of crimes of genocide, and is central to the term’s definition and application. By not providing a clearer guideline for the determination of intent, the Convention leaves the judge and jury the subjective responsibility of doing so. Also of note in this regard, the article’s reference to “serious mental harm,” which was proposed by China, is vague and subject to wide degrees of interpretation.

Article III. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.\(^\text{40}\)

In its third article, the Convention expands the domain of acts that fall within its legal parameters, reflecting the complexity of the acts that contribute to genocide. In the first verdict ever handed down by an international court on charges of genocide, delivered against Jean Paul Akayesu by the International Criminal Tribunal for Rwanda (ICTR) in 1998, the defendant was found guilty of not only genocide but also public incitement to commit genocide.\(^\text{41}\) Two days later, the same court convicted Rwanda’s former Prime Minister, Jean Kambanda, of genocide, conspiracy to commit genocide, and incitement of genocide.\(^\text{42}\) By criminalizing related acts of genocide, the Convention expands the domain of prosecution into important areas.

Rather than providing a definition of the acts other than genocide that are deemed criminal, Article III simply lists them. The inclusion of sub-paragraph c, which lists “direct and public incitement to commit genocide” raised concerns


\(^{40}\) 1948 Genocide Convention, *supra* note 30, at art. III.


in the United States, in particular, about the dividing line between incitement and the constitutionally guaranteed freedom of speech.

Article IV. Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.\(^\text{43}\)

The fourth article both reflects the historical tendency of complicity at the highest levels of state office in the commission of genocide and seeks to undermine sovereign immunity defenses of leaders. Traditionally, the application of international law to state officials has been undermined by the principle of immunity, which is granted internationally to heads of state and domestically to other state officials. By clearly stating in Article IV that criminal responsibility extends not only to private individuals but also to rulers and public officials, the Convention expands the range of culprits that can be held accountable for their genocidal actions. This article could have been strengthened by an explicit rejection of the plea of superior command. A Soviet amendment to specifically exclude the plea, however, was rejected at the convention's drafting.\(^\text{44}\)

Article V. The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.\(^\text{45}\)

The fifth article seeks to internalize the prohibition on genocide into the national laws of Parties to the Convention. The drafting of Article V reflects a recognition that genocide often takes place within the boundaries of the state and that the municipal criminalization of such acts is essential to the effectiveness of the legal regime.

Article VI. Persons charged with genocide or any of the other acts enumerated Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.\(^\text{46}\)

\(^{43}\) 1948 Genocide Convention, \textit{supra} note 30, at art. IV.


\(^{45}\) 1948 Genocide Convention, \textit{supra} note 30, at art. V.

\(^{46}\) \textit{Id.} at art. VI.
The original draft of the convention provided for universal jurisdiction, permitting the state whose authorities had arrested those charged with the crime to exercise jurisdiction regardless of the nationality of the accused or of the place where the offense was committed. After heated debate, it was concluded that universal jurisdiction would not be incorporated into the final convention. As a result, the first part of Article VI only recognizes the jurisdiction of the state in the territory of which the act of genocide was committed. To expand jurisdiction over crimes of genocide, the second part of Article VI extends jurisdiction to an international penal tribunal, as long as the contracting parties have accepted that tribunal's jurisdiction. Since no such international tribunal existed at the time of the Convention's drafting, this provision did little to expand jurisdiction as it relates to crimes of genocide. The establishment in the 1990s of criminal tribunals for the former Yugoslavia and Rwanda, along with the drafting of the Statute for an International Criminal Court, however, greatly increases the impact of Article VI's reference to an international penal tribunal.

Article VII. Genocide and other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in accordance with their laws and treaties in force.47

The ability to secure the extradition of international criminals is central to prosecution when the state seeking prosecution does not physically possess the accused. While states have entered into extradition agreements that include a wide range of acts deemed criminal, modern extradition treaties specifically exclude political offenses. A political offense is defined as an overt act, in support of a political rising that is connected with a struggle between two groups in a state for control of the state. Since states complicit in genocidal acts may easily escape their legal obligation to extradite an individual or individuals accused of genocide on the grounds that the offense is political in nature, Article VII closes a legal loophole that otherwise would greatly undermine the Convention's effectiveness.

Article VIII. Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.48

47. Id. at art. VII.
48. Id. at art. VIII.
Article VIII places at the disposal of states seeking to prevent or punish genocide the institutions and organs of the United Nations. Several United Nations bodies, including the General Assembly, the Economic and Social Council, the Security Council, the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities have played a constructive role in the prevention and punishment of the crime of genocide. On several occasions, these bodies have qualified acts as genocide, publicly proclaimed states complicit in genocidal acts, and established tribunals for the prosecution of accused. Mendlovitz and Fousek argue that Article VIII may serve as the basis for creating innovative preventive mechanisms, such as the United Nations Constabulary that they propose.\(^49\)

Article IX. Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.\(^50\)

While Article IX was weakened by reservations submitted by several states, which declared that they were not bound by the article's provisions unless all parties to the dispute agreed to submit the issue to the International Court of Justice, the ICJ has been called upon to adjudicate genocide cases and to provide advisory opinions upon request by the General Assembly and Parties to the Convention. In 1951, the General Assembly requested an advisory opinion from the Court regarding the impact of reservations made by Parties to the Genocide Convention that were objected to by other Parties to the Convention. The Court ruled that Parties registering reservations, which are subsequently objected to by other Parties to the Convention, remain Parties to the Convention. The Court's ruling, contrary to some legal opinion, worked to strengthen the Genocide Convention, since the complete exclusion from the Convention of one or more States would not only restrict the scope of its application but would detract from the authority of the moral and humanitarian principles which are its basis. On three occasions during the 1990s, states initiated proceedings in the International Court of Justice on the charge of genocide, as provided for in Article IX.


\(^50\) 1948 Genocide Convention, *supra* note 30, at art. XI.
IV. THE INTERNATIONAL ADJUDICATION OF THE CRIME OF GENOCIDE

If the decade of the 1940s was characterized by the international effort to codify the legal regime on genocide, the decade of the 1990s was characterized by international efforts to adjudicate the crime of genocide. During the 1990s several instances of international adjudication of the crime of genocide have taken place. Numerous cases against individuals have been adjudicated by the two ad hoc tribunals established in response to the conflicts in Yugoslavia and Rwanda, and three genocide cases against States were adjudicated by the International Court of Justice. These cases represent the first international legal adjudications of the crime of genocide.

A. The International Criminal Tribunal for Yugoslavia (ICTY)

The massive violence and brutality in the war that erupted in the former Yugoslavia, with an unprecedented scale of mass killings in Europe since 1945, the implementation of genocidal “ethnic cleansing” policies, the existence of concentration camps, murder, organized torture, rape, and other atrocities, drew international attention and condemnation. As the situation deteriorated, the United Nations Security Council received requests from some of its members to convene a meeting and take action in the Yugoslav conflict. On September 25, 1991 the Council responded to those requests and met to discuss the unfolding situation in Yugoslavia.51 In response to the failed sanctions to halt the conflict and atrocities committed on all sides, the Security Council adopted Resolution 780 in 1992, requesting the establishment of a Commission of Experts to report on the grave breaches of international law in the former Yugoslavia. The Secretary General, at the request of the Security Council, compiled and submitted a report recommending the creation of a criminal court expressly for the conflict in Yugoslavia. By Resolution 827 (1993) the Council established the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY). A statute of the tribunal was drafted and approved by the Council, setting into motion the creation of the tribunal.

Seated in The Hague, Netherlands, the ICTY is mandated to prosecute and try persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991. The Tribunal enjoys jurisdiction over four clusters of offenses:

1) grave breaches of the 1949 Geneva Conventions;
2) violations of the laws or customs of war;
3) genocide; and
4) crimes against humanity.

To date, the Yugoslav Tribunal has indicted ninety-four individuals, with sixty-seven public indictments outstanding, including nine indicted for the crime of genocide. To date, however, the Yugoslav Tribunal has adjudicated only one case involving genocide.

1. The Goran Yelisic Case

The trial of Goran Jelisic before Trial Chamber I of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 opened on November 30, 1998 and ended on November 25, 1999. The indictment of Goran Jelisic included thirty-two distinct counts of genocide, violations of the laws or customs of war, and crimes against humanity. The first count of the indictment pertains to genocide and reads as follows:

In May 1992, Goran Jelisic, intending to destroy a substantial or significant part of the Bosnian Muslim people as a national, ethnical or religious group, systematically killed Muslim detainees at the Laser Bus Co., the Brcko police station and Luka camp. He introduced himself as the “Serb Adolf” said that he had come to Brcko to kill Muslims and often informed the Muslim detainees and others of the numbers of Muslims he had killed. In addition to killing countless detainees, whose identities are unknown, Goran Jelisic personally killed the victims in paragraphs 16-25, 30, and 33. By these actions, Goran Jelisic committed or aided and abetted:

Count 1: Genocide, a crime recognized by Article 4(2)(A) of the Tribunal’s Statute.

The indictment was issued against the accused on June 30, 1995, and Goran Jelisic was arrested on January 22, 1998 in accordance with the arrest warrant issued by the Tribunal and transferred to its Detention Unit in The Hague. At his initial appearance before the Tribunal, the accused plead not guilty to all the counts on which he was charged, including the count of genocide. The indictment was amended on October 19, 1998 when Goran Jelisic plead guilty to all counts except the charge of genocide.

In its prosecution of Goran Jelisic on the charge of genocide, the Trial Chamber focused upon the two key elements of the crime, the material effect and the mens rea of the offense. To prove material effect the prosecution first

53. Id.
established that the actions of the accused, namely the murder of members of a group at the Luka camp in Brcko in May 1992, constitute the crime evoked by the Prosecutor in support of the genocide charge. Associating the acts of murder with the accused was not problematic, since Goran Jelisic had earlier admitted to having committed thirteen murders at the Luka camp. Next, the Trial Chamber addressed the *mens rea* element of the charge. Accordingly, the underlying crime or crimes must be characterized as genocide when committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The Trial Chamber concluded that the Prosecutor had not established beyond all reasonable doubt that genocide was committed, since the accused appeared to have killed arbitrarily rather than with the clear intention to destroy a group. As such, the Trial Chamber concluded that it had not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide.

**B. The International Criminal Tribunal for Rwanda (ICTR)**

In Rwanda, ethnic violence was unleashed in the aftermath of the sudden death in a plane crash of Rwanda’s president. In shocking speed, as many as one million Rwandans were massacred in a brutal one-hundred-day period. The clear ethnic division between victims and perpetrators indicated that crimes of genocide were taking place. Having failed to prevent the human destruction, the Security Council took action to prosecute those believed responsible for the killings. In July of 1994, the Security Council adopted Resolution 935, establishing a Commission of Experts to investigate human rights violations in Rwanda. Next, following the Yugoslav model, the Security Council decided to establish the United Nations International Criminal Tribunal for Rwanda (ICTR).

The ICTR was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994. It may also deal with the prosecution of Rwandan citizens responsible for such acts in the territory of neighboring states during the same period. The Tribunal has secured the arrest of over forty individuals accused of involvement in the 1994 genocide in Rwanda, and convicted several prominent members of the former Rwandan government, including its prime minister. At present, the Tribunal is holding forty-three detainees for trial. While an exhaustive review of genocide cases completed by the ICTR is not possible in this article, a review of three cases illustrates the Tribunal’s adjudication powers.

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1. The Jean-Paul Akayesu Case

Jean-Paul Akayesu was arrested in Zambia on October 10, 1995, and charged by the International Criminal Tribunal for Rwanda on February 16, 1996, with thirteen counts of genocide, crimes against humanity and violations of the Laws and Customs of War. Jean-Paul Akayesu made his first appearance before the Chamber on May 30, 1996, where he plead not guilty to all counts against him. During the trial, which opened on January 9, 1997, the Chamber heard forty-two witnesses and entered into evidence 125 documents, generating more than 4,000 pages of transcripts. While acknowledging that massacres aimed mainly at the Tutsi took place in 1994 Taba commune, where the accused held a prominent position as bourgmestre, the defense claimed that its client did not commit, order to be committed, or in any way aid and facilitate the acts with which he was charged. In fact, the defense continued, Akayesu was himself the target of harassment, as evidenced by his decision to flee to neighboring Zambia.

In its ruling, the Trial Chamber established the material effect in view of the widespread killings of victims of which were mainly Tutsi. In demonstrating the mens rea element of the charge of genocide, the Trial Chamber referenced many facts showing that the intention of the perpetrators of the killings was to cause the complete disappearance of the Tutsi people. In this connection, Alison DesForages, a specialist historian on Rwanda who appeared as an expert witness, stated as follows:

[O]n the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that - as they said on certain occasions - their children, later on, should not know what a Tutsi looked like, unless they referred to history books.

56. In the course of the trial on June 17, 1997, the Chamber granted the Prosecutor leave to amend the Indictment in order to add three new counts relating to allegations of rape and sexual violence, to which several witnesses had testified earlier during the appearance before the Chamber. The accused plead not guilty to these three additional counts. Id.
57. The structure of the executive branch, and the authority of the members therein, is set forth in the laws of Rwanda. In the Prefecture, the Prefect is the highest local representative of the government, and is the trustee of the State Authority. In each commune within a Prefecture there exists the council of the commune, which is led by the Bourgmestre of that commune. The Bourgmestre is nominated by the Minister of the Interior and appointed by the President. While subject to the hierarchical authority of the Prefect, the Bourgmestre is in charge of governmental functions within his commune, including shared authority over the Gendarmerie Nationale in his commune.
58. Summary of the Judgement in Jean-Paul Akayesu Case: ICTR-96-4-T Delivered on 2 September
Two prosecution witnesses, who testified separately before the Tribunal, confirmed the testimony.

The Trial Chamber found that the accused, Jean-Paul Akayesu, in his capacity as bourgmestre, was responsible for maintaining law and public order in the commune of Taba and that he had effective authority over the communal police. Moreover, as "leader" of Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted before the Chamber that he had the power to assemble the population and that they obeyed his instructions. The Chamber ruled that Akayesu was present during the acts of violence and killings, and sometimes gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi. Absent of a confession from the accused, the Chamber was required to infer the intent of Akayesu from his actions. The Chamber ruled on September 2, 1998, that Jean-Paul Akayesu was guilty of commission of the crime of genocide. On the charge of complicity in genocide, the Chamber ruled that the same person could not be both the principal perpetrator of, and accomplice to, the same offense. As such, the Chamber ruled not guilty on the charge of complicity in genocide.

2. The Jean Kambanda Case

Jean Kambanda, the former Prime Minister of Rwanda, was arrested by the Kenyan authorities, on the basis of a formal request submitted to them by the Prosecutor on July 9, 1997, in accordance with the provisions of Rule 40 of the Rules of Procedure and Evidence. After being transferred to the Detention Facility of the Tribunal an indictment was filed on October 16th, charging:

1) genocide,
2) complicity in genocide,
3) conspiracy to commit genocide, and
4) crimes against humanity.

On May 1, 1998, during his initial appearance before the Trial Chamber, the accused plead guilty to the six counts contained in the indictment. As such, the Trial Chamber moved directly to the sentencing phase of the proceedings.

3. The Clement Kayishema and Obed Ruzindana Case

Clement Kayishema and Obed Ruzindana were indicted by the Prosecutor on April 11, 1997, on charges of genocide and crimes against humanity stemming from their alleged participation in a series of massacres that took place between April 10 and June 30, 1994. During this period, at several sites which included two churches, a stadium, and other public domains, the indictment alleges that thousands of men, women and children were killed and injured by the accused. Clement Kayishema was charged with twenty-four counts, including four counts of genocide. Obed Ruzindana was charged with four counts, including one count of genocide.

On May 21, 1999, the Trial Chamber rendered its judgment, finding each defendant guilty on all counts of genocide but not guilty on all other counts. In so ruling, the Chamber accepted the defense argument that the alleged crimes were based on the same conduct and therefore a *concur d’infraction*, or concurrence of violations, prevented guilty verdicts for both genocide and crimes against humanity. The Chamber ruled that it is only acceptable to convict an accused of two or more offenses in relation to the same set of facts where the offenses have differing elements or where the laws in question protect the same social interests.

C. The International Court of Justice

The International Court of Justice (ICJ) superceded the Permanent Court of International Justice (PCIJ) following the Second World War. Described by the United Nations Charter as the principal judicial organ of the Organization, the ICJ is, in essence, a continuation of the Permanent Court with virtually the same statute and jurisdiction. Composed of fifteen judges elected by the General Assembly and Security Council, the ICJ is empowered to rule on cases brought by nation-states against other nation-states. A second, and more limiting, restriction on the Court’s jurisdiction is its consent requirement. Unless states accept the Court’s compulsory jurisdiction clause, in essence an *a priori* commitment to appear before the Court when a case has been filed against them, the Court’s jurisdiction is contingent upon the expressed consent

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61. Clement Kayishema was found not guilty on four counts each of crimes against humanity, violation of Article 3 common to the Geneva Conventions, and violation of Additional Protocol II of the Geneva Conventions. Id. Obed Ruzindana was found not guilty on one count of each of the aforementioned charges. Id.

62. Notwithstanding the restriction on the Court’s jurisdiction limiting it to interstate cases, the ICJ is capable of rendering “advisory opinions” requested by certain principal organs of the United Nations.
of states party to a dispute. The ICJ's dismissal of the Yugoslav cases brought against Spain (1999) and the United States (1999), in which the crime of genocide was charged, illustrate this weakness. During the 1990s, three genocide cases were filed by states in the International Court of Justice.

1. The Bosnia v. Yugoslavia Case

In 1993, the ICJ heard its first case regarding genocide, brought by Bosnia and Herzegovina versus Yugoslavia. In its application, Bosnia claimed that the Serb effort to create a "Greater Serbia" resulted in the systematic bombing of Bosnian cities and the intentional targeting of its Muslim citizens. The Bosnian application also contends that the Serb policy of driving out innocent civilians of a different ethnic or religious group from their homes, so-called "ethnic cleansing," was practiced by Yugoslav/Serbian forces in Bosnia on a scale that dwarfs anything seen in Europe since Nazi times. The application declared that the evidence indicates a *prima facie* case of genocide against Bosnia, and requested that all appropriate actions be taken by the Court in accordance with the standards of the Genocide Convention.

In its 1994 ruling, the Court did not issue a finding on whether genocide was being committed in Bosnia; however, it did ask the government of the Federal Republic of Yugoslavia to:

> [e]nsure that any military, paramilitary or irregular armed units which may be directed or supported by it...do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovena or against any other national, ethnical, racial or religious group.\(^64\)

2. The Yugoslavia v. N.A.T.O. Case

On April 29, 1999 the Federal Republic of Yugoslavia instituted proceedings before the Court against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom, and the United States, accusing those states of bombing Yugoslav territory in violation of their international obligations, including the obligation not to deliberately inflict

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64. Id.

conditions of life calculated to cause the physical destruction of a national

66. In two cases (Yugoslavia v. Spain and Yugoslavia v. United States) the Court concluded that
it manifestly lacked jurisdiction and it accordingly ordered that those two cases be removed from its docket.

67. Id.

(Croatia v. Yugoslavia), 1999 I.C.J. (July 2).

69. Id.

70. This is not to say, however, that the Yugoslav and Rwandan tribunals have been wholly effective
in adjudicating instances of genocide. Each tribunal has faced difficulties relating to the apprehension, arrest
and transfer of indicted criminals to face trial. In Yugoslavia, cooperation from N.A.T.O. forces in
apprehending indicted war criminals has been minimal, while in Rwanda the ICTR competes with Rwandan
national courts over the prosecution of the perpetrators of the 1994 genocide.
of the crime of genocide would have remained at the municipal level. Second, as a result of the Bosnian war and the Kosovo air campaign, the International Court of Justice has emerged as a potentially useful legal arena for the international adjudication of the crime of genocide. The limitations of the ICJ, namely its jurisdictional limitations to hear only consensual cases brought by nation-states against other nation-states, however, continues to limit the utility of the Court in the adjudication of genocide cases.

The international adjudication of genocide cases by ad hoc tribunals and the International Court of Justice is possible as a result of two forces, one legal and the other political. The legal force is the emergence of the legal regime on genocide, in the form of General Assembly resolutions, the 1948 Genocide Convention, and the parallel development of human rights laws. Without the Genocide Convention as a legal cornerstone, which both criminalized acts of genocide on an international plane and provided a working legal definition of genocide, the international community’s basis for adjudicating genocide cases would be weak. The political force that made international adjudication of the crime of genocide increasingly possible is the monumental changes in the international environment following the end of the cold war. The dissolution of the Soviet Union and the subsequent reordering of world politics translated into a concerted interest by the Security Council to address matters historically considered to fall within the domestic affairs of states. The Security Council took no legal action, for example, in response to Pol Pot’s genocidal reign of terror in Cambodia or Idi Amin’s massacre of rival tribes in Uganda. But with the cold war’s end came a consensus in the Security Council that the destructive internal affairs of states fell within the parameters of the Council’s authority. As a result, the tribunals were established for the conflicts in Yugoslavia and Rwanda.

The limitations of prosecuting the crime of genocide by both ad hoc tribunals and the International Court of Justice, however, indicate the utility of establishing a permanent international criminal tribunal with far-reaching jurisdictional powers. With an international criminal court the ability of the international community to prosecute individuals for acts of genocide would be greatly enhanced. While an international criminal court does not presently exist, positive steps have been taken to establish such a court. In 1998, the Statute for an International Criminal Court (ICC) was completed in Rome. While the proposed court’s jurisdiction is severely limited both in terms of the crimes that it may adjudicate and its relationship to the Security Council, the court’s statute does include genocide as one the “core crimes” that can be adjudicated.
INTERNATIONAL TRIBUNALS AND THEIR ABILITY TO PROVIDE ADEQUATE JUSTICE: LESSONS FROM THE YUGOSLAV TRIBUNAL

Ivana Nizich*

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I. INTRODUCTION

In 1994 and 1996, respectively, the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were created by the United Nations Security Council to hold accountable those responsible for genocide, war crimes, crimes against humanity and other violations of international laws and norms. The genesis of the ICTY, created during the latter half of the war in Bosnia-Herzegovina, was seen by many as a half-hearted effort by some European countries and the United States to address the perpetration of atrocities in the Balkans without actually intervening to cease and prevent their continued commission. The ICTR, created only after the genocide had taken place in Rwanda, amounted to a *mea culpa* on the part of an international community that expressly refused to intervene during the slaughter of that country’s Tutsi and moderate Hutu populations.

Despite the cynicism surrounding their creations, the *ad hoc* tribunals have accomplished more than most expected, or may have intended. The jurisprudence stemming from the ICTY and the ICTR will undoubtedly contribute to the development and expansion of international humanitarian law, and the creation and continued operation of both Tribunals, augers well for those seeking to establish mechanisms of accountability for egregious crimes that have all too often gone unpunished.

Despite the impact the ICTY and ICTR have had on the development of humanitarian law and the impetus their existence provided for the creation of other *ad hoc* courts in Cambodia, East Timor, and Sierra Leone and for the International Criminal Court (ICC), one must ask whether the existing *ad hoc* tribunals and those that will follow truly do address the need for justice, accountability, reconciliation and deterrence in their respective countries and regions. To that end, one could begin by asking the following questions:

1) To what extent have the tribunals held accountable those they were intended to prosecute? To what extent have they provided justice to the victims of genocide, war crimes, and “ethnic cleansing” in Rwanda and the former Yugoslavia?

2) To what extent have the existing tribunals affected civil society and contributed to truth and reconciliation in Yugoslavia and Rwanda?

3) Has the existence of the ICTY and ICTR deterred the commission of further crimes in the former Yugoslavia, Rwanda, and elsewhere in the world?

4) Are the existing tribunals exemplary of what the world wants to see in a permanent international criminal court?

5) To what extent have the experiences of the former Yugoslav and Rwandan tribunals affected formation of similar tribunals for Cambodia, East Timor and Sierra Leone?
The following remarks provide an admittedly brief and cursory overview of issues raised by each of the aforementioned questions, focusing on the former Yugoslav tribunal in this case.

II. TO WHAT EXTENT HAS THE ICTY PROVIDED JUSTICE, ELUCIDATED TRUTH, AND CONTRIBUTED TOWARD RECONCILIATION IN THE FORMER YUGOSLAVIA?

Unfortunately, the ICTY has been woefully deficient in these respects. Anyone who knows the facts of, and persons associated with, the commission of war crimes and crimes against humanity in the former Yugoslavia during the past decade cannot avoid the sad fact that the ICTY has been slow and inadequate in providing justice to the victims of the Balkan wars.

Few in the former Yugoslavia believe that the ICTY is going to prosecute those that deserve prosecution, that it will establish the truth of what happened during the war, or that it will serve as a vehicle or impetus for reconciliation among the various peoples of the former Yugoslavia. Even proponents of the ICTY in the former Yugoslavia are disillusioned by its performance.

The Tribunal is not a serious “issue” in the former Yugoslavia. Until recently, some of the governments in the region ignore it, while others cooperated. But the cooperation that does exist is driven, in large part, by the need to satisfy the international community so that the respective state can continue receiving foreign aid and continued membership in international and regional institutions. The people of the former Yugoslavia view the ICTY as an amorphous body in the Hague that was created by the international community to ameliorate its own guilt. They do not believe that the Tribunal is there to provide justice to them; it is “someone else’s” tribunal.

Why has the ICTY failed to address the needs for justice, truth and reconciliation in the former Yugoslavia? One can point to several reasons.

A. Lack of Factual Knowledge and Strategic Vision at the Outset

When the ICTY was being formed, the international community focused on the Tribunal’s Statute and its Rules of Evidence and Procedure, while glaringly ignoring factual and operational requirements of the Tribunal. Similarly, when staff began arriving during the early days of the Tribunal, little effort was made to thoroughly and objectively assess the facts and personalities relevant to the wars in Croatia and Bosnia, and to craft an informed investigative strategy based on that information. The following criticisms levied against the Tribunal stem, in large part, from the international community’s and Tribunal staff’s failure to recognize and address the need for: a) educating staff and management as to the facts, personalities, and opposing views relevant to the wars in the Balkans; and b) crafting an investigative
strategy that would identify and, if necessary, revise areas and topics of
investigation, targets for potential indictment, and evidentiary requirements for
a successful prosecution.

I preface the following remarks by pointing out that I do not, by any
means, intend to create the impression that all sides are equally to blame for the
commission of war crimes and crimes against humanity in the former
Yugoslavia. Rather, I highlight criticisms often heard by the Serbs, Croats,
Bosniaks and others vis-à-vis the Tribunal’s track record to date.

To the people of the former Yugoslavia and the victims of its wars, the
Tribunal has taken too long to indict too few responsible for the crimes
committed in their countries during the past decade. Many people in the former
Yugoslavia who are not necessarily hostile to the ICTY have asked, “Why have
you indicted him but not her? Why are you focusing on such minor figures
without having addressed notoriously egregious abusers and leadership figures?
Why are you looking at ‘minor’ crime scenes and seemingly ignoring other
minor and major crime scenes?”

Similarly almost all informed, objective observers of the Balkans in the
past decade are befuddled as to why the ICTY has not prosecuted crimes
committed in obviously abusive areas but has often focused on less-significant
sites and persons, and why has it taken so long to indict those that have been
indicted. For example:

1) The ICTY has appropriately indicted persons associated with the
commission of crimes in detention camps in northwestern Bosnia, the
siege of Sarajevo, the massacre of approximately 7,000 Muslim men
in and around Srebrenica, and the systematic rape of women in Foca.
However, arguably the most systematic and egregious pattern of
“ethnic cleansing” took place throughout eastern Bosnia particularly
in the Zvornik, Bratunac and Bijeljina municipalities in April and
May 1992 but public indictments stemming from these crimes have
not been issued. Moreover, evidence also points to the direct
participation of agents of the Republic of Serbia and its then
president, Slobodan Milosevic, in this region and at that time.
However, Milosevic and his accomplices notably Jovica Stanisic,
Mihalj Kertes, and Frenki Simatovic have not been indicted for their
direct involvement and sponsorship of “ethnic cleansing” throughout
the Balkans. Although Milosevic has been indicted for crimes
committed in Kosovo in 1998-1999, his responsibility for the “ethnic
cleansing” of non-Serbs in Croatia and Bosnia from 1991 to 1995 is
glaringly absent from the Office of the Prosecutor’s (OTP’s) list of
indictments. Similarly, Croats complain that with the notable
exception of Vukovar and very recently Dubrovnik, crimes
committed by agents of the so-called Republic of Serbian Krajina, the
Yugoslav Army and the government of the Republic of Serbia during the 1991 war in Croatia have been ignored by the Tribunal.

2) Arguably the most egregious crimes committed by ethnic Croatian troops were perpetrated by Bosnian Croat forces in and around the Mostar area in Herzegovina. These troops were supported by agents of the Croatian government in Zagreb and its then president, Franjo Tudjman, and defense minister, Gojko Susak, both of whom are now deceased. Despite this fact, the OTP has chosen to focus on crimes committed by Croats in central Bosnia that have resulted in prosecution of relatively low- or mid-level figures while ignoring the culpability of higher-level and arguably more culpable counterparts in Hercegovina and their sponsors in Zagreb. Indeed, Tudjman, Susak and their lackey in Hercegovina, Mate Boban, have all died as "heros" in the eyes of many of their countrymen and women. At the time of their deaths, little attention focused on their responsibility for the commission of war crimes in Croatia and Bosnia, and they will never be called account because they died before the Tribunal acted. Similarly, Serbs who fled after the Croatian government's offensive to re-capture the "Krajina" region in 1995 only to have their homes and villages torched and their elderly and disabled family members killed often complain as to the lack of indictments against Croatian military, police or civilians responsible for those crimes.

3) With the exception of crimes committed in the Celebici detention center, Bosniak-perpetrated crimes against Serbs and Croats in eastern Bosnia and Hercegovina have not been addressed via an indictment. Despite evidence of Bosniak-perpetrated crimes committed against Croats in the Jablanica-Konjic pocket, and against Serbs in and around Sarajevo and in small pockets in eastern Bosnia, the Tribunal has only been able to muster one related indictment in seven years.

Many of the aforementioned criticisms address the relative paucity of indictments of high-level officials in the former Yugoslavia. Although recent indictments of additional Bosnian Serb civilian and military leaders significantly addressed responsibility for war crimes within the Republika Srpska leadership, similar civilian and military officials affiliated with the Republics of Serbia and Montenegro, the Republic of Croatia, the Croatian Community of Herceg-Bosna and the Republic of Bosnia-Hercegovina have not been indicted. Some of these persons live peacefully throughout the Balkans, and some have run for, or hold, high-ranking public office in their respective countries/entities. Others remain in positions of power at the municipal and local level, thereby preventing the return of displaced persons to their homes.
Still others are being promoted within their own governments. In the case of Serbia, Montenegro, and to a lesser extent Bosnia-Hercegovina, persons who should at the very least be investigated for their involvement in the commission of crimes throughout the 1990s, serve as advisers and ministers to present governments in each of these republics. The Tribunal is mandated to investigate and, if appropriate, indict such persons, but it has to date failed to do so.

In addition to its spotty record on leadership-level indictments, the investigations, indictments and prosecutions of lower-level individuals are viewed by some as arbitrary. Thousands of villages were torched and thousands of people were killed in scores of massacres over a five to six year period. Yet the OTP has only focussed on some (e.g., Ahmici) but not other massacres (e.g., Gospic, Skabrnje, Grabovica, etc.). What criteria, it is often asked, are used to determine what cases get investigated and who gets indicted? To many victims of the war in the former Yugoslavia and to those who have followed that war closely, there is little logic to the OTP’s investigative focus and little justification for the time it has taken to indict those that have, eventually, been indicted.

These are legitimate questions that people in the former Yugoslavia have asked and for which they are entitled to an answer. Unless these matters are addressed by the ICTY, there will not be an accurate historical record of the war and the establishment of “truth” will have failed. To date, the historical record reflected by the Hague’s indictments and jurisprudence does not accurately reflect what transpired during the war. Nor do the ICTY indictments adequately reflect the figures primarily responsible for the crimes committed therein. At best, the ICTY has established a partial historical record with significant gaps vis-à-vis the facts of the war and responsible perpetrators of the war’s attendant crimes.

Future ad hoc tribunals and the ICC should learn from the early oversights made by the Tribunal that have continued to plague its progress and efficiency. Namely, before a tribunal embarks on investigation and indictment of war crimes, crimes against humanity and genocide in a given area, concerted efforts must made to educate staff and management about the facts of and personalities affiliated with the given region, and the interpretations and sensitivities of various parties and/or groups vis-à-vis the issue under investigation. Thereafter, a strategy must be crafted that reflects the “big picture,” namely the factual reality of the war, conflict, genocide or criminal behavior at issue. Finally, a preliminary but detailed identification of potential targets, appropriate avenues of investigation, and type and quality of evidence necessary to bring the case to court must be undertaken. Only then should investigations commence, necessary resources be allocated, and indictments be written.
B. Problems with the Determination of Targets

Was it realistic to expect a Hague-based Tribunal to address crimes committed at all levels (from heads of state to local murderers and looters) in three separate conflicts that involved a vast array of different state and quasi-state actors?

As noted above, the Tribunal did not clearly determine who it wanted to investigate and possibly prosecute, and what was the best avenue through which to achieve those goals at the outset. The Tribunal should have focused on investigating, indicting and prosecuting leadership figures, and egregious perpetrators and “notorious” offenders. Instead, the ICTY’s initial focus had been on camp guards and low-level “hoods” with few clear connections to the true power-brokers of the war and the crimes perpetrated at their behest and/or with their active assistance. This has resulted in use of resources to complete investigations and prosecutions of low-level perpetrators, while many, but admittedly not all, of their superiors retain their positions of power and attendant privilege.

One must obviously prove that a crime took place before one can hold an individual responsible for having perpetrated that crime or ordered the commission thereof. As a result, there are those who argue that one must first prosecute low-level offenders to prove that a crime base existed before one can hold a civilian or military superior responsible for such crimes. I have no quarrels with this general principle.

However, an international tribunal faced with thousands of war crimes cases and with limited resources should only be expected to prosecute mid- and high-level war criminals. Such persons can be divided into two categories: a) those who qualify as “notorious offenders,” namely persons who have systematically perpetrated large-scale and particularly egregious crimes (e.g., Milan Lukic); or b) those who may be linked in the chain of command leading to the pinnacle of command and responsibility. Prosecutions of camp guards, and even some military officers, are not necessarily the best avenue to build a case against heads of state, paramilitary leaders, interior ministry officials, and intelligence officials that orchestrated, or encouraged, the commission of war crimes in the field.

Crimes of vast scale such as Srebrenica should have been prosecuted. However, an international tribunal’s determination to investigate and/or prosecute one massacre over another massacre of similar proportion and character should be determined by whether or not that investigation and/or prosecution will lead to additional evidence of criminal behavior by persons higher up the chain of command.

This is not to say that the camp guards, local police officers and individual civilians who murdered, tortured, raped, or otherwise brutalized disarmed
combatants and civilians should go unpunished. Insofar as international tribunals, third-party governments or local officials can conclusively develop a case of such individual culpability and provided that such investigations are done in accordance with due process requirements, such low-level war criminals could be tried: a) in a third country where due process requirements will be respected; b) by a "mixed" tribunal of international and local jurists either in the country where the crimes were perpetrated or in a third country; or c) by the courts of the country of which the perpetrators is a citizen, provided such courts are objective, and can provide due process guarantees to the defendant and protection for victims and witnesses. However, it would be premature to expect the countries of the former Yugoslavia to "try their own" and, given the present political climate, such low-level individual perpetrators should be tried in a third country. But it is not realistic to expect an international Tribunal charged with investigation of three separate wars over a ten-year period to be able to investigate, indict and prosecute all those responsible for war crimes. Priorities must be set, tasks appropriately delegated, and resources and energies apportioned accordingly.

C. The Tribunal's Lack of Deterrent Effect

The existence of the Tribunal during the latter half of the war in Bosnia in 1994 and 1995, in the aftermath of the Croatian government's offensive to re-capture the Krajina region in 1995, and during the armed conflict and war in Kosovo in 1998 and 1999, seemingly had little impact on the level of atrocities committed therein. Most glaringly in Kosovo, Serbian and Yugoslav forces undertook methods of "ethnic cleansing" that were virtually identical to those employed by these same forces and their agents during the war in Croatia and Bosnia.

The Tribunal had been in existence for over four years when the armed conflict in Kosovo began, and it was clear to the Serbian and Yugoslav leadership that the Tribunal was actively investigating and indicting persons affiliated with that leadership vis-à-vis their alleged and actual commission of war crimes in Croatia and Bosnia. Yet, the conduct of the Yugoslav Army, the Serbian Interior Ministry, and the leadership of Slobodan Milosevic indicate that they paid little, if any attention, to the Tribunal before or during their military campaign in Kosovo.

The lack of the Tribunal's ability to arrest those it indicts, and the international community's reticence or inability in doing so, is probably the most significant factor that emasculates any deterrent effect supporters of the Tribunal hoped to achieve. Indeed, Milosevic, his generals, intelligence officials, and political envoys appear to have paid little heed to the possibility of their indictment and arrest at the time they were planning or prosecuting the
war in Kosovo. Although they may be concerned for their fate now that some of them have been indicted and removed from power, there is little reason to believe that the Tribunal’s existence and operation played any role in preventing or alleviating the commission of atrocities in Kosovo.

Moreover, victims and others who claim—sometimes illegitimately—to be acting on their behalf have resorted to revenge killings to achieve justice they believe they have been denied. The abuses that took place against Serbs following the Croatian offensive to re-take Krajina and after the withdrawal of Yugoslav forces in Kosovo only highlight the lack of deterrence on all sides in the conflict. Croats and the Albanians seeking to “avenge themselves” against those Serbs who may or may not have committed atrocities against them, against members of their family, or against members of their ethnic group, did so by committing atrocities against Serbs who remained in Krajina and Kosovo after Serbian and Yugoslav forces withdrew from those areas. In the case of Kosovo, members of the Roma population and others who were viewed as having collaborated with the Serbs were also attacked and murdered by Albanians. Revenge was not sought against the perceived perpetrator but against any member of the same ethnic group as the perceived perpetrator. The Tribunal’s goal of providing individual rather than collective justice has clearly not yet been met.

D. The Need for Outreach

Although the Tribunal’s inability to deter future atrocities is largely due to the fact that it cannot arrest those it indicts, its inability to act as a vehicle for reconciliation or to be respected in the Balkans is due, in large part, to its lack of outreach to the peoples of the region. Although the Office of the Registrar has an outreach staff in Zagreb and parts of Bosnia, this staff usually amounts to one person in one or two locations in the Balkans and focuses on disseminating general information about the Tribunal. Conversely the Office of the Prosecutor has made little effort to communicate with the public of the former Yugoslav countries despite the fact that one of its primary goals is to provide justice to the victims of the region.

The Office of the Prosecutor cannot and should not disclose any information concerning the details of its respective investigations. However, this does not mean that it should completely absent itself from public fora in the region. The Tribunal staff is reluctant and often prohibited from giving interviews on even the most innocuous subjects. However, the time, resources and effort needed to conduct war crimes investigations and prosecutions is not understood in the Balkans and, with a few very rare exceptions, no one from the Tribunal has made an effort to explain what a forensic investigation, an exhumation, document analysis, and translation of a foreign language entails.
These are all neutral subjects that could be addressed to help foster understanding and at least tolerance for the Tribunal, rather than the hostility with which it is faced in many parts of the region.

For example, although Croatia's recent support for the Tribunal and its willingness to re-examine its role during the 1990-1995 period has dramatically improved since Tudjman's death and the subsequent election of a new government, the nascent willingness to re-assess its past is due in large part to internal factors rather than the Tribunal. Croatia's new president, Stipe Mesic, its prime and deputy prime ministers, Ivica Racan and Goran Granic, respectively, and members of the independent press have played a major role in calling for accountability on all sides. But the Tribunal has played little role in Croatia's re-assessment of its recent history and reconciliation with its remaining Serbian population.

In most places around the world, the United Nations and other internationals who are sent to an area to help the local population, are perceived as arrogant, ignorant and imperialist. In many instances these perceptions are unjustified or instigated by governments or quasi-governmental entities or rebel groups in a given area. However, it is also a sad fact that many internationals are disdainful or ignorant of the culture, history and sufferings of the local population they are supposedly there to protect or for whom they are purportedly working to provide justice.

Thus, where feasible, future Tribunals should make provisions to employ an outreach staff that will explain their work generally to the public in a given country either via the media, symposiums, conferences, and town hall meetings throughout the country and not just in capitol cities. Outreach should also include informal and semi-regular contact with victims and the family of victims in order to dispel the often wide-spread cynicism that international staff are more interested in their salaries than in the suffering of others. If feasible, such outreach staff should include persons who are fluent in the respective language(s) and dialect(s) of a region and others familiar with the area and its history and culture.

III. To What Extent Can International Tribunals Accomplish Their Mandates?

It was once highly unpopular to argue that war crimes trials should take place in the country in which they were perpetrated. There are credible reasons for this. In some countries, local courts are politicized and controlled by the very agents that perpetrated or ordered the crimes they are called upon to adjudicate; there is an obvious lack of due process in many such countries; persons genuinely responsible for such trials will never stand trial and those who are members of the "enemy" group will never get a fair trial.
These are all valid reasons and, in the case of the former Yugoslavia, I agree that it would have been ludicrous to expect the peoples of the former Yugoslavia to try members of their own ethnic and national group while Tudjman and Milosevic were still in power. Indeed, I do not believe that truth commissions or tribunals can function in a country where crimes were committed unless there has been a radical change of regime(s) and until the new government(s) makes a concerted effort to address its country’s recent history.

However, if the political climate is not overtly hostile to an international war crimes tribunal and if victim and witness protection and general security can be facilitated, such tribunals should consider basing a significant portion of their investigative operations and holding trials in the country where the crimes were perpetrated. These trials could be adjudicated solely by “international” judges or by “mixed” tribunals that include both international and “local” judges.

The point of such an effort would be to ensure that the tribunals provide justice to the victims, the families of victims, and civil society of the respective country(ies) in which heinous crimes were committed. However, such trials are not feasible in all places. Despite my call for increased outreach by the ICTY, I do not believe that war crimes trials can yet be held in the former Yugoslavia. Because the Balkan wars were fought between ethnic groups who had and now do live in separate countries/entities, because the war therein involved eight separate entities and states, and because at least in present-day Yugoslavia those who are the architects of the war remain in a position to harm witnesses and informants, such trials cannot yet be held in that region.

Nevertheless, burgeoning attempts at “mixed” tribunals (e.g. in Sierra Leone, Cambodia, and East Timor) have commenced in other parts of the world. This hybrid attempt to fuse both international and national participation in adjudicating war crimes cases may, in some cases, be preferable than the existing “elitist” models (i.e., ICTY and ICTR). A hybrid tribunal should use both international and national law (i.e., aspects of a country’s legal code that incorporate relevant and complementary elements of international treaty and customary law, civil and human rights, etc.). Such an approach would add legitimacy to the international tribunals in the eyes of the local people and would breathe “life” into the laws that exist in countries that have either been ignored or usurped by abusive regimes in the past. It would also serve to facilitate respect for the rule of law from within the country, rather than imposing it from afar.

The “hybrid” aspect of these tribunals should also be reflected in the staffing of these tribunals in the office of the Prosecutor, Chambers, and Registrar. Often and understandably, “local” populations are not objective, but there are some portions of the population that have stood up in the face of tyranny and their opinions and expertise should be used and listened to by the
tribunals. For example, while a prosecutor could be an international, two deputy prosecutors—one from the respective region and the other an international—could operate immediately below him or her. A variation of this is being considered for the Sierra Leone tribunal and may prove successful.

However, one must concede that the nature of certain trials will require that they be held in the Hague or in some other removed setting. When heads of state, armies and powerful paramilitary or police forces are indicted, and when their supporters retain some level of power or influence within a country or region, it will be difficult if not impossible to try such persons in the area where their crimes were committed. Because such investigations and trials include testimony of sensitive witnesses, including informants close to the accused, the security of such witnesses could probably not be guaranteed in the respective country. Moreover, incarceration of such persons may also not be feasible if their supporters retain significant military or paramilitary power to force their release. In such circumstances, it would be irresponsible and naive to suggest that such trials be held in-country.

The difficulties and obstacles posed by holding "local" trials and of incorporating "local" participation into an international court are admittedly significant, e.g., protection of both local and international staff; ethnic/tribal/political divisions among the local population(s) and the risk of appearing biased if one is favored/appointed over another; lack of or damaged local infrastructure; and lack of experienced local lawyers, judges, investigators, analysts, etc. But this should not preclude exploration of the possibility.

For example, despite Hun Sen's obstruction and criticisms of the Cambodian tribunal, one should not negate the importance of Cambodian participation in trials in that country. The crimes being adjudicated were perpetrated in their country, and the international community did nothing to prevent the slaughter at the time of its commission. The same can be said for the victims of the Rwandan genocide. The international community cannot have an elitist, paternalistic attitude toward these crimes and toward the victims of these crimes, i.e., viewing local participation as inherently biased, tribal, inexperienced, and inept. Recent efforts to involve local populations in East Timor, and possibly in Sierra Leone, are steps in the right direction. The ICC should continue to support local participation when it begins functioning. Preferably, the ICC should largely exist in the Hague as an administrative headquarters of sorts, but the bulk of its investigative and trial efforts should take place either within the country where the atrocities were committed or, if that is not possible, as close to that country as possible.

The ICC should not aspire to the "disconnectedness" of the ICTR, which is at least partly based in Kigali, and the ICTY, which has virtually no connection whatsoever with the peoples of the former Yugoslavia. Even if a country truly cannot try its own or participate in that process, the people of that
country should at the very least be consulted and kept informed of what the international ad hoc or permanent tribunals are doing, ostensibly on their behalf.

IV. To What Extent Can Analytical and Operational Issues Be Better Addressed by Future Ad Hoc Tribunals and the ICC?

The attention to Statutes and Rules of Evidence and Procedure of ad hoc tribunals and the ICC are obviously necessary and integral to their workings. However, appreciation for country and fact-based expertise, operational aspects, and organizational structures of these tribunals are not properly if at all addressed when these tribunals are formed, despite the fact that they have enormous effect on the extent to which the Tribunals can function and achieve what they were meant to do.

The following general suggestions are posited in the hope that future tribunals will provide the attention and resources necessary to properly support these factual, operational and organizational necessities.

A. Develop and Maintain Country-Specific and Regional Expertise within a Respective Ad Hoc Tribunal and within the ICC

Any ad hoc tribunal and the ICC should maintain a staff that serve the need for in-house expertise relating to the background and facts relating to a war, armed conflict, genocide, or other event that the tribunal is mandated to investigate, indict and prosecute.

This proposed staff should play a minimal role in developing the facts of a specific crime scene under investigation. Rather, it should focus on providing tribunal and ICC staff with the following:

1) The "big picture" of what transpired during a respective war, genocide or conflict, and how events in one area relate to those in another;
2) The relevant positions and ideologies of the various parties to the conflict, political factions, ethnic groups, religious groups, etc.;
3) Who's who in the country/countries and their relationship to one another; and
4) The structure and hierarchy of a relevant government, interior ministry, military, and paramilitary or guerrilla group(s).

This staff need not be large in number, and it should not resemble an academic think-tank. Rather, it should focus its efforts on providing information necessary to making informed decisions as to what crimes and which individuals are to be investigated. As noted above, an effective investigative strategy cannot be formulated if staff remains ignorant of overall facts relevant to the area under investigation. Moreover, this staff should craft its analysis in a fashion consistent with the requirements for trial preparedness of trial
attorneys and, to a lesser extent, judges. While factual background knowledge is of imperative importance during the early stages of a tribunal's existence, the subsequent development of factual information must be tailored to meet the requirements of a trial.

B. Specialize and Improve Victim, Witness, and Informant Protection

Significant discussion has been devoted to victim and witness protection vis-à-vis the existing ad hoc and future tribunals. However, this effort has focused on direct victims of, and witnesses to, violence criminal activity. Although there is significant room for improvement in this regard, consideration must also be given to the arguably more difficult protection of potential informants and other high- and mid-ranking officials who can implicate, and are willing to testify or provide evidence against, heads of state, intelligence officials, high-ranking military personnel, and other related leadership figures.

The “handling” of such persons necessarily requires staff experienced in dealing with such sensitive situations. However, certain general issues present themselves vis-à-vis such situations that future tribunals should consider:

1) Third countries generally are not willing to grant refuge to war crimes tribunal informants if such persons do not fit the profile of a “refugee” or “asylum seeker.” If the individual is a perpetrator of crimes who is willing to inform on his co-perpetrators, countries are even more reluctant to provide refuge to such persons. The laws of individual countries do not allow entrance and re-settlement of persons into their countries unless they meet the criteria of the country’s laws. To date, most countries do not have legislation that would permit for relocation, resettlement and protection of the very specialized but potentially very important informant witnesses for international war crimes prosecutions.

2) The establishment of new identities for such “witnesses” must be addressed. High-ranking officials who inform for a tribunal are not likely to assimilate in countries where they are complete strangers who must conceal their past, and lack the necessary language proficiency, relevant job skills, housing, and means through which to make a living.

3) The agreement of third countries to assist with such witness relocation must be negotiated with various states before a tribunal commences operating. One cannot spend months negotiating on such matters when an individual has a justifiable and credible fear of discovery and subsequent harm.
C. Improve Due Process Guarantees for the Defense

Defendants are not always afforded a right to a speedy trial by the present Tribunals. This is due in large part to the fact that the defendants usually have not retained lawyers and developed defenses prior to arriving at the tribunals. The development of a defense necessarily takes weeks and often months of preparation. While this delay is understandable on the part of the defense, all indictments that are issued by the prosecutor’s office must be “trial ready” when they are approved and signed by the prosecutor. Although the defense must be given time and resources to develop its case, there is little excuse for prosecutorial ill-preparedness to commence trial once a suspect is in custody.

Another issue that has caused delay, at least at the ICTY, concerns the lack of courtroom space. As more persons are apprehended, there are not enough facilities available to allow for concurrent trials of various defendants to take place. As a result, trials are held on a rotating basis: defendant X in case A is on trial during the first two weeks of the month, and then defendant Y in case B is on trial for the next two weeks. This rotating schedule aims to address the lack of courtroom facilities, but future tribunals must ensure that it has appropriate courtroom, judicial, interpretation, and other resources available to ensure that a trial commences and concludes with brevity.

Moreover, the quality or motives of some defense counsel does not, at times, serve the best interests of their client. Although defendants must obviously have the right to choose their own counsel, tribunals should be careful to ensure that such lawyers are representing the interests of their clients rather than the governments by whom they were employed or to whom they are otherwise beholden. A defendant may be used as a scapegoat by an abusive government, and that defendant’s lawyer may be under instructions to deflect culpability from others onto the defendant. International tribunals must explore avenues to prevent such situations, and judges should also consider grounds that would justify their intervention during trial in such cases.

D. Equity of Punishment

When the ICTR was created, the Rwandan government voiced its disapproval that high-level officials who might be convicted for their role in the country’s genocide would serve their sentences outside Rwanda, probably in a comfortable jail in a third country that opposes the death penalty but which Rwanda retains. Others pointed out that while the architects of the genocide would be in relative “comfort” in Western prisons. Low-level perpetrators and possibly some wrongly accused of such crimes would be tried by the Rwandan government, incarcerated in over-crowded prisons under inhumane conditions, or put to death. Moreover, those persons convicted by the ICTY are placed in prisons in Western Europe and are subject to the respective European countries
parole and criminal justice laws that are infinitely more lenient than those in other parts of the world where persons convicted of less serious offenses are forced to serve longer and more difficult sentences.

I am opposed to use of the death penalty under any conditions, even for genocide, and I am not by any means implying that those convicted of such crimes should be incarcerated inhumanely. However, the inequity of punishment for those who are convicted by international tribunals and those convicted by domestic courts where the crimes took place can often be inordinately disparate. Thus, international tribunals should consider efforts to address this inequity.

E. Protection of Sensitive Information and Confidentiality

Various countries cooperate with international tribunals by sharing sensitive information, re-locating witnesses and other such matters. These countries have a legitimate right to insist that information they provide to the tribunals be handled appropriately and that confidentiality be strictly respected. The international tribunals cannot dismiss the concerns of cooperative governments in this respect as "interference in the court's independence." This is a legitimate and valid concern that must be addressed by tribunals by ensuring that security and confidentiality of such information are competently and strictly enforced and protected.

V. CONCLUSION

The aforementioned observations and recommendations were meant to provide an admittedly cursory, but hopefully constructively critical, observation of an ad hoc tribunal's workings to date. It is hoped that future tribunals and especially the ICC will look to their predecessors and improve on their workings and accomplishments in their future endeavors.

Diego Rodríguez Pinzón*

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I. INTRODUCTION

The question of admissibility of human rights petitions involves a broad field of legal issues, which include exhaustion of domestic remedies, duplication of procedures and other technical procedural matters. I will, however, focus on three legal issues that have special importance in the inter-American system because of their impact on the individual petition system. These are: the "victim" requirement of individual communications, the so-called "fourth instance formula" and the notion of "person" in the individual complaint procedure of the Inter-American Commission on Human Rights (Commission). All these questions directly refer to the admissibility ground established in Article 47(b) of the Convention. I have decided to refer to these issues considering that rejection of a petition on these grounds is closely related to the merits of a case, and, consequently, those cases generally cannot be amended, completed or corrected by the petitioner if they are dismissed by the Commission.

The Commission has jurisdiction to review petitions that claim the violation of the rights of individuals guaranteed in the American Convention on

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Human Rights (American Convention or Convention). Additionally, the Commission has competence to review alleged violations of the rights recognized in the American Declaration on the Rights and Duties of Man (American Declaration or Declaration). This competence *ratione materiae* of the Inter-American Commission is therefore broader than that of the European human rights supervisory bodies or the Human Rights Committee (HRC) which is limited to, respectively, the European Convention and the International Covenant on Civil and Political Rights (ICCPR).

The Commission examines petitions in accordance to the procedures established in the American Convention, the Commission's Statute and its Regulations. The individual petition mechanism is gaining in importance in the inter-American system of promotion and protection of human rights. Under the petition system, the Commission can issue public reports on its findings of fact and law in each individual case and can file cases before the Inter-American Court. This Commission's individual complaint jurisdiction must not be confused with its authority to issue reports on the general human rights situation of a specific country or on a particular human rights issue or topic.

Petitions before the Commission are filed through written submissions. Victims, other persons or group of persons as well as any nongovernmental entity have standing before the Inter-American Commission pursuant to Article 44 of the American Convention. States can also file petitions against another state, only if both states have expressly recognized the competence of the Commission to hear such cases. Once a petition is filed, the Commission will examine the formal admission requirements for the communication and will transmit it to the respondent state for its observations.


3. These reports can be found in separate reports colloquially called "Special Reports" which usually follow an on site visit to a country, or in "General Reports" which are included in the Annual Report of the Commission.

4. It is a unique provision in international human rights systems. The European System and the UN Human Rights Committee only give standing to victims or their representatives.

II. ARTICLE 47(B) OF THE CONVENTION: GENERAL SCOPE

The Commission will declare inadmissible petitions that do not characterize a *prima facie* violation of the rights recognized in the Convention or Declaration. The Commission's Statute and Regulations have a set of rules that intend to differentiate between State Parties to the American Convention and other OAS member States subject to the Commission's jurisdiction under the American Declaration. For our purposes, a main conclusion is that the grounds for dismissal of a petition established in Article 47, paragraph b of the American Convention, applies in a very similar way to all Organization of American States (OAS) member States, under the Convention or the Declaration, by virtue of the authority recognized in Article 24 of the Statute, and Articles 26.1, 31, 35 b and c, and 41.b of the Regulations of the Commission (that basically reproduce the Article of the Convention in this matter). Consequently, inadmissibility of a claim can be declared if it is evident that the Commission lacks jurisdiction because the petition does not state facts that tend to establish a violation of the Convention.

Questions under this provision are usually related to issues that can not be clearly characterized as rights protected in the Convention. For example, it remains to be seen to what extent environmental and labor claims, and in general, economic social and cultural rights, can be directly protected under the Convention. There are specific treaties in the universal system (e.g. International Labor Organization treaties or the United Nations International Covenant of Economic, Social and Cultural Rights) as well as in the regional system that recognize those rights. However, their protection through individual complaint procedures is still very limited. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (known as the Protocol of San Salvador), which recently entered into force, only establishes two rights that can be subject to the Inter-American system's individual complaint procedure.

Another issue that falls under this provision is the "victim requirement." The Commission requires the petition to indicate a violation of the rights of a victim, in order to establish the Commission's jurisdiction under the individual

6. **THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELI 201 (1995).**

7. Article 24.1 of the Inter-American Commission on Human Rights states: "The Regulations shall establish the procedure to be followed in cases of communications containing accusations or complaints of violations of human rights imputable to states that are not Parties to the American Convention on Human Rights."

8. **INTER-AM. C.H.R. CHARTER art. 47(b).**

9. Which could be linked, in certain circumstances, to the right to life, personal integrity and judicial protection.

10. Which can be related to the right of association, free speech, and judicial protection, among others.
petition system. According to the Inter-American Court on Human Rights' jurisprudence, in order for the Commission to hear an individual case, it is necessary to lodge "a communication or petition alleging a concrete violation of the human rights of a specific individual." Consequently, a case without a victim will be declared inadmissible by the Commission. Similarly, petitions claiming the violation of the rights of juridical persons (corporations, nongovernmental organizations, etc.) are reputed to be inadmissible by the Commission. We will explore some of the issues that these admissibility requirements raise in the Inter-American system.

III. THE "VICTIM" REQUIREMENT

As a consequence of the broad standing established by Article 44 of the American Convention, petitioners do not have to prove before the Commission that they, themselves, are victims, nor that they have the consent of the victim to present the petition on their behalf. However, the Commission requires the petition to indicate a violation of the rights of a victim, in order to establish the Commission's jurisdiction under the individual petition system. According to the Court, in order for the Commission to hear an individual case, it is necessary to lodge "a communication or petition alleging a concrete violation of the human rights of a specific individual." A case without a victim will be declared inadmissible by the Commission.

The Court has further referred to what it calls "self-executing laws," as opposed to "non-self-executing laws," which require additional government implementation in order to affect the "legal sphere of specific individuals." In this regard, the Court stated that:

In the case of self-executing laws, as defined above, the violation of human rights, whether individual or collective, occurs upon their promulgation. Hence, a norm that deprives a portion of the population of some of its rights - for example, because of race automatically injures all the members of that race.

As mentioned above, the Court considers that it is necessary to have a "concrete violation" of the rights of a "specific person," thereby permitting it to hear cases where a person or group of persons have been actually affected by

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14. *Id.* ¶ 41.
15. *Id.* ¶ 43.
an action or measure of the state. Consequently, the Court has rejected competence to review in abstracto claims regarding laws that have not affected the rights of individuals under the Convention. The European Convention requires the petitioner to be a victim, disallowing petitions in abstracto concerning national laws. However, the victim requirement has been expanded through a notion of "potential victim," which opens the possibility for the Commission and Court to examine laws that have not yet been enforced or applied. The European Court has developed the notion of "potential victim" in certain cases where, even though a measure has not been applied, the person is at risk by the mere existence of a law or certain administrative measures. In the Klass Case, the European Court considered that the existence of legislation in Germany that permitted the secret surveillance of mail and telecommunications of persons, even if such measures had not been applied in the case argued, satisfied the victim requirement. The same approach was followed by the European Commission in the Campbell and Cosans Case where it considered that a system of corporal punishment in schools of Scotland violated the rights of children attending those schools, even though the alleged victims had not yet been punished. According to the Commission, to require that corporal punishment be applied to the boys so that they could be considered victims, would be too restrictive of the rights of the boys.

The Court's notion of victim, it argues, follows the European Court's jurisprudence. While it is true that the European Court rejects in abstracto claims, the Inter-American Court's approach is still not clear regarding the notion of potential victim. The Inter-American Court in Advisory Opinion OC-14 did not clearly addressed if the existence of a law or practice incompatible with the Convention, such as the corporal punishment law of Scotland in the Campbell and Cosans Case, would be a "self-executing law" or a "non-self-executing law." By developing these notions the Court did not give a clear indication on how the concept of victim would operate in such a case. According to the test of the Inter-American Court, a corporal punishment law could require additional Government action (the punishment itself) in order to affect the legal sphere of an individual, which would be a questionable

16. Id. ¶ 47-49.
20. Id. at 52.
21. Id. at 53.
22. Advisory Opinion OC-14/94, supra note 11, ¶ 47.
conclusion. However, it remains to be seen how the Inter-American Court would approach such a case.

In the cases in which these questions has been raised, the Inter-American Court has adopted different approaches when requested to declare the incompatibility of domestic legislation with the Convention. For example, in its decision in the Genie Lacayo Case, the Court considered that it did not have jurisdiction to declare the incompatibility in abstracto of Decrees 591 and 600 with the Convention.23 Following its previous views in Advisory Opinion OC-14/94, the Court considered that its competence was limited to the conduct of the state and the effects of applying such laws in the case before it. It further stated that such incompatibility in abstracto could be declared through its advisory jurisdiction. Later, in the decision on the merits of the Genie Lacayo Case, the Court found that even though the Decrees were in force at the time of the criminal proceedings, they were not entirely applied in the case, and consequently there was no violation of the Convention.24 In the Loayza Tamayo Case, however, the Court declared that “Article 2(a), (b) and (c) of Decree-Law No. 25.659 (crime of treason) and Articles 2 and 4 of Decree-Law No. 25.475 (crime of terrorism)” were contrary to “Article 8(4) of the American Convention.”25 The Court fell short of explicitly ordering the Decree-Laws to be repealed, but stated “[t]hat the State of Peru shall adopt the internal legal measures necessary to adapt Decree-Laws 25,475 (Crime of Terrorism) and 25,659 (Crime of Treason) to conform to the American Convention.”26 A question remains as to what specific reparations the Court could order when finding that a law violates the Convention, considering that the repeal of incompatible laws could be an important remedy for the victims. More importantly, the repeal of incompatible laws can constitute satisfaction vis-à-vis the State Parties to the Convention by preventing future violations due to its application in other cases.

The HRC also considers that it does not have competence under the Optional Protocol of the ICCPR to review in abstracto national legislation.27 The Committee requires the alleged victim to be “actually and personally affected.”28 The approach of the Committee, as in the Inter-American Court’s jurisprudence, is also rather restrictive. However, some scholars consider that

23. Case 10.792, supra note 17, ¶ 48-51 (preliminary objections).
26. Id.
28. MCGOLDRICK, supra note 27, at 175.
it would be instructive for the Committee to follow the European system experience in this area.29

In *Morales de Sierra v. Guatemala*,30 regarding the notion of victim, the Commission received a petition claiming that several provisions of the Guatemalan Civil Code that granted the husband more conjugal rights than to the wife violated the Convention.31 Initially, the petitioners requested the Commission to render a decision finding such provisions incompatible in abstracto with the Convention. The Commission was reluctant to consider the case without a victim.32 Later, the petitioners provided the Commission with the name of a victim, Mrs. Morales de Sierra. This allowed the Commission to focus the discussion on a specific victim regarding the existence and effects of the provisions of the Civil Code by identifying an affected person.

The Commission examined the nature of the existence of the provisions of the Civil Code and considered that the demonstrated direct effect in the daily life of the victim was sufficient to provide the Commission with competence *ratione materiae* to hear the case. The Commission additionally stated that the "relevance" and "impact" of the provisions of the Civil Code were to be studied in the merits phase. This case can constitute an important precedent to further understand the "self-executing" or "non-self-executing" character of a law. Moreover, it will contribute to a better understanding of the notion of "potential victim" regarding a "norm that deprives a portion of the population of some of its rights," as stated by the Court in Advisory Opinion OC-14, which it considers to be a "self-executing law."

In *Montoya González v. Costa Rica*,33 a confusing inadmissibility decision, the Commission appears to restrict the access of petitioners to the Inter-American system by rejecting the claim *ratione personae* on the basis of lack of standing. The Commission considered that the petitioner did not have standing because she had to be a victim in order to have access to the Commission. Presumably the Commission was attempting to develop the notion of "potential victim" in order to establish its competence *ratione materiae*. The substance of the claim argued that the rules of a competition discriminated against women by assigning lower awards to the winners of that gender. The petitioner, an athlete, decided not to participate in the competition

29. *Id.* at 177.
31. Under the Guatemalan Civil Code, wives are given the right and obligation of taking care of the children and the home, and, therefore, they can only work if such activity does not interfere with these obligations. The husband can stop his wife from working if he can demonstrate that he is supporting the family. The Civil Code further states that the husband has primary responsibility in representing the children of the marriage and administering their assets.
32. See supra note 30, ¶ 4-18.
for this reason. The Commission decided that, by not participating in the race, she could not be considered a victim. From our perspective, the facts of the petition presented enough elements to constitute an arguable claim for purposes of admissibility. However, the Commission, apparently trying to protect its jurisdiction from in abstracto petitions, rejected the case as inadmissible.

IV. THE FOURTH INSTANCE FORMULA

Based on Article 47(b) the Commission developed the so-called “fourth instance formula,”34 by which it considers that decisions of impartial and independent domestic courts are not subject to scrutiny under the American Convention. In Marzioni Case v. Argentina, it stated:

50. The nature of that role also constitutes the basis for the so-called “fourth instance formula” applied by the Commission, consistent with the practice of the European human rights system. The basic premise of this formula is that the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved.

51. The Commission is competent to declare a petition admissible and rule on its merits when it portrays a claim that a domestic legal decision constitutes a disregard of the right to a fair trial, or if it appears to violate any other right guaranteed by the Convention. However, if it contains nothing but the allegation that the decision was wrong or unjust in itself, the petition must be dismissed under this formula. The Commission’s task is to ensure the observance of the obligations undertaken by the States parties to the Convention, but it cannot serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction. Such examination would be in order only insofar as the mistakes entailed a possible violation of any of the rights set forth in the Convention.35

The Commission developed the formula pursuant Article 47(b) of the Convention, to dismiss any claim that would argue exclusively a judicial error.36 However, the formula does not apply when there is violation of due process,

34. The “fourth instance formula” was developed initially in Case 9260, Inter-Am. C.H.R. 154, OEA/ser. L/V/II.74, doc. 10, rev. 1 (1988).
36. See supra note 35, ¶ 53.
discrimination, or a violation of other rights recognized by the Convention. In *Marzioni v. Argentina*, a former worker that was seeking compensation from his employer for a work related disability claimed that Argentina’s tribunals wrongly applied the laws governing damages in labor disputes. The Commission considered that it could not review the alleged judicial error and consequently the petition was inadmissible. In explaining the fourth instance formula, the Commission also relied upon jurisprudence of the European Court and Commission on Human Rights.

Both the HRC and the European system have develop similar mechanisms to ensure that the supervisory bodies of the corresponding human rights treaties do not act as an appellate courts. The European Commission consistently rejects communications that claim that a domestic court erroneously interpreted domestic law or that it failed to make appropriate finds of fact and evidence, unless such errors could constitute a violation of the ECHR. Similarly, the HRC considers that it is not competent to review findings of fact or law by a domestic court, unless the domestic proceedings are manifestly arbitrary or constitute denial of justice.

The *Marzioni v. Argentina* case plays an important role in the evolution of the standards of the system, considering the current trend in the hemisphere of transition to democracy. The case clearly shows that states with functioning judiciaries in the framework of a democratic society will benefit from a degree of deference that the Commission gives to domestic courts. Conversely, in authoritarian regimes or states where the judiciary’s independence or impartiality is in question, the decisions of domestic courts will be subject to closer scrutiny by the Commission.

It is important to note that the fourth instance doctrine is directly related to the existence of a functioning judiciary and to the level of discretion to be afforded to a domestic court in, for example, estimating the value of evidence or establishing the domestic law applicable to a case. Therefore, to override the threshold set by the Commission, a petitioner would have to prove that there is a manifest arbitrariness that violates a right protected by the Convention in the domestic judicial proceedings.

From an exclusively legal point of view, the fourth instance formula simply recognizes that if agents of the state in the judiciary act in such a way that they violate the Convention, the Commission will review the case and declare their international responsibility. This reasoning is also valid when the Commission

37. *Id.* ¶ 40, 63.
39. *Id.* at 151.
reviews petitions that claim the violation of the Convention by agents of any organ of the state. However, the basic difference relies in the fact that the violation must be "manifestly arbitrary" signaling to certain states with problems in their judiciaries that it is clearly in their interest to improve the independence and impartiality of the administration of justice.

Interestingly, in *Narciso Palacios v. Argentina*, the Commission examined a petition that involved a judicial decision by Argentina's Supreme Court in a case in which the alleged victim was dismissed from his official job as municipal accountant and filed a suit against the decision of the Mayor of the city. The issue in question before the Commission referred to the interpretation of domestic law by the Supreme Court on whether Argentinean law required exhaustion of administrative remedies before a person could resort to judicial remedies. The petitioner argued that the Supreme Court arbitrarily changed its jurisprudential interpretation, requiring him to exhaust administrative remedies before being able to file a judicial complaint (a contentious administrative suit), requirement that was not mandated by the same Court at the time he filed the judicial suit. The Commission found that "at the time the petitioner filed his contentious administrative suit, on August 23, 1985, against the administrative decree of June 11, 1985, issued by the Mayor of Daireaux, mandating his dismissal from the post of municipal accountant, it was not necessary to exhaust the administrative process in order to accede to contentious administrative proceedings." Furthermore, the Commission considered that "the petitioner was denied access to this proceeding [the judicial remedy], by virtue of the retroactive application of a jurisprudential criterion that altered the interpretation of a legal provision applicable to his case." Presumably the Commission considered that the petition was admissible because the violation was closely related to due process guarantees, one of the exceptions to the application of the fourth instance formula.

In another interesting case, *Carranza v. Argentina*, the Commission found that the refusal of the courts of that country to hear the case in the merits violated several provisions of the American Convention. The Superior Court of Chubut heard the case in which a former judge claimed the illegality of his dismissal as judge during the *de facto* military regime. The Chubut Court found it was "non-justiciable" based the inappropriate application of the "political question doctrine." The case was then filed in "extraordinary appeal" before the Supreme Court of Argentina (a recourse similar to the United States Supreme Court *certiorari*) and this court rejected hearing the case. The Commission considered that the lack of review of the case in the merits by the Superior Court

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of Chubut and the Argentinean Supreme Court could characterize a violation of the Convention.

Interestingly, the Argentinean courts, particularly the Superior Court of Chubut, interpreted and applied domestic law and appeared to have afforded all due process guarantees in the case, which could have justified the application of the fourth instance formula by the Commission. However, the exception to the fourth instance formula was triggered, arguably, by the existence of a clear and manifest violation of the American Convention due to the "utter disregard" for constitutional procedure when dismissing the judge. The Commission stated:

It is not for the Commission to pass judgment on the wisdom or efficacy of a judicial doctrine per se, unless its application results in a violation of any of the rights protected by the American Convention . . . . [T]he Commission notes that the effect of the political question doctrine has been to preclude a decision on the merits of the petitioner's claims.

The removal of magistrates by order of the competent body and in accordance with established constitutional procedure is one thing, but the "dismissal of a magistrate" by an illegitimate authority without competence, with utter disregard for the procedure prescribed by the Constitution, is quite another. The first under internal legislation, might well be non-justiciable, but the second would be unconstitutional and unlawful, and it is up to the Courts to review it and declare so.

This precluded any decision on the merits of the petitioner's claim that in 1976 the military authorities had unlawfully dismissed him from his position as a judge.43

Some authors consider that this "formula" establishes a "double standard."44 I partially agree with such a characterization (although I prefer to call it a differential standard). Usually adjudicatory bodies have legal doctrines that allow for certain levels of discretion and margin of appreciation for the local authorities being supervised. The Commission focused such level of deference on the judiciaries, based on accepted principles and practice of international law: 1) interpretation of domestic law is, in general, reserved to the national courts; and 2) international human rights supervisory bodies are complementary or subsidiary to the domestic mechanisms of human rights

43. *Id.* at ¶ 45, 58, 64.
protection. These doctrines, therefore, permit different state practices to coexist regarding the protection of the same right. Similarly, the Commission has signaled that it will exercise a closer scrutiny of domestic judicial decisions depending on the right involved (the right to life or to personal integrity require closer scrutiny). This presumably also allows for a differential standard depending on the right affected.

Additionally, the mandate of the Commission has a dual dimension: political and judicial. In a hemisphere where States with different levels of democratic development coexist and there are certain states that still have gross and systematic violations of human rights in their jurisdiction, the Commission must use its mechanisms in a creative and effective way to induce progress in the general human rights situation. This means that all states that have independent and impartial judiciaries will be treated with more deference than those states where such independence or impartiality is compromised. The later will receive closer scrutiny by the Commission. In a way, we believe that the Commission is creatively resorting to legal presumptions similar to those used by the Inter-American Court in the Velásquez Rodríguez Case when documenting the practice of forced disappearance of persons in Honduras as way to shift the burden of proof to the State.

V. THE NOTION OF "PERSON" IN THE INTER-AMERICAN SYSTEM

Article 1.2 expressly states that, for the purposes of the Convention, the notion of "person" refers to human beings. This provision excludes from protection under the Convention other notions of person, such as NGOs, private corporations and other juridical persons.

The Commission has, however, admitted and decided cases under the American Declaration in which the alleged victim was a private organization. In this respect, it must be noted that neither the Declaration or the Statute or Regulations of the Commission define the notion of "person" as the Convention does. The Declaration only refers to "human being" in Article I; in all other articles the Declaration refers to "person." In light of the fact that the ECHR, for example, extends its protection to non-governmental entities, it is possible to conclude that the American Declaration may be properly interpreted as protecting the rights of juridical persons.

One clear example is Case No. 9250, ABC Color v. Paraguay. In this case, the Commission considered that it had competence to examine a claim filed against Paraguay regarding "the closing of the newspaper, ABC Color, that was printed in the city of Asuncion, Paraguay." The Commission stated that

Articles IV (right to freedom of investigation, opinion, expression and dissemination) and XXVI (right to due process of law) of the American Declaration were violated by Paraguay. The Commission did not refer to individual members of ABC Color or to other human beings and their right to receive information. Therefore, the state was found to have violated the rights of ABC Color, a juridical person under Articles IV and XXVI of the Declaration, by revoking its license to operate.

Similarly, Case No. 2137, Jehovah Witnesses v. Argentina, the Commission also examined a petition filed under the Declaration. The Commission found that the Argentinean state violated several rights under the Declaration, including the right to freedom of religion (Art. V) and the right of association (Art. XXI), as against the Jehovah Witnesses as a group. The decision makes no reference to individuals, and, only in one fragment, refers to "members of the Jehovah Witnesses group" when discussing the rights to life and personal security as well as to equal opportunity in education.

This notion of person under the Declaration gives rise to several questions regarding the relationship between the American Convention and the American Declaration. If we accept the analysis above as accurately reflecting the Commission's approach, we will in fact be accepting that there are two different notions of "person" in the individual complaint procedures of the Inter-American system, one under the Declaration, which establishes that nongovernmental entities (juridical persons) also have protection under the Declaration, and another under the Convention, which only provides protection for violations of the rights of human beings. A question remains whether juridical persons could assert their rights under the Declaration, when the respondent state has ratified the American Convention. Arguably, according to Article 29.d., ratification of the American Convention by a member State of the OAS does not supersede the obligations under the Charter of the OAS/American Declaration. The less restrictive criteria to interpret the relationship between the Convention and the Declaration could be used in order to avoid the regressive effect of eliminating the rights of certain group of "persons" through the ratification of the Convention.

Under the American Convention, the Commission rejects petitions regarding alleged violations against juridical persons (e.g. private corporations). The Commission reviewed such issue in Shareholders of Banco de Lima v. Peru, and considered the petition inadmissible based on the lack of

competence to review claims regarding "juridical beings" under the American Convention. The Commission considered that "what is at issue here are not the individual property rights of the individual shareholders, but rather the collective property rights of the company, the Banco de Lima." 49

More recently, the Commission, in Tabacalera Boquerón S.A. v. Paraguay, 50 similarly rejected the claim that Paraguay violated the right to property, among other rights, of the organization and its shareholders. Following its previous case Shareholders of Banco de Lima v. Peru, the Commission considered that Tabacalera was not protected under the Convention and that the shareholders could not argue that their individual property was affected. In making this decision, the Commission also considered the fact that domestic remedies were exercised exclusively on behalf of the Tabacalera and not the shareholders. 51

In this connection, the approach of the Commission raises some questions. In many instances, property rights by human beings are exercised through juridical persons such as Tabacalera S.A. or the Banco de Lima. In domestic courts shareholders do not usually have individual standing before the courts regarding claims of the company against third parties on matters related with the normal course of business. The company performs, in practice, as a representative of the individual interests of the shareholder. So it would be desirable for the Commission to re-think this approach, because the current jurisprudence may be limiting inappropriately the right to private property of persons under the Convention.

VI. CONCLUSION

Decisions of inadmissibility on grounds set in Article 47(b) of the American Convention have a preclusive character, arguably ending any avenue for a petitioner to bring its claim before the inter-American system. As we have mentioned, these decisions are very closely related to the merits of the petitions. They, in fact, are setting human rights standards in specific cases which, of course, increases their importance for the protection and promotion of human rights.

The boundaries of the fourth instance formula are being drawn by the emerging case law of the Commission on this matter. Although these limits are yet to be clearly stated, the Commission's decisions, both in admissibility and in the merits, are the primary reference by which we will be able to discern a reviewable case from a fourth instance formula petition. Much academic work is needed to understand the impact of this doctrine in the human rights

49. Case No. 10.169, supra note 48, ¶ 3.
51. Id. ¶ 26-27.
individual petition system and more active public scrutiny is required to avoid inconsistencies in its application.

In contrast with the European and United Nations human rights adjudicatory systems, the notion of “victim” in the inter-American system is more related to the merits of a case than to the admissibility requirements of petitions. It is for this reason that the Commission should have a lower level of review of this requirement in its admissibility stage and leave a more comprehensive study of this question to the merits phase of the case.

The question regarding the notion of “person” in the inter-American system requires a more rigorous treatment and further discussion in order to ensure that certain rights and persons are not overlooked by the Commission. It is probably necessary to inquire if the current de facto legal situation requires clarification through amendment of its case-law by the Commission or through a Protocol to the American Convention. In either case, it is necessary to recognize the problem and to forward proposals to further improve the current regional machinery.

Finally, we must note that in the Commission’s practice, the admissibility decisions were taken by the Secretariat before communicating the petition to the state and in many instances without any close scrutiny by Commissioners themselves and without public and reasoned decision. Only until recently, the Commission has issued inadmissibility decisions based on Article 47(b), among others, to be published separately and in its Annual Report, which is an important step towards guaranteeing scrutiny by the Commissioners themselves as a safeguard for petitioners. Hopefully, this practice will ensure that no case will be processed by the Commission without a transparent legal debate, and consequently, the substantive standards set in those admissibility cases will be publicly known so that the States can conform their domestic practices to the required international standards.
THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: A RECOMMENDATION FOR THE BUSH ADMINISTRATION

Michael P. Scharf

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I. INTRODUCTION

In the waning days of his presidency, William J. Clinton authorized the United States signature of the Rome Treaty establishing an International Criminal Court (ICC), making the United States the 138th country to sign the treaty by the December 30th deadline. According to the ICC Statute, after December 31, 2000, States must accede to the Treaty, which requires full ratification—something that was not likely for the United States in the near term given the current level of Senate opposition to the Treaty. While signature is not the equivalent of ratification, it sets the stage for United States support of Security Council referrals to the International Criminal Court, as well as other forms of United States cooperation with the Court. In addition, it enables the United States to continue to seek additional provisions to protect American personnel from the court's jurisdiction.

Clinton's action drew immediate reaction from Senator Jesse Helms, Chairman of the United States Senate Foreign Relations Committee, who has been one of the treaty’s greatest opponents. In a Press Release, Helms stated: “Today’s action is a blatant attempt by a lame-duck President to tie the hands of his successor. Well, I have a message for the outgoing President. This decision will not stand. I will make reversing this decision, and protecting America's fighting men and women from the jurisdiction of this international kangaroo court, one of my highest priorities in the new Congress.”

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During the 107th Congress, Helms is likely to resurrect the "Servicemembers Protection Act," Senate Bill 2726, which he initially introduced in June 2000. The Act would prohibit any United States Government cooperation with the ICC, and cut off United States military assistance to any country that has ratified the ICC Treaty (with the exception of major United States allies), as long as the United States has not ratified the Rome Treaty. Further, the proposed legislation provides that United States military personnel must be immunized from ICC jurisdiction before the United States participates in any United Nations peacekeeping operation. The proposed legislation also authorizes the President to use all means necessary to release any United States or allied personnel detained on behalf of the Court.  

II. INFLUENTIAL INSIDER OR HOSTILE OUTSIDER?

The inescapable reality for the United States is that the ICC will soon enter into force with or without United States support. As this is being written, thirty countries have already ratified the treaty, and 139 have signed it indicating their intention to ratify. Sixty ratifications are necessary to bring it into force. The Signatories include every other North Atlantic Treaty Organization (NATO) State except for Turkey. Three of the Permanent Members of the Security Council (France, Russia, and the United Kingdom) have signed it. Both of the United States' closest neighbors (Mexico and Canada) have signed it. And even Israel, which had been the only Western country to join the United States in voting against the ICC Treaty in Rome in 1998, later changed its position and signed the Treaty.

The question facing the Bush Administration, then, is whether its interests are better served by playing the role of a hostile outsider (as embodied in Jesse Helms' "American Servicemembers Protection Act") or by playing the role of an influential insider (as it has done for example with the Yugoslavia Tribunal). In deciding on a course of action, the Bush Administration must recognize the consequences that would flow from the hostile approach.

First, the hostile approach would transform American exceptionalism into unilateralism and/or isolationism by preventing the United States from participating in United Nations peacekeeping operations and cutting off aid to many countries vital to United States national security. Further, overt opposition to the ICC would erode the moral legitimacy of the United States, which has historically been as important to achieving United States foreign

policy goals as military and economic might. Perversely, the hostile approach may even turn the United States into a safe haven for international war criminals, since the United States would be prevented from surrendering them directly to the ICC or indirectly to another country which would surrender them to the ICC.

Second, the United States would be prevented from being able to take advantage of the very real benefits of an ICC. The experience with the Yugoslavia Tribunal has shown that, even absent arrests, an international indictment has the effect of isolating rogue leaders, strengthening domestic opposition, and increasing international support for sanctions and even use of force. The United States has recognized these benefits in pushing for the subsequent creation of the *ad hoc* tribunals for Rwanda and Sierra Leone, as well as proposing the establishment of tribunals for Cambodia and Iraq. But the establishment of the ICC will signal the end of the era of *ad hoc* tribunals. Under the hostile approach, when the next Rwanda-like situation occurs, the United States will not be able to employ the very useful tool of international criminal justice.

The United States opponents of the ICC have suggested that without United States support, the ICC is destined to be impotent because it will lack the power of the Security Council to enforce its arrest orders. But as the *ad hoc* Tribunals for Rwanda and Sierra Leone indicate, in most cases where an ICC is needed, the perpetrators are no longer in power and are in the custody of a new government or nearby states which are perfectly willing to hand them over to an ICC absent Security Council action. Moreover, the Security Council has been prevented (by Russian veto threats) from taking any action to impose sanctions on States that have not cooperated with the Yugoslavia Tribunal despite repeated pleas from the Tribunal’s Prosecutor and Judges that it do so. Indeed, in the Yugoslavia context, where the perpetrators were still in power when the Tribunal was established, it was not action by the Security Council, but rather the withholding of international loans that have induced Croatia and Serbia to hand over two dozen indictees. This indicates that, unlike the League of Nations (which United States opponents of the ICC have frequently referred to in this context), the ICC is likely to be a thriving institution even without United States participation. In other words, the United States may actually need the ICC more than the ICC needs the United States.

The third problem with the hostile approach is that the United States achieves no real protection from the ICC by remaining outside the ICC regime. This is because Article 12 of the Rome Statute empowers the ICC to exercise jurisdiction over nationals of non-party States who commit crimes in the territory of State Parties. Opponents of the ICC have attempted to negate this problem by arguing that international law prohibits the ICC from exercising
jurisdiction over the nationals of non-parties. In a lengthy article in *Law and Contemporary Problems*, I provide a detailed critique of this legal argument, pointing out that it is not supported by the historic record or guiding precedents. But far more important than what I have to say is the fact that the representatives at the ICC Prep. Con. have rejected the argument, indicating that the ICC Assembly of State Parties and the ICC itself are extremely unlikely to accept it.

If United States officials can be indicted by the ICC whether or not the United States is a party to the Rome Treaty, then the United States preserves very little by remaining outside the treaty regime, and could protect itself better by signing the treaty. This has been proven to be the case with the Yugoslavia Tribunal, which the United States has supported with contributions exceeding $15 million annually, the loan of top-ranking investigators and lawyers from the federal government, the support of troops to permit the safe exhumation of mass graves, and even the provision of U-2 surveillance photographs to locate the places where Serb authorities had tried to hide the evidence of its wrongdoing.

This policy bore fruit when the International Prosecutor opened an investigation into allegations of war crimes committed by NATO during the 1999 Kosovo intervention. Despite the briefs and reports of reputable human rights organizations arguing that NATO had committed breaches of international humanitarian law, on June 8, 2000 the International Prosecutor issued a report concluding that charges against NATO personnel were not warranted. I am not suggesting that the United States co-opted the Yugoslavia Tribunal, but when dealing with close calls regarding application of international humanitarian law it is obviously better to have a sympathetic Prosecutor and Court than a hostile one.

### III. A RECOMMENDATION BASED ON REAL POLITICK CONSIDERATIONS

I served as Attorney-Adviser for Law Enforcement and Intelligence and Attorney-Adviser for United Nations Affairs at the State Department under the first President Bush. Unlike much of the commentary on both sides of this issue, which is clouded by emotionalism and idealism, I have sought here to...
provide a detached risk-benefit analysis of the foreign policy and national security consequences of the question facing the new Administration.\(^9\)

The risks to United States servicemembers presented by the ICC have been greatly exaggerated, while the safeguards contained in the ICC Treaty have been seriously underrated. But to the extent that such fears are valid, United States opposition to the ICC will only increase the likelihood that the ICC will be more hostile than sympathetic to United States positions. And, ironically, by opposing the Court, the United States would likely engender more international hostility toward United States foreign policy than could result from an indictment by the Court. Thus, whether or not the United States is able to achieve additional safeguards to prevent the ICC from exercising jurisdiction over United States personnel, it will be in the interests of United States national security and foreign policy to support, rather than oppose, the ICC. This does not require immediate ratification. Perhaps it is better to let the Court prove itself over a period of years before sending the treaty to the Senate. But when the next Rwanda-like situation comes along, the Bush Administration will find value in having the option of Security Council referral to the ICC in its arsenal of foreign policy responses.

\(^9\) For a more detailed analysis, see THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW (Sewall and Kaysen, eds., 2000) (A project of the American Academy of Arts and Sciences of which the author served as Co-Director).
DEFINING TERRORISM AS THE PEACETIME EQUIVALENT OF WAR CRIMES: A CASE OF TOO MUCH CONVERGENCE BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW?

Michael P. Scharf

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I. INTRODUCTION

The problem of defining “terrorism” has vexed the international community for years. The United Nations General Assembly has repeatedly called for the convening of an international conference to define terrorism and distinguish it from legitimate acts in furtherance of national liberation struggles.¹ A decade ago, representing the United States, I gave a speech in the United Nations Sixth (Legal) Committee, in which I pointed out that general definitions of terrorism “are notoriously difficult to achieve and dangerous in what all but the most perfect of definitions excludes by chance.”² Today, we hear calls for a renewed effort to reach international agreement on a definition of terrorism, drawing from existing definitions of war crimes as a way around

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² See Press Release, Michael P. Scharf, United States Advisor to the Forty-Sixth General Assembly, in the Sixth Committee, on Item 125, Terrorism (Oct. 21, 1991) (on file with author) (USUN 63-(91)).
the definitional quagmire. This presents a case study for the topic of today’s panel and raises the question: Is the convergence of the laws of war and international criminal law always a good thing?

II. THE CASE FOR DEFINING TERRORISM AS THE PEACETIME EQUIVALENT OF WAR CRIMES

Terrorism can occur during armed conflict or during peacetime (defined as the non-existence of armed conflict). When terrorism is committed in an international or internal armed conflict (including a guerrilla war), it is covered by the detailed provisions of the four 1949 Geneva Conventions and their Additional Protocols of 1977. These conventions provide very specific definitions of a wide range of prohibited conduct, they apply to both soldiers and civilian perpetrators, they trigger command responsibility, and they create universal jurisdiction to prosecute those who engage in prohibited acts. The Conventions specifically prohibit use of violence against non-combatants, hostage taking, and most of the other atrocities usually committed by terrorists.

The key is the “armed conflict” threshold. By their terms, these conventions do not apply to “situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence.” In those situations, terrorism is not covered by the laws of war, but rather by a dozen anti-terrorism conventions, which outlaw hostage-taking, hijacking, aircraft and maritime


sabotage,\textsuperscript{9} attacks at airports,\textsuperscript{10} attacks against diplomats and government officials,\textsuperscript{11} attacks against United Nations peacekeepers,\textsuperscript{12} use of bombs\textsuperscript{13} or biological, chemical or nuclear materials. These peacetime anti-terrorism Conventions establish universal jurisdiction to prosecute perpetrators, require states where perpetrators are found to either prosecute them or extradite them, and establish a duty to provide judicial cooperation for other states.

There are significant gaps in the regime of the peacetime anti-terrorism conventions. For example, assassinations of businessmen, engineers, journalists and educators are not covered, while similar attacks against diplomats and public officials are prohibited. Attacks or acts of sabotage by means other than explosives against a passenger train or bus, or a water supply or electric power plant, are not covered; while similar attacks against an airplane or an ocean liner would be. Most forms of cyber-terrorism are not covered by the anti-terrorism conventions.

Defining terrorism as the peacetime equivalent of war crimes would fill most of these gaps. As described below, domestic and international judicial bodies are beginning to apply the laws of war to peacetime acts of terrorism, thereby setting a precedent for this approach.

A. The Juan Carlos Abella Human Rights Case

The most recent example is the Juan Carlos Abella v. Argentina case, decided by the Inter-American Commission on Human Rights in 1997.\textsuperscript{14} The case concerned the January 23, 1989 attack by 42 civilians, armed with civilian weapons, on the La Tablada military barracks in Argentina during peacetime. The Argentine government sent 1,500 troops to subdue this terrorist attack. Allegedly, after four hours of fighting, the civilian attackers tried to surrender by waving white flags, but the Argentine troops refused to accept their surrender and the fighting raged on for another thirty hours until most of the attackers were killed or badly wounded by incendiary weapons.


The Inter-American Commission first held that international humanitarian law (the laws of war) was part of its subject matter jurisdiction by implied reference in Article 27(1) of the Inter-American Convention on Human Rights.\(^\text{15}\) Next, the Commission held that the confrontation at the La Tablada barracks was not merely an internal disturbance or tension (in which case it would not qualify as an armed conflict subject to the laws of war). The Commission stated that international humanitarian law "does not require the existence of large scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory." The Commission found the confrontation at the La Tablada barracks to qualify as an armed conflict because it involved a carefully planned, coordinated and executed armed attack against a quintessential military objective—a military base—notwithstanding the small number of attackers involved and the short time frame of the fighting.\(^\text{16}\) The Commission thus stated that had the Argentinean troops in fact refused to accept the surrender of the civilian attackers, or had they in fact used weapons of a nature to cause superfluous injury or unnecessary suffering, this would have constituted a war crime.\(^\text{17}\) However, "because of the incomplete nature of the evidence," the Commission was unable to find against Argentina concerning these allegations.\(^\text{18}\)

The *Juan Carlos Abella* case is an important precedent because it lowers the armed conflict threshold so that many terrorist situations could now qualify for application of the laws of war. But it also highlights several potential problems with applying the laws of war to terrorist attacks. First, by confining their attack to a military barracks, the terrorists themselves acted lawfully under the laws of war. Conversely, the laws of war would constrain the methods the government could use to quell the attack.

**B. The Fawaz Yunis Prosecution**

A second case in which a court applied the laws of war to a peacetime terrorist act was *United States v. Yunis*.\(^\text{19}\) Fawaz Yunis was a member of the Amal militia which opposed the presence of the PLO in Lebanon. On June 11, 1985, Fawaz Yunis hijacked a Jordanian airliner from Beirut and attempted to fly it to the PLO Conference in Tunis to make a political statement. At his trial in the United States for committing acts of terrorism (hijacking and hostage taking), Yunis sought to use the obedience to orders defense.\(^\text{20}\) This is the

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15. *Id.* ¶ 157-164.
16. *Id.* ¶ 155.
17. *Id.* ¶ 180.
18. *Id.* ¶ 185.
20. *Id.* at 1095.
defense made famous in the case of Lieutenant William L. Calley who was tried for the My Lai massacre in Vietnam.\textsuperscript{21} According to U.S. law, "acts of a subordinate done in compliance with an unlawful order by his superior are excused unless the order was one which a man of ordinary sense and understanding would know to be unlawful."\textsuperscript{22}

The Yunis Court instructed the jury that Yunis could prevail on the obedience to orders defense if it found that the Amal Militia was a "military organization." To make that finding, however, the judge indicated that the jury had to determine that: (1) the Amal Militia had a hierarchical command structure; (2) it generally conducted itself in accordance with the laws of war; and (3) its members had a distinctive symbol and carried their arms openly.\textsuperscript{23} Although the jury did not find that the Amal Militia met this test, at least some terrorist organizations would qualify as a "military organization" under it, and thus have the right to rely on the obedience to orders defense.

C. The Ahmed Extradition Case

In the \textit{Mahmoud El-Abed Ahmed} Extradition case, a United States district court used the rules of armed conflict by analogy to determine whether a peacetime terrorist act could qualify for the political offense exception to extradition.\textsuperscript{24} In 1986, Ahmed attacked an Israeli passenger bus near Tel Aviv, and then fled to the United States. At his extradition hearing, his lawyer, former United States Attorney-General Ramsey Clark, argued that this was a non-extraditable political offense.

The Court held that a person relying on the political offense exception must prove the acceptability of his offense under the laws of war, even when there did not exist an armed conflict as such at the time of the offense.\textsuperscript{25} The Court found that Ahmed's acts did not qualify for the political offense exception because they violated Additional Protocol II's prohibition on targeting civilians.\textsuperscript{26} While this result ensured that Ahmed would be prosecuted in Israel, the implication of the holding is that if a terrorist targets military personnel or a government installation, the terrorist would be protected by the political offense exception.

\textsuperscript{22} \textit{Fawaz Yunis}, 924 F.2d at 1097.
\textsuperscript{23} \textit{Id.}
\textsuperscript{25} \textit{Id.} at 404.
\textsuperscript{26} \textit{Id.} at 406.
III. NEGATIVE IMPLICATIONS OF APPLYING THE LAWS OF WAR TO PEACETIME ACTS OF TERRORISM

The Abella, Yunis, and Ahmed cases show that domestic and international judicial bodies are beginning to apply the laws of war to terrorist acts outside the traditional concept of armed conflict. These cases thus provide a precedent for treating terrorism as the peacetime equivalent of war crimes. But these cases also indicate some of the problems inherent to this approach, which stem from the fact that the laws of war establish rights as well as obligations for those over whom they apply.

The first problem is that, under this approach, terrorists can rely on the "combatant's privilege," under which combatants are immune from prosecution for common crimes. For example, killing a combatant is justified homicide, not murder. This means that terrorist attacks on military, police, or other government personnel would not be prosecutable or extraditable offenses. Similarly, kidnapping a combatant constitutes a lawful taking of prisoners. Consequently, taking military or government personnel hostage would generally not constitute a crime. Finally, government installations are a lawful target of war. Thus, terrorist attacks on military, police, or government buildings would not be regarded as criminal. And the collateral damage doctrine would apply, such that injury or deaths to civilians would not be regarded as criminal so long as the target was a government installation, and reasonable steps were taken to minimize the risk to innocent civilians.

The second problem is that the approach would permit assassination of political leaders while they are within their own borders. The Internationally Protected Person Convention only protects heads of state, high level officials, and diplomats when they are on a mission outside of their home state. The laws of war, which would apply to such persons while within their country, make it a war crime to kill "treacherously,"—understood as prohibiting assassination. But this prohibition has been narrowly interpreted to, for example, permit targeting military or civilian commanders during a conflict.


31. W. HAYS PARKS, Memorandum of Law: Executive Order 12333 and Assassination, ARMY LAW
Executive Order 12,333, which prohibits United States government personnel from engaging in assassination, has been subject to a similarly narrow interpretation. Shortly after the 1986 bombing of Libyan leader Colonel Muammar Qaddafi's personal quarters in Tripoli, Senior Army lawyers made public a memorandum that concluded that Executive Order 12,333 was not intended to prevent the United States from acting in self-defense against "legitimate threats to national security" even during peacetime. If the laws of war apply to terrorists it would logically follow that they have the same right as governments to target military or civilian commanders and others who pose a threat to the security of their self-determination movement.

The third problem is that the approach would entitle terrorists to prisoner of war (hereinafter POW) status, which requires that they be given special rights beyond those afforded to common prisoners. In United States v. Noriega, General Noriega argued that Article 22 of the Third Geneva Convention required that he not be interned in a penitentiary. Although the District Court held that Article 22 did not apply to POWs convicted of common crimes, it agreed that General Noriega was entitled to POW status and therefore entitled to the protections of Article 13 ("humane treatment"); Article 14 ("respect for their persons and their honour"); and Article 16 ("equal treatment"). General Noriega's jail cell has been described as having all the amenities of a hotel suite, including a television, phone and fax machine, and a private bathroom.

Finally, as the Fawas Yunis Case demonstrated, the approach would enable terrorists to rely on the obedience to orders defense. This may be a fair tradeoff for providing the prosecution with the use of the doctrine of command responsibility, but at least in some cases it will render it more difficult to obtain a conviction of accused terrorists.

IV. CONCLUSION

The proposal to define terrorism as the peacetime equivalent of war crimes necessitates application of the laws of war to terrorists. The approach would fill some of the gaps of the current anti-terrorism treaty regime. It would give the prosecution the ability to argue the doctrine of command responsibility, which was not previously applicable to peacetime acts. And it will encourage terrorist
groups to play by the rules of international humanitarian law. On the other hand, the approach virtually declares open season on attacks on government personnel and facilities. It would encourage insurrection by reducing the personal risks of rebels. And it would enhance the perceived standing of insurgents by treating them as combatants rather than common criminals.

It is important that those advocating this new approach to the definition of terrorism be fully aware of all the legal consequences that stem from the approach. It is no panacea, and in the final analysis the negative consequences may render it another dead end in the age-old struggle to define terrorism. Thus, this may be a case of too much convergence.

Dr. Sabine Schlemmer-Schulte

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I. INTRODUCTION

Since the 1980s, the international community has both in theory and in practice called for reform of the development process. Development, it was felt, would only be sustainable if an enabling participatory environment in a country and appropriate accountability mechanisms of the country’s government were existing. Very soon, similar calls for participation of affected people and their representatives, i.e., the local and/or international civil society, in development assistance processes supported by international development agencies, and calls for mechanisms in these organizations that would ensure these organizations’ accountability to the local and/or international civil society were expressed. While international development agencies have introduced innovations in terms of participation and accountability on the basis of their own internal conviction that change to adjust to new challenges is needed as well as in response to the external calls for reform, the recent demonstrations at the World Bank and the International Monetary Fund Spring and Fall 2000 Meetings show that in the view of many outsiders changes made are not sufficient in an era of continued, even in some places increasing, poverty despite a trade and investment boom under the new international framework for trade.

This paper will, first, lay out the legal framework for “interaction” between the Bank and civil society both local and international; second, describe the evolution of such “interaction” in practice; third, assess the impact of local and international civil society on the Bank; and, fourth and finally, share some reflections on future developments for the relationship between the Bank and local and international civil society.


2. See, e.g., Olusegun Obasanjo, Democracy and Good Government - Basis for Socio-Economic Development (Lecture Delivered at the Vienna Social Issues Forum Oct. 24, 1991) (arguing that sustainable development in developing countries requires both “empowerment and capacity building of and for the people”).


4. For details regarding the major changes in the World Bank’s operations in terms of participation and accountability, see 3 IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD (2000).
II. LEGAL FRAMEWORK FOR "INTERACTION" BETWEEN CIVIL SOCIETY AND THE WORLD BANK

Under its Articles of Agreement, the World Bank was created as an international development finance institution. Its purposes are to finance the economic and social development of its borrowing members. It is prohibited from taking political considerations into account in its lending decisions. The Bank finances development by primarily making loans and guarantees for specific programs and projects to member governments. When it makes a loan or gives a guarantee on repayment of a loan to a private business, i.e., a borrower or recipient of a guarantee other than a member government, an additional guarantee by the government in whose territory the project to be financed is located is required.

In essence, the Bank's operations may be described as the Bank's entering into contractual relations with borrowing member governments, or with private business provided the member government in whose territory the project will be executed supports this contract through a guarantee. In practice, the vast majority of Bank operations consist of loans to borrowing member governments.

The Bank's charter explicitly provides for "[d]ealings between members, i.e., the members’ treasury, central bank, stabilization fund or other similar fiscal agency" for the entering into loan and guarantee contracts with the

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5. The term World Bank is used here to mean the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA), unless the context indicates otherwise.


7. The relevant provision of the Bank's Articles of Agreement state that "the Bank and its officers shall not interfere in the political affairs of any member, nor shall they be influenced by the political character of the member or members concerned" and that "only economic considerations shall be relevant to [the Bank's] decisions." IBRD, supra note 6, at art. IV, § 10; IDA, supra note 6, at art. V, § 6.

8. IBRD, supra note 6, at art. III, § 4, with IDA, supra note 6, at art. V, § 2 (limiting the Association's form of financing to loans). According to its Articles of Agreement, the Bank enters into loan and guarantee agreements with governments, (or any political sub-division thereof) of its member countries. See IBRD, supra note 6, at art. IV, § 10; IDA, supra note 6, at art. V, § 6.

9. Compare IBRD, supra note 6, at art. III, § 4, with IDA, supra note 6, at art. 5, § 2(d) (leaving the requirement of a government guarantee up to the discretion of IDA).
members.10 The charter provides further that the Bank shall cooperate "with any
general [public] international organization and with public international
organizations having specialized responsibilities in related fields."11

Neither the contractual loan and guarantee related relationship nor the
cooperation with other international organizations, as envisaged under the
Bank’s Articles of Agreement, include clauses on contracts with, or
participation by, affected people, local, or international civil society. No other
provision in the Bank’s Articles of Agreement contemplates contracts between
the Bank with, negotiation of contracts with, or participation in the operations
of any nature by, people potentially affected by Bank-financed projects, or local
civil society. Nor is cooperation with civil society in other respects envisaged.
From the supervisory perspective of Bank operations (or the perspective of
checks and balances between Bank Management and the Board of Executive
Directors which supervises Management in the realization of the Bank’s
operations), no possibility of, or requirement for, people from borrowing
countries or civil society to participate in this supervision by the Board of
Executive Directors of Management is envisaged by the Articles of Agreement.

III. EVOLUTION OF "INTERACTION" BETWEEN CIVIL SOCIETY AND THE BANK
IN PRACTICE

Despite the silence of the Bank’s charter regarding participation of civil
society in the Bank’s work or accountability by the Bank to civil society,
participation of and accountability vis-à-vis civil society has evolved over the
years. Thus, while no voice has been contemplated for civil society according
to the Bretton Woods Agreement under which the Bank was created in the
1940s, civil society, by now, has a voice in the Bank’s activities. The voice
given to civil society in practice does, however, not yet reach as far as scholars
and parts of civil society have called for; its overall scope, nevertheless, is quite
remarkable.

Participation of civil society exists in many areas of Bank operations and
keeps expanding although it takes the form of “meaningful consultation” rather
than participation in the sense of vesting full or partial powers of decision-
making in civil society.12 It does not mean negotiation and does not imply a

10. IBRD, supra note 6, at art. III, § 2. Article V, Section 2(c) of IDA’s Articles of Agreement
provide that IDA can provide financing to a member, the government of a territory included within the
Association’s membership, a public or private entity in the territories of a member or members, or to a public
international or regional organization, implying that contacts by IDA can go beyond government bodies.
11. Id. at art. IV, § 10; IDA, supra note 6, at art. V, § 6.
(2000).
priori acceptance of the views of the consulted civil society. Similarly, accountability mechanisms developed in the Bank’s context do not go as far as outsiders ask for, i.e., they do not enable civil society to ask for redress or remedy of harm it has either suffered itself, or asks for on behalf of people adversely affected by development projects.

A. Participation of Civil Society in the Bank’s Work

Since the 1980s, participation of civil society has been made possible and has, in some instances, even been made mandatory in connection with project-lending by the Bank. For several years now, it has been part of the policymaking process. It further, since recently, exists in the context of adjustment-lending. It is also part of the policy-dialogue, i.e., the dialogue on medium- and long-term lending program, in which the Bank engages in with its borrowing member governments. Finally, further informal dialogue with NGOs and civil society with the Bank is evolving in conjunction with events organized by the Bank, e.g. seminars on research and policy evaluation, the Bank/Fund joint Board of Governors’ meetings, and sector strategy paper formulation.

The Bank has built participation into the so-called project cycle which characterizes its lending activities for development. The project cycle consists of several stages: 1) selection of the project to be financed; 2) design and preparation of the selected project; 3) appraisal of the project (plus following approval of the loan financing the project); 4) implementation of the approved project; 5) supervision of the project’s implementation; and 6) evaluation of the project. Each, the Bank and the borrower, has a specific role in the project cycle. The selection of the project is both the Bank’s and the borrower’s task. Design and preparation of the project is the borrower’s responsibility. Appraisal of the project is done by the Bank. Implementation of the project is the borrower’s responsibility while the supervision of the implementation rests with the Bank as well as project evaluation.
The inclusion of a diversity of stakeholders other than the borrowing member's government is, according to Bank policies which bind Bank staff and which bind also the borrower after their incorporation into loan agreements, made an obligation at particularly two stages of the project cycle, i.e., the preparation and implementation of the project. As these stages fall into the responsibility of the borrower, the Bank requires the borrower to ensure participation of ultimate beneficiaries of the projects it finances.

For example, during the design and preparation of a hydro-electric dam project, Bank policies and procedures require the undertaking of environmental studies, the elaboration of resettlement plans, and the identification of indigenous people. Participation in the context of such studies and plans will involve consultation with the people living in the area proposed as the construction site of the dam as well as with local non-governmental organizations (NGOs) to determine the environmentally most sustainable framework for the project, elaborate appropriate resettlement measures, and work out protection measures for indigenous people. Again, during the execution of the Bank-financed project by the borrower or its sub-contractors, for example, a resettlement plan will have to be followed, people moved from one location to the other will have to be compensated for any losses, and people will have to be consulted in the course of the implementation of the project.

It may be noted that Bank policies on disclosure of information to the outside greatly facilitates the ability of beneficiaries of projects, local and international civil society to be involved in Bank's projects and offer their views, especially beyond what the Bank is required to ask for.

Participation of civil society has been for years a regular feature in the Bank's formulation of new policies, its conversion of operational directives and

17. See SHIHATA, supra note 14, at 41-49 (discussing the legal nature and function of Bank policies and procedures in detail).
18. See, e.g., The World Bank Operational Manual, Operational Policies: Environmental Assessment, OP 4.01 (1999) (standardizing a process in which projects to be financed by the Bank undergo a specific assessment to ensure that the environmental effects of Bank-financed projects are discovered as early as possible in the project cycle and that measures are incorporated to minimize, mitigate or compensate for adverse impacts of the projects or to enhance their environmental benefits).
19. See The World Bank Operational Manual, Involuntary Resettlement, OP 4.12 (1999) (establishing procedures to ensure that the population displaced by a project receives benefits from it by compensating them for their losses, assisting them with the move and their efforts to improve their former living standards, income earning capacity, and production levels, or at least to restore them).
other older instruments into operational policies and procedures, or the latter's amendments.\textsuperscript{23}

The Bank engages civil society in the review of its structural adjustment strategies and has established a global network of civil society organizations to discuss ways to improve mutual understanding of policy impacts on the poor and explore improvements in economic reform programs.\textsuperscript{24} The Structural Adjustment Participatory Review Initiative (SAPRI), as this review is called, was launched in 1997.

The Country Assistance Strategy (CAS) is the primary tool in the Bank prepared for all borrowing countries considering lending from it. The CAS report contains a description of the countries' priorities and the composition of assistance required. It is prepared with the participation of the government. In some instances, civil society, the private sector, and other country stakeholders are consulted about the CAS contents before consideration by the Bank's Board. In July 1998, the Bank's Board directed Bank staff to publicly disclose CAS reports at the request of governments.

In the vein of implementing the Comprehensive Development Framework (CDF), the Bank is also working in partnership and in a dialogue with a variety of partners, including civil society.\textsuperscript{25} The CDF, introduced in January 1999 by the Bank's President James D. Wolfensohn, proposes a long-term holistic approach to development. It acknowledges a country's macroeconomic fundamentals but stresses further the importance of the institutional, structural, and social underpinnings of development. As a process and tool for development effectiveness, the CDF emphasizes strong partnerships among governments, donors, civil society, the private sector, and other development actors working toward the goal of poverty reduction.

The growing rather informal dialogue between the Bank and civil society beyond project-lending, policy formulation \textit{stricto senso}, adjustment strategy review, and policy dialogue (CAS and CDF), relies primarily on several focal points within the Bank, \textit{e.g.} its NGO unit to establish and organize a dialogue, or its office for external relations. However, frequently, the specialized networks in the Bank, when they feel this to be opportune, initiate themselves

\textsuperscript{23} For a detailed description of the conversion process of Bank policies, see SHIHATA, \textit{supra} note 14, at 41-46.


the contracts with relevant specialized NGOs or particular parts of civil society to receive comments on draft sector strategy papers or discuss research.

In conjunction with major institutional reform on new initiatives, the Bank often receives unsolicited comments from NGOs and civil society, or engages deliberately in a dialogue with outsiders. Such dialogue, for example, occurred on the occasion of the establishment of the Inspection Panel itself as well as Bank internal reviews of the experience with it. A similar dialogue is taking place in conjunction with major Bank events, e.g., the joint Bank/Fund Board of Governors' meetings.

From a legal point of view, it is important to note that participation of civil society, i.e., mainly beneficiaries of Bank-financed projects and local NGOs concerned with the projects for the purposes of the Bank's operational work, and local and international NGOs when it comes to adjustment strategies and policy-making, is defined in terms of meaningful consultation with civil society before the Bank takes a decision on the financing of or measures for the supervision of the projects it supports, or on the design of strategies and contents of policies. That means that the Bank gives civil society the opportunity to comment on projects, strategies and policies before those are submitted for approval to its decision-making organ. Consultation in this context does not mean negotiation and it does not imply acceptance of the views of the consulted party or a mandatory influence (in whatever form) on the decisions taken by the Bank. However, it means receiving adequate information from the ultimate project, strategy, and policy beneficiaries and their spokesmen, listening to them with an open mind and readiness to take their views into account before the Bank reaches its own conclusion.

The organ of the Bank which is mostly consulting with stakeholders from civil society is the Bank's Management. It is the Bank's Management which is giving project beneficiaries and NGOs the opportunity to express their views and concerns regarding projects and programs financed by the Bank. It is also Management calling for comments in the formulation of strategies and policies. Participation of or consultation with project beneficiaries and NGOs is thus, as a general rule in the Bank's practice, tied to Management's work, i.e., the organ which conducts the ordinary business of the Bank according to its charter. As an exception from this rule, the Board of Executive Directors, i.e., the Bank's principal decision-making organ, has recently also allowed for comments by NGOs before taking a decision on the second review of the Inspection Panel. Nevertheless, whatever organ has listened to Bank outsiders, such listening has always taken the form of consultations as any other influence on the decision-making procedure of the Bank impairing on or interfering with the decision-

26. IBRD, supra note 6, at art. IV, § 10; IDA supra note 6, at art. V, § 6.
27. For details, see SHIHATA, supra note 14, at 196-199.
making powers of Bank organs would have been in violation with its Articles of Agreement.

B. The Bank’s Accountability to People Affected by Bank-Financed Projects

The Bank does not establish any contractual relations with the ultimate beneficiaries of the projects it finances. It also does not take any actions vis-à-vis them. Nevertheless, it can be the Bank’s failure to comply with its own standards, e.g. having failed to properly supervise the implementation of a project that could potentially result in harm to people.

Before the Inspection Panel was established, people adversely affected by such failures could, of course, write to the Bank’s Management and ask for appropriate actions to stop such harm but no institutionalized, independent complaint mechanism for them existed.

To enhance the Bank’s accountability vis-à-vis project beneficiaries as well as to improve the Board’s ability to supervise Management, the Bank established in 1994 the Inspection Panel. The Inspection Panel provides a formal mechanism for people directly affected by Bank-financed projects to bring complaints before it on grounds of the Bank’s failure to abide by its own policies and procedures in the design, appraisal and implementation of the projects it finances.

The Panel’s role is in principle to be performed in two stages. In the first stage, the Panel registers the request provided it is not frivolous or manifestly outside the Panel’s jurisdiction. Management, thereafter, has the opportunity to respond to the request. Then, the Panel has to assess whether the request for inspection meets the eligibility requirements of the Resolution. The main eligibility requirements include that the request must have been brought by a group of project beneficiaries from the territory of the borrowing member, that it relates to a failure of the Bank to comply with its own policies and procedures, and that harm for project beneficiaries has or is likely to result from that Bank failure. A local NGO can bring the complaint on behalf of affected


31. In the first stage, the Panel has to establish four elements of jurisdiction, the first of which does
people. In case local representation is not available, an international NGO can, with the approval of the Bank’s Executive Directors, bring the complaint. On the basis of the eligibility assessment, the Panel recommends to the Executive Directors whether to authorize an investigation.

In the second stage, which takes place only after the Board authorizes an investigation, the Panel carries out its investigation and reaches its findings on whether the Bank has been in serious violation of its operational policies and procedures with respect to the design, appraisal and/or implementation of the project involved. If the Panel finds Bank failures in its investigation, Management may propose corrective measures or the Board may decide on such measures. That latter decision is, while binding on Management, resulting from the Board’s discretionary power to supervise Management. It is not the enforcement of a right of project beneficiaries to such corrective measures. Management’s own proposal on corrective measures is based on Management’s duty to conduct the Bank’s day-to-day operations properly according to the applicable rules.

It must be emphasized that the concept of the Inspection Panel is, unlike the concepts of liability under domestic law or international responsibility under international law, not based on the philosophy of legal action and remedies. This means that the essence under the old maxim of “ubi jus, ibi remedium,” i.e., that someone who has been wronged by another has a right to be remedied

not apply in the exceptional case where a request for investigation is made by a member or members of the Bank’s Board of Executive Directors: (i) the Panel’s competence relating to the person of the complainant (ratione personae); (ii) its competence regarding the subject matter of the complaint (ratione materiae); (iii) its competence relating to the timing of the complaint (ratione temporis); and (iv) the admissibility of the complaint in the absence of other grounds excluding the request’s eligibility under the Resolution (e.g. when Management has already dealt with the subject-matter or is taking adequate steps in that direction). For a comprehensive description of the Panel’s role in the first stage, see IBRAHIM F.I. SHHATA, THE WORLD BANK GENERAL COUNSEL’S LEGAL PAPERS: 1983-1998 (2000) (The Role of the Inspection Panel in the Preliminary Assessment of Whether to Recommend Inspection).

32. Inspection Panel, supra note 28, ¶ 12.
33. Id.
34. Id. ¶ 19.
35. The Panel conducts the investigation by checking pertinent Bank records, interviewing Bank staff and other persons and, if needed, carrying out an investigation in the territory of the borrowing country with the borrowing country’s consent.
36. Id. ¶ 23.
and will receive an enforceable court judgment if he brings an action before the
court requiring the wrongdoer to correct the wrong, compensate the wronged,
or put him in the position he was before the wrongdoing occurred, does not
apply to the Panel. 38 By contrast, the accountability concept, for which the
Inspection Panel stands, is essentially not a remedy concept. 39 It does not give
a right to remedial measures and it also does not provide for a corresponding
enforceable judgment. 40

By contrast, the concept of legal liability under domestic law is a legal
remedy. Under this concept, an action could theoretically be brought against the
Bank by any individual having standing under domestic law on the basis of
applicable domestic law (e.g. on the basis of the law of contracts, torts, or lender
liability) in a domestic court. 41 The latter would, if the claim is valid on its
merits, require the defendant to take remedial measures (e.g. pay damages or
give restitution). In practice, such action can, however, not be brought against
the Bank as the Bank is immune from suit in domestic courts with respect to its
operational activities and is not likely to waive its immunity. 42

While, like states, international organizations such as the Bank are in
principle responsible for any breaches of their international obligations under
an international agreement to which they are a party or an established principle
of customary international law applicable to them adversely affecting
individuals' rights, the establishment of any such international responsibility on
the part of the Bank vis-à-vis non-state actors meets in practice insurmountable
obstacles. 43 There is in particular no judicial international forum before which
individuals could bring claims against the Bank for violation of international

38. See Sabine Schlemmer-Schulte, The World Bank, Its Operations, and Its Inspection Panel, 45
Recht der Internationalen Wirtschaft (RIW) 175-81, 180 (1999). See also AVERY LEISERSON, RESPONSIBILITY
IN A DICTIONARY OF THE SOCIAL SCIENCES 599, 600 (Julius Gold & William L. Kolb eds., 1964) (discussing
the distinction between accountability and legal responsibility and, in this context, pointing out that legal
responsibility includes the elements of an obligation, the breach of that obligation, harm caused to third parties
by the breach, and the duty to remedy the harm, while accountability does not include the element of liability
for harm caused to third parties).

39. See Schlemmer-Schulte, supra note 38.

40. Id.

41. Id. at 181. See also SHIHATA, supra note 14, at 241-258.

42. As a general matter, the Bank is under its Articles of Agreement and its Headquarters and
Establishment Agreements it entered into with the countries where its headquarters or resident missions are
located, immune from suit in domestic courts with respect to its operational activities. IBRD, supra note 6,
at art. IV § 10; IDA, supra note 6, at art. V, § 6.

43. For a discussion of the World Bank's potential international responsibility and the Inspection
Panel's role in clarifying some of this notion's complex aspects, see Daniel D. Bradlow & Sabine Schlemmer-
Schulte, The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the
International Legal Order, 54 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)
legal standards conferring rights on them even if a borrowing country would espouse such a claim against the Bank.\textsuperscript{44}

V. ASSESSMENT OF THE IMPACT OF CIVIL SOCIETY ON THE BANK

Participation in project-lending, adjustment strategies, and policy-making has been introduced by the Bank on the basis of the conviction that broad consultation with many stakeholders and their advocates enhances its operations' impact on poverty reduction and increases its activities' sustainability. Likewise the new accountability mechanism of the Inspection Panel entertaining complaints by third party non-state actors over Bank failures has been established in order to improve the Bank's portfolio performance.

From a quantitative point of view, it may be noted that the extent of NGO participation in some capacity in the Bank's operations goes beyond fifty percent of the operations approved every fiscal year.\textsuperscript{45} Over 500 NGOs are participating in the review of the structural adjustment initiative. As of the end of fiscal year 1999, all SAPRI countries have held national forums in seven countries, organized by multi-stakeholders follow-up committees.\textsuperscript{46} Local NGOs in three other countries are conducting their own debates and research through their involvement in a global NGO network set up to follow up the SAPRI exercise. This process is expected to culminate in a global forum sometime in 2000.\textsuperscript{47} Of the twenty-five CASs prepared during fiscal year 1999, twenty-two (or eighty-eight percent) included some involvement of NGOs and civil society.\textsuperscript{48} This represents a remarkable increase over fiscal year 1998 when only 20 percent of the CASs demonstrated an effort to reach poor and marginalized stakeholders. Moreover, ten of the twenty two CASs prepared in fiscal year 1999 provided details in the CAS report about the participation of NGOs or civil society and included, for example, annexes listing consultation participants, descriptions of the discussions, and findings resulting from the discussions. As to the CDFs prepared in the twelve pilot countries, NGOs and civil society have been involved in various forms in the CDF dialogue.

In response to a Board discussion on the progress made in the implementation of the pilot CDFs, a "Questions & Answers" document on the CDF was posted on the Bank's CDF webpage. One of the major concerns

\textsuperscript{44} See, e.g., JERZY SZTUCKI, INTERNATIONAL ORGANIZATIONS AS PARTIES TO CONTENTIOUS PROCEEDINGS BEFORE THE INTERNATIONAL COURT OF JUSTICE (ICJ) 141 (A.S. Müller et al eds., 1997) (noting that the ICJ is not a forum for claims brought by individuals and discussing the various proposals advanced during the past half of the century to change this situation).


\textsuperscript{46} See WORLD BANK CIVIL SOCIETY RELATIONS FISCAL 1999 PROGRESS REPORT 20-21 (2000).

\textsuperscript{47} Id. at 21.

\textsuperscript{48} Id. at 11.
addresses in the Q&A paper was the ongoing involvement of NGOs and civil society in the CDF process and in building effective partnerships. In May and June 1999 a world wide on-line consultation was held. Many NGOs from both developed and developing countries took part in the electronic discussion, which involved about 800 subscriptions from ninety-eight countries.49

The Bank is also actively contributing to many of the over fifty different global policy and research networks which combine NGOs with international institutions, especially international financial institutions (IFIs), and private business organizations or academic institutions and has received comments from hundreds of NGO in its policy drafting (including the conversion exercise regarding old policies as well as the formulation of new policies). Such comments are also often received where the bank engages in institutional reform, e.g., as mentioned earlier, on the occasion of the establishment of the Inspection Panel itself and its two revisions. The informal dialogue with civil society on the occasion of the recent Spring and Fall 2000 meetings of the Board of Governors of the Bank and the Fund has increased as well.

The accountability mechanism of the Inspection Panel has been frequently used. The Panel opened for business in 1994. By October 15, 2000, it had received twenty-one requests for inspection. Three of these requests fell clearly outside the Panel’s mandate and were, therefore, not registered. Of the other eighteen requests, seventeen were either brought by local people allegedly adversely affected by Bank failures in connection with the Bank-financed projects and their local NGO representatives, or by local NGOs on behalf of affected peoples whose names and identities were often asked to be kept confidential and not to be disclosed for fear of potential reprisals. One request was submitted by an international NGO headquartered in the United States on behalf of people in a borrowing member country to whom local representation was not available.

From a qualitative point of view, the impact of civil society, and especially NGOs, is harder to measure.50 However, some concrete examples are showing that participation of and accountability to civil society can indeed have a great impact.

Participation of civil society can in particular change the project, adjustment strategy, or policy design. It can be a contributory factor for Bank activity. It can even be the major catalyst for a Bank activity in cases where such activity would not have been undertaken but for civil society engagement.

49. Id. at 15.
50. In conjunction with its project-lending, qualitative assessments of NGO and civil society impact is most advanced. Analysis of the Annual Reports on Portfolio Performance indicates that NGO involvement reduces the risk of poor project performance. See also, e.g., Carmen Malena, NGO Involvement in World Bank- Financed Social Funds: Lessons Learned (World Bank, Environment Department papers, 1997).
Thus, the Bank's reviews of the Resolution Establishing the Inspection Panel, especially the second review, and the Bank's strategy to assist its borrowing countries in eliminating corruption carry, to some extent, the works of NGO comments/involvement. Most likely, the Bank would not at all have adopted guidelines to help countries reduce harmful child labor, or would have only done so later.

A. The Establishment of the Inspection Panel and the Two Reviews of the Bank's Experience with It

The creation of the Inspection Panel was the result of both internal and external demands on the Bank to be more transparent and accountable in its operational work by providing the Bank's Board with the results of an independent review of controversial Bank projects and, thereby, to improve quality control in project design, appraisal, and implementation.\(^5\)

Inside the Bank, the creation of an operations' inspection function emanated from an internal review of the Bank's work following the appointment of Lewis Preston as President of the Bank in September 1991. The report of the task force commissioned by him, which was submitted to the Board in November 1992 and which came later known as the Wapenhans Report after its chairman, found, when examining the quality of the Bank's loan portfolio, that Bank staff was often concerned about getting as many projects approved as possible under the Bank's lending program.\(^2\) In such an "approval culture," less attention had, however, been given to the commitment of borrowers and their implementing agencies to the implementation of projects and to the supervision by the Bank of such project implementation. The task force recommended a change in the Bank's policies and practices in order to improve performance of its portfolio management and an enhancement of the role of the Bank's Operations Evaluation Department (OED) which carries out ex post evaluations of projects after project completion. A subsequent action plan, prepared by the Bank's Management in July 1993, in response to the task force's recommendations, introduced new business practices and processes.\(^3\)

It recommended greater participation in the design and implementation of bank-financed projects by the people affected by these projects and greater

51. For a detailed account on the developments which led to the establishment of the Inspection Panel, see SHIHATA, supra note 37, at 1-34; 3 THE WORLD BANK IN A CHANGING WORLD ch. XVII (The World Bank Inspection Panel- Its Historical, Legal and Operational Aspects).


involvement of relevant NGOs in project design and implementation. It also highlighted the need for the Bank's access, when necessary, to a reliable source of independent judgment about specific operations that may be facing severe implementation problems, such as an independent Inspection Panel.\footnote{Id. \textsuperscript{160.}}

External criticism of the Bank by NGOs and influential circles in certain member countries with large subscriptions/contributions to the Bank's affiliate, the International Development Association (IDA), no doubt influenced that conclusion. The essence of the external criticism was that international organizations including the Bank were not adequately accountable for their activities and that they needed to be more open and responsive. The criticism escalated in 1993 in the course of final negotiations by donor countries on the tenth Replenishment of IDA and the call for the establishment of an independent inspection function by the Bank was linked by the US to its willingness to contribute to IDA.\footnote{Dick Thornburgh, \textit{Today's United Nations in a Changing World}, 9 AM J. L. \& POL.'Y 215, 220 n.7, 222 (1993).}

Another major external pressure pushing the Bank to think about the establishment of a special mechanism improving its accountability came from the mistakes made by the Bank regarding a project in India, \textit{i.e.}, the Narmada dam and canal project which was financed by the Bank to ten percent.\footnote{See Loan Agreement No. 2497-IN (1985) and Development Credit Agreement No. 1553-IN (1986).} Under construction since 1987, the project was in particular criticized for not responding to major environmental concerns and having greatly underestimated the number of people that needed to be resettled from the submersion area of the dam. The Bank, under Barber Conable, then President, commissioned an independent review of the project and the commission's chairman, noted a failure by the Bank to incorporate Bank policies in the project credit and loan agreements and a subsequent failure to require adherence to enforceable provisions of these agreements.\footnote{The Report was published by its authors, without prior Bank permission, as B. Morse/T.R. Berger/Sardar Sarovar, \textit{The Report of the Independent Review} (Ottawa: Resource Futures International 1992) (hereinafter Morse Report); see also T.R. Berger, \textit{The World Bank's Independent Review of India's Sardar Sarovar Projects}, 9 AM. UNIV. J. INT'L LAW AND POL.'Y 33 (1993).} While Management disputed some of the Morse Commission's findings, it agreed with the thrust of them after carrying out a further review.\footnote{See India: The Sardar Sarovar (Narmada) Projects Management Response (SecM 92-849), June 23, 1992. The Bank-wide resettlement review, initiated in 1993, was completed in April 1994. See The Bankwide Review of Involuntary resettlement 1968-1993, Report prepared by the Task Force for the Bankwide Resettlement Review, Environment Department (April 1994). For the details of the further internal review, see H. Wyss, Bankwide Lessons learned from the Experience with the India Sardar Sarovar (Narmada) Project, annexed to SecM 93-516, May 24, 1993.}
The above mentioned circumstances led several Executive Directors in February 1993 to come forward with a proposal for the establishment of an in-house inspection capacity for ongoing projects. Outsiders' proposals included the appointment by the Board of a Bank ombudsman and another for an independent commission with judicial powers, including the power to issue binding decisions on the Bank. Because of the political support of these external proposals in particular in the US House of Representatives in the course of IDA tenth Replenishment, Bank Management moved toward the development of a plan for the establishment of a standing inspection function. After the discussion of various Draft Resolutions prepared by the Legal Department, a final text was adopted by the Board of Executive Directors on September 22, 1993.

The first review of the Inspection Panel was required by the Resolution establishing it. This review took place in 1996. Along the process of the review within the Bank, especially discussion of the issue in the Board's Committee on Development Effectiveness (CODE), suggestions from several NGOs and academics were received by management and circulated to the Committee which discussed these outsiders' suggestions together with Management's and the Panel's suggestions. The first review resulted in the issuance by the Board of Clarifications of Certain Aspects of the Resolution establishing the Panel. As to the substance of the 1996 clarifications, including, inter alia, issues of the Panel's functions such as the two-stage procedure (with the addition of a "preliminary assessment in the first stage), issues of access and eligibility, outreach, composition of the Panel, and disclosure of documents in the Panel process outsiders' views have to some extent had a direct and/or indirect impact on the Board's formulation of the 1996 Clarifications in a number of aspects.

59. See SHIHATA, supra note 14, at 22-23.
61. Inspection Panel, supra note 28, ¶ 27.
62. For a summary of the discussion on the occasion of the first review of the Resolution Establishing the Panel and the results thereof, see SHIHATA, supra note 14, at ch. 4; see also Louis Forget, Le "panel d'inspection" de la Banque Mondiale, Annuaire Français de Droit International 645 (1996).
In connection with the Panel's function and procedures, the Board agreed to the flexible extension of the Panel's time frame for ascertaining the eligibility of a request as an exception to the general rule while not agreeing with the suggestion made by some NGOs to eliminate the first phase of the Panel process altogether and have the Panel alone decide on the eligibility of a request. The Board clarified further that the Panel's investigations should continue to result in "findings," not in recommendations to the Board on remedial measures alleviating the project's flaws, or on overall improvements of the Bank's policies and procedures, as suggested by some NGOs.

In terms of access to the Panel and eligibility of requests for inspection, Management had not objected to the suggestion of several NGOs to extending access to the Panel to all affected parties, including a single individual. The Board, however, declined to follow that suggestion. It also did not agree to another NGO-supported suggestion which favored the extension of the inspection function to requests submitted by foreign NGOs, local NGOs whose right or interests were not affected by the project, or even to complaints submitted in the general public interest.

On the question of disclosure of information, the Board agreed to make Management's response to the request for inspection as well as the opinions of the General Counsel of the Bank on matters related to the Panel available to the public after Board discussion of these documents, as requested by some NGOs. In the case of the General Counsel's opinion, the Board, however, reserved its right to decide otherwise in a specific case. Regarding another dimension of outreach, the Board decided that Management would make significant efforts to make the Inspection Panel better known in borrowing countries, as asked for, among others, by several NGOs. The Board clarified, however, that the Bank would not provide technical assistance or funding to potential requesters.

The Board reiterated the requirement of the Resolution that "[t]he Panel shall seek the advice of the Bank's Legal Department on matters related to the Bank's rights and obligations with respect to the request under consideration."
The request of some NGOs that the Board should have to separate legal counsel to advise on Panel matters distinct from the Bank's General Counsel was rejected.\textsuperscript{73} It was recalled that the General Counsel provided independent legal advice to both the President and the Board on all matters.\textsuperscript{74}

Controversies in connection with some requests over the decision on whether to authorize investigations in these cases led the Bank's Board in September 1997 to initiate a second review of the Panel. This review resulted in April 1999 in the issuance of another set of clarifications of the Resolution establishing the Panel, the so-called 1999 Conclusions of the second review of the Panel's experience.\textsuperscript{75}

Unlike in the case of the first review of the Resolution of the Inspection Panel, the second review was in its major part concluded by an \textit{ad hoc} Working Group formed following two informal Board meetings on Management proposals and Panel comments by Board decision and composed of six Executive Directors (representing both non-borrowing and three borrowing member countries).\textsuperscript{76} The Working Group's deliberation took place without representation from Management and the other Board members not chosen to be Working Group members. The Working Group only heard the General Counsel and the Inspection Panel before asking the corporate secretariat to circulate its final proposal to all Board members and schedule it for discussion in the Board. After the Working Group's proposal for a second set of clarifications of the Resolution had been put on the agenda of the Board of Executive Directors' meetings, the fact that a paper by the Working Group was scheduled to be discussed by the Board and the text of the paper itself leaked to the outside. As a result, several NGOs and academics criticized the Working Group's proposal openly in the media and/or wrote to the Bank and requested an open discussion of the Working Group's proposal with civil society before the Board would take a decision on the proposal. In a move unprecedented in the Bank's history, the Board invited NGOs and academics to send written comments on the proposal as well as to attend an entire day session of

\textsuperscript{73} Id. It may be noted that historically, these are examples where the views of Management as expressed in its response have differed from the views of the General Counsel as found in his opinion.


\textsuperscript{76} For a comprehensive record of the events surrounding the second review of the Inspection Panel, see SHIHATA, supra note 14, at 173-203. See also Daniel D. Bradlow, Precedent Setting NGO Campaign Saves the World Bank Inspection Panel, 6 HUM. RTS. BRIEF OF THE WASH. L. AM. U. 7 (1999).
discussion with Board members at Bank headquarters. This consultation with civil society had its impact on several aspects of the text of the later-on adopted 1999 Conclusions of the second review of the Inspection Panel. While not changing the essence of the Working Group’s original proposal for conclusions, some of the nuances later adopted in the final version of the 1999 Conclusions stem from civil society’s suggestions made before Board decision on the matter.77

The solutions to the following three issues were at the heart of the 1999 Conclusions. The 1999 Conclusions ended the unbalanced focus on assessing harm suffered or to be suffered by the requesters in the first stage of the Panel process and made it clear that the first stage is about the formal eligibility of a request which lies in an assertion of both (i) non-compliance by the Bank with its policies and procedures, and (ii) resulting potential or material harmed suffered or to be suffered by the requesters caused by Bank’s failures. The 1999 Conclusions brought an end to the wrong impressions that remedial action, as opposed to accountability in response to harm, was at the heart of the process which had been nurtured by the Panel’s practice to focus more on assessing the harm suffered by requesters than on ascertaining Bank failures to comply with policies and procedures.

The 1999 Conclusions also reversed the trend of the Management submitting borrowers’ remedial action plans after the Panel issued its recommendation on whether to investigate but before the Board met to decide on that recommendation, a practice that frequently frustrated the Board’s authorization of investigations. Submission of borrowers’ remedial action plans by Management at this point in time, i.e., not in conjunction with either Management’s response to the request or Management’s response to the Panel’s investigation report, are now explicitly prohibited. Management compliance plans may also only be submitted together with either Management’s response to the request or its response to the Panel’s findings. The Panel’s role with respect to borrowers’ remedial action plans will be limited to giving a view regarding appropriate consultations with selected people and local NGOs as such plans do not fall under the Panel’s jurisdiction.

Finally, the 1999 Conclusions require a distinction to be made in Management’s responses and Panel recommendations/reports between (i) failures exclusively attributable to the Bank; (ii) those exclusively attributable to the borrower (or other external factors); and (iii) those that are attributable to both the Bank and the borrowers (or other external factors). The earlier absence of a distinction between the different authors of failures that contributed to harm

suffered by requesters had created the impression that the Panel would, in addition to Bank failures, be investigating borrower failures. That wrong impression should no longer be possible with the new requirement to distinguish between different categories of failures as well as to design action plans including proposals for corrective measures corresponding to the different categories of failures.

The most prominent comments by civil society included the following arguments/requests. Instead of the Board Working Group's original suggestion on that the Board "will authorize an investigation without making a judgment on the merits of the claimant's request and without discussion, except with respect to the technical eligibility criteria," civil society representatives requested that the preliminary review process requiring Board authorization of investigations be dropped altogether, or Board approach of investigations be deemed to be given upon submission of the Panel's recommendation unless otherwise decided by a two-thirds vote of the Board. While the latter suggestions were ultimately not adopted, the technical eligibility criteria were, however, clearly enumerated in a inserted by the Working Group in its proposal after meeting with NGOs and accepted by the Board in the final discussion on the set of objective factors, with the expectation that, as a result of the criteria being spelled out, the Board would indeed trust the Panel's recommendation and allow it to go forward with an investigation without prior discussion on the latter's justification in the Board.

Civil Society further requested that any remedial action plans (those agreed upon with the borrower and those concerning Bank action only) would only be adopted after the Panel process would have been completed, i.e., the Panel would have submitted the findings of its investigation. Neither the Working Group after meeting with NGOs nor the Board in its final discussion did follow this request, but it was emphasized that what seemed to have pre-empted the Panel by previous practice from going forward with investigation had been taken care of in the Working Group report. Management, while free to adopt a plan including corrective measures concerning Bank failures before the Panel would investigate, would at the first stage of the Panel process only communicate such plans on corrective measures to the Panel, together with its response to the request, not to the Board, so that the panel would be given an opportunity to judge the appropriateness of the proposed Management action to address Bank failures. (Of course, Management would be in a position to take corrective measures after the Panel would have investigated and then the measures would be reported to both the Panel and the Board as the Panel's investigation would no longer be impeded by Management action.) Management would also be free to agree on remedial action plans with the borrower. These plans could address borrower's failures; they would fall outside the Panel's jurisdiction (which deals with Bank, not borrower failures).
In order, however, not to subvert the Panel process through the negotiation of such plans either, these plans would also be communicated to the Panel which would have the opportunity to comment on the part on consultation with affected people and local NGOs in the plan. And would normally be considered by the Board only after the Panel would have undertaken its investigation. The Board's final decision on this issue achieved two purposes: (i) the Panel's original jurisdiction was confirmed, i.e., its focus on Bank failures; and (ii) the Panel's function was nevertheless not diminished as it would be the Panel in the first place to be informed of any remedial plan with the Board normally becoming involved in Management corrective plans and borrower agreed upon plans only after the Panel had the opportunity to comment on the measures (albeit in a limited way only for borrower agreed upon plans).

Another proposal by civil society concerned the standard to measure material harm suffered by people as a result of the Bank's non-compliance with its policies and procedures. Outsiders criticized the Working Group's standard to measure such harm on the basis of the without-project situation since the latter would only reflect a "do-no-harm" approach while not pursuing a higher standard of importing living conditions, a standard that should be more in line with the Bank's genuine mission of poverty reduction. This suggestion was not accepted either by the Washington Group or by the Board in its final decision on the Working Group report. The standard of the without-project situation was kept because it allowed for a more objective assessment of harm and avoided evaluations in the abstract, effectively excluding unfulfilled and difficult to measure expectations from the assessment. It was, however, added that it was important to gather whatever baseline information might be available.

Another suggestion by civil society related to an unimpeded Panel access to project sites on the basis of Bank loan agreements. Again, this suggestion was not accepted but the final Board agreed upon text of the conclusions of the second review of the Inspection Panel equally relies on a presumption of unimpeded Panel access to the project site. This text leaves it up to the Panel to decide whether it would need to visit the country in order to establish the eligibility of the request. Furthermore, the final text of the conclusion states explicitly that the borrower's consent for field visits envisaged under the Resolution establishing the Panel is assumed.

Upon criticism from civil society as to the recommendation that the Panel maintain a low profile during the investigation in keeping with its role as fact-finding body and, so as to not create the impression that it might be investigating borrower's failures, it should decline media contacts during the investigation, the language on the Panel's conduct was changed. The report as newly formulated by the Working Group after the meeting with NGOs and as ultimately adopted by the Board emphasized the need to conduct the investigation in an independent and low-profile manner. It further called on
both Management and the Panel to limit their comments to the media to the
process, not the substance, of the inspection. Such comments would only be
made under those circumstances in which, in the judgment of the Panel or
Management, it is necessary to respond to the media (the final Board adopted
a version which slightly deviated from the Working Group version).

As a result of the meeting with NGOs, the revised Working Group report
added a new paragraph on “outreach,” calling on Management to make
significant efforts to make the Panel better known in developing countries.
Similarly, as a result of the discussion with NGOs, the revised report stressed
the importance of prompt disclosure of information to claimants and the public
and, for the first time, recommended that information provided to claimants
should be translated into their own language, to the extent possible (final Board
approved version).

B. The Bank’s Anti-Corruption Strategy

The Bank’s explicit concern with corruption as a general development
issue developed from both internal efforts and pushes from civil society outside.
The Banks had long been concerned with governance issues but corruption,
which may be identified as part and parcel of governance, in the Bank primarily
defined as a country’s efficient and orderly management of its economic and
social resources, had been a taboo.

When James D. Wolfensohn assumed the Bank’s Presidency in mid-1995,
he soon asked the Bank’s General Counsel to review all proposals and consider
initiatives for possible actions by the Banks to address the issue of corruption.
Detailed discussion of such proposals and initiatives at the senior management
level led to specific actions that were then approved by the President, and, as
needed, by the Board of Executive Directors. In particular, a comprehensive
strategy to address corruption, both as an issue of the Bank’s own effectiveness
and more generally as a development policy issue, was approved by the Bank’s
Board on September 2, 1997. At all stages of the various steps the Bank
undertook to address corruption more explicitly, its internal discussion was
accompanied by receipt of comments and suggestions for a Bank strategy from
many NGOs (including Transparency International) and other parts of civil
society. A dialogue with the latter took place in particular along the work of the

Even before October 1, 1996, the Bank’s President, James D. Wolfensohn,
had referred to corruption as the “cancer” of development in his speech before
the Annual Meetings of the Board of Governors, in the summer of 1996, an

79. For a detailed chronology and on a listing of the Bank’s approach to corruption, see id. at 18.
internal Bank Group task force, the CAPWG, was set up. It was charged with working out a systematic framework for addressing corruption as a development issue in the assistance the Bank provides to countries and in the Bank’s operational work more generally. The report came out in June 1997 after lengthy discussions in the Bank’s Policy Committee and was discussed in a Board seminar in July 1997, then approved (as revised) by the Board in September 1997. It provided a framework for addressing the issue by pulling together existing bank approaches, suggesting new ones, and outlining a plan for action. The framework was meant to guide the Bank in addressing the issue of corruption at four levels:

1) Protecting Bank-financed projects from fraud and corruption;
2) Helping borrowing countries address corruption by responding to specific country request for assistance in areas of Bank expertise (including policy reform and institutional strengthening);
3) Considering corruption more explicitly in the policy dialogue with borrowing countries, country assistance strategies, the allocation of the lending program, the design of projects, economic and sector work, and research; and
4) Lending the Bank’s voice, knowledge and full support to international efforts against corruption.

At the first level, the Bank had revised its Procurement Guidelines in July 1996 even before the report was written. Further changes were made around the same time at which the CAPWG report came out.

At the second and third levels, the Bank has helped and keeps helping countries reform economic policies and strengthen public institutions. It is now also involved in explicit anti-corruption strategies, and raising the issue of corruption explicitly in the dialogue with its borrowing members.

Advice on economic policy reform is the main pillar of the Bank’s anti-corruption work with borrowers. Enlarging the scope and improving the functioning of markets strengthens competitive forces in the economy and curtails opportunities for monopoly profits, thereby eliminating the bribes public-officials may be offered or may extort to secure them. Markets, in view of the report of the CAPWG, discipline participants more effectively than public sector accountability mechanisms generally can.

Further Bank advice considers institutional capacity building. Without sufficient institutional capacity, well-intended policies can result in poor outcomes and even more corruption. Infrastructure privatization, environmental regulation, decentralization of government activity, tax reform, and public expenditure reduction are examples of policy areas where institutional capacity must be carefully factored into policy design. Building strong institutions is not only a key to good governance and therefore to development, but also to the control of corruption.

At the fourth level, the Bank strongly supports international efforts including the OAS, the OECD, the European Union and the Council of Europe. These efforts are an important complement to its country-based work, and should become increasingly active as an observer, advisor, and/or participant.

C. The Bank's Child Labor Reduction Strategy

Until the mid-1990s, the Bank had not addressed the issue of child labor as either a very prominent or a free-standing concern in its operations.\textsuperscript{81} With the international community's growing awareness of the issue and recognition of it as much pressing, the Bank's attitude changed. The latter change can be traced back to not exclusively but especially several NGOs writing to the Bank's President.

Before this NGO pressure, the Bank had addressed the issue of child labor under some other titles, e.g., in the policy papers on women in development and labor migration. The 1995 World Development Report (WDR), a major World Bank research and vision publication, was also devoted to labor issues. One of the WDRS findings concerned child labor and stated:

National legislation and international conventions banning child labor have symbolic value as an expression of society's desire to eradicate this practice. But they cannot deliver results unless accompanied by measures to shift the balance of incentives away from child labor and toward education. The most important ways in which governments can shift this balance are by providing a safety net to protect the poor, expanding opportunities for quality education, and gradually increasing institutional capacity to enforce legislated bans.

\textsuperscript{81} For a comprehensive chronology and analysis of the Bank's approach to child labor, see Sabine Schlemmer-Schulte, The World Bank's Role in Fighting Child Labor, in UNDERSTANDING CHILDREN'S RIGHTS PROCEEDINGS OF THE FOURTH INTERNATIONAL INTERDISCIPLINARY COURSE ON CHILDREN'S RIGHTS 327-342 (Eugen Verhellen ed., 1999).
The Bank had further studied the question of child labor.\textsuperscript{82} Despite of the absence of an operational policy on child labor, the Bank contributed to child labor reduction through its financing of projects for education, health, nutrition, population and social safety nets. The Bank had also long recognized its linkage to poverty and to the poor quality or availability of education.

In the mid-1990s, when child labor moved further to the center of the international debate on the positive and negative effects of globalization and several NGOs skillfully made the case to address child labor issues in a more focused way in letters to the Bank’s President, Bank Management, in the first place the Bank’s General Counsel, felt that the time was ripe for the Bank to develop a more explicit position on the issue of child labor.

As a result of a growing awareness of the issue of child labor in the mid-1990s and based on the conviction that exploitative child labor has a negative impact on the economic and social development of countries, the Bank’s Management prepared in 1996/1997 a position paper on child labor (the World Bank’s Child Labor Paper). This paper was submitted to the Bank’s Board of Executive Directors for their consideration in May 1997. In their discussion of this paper in July 1997, the Executive Directors agreed with the new approach by the Bank to child labor issues, as proposed by Management. They also agreed to the publication of the position paper with some revisions.\textsuperscript{83} According to the position paper, the Bank’s new approach to child labor issues includes: (a) giving more focus to child labor issues in the policy dialogue with borrowing countries; (b) improving partnership on these issues with other relevant international organizations and NGOs; (c) raising the awareness and sensitivity of Bank staff regarding the issues involved; (d) giving more emphasis to child labor issues in existing lending activities; (e) requiring compliance with applicable child labor laws and regulations in specific projects where exploitative child labor is otherwise likely to occur; and (f) designing specific projects or components of projects to target the most harmful forms of child labor, possibly starting with pilot projects in countries where child labor is seen as a serious problem.

Following the Board of Executive Directors’ approval of the Child Labor Paper, Bank Management immediately began to engage in the above mentioned efforts and has, since then concentrated on mainstreaming child labor into its work. For example, the Bank’s credit agreement for the Silk Development Project in Bangladesh, which was approved in late 1977, comprises covenants


requiring Bangladesh to make sure that contractors, hired by the Silk Foundation (the agency responsible for the implementation of the project in Bangladesh) undertake to abide by the applicable laws of Bangladesh, including child labor laws, in their carrying out of the project. Similar provisions are considered in other projects. An increasing number of further child labor related projects are currently being undertaken by the World Bank.

Reducing child labor is a difficult task, involving a broad range of general and more specific measures, from poverty alleviation to programs which encourage greater school attendance. In order to incorporate the concern to address child labor into the Bank’s work, the Bank established a Child Labor Program in May 1998. The Child Labor Program promotes a range of practical initiatives to combat child labor and builds up knowledge on the topic. The Program is housed in the Human Development Network and is the focal point for Bank-wide child labor activities, projects and policy. The Program supports various child labor and child labor related projects, including research, and analyses, pilot studies, child labor reduction evaluations, and internal and external dissemination through training, seminars and via the child labor website. Policy implications derived from these projects feed into Bank dialogue with clients and donors, Bank country assistance strategies and lending activities.

Among major international organizations, the Bank was the first to focus specifically on harmful or exploitative child labor when it began to discuss child labor as a policy issue at the Senior Management level in Summer 1996, a debate that resulted in new directions agreed upon with the Board of Executive Directors in July 1997. With its focus on harmful child labor, the Bank provided an impetus to further efforts by others with whom the Bank has by now developed an extensive cooperation on the issue.

The World Bank’s pragmatic focus on harmful or exploitative child labor inspired and reinforced the debate in International Labor Organization (ILO) on the adoption of a new convention similarly focusing on the worst forms of child labor. Cross-fertilization between the Bank and ILO in the approach to child labor continues beyond the adoption by ILO of the new Convention on worst forms of child labor in June 1999. The Bank welcomes the new ILO Convention’s more substantive approach (versus its earlier, primarily formal definitional approach to child labor based on strict age standards in the Minimum Age Convention). The new ILO view on child labor corresponds its own, from a general perspective, and is susceptible, in the more comprehensive details of defining the worst forms of child labor, to even guide Bank actions to combat child labor where the Bank’s own position paper fails to give guidance.

The greater parallels in ILO's and the Bank's approach from a general policy perspective have increased the opportunities for both institutions to work closer together as partners on the ground. As a result, ILO with its IPEC program and the Bank are working together towards a gradual elimination of child labor by strengthening the capability of countries to deal with the problem.

Further partners of the Bank include UNICEF, the International Organization of Employers (IOE), and the International Confederation of Free Trade Unions (ICFTU).

V. CONCLUDING REMARKS

The scope of impact which civil society has on the Bank in legal terms is reflected in the concrete meaning the Bank has given to two concepts: participation and accountability. The later translate into "meaningful consultation" with project beneficiaries and "accountability of Bank Management to the Board triggered by affected people's standing before the Panel" rather than "participation in the Bank's decision-making process" and "legal remedies against Bank financing of projects." This does not mean that the Bank has once and for all rejected broader concepts as those brought forward by development scholars. It means that the Bank has been the first international finance and development institution to courageously introduce new processes and mechanisms while ensuring a legally sound basis for them as well as keeping an eye on the practical feasibility of dramatic changes. The bank remains open to further develop these new processes and mechanisms and thereby contribute to the shaping of the features of emerging concepts of international development law.

There are a number of things that have to be kept in mind for the continued use of already existing participation and accountability structures as well as in the further evolution of these structures in the future.

Involvement of civil society in the Bank's activities has in terms of participation and in accountability terms always taken place on a legally sound basis. It developed from ad hoc incidents to more institutionalized ways (either in the format of established and repeated practices or by incorporation in written procedures).

From a geographical point of view, the focus by the Bank was initially on local civil society reflecting the traditional project-lending mode of the Bank. By now, it has broadened to international civil society, especially in adjustment strategy, and in policy matters.

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85. With its International Programme on the Elimination of Child Labor (IPEC), ILO is assisting countries in elaborating and implementing comprehensive policies and targeted programs and projects starting in 1992, with financial support from several governments.
In substance, involvement took the form of consultation or assistance in oversight through alerting the Bank where its projects were badly managed. It never meant attribution of powers in the decision-making, as such an attribution would have been inconsistent with the Bank's Articles of Agreement and the allocation of powers to Management and the Board of Executive Directors under the Articles. Any future developments should keep this limitation in mind.

From a practical point of view, involvement of civil society in the way it has so far been structured has not led to disruptions in the functioning of the Bank and in doing its business. Inappropriate manipulations only occurred when civil society made itself heard outside the established ad hoc and/or institutionalized frameworks, i.e., contrary to the existing established rules of the game or ad hoc agreed-upon new practices by those vested with the powers to set the rules of the game. For example, undue influences were exerted on the Bank when, contrary to the Bank's rules of the game, demonstrations in front of the Bank took place and comments originating with civil society were published in the media at the time the Bank's Board of Executive Directors were deliberating and discussing the investigation report of the Inspection Panel in the Western China Poverty Reduction/Tibet case before the Board had taken a decision because the reports by both Management and the Inspection Panel had been leaked to the outside.86 In the latter incident, the Board followed the traditional model of decision-making process in the Bank and, unlike in the case of the second review of the Inspection Panel where it had itself organized a meeting with NGOs before making a final decision, did not want to officially hear outsiders' views before taking a decision. For an orderly development of consulting with outsiders, agreed upon procedures, i.e., the "rule of law," should be followed. Furthermore, respect must be paid to limitations that cannot be overcome by agreed upon procedures but would require a change in the big framework through an amendment of the Bank's Articles of Agreement.

Beyond the rules of the game under the Bank's current framework, i.e., in terms of future developments, or from a policy perspective, two issues are most important. First, if one would like to accord civil society a greater role in the development activities of the Bank and other development agencies, in particular accord to them some decision-making powers, the legitimacy of such a move must be scrutinized. Are international NGOs, for example, really the representative of local population in a developing country, i.e., the ultimate beneficiaries of development assistance? Or are they not merely self-appointed spokesmen, frequently without elaborate internal governance structures and without their heads being internally "democratically" elected, with the

exceptions of labor unions? As Paul C. Szasz, a fellow member of the ILA Committee on Accountability of International Organizations has written, "[a]ny discussion of the role of NGOs in relation to [international organizations] must start from an understanding of what those organizations are " i.e., inter alia, who their members and representatives are and who supports them, before giving them roles in the working of international organizations. The Bank has started, in addition to involving NGOs, to analyze them but much more analysis would be needed to be informed for further increasing NGOs’ roles in Bank activities. It is understandable that Executive Directors from democratic member countries express great frustration over NGOs’ participating in the demonstration on the occasion of the joint Bank/Fund Board of Governors’ meetings as NGOs deserve less attention than Executive Directors or Governors who, when coming from democratic countries, bring much more legitimacy with them.

The second issue is of conceptual nature. Frequently, outsiders have called for greater "democratization" of international organizations generally, and international financial organizations in particular. Democratization, however, is not only the wrong term but should never conceptually be asked for because, unlike states, international organizations are not organisms that could within themselves establish a self-standing democratic structure. They do neither possess a territory nor a population to be looked after fairly, but have a much narrower purpose to fulfill. The only exception here would potentially be the European Union. Thus, any call for direct involvement of the people in the political decision-making process or their representation for that process as well as separation of powers, e.g., direct participation by people in Bank decisions or representation by them in the Board as well as establishment of an independent court judging in cases between Bank Management and affected people, or participation of NGOs in decision-making by the Bank’s Board as

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88. See the work on putting together a Handbook on Good Practices for Laws relating to NGOs, analytical work which was sponsored and begun by the World Bank in the mid-1990s but has been abandoned in the meantime. A definition of NGOs for bank purposes, however, has been formulated. See Good Practice (GP) 14.70 Involving NGOs in Bank-supported Activities (1998) (noting that, in general, the interest of the Bank is restricted to those NGOs that work in the field of economic and social development, emergency relief, and environmental protection or that comprise or represent poor or vulnerable people). For further analytical work and classification of NGOs as relevant for the Bank’s operational work, see Carmen Malena, Working with NGOs A Practical Guide to Operational Collaboration between the World Bank and NGOs (World Bank Publication, Operational Policy Department March 1995).

89. Even in the case of the European Union (EU), great care in the use of the term “democracy” and application of that term to the EU has to be exercised. For a discussion of the issue of democracy and the EU, see Sabine Schlemmer-Schulte, The "Democratic Deficit" in the European Union Revisited, EUROPEAN REVIEW OF PUBLIC LAW (2000) (forthcoming).
part of involvement of people in the legislating process of the Bank have their conceptual shortcomings. These shortcomings should be kept in mind while, of course, smaller goals for change to enhance the organizations’ efficiency such as further transparency and additional checks and balances can and should certainly be pursued.

The modern history—the tragic history—of the people of East Timor can be said to have begun in 1493. In that year the Borgia Pope, Alexander VI, was asked to rule on a conflict of jurisdiction that had arisen between the religious orders governed from Spain and Portugal over newly found mission territories in South America. The Pope drew a vertical north-south line on a map: to the east of that line the Portuguese orders would have exclusive jurisdiction; to the west, the Spanish orders.

In the following year, Spain and Portugal revised this line, without the help of the Pope, in the Treaty of Tordesillas, moving it further westward, to a point where it began to approximate the present day border between Brazil and Spanish-speaking America. It seemed to have been forgotten that the division began as one of ecclesiastical jurisdiction only. The Portuguese interpreted the Treaty (and the inferred Papal authority) as extending their general sovereign rights to the whole southern hemisphere east of the line.

So it was that in their exploration of the so-called East Indies (the present day South East Asia) the Portuguese claimed sovereignty not only over their settlements on land, but on the sea areas surrounding those settlements and as a consequence, the right to exclude other European nations from navigation and trade in the area. This brought them into conflict with the Dutch, and later the British, who were keen to participate in the lucrative trade in spices and timber.

This is not the place to recount the story—in any case well known—of how the Netherlands East Indies Company, which confronted the Portuguese in the so-called Spice Islands and surrounding seas, commissioned a brilliant young Dutch lawyer, named Hugo de Groot, to write an opinion for the company refuting the claims of the Portuguese, and supporting the legal and moral right of the company to trade in the East. The motivation of this brief was two-fold: to assuage the consciences of the shareholders that they did indeed have rights, that these were being unjustly denied, and that force might be used to vindicate them; and to engage, if possible, the interest of the Netherlands government in protecting the company. As everyone knows, the young Grotius published to the world what was originally a confidential opinion, to the embarrassment of

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the Netherlands government, which had in the meanwhile adopted different policies, under the title De Mare Liberum: “Of the Freedom of the Seas.”

No doubt the people of East Timor, in the late 16th century when the Portuguese and the Dutch arrived, would have been bemused by these theological and legal debates. All they knew was that these Europeans were fighting for control of the land territory of the island of Timor, among many other islands. Both were invaders. Both were equally unwelcome.

We travel forward now to the late 19th century. The Portuguese had been largely repelled in Asia by the Dutch, the British, and the Spaniards, but retained small territories as trading posts in India (Goa), China (Macau), and—fatefully—East Timor. The Dutch occupied the western half of the island of Timor, which, together with the remainder of the Indonesian archipelago, constituted the Netherlands East Indies. This situation, which had existed since the late 16th century, continued with minor adjustments or rectifications of the border until 1949. A geographical anomaly was the Portuguese enclave of Oecussi on the northern coast of West Timor, but administered as part of East Timor from the capital of the colony, Dili.

In 1945, in the dying days of the Japanese occupation, an Indonesian Republic was proclaimed by Hatta and Soekarno. The Dutch, however, returned to their possessions and a bloody civil war ensued. This came to an end in December 1949, with the signing of the Roundtable Agreements between the Netherlands and Indonesia for independence. All parts of the former Netherlands East Indies were transferred to the sovereignty of the Republic of Indonesia, with the exception of West New Guinea. East Timor, in the meantime, had been ravaged under a Japanese occupation that took place notwithstanding the neutrality of Portugal during the Second World War. There was no move in 1949 to incorporate East Timor as part of Indonesia. Indonesia was content to leave Portugal in possession of this sleepy backwater of European empire.

It is of more than passing interest to compare, at this point, the status of East Timor with that of West New Guinea (now the Indonesian Province of Irian Jaya). East Timor was never part of the Netherlands East Indies, but its people were geographically, ethnically, and culturally (the last, at least, until the 20th century) part of the Indonesian archipelago. West New Guinea, by contrast, was not related geographically, ethnically, or culturally with Indonesia. Its administration as part of the Netherlands East Indies was purely a matter of convenience to the distant sovereign power. Nevertheless, Indonesia was determined to claim it, and a campaign against the Netherlands continued until 1962 when, after a temporary administration by the United Nations and the holding of a consultation with representatives of the people (the validity of which has been much debated), the territory was transferred to Indonesia.
It can now be understood why Indonesia did not campaign after 1949 for the incorporation of East Timor. West New Guinea was a far richer prize. The arguments for its incorporation stood or fell by the claim to succession to the entire territory of the Netherlands East Indies, of which East Timor had never been part. To have claimed East Timor then on the grounds of propinquity and ethnic affinity would have undercut the arguments for incorporation of West New Guinea.

Nevertheless, East Timor remained a geographical and historical anomaly. It was, moreover, ruled by a distant European power of rather feeble pretensions in Asia; Portugal's overseas interests were focused on its rich territories in Africa, especially Angola and Mozambique. In Indonesian eyes, this neglected and unimportant territory could be allowed to slumber on: one day it would just drop into Indonesia's lap when the colonial power decided to leave.

Unexpected events suddenly took place in 1974. In that year, the Salazar dictatorship in metropolitan Portugal was overthrown in a military coup led by an idealistic general with experience in Africa. Doors were thrown open for the first time in more than forty years to the prospects of democracy. There was turmoil in Portugal as different political parties, tasting freedom after so many years of repression, vied for the realization of their vision for the future. Portugal's African colonies were offered independence. Government authority in Portugal itself throughout 1974 and 1975 was precariously balanced. The reverberations were felt not only in the African colonies, where ill-prepared leaders accepted an independence that soon turned into economic and political disaster, but also in East Timor.

In East Timor the main political parties emerging from the heady liberation of political thought and process of 1974 were: a) Fretilin, a Marxist-inspired party which sought immediate independence; b) the UDT, a non-Marxist party which also sought independence but only after a period of transition under continuing Portuguese presence; and c) Apodeti, a party dedicated to bringing about East Timor's incorporation into Indonesia. Portugal tried to bring these parties together at a conference in Macau in March 1975, but without success. In August of that year, Fretilin decided to seize the initiative and to take over the administration. They were opposed principally by the UDT and a bloody civil war erupted.

The Portuguese colonial administration under Governor Pires was only lightly garrisoned, mostly with locally recruited troops whose loyalty soon evaporated. No reinforcements came from Lisbon. Governor Pires made a fateful decision. In September 1975, in view of the impossible security situation, he decided to abandon the administrative capital, Dili, and other settled towns, and to withdraw to the offshore island of Atauro. There the Governor and his officials waited on the outcome of events, not interfering at all. They could be seen through binoculars swimming and playing sports on the
beaches of the island. Meanwhile, on the mainland, Fretilin gained the upper hand over its rivals. For a time they resisted the proclamation of a new state. They left the symbols of Portugal, including the flag, in place. They even left Governor Pires’s official Mercedes parked untouched in its garage. Finally, however, in November, the Fretilin leaders proclaimed “The Democratic Republic of East Timor.”

Most in this room are old enough to remember that countries inserting the word “Democratic” into their names were anything but that. They were Marxist dictatorships. It may be true that Fretilin held to a mild version of Marxist theory and practice. Nevertheless, (and remember, it is 1975 and Vietnam and Cambodia have just fallen to the Communists) the name sent a distinctly unwelcome message to the anti-Communist world outside. The alarm bells rang in Washington, Canberra, and Tokyo. They rang loudest of all in Jakarta.

Let us pause here to consider the options, as of November 1975. Fretilin appeared willing, until then, to allow the Portuguese back in order to perform the last rites of colonialism, and to hand authority over to the new state. Perhaps they knew that a disorderly Portuguese withdrawal would play into the hands of Indonesia. Indonesia, meanwhile, was readying itself in West Timor to intervene. But the question was, if and how it should do so. Members of the UDT and Apodeti parties in East Timor had fled to sanctuary in Indonesian West Timor and were urging intervention by Indonesia in order to overthrow Fretilin. But would this be merely a law and order exercise, or the prelude to incorporation? There is evidence of Indonesian military incursions into East Timor as early as October. In one of these actions a group of western journalists was murdered.

In October 1975, President Suharto paid a visit to Australia. He had a meeting with Australian Prime Minister, Whitlam. Their discussions included the issue of the future of East Timor. The records of this meeting have recently been released. They show clearly that Prime Minister Whitlam, while expressing the view that the best long-term solution for East Timor was to be integrated with Indonesia, stated that the people of East Timor must be consulted and agree. The procedures laid down by the Decolonization Committee of the United Nations (the Committee of twenty-four) must be followed, and the result of the consultation with the people must be approved by that Committee. President Suharto agreed.

What caused President Suharto to change his mind was the declaration of independence by Fretilin under the name “The Democratic Republic of East Timor” on November 22, 1975. He had visions of a Marxist enclave, exporting revolution to the rest of the Indonesian archipelago. Under those circumstances it was highly unlikely that a popular vote would be free or would produce a result amenable to Indonesia.
On December 7, 1975, Indonesian paratroopers landed in Dili. The city and the surrounding countryside were quickly overrun. Resistance was brutally suppressed. Fretilin forces fled to the mountains, where they remained for the next twenty-four years. On December 8, 1975, the very next day, the Portuguese administration under Governor Pires was seen leaving Atauro by ship for the Australian port of Darwin. No effort was made by the Portuguese to intervene or resist the Indonesian invasion. If this were a home invasion it would be as though the owners had left the doors of their house wide open, camped at a nearby beach and run away at the first sight of the invaders.

The reaction of the international community to these events was not swift. The invasion took place on December 7, 1975. The Security Council passed no resolution on the matter until December 22, 1975. In the meantime, the General Assembly, on December 12, 1975, passed a resolution condemning the Indonesian action and calling upon it to withdraw by seventy-two votes to ten, with forty-three members abstaining. The large number of abstention votes causes us to pause again for thought: more than one third of the roll-call of the United Nations were either actively opposed to the condemnation of Indonesia or were undecided about it.

The Security Council met to consider East Timor on December 22, 1975. It passed a resolution calling upon Indonesia “to withdraw without delay all its forces from the Territory.” This rather mild resolution, using the phrase “calls upon” rather than “demands,” was further weakened by the paragraph requesting the United Nations Secretary-General to send a special representative to East Timor for the purpose of making an on-the-spot assessment of the situation. This implied that, at least in the minds of some members, the situation was not entirely clear-cut. While “deploring” intervention by Indonesia, the resolution also “regretted” the failure of Portugal to discharge its responsibilities as administering Power of the Territory under Chapter XI of the United Nations Charter. The resolution was adopted unanimously.

Indonesia did not withdraw. The Secretary-General’s representative made his visit and reported back to New York, in March 1976. In April, Indonesia called together a meeting of district chiefs to consider the future of the Territory. The meeting unanimously called for integration with Indonesia. On April 22, 1976, the Security Council passed a second resolution, repeating its call for Indonesia to withdraw its forces from the Territory without further delay. By reaffirming also the “inalienable right of the people of East Timor to self-determination and independence in accordance with the principles of the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples,” the Council impliedly rejected the validity of the “act of self-determination” carried out by Indonesia earlier that month. That act, in which the general population did not participate, but only a small number of selected community representatives, was similar to the one carried out in
West New Guinea in 1962. An invitation to the President of the Security Council from Indonesia to visit East Timor on June 24th to witness or validate the act of self-determination was rejected by a letter sent by the President of the Security Council on June 21st. That letter reaffirmed the Council’s resolutions.

It is important to note that the second resolution of the Security Council (and the last on the question of East Timor by the Security Council) was not passed unanimously. Twelve members voted in favor of calling upon Indonesia to withdraw. Japan and the United States abstained. One member (Benin) did not participate in the vote. The significance of the abstentions of Japan and the United States can hardly be overstated. They sent a message to the rest of the world, from the world’s two largest economies, that the situation would soon be under control and that, although the manner of Indonesian intervention was regrettable, in the longer run East Timor would be better off as part of Indonesia.

It is therefore not surprising that Indonesia failed to heed the Council’s resolution. In July 1976, after the visit of an Indonesian Parliamentary delegation charged to investigate whether the people of East Timor truly wished to become part of Indonesia, the territory of East Timor was formally incorporated by an Act of the Indonesian Parliament as a Province of Indonesia.

In the meantime, in Portugal a new Constitution had been adopted in April 1976. The definition of the territories over which Portugal claimed sovereignty omitted East Timor. A special article of the Constitution, however, charged the President of the Republic with the responsibility of continuing to work for the self-determination of the people of East Timor. Thus Portugal was no longer, in law, the sovereign of East Timor; only the dispossessed “administering Power” under the terms of United Nations resolutions and in the eyes of the Decolonization Committee of the United Nations. In formal terms, Indonesia could be argued to have temporarily occupied East Timor during the period December 1975 to July 1976 in order to restore security in a Territory effectively abandoned by Portugal. By July 1976, Portugal no longer claimed sovereignty, so that the act of incorporation of East Timor in that month was not an act of aggression by Indonesia against Portugal. The house owners had not only left the house unguarded and run away but had now thrown away the title deeds.

From this point onwards, the international community gradually lost interest in the plight of the people of East Timor. The issue of East Timor returned next to the Agenda of the United Nations in December 1976 as a regular item from the Fourth Committee. Each December thereafter, until 1982, the General Assembly passed a resolution reaffirming the right of the people of East Timor to self-determination. But each year the language became less peremptory and support for it weaker. Even in its watered-down form, the resolution of November 23, 1982, introduced by Portugal, was passed by the
very narrow majority of fifty in favor, forty-six against, and fifty abstentions. Putting these figures another way, it could be said that nearly two-thirds of the roll-call of the United Nations membership either supported Indonesia’s incorporation of East Timor or was indifferent to it. No resolution on East Timor was introduced into the General Assembly after 1982. Portugal and the East Timorese leaders in exile feared that, on these voting trends, the resolution would be defeated if introduced again and that the question of East Timor would disappear forever from the agenda of the United Nations.

Instead, the East Timor issue was kept alive through representations directly to governments by pro-East Timor lobby groups, motions in various forums, including the European Parliament, and by the concerns of human rights groups. Most of all, Indonesia itself managed to keep the issue alive through its brutal and corrupt administration of its new province. A number of outrages occurred, most notably the Santa Cruz cemetery massacre of November 1991. There was in consequence relentless international media attention. Indonesia’s Foreign Minister, Ali Alatas, ruefully described East Timor as “the pebble in Indonesia’s shoe.”

What was the status of East Timor in international law from 1976 to 1999? The simple answer is that it was a territory entitled to self-determination and independence under the law of the United Nations Charter, in particular the Declaration on the Granting of Independence to Colonial Countries and Peoples, Res. 1514 (XV) of December 14, 1960, which had not yet exercised that right. By the use of force, the territory had been occupied by Indonesia, and subsequently annexed by it without the approval of the United Nations. According to the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Res. 2625 (XXV) of October 24, 1970, “the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”

Neither the administering Power (Portugal) nor any other State was willing, however, after 1982 to propose resolutions to the General Assembly demanding the exercise by the people of East Timor of the right of self-determination, still less to request the Security Council to take action to force the withdrawal from the Territory of the occupier (Indonesia). What were other States with economic and security interests in the area to protect to do?

The country most closely affected was Australia. It has already been recounted that Australia and Indonesia had agreed in October 1975 that the people of East Timor must be granted the right to self-determination in accordance with United Nations resolutions and procedures. Australia voted to condemn Indonesia’s actions in the United Nations General Assembly vote in December 1975. In December 1976, however, and again in December 1977, it
abstained in the vote on the resolutions. (In 1977 the vote to condemn Indonesia was passed with sixty-seven votes in favor, twenty-six against, and forty-seven abstaining). In 1978, Australia began to vote against the resolution, and maintained that position until the votes ceased after 1982.

Australia had to consider its position carefully. In the first place, Australia and Indonesia are close neighbors. Australia has a population of less than twenty million. Indonesia has a population some nine times greater. For its own security, Australia has always tried to foster good political and economic relations with Indonesia. It would not wish to offend it without a reason that outweighed these considerations. In the second place, there appeared to be no willingness in the United Nations to take any action to force Indonesia to accede to the demand for a proper process of self-determination for East Timor under United Nations procedures. States were largely indifferent, and significant numbers of them appeared by their negative votes to have already acquiesced in the annexation. Thirdly, the seabed between the island of Timor and the northwest coast of Australia was known to contain hydrocarbon deposits and prospects of significant sources of oil and gas. That seabed constitutes an uninterrupted continental shelf (uninterrupted, that is, apart from the Timor Trough—discussed later) and thus required delimitation and apportionment. Considered as part of the exclusive economic zones of these opposite territories, the distance between the coasts was less than four hundred nautical miles, and, thus would equally require delimitation and apportionment.

Australia had already concluded a treaty (1971-72), with Indonesia delimiting the seabed between Australia and West Timor and Australia and the easternmost parts of the archipelago. This left a gap in the line adjacent to the then Portuguese colony of East Timor (the so-called “Timor Gap”). Portugal was invited by Australia in 1974 to negotiate a delimitation line that would have closed the gap, but it declined. The reason appeared to be the relevance of the Timor Trough. Not to be confused with the Gap, the Trough is a geographical feature running along the entire length of the island of Timor, both West and East. It is a deep depression, a trench, in the seabed, lying close to the coast of Timor. Relying on what the International Court of Justice had declared (North Sea Continental Shelf cases, 1969), that the basis of a coastal state’s right to its continental shelf lay in the natural prolongation of its land territory beneath the sea it was argued by Australias that the Trough marked the outer edge of the natural prolongation of the land territory of Timor, and that this was the natural delimitation line in the otherwise uninterrupted continental shelf between the two countries. If accepted, this argument would have given the lion’s share of the shelf to Australia, since the distance of the Trough from the coast of Timor is only between thirty and sixty miles. Indonesia did not accept it, but in deference to the equities that might be said to flow from such a significant geographical feature agreed on a compromise line roughly halfway between a
median line and the Timor Trough. Portugal perhaps divined that UNCLOS III, then in progress, or the International Court of Justice, might move away from the natural prolongation theory, thus discounting the relevance of the Trough. Or perhaps events in metropolitan Portugal in 1974-75 made it impossible to give the subject the necessary attention.

After Indonesia's incorporation of East Timor in 1976, there was urgency in the need to fill the Gap. Prospectors had been active for some time, and Portugal had already granted some licenses in the area. To whom were the prospectors to turn for security of title? Australia, seeing that Indonesia was firmly in possession of East Timor and that no effective action by the United Nations was forthcoming, decided in December 1978, to propose negotiations to Indonesia, the de facto sovereign power, for the filling of the Gap. The opening of these negotiations in February 1979 marked the transition by Australia from recognition de facto of Indonesia's authority in East Timor to recognition de jure of the incorporation of East Timor. Several weeks later Portugal sent a Note to Australia expressing "surprise" at this action. In the language of diplomacy this must be the faintest form of protest.

Australia opened the negotiations with Indonesia with a proposal that the Gap be closed simply by extending the existing lines of delimitation. Indonesia, however, also had the same intuition as Portugal that international law was moving away from the primacy of the natural prolongation theory. Moreover, it was irritated by reports in the Australian press in 1972 that Australia's success in negotiating a line in 1972 very much in Australia's favor, by reason of the account taken of the Timor Trough, could be described as "taking Indonesia to the cleaners"—an Australian expression meaning "trouncing." It therefore sought a better deal in the area off East Timor.

The negotiations begun in 1979 continued until 1989. This period coincided not only with the negotiation and conclusion of the United Nations Convention on the Law of the Sea, 1982, but also with the hearing of several seabed delimitation cases before the International Court of Justice in which the Court discounted geomorphology and prolongation in favor of broader equitable factors. These factors favored the Indonesian position, but Australia did not resile from its own position. The result was a compromise, not in the form of a line, but in the form of a joint development zone, called the Zone of Cooperation, which boxed in the entire area bounded by the extremes of the Australian and Indonesian claims, but then divided it into three sectors which more realistically represented, respectively, the areas more naturally appertaining to the parties and the central area, the true area in dispute. The treaty was signed by the Australian and Indonesian foreign ministers in an aircraft flying over the zone.

The ratification and entry into force of the treaty in 1991 was the signal that at last galvanized Portugal into action. In its capacity as the administering
Power under still extant, but dormant, United Nations resolutions relating to East Timor it commenced action in the International Court of Justice in February 1991 against Australia for its failure to respect the rights of Portugal as administering Power of East Timor by entering into an agreement relating to the natural resources appurtenant to that Territory with a third party. Indonesia was not named in the application documents. The reason was that both Portugal and Australia had accepted the compulsory jurisdiction of the International Court of Justice under the Optional Clause of the Court’s Statute; Indonesia had not. It could therefore not be made a party to the case without its consent. Moreover, according to the jurisprudence of the Court, a dispute could not be decided in relation to a matter in which a State not party to the case had a substantial interest. The issue before the Court was whether Australia alone was in breach of obligations owed towards Portugal which could be determined in the absence of Indonesia as an affected party. The Court decided that it could not determine the matter in the absence of Indonesia. In rejecting the application on the grounds of its inadmissibility for this reason, the Court nevertheless stated that the people of East Timor had a continuing right to self-determination. By implication, this right could be achieved only through the relevant political organs of the United Nations. Of that, there were still no signs.

This is not the place for an analysis of the Timor Gap Zone of Co-operation Treaty. It is fair to say, however, that it suited the interests of both Australia and Indonesia very well. It was innovative in design and sophisticated in its detailed provisions. As a working model of co-operation it attracted favourable comment even from the Fretilin leaders in exile; their only objection was that they, and not Indonesia, should have been the partner with Australia in the arrangement.

We move forward now to the events in Indonesia of 1999. Following student protest and other unrest, President Suharto stepped down to be replaced by his deputy, Dr Habibie. Unrest spread also to East Timor. The Australian Prime Minister, John Howard, using what he considered to be the influence available to him as the Prime Minister of a country with close and friendly ties to Indonesia, suggested in a letter to President Habibie that the people of East Timor be prepared for a decision on their future. The pebble in the shoe should be removed: it was doing Indonesia much harm. President Habibie’s heart may have been in the right place, but he was impetuous in nature and erratic in action. Whereas Mr. Howard had in mind a series of cautious steps, beginning with increased autonomy for East Timor, a lessening of the military presence there, and an effort to improve the conditions of the people, all paving the way for a plebiscite on independence in a few years time, President Habibie decided to hold a plebiscite in East Timor immediately, for or against independence. The result was, as we know, an overwhelming vote for independence followed
by mayhem and the intervention of the United Nations Force, called INTERFET. Pro-Indonesian militias went on a rampage, destroying seventy percent of all buildings, and driving a quarter of the population out of the country. Many lives were lost, some of them in horrendous ways. The people of East Timor had been made to pay dearly for their lack of gratitude toward Indonesia, which considered that it had done so much for them. Indonesian politicians rounded on Australia as the alleged instigator of the disaster. Unrest has since broken out elsewhere in the Indonesian archipelago, especially Aceh and Ambon. The new President, Abdurahman Wahid, is beset from all sides with political problems. Australian stocks in Jakarta are at their lowest level ever.

The United Nations military operation is now over. There is a transitional United Nations civil administration called UNTAET, which, under the terms of Security Council Resolution 1272 of 1999, is exercising complete authority over East Timor pending the holding of elections to form a government of the newly independent State of East Timor. Indonesia has formally renounced sovereignty over East Timor. The formal date of relinquishment of Indonesian authority and its transfer to UNTAET was October 25, 1999.

What has happened to the Timor Gap Treaty? Australia proposed to UNTAET a formal succession, but that was rejected by UNTAET on the ground that the treaty was void ab initio by reason of the lack of capacity of Indonesia to conclude it. By an exchange of notes between Australia and UNTAET in Dili on February 10, 2000 it was agreed that the terms of the treaty—but not the treaty itself—should remain binding throughout the transitional period, until the date of independence of East Timor. This was stated to be without prejudice to the position of the future government of an independent East Timor with regard to the Treaty. Indonesia recognized the termination of the Timor Gap Treaty, as from October 25, 1999, by an exchange of letters with Australia in Jakarta on May 25, 2000.

Australia will thus have to negotiate with an independent East Timor a replacement for the terminated Timor Gap Treaty. Indeed, negotiations have already commenced, with UNTAET acting on behalf of East Timor, with putative future East Timorese leaders as advisers. Chief negotiator on the East Timor side is a former United States diplomat, Peter Galbraith, now minister for political affairs in UNTAET. He is known to be arguing that the Timor Trough is not in fact a fault line between tectonic plates and that no equities flow from it. He is pressing for adoption of the median line between Australia and East Timor, and thus, impliedly, for the dismantling of the zone of co-operation. The median line as a permanent solution would place the presently most promising oil field, Bayu Undan, which is expected to go into production in four years time, exclusively inside East Timor’s claim. The delimitation of the line of fisheries and other EEZ jurisdictions between Australia and East Timor will also
need to be renegotiated. These are presently included in the Memorandum of Understanding between Australia and Indonesia concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement of 1981, and the Treaty Establishing an Exclusive Economic Zone Boundary of 1997. The latter has not yet entered into force. Both instruments provide for, in effect, a median line between Australia and East Timor. Assuming this to be acceptable to both sides, East Timor would then need to negotiate the lines perpendicular to its coasts to the transverse median line separately with Indonesia.

What can be said to be the lessons learned from all this? There are at least three lessons. First, questions of self-determination are notoriously difficult, and most often intractable where basic facts are disputed. In the case of East Timor, however, the case was clear: East Timor was a territory inscribed on the list of non-self-governing territories maintained by the United Nations Decolonisation Committee. The failure of the United Nations to deal with it promptly and decisively, in December 1975, was disgraceful and led to much unnecessary suffering.

Second, the role of the Security Council, in particular, calls for examination in relation to East Timor. It did not want to act decisively because Indonesia is a large and important country. As has been the case for some time, it is not necessarily the casting of a veto that impedes the Council in its work, but the express or even implied or assumed potential exercise of one that casts a long shadow over proceedings. This has been most recently evident in relation to Kosovo; the taking of action by NATO without Security Council authorization may have been controversial but has occasioned little surprise. Such situations will fuel the movement for reform of the structure of the Security Council.

Last, where the United Nations is unable or unwilling to act, what are particular member states to do, faced with pressing realities? This is the situation which faced Australia after July 1976 when it appeared that Indonesia was firmly in control of East Timor and unlikely to be dislodged. An apparently "dead" claim to self-determination should not be allowed to hang over other nations' heads for twenty-five years or more, only to surface in an unexpected way and to give rise to possible claims based on the illegality of dealing with the power actually in control (nemo dat quod non habet). Effectiveness should be considered in this context, in the interests of stability, fairness, and good legal order.
TEACHING THE LAWS OF WAR: MUCH TOO IMPORTANT TO BE LEFT TO MILITARY ACADEMIES?

Professor Ivan Shearer*

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I. INTRODUCTION

I have an uneasy feeling about the title of this panel. If it implies that there is widespread ignorance in the general community, and in civilian law schools in particular, and that this ignorance ought to be redressed, then my answer is yes. But if it implies—as I think it also does—that somehow the teaching of the laws of war in military academies is inadequate or inappropriately biased, and that those academies cannot be trusted to teach it properly, then my answer would be no.

I speak with some knowledge of both. As well as being a professor of international law, I am also a Captain in the Reserve of the Royal Australian Navy. I teach courses in international humanitarian law (incorporating the laws of war) in my own University in Australia to civilian law students (although typically there are a few in the class with military experience). I also teach the same subjects to military courses in Australia and also presently at the United States Naval War College in Newport, Rhode Island. I have to offer some comparisons between military and civilian students based on my experience, mainly in Australia.

First, let us note the actual obligations of nations in the teaching of the laws of war, deriving from their treaty commitments. There are some 190 States Parties to the four Geneva Conventions of 1949, making them the most heavily subscribed conventions in existence. A common article (with minor variations) in each of the four reads:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the

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study thereof in their programmes of military, and, if possible, civil instruction, so that the principles thereof may become known to the entire population.

The Geneva Conventions relate to what is called, in its narrower sense, international humanitarian law. Additional Protocol I of 1977, however, brought the law of Geneva together with the law of The Hague (the laws of war, or the law of armed conflict), so that it is now accepted that the expressions “the laws of war” and “the law of armed conflict” are coextensive with international humanitarian law. Article 83 of Protocol I thus marks a significant step forward in that it imposes an obligation of dissemination in respect of the laws of war/armed conflict as well as of international humanitarian law. That article reads:

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.

The fact that the United States is not yet a party to Additional Protocol I is not, I think, relevant. As I understand it, the policy of the United States is to apply the Protocol de facto wherever possible, and to accept most of its provisions as reflective of customary international law.

It is interesting to note that prime emphasis is placed in these provisions on dissemination through courses of military instruction, with civilian instruction in second place. That is understandable. But I take it that at least one of the intentions of the title of the present panel is to suggest that, if civilians are not made aware of the content of the laws of armed conflict they will not be knowledgeable enough to put appropriate pressure on governments to live up to their obligations. That can certainly be accepted.

II. AUSTRALIA

A major role is played in Australia in the field of education in the laws of armed conflict by the Red Cross movement. The work of the Regional Delegate of the International Committee of the Red Cross (ICRC), based in Sydney, is almost entirely devoted to the promotion of the Conventions and the two Additional Protocols. He travels extensively throughout Australia, New Zealand, and the Pacific islands. He meets with officials of local defense ministries and with politicians. He also visits the universities.
The national association, the Australian Red Cross, although primarily concerned with disaster relief and the tracing of missing relatives, is also engaged in the work of making the Conventions and Protocols better known to the entire population. There is a Dissemination Committee in each of the States of Australia, where there is a representative of each of the three armed forces—Navy, Army, and Air Force. The Australian Red Cross sponsors periodic conferences on international humanitarian law, in which academics, journalists, the general public, uniformed military personnel, and defense civilians take part.

A recent and most notable initiative of the Australian Red Cross is the sponsorship of a Red Cross Chair in International Humanitarian Law at the University of Melbourne. This is a continuing chair, not a short-term visiting post. The inaugural holder of the chair is Professor Timothy McCormack.

There are elective courses in international humanitarian law/law of armed conflict (IHL/LOAC) offered in at least four Australian law schools: the University of Melbourne, the University of Sydney, the University of New South Wales, and the Australian National University. The Red Cross sponsors an essay competition for law students throughout Australia whether they are enrolled in such an elective or not. There are also plans to conduct a national student moot court competition involving questions of IHL/LOAC under the auspices of the Red Cross.

So far as military instruction is concerned, there are short courses or seminars in IHL/LOAC at each stage of the officer promotion process. Such courses are not confined to those who especially need them for their particular billets. The courses are conducted either by regular officers with appropriate academic qualifications, by reserve personnel (who include a number of university law teachers), or by civilian experts. Exercises and war games always contain international law elements. Each of the three branches of the Armed Services has a Manual of International Law specific to their operations. Officers of the Australian Defence Force may be selected to attend the courses run at San Remo, Italy, by the International Institute of Humanitarian Law. Selected senior legal officers specializing in international law may also attend a course at Cambridge University in England. On exchange with the United States many officers study courses, or take higher degrees, in international law at United States military academies.

One should never be complacent. However, I do believe that IHL/LOAC training in the Australian Defence Force is on the right track. It may be that the isolation of Australia has the effect of making Australians more internationally minded. Certainly the prospect of attending a course or seminar on IHL/LOAC at an overseas location helps to make the subject popular. I personally know four serving legal officers who have Ph.Ds in international law, and many have master’s qualifications or their equivalents. My only substantial criticism is that officers move billets too frequently and that often their advanced expertise in
IHL/LOAC becomes dissipated. I suppose that is inevitable in a force of such a small size.

I have one final comment on Australia, anecdotal but I think more broadly true. I was once the presenter of an unclassified "war game" at a Navy seminar, in which line officers (not legal officers) were the participants. I decided to use the same scenario in playing a war game with a group of law students in my University humanitarian law class. The general object of war games is to decide when deadly force will first be used. They are typically exercises using rules of engagement (ROE) in which the stated national objective is to contain, and if possible, de-escalate a situation of tension with another country. If armed force is to be used, let it be the other side who uses it first. That is the approach. But of course there are situations in which the use of force in anticipatory (or "interceptive") self-defense must be considered. One does not have to accept the first casualties in order to be on the "good" side. I have to report that the law students were far more eager to open fire first than were the naval officers. They were the Rambos, not the military people. I shall leave you to speculate on the possible reasons for this.

III. THE UNITED STATES

I shall not speak at any length about the situation in the United States. Although I have now been teaching at the Naval War College for three months, I am not sufficiently aware of the scene in the United States at large. What I have seen and heard, however, inclines me to believe that the teaching of IHL/LOAC in military academies is generally conducted at a very high level of both awareness and competence.

The Chair I occupy for the academic year 2000-2001—the Charles H. Stockton Chair of International Law—stands as an example of the "infiltration" of civilian professors of international law into the curriculum of the College. Founded in 1951, the Stockton Chair has been occupied by a line of holders of recognized eminence in civilian academic life (although it is true that some have also had military experience). The inaugural holder of the Chair was Judge Manley O. Hudson. He was followed by Hans Kelsen and Leo Gross. Other notable holders include Brunson MacChesney, William T. Mallison Jr., Carl Christol, Richard Lillich, Oliver Lissitzyn, L.F.E. Goldie, Howard Levie, Alwyn Freeman, our current ILA American Branch President Alfred Rubin, George Bunn, George Walker, Myron Nordquist, Leslie Green, Ruth Wedgwood, and most recently Yoram Dinstein. Each one of these names will, I am sure, be familiar to this audience.

The Department of Oceans Law and Policy at the College, in which the Stockton Chair is situated, and whose mandate extends to the teaching of IHL/LOAC, is staffed with highly qualified and experienced serving and retired
officers. All have law degrees and have participated in advanced courses. They include United States Coast Guard and Marine Corps officers as well as Navy. All are able to integrate their military training with their advanced legal knowledge and teaching skills. This is a vital point. Teaching to military audiences lacks credibility unless scholarship and teaching are informed and focused through operational experience. This is the “street cred” factor, if you will; essentially it ensures the relevance of the teaching to the real world the audience inhabits.

The Naval War College has also contributed significantly to the fund of scholarship and dissemination of the laws of war through its well known series of International Law Studies, begun in 1901. Known as Bluebooks, they are to be found in all major law libraries of the world. There are now nearly eighty volumes in the series. The most recent are Howard S. Levie on the Law of War (Vol. 70, 1998); a collection of essays on The Law of Armed Conflict: Into the Next Millennium (Vol. 71, 1998); The Law of Military Operations: Liber Amicorum Professor Jack Grunawalt (Vol. 72, 1998); and the Annotated Supplement to the Commanders Handbook on the Law of Naval Operations (Vol. 73, 1998). This last publication (which had been issued in a different format previously as NWP 9) has been immensely influential in the navies of other nations. There are four further volumes currently in press or nearing completion: a study of the Tanker War 1980-88 by Professor George Walker, a Festschrift for Professor Leslie Green, articles from a symposium held at the War College on Computer Network Attack and International Law, and a study of the Forcible Protection of Nationals and Humanitarian Intervention. This is a quite outstanding body of work. The Government Printing office distributes free copies to United States law schools and to various public libraries.

Others here will be able to say how widely IHL/LOAC is taught in American law schools. Judging from the periodical literature and the number of monographs, there is a very significant body of scholars contributing greatly to the development of this branch of the law.
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I. INTRODUCTION

The present panel, captioned the “Evolving Dynamics of Intervention to End Atrocities and Secure Accountability,” analyzes developments in the doctrine of humanitarian intervention and corresponding efforts to secure accountability for mass atrocities in the context of recent events in Kosovo, East Timor, Sierra Leone, and Cambodia.

The doctrine of “humanitarian intervention,” defined for the purposes of this discussion as the threat or use of force or other coercive measures by states or international or regional organizations in response to gross violations of human rights, has assumed an increasingly prominent profile in recent years, both in international discourse and through United Nations and state practice in such regions as the former Yugoslavia, Rwanda, East Timor and Sierra Leone. The contemporary agenda of the United Nations Secretary-General has reflected this development. In his address to the United Nations General Assembly in September 1999, for example, Secretary-General Annan proclaimed that the core challenge to the United Nations, and specifically the Security Council, in

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the next century will be to "forge unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand." The Secretary-General repeated this challenge in his Millennium Report, "We the Peoples: The Role of the United Nations in the 21st Century," in which he called upon United Nations member-states to unite in the pursuit of more effective policies to stop mass murder and egregious violations of human rights. In urging this approach, Secretary-General Annan emphasized that while armed intervention must always remain the option of last resort, in the face of gross and systematic violations of human rights that offend every precept our common humanity it is an option that cannot be relinquished.

This rise in instances of humanitarian intervention in gross human rights violations has also witnessed a recognition and practice on the part of the international community that such intervention must be accompanied by mechanisms to secure individual accountability for those human rights violations. The creation through United Nations Security Council resolutions of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda in the early 1990s constituted milestones in this respect. Variations on these initiatives have been canvassed more recently in the post-intervention environments in Sierra Leone and East Timor, with the United Nations playing a leading role in the development of accountability mechanisms in those regions. My colleagues on this panel will address the particulars of each of these instances in more detail.

My presentation considers the doctrine of humanitarian intervention in the context of current efforts to seek accountability for atrocities committed by the Khmer Rouge regime in Cambodia in the 1970s. In summary, the Cambodia experience suggests that the absence of timely intervention by the international community to prevent or punish Khmer Rouge atrocities significantly limited the United Nations' present-day ability to influence the creation of a Khmer Rouge tribunal or to ensure that any such tribunal is competent, impartial, and effective. Correspondingly, these conclusions militate in favor of humanitarian intervention in future atrocities where, at least prior to the establishment of the International Criminal Court, ad hoc measures by the international community may be necessary to secure accountability for those atrocities.

II. THE HISTORY OF KHMER ROUGE ATROCITIES AND RECENT EFFORTS TO SECURE ACCOUNTABILITY FOR KHMER ROUGE CRIMES

In April 1975, the Communist Party of Kampuchea (CPK), more commonly known as the Khmer Rouge, seized power from Cambodia's Khmer Republic Government and established a brutal authoritarian regime, which it subsequently named Democratic Kampuchea (DK), under the political and ideological leadership of Pol Pot. What followed during its nearly four years
of rule were increasingly widespread and violent campaigns of displacement, forced labor, arrests, torture, and executions. These atrocities were perpetrated under the guise of CPK policies that sought to construct a socially and ethnically homogeneous society and rid the country, and increasingly the Communist Party itself, of perceived enemies of the Communist revolution. Millions of Cambodians were displaced and subjected to inhumane living and working conditions during the period of DK rule, and it is estimated that over one million Cambodians perished as a consequence of the Khmer Rouge’s deadly policies.

The Khmer Rouge’s rule ended in January 1979, when, following a protracted and escalating border war with Vietnam, Vietnamese forces launched a full-scale invasion of Cambodia, took Phnom Penh, and installed the opposition group in power, which later declared itself the People’s Republic of Kampuchea. With the collapse of Democratic Kampuchea, many remaining Khmer Rouge members fled and re-established themselves on the Cambodia-Thai border. Over the next decade, CPK forces maintained an armed resistance against the Vietnam-backed Cambodian government. In 1993, however, the Khmer Rouge ceased to be an active fighting force, due principally to the defection from the CPK of Khmer Rouge guerrillas in response to offers of amnesty from prosecution by the Cambodian government.

Throughout this period, neither the perpetration of atrocities by the Khmer Rouge nor the issue of accountability for those atrocities were the subject of constructive action by the international community. It was not until 1997 that the United Nations contemplated concrete measures to bring surviving Khmer Rouge members to justice. In a jointly-authored letter to the United Nations Secretary-General dated June 21, 1997, former first Prime Minister of Cambodia Prince Norodom Ranariddh and second Prime Minister Hun Sen requested the assistance of the United Nations and the international community in “bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979.” The letter also indicated that Cambodia did not have the resources or expertise to conduct this very important procedure, and specifically requested assistance similar to that of the ad hoc tribunals for the former Yugoslavia and Rwanda.

Following receipt of the June 1997 letter, the United Nations General Assembly adopted a resolution in December 1997 requesting that the Secretary-General consider the possible appointment of a group of experts to respond to Cambodia’s request for assistance. In July 1998, the Secretary-General appointed a three-member group of experts with a three-fold mandate: 1) to evaluate existing evidence to determine the nature of the crimes Khmer Rouge leaders committed in the years 1975 to 1979; 2) to assess the feasibility of apprehending, detaining and extraditing, or surrendering Khmer Rouge leaders;
and 3) exploring options for bringing Khmer Rouge leaders to justice before an international or national jurisdiction.

The group of experts subsequently delivered its report to the Secretary-General on February 22, 1999, which concluded that serious crimes under international and Cambodian law had been committed during the period of CPK rule. These crimes included genocide, crimes against humanity, war crimes, and other acts incurring individual responsibility, in particular torture, forced labor, and crimes against internationally-protected persons. The group of experts also recommended that the United Nations Security Council or General Assembly establish an *ad hoc* international tribunal to prosecute those persons most responsible for the most serious violations of human rights during the DK era. In making this recommendation, the group specifically rejected the option of establishing a tribunal under Cambodian law. This was based upon the group's informed opinion that Cambodia continued to lack a culture of respect for an impartial justice system, and the group's corresponding concern that domestic prosecutors, investigators, and judges may be subject to political pressure and influence.

In the interim, however, events transpired in Cambodia that further complicated the United Nations' efforts to secure accountability for Khmer Rouge crimes. In July 1997, Hun Sen and his Cambodian People's Party seized exclusive control of the Cambodian government, and later rejected the group of expert's call for an *ad hoc* international tribunal, claiming that any decision to bring Khmer Rouge leaders to justice must take into account Cambodia's need for peace and national reconciliation and that Cambodian courts were "fully competent" to conduct trials of former CPK officials. At the same time, Pol Pot was captured and subjected to a show trial by his CPK compatriots in 1997. This, followed by Pol Pot's death in April 1998, galvanized world attention on the question of accountability of surviving Khmer Rouge members for DK-era crimes. This was accompanied in 1998 and 1999 by the surrender or capture of several of the most prominent surviving members of the Khmer Rouge leadership, including former CPK Deputy Secretary Nuon Chea, former CPK Foreign Minister Ieng Sary, former DK state president Khieu Samphan, former head of the Southwest Region Ta Mok, and former director of the prison and torture facility at Tuol Sleng, Kaing Khek Iev, better known as Duch.

These developments have since resulted in prolonged negotiations between the United Nations and Hun Sen's government to find a compromise on the convocation of Khmer Rouge trials. In the course of these negotiations, the Cambodian Government has steadfastly rejected the creation of a fully-independent international tribunal, but has at most expressed some support for the establishment of a domestic tribunal with limited international participation and a narrowly-defined personal jurisdiction. For its part, the United Nations appears to have abandoned any call for an international tribunal, and has
endeavored to negotiate attributes of a tribunal established under Cambodian law that would render Khmer Rouge prosecutions fair and impartial. Such attributes have included in particular an effective and independent role for the international community in any domestic prosecutions. Although the latest round of negotiations between the United Nations and the Cambodian government concluded in July of 2000, the particulars of any agreement between the parties have not been officially publicized. Currently, it appears to have been left to the Cambodian government to take the legislative measures necessary to establish a Khmer Rouge tribunal.

III. THE ABSENCE OF TIMELY INTERVENTION AND ITS IMPLICATIONS FOR PROSECUTING KHMER ROUGE ATROCITIES

As alluded to above, during the course of the Khmer Rouge regime and for much of the subsequent period of civil conflict in Cambodia, the international community did not intervene to prevent or seek accountability for the commission of DK-era atrocities. To the contrary, an anti-Vietnam coalition of states composed of China, the Association of Southeast Asia Nations, and the United States ensured through United Nations General Assembly’s Credentials Committee that the Khmer Rouge retained Cambodia’s seat in the United Nations General Assembly through most of the 1980s.

While the international community took concrete measures in the late 1980s to end the conflict between the warring factions in Cambodia, this process ultimately did not address the issue of accountability for Khmer Rouge crimes. An internationally-sponsored peace process, the Paris Conference on Cambodia, was convened in 1989 and ultimately led to a comprehensive peace settlement between the principal factions in Cambodia, although the Khmer Rouge subsequently refused to comply with most of the terms of the settlement. The agreement provided for the establishment of the United Nations Transitional Authority in Cambodia (UNTAC), which was given the mandate of establishing a peaceful and neutral environment in Cambodia for the conduct of elections and responsibilities for demobilizing and disarming the rival forces in Cambodia. However, the settlement contained no explicit provision for Khmer Rouge trials, and such a process was not included in UNTAC’s mandate. Rather, the matter was left to the future Cambodian government.

In light of the absence of humanitarian intervention in CPK atrocities, and without addressing the feasibility of such intervention or the morality of the international community’s conduct in this regard, the present analysis endeavors to draw insights respecting the effect of this non-intervention upon recent efforts by the United Nations to secure accountability for Khmer Rouge atrocities. The Cambodia experience suggests that the absence of timely intervention by the international community to prevent or punish Khmer Rouge atrocities
significantly limited the United Nations' present-day ability to influence the creation of a Khmer Rouge tribunal or to ensure that any such tribunal is competent, impartial, and effective.

More particularly, the international community's inaction in the face of Khmer Rouge atrocities has been depicted by some as undermining the United Nations' political and moral authority to call for the establishment of an international tribunal to prosecute DK-era crimes. Prime Minister Hun Sen has exploited this apparent weakness on numerous occasions, citing in particular the CPK's retention of Cambodia's seat in the United Nations General Assembly in challenging the legitimacy of current United Nations efforts to create an international Khmer Rouge tribunal. The Cambodian government has likewise disparaged the considerable delay in international action on Khmer Rouge crimes, arguing early on that after over twenty years, such matters may be best left buried in the past. And unlike the recent conflicts in the former Yugoslavia and Rwanda, the United Nations is not able to draw political or legal support from Security Council resolutions adopted contemporaneously with the perpetration of Khmer Rouge atrocities as to the international criminality of the conduct Khmer Rouge members and their susceptibility to prosecution before an international tribunal.

These limitations on the United Nations' negotiating authority have been exacerbated by the fact that, in the delay following the fall of Democratic Kampuchea, individuals who may potentially be implicated in Khmer Rouge atrocities have assumed influential positions with the current Cambodian government. In particular, Prime Minister Hun Sen and various other current Cambodian officials were previously members of the CPK and, according to some observers, may constitute potential targets in open-ended and rigorous Khmer Rouge prosecutions. Indeed, this possibility has been cited by some authorities as explaining in part Prime Minister Hun Sen's opposition to the establishment of a fully independent Khmer Rouge tribunal with broad personal jurisdiction.

In the face of these political shortcomings, the United Nations has had little choice but to abandon its recommended approach of establishing an international Khmer Rouge tribunal. Rather, it has been relegated to negotiating some degree of meaningful international participation in domestically-constituted Khmer Rouge trials, and this despite concerns expressed by its own group of experts and civil society more generally that the Cambodian justice system cannot support fair or impartial trials. Although this does not necessarily foreclose the possibility that an appropriate accommodation might be reached on Cambodian-constituted prosecutions, it has placed the United Nations in an exceedingly problematical negotiating position and with considerably less control over whether a Khmer Rouge tribunal will ultimately be established.
The absence of timely humanitarian intervention in preventing or punishing Khmer Rouge atrocities may also be considered to have limited the United Nations' ability to ensure that a Khmer Rouge tribunal, if established, is competent, impartial, and effective. It is apparent, for example, that the effective personal jurisdiction of a Khmer Rouge tribunal has been significantly restricted, resulting in a diminishing number of potential defendants available for prosecution. Among the key candidates for prosecution who have died since the period of DK rule are CPK Secretary Pol Pot and General Staff Chairman Son Sen. Moreover, in light of the fact that most, if not all, of the remaining potential candidates live within Cambodia's borders, the United Nations must rely entirely upon the Cambodian government to secure the arrest of suspects who may be indicted by a Khmer Rouge tribunal. While likely candidates for prosecution, such as Ieng Sary and Nuon Chea, reportedly live freely in Cambodia, the Hun Sen government's commitment in this regard is open to serious question. The early establishment of an appropriate international presence within a jurisdiction like Cambodia, on the other hand, arguably provides the international community with some independent avenue through which to secure effective jurisdiction over suspected perpetrators of atrocities.

The international community has also found itself at a considerable disadvantage in facilitating the search for pertinent evidence for potential Khmer Rouge prosecutions. As with potential suspects, victims and witnesses of Khmer Rouge atrocities have died or their memories have diminished since the 1970s. Despite the impressive efforts of institutions, such as the Documentation Centre of Cambodia, in gathering, cataloguing, and translating DK-era documentation, it has been recognized by the United Nations group of experts and other authorities that many potentially incriminating documents have been lost or destroyed since 1979. Further, the delays in investigations have aggravated difficulties in identifying and authenticating what documentary and other physical evidence may still be available for use in Khmer Rouge prosecutions. Conversely, a timely international presence may facilitate the collection and verification of potentially relevant documents and other evidence. International inaction on Khmer Rouge atrocities has also complicated the process of identifying the proper subject matter jurisdiction of a current CPK tribunal. In this connection, the general legal principle *nullum crimen sine lege* limits the crimes for which an individual may be prosecuted to those that were considered criminal under domestic or international law at the time they were committed. As a consequence, present-day efforts to establish a Khmer Rouge tribunal must endeavor to define the substance of Cambodian and international law as it stood over twenty years ago.

Finally and more generally, the absence of any effective international intervention initiative in Cambodia has diminished the United Nations' operational independence to serve as a control against unfairness and
impropriety in any domestic Khmer Rouge prosecutions that may be convened. This may be especially significant in respect to such matters as witness protection and tribunal staffing, which are particularly susceptible to improper influence and abuse.

IV. CONCLUSION

The foregoing analysis should not be taken to suggest that the international community lacks any authority to influence the creation or conduct of a Khmer Rouge tribunal by Cambodia, or that it is not still possible to convene proper and effective trials of surviving members of the Khmer Rouge regime through a carefully designed tribunal under Cambodian law with appropriate and effective international participation. The Cambodia experience should, however, serve as a stark illustration of the risks and complications posed when the international community fails to intervene in a timely manner in response to gross violations of human rights. The future implications of such intervention could mean the difference between accountability and impunity.
ACCOUNTABILITY AND INTERNATIONAL ACTORS IN BOSNIA AND HERZEGOVINA, KOSOVO AND EAST TIMOR

Ralph Wilde*

Current international involvement in Bosnia and Herzegovina, Kosovo and East Timor has two elements. The first is an "accountability" element, consisting of various judicial and non-judicial processes. This element includes the International Criminal Tribunal for the former Yugoslavia (ICTY), the proposed mixed international/local courts for "special crimes" in Kosovo, and the mixed international/local process for prosecuting militia members for serious crimes committed after the East Timorese referendum in 1999. The second is a territorial administration element. Here, international actors assert the right to exercise either plenary powers of administration—as with the United Nations Mission in Kosovo (UNMIK) and the United Nations Transitional Authority in East Timor (UNTAET)—or certain governmental prerogatives (e.g. the right to impose laws), as with the Office of the High Representative (OHR) in Bosnia and Herzegovina.

In this paper, I suggest that the two elements of international involvement—accountability and administration—have been conceived by international law as mutually exclusive. That is to say, the accountability agenda has been set up to address a particular area of activity, excluding the conduct of territorial administration by international actors. I argue that such an exclusion has a potentially negative impact within the territories affected. I set out the powers asserted by and accountability regime directly applicable to international actors in the sphere of territorial administration, and suggest the reasons for and the effects of a lack of accountability in this sphere. In this regard, I look at international law's regulatory structures insofar as these structures are directly applicable to the international actors involved. I am not concerned, therefore, with how such structures might engage with the activity of territorial administration because this activity engages the legal personality of the host territorial entity.¹

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In each of the administration projects, international actors assert extensive administrative powers. These powers are broad in terms of their subject-matter, covering the whole spectrum of territorial administration. For example, under Resolution 1272, the United Nations Transitional Administration in East Timor is "endowed with overall responsibility for the administration of East Timor and ... empowered to exercise all legislative and executive authority, including the administration of justice." These powers are also wide in scope, being explicitly conceived with minimal standards delineating how they are to be exercised. Much of general international law—such as human rights and environmental law—is clearly relevant to the conduct of territorial administration. However, traditionally this law is conceived in terms of state or (in the case of gross human rights abuses) individual responsibility.

In Bosnia, Herzegovina, and Kosovo, international actors have been granted the usual privileges and immunities, undermining the capacity of national law to regulate them directly for their conduct of administration. In East Timor, UNTAET considers itself immune from local jurisdiction, although at the time of this writing, no legal instrument relating to such immunity has been passed in local law. An Ombudsperson has been introduced belatedly in Kosovo, and a similar institution is, at the time of this writing, at the proposal stage in East Timor. The Kosovo Ombudsperson has the power to hear complaints "concerning human rights violations and actions constituting an abuse of authority" by UNMIK, but only has the power to make recommendations as a result of these complaints.

This attenuated local system of accountability is more than matched at the international level, since none of the international judicial scrutiny mechanisms can hear complaints brought against the international actors involved arising out of their conduct of territorial administration. Looking at the International Court of Justice (ICJ), scrutiny would only seem possible in the (somewhat unlikely) event of the United Nations referring a case relating to its own activities for a non-binding advisory opinion. Beyond judicial mechanisms, there is, of

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5. UNMIK, Regulation 2000/38, supra note 4, at 1-2.
6. See Statute of the International Court of Justice, Art. 34.1, Art. 65.
course, also the United Nations Security Council. However, in addition to the usual problems that are raised by the idea of the Security Council as an effective regulatory mechanism (its unrepresentative nature, the veto etc.), an additional independence question is raised by the fact that this body played a formal role in creating each of the administration projects to begin with.

A striking example of the combined inadequacy of domestic and international scrutiny mechanisms directly applicable to international actors when they carry out territorial administration would be the mandates of OHR and the military Stabilization Force (SFOR) in Bosnia and Herzegovina. Dayton grants both organizations "final authority" power "in theatre" (viz. Bosnia and Herzegovina) to interpret their respective mandates.\(^7\) Since the mandates exist as a matter of international law, the "in theatre" caveat suggests that the final authority power does not render all interpretations made by OHR and SFOR automatically lawful, but rather makes the legality of such interpretations unchallengeable in Bosnia and Herzegovina. Taking this domestic exclusion alongside the lack of international jurisdiction, it would seem that, lawful or unlawful, all interpretations of these mandates by the relevant international actors go unchallenged as far as the institutions of national and international judicial scrutiny are concerned.\(^8\)

Considering the above factors together, international actors engage in administrative activity that is similar to (and, indeed, necessarily based on) the activity performed by states in their own territory, yet no comparable regulatory regime applies directly to them when they engage in such activity. Some of the reasons for this lie in two broad areas: first, assumptions concerning the behavior of states and international organizations, and second, the manner in which territorial administration by international actors has emerged.

The way international law applies to international organizations and states assumes that these two actors perform different activities. With territorial administration, the assumption is that states perform this activity and international organizations do not. This assumption explains who is involved in regulating territorial administration, and in what role. States are regulated; international organizations are not, and, moreover, act in a regulatory role (for example, through monitoring human rights). The international regulatory process reflects, and thereby reinforces, these distinct roles and the assumption that lies behind them. Moreover, the assumption that states administer territory and international actors do not is reflected in the way international law influences the application of national law to these two actors. Whereas the law

\(^7\) See Dayton Peace Agreement, supra note 3, Annex 1A, art. XII (SFOR); Annex 10, art. V (OHR).

\(^8\) They may however, be challengeable not as the acts of international actors, but as the acts of the state. See supra note 1.
is silent with respect to local governments (in their own state), as I have already said it grants international actors immunity from national law. This immunity reflects an idea that international organizations do not perform "local" activities (such as administration), but rather, perform activities that are distinct and somehow "above" the "local" (such as scrutinizing territorial administration by states).

A further potential cause of the accountability deficit is the way the current administration projects merged and were conceived. The projects developed in an *ad hoc* manner, with different organizations involved (OHR in Bosnia and Herzegovina, the United Nations in Kosovo and East Timor). Each project is conceived as "temporary" and "interim," with the full conduct of territorial administration by local actors the eventual goal. These two factors can undercut arguments calling for accountability mechanisms applicable directly to international actors when they engage in territorial administration—there is no need to bother too much about accountability for something that will not last and may not recur.

What effect does this accountability problem have on the activity itself and those affected by it? One of the objectives in the current projects is to foster conditions for a liberal-democratic order in the territory, rooted in human rights, a vibrant civil society, the rule of law and an elected, representative government. Whereas territorial administration by international actors seeks to promote these conditions, paradoxically it operates in an autocratic manner itself—"benevolent despotism," as Sergio Vierra de Mello, the head of the United Nations administration in East Timor, puts it. An aspect of this 'despotism' is, of course, the lack of accountability. One danger is that territorial administration by international actors may be undermining its own objectives, by establishing a precedent for governance that is unaccountable, centralized and autocratic.

Moreover, the accountability deficit with respect to international actors when they carry out administration creates further problems when considered alongside other areas where accountability is promoted. This brings me back to the accountability agenda I sketched at the start. One of the arguments made for the International Criminal Court (ICC) was that justice is compromised when it is selective. The presence of *ad hoc* tribunals with limited temporal and territorial scope, in the absence of an ICC, effectively privileges accountability with respect to a narrow geographical area and time period. Looking at the issue of selectivity from a different angle, the existence of criminal tribunals with certain subject-matter jurisdiction over individuals, in the absence of accountability mechanisms applicable directly to international actors conducting administration, may operate on a symbolic level to foster an idea that

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accountability operates exclusively on the individual level, and only in respect of the most serious acts. I shall discuss these two symbolic elements in turn.

First, the symbolism of focusing exclusively on individual accountability. Of course, because of the role played by group identity in the 1991-95 conflict in the former Yugoslavia, many found the focus on individual rather than collective local accountability appealing. However, this consideration, whatever its merits, is on its own terms inapplicable to collective responsibility as far as international actors are concerned. Moreover, the above objective allied to the conduct of administration by international actors—promoting a liberal democratic order—is necessarily rooted in the idea of a collective polis. In administration, therefore, the nettle of collective identity has been grasped already, albeit in a confused fashion in the case of Kosovo, given the continuing uncertainty as to that territory’s eventual status. An exclusive focus on the individual in the accountability sphere risks undermining the project of forging a particular kind of collective identity in the political sphere.

Turning to the symbolism of focusing exclusively on serious crimes. Again, the commission of these crimes is considered more important than other forms of accountability, because of their serious nature. Such a consideration, however, concerns relative importance: it does not itself suggest why other forms of accountability should be almost totally absent. Moreover, in the long term, an absence of other forms of accountability may operate on a representational level to occlude the changes that happen in the society affected. The prosecution of serious crimes symbolizes a deeply traumatized society. Equally, the operation of other, less important accountability structures also symbolizes a society where accountability issues are no longer as grave. As far as Bosnia and Herzegovina is concerned, the vast majority, if not all prosecutions at the ICTY concern acts that took place at least five years ago. Whereas these prosecutions continue to symbolize the trauma of the Bosnian people, certain other accountability mechanisms symbolizing how Bosnian society has changed since 1995—such as mechanisms directly applicable to international actors—are absent. Yet all can agree that, regardless of whether anything else has changed significantly since Dayton, the kinds of acts that come under ICTY jurisdiction no longer take place to anywhere near the same degree.

Another representational problem with the current accountability bias is that it risks creating a perception that accountability is for “us” the local people, not “them” the international officials. Whereas some of the reasons for territorial administration by international actors—for example, filling the administrative vacuum after conflict—are understood, the reasons for unaccountability on the part of international actors are not. This apparent inconsistency creates the impression of arbitrariness, potentially making more persuasive the idea that territorial administration by international actors is a
paternalistic, imperialist endeavor. In turn, this idea threatens the project of fostering conditions where a liberal-democratic political system can flourish, by reinforcing perceptions that the project is about imposing an alien system rather than supporting local political initiatives.

In conclusion, the international regulatory regime directly applicable to international actors when they carry out administration needs to be transformed. This requires changes in the law and legal enforcement modalities. Territorial administration by international actors is a significant institution of international policy that profoundly affects the lives of people in Bosnia and Herzegovina, Kosovo and East Timor, and may be utilized in other situations in the future. The ad hoc criminal tribunals were followed by the joined-up thinking on international criminal justice effected through the institution of the ICC. What is also needed, in the light of the ad hoc administrative projects, is joined-up analysis on the way international actors can be made more directly accountable for their conduct of territorial administration.
THE ENFORCEMENT OF THE FOURTH GENEVA CONVENTION IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING JERUSALEM

Hussein A. Hassouna*

This article expresses a timely and most important subject. It concerns the implementation of international humanitarian law, that branch of law that has recently assumed an ever-growing prominence, as an expression of our generation's ideal of the rule of law in international relations.

This article was written in a year of historic celebrations. Let us remember that the year 1999 marked the centenary of the first Hague Peace Conference, which began a long ongoing process of outlawing destructive deadly weapons while setting up the first institution for peaceful settlement of disputes. It was also the fiftieth anniversary of the signing of the four Geneva Conventions, which laid down a set of universal rules for humane conduct in armed conflict. And lastly, it marked the anniversary of the Convention of the Rights of the Child that combines articles of human rights with provisions of international humanitarian law.

As the century drew to a close, we may also add to that series of historic celebrations 1998's celebration of the fiftieth anniversary of the Universal Declaration on Human Rights. This universal declaration, whose principles have been enshrined over the years in a number of international conventions, has formed the core of a growing body of international human rights law.

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Furthermore, the adoption of the Statute of the International Criminal Court in Rome has since been signed by 139 states and ratified by twenty-seven as of December 31, 2000, thus marking an important step in institutionalizing the enforcement of international humanitarian law in terms of individual criminal responsibility.\textsuperscript{6}

These recent developments in the field of international humanitarian law have found their inspirational source in the Charter of the United Nations\textsuperscript{7} that declares the solving of international problems of a humanitarian character to be one of the main purposes of the United Nations.

These advancements should be seen as part of the United Nations and other humanitarian organizations, notably the International Committee of the Red Cross’ long-term efforts and overall contribution to the codification and implementation of international humanitarian law.\textsuperscript{8}

But while we may rejoice at the richness of this legal creativity and the proliferation of instruments of international humanitarian law, we cannot but notice with concern the widening gap between the rules of international humanitarian law and their actual application. The case of the Fourth Geneva Convention provides a good illustration of that regrettable situation.

The issue is therefore not to elaborate new rules, since current humanitarian law already comprises all the basic rules and principles. For example, if we are guided by the principles and standards of international humanitarian law, such as the Fourth Geneva Convention,\textsuperscript{9} the Universal Declaration of Human Rights\textsuperscript{10} and the International Covenants on Human Rights\textsuperscript{11} the essence for confronting such violations is already present. Rather it is necessary to implement effective mechanism to ensure a globalized compliance of all relevant established rules of international humanitarian law. This is not an easy task for the United Nations, which is often confronted with difficult challenges in its contact with humanitarian issues, such as how to

\begin{itemize}
  \item \textsuperscript{7} UN Charter of October 24, 1945.
  \item \textsuperscript{8} The International Committee of the Red Cross (ICRC) contributes to the development of international law by drafting documents which form the basis of the texts adopted by States while also preparing drafts for the Diplomatic Conferences. Thus, the ICRC plays an important role in the codification process of humanitarian law. This is how the four Geneva Conventions of 1949 and their two Additional Protocols of 1977 came into being. Accordingly, the ICRC has become the guardian of international humanitarian law, whereas it has been legitimized by the international community to monitor its application by the parties to conflict. Excerpt from ICRC information site, available at www.icrc.org (last visited Mar. 17, 2001).
  \item \textsuperscript{9} Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, U.N.T.S., No. 970.
  \item \textsuperscript{10} Resolution 217, supra note 5.
\end{itemize}
refrain from attempting to politicize humanitarian issues, how to avoid selectivity and double standards, how to avoid using humanitarian action as a substitute for the necessary political action, and how to reconcile preservation of the sovereignty of states and their domestic jurisdiction with the ever growing drive to protect human rights worldwide.

But there is perhaps no greater need in our turbulent world of today than to raise to the challenge of confronting the growing civilian toll of armed conflict and protecting the millions of innocent civilians that now account for the vast majority of casualties in armed conflict. Civilians have increasingly become primary targets in many armed conflicts in which the basic rules of humanitarian law have been deliberately violated. Such violations of humanitarian law have been observed in the Balkans, in the Great Lakes region, in West Africa, in the Caucasus and in the Middle East.

These continuous violations of international humanitarian law explain why the International Court of Justice, in recent cases, involving Yugoslavia and a number of NATO countries, expressed its deep concern with the human tragedy, the loss of life and the human suffering found in Kosovo, other parts of Yugoslavia and in East Timor. The International Court of Justice has since called upon all parties to act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law.

Such humanitarian violations also explain why the Security Council has recently devoted a number of official meetings in February and September of 1999 to a comprehensive discussion of the issue of "Protection of Civilians in armed conflict.

Furthermore, such acts of humanitarian apathy explain why the Fourth Geneva Convention of 1949 has become the essential core of numerous Security Council and General assembly resolutions. These resolutions call for strict observance and full respect for the rules of

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13. Id.


15. Id.

16. Id. at 15.

17. Id. at 18.

international humanitarian law. In short, it explains the justification behind the international community's current sustained efforts to improve the physical and legal protection of civilians in situations of armed conflict.

The signing of the Fourth Geneva Convention in 1949 was a major breakthrough that culminated long efforts over the years to ensure a better protection for the civilians in times of war. And while the Convention, which has now been ratified by 188 states, has received universal recognition, its observance and implementation is still lacking, since serious violations of its provisions have become common practice in many conflicts.

A major problem facing implementation stems from the frequent refusal of the occupying power to acknowledge that definition, thereby contesting its obligation to apply the convention. The main aim of the convention resides in alleviating human suffering caused by conflict. According to Article Four of the Fourth Geneva Convention "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." While lengthy legal debate over the applicability of the convention is politically important, it should nevertheless be minimized, in order to terminate the possibility of any deviation from the basic rules of the convention and humanitarian law altogether, by the occupying power. Instead, efforts should be centered on the practical problems arising from occupation or the threat of occupation, in the hope of adopting practical steps for the early resolution of the problem and this allows no change under the convention in the legal status of the territory or the continued normal life of its inhabitants in accordance with their laws, culture, and traditions.

However, the most effective way to bring about an end to any violations of the applicable rules of international humanitarian law is to deal with the underlying issues of the conflict, thus bringing about an end to that occupation. But let us add in all candor that any success in settling such issues, such as the applicability of the convention, practical problems of the occupation and the underlying conflict, depend on two things. First, on the cooperation and good will of the parties concerned, and second, on the international community's readiness, will and ability to adopt a clear and firm position vis-à-vis the recalcitrant party.


In assessing the effectiveness of the mechanism provided under the Fourth Convention for implementation of its provisions, we cannot but express consternation over the fact that the role contemplated for the Protecting Powers and the International fact-finding Commission has virtually remained dead letter. Will the newly created International Criminal Court witness a similar fate? As a general rule, the activation of these bodies to accomplish their task depends on the political and practical support they receive from the international community.

The difficulty in implementing the Protecting Power mechanism owing to the lack of consent of a party to the conflict could be overcome by granting the ICRC, well known for its neutrality and impartiality, the necessary mandate to play the role of substitute. Either formally as provided in the convention, or informally, in that formal acceptance is difficult to achieve. Likewise, the International fact-finding Commission's role could be revived by inducing more states to formally recognize its competence, or alternatively to grant their consent for its role in any given situation. And this task of fact-finding can be supplemented by humanitarian missions undertaken by United Nations ad hoc bodies.

A unique feature of the four Geneva Conventions and their additional Protocols lies in the collective responsibility of the parties. The parties have undertaken to implement such responsibility through a common goal in which "to respect and to ensure respect for the Convention in all circumstances." It underscores the particular legal nature of the conventions, their universality and the essential value of the body of humanitarian law they incorporate. The carrying out of this solemn obligation entails, in our opinion, concrete action of the parties, to ensure respect for the Convention and not merely rebuke or condemn the violating state.

However, the permissible limits of such action should always be consistent with the provisions of the United Nations Charter. In case of serious violations, like those perpetrated in a systematic manner as deliberate policies of state, such action could be taken in cooperation with the United Nations Charter in adopting a variety of measures, coercive ones if necessary. Furthermore, as a true reaffirmation of their collective responsibility, the High Contracting

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23. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, supra note 9, at art. I.
24. UN Charter, supra note 7, at ch. VII.
Parties of the Conventions should seek to hold periodic meetings among themselves, in order to create an institutionalized forum for undertaking effective collective action.

The measures just suggested for enhancing the implementation of the Fourth Geneva Convention, would apply to any occupied territory, including occupied Palestinian territory of which Jerusalem is an integral part. One crucial question raised is the issue of the applicability of the Fourth Convention on occupied Palestinian territory in the light of Israel's refusal to accept its *de jure* applicability while agreeing only to *de facto* application.

International legal opinion, twenty-four resolutions adopted by the United Nations Security Council, five resolutions adopted by the General Assembly in ordinary and emergency special sessions, as well as the International Committee of the Red Cross, all clearly confirm the applicability of the Fourth Geneva Convention to the territories occupied by Israel since 1967, including Jerusalem. Such provisions call upon Israel, as party to the Convention since January 1952, to comply and accept its *de jure* applicability. Israel's contention on this issue must therefore be categorically rejected on solid legal grounds, including the inadmissibility that a duly ratified international treaty may be suspended at the wish of one of the parties, who refuses to comply according to its own free discretion. Furthermore, there is ample evidence produced by several impartial bodies, governmental and non-governmental, international and even Israeli, refusing Israel's contention that although the Convention is not legally applicable, nonetheless it implements its provisions in practice. And in the final analysis, all violations of the Fourth Geneva Convention are the outcome of the very fact of Israel's illegal occupation of the concerned Arab territories.

The United Nations International Meeting on the Convening of the Conference on Measures to Enforce the Fourth Geneva Convention in the Occupied Palestinian Territory, including Jerusalem, was held in Cairo, Egypt on June 14, 1999 and June 15, 1999, under the auspices of the Committee on the Exercise of the Inalienable Rights of the Palestinian People. The Meeting was attended by hundred Governments, eleven United Nations bodies and agencies, five intergovernmental organizations, forty-two non-governmental organizations and a delegation from Palestine. The two-day meeting was divided by three plenary sessions and adopted a final document which declared:

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The participants strongly supported the convening of the conference on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, as recommended in General Assembly resolutions ES-10/3, 10/4 and 10/5. They also strongly supported the convening by the High Contracting Parties of the said conference on 15 July 1999 at the United Nations Office at Geneva in accordance with General Assembly resolution ES-10/6, adopted overwhelmingly on 9 February 1999. The report of the Secretary-General of 14 October 1997 demonstrated clearly that the majority of the High Contracting Parties were in favour of the convening of a conference and recent consultations conducted by the depository also showed that the broad majority supports the convening of the conference on 15 July 1999. The participants called upon all the High Contracting Parties to participate actively in the conference.  

The convening of the Geneva Conference of the High Contracting Parties to the Fourth Geneva Convention on Measures to Enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, as recommended by the General Assembly at its tenth emergency special session in its resolution ES-10/6, assumed a historic importance, since it was the first of such meetings of the Contracting Parties to the Convention at that level. The significance of the Conference was that the “participating High Contracting Parties reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem . . . [and] would convene again in the light of consultations on the development of the humanitarian situation in the field.” The Conference will open the door for future similar meetings, held on a regular basis, to monitor implementation of the Convention in Palestinian territory or any other occupied territory where the provisions of the Convention are not applied and fully respected. In a more general context, the convening

27. Excerpt from the final document of the United Nations International Meeting on the Convening of the Conference on Measures to Enforce the Fourth Geneva Convention in the Occupied Palestinian Territory, including Jerusalem, organized in Cairo, June 14 - 15 1999, under the auspices of the Committee on the Exercise of the Inalienable Rights of the Palestinian People; see also U.N. Doc. A/ES-10/34 (1999); supra note 19, at 35 ¶ 7 (final document).


30. On October 18, 2000, the 10th Emergency Special Session was resumed in light of the serious deterioration of the situation on the ground in the Occupied Palestinian Territory, including Jerusalem, and after a permanent member of the Security Council indicated publicly on October 12, 2000 that it would veto any draft resolution presented to the Security Council. Following the Emergency Special Session, Resolution ES-10/7 on October 20, 2000 was adopted inviting the
of the conference can be considered as an expression of the international community’s renewed commitment and dedication, by reinforcing the rule of law in armed conflict.

In conclusion, it is my view that the Geneva Conference represented a unique opportunity to increase world-wide awareness of the solemn obligation of states to respect the norms of international humanitarian law in armed conflict, and take collective measures to ensure their implementation by all states without exception. The success of the Conference will contribute to creating a better world, a world based on the rule of law and respect for the principles of humanity and justice.

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depository of the Fourth Geneva Convention to consult on the development of the humanitarian situation in the field, in accordance with the statement adopted on 15 July 1999 by the above-mentioned Conference of High Contracting Parties to the Convention, with the aim of ensuring respect for the Convention in all circumstances in accordance with common article 1 of the four Conventions.

Accordingly, and following receipt of a letter from the Permanent Delegation of the League of Arab States in Geneva on October 13, 2000, which invited the High Contracting Parties to convene again their meeting in light of the situation in the field, Switzerland, in its capacity as depository of the Fourth Geneva Convention, distributed a note to the High Contracting Parties of the Geneva Conventions on November 17, 2000, submitting the above-mentioned proposal to reconvene the conference and requesting responses by December 31, 2000 on the appropriateness of such a meeting.
NEW LEGISLATION IN GERMANY CONCERNING SAME-SEX UNIONS

Stephen Ross Levitt*

Freudvoll und leidvoll, gedankenvoll sein, langen und bangen in schwebender Pein; himmelhoch jauchzend, zum Tode betrübt-glücklich allein ist die Seele, die liebt.**

Johann Wolfgang Von Goethe

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** "Joyful and rueful, Far off in a thought; Yearning And burning, With sorrow distraught; Sky-high exulting, To death burdened down; Happiness lives In the lover alone." JOHANN WOLFGANG VON GOETHE, EGOMONT: A TRAGEDY IN FIVE ACTS 59 (Charles E. Passage trans., Frederick Ungar Publishing Co. 1984).
I. INTRODUCTION

Various forms of legal recognition have been given to same-sex spousal relations in many nations of the European Union. At present Holland, Denmark, Sweden and France have implemented laws that Americans would find similar to the legislation concerning civil unions which came into force in Vermont in July of 2000. In the current year, following the lead of its Nordic neighbors, Norway and Sweden, Finland will likely implement legislation providing recognition in law to partnerships between two men or two women. This trend towards greater integration of Gays into Western European society, granting spousal rights, has been followed to a less dramatic extent even by nations that might be considered less socially liberal.

Last year, the United Kingdom removed one more legal obstacle that stigmatized Gays. Despite strong opposition from the House of Lords, the Blair government lowered the age of consent for homosexual relations to that of heterosexual relations. In October 2000, the Liberal Democratic Party adopted civil partnerships as part of its political platform. In Belgium, the government enacted a partnership registration law, though with fewer significant legal rights flowing to the "spouses."

3. Civil Developments, supra note 1, at 80.
5. See generally, VT. STAT. tit. 15, §§ 1201-1207 (discussing Civil Unions).
8. Sexual Offences (Amendment) Act, 2000, c. 44, §§ 1, 2 (Eng.).
10. The act provides for the registration and recognition of long-term relationships between two men or two women. However, some commentators suggest that the rights contained in this legislation are weaker than those in French law and significantly weaker than those found in the legislation in effect in Holland, Denmark, Sweden, and Norway. See Civil Developments, supra note 1, at 80. In terms of the integration of Gays and Lesbians into European society, one might note the recent Charter of Fundamental Rights of the European Union which states in Article 21: "Any discrimination based on any ground such as sex, race, colour, . . . age or sexual orientation shall be prohibited." 2000 OJ (C364) 13. The text can also be found at http://ue.eu.int/dl/docs/en/ CharteEN.pdf (last visited Mar. 9, 2001).
Within this framework of a Western European movement towards fuller emancipation of homosexuals culminating in recognized spousal rights, recent German developments are most significant. This article will discuss the colorful legislative history of the German same-sex partnership law. It will look at the key features of the legislation and explain the constitutional challenges that might prevent implementation on August 1, 2001. While it is true that the topic of this article narrowly construed involves same-sex spousal rights, the reader may find its scope to be broader. An examination of the legislative process related to this strikingly progressive bill brings into sharper focus significant aspects of the political and constitutional structuring of Germany.

II. THE HISTORICAL BACKGROUND

The coming of same-sex partnership legislation to Germany has been long and somewhat arduous. During the twentieth century, the German record on Gay rights has been a mixture of both progress and persecution. At the turn of the last century, the German Reich’s capital was Berlin, a city in which Magnus Hirschfeld lived, worked, established an institute, and developed and published his theories about the “third sex.” The Reich capital was also the city where government officials promulgated Paragraph 175 of the Criminal Code, which subjected homosexuals in all German states to prosecution for sodomy. In the time of the National Socialists, officials working for the Reich Ministry of Justice in Berlin made Paragraph 175 more draconian; homosexual activity, contemplated as well as consummated, became subject to prosecution. It is estimated that during the period of the Nazis, more than sixty thousand German homosexuals were prosecuted under Paragraph 175. Of this number, between

Hirschfeld, a Jew, a homosexual, and a physician, was a man possessed of enormous energy, imagination, and ambition. He became a leader of several psychological and medical organizations, the founder of a unique institute for sexual research, and the organizer of numerous international congresses dedicated to research on sexual matters and to the promotion of policies that would lead to an acceptance of homosexuals by society.

Id. Plant further states:
For a long time Hirschfeld had believed that homosexuals formed a third sex. (He would abandon this notion in 1910) . . . . He was convinced that homosexuals constituted a biologically distinct gender - a human being between male and female. He devoted much thought to establishing fine differentiations within this third sex.

Id. at 30.

12. Id. at 110. Plant states: “In December of 1934 the Ministry of Justice issued new guidelines stating that homosexual offences did not have actually to be committed to be punishable; intent was what mattered.” Id. at 112. Plant further states: “Later, courts decided that a lewd glance form one man to another was sufficient grounds for persecution.” Id. at 113.

13. Id. at 148.
5,000 and 15,000 “perished behind barbed-wire fences.” At the close of World War II when the Allies liberated Czechs, French, Jews, Poles, Roma and Sinti, and Russians from concentration camps, Gay inmates were freed from their Nazi captors, sometimes only to serve out the remainder of their sentences in “democratic” prisons. In 1957, the German Constitutional Court upheld anti-sodomy laws and commented that “homosexual activities violate the moral laws of society.” A resolution brought by the Party of Democratic Socialism before the German Parliament revealed that prosecutors opened over 100,000 cases and courts convicted 59,316 homosexuals under Paragraph 175 of the Criminal Code in the period between 1950 and October 1969. After 1969, the Federal Republic of Germany decriminalized sexual relations between two consenting adult males.

In regard to Gay rights, both Germanies rapidly moved forward since 1969. In the twenty-year period prior to unification on October 3rd, 1990, the Democratic Republic and the Federal Republic both promulgated laws that gradually eliminated legal burdens previously imposed upon homosexuals. Gays became more integrated into society in both the East and the West. After unification, it was hoped in the early 1990s that the tide of freedom sweeping across Eastern Europe and Eastern Germany would ultimately bring with it

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14. Id. at 154.
16. Homosexuelle, BverfGE 6, 389. At page 394 of the judgment, a most interesting commentary is provided. The court explains that there was a change in the attitude of the National Socialists after the murder of Ernst Rohn and those groups supporting him, which included a large number of homosexuals. According to the court, this led to the law of 28 June 1935 that sharpened the provisions of para. 175 of the Criminal Code. Plant confirms this opinion and states:

Inner-party rivalry grew more heated and bitter. Himmler, together with Heydrich and Göring, used every opportunity and means to drive a wedge between Hitler and Roehm, even going so far as to accuse Roehm, as Hitler’s only serious political rival, of planning a coup against the Führer... Hitler was forced to conclude that the SA, unruly and undisciplined, headed by a man whose objectives threatened his own, simply had to go.

Plant, supra note 11, at 55.
17. BT-Drs. (Bundestag-Drucksache) [Printed matter of the lower house of the German Parliament] 14/2620 from Jan. 27, 2000, p. 2, "Rehabilitierung und Entschädigung für die strafrechtliche Verfolgung einvernehmlicher gleichgeschlechtlicher sexueller Handlungen zwischen Erwachsenen in der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik," [Vindication and apology for the penal prosecution of consensual sexual relations between same-sex adults in the Federal Republic of Germany and the German Democratic Republic] [hereinafter BT-Drs. 14/2620]. The printed matter of the Bundestag can be found at http://dip.bundestag.de/parfors/parmain.htm.
greater emancipation for Gays, a more earnest Wiedergutmachung, as well as complete and final rehabilitation.

III. POLITICAL BACKGROUND OF THE LAST TEN YEARS

Chancellor Kohl’s government, which brought about German unity, concentrated on the very compelling and immediate economic problems that presented themselves in the early 1990s. The eastern part of the nation lacked adequate housing, employment, and infrastructure. Consequently, liberal social issues were sometimes left on the back burner. However, to characterize the last two Kohl administrations as a time of little progress on social issues would be unfair. In 1994, legislators finally struck Paragraph 175 from the German Criminal Code. Nonetheless, Chancellor Kohl and his Christian Democratic Party relied upon a base of support that included religious Catholics and Lutherans, as well as older persons and social conservatives. Pursuant to their more conservative Weltanschauungen, most Christian Democrats were prepared to grant toleration to Gays, to give them protection against physical assault or verbal degradation, but not to fashion a law giving legal recognition and legitimization to a spousal relationship between two men or two women.

In the 1998 election, an entirely new political landscape emerged. For the first time in more than sixteen years the Social Democratic Party, forming a coalition with the Green Party, won control of the government. With this completely new political constellation in place the situation looked hopeful for significant movement on the issue of recognizing and legalizing same-sex partnerships.


19. Kohl’s coalition partners were in some respects strange bedfellows. Today, the Free Democratic Party supports same-sex partnerships and a liberal social agenda. The Christian Social Union (CSU) exists in Bavaria only and is allied at the national level with the Christian Democrats (CDU). The CSU is socially conservative and opposes legally recognizing same-sex partnerships.


23. The SPD’s decision to choose the Green Party as its coalition partner constituted a new twist to German politics. Since 1969, all previous governments had chosen the Free Democratic Party (FDP) as the coalition partner. The FDP was in a coalition government with Chancellor Kohl’s Christian Democrats from 1982 to 1998. The FDP was previously in a coalition government with the Social Democrats in the Schmidt government from 1974 to 1982, and before that with the Brandt government from 1969 to 1974.
IV. THE "HAMBURG MARRIAGE" LEGISLATION AND THE RESOLUTION FROM THE EUROPEAN PARLIAMENT

A same-sex partnership law was ultimately brought to Germany on account of changing political tides and a complicated "tango" involving four levels of government: local, state, national, and European.

It has been argued that the now well-known "Hamburg Marriage" legislation of April 1999 brought this issue to the fore. However, this view is not historically accurate. Across northern Europe in the early 1990s, nations liberalized their laws on Gay issues. For years, members of the Green Party, Schroeder's coalition partners, had actively fought for Gay Rights on various European political planes. In 1994, a representative of the Green Party from Germany brought forth in Strasbourg before the European Parliament a non-binding, but morally significant, resolution. This resolution called upon governments in the European Union to recognize the rights of Gays and Lesbians to dignity and equality. The majority of European Parliament members who supported the resolution called upon nations in the Union to treat in law the sexual conduct of homosexuals in the same manner as heterosexual relations. They contended that just as heterosexual persons benefited from the institution of marriage, equality under law should accord same-sex partnerships similar advantages and protections.

Despite an outpouring of criticism including strong words from the Pope, the 1994 Resolution influenced liberals in Germany. Even before Schroeder was elected, three states, Hamburg, Schleswig-Holstein and Lower Saxony, brought before the Bundesrat (the upper house of the German legislature) a resolution calling on the Kohl government to take action toward implementing a same-sex partnership law.

The city-state of Hamburg decided not to wait until the national government moved on the issue of legislation recognizing same-sex partnerships. Its lower and upper houses of the legislature enacted a domestic

27. Hamburg constitutes one of the sixteen state governments. However, the impact of Hamburg's decision to legislate same-sex partnership registration must be less than that of Vermont in the United States constitutional system. In Germany, the Code of Civil Law, enacted in 1900, governs family law relationships, as well as inheritance rights, contract law, and torts. The purpose of the Civil Code of 1900 was to supplant state laws with a unitary nation-wide statutory code. Without amendments to the Civil Code that would have had to be enacted by the federal government, Hamburg's new partnership law had to remain, to a large extent, symbolic.
partnership law authorizing same-sex couples to register their relationships with the city-state officials. Despite the fact that the legislation stated that the partners’ standing in law would not change through this registration, some rights ultimately were extended to registered partners. In March 2000, the legislature extended a right to registered partners to deal with hospital officials in the city-state of Hamburg. In June 2000, a major insurance company, the Volksfürsorge, decided to grant benefits previously extended only to married employees to same-sex employees who submitted proof to the company of the registration of their relationship. Even if the “Hamburg Marriage” was mostly of symbolic importance, this legislation sparked national debate.

V. THE LEGISLATION PROPOSED BY THE FDP

The “Hamburg Marriage” legislation led within three months to action in the Bundestag. For many years, the platform of the Free Democratic Party, despite the long-standing political coalition with the Kohl government, called for legal recognition of same-sex partnerships. In June 1999, members of this party, now sitting on the opposition benches, challenged the Social Democrats and Greens to make good on their election promises to the Gay and Lesbian community. The Free Democratic Party tendered a draft of legislation to the lower house of Parliament (Bundestag) establishing a regime of life partnership between two persons of the same sex.

The draft legislation, “On the Regulation of the Legal Relations of Registered Life Partners,” contained fifteen articles, an introduction, and a

29. Id. at para. 1.

My party, concerning this question, has a long tradition. We are convinced on account of our liberal convictions that minorities may not be discriminated against, that the state should not be the censor of various forms of living arrangements, that what is allowed, should be what makes the individual happy provided that this does not harm others.
commentary on the effect and purpose of the bill. The introduction stated that with more than 2.5 million persons living in same-sex partnerships, there was a need for a new legal construct. On the one hand, this new legal construct would be used to end discrimination and unequal treatment of same-sex couples. On the other hand, this construct could not extend so far that it would violate constitutional norms protecting marriage and family.

To gain this balance, the draft legislation envisioned a series of amendments to various federal statutes and paragraphs of the Civil Code affecting property, inheritance, income tax, and residential tenancy laws. It set out requirements for entering a registered life partnership and provided a mechanism for dissolution. The bill envisioned by the FDP would have changed a number of penal and civil procedural rules. One of these changes set out that partners, like wives or husbands, would not be compelled to testify against one another. Upon the death of one of the partners, the “matrimonial” home could pass tax free to the other and a preferential share in the estate would be guaranteed to the surviving partner. Also, the bill would authorize doctors and other professionals, as well as government officials, to treat a same-sex partner in a manner similar to family members vis-à-vis information and decision-making.


34. Id. at p. 1. See also GRUNDGESETZ [Constitution] [GG] art. 6(1) [F.R.G.], which states: “Marriage and family enjoy the special protection of the state.”

35. Id. at pp. 3, 4, 6.

36. Id. at pp. 3-4. According to the bill, Paragraph 1588A would have been added to the Civil Code. This sets forth that if two persons of the same sex declare in the presence of a notary that they wish to enter a life partnership, and if they fulfill the prerequisites set out in subparagraphs 1, 2, 3, and 4, the Status Registry Office will enter the registered life partnership in the registry book concerning family matters. Dissolution was envisioned to occur after a one-year period of separation.

37. Id. at pp. 5-6. Article 3 of the draft concerns changes to the rules of civil procedure. Article 4 concerns changes to the Criminal Code. Article 5 concerns changes to the Code of Criminal Procedure.

38. FDP Draft of the Registered Life Partners Act, supra note 33, at p. 6. Article 5, subparagraph 1, speaks of changes to Paragraph 52 of the Code of Criminal Procedure.

39. Id. at pp. 3, 5, 6. Article 1, Subparagraph 8 speaks about amendments to the statute concerning the compulsory share that must be awarded to a surviving spouse. It amends Paragraph 1931 of the Civil Code and adds the words, “or life partner.” The effect of this will be that the life partner, unless explicitly excluded from the estate according to the terms of a “pre-nuptial” partnership contract, will have the rights vis-à-vis the estate as if he or she were a married spouse. For a translation of Paragraph 1931 in English, as it was written before any of these amendments were proposed, see SIMON L. GOREN, THE GERMAN CIVIL CODE 350 (Fred B. Rothman & Co.1994).

40. Id. at p. 5. Article 2 of the bill concerns changes to the Law Concerning Personal Status. According to the amendments proposed, the registered life partner would be treated as a family member in
The debate after the introduction of this bill followed party lines. For members of the Green Party, Social Democrats and some members of the Party of Democratic Socialism (hereinafter “PDS”), the draft introduced by the FDP did not go far enough. Specifically, the Social Democrats and Greens criticized the draft legislation on account of its failure to provide sufficient support provisions for each partner during the period of separation and subsequent dissolution of the relationship.\footnote{Stenographic Report Nov. 5, 1999, supra note 32, at 6028 A, B, speech made by Margot von Renesse (SPD); see also statements made by Volker Beck (Green Party) at 6035 D and 6036 A, B, C, D.} For these Bundestag representatives of the Green Party and the SPD, the draft of the Free Democrats was too malleable. It provided too few financial obligations between the partners, and in their view, the proposed law permitted dissolution too easily.\footnote{Id. at 6028 C, D, 6029 B.} One of the members commented that this is like trying to get washed without getting wet.\footnote{Id. at 6028 D.}

For the Christian Democrats this draft legislation went too far. A same-sex partnership law would undermine the special protections, which they viewed as exclusive in nature, granted to traditional marriage and family life set out in Article 6 of the German Constitution.\footnote{Id. at 6032 D (Norbert Geis of the Christian Democratic Party speaking before the Bundestag).} At the end of the day, the draft legislation of the FDP, put before the Bundestag in June 1999, constituted an important step in furthering the debate on this issue and it compelled the new government to move forward with its own draft legislation.

VI. THE DRAFT LEGISLATION FROM JULY 4TH, 2000


\text{law. The Law Concerning Personal Status (Personenstandgesetz), first enacted in 1937, established a unified regime of registration of all births, deaths, marriages, and familial relationships. Like a marriage registration, which will subsequently note the death of one of the parties, dissolution through divorce, or a decree of nullity, registered life partnerships will also be entered and various notations made as legal changes in the status of the relationship occur.}
revolves around the political and constitutional hurdles that needed to be cleared.  

European governments took different approaches to implementing same-sex partnerships. Nordic legislation extended spousal rights to two men or two women. However, from the bundle of rights and responsibilities that flowed to married couples, adoption rights were removed for same-sex partners. In France, due to political considerations, the government had to create a new legal institution. The Pacte Civile de Solidarité had its own set of rules and duties. This law was not limited to same-sex partners; it also provided a new legal construct for partners of the opposite sex who did not wish to exercise the option of marriage.

Article 6 of the Constitution made it impossible for German drafters to follow the established path of either the French or Nordic legislation. These civil servants had to illustrate a sure-footedness similar to that of mountain goats negotiating a precarious pass. The writers of this bill wanted to provide as many rights of marriage to same-sex partners as was possible; however, they

46. Compared with Nordic Legislation, which runs three or four pages, this draft law seems mammoth, with more than thirty-two pages and five major articles. Article 3 is the longest, containing 112 subparagraphs amending various federal laws. The justification for the law and other explanations are attached; these are thirty-nine pages in length.

47. Pedersen, supra note 2, at 290. Another limitation affects foreigners. “However, while two foreigners who are in the country for only a short period of time can enter into a marriage, at least one of the parties must be a Danish citizen to obtain a partnership registration.” Id. “In contrast to marriage, partnership registration requires that at least one of the partners be a citizen of Norway, domiciled there.” Roth, supra note 6, at 468. “According to Section 3 of the Partnership Act, registration of homosexual partnership had the same legal consequences as entering into marriage, with the exception of the right to adopt children as a couple.” Id. at 469. See also Government’s First Draft of the Life Partnership Law, supra note 45, at p. 33. The discussion attached to the Law to End Discrimination against Same-Sex Unions, supra note 45, at p. 33. The discussion attached to the Law to End Discrimination against Same-Sex Unions deals explicitly with this issue. It mentions that in many nations of Europe, there is already legislation in place concerning couples. In some European nations (namely Belgium, France, Holland, and some regions of Spain), it is explained there are three possibilities for heterosexual couples: they can marry, enter into a life partnership, which is registered and has legal consequences, or they can avoid entirely any formalization of the relationship. Gays and Lesbians can enter into a life partnership or avoid legal formalization. It is stated further that in other nations of Europe (namely Denmark, Norway, and Sweden), partnership laws are open only to same-sex couples, and similar legal consequences flow to same-sex couples as married couples with the exception of adoption. Also, in these Nordic nations, there are limitations imposed upon foreigners who come into the jurisdiction solely to conclude a same-sex marriage which might not be recognized where the couple is domiciled. Further, the Lebenspartnerschaftsgesetz states that because of the constitution in Germany, which provides marriage special protection, a new legal institute had to be constructed. This new construct could not make marriage and partnership rights identical. However, it could be designed to combat discrimination against same-sex couples and it could provide for rights and duties between the partners. What is the significance of the name given to the legislation? The legislation in Germany was framed not only as a partnership act, but a law to combat discrimination against same-sex partners.

48. Law No. 99-944 of Nov. 15, 1999, J.O., at p. 16959. Article 515-1 of this French legislation states (author’s translation): “A pacte civil de solidarité is a contract concluded between two persons who are of the age of majority, of different sexes, or the same sex, to arrange their life together.”
could not use the word "marriage." They could not design a French-styled compromise for both same-sex and opposite-sex unions, as legislation fashioning a quasi-marriage or "marriage light" would likely violate Article 6. Last but not least, if all the indicia of marriage were found to be present in same-sex partnerships, the constitutional norm protecting marriage and family life might be violated; hence, the Federal Constitutional Court might strike down the legislation.\textsuperscript{49} A final hurdle involved the sixteen German states and how they would react to this draft.

VII. THE BUNDES RAT AND THE SAME-SEX PARTNERSHIP LEGISLATION

Germany, like the United States, is a federal state. There is a bicameral federal legislature in Berlin and state legislatures in each of the sixteen states. However, there are some significant differences concerning the passage of federal legislation, particularly in regard to the role of the upper house. This constitutional framework would come into play in the passage of same-sex partnership legislation.

In Germany today, similar to the situation in the United States prior to the passage of the XVII amendment, representatives of the upper house of the German federal legislature (Bundesrat) are chosen by the state governments. At present there are sixty-nine votes in the Bundesrat; each of the sixteen states has three, four, five, or six votes depending on its population. Unlike the rules that govern the U.S. Senate, each German state must cast all its votes in one block.\textsuperscript{50} In the United States, there is a standard path for the passage of legislation. A bill must pass both the House and the Senate and the President must sign it into law. In the case of a presidential veto, legislation supported by a two-third's majority in both houses becomes law. In Germany, the President also must sign a bill into law, and under many situations a bill becomes law after a majority vote in both the lower and upper houses, the Bundestag and the Bundesrat. However, there are variations on this theme involving the role of the upper house in enacting legislation.

If a bill affects the rights or interests of states, it needs to win the consent of a simple majority of votes in both the Bundestag and the Bundesrat.\textsuperscript{51} However, if legislation is considered within the competency of the federal government, a lack of consent by the upper chamber does not automatically defeat the bill. The Bundesrat has to make a decision whether it wishes to lodge

\textsuperscript{49} Government's First Draft of the Life Partnership Law, supra note 45, at p. 33.

\textsuperscript{50} See GG art. 51 (3), which states, "Each Land [state] may delegate as many members as it has votes. The votes of each Land may be cast only as a block vote and only by Members present or their alternatives." See also KURT SONTHEIMER, GRUNDZÜGE DES POLITISCHEN SYSTEMS DER NEUEN BUNDESREpublik DEUTSCHLAND 290 (Piper 16th ed. 1995). See also ALFRED KATZ, STAATSRECHT: GRUNDKURS IM ÖFFENTLICHEN RECHT 181-2 (Luchterhand 12th ed. 1994).

\textsuperscript{51} A constitutional amendment needs the consent of two-thirds of the members of the Bundesrat.
an objection. If the Bundesrat lodges an objection to a bill within the competency of the federal government by a margin of two-thirds, this will require a new vote in the Bundestag with a two-third’s majority in order to override the “veto.” If the Bundesrat lodges an objection to a bill by a simple majority, this will require a simple majority in the Bundestag in a new vote to override the “veto” and place this legislation before the President for signature into law.\textsuperscript{52} A final option open to members of the Bundesrat is to vote for a committee to be constituted with members of both the Bundestag and the Bundesrat to negotiate compromise legislation.

When the question of same-sex partnership arose, it was estimated that there were twenty-six votes in the Bundesrat that were favorable to this legislation, and twenty-eight votes which would be cast against it. The question of passage came to concern the three coalition CSU/SPD states and the Rhineland that together possessed a total of fifteen “swing” votes.\textsuperscript{53}

For the Schroeder government, it became evident that there would not be a majority in favor of the partnership legislation in the Bundesrat. In late fall of 2000, the government decided to take the following measure. It split the legislation into two: the first impacted upon state governments and required a majority vote in favor in the Bundesrat, while the second bill was within the competency of the federal government as defined by the Constitution. The part that was within federal competency was named the “Law to End Discrimination against Same-Sex Unions: Life Partnerships,”\textsuperscript{54} while the second bill was named the “Law to Supplement the Life Partnership Act and other Laws [The Life Partnership Supplementary Law].”\textsuperscript{55}

\textsuperscript{52} Article 77 (4) of the German Constitution states:

If the objection was adopted with a majority of the votes of the Bundesrat it may be rejected by a decision of the majority of the Members of the Bundestag. If the Bundesrat adopted the objection with a majority of at least two thirds of its votes its rejection by the Bundestag shall require a majority of two thirds of the votes . . . .

\textsuperscript{53} When this legislation was considered, the SPD controlled two state governments, was in alliance with the Green Party in three states, and was in alliance with the Party of Democratic Socialism in the State of Mecklenburg-Pomerania. The conservatives (CDU or CSU) controlled four state governments and were in coalition governments with the Free Democrats in two. The CDU was also in coalition governments with Social Democrats in three states, and there was an alliance between the SPD and the FDP in the Rhineland.

\textsuperscript{54} BR-Drs. (Bundesrat-Drucksache) [Printed matter of the upper house of the German Parliament] 738/00 from Nov. 10, 2000 “Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften” [An Act to End the Discrimination against Same-Sex Unions: Life Partnerships] [hereinafter Law to End Discrimination].

\textsuperscript{55} BR-Drs. (Bundesrat-Drucksache) [Printed matter of the upper house of the German Parliament] 739/00 from Nov. 10, 2000 “Gesetz zur Ergänzung des Lebenspartnerschaftsgesetzes und anderer Gesetze (Lebenspartnerschaftsgesetzergänzungsgesetz LPartGERgG)” [An Act to Supplement the Life Partnership Law and other Laws, the Life Partnership Supplementary Law] [hereinafter Law to Supplement the Life Partnership Law]. See also Katz, supra note 50, at 209. Katz states that in the 1950’s, around ten percent of the legislation was considered to affect states’ rights. Today, about sixty percent of the legislation requires a
This division of the July 4, 2000 draft legislation into two separate bills led to the following results on December 1, 2000 when the members of the Bundesrat met and voted. They discussed the first bill, the Law to End Discrimination against Same-Sex Unions, and took two separate votes. The first count of hands sought to determine whether a majority of the Bundesrat thought that there needed to be a joint committee established between members of the Bundestag and Bundesrat to negotiate a compromise concerning the legislation. Only a minority voted in favor of this. A second vote was taken to determine whether a majority believed that the Law to End Discrimination affected state interests such that this legislation was not in the competency of the federal government. Again, only a minority voted in favor of this. These two votes, framed in negative questions, meant that the upper house would not lodge an objection to the first bill, and it could go to the president for signature. Concerning the second bill, there was no desire by a majority of the Bundesrat to form a committee to negotiate an acceptable version that later might be passed in the upper house. This second bill, because it affected states' rights, needed to win a majority of votes in the upper house, and there was no majority in favor of it. The Law to Supplement the Life Partnership Act was defeated.

VIII. THE LEGISLATION GOVERNING SAME-SEX PARTNERSHIPS

The Law to End Discrimination against Same-Sex Unions: Life Partnerships, which was signed into law on February 16, 2001 by the President of the Federal Republic of Germany, is divided into five main articles. Each article is divided into paragraphs and subparagraphs. Article 1 is the most significant as it sets out the main features of a life partnership. Article 2 lists majority vote in the Bundesrat because it affects the interests of the states. This still means that forty percent of legislation is viewed as within the competence of the federal government.


57. Id. at p. 551D. Rau unterzeichnet Partnerschaftsgesetz, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 17, 2001, at 7. The Bundestag asked for a committee to be formed comprised of Bundestag and Bundesrat members in order to consider whether the Life Partnership Supplementary Law, that was defeated in December, 2000, might be amended so that it would become acceptable to a majority in the Bundesrat. As of February 20, 2001, there has been no compromise reached.

58. Rau unterzeichnet Partnerschaftsgesetz, supra note 57, at 7. It is stated that President Rau has signed the Life Partnership bill into law on February 16, 2001. Its provisions will come into force on August 1, 2001. The law has been published, on February 22, 2001, in the Bundesgesetzblatt. (2001 BGBl. I s. 266).

59. Law to End Discrimination, supra note 54. Ulrich Thoelke of Viadrina University explains that when German legislation regulates a new subject matter, the most important substantive and/or procedural provisions are found in the first article. The name of the new legislation is also found in the first article. In the present case, although all five articles together are called "The Law to End Discrimination against Same-Sex Couples, the Life Partnership Act,” this legislation will ultimately come to be known by its shorter title...
a series of amendments to the Code of Civil Law which give force and effect to the partnership arrangements set out in Article 1, primarily, but not exclusively, in respect to residential tenancy and inheritance laws.\(^{60}\) Article 3, in a similar vein, sets out other amendments to various federal statutes, relating both to procedural and substantive rules, impacted by the creation of a life partnership.\(^{61}\) Article 4 sets out that those regulations amended by this legislation continue in force as regulations and do not take on the characteristics of statutory law.\(^{62}\) Article 5 establishes a mechanism for determining the date when the partnership legislation will come into force.\(^{63}\)

A partnership between two men or two women comes into being when “they both declare at the same time that they wish to establish a partnership with each other for the course of their lives.”\(^{64}\) At the time they make their declaration, each party must accept certain rights and responsibilities. Prior to the establishment of the domestic partnership, a decision must be made concerning the regime of “spousal” finances.\(^{65}\) Either the partners have already negotiated a contract setting out a division of assets upon dissolution, or they must accept the statutory regime set out in Paragraphs 1371 to 1390 of the Civil Code.\(^{66}\)

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\(^{60}\) Id. at art. 2.

\(^{61}\) Id. at art. 3.

\(^{62}\) Id. at art. 4.

\(^{63}\) Id. at art. 5.

\(^{64}\) Law to End Discrimination, supra note 54, at art. 1, para. 1.

\(^{65}\) Id. at art. 1, para. 1, Subparagraph 1.

\(^{66}\) Id. at art. 1, para. 6 (2). Paragraphs 1371 to 1390 provide a mechanism for the division of assets between spouses upon dissolution of the marriage or death. For the purposes of this discussion reference should be made to two paragraphs. Paragraph 1372 of the Civil Code states: “If the matrimonial regime is terminated otherwise than by the death of a spouse, the accrued gains shall be equalized according to the provisions of §§ 1373 to 1390.” Goren, supra note 39, at 240. Paragraph 1378 (1) states: “If the accrued gains of one spouse exceed the accrued gains of the other, the other is entitled to half of the surplus as an equalization claim.” Goren, supra note 39, at 241. Claudia Wendrich describes this regime in her article. She states:

In both jurisdictions [Manitoba and Germany] there is a so-called deferred community property regime. Its main feature is that there is no property which belongs to the community. The spouses remain owners of their separate properties, which each of them can freely dispose of and control, with few exceptions. At the end of the marriage there is only a monetary compensation. The amount of money that must be paid will depend both on the assets included in the calculation and on their fate during the marriage. The purpose of an equalization payment upon marriage breakdown is to share the economic achievements of the marriage and, by doing so, to implement the idea of marriage as an economic partnership. The individual contributions of each spouse are not decisive.
The freedom to contract a regime of "spousal" property and financial relations, similar to a pre-nuptial agreement in American law, is not unlimited. According to Paragraph 1, subparagraph 4, clause 4, "a partnership cannot be concluded if the life partners are not prepared to assume any of the obligations [of maintenance and support] set out in paragraph 2 of this act." At the time that the parties enter a life partnership, like persons entering a marriage in Germany, they have to consider the issue of a surname. A party can keep his or her own surname or take on the surname of his or her partner.

Paragraph 5 stipulates that the parties have duties to each other. This paragraph speaks about a duty of care and makes reference to the Code of Civil Law. It mandates that a partner must support the other during the course of the relationship in a manner similar to the obligations between a husband and a wife. This right of support, according to the new legislation, is not extinguished in its entirety by either separation or the dissolution of the partnership.

Pursuant to Paragraph 12, during a period of separation, one partner can claim support from the other. According to Paragraph 16, there may exist a duty of support between partners even after the relationship is dissolved. Subparagraph 1, for instance, states that "after the dissolution of the partnership if one of the parties cannot support himself, the other may be obliged to do so." Paragraph 16 is also noteworthy because one sees in it a hierarchy of relationships established, at least in terms of maintenance subsequent to the dissolution of the same-sex relationship. In the event of dissolution, a court is advised first to look to blood relatives to support the former partner, and then if this group of persons cannot support the relative or does not exist, the former partner's ability to support will be considered.

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67. Id. at art. 1, para. 1, subparagraph 4, cl. 4.

68. Id. at art. 1, para. 3 (1). If one party takes on the surname of his or her partner, s/he can fashion a hyphenated surname which contains the "maiden" name along with the partner's name. For example, if Smith enters into a life partnership with Jones, and s/he wishes to take on the surname Jones, this partner can legally be known as Jones, Jones-Smith, or Smith-Jones.

69. Law to End Discrimination, supra note 54, at art. 1, para. 5. There is a reference to Paragraphs 1360a and 1360b of the Civil Code. 1360a has four subparagraphs. 1360a(1) states: "The adequate financial support of the family includes all that is required, according to the circumstances of the spouses, to meet the household expenses and to provide for the personal needs of the spouses and the necessities of life for those of their children who are entitled to support." Goren, supra note 39, at 236. 1360b states: "If a spouse contributes more to the support of the family than he is obliged to give, the presumption is, in case of doubt, that he does not intend to demand restitution from the other spouse." Id.

70. Id. at art. 1, para. 12.

71. Id. at art. 1, para. 16 (1).

72. Id. at art. 1 para. 16 (3). This approach is interesting because the rule is different from the provisions governing support after the dissolution of marriages. In the case of husband and wife after divorce, the court will consider first the husband's or wife's ability to pay support before burdening relatives.
Prior to the passage of the Law to End Discrimination against Same-Sex Unions, the law as it stood generated certain results, which some members of both houses of the German legislature came to view as unconscionable. The AIDS pandemic exacerbated these problems. If a same-sex relationship ended through illness leading to death, the healthy partner during the illness, and after the death, was left in a very precarious position. There was a question concerning how hospitals were to handle relations between the same-sex partner and the parents of the patient. Who was to be informed of the medical condition of the patient and which party had the legal authority to authorize treatment? As well, complications arose concerning whether the same-sex partner was entitled to receive leave from work to assist the ailing partner and bereavement time in the event of death. Upon the death of the partner some very unusual results occurred. If a same-sex partner died intestate, pursuant to statutory provisions courts divided up his or her property between parents, and if they did not survive, among grandparents or siblings. Upon death, a residential tenancy in the name of the deceased would terminate. Hence, after caring for a sick partner, the same-sex partner might find himself or herself facing eviction from the apartment, fighting with the blood relatives over furniture, pots and pans, and excluded from receiving any money from the estate. He or she might even be excluded from participating during the funeral service or carrying out the partner’s last wishes.

The Law to End Discrimination against Same-Sex Unions attempts to remedy the above-described situations through a number of key provisions. Paragraph 10 sets out a right of inheritance for the partner. In the event that the parents or children of a deceased partner survive, and there is no will, the life partner is entitled to a quarter of the estate. A surviving life partner is entitled also to the household effects and gifts, which he or she received in anticipation of the establishment of the relationship. If a partner dies intestate, and there are no relatives of the first degree alive, nor grandparents, the surviving life partner will receive the entire estate.

In Germany, total freedom of testation does not exist. According to law, child/parent and husband/wife relations, in terms of support and inheritance, are never fully extinguished. A parent must provide for his or her child during that child’s minority, and even after the child becomes an adult, the parent must give that child a share of the estate unless a compelling reason exists for disinherition. A husband cannot exclude his wife from inheritance unless there

73. Bundesrat Resolution on a Legal Framework, supra note 26. See also Stenographic Report Nov. 5, 1999, supra note 32, at 6034 A/B, Statement by Volker Beck. He asks: “I would like to know whether there is one known case of a hospital ordinance which would prevent a husband or wife from going to the hospital room of his or her spouse. I know of many cases in which same-sex couples had this problem.”

74. Bundesrat Resolution on a Legal Framework, supra note 26, at Anlage I [attachment #1].

75. Law to End Discrimination, supra note 54, at art. 1 paras. 10 (1), 10 (2).
is a compelling reason.\footnote{Goren, \textit{supra} note 39, at 286, translating \S~2 para. 1601 BGB (Bürgerliches Gesetzbuch (Civil Code)): "Relatives in direct line are obliged to furnish maintenance to each other." \textit{See also} Paragraph 2333 at p. 417 that sets out conditions when a testator may deprive a descendant of his compulsory portion. \textit{See also} Paragraph 2335 at p. 418 that sets out conditions when a testator may deprive a spouse of the compulsory portion.} Paragraph 6 of the Life Partnership Law establishes a regime of support, inheritance, and obligation between the partners. A partner is \textit{prima facie} entitled to a share of the inheritance that can never be entirely extinguished. Subparagraph 6 of Paragraph 10 states:

If the deceased through his testamentary disposition of assets has excluded the life partner from the estate, the partner is entitled to bring a suit for his compulsory portion, which can constitute up to half the value of the estate. The provisions of the Civil Code setting out the compulsory portion of an estate are to be applied in such a manner that the life partner is treated [in law for the purposes of this section] as if he were a [married] spouse.\footnote{Law to End Discrimination, \textit{supra} note 54, at art. 1, para. 10(6).}

The issue concerning unexpected termination of a residential tenancy is dealt with by the first paragraph of Article 2, which sets out amendments to Paragraph 569 of the Code of Civil Law. Paragraph 569 of the Code of Civil Law will now state: "upon the death of the lessee, the spouse, who had a common household with the deceased can assume the tenancy. The same will apply for life partners."\footnote{\textit{Id.} at art. 2, subparagraph 2.}

If the partnership does not end by death, the provisions of Paragraph 15 set out three paths leading to dissolution. If both the partners agree that the relationship has come to an end, and they separate for one year, a court may grant dissolution. If only one of the partners wishes to leave the relationship, he or she will have to wait three years from the time that he or she separates and serves written notice upon the other party. If an unacceptable hardship would result from not granting dissolution more quickly, and this relates entirely to the conduct of the non-petitioning partner, the court, in its discretion, may grant dissolution prior to the expiration of three years' time.\footnote{\textit{Id.} at art. 1, para. 15, subparagraph 2, cls. 1, 2, 3.}

During the period of separation envisioned by Paragraph 15, issues of support, division of property and living arrangements will arise. Upon the separation of the parties, Paragraphs 12 and 13 of the legislation authorize the court, in the absence of an agreement between the parties, to decide upon a regime for the division of household goods and put into place rules concerning living arrangements.\footnote{\textit{Id.} at art. 1, paras. 12, 13.} Upon final dissolution, Paragraphs 18 and 19 come into
play and the court is authorized to make a final decision regarding living arrangements and the assignment of household effects. It is interesting to note that Paragraph 19, involving division of household effects between same-sex partners, refers the court to the laws dealing with the division of effects between married couples.81

The question arose concerning what would occur if a formerly married person with children entered a same-sex partnership or a child were born to a same-sex partner. Despite liberal laws across Europe on the issue of the establishment of same-sex partnerships, adoption and raising children seems to be the point where the boundary of permissiveness is reached. The German law does not envision same-sex couples adopting children. It does, however, provide for the situation when a partner has custody over a child. Although there are no provisions for adoption, Paragraph 9 sets out that "with the consent of the custodial parent . . . a partner will . . . have the right to help make decisions regarding the day-to-day life of the child."82 Interestingly enough, subparagraph 3 spells out clearly that "if this is in the best interests of the child," the family court can limit or exclude the participation, enumerated in subparagraph 1.83 Also, it is interesting to note that upon dissolution a partner is deemed to keep the partnership name and relations with the relatives of his or her former spouse. However, "the right to participate in raising a child . . . will not survive the separation of the partners."84

It is beyond the scope of this article to discuss each of the more than sixty amendments to federal legislation envisioned in Article 3. However, three paragraphs or subparagraphs illustrate both the attention to detail and extensive scope that characterize this new same-sex partnership law. Changes to the Code of Criminal Procedure will be examined. The new rules enunciated in regard to foreign residents who wish to bring a same-sex partner to sojourn in Germany are also worthy of discussion. Finally, to illustrate how the new law impacts upon a very wide range of federal laws, the provisions concerning security clearances will be examined.

Paragraph 56 of Article 3 sets out a series of amendments to the Code of Criminal Procedure. According to subparagraph 1, a judge will be required to recuse himself or herself from a case if his or her life partner is a defendant or a victim of the crime. Pursuant to subparagraph 2, the German Code of Criminal Procedure will be amended so that a witness in a criminal trial can no

81. Id. at art. 1, paras. 18, 19.
82. Law to End Discrimination, supra note 54, at art. 1, para. 9 (1).
83. Id. at art. 1, para. 9 (3).
84. Id. at art. 1, para. 9 (4). See also art. 1, para. 3(3) in relation names, and art. 1, para. 11(1) and (2) (concerning family ties).
longer be compelled to testify against his or her life partner or former life partner.\footnote{Id. at art. 3, para. 56. This paragraph makes amendments to paragraphs 22, 52, 149, 361, 395, and 404 of the Code of Criminal Procedure.}

The life partner of a defendant will gain the right to attend the trial. The legislation permits the life partner of a victim of a crime to be present at the trial and to make representations to the court. In the event that a victim dies, his or her life partner, like a husband or wife, under Paragraph 361 of the Code of Criminal Procedure, can petition the court to reopen the case. If the victim of the crime dies, his or her life partner can become a \textit{Nebenklager}.\footnote{JOHN LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE GERMANY 154 (West Publishing 1977), "Nebenklager, literally one who complains alongside, in the sense of alongside the public prosecutor; the victim or near kin of a victim of a crime who is allowed to intervene and to have right of audience in criminal trials under certain circumstances."}

Paragraph 47 of Article 3 makes four main amendments to the Law Concerning the Entry and Sojourn of Foreigners in the Federal Republic. Paragraphs 17, 18, and 31 of this statute currently create a right for minor children and a married spouse to apply for an entry and residence permit for the duration of the period while the foreign husband or wife legally resides in Germany.\footnote{Gesetz Uber die Einreise und den Aufenthalt von Auslander im Bundesgebiet, v. 9.7.1990 (BGBl. I S.1354), [The Law concerning the Entry and Sojourn of Foreigners in Lands [belonging to the] Federation], paras. 17, 18, 31.}

When the Life Partnership Act comes into force, a same-sex partner will be able to apply also for an entry permit to be reunited with his or her partner and establish a common residence on German soil.\footnote{Law to End Discrimination, supra note 54, at art. 3, para. 47.}

Paragraph 4a of Article 3 provides for a series of amendments to the Law Concerning Security Clearances. When a security clearance is authorized, the life partner of the applicant will be included in any background check. The Law Concerning Security Clearances provides that if a man or woman enters into a marriage during the period while clearance is still being investigated, the new spouse will be included in the background check. When the Life Partnership Act comes into force, if a life partnership is concluded before the clearance is finished, the new partner will, like a new spouse, be included in the background check.\footnote{Id. at art. 3, para. 4a.}

Section VII of this essay explained that because of opposition in the upper house, the original draft of this legislation was split into two parts. One part needed the consent of the Bundesrat, and the other did not because it was within the competence of the federal government. The Law to Supplement the Life Partnership Act was defeated on December 1, 2000 in a vote of the Bundesrat.\footnote{Stenographic Report, Bundesrat, Dec. 1, 2000, supra note 56, at p. 551D.
Put in a nutshell, there are at least four main features of the original draft from July 4, 2000, which will not come into force in August of 2001.

The first feature concerns the solemnization and registration of the partnership. In Germany today, there is a registry office in each town and city that records in separate registry books births, deaths, marriages, and family relationships. The first draft of the legislation envisioned the participation of these offices in each state in the registration and solemnization of same-sex partnerships. As well, the Supplementary Law that the Bundesrat defeated had envisioned the addition of a fifth book to the list, a same-sex partnership registry. When it became clear that the states would not consent, the government changed the legislation to remove references to these state offices. At present a question remains concerning exactly where the registration will take place and which government agency will be responsible for record keeping.91

Second, the government had hoped to award to same-sex couples a number of tax benefits that accrue to married couples.92 This has been defeated through the refusal of the Bundesrat to pass the supplementary legislation. Third, the government had hoped to amend inheritance and tax laws to permit assets to transfer between the partners at death without tax liability accruing, and this will not be possible at present.93 Fourth, the government had hoped to change embassy and consular law such that partnerships could be registered abroad and German consular officials would be better instructed how to assist German same-sex partners.94

IX. CONSTITUTIONAL CHALLENGES

Even before the first partnership is established, there is a strong possibility that this legislation will face a challenge before the Federal Constitutional Court. Unlike the United States, where judicial review will occur only if a case and controversy exists, Germany provides for abstract review of the constitutionality of legislation. The provisions of Article 93(1)(2) of the Constitution of the Federal Republic of Germany provide two avenues whereby the Federal Constitutional Court will be required to review legislation after it is enacted, and sometimes before it comes into force.95

A review before the Federal Constitutional Court can be triggered by the lodging of a formal complaint by any one of the sixteen state governments
alleging that a federal law violates any fundamental principle set out in the constitution. Abstract judicial review by the Federal Constitutional Court can also be compelled if one-third of the members of the Bundestag sign a petition challenging the constitutionality of a recently enacted federal law in part or in its entirety.  

The provisions of Article 93 permit results which would be unexpected by American jurists. An American jurist might say that constitutional review, as permitted in Germany, may actually limit or circumscribe rights that have been granted or extended by the federal legislature. Unlike the Bill of Rights, which establishes limits upon the power of the federal government, the Constitution of Germany extends governmental duties further. It is incumbent upon the German government not only to refrain from implementing policies that limit or infringe rights, but also actively to protect and ensure rights.  

A constitutional challenge to the Life Partnership Act might well adopt the following argument. Article 6 of the German Constitution clearly states that marriage and family are subject to special protection by the state. The new same-sex partnership legislation creates a paradigm which undermines the legitimacy and sanctity of marriage between a man and a woman and traditional family life.  

To understand a constitutional challenge along these lines one might consider the German Abortion Case of 1975. The Abortion Case concerned legislation of the Bundestag that liberalized abortion rules in Germany. For all intents and purposes, abortion was permitted in the first twelve weeks with relatively few limitations. In 1974, the Christian Democrats objected to liberal legislation brought forward by Social Democrats and argued that the law

96. GG art. 93 (1) (2) states that the Federal Constitutional Court shall rule “in case of a disagreement or doubt as to the formal and material compatibility of federal or land legislation with this Basic Law or as to the compatibility of land legislation with other federal legislation at the request of one third of the Members of the Bundestag.” “Land” in Article 93 means a state of Germany.  

97. See Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 EMORY L. J. 837 at 861 (1991), which states:

German constitutional theory posits the dual character of basic rights. These rights are both negative and positive. A negative right is a subjective right to liberty. It protects the individual against the state, vindicating his right to freedom and personal autonomy. A positive right, on the other hand, represents a claim that the individual has on the state.

See also Martin Rhonheimer, Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy, 43 AM. J. JURIS 135, 150, which states: “Fundamental rights not only represent the freedoms of the individual in relation to the state but also express an order of values to be realized by the political community; they constitute the aims that define state functions and tasks.”

violated constitutional norms, the right to life under Article 2 (2) and the right to dignity under Article 1. 99

Despite arguments concerning a woman's right to the free development of her personality, guaranteed by Article 2 (1), the Federal Constitutional Court struck down the legislation and required the federal government of Germany to re-institute criminal sanctions for abortions. The Court determined that the right to life under Article 2 of the Constitution extended to fetuses fourteen days after conception. Any interference with pregnancy, after the fourteen days had passed, would be a prima facie deprivation of a constitutionally protected right to life. The Court carved out from the general prohibition against abortion four specific exceptions. These included pregnancies that threaten the life of the mother, cases of rape or incest, gross deformation of the fetus, and social hardship. 100

The approach of the Court in the Abortion Case is significant. In that case, legislation, which liberalized law and extended rights to women, was held to be unconstitutional. The Court found that the government could not extend these rights to women without violating the constitutional protection of life. Analogously, German conservatives have already made the argument that the state has a positive obligation to protect and promote the institution of marriage, and that this protection must be exclusive. 101 They further argue that any legislation that legitimizes or recognizes any other form of union between two persons undermines that exclusivity.

For several reasons it is not certain that the Life Partnership Act will be struck down. German, like American, constitutional law is often animated by the past. When a court makes a decision in an American constitutional case concerning equal protection or due process, the legacy of slavery and segregation seldom remains far from the judge's thoughts. 102 Similarly,


100. Id. at 642. The Court says: "The obligation of the state to take the life developing itself under protection exists, as a matter of principle, even against the mother." See also id. at 648.

101. Stenographic Report, Bundestag, Nov. 10, 2000, supra note 98, at p. 12614D, (speech by Norbert Geis of the Christian Democratic Party). He states marriage and family enjoy a constitutional protection that is exclusive. Although the opinion of Bundestag Representative Geis is not decisive on this matter, it is important to note that the Federal Constitutional Court has interpreted marriage under Article 6 to mean a union between a man and a woman. See Stenographic Report, Nov. 5, 1999, supra note 32, at p. 6035C, statement by Volker Beck of the Green Party.

102. See Runyon Et Ux., DBA Bobbe's School v. McCrary et. al., 427 U.S. 160 (1976). See also Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964). See also Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). See also Regents of the University of California v. Bakke, 438 U.S. 265 (1978). In Bakke, Justice Marshall said, "Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights." Id. at 387. Further, Justice Marshall stated:

In light of the sorry history of discrimination and its devastating impact on the lives of
constitutional judges in Germany are concerned with the past, including the
Third Reich, and its negative legacies which must be overcome.

The majority of the Federal Constitutional Court in 1975 in the Abortion
Case wrote in relation to negative legacies that: "Underlying the Basic Law are
principles for the structuring of the state that may be understood only in light of
the historical experience and the spiritual-moral confrontation with the previous
system of National Socialism." ¹⁰³

Recently, there has been a spiritual-moral confrontation with the past in
regard to National Socialist treatment of homosexuals. On January 27, 2000,
on the fifty-fifth anniversary of the liberation of Auschwitz concentration camp,
the members of the Party of Democratic Socialism brought a motion before the
Bundestag that called upon the government to declare that all prosecutions by
the Nazis under Paragraph 175 and 175a were illegal.¹⁰⁴ Secondly, it called
upon the government to offer compensation to the victims and to establish a Dr.
Magnus Hirschfeld institute, which would be supported by both state and
federal money, to document the persecution of Gays in Germany during the
Third Reich. A second motion brought forth on the same day noted that in both
the Federal Republic of Germany and the German Democratic Republic
consensual sexual relations between same-sex adults were punishable with
prison sentences. It called for the vindication of Gays and an official apology
by the German government for these prosecutions, and striking from the federal
registry of criminals the names of all persons convicted under Paragraph 175.¹⁰⁵

Negroes, bringing the Negro into the mainstream of American life should be a state
interest of the highest order. To fail to do so is to ensure that America will forever
remain a divided society.

Id. at 396.

103. The Abortion Case, supra note 99, at 662.

104. BT-Drs. (Bundestag-Drucksache) [Printed matter of the lower house of the German Parliament]
14/2619 from Jan. 27, 2000, "Unrechtserklärung der nationalsozialistischen §§ 175 und 175a Nr. 4
Reichstrafgesetzbuch sowie Rehabilitierung und Entschädigung für die schwulen und lesbischen Opfer des
NS-Regimes," [Declaration that Paragraphs 175 and 175a No. 4 of the Criminal Code during the Nazi period
were unjust and a call for the vindication of, and apology to, Gay and Lesbian victims of the Nazi Regime].
See also a motion brought by the Social Democrats and the Green Party: BT-Drs. (Bundestag-Drucksache)
[Printed matter of the lower house of the German Parliament] 14/2984 from Mar. 21, 2000, "Rehabilitierung
der im Nationalsozialismus verfolgten Homosexuellen," [Vindication of Homosexuals persecuted during the
National Socialist regime]. These two motions have been given consideration by the legal committee of the
Bundestag and the report and recommendations can be found in the following document: BT-Drs.
(Bundestag-Drucksache) [Printed matter of the lower house of the German Parliament] 14/4894 from Nov.
29, 2000. A resolution apologizing to Gays for persecution during the Third Reich was passed unanimously
by the Bundestag on December 7, 2000. See Plenarprotokoll 14/140, Deutscher Bundestag, Stenographischer

105. BT-Drs. 14/2620, supra note 17.
The recent domestic partnership legislation can be viewed as the culmination of the integration of homosexuals into German society and a somewhat late Wiedergutmachung (reparation) for past wrongs committed by previous regimes, including, but not exclusively, the Nazis. Today, human dignity is the highest value of the German constitutional order. As well, under Article 2, each citizen has the right to the “free development of his personality.”

Article 3 states that “all people are equal before the law.” Politicians have argued that a same-sex partnership law helps make Gays and Lesbians equal before the law because it eliminates to a large extent the intended and unintended discrimination against same-sex relationships that arises from a system of laws made by the majority for the majority. A law which makes living as man and man or woman and woman less socially awkward could be viewed as providing two and one-half million persons with the freedom to develop their personalities and a right of dignified living.

The Federal Constitutional Court also might hold that marriage rights under Article 6 are not injured to any extent by giving homosexuals the right to legitimize their relationships. This group of persons, by definition, is excluded from taking advantage of marriage rights, which are extended only to heterosexuals. The Court could find that despite the introduction of a same-sex partnership law, marriage rights can be upheld fully as they always have been. The chance to right past wrongs, to protect groups victimized by the Nazis, to defend dignity, to protect the right of the free development of personality, and to ensure that “all people are equal before the law” are compelling motives for the Federal Constitutional Court to view the legal recognition of same-sex partnerships as neither detrimental to nor competitive with the institution of marriage.

106. Bundestag Representative Hanna Wolf (Munich) of the Social Democratic Party states that what the legislation concerns may be found in its title: The Law to End Discrimination against Same-Sex Couples. She further states that “after one century of discrimination, this is a long overdue reparation [‘Wiedergutmachung’] to Lesbians and Gays.” See Stenographic Report, Bundestag, Nov. 10, 2000, supra note 98, at 12620 D.

107. Id. at 12624 A, (speech by Volker Beck, Green Party). He makes reference to Article 2 (1) in his discussion concerning the reasons why the same-sex partnership legislation is constitutional.

108. Id. at 12628 B, C, speech by Alfred Hartenbach, Social Democratic Party. He says that rather than violating constitutional norms, the Partnership Law fulfills the requirements of Article 3 of the Constitution.

109. Of course, there remains a possibility that the Federal Constitutional Court will interpret Article 6 to be exclusive in nature thus making competitive forms of “spousal” arrangements unconstitutional. There also might arise questions concerning the government’s division of the original legislation into two bills in order to circumvent opposition in the Bundesrat.
X. Conclusion

Granting legitimization to same-sex spousal relations started in Denmark and spread to other Nordic nations. This trend toward liberalization ultimately influenced the European Union, with its focus on human rights. From the European Parliament came a resolution that spurred on discussion about the legal treatment of Gays and Lesbians. In the 1990s, even socially conservative nations began to reevaluate their positions on these issues, and at the very least, they took action to end those practices that were most discriminatory.

Located at the heart of Europe, Germany watched as its neighbors, France, Belgium, and Holland experimented with laws making spousal rights more flexible, either by the institution of "quasi-marriage" or extending to homosexuals the possibility of a recognized legal framework for their relationships. Pressure mounted upon the Kohl government to move forward on the issue of same-sex partnerships. Ultimately with a new political constellation in place in September 1998, it became possible for legislation to be drafted that would change German society fundamentally.

Since 1945, Germans have struggled to bring democracy and human rights to Central Europe. Against an historical backdrop of totalitarianism, the German Constitution of 1949 defends democracy and places the protection of the dignity and worth of the individual as the highest societal good. In 2001, on account of this partnership legislation, the German government will grant dignity and vindication to a group in society that had been victimized by the Nazis. This legislation will overcome many defects of past legal structures, and Gays and Lesbians will become more fully integrated into German society.

On account of the fact that Germany is the most wealthy and populous nation in the European Union, its example will be significant. The German legislation, combined with initiatives in Belgium, Denmark, France, Holland, Sweden, and regions of Spain, has turned the tide in terms of favoring legitimization of same-sex relationships in the European Union. One can anticipate that because of this recent initiative taken in Berlin, same-sex partnership laws will become in the next decade an entrenched norm of the European Union and an established practice all across the European continent.

*** This article was completed in May of 2001, and it represents the legal situation as of that date. On August 1, 2001, the partnership legislation went into effect.
THE MARITIME SLAVE TRADE: A 21ST CENTURY PROBLEM?

Samuel Pyeatt Menefee*

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I. INTRODUCTION

Whoever, being a citizen or resident of the United States and a member of the crew or ship’s company of any foreign vessel engaged in the slave trade, or whoever, being of the crew or ship’s company of any vessel owned in whole or in part, or navigated for, or in behalf of, any citizen of the United States, lands from such vessel, and on any foreign shore seizes any person with intent to make that person a slave, or decoys or forcibly brings, carries, receives, confines, detains or transports any person as a slave on board such vessel, or, on board such vessel, offers or attempts to sell any such person as a slave, or on the high seas or anywhere on tide water, transfers or delivers to any other vessel any such person with intent to make such person a slave, or lands or delivers on shore from such vessel any person with intent to sell, or having previously sold, such person as a slave, shall be fined under this title or imprisoned not more than seven years, or both.1

At first glance, 18 U.S.C. §1585 appears to be a curious artifact embedded in the United States Code. It is part of a chapter on peonage and slavery, whose other seven sections deal with peonage,2 involvement with vessels for the slave trade,3 enticement into slavery,4 sale into involuntary servitude,5 service on slavers,6 possession of slaves,7 and the transportation of slaves from the United States.8 At first glance, these laws would appear to be more appropriate for a nineteenth century historical treatise or a romantic novel rather than a code constituting the law of the land. This paper will examine the existence of the maritime slave trade and analogous problems in the twentieth century and consider supporting arguments and evidence for the retention and elaboration of 18 USC § 77 as we move into a new millennium.

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II. THE MARITIME SLAVE TRADE IN THE TWENTIETH CENTURY

A. "Beyond the Horizon": The 20th Century "Classic" Slave Trade Overseas

While the Atlantic and East African slave trade had largely ceased by the beginning of the twentieth century, classic maritime slaving was still practiced in the Red Sea and Persian Gulf area. It seems likely, for example, that the kidnaping of Eritrian women by pirates (which led to calls for more stringent policing by the Italian government) was for slaving purposes. The second half of the twentieth century has shown persistence in this trade. Gerald de Gaury, writing about his Arabian experiences in 1950, noted that "[i]n 1941 the price of a small boy was about £20, for a strong young male £50 (for a Somali rather more), [and] for a small girl £12, which is considerably less than the price of a good horse... and a little less than that of a camel." According to de Gaury, "the main route for them is to Mecca from the Yemen, where they are brought by sailing-boats from the opposite African coast." A November 7, 1953, report from France's ambassador to the Saudis claims that naturalized Saudis of Senegalese origin posed as Muslim missionaries in Sudan, Upper Volta and Niger and inveigled the faithful to make the haj (pilgrimage). This apparently occurred despite the 1936 decree of King Saud prohibiting the importation of slaves by sea. They were then transported by truck to Port Sudan or Suakin on the Red Sea and took specially constructed dhows across to Rith, only to be declared illegal pilgrims, thrown into prison and have their services sold. Sean O'Callaghan reports a generally similar scam, with the exception of the initial temptation and with land transportation being by camel on an individual basis.

O’Callaghan also found evidence of the funneling of slaves through Suakin from as far away as Zaire "and was given specific information from one slaver about a shipment of 10 juveniles, mainly Gallas, whom he had sent from Suakin..."
to Lith."

"Djibouti has been another transhipment port for slaves from southern Ethiopian who have been sent across the Red Sea to Yemen," a city also "identified as a clearing house for slaves landed by dhow from Sudan [and] Ethiopia..."

Africa has not been the only source of slaves for the Arabian peninsula during the twentieth century. De Gaury notes that:

Among the white-skinned slaves from Persia or Indian Mekran, who fetch a higher price, are some who remember whence and how they came. It was usually to the Oman coast, but there are other clearing-houses on the mainland, much farther north, where cargoes of boys according to a good authority, were still arriving in 1947. The trade is if anything increasing, probably because of the cheapness of money consequent upon the War, the high cost of labourers, wives, and servants.

Noting the difficulty in stanching this flow, de Gaury states that "it would, to be effective, entail the use of a number of fast vessels especially built to the quest."

According to Viscount Maugham in a House of Lords debate on July 14, 1960, a slave route extended from Iran and Iraq across the Persian Gulf to the Arabian peninsula. O'Callaghan states that he was told that as late as this date, men were shipped from Abadan to Kuwait by dhow, smuggled to Bahrain and sold into slavery. A story said to have appeared in a November 1958 Iranian newspaper reported the discovery of two starving men on a Persian Gulf island—all that remained of a group of 40 transportees who had been marooned there by a dhow captain seeking to avoid the Iranian Navy. Many such individuals were allegedly employed in pearl fishing and kept in a perpetual state of indentured servitude through loans for food.

While not prolific, this evidence suggests a continuing trickle of slaves shipped by sea, which argues that 18 U.S.C. § 77 can be viewed as more than an historical artifact. The development of international law on the subject during the century bolsters this conclusion.

15. Dr. Samuel Pyeatt Menefee, supra note 9, at 43.
16. Id.
17. Id.
18. Gerald de Gaury, supra note 12, at 90.
19. Id.
20. Dr. Samuel Pyeatt Menefee, supra note 9, at 43. See also Sean O'Callaghan, supra note 9, at 122-23, 174.
B. The Slave Trade and Twentieth Century International Law: A Brief Overview

Initially, twentieth century developments in the law on slavery related to earlier agreements dealing with the African Slave Trade such as the General Act for the Repression of the African Slave Trade. The 1919 Convention of St. German-en-Laye declared that its contracting parties would "endeavour to secure the complete suppression of slavery in all its forms and of the slave-trade by land and sea." Greenridge notes that the Brussels act of 1890 "is still in force as between parties to it which did not adhere to the Convention of St. Germain-en-Laye . . . and doubts are entertained by international lawyers of authority as to whether it was in fact abrogated even between parties to the convention." A League of Nations investigation of slavery by the Slavery Commission of 1924 included not only the Red Sea trade, but forms of servitude in Liberia and Ethiopia resulting in the 1926 Convention to Suppress the Slave Trade and Slavery. This recognized the metamorphosis in the trade, as parties were not only to "prevent and suppress" the practice, but "to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms," including certain forms of forced labor. Due to the continuation of slavery problems, a second League of Nations Standing Committee was established in 1932, which called for a Permanent Advisory Committee of Seven Experts on the subject. After World War II, the new United Nations appointed an ad hoc committee of four to consider the problem of slavery.

The committee recommended that the definition of slavery in the 1926 Slavery Convention was accurate and adequate and that the United Nations should assume the powers and functions of the League of Nations under the Slavery convention. It further recommended that a Supplementary Convention on Slavery should be prepared to remedy deficiencies found by experience to exist in the 1926 Slavery Convention.

This resulted in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery in 1956, stating that "[t]he act of conveying or attempting to convey slaves from..."
one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offense under the laws of States Parties . . . ."27 The First United Nations Conference on the Law of the Sea considered the subject and embedded an anti-slavery article in the 1958 Convention on the High Seas: "Every State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall, *ipso facto*, be free."28 This wording was adapted as article 99 of the 1982 Convention on the Law of the Sea.29 Thus, it can be seen that at the close of the twentieth century, a strong continuing basis exists in international law for criminalization of the slave trade.

C. "The New American 'Slavers': A Slave Trade Analogue in Western Waters

It is comforting to assume that problems like those of the slave trade only exist in some "diminished capacity" over the horizon. The truth, unfortunately, is otherwise, as slave-trade analogues have been occurring in American waters with increased frequency. The problem of illegal Chinese immigration provides one obvious case study.

In September 1991, American authorities first intercepted a vessel carrying illegal Chinese immigrants.30 It has been estimated that in the years following:

[S]ome 50 Chinese crime groups have smuggled tens of thousands of Chinese into the U.S. The routes vary, some plying the seas, others the air or the overland paths through Mexico. But the sticker price of $20,000 to $35,000 per head holds steady. In the southern coastal province of Fujain, home to some 80% of these immigrants, families band together to raise the funds, thinking they are making a down payment not only on a loved one’s future but on their own as well. For their effort, they often bankrupt their savings—only to sell the loved one into slavery.31


On June 6, 1993, the Golden Venture grounded off Rockaway peninsula in Queens. Some two hundred and eighty five illegal Chinese immigrants were aboard, and six to eight of them perished in the surf. The conditions aboard the rusty freighter came as a shock. Flies swarmed among the clothing, blankets, and personal possessions that were strewn everywhere, and the smell of urine and fecal matter filled the air. Says Petty Officer Chris O’Neil of the Coast Guard:

You don’t like to say something smelled like death, but . . . [n]o food was in evidence, save some rice. An assortment of bags illustrated the efforts of the ship’s 285 immigrants to collect rainwater for drinking. Despite the damp conditions in the cargo hold, exposed wires jutted every which way.33

Asian analyst Paul George notes that:

Typically, a down-payment is made in China with the balance being paid off over many years of virtual slave labor in the garment and restaurant industries . . . . Retribution for failing to make repayment is believed to be harsh. For the individual, the voyage usually involves many months crowded into the hold of an unseaworthy vessel with inadequate toilet and bathing facilities. Paid enforcers maintain brutal control over the passengers and distribute the food, which consists only of rice.34

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33. Jill Smolowe, supra note 31, at 29. Such appalling conditions were not unusual; the Chens, a Fujian couple who arrived illegally in 1992, subsisted for two months “on a single bottle of water weekly and a single meal daily.” Id. See also Jennifer Mattos, supra note 32.

34. Paul George, supra note 31.
While several vessels directly targeted the western and eastern coasts of the United States, other sea smugglers have used a more oblique approach: Mexico.\textsuperscript{35}

Upon arrival, assuming they are not intercepted, the immigrants have to fade into American life, but in fact enter a strange half world run by the Chinese tongs and “snakeheads” who have sponsored their immigration. “We live like pigs and eat like dogs.” Working for minimal wages with no legal safeguards, many of the immigrants live in gang-run safe houses.\textsuperscript{36} Tales of forced behavior abound. Twice during 1998 “gang members surrounded the Bowry quarters, blocked the fire escapes, then calmly robbed the residents of their savings. The victims didn’t complain, they said, because they feared retaliation against their families in China if they caused trouble for the gangs.”\textsuperscript{37} On other occasions, when workers cannot pay off their immigration debt, the gangsters offer them a deal. The illegals describe their ex-employer’s operation and return with shotguns and masks to rob the place with members of the gang. The debt is then canceled. “Local police are usually stumped, but we know exactly what

\textsuperscript{35} See Id.; THE ECONOMIST, July 24, 1993, \textit{available at} Westlaw: 1993 WL 12190650 (noting a single maritime seizure which netted 661 illegal Chinese immigrants); Yogana Sharma, \textit{China: International Action Needed to Stop Human Smuggling}, Inter Press Service Global Information Network, \textit{available at} Westlaw: 1993 WL 2538372 (noting the repatriation of three boatloads of illegal immigrants from Mexico). See also Bert Wilkinson, \textit{Authorities Investigating Major Alien Smuggling Ring}, Inter Press Service Global Information Network, \textit{available at} Westlaw: 1994 WL 2588935 (smuggling of immigrants by boat from Guyana). Peter Kwong notes that Chinese human smuggling entails an elaborate and sophisticated international network, which is said to be financed and masterminded in Taiwan. The whole operation is like a global baseball game. Most often, the sprint to first base involves the transfer of would-be immigrants from Fuzhou or Wenzhou to international waters, where they are picked up by Taiwanese cargo ships or fishing boats. After each vessel is fully loaded (the shipping companies are paid by the head), it sails south to Thailand for refueling before making the dash to second base, across the Pacific to the coast of Central America or Mexico. The southern sea route is specifically chosen to avoid detection by U.S. reconnaissance satellites monitoring American coastal waters. (The path selected by the Golden Venture-making a landing off the American shoreline-is the most risky and least popular route.) Having landed, the smuggling crew escorts its charges to third base, crossing the U.S. border by land. If the ship comes ashore in Central America, the immigrants travel through Mexico City, cross the border clandestinely and arrive in Houston. If they land in the Baja peninsula of Mexico, they cross into San Diego and rest in safe houses in Monterey Park before making their way to New York. Kwong, \textit{China’s Human Traffickers: Wake of the Golden Venture}, 259 THE NATION no. 12, October 17, 1994, \textit{available at} Westlaw: 1994 WL 1344869. See also CLIVE CUSSLER, FLOOD TIDE: A NOVEL (1997); small watercraft plying between islands in the St. Lawrence river, CP, \textit{Human Smuggling Ring Busted}, in LONDON FREE PRESS (1998), \textit{available at} Westlaw: 1998 WL 27450952 (noting that “[t]he ring is believed to have made 33 smuggling runs in 60 days, moving from eight to 24 persons per run and adding that the illegals ‘paid $40,000 US or more and some worked as indentured servants for years to pay their fee!’”).

\textsuperscript{36} Slaves of New York, 72 TIME, November 2, 1998 (noting the presence of 300 such safe houses in New York city).

\textsuperscript{37} Id.
happens," says [New York city police intelligence officer Tony] Ong. "It has been a nationwide problem."

Such illegal workers "are slaves, pure and simple," says a United States immigration official. "Many end up in bondage, forced to become gang enforcers or drug carriers." The coercive nature of the smuggling has been confirmed by at least one of the bosses involved in the racket, of his $20,000 prepaid package trips, which he claims have a success rate of 80% to 90%.

"What if the Chinese illegal is detained?" a writer asks.
"We will get him out," Big Boss says cockily.
"What if the full fee cannot be paid?"
"That," Big Boss says calmly, "is very dangerous business."

While American sources testify as to the force used against illegal immigrants, Chin Ko-Lin of Rutgers University reports that:

[M]any illegal immigrants are locked up in "safe houses" until their final installment is paid. Sometimes triad goons are hired to do the collection, and the "safe houses" turn into "hell houses," says Chin. Methods of persuasion to pay up include sexual assault, starvation, and the chopping-off of fingers.

Similar brutality infects European safe houses. "When these people arrive, those who do not pay up are treated as slaves, sometimes they even have an ear chopped off," Winrich Granityka, police chief in Cologne, said in a recent interview. "To pay their debts, women are often forced to prostitution . . . ."

When relatives cannot pay a fare, immigrants are often forced to borrow money from the "snakeheads" at rates of thirty percent. "The snakeheads hire enforcers to beat up debtors who evade their obligations. A favorite tactic is to threaten the victim's relatives with his imminent execution so they will come up with some quick cash." "AsiaWeek has described New York's Chinatown as a "grim place where powerful businessmen and crime syndicates keep . . . [undocumented workers] in line with threats of kidnaping, torture and rape."

Despite such hardships, the wave of illegal immigration continues. In July 1995, the Jung Sheng 8 with 147 Chinese illegals was nabbed by the Coast

38. Id.
40. A Thai of Chinese extraction, who spoke on the record.
41. Id.
42. Bertil Lintner, supra note 32.
43. Id.
44. Peter Kwong, supra note 35.
Guard 800 miles south of Hawaii. Some of the migrants were beaten and sexually abused by enforcers on board, and many suffered from skin and urinary tract infections due to dehydration and unsanitary conditions. "When we pulled the hatch on the hold, we were overwhelmed with a rush of hot steamy air that smelled of urine and fecal matter," says Lt. Shannon Crothers, a Coast Guard boarding officer. "The smell just never went away."\textsuperscript{46}

Early in 1999 "a surge of illegal smuggling vessels began targeting the island of Guam,"\textsuperscript{47} while in September of that year, suspected Chinese illegals were removed from a ship off Vancouver by Canadian authorities; the vessel was one of three ships with no names or flags recently spotted in the area."\textsuperscript{48} It seems clear that this represents an ongoing problem, which will remain with us into the new millennium. How then may American law on the subject best be revised to cover the modern maritime slave trade?

III. "F\textsuperscript{U}RT\textsuperscript{E}R \textsuperscript{A}\textsuperscript{N} \textsuperscript{I}\textsuperscript{O}N \textsuperscript{R}E\textsuperscript{V}I\textsuperscript{S}\textsuperscript{I}\textsuperscript{O\textsuperscript{N}}... \textit{SHOULD BE CONSIDERED}": UPDATING UNITED STATES LAW ON THE SLAVE TRADE

It was felt that further revision of this chapter should be considered at an opportune time for the same reasons stated with respect to Chapter 81, "Piracy and Privateering."\textsuperscript{49}

In recasting American law on the slave trade to take account of contemporary conditions, a process similar to that used for piracy and privateering would appear to be in order.\textsuperscript{50} The following discussion will focus on major suggestions and corrections which might be considered.

\textsuperscript{46} GORDON WITLAIN, DANA HAWKINS, and BRIAN PALMER, supra note 32.
\textsuperscript{48} David Osler, Chinese taken off "rustbucket": Canada, LLOYD'S LIST, September 2, 1999, available on Westlaw (1999 WL 21568339).

In the light of far-reaching developments in the field of international law and foreign relations, the law of piracy is deemed to require a fundamental reconsideration and complete restatement, perhaps resulting in drastic changes by way of modification and expansion.... It is recommended... that at some opportune time in the near future, the subject of piracy be entirely reconsidered and the law bearing on it modified and restated in accordance with the needs of the times.

A. § 1581. Peonage; Obstructing Enforcement

(a) Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Whoever obstructs, or attempts to obstruct, or in any way interfere with or prevent the enforcement of this section, shall be liable to the penalties prescribed in subsection (a).

In addition to problems of coverage, this section suffers from poor drafting and verbosity. As currently drafted, those who return an individual to peonage, however inadvertent or innocent, their action may be, are liable to fine or imprisonment. It would serve further to require a mens rea. Similarly, expansion to include slavery and indentured servitude would provide more comprehensive coverage of the problem. A more succinct reading of § 1581(a), might be: Whoever entices, persuades or induces, kidnaps or carries away, sells, receives, holds or detains, arrests, transfers, delivers, or transports any person with the intent of placing him in, keeping, or returning him to a condition of slavery, peonage, or indentured servitude shall be fined.

B. § 1582. Vessels for Slave Trade

As drafted, the section suffers from three major flaws-the individuals covered, the required geographical nexus for their crimes, and the limitation to maritime situations. It would appear a better strategy to concentrate on the mens rea of the persons involved rather than their particular title or designation, and to expand geographical coverage to allow for a more universal jurisdiction. As has been argued in the case of piracy, establishment of an expansive jurisdiction does not require the prosecution of the crime in all cases; it is better that jurisdictional overlapping occur, rather than that some criminal conduct be


Whoever, whether as master, factor, or owner, builds, fits out, equips, loads, or otherwise prepares or sends away any vessel, in any port or place within the United States, or causes such vessel to sail from any such port or place, for the purpose of procuring any person from any foreign kingdom or country to be transported and held, sold, or otherwise disposed of as a slave, or held to service or labor, shall be fined under this title or imprisoned not more than seven years, or both.
allowed to "fall between the cracks." Similarly, an expansion to include potential aerial transport would appear to be in order. A redraft of this section could read:

Whoever builds, fits out, equips, loads or otherwise prepares, sends away, or insures a vessel, vehicle or aircraft with knowledge that it is to be used for the transportation, sale, or disposal of slaves, peons, or indentured servants, shall be fined under this title or imprisoned not more than seven years, or both.

C. § 1583. Enticement into Slavery

Whoever kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave; or whoever entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he may be made or held as a slave, or sent out of the country to be so made or held, shall be fined under this title or imprisoned not more than 10 years, or both.

Section 1583 has certain problems of coverage. While its first paragraph speaks of slavery or indentured servitude, only the former is referred to in the subsequent "subsection." Enticement into involuntary servitude is thus not a punishable crime! Neither paragraph covers the subject of peonage. A more expansive statement might read: (a) Whoever kidnaps or carries a person away with the intent that he be made a slave, peon, or involuntary servant; or (b) Whoever entices, persuades, or induces a person to board a vehicle, vessel or aircraft or to travel to any location with the intent that the person be made a slave, peon, or involuntary servant shall be fined under this title or imprisoned not more than 10 years, or both.

D. § 1584. Sale into Involuntary Servitude

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or

brings within the United States any person so held, shall be fined under this title or imprisoned not more than 10 years, or both.\textsuperscript{58}

As currently drafted, this only covers the condition of involuntary servitude. A redraft of the section could combine it with § 1581.\textsuperscript{59}

\textbf{E. § 1585. Seizure, Detention, Transportation or Sale of Slaves}\textsuperscript{60}

This section only applies to citizens or residents of the United States, leaving other foreigners free to engage in slavery activities. Expansion to include forms of land and air transportation would appear to be in order. Again, an amended § 1581 could include the major points made under this section.\textsuperscript{61}

\textbf{F. § 1586. Service on Vessels in Slave Trade}\textsuperscript{62}

Whoever, being a citizen or resident of the United States, voluntarily serves on board of any vessel employed or made use of in the transportation of slaves from any foreign country or place to another, shall be fined under this title or imprisoned not more than two years or both.\textsuperscript{63}

Two problems similar to those found with previous situations appear in this section, the class of those subject to the law, and the absence of any requirement for intent. There seems to be no good reason to confine the statute's ambit to United States citizens or residents, and equally, no need to make criminal the activity of voluntarily serving on board a slaver if the crewman lacks the necessary \textit{mens rea}. Particularly with the advent of hidden compartments, it is not inconceivable that some members of the crew might not be in on a smuggling racket, and it thus seems unfair to make their mere present on board criminal. Again, the current statute seems to be adequately covered by a revised version of § 1581.\textsuperscript{64}

\textbf{G. § 1587. Possession of Slaves Aboard Vessel}

Whoever, being the captain, master, or commander of any vessel found in any river, port, bay, harbor, or on the high seas within the

\begin{footnotes}
\item[59] Supra note 51; see also supra text accompanying note 51.
\item[60] Supra note 1; see also supra text accompanying note 1.
\item[61] Supra note 51; see also supra text accompanying note 51.
\item[64] Supra note 51; see also supra text accompanying note 51.
\end{footnotes}
jurisdiction of the United States, or hovering off the coast thereof, and having on board any person for the purpose of selling such person as a slave, or with intent to land such person for such purpose, shall be fined under this title or imprisoned not more than four years, or both.⁶⁵

As it now exists, this statute exclusively relates to the individual in charge of a vessel. Additionally, it is not clear whether any place outside American jurisdiction is included in the statute’s ambit, nor are peonage or involuntary servitude considered within the context of the law. A revised § 1581 would appear to cover these matters adequately.

H. § 1588. Transportation of Slaves from United States⁶⁶

Whoever, being the master or owner or person having charge of any vessel, receives on board any other person with the knowledge or intent that such person is to be carried from any place within the United States to any other place to be held or sold as a slave, or carries away from any place within the United States any such person with the intent that he may be so held or sold as a slave, shall be fined under this title or imprisoned not more than 10 years, or both.⁶⁷

While this might initially seem to represent the flip side of § 1585, dealing with the seizure, detention, transport, or sale of slaves from foreign shores, it arguably does not cover the transport of slaves between points in the United States. The key question here is whether “any such place” means any place besides the point of transhipment, or whether it refers to a place other than “any place within the United States.” Additionally, unlike § 1585, § 1588 makes owners liable for punishment.⁶⁸ This section would again be subsumed under a revised § 1581.

IV. "BROKEN FETTERS": FIGHTING THE 21ST CENTURY SLAVE TRADE

This study has traced the slave trade through some of its 20th century permutations. It has been shown that vestiges of the “classic” slave trade remain in the Red Sea and Persian Gulf area, but that the situation has changed with the introduction of slave trade analogues to American waters, such as the illegal importation of Chinese immigrants. The greatest threat we face in the

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⁶⁸. Although, arguably, § 1585 owners are covered under § 1582.
21st century, lies in the landward extension of the slave-like relations between immigrants and "snakeheads." Much as is the case with marine piracy, changed conditions call for changed laws. A revised chapter 77 would consist of four articles, a revised and much expanded § 1581, subsuming many of the previous articles, revised versions of §§ 1582 and 1583, and a new article making attempts to engage in the forbidden activities and accessories before and after the fact, liable to some punishment. Expansion to include peonage and involuntary servitude would obviate many of the definitional problems found in the current statutes and would more closely track the targeted behavior as it is now practiced. Such a revision of 18 U.S.C. § 77 would not only clarify the meaning of the statutes, but would make law dealing with the maritime slave trade more directly responsive to the events occurring on today's oceans.
AIR RAGE: IS IT A GLOBAL PROBLEM? WHAT PROACTIVE MEASURES CAN BE TAKEN TO REDUCE AIR RAGE, AND WHETHER THE TOKYO CONVENTION SHOULD BE AMENDED TO ENSURE PROSECUTION OF AIR RAGE OFFENDERS?

Margaret P. Fogg*

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I. INTRODUCTION

Air rage is a fairly recent phenomenon gaining domestic and international scrutiny in an area of increasing importance and interest to the traveling public. In order to provide reasonable solutions to eliminate or decrease this trend, it is necessary to analyze recent occurrences, as well as the motives for air rage. It is also essential to examine government and airline union roles and responses to the phenomenon. With an understanding of the motives for air rage, along with a solid background of the current status of the laws around the globe, proactive measures can then be taken to ensure full and complete prosecution by governments of disruptive passengers. Part I of this article introduces several outrageous examples of air rage. Part II examines the important role of airline unions and governments. Part III presents various domestic and international air rage statistics and the need for further studies and analysis. Part IV addresses the role that different cultures may play with air rage. Part V discusses the potential dangers associated with air rage, from both pilot and passenger perspectives. Part VI reveals the various measures that airlines are using to combat air rage. Lastly, Part VII provides the current status of domestic and international air rage laws, including a discussion of the Tokyo convention.

II. EXAMPLES OF AIR RAGE

With visions of rum punch, sandy beaches, and a week of relaxation ahead, your mind and body are beginning to transform into vacation mode. Imagine embarking on an airplane looking forward to a well-earned holiday at a warm Caribbean resort destination. As the aircraft flies along at 36,000 feet, your daydream begins. All of a sudden, your daydream is immediately interrupted by a group of rowdy, drunk passengers singing noisy songs, screaming obscenities, and throwing objects at the flight crew. This exact scenario occurred on board an Airtours flight from London, England to Montego Bay, Jamaica. Apparently, the group of twelve passengers started demanding alcohol shortly after takeoff. A fight ensued when a Jamaican passenger complained about the other passenger’s outlandish behavior and threw beer on

a member of the group, Patrick Connors. Connors, restrained by three flight attendants, lunged at the Jamaican man. As a result, the captain of the plane diverted to Norfolk, Virginia, and ten FBI agents boarded the plane and removed the twelve unruly British passengers. The disruptive passengers were returned to England, and Connors was convicted of endangering an aircraft. Connors was jailed for twelve months and another member of the group was jailed for three months. The judge presiding at the three-week trial told the men, "[f]or those passengers around you who were unused to public displays of violence it must have been a very terrifying incident."

A more recent international air rage incident receiving media attention occurred this past holiday season on a British Airways flight from London to Nairobi. A man entered the cockpit and temporarily took over the aircraft controls causing the plane to nosedive. After a struggle, the pilots managed to regain control of the plane. It was within only four seconds of crashing to the ground.

Another outrageous incident aboard an airplane occurred when a thirty-nine year old man from Missouri was on the final leg of an Alaskan Airline flight enroute from Puerto Vallarta, Mexico. He became restless and started acting irrational. He took off his shirt, threatened to kill everyone on board, and even tried to open an exterior plane door. After walking through the cabin, the man broke into the cockpit and attacked the plane’s co-pilot, who defended himself with a small ax. Six passengers answered the captain’s call for assistance and restrained the man using plastic restraints. The man was taken into custody, appeared in federal court, and was charged with interference with the flight crew.

3. See id.
4. See id.
5. See id.
7. See id.
8. Jimmy Burns, Passenger Drama Puts BA Jet in Jeopardy: Aircraft Man Tries to Seize Controls, FIN TIMES (London), Dec. 30, 2000, at National News 3. The plane’s automatic pilot was disengaged and the plane spiraled downward. The man who broke into the cockpit was apparently a deranged mental patient.
9. See id.
10. Ryan Kim, Menace of Air Rage Appears to be Growing, Thursday’s Airliner Drama is Part of a Disturbing Pattern, S. F. EXAMINER, Mar. 18, 2000, at A1.
11. See id.
13. See id.
There are different categories of passenger misconduct. Some events do not interfere with flight safety (e.g. minor verbal abuse). However, some actions do interfere with flight safety and cause a crew member’s duties to be disrupted, or may even cause a crew member to become injured. Passengers have been jailed for one year from everything from a simple refusal to turn off a cellular phone during a flight, to a passenger with a broken bottle attacking a flight attendant causing an injury requiring eighteen stitches.

On a flight to Florida from England, a British woman head-butted a flight attendant after she was asked to stop smoking in the bathroom. The woman was then detained in a cubicle but she broke loose and had to be controlled by passengers and the flight crew. The pilot had to abort landing the airplane and went into a holding pattern until the woman calmed down. The flight attendant was treated later for a suspected broken nose. On a United Airlines flight from Buenos Aires, Argentina to New York City, a passenger was fined $50,000 (clean-up fees) by the airline after he assaulted a flight attendant, and defecated on a first-class food cart. On a different flight, a passenger placed his hands around a flight attendant’s throat and threatened her because she accidentally spilled a drink. A female passenger grabbed a flight attendant’s finger and bent it backward, saying that she did not like the way the attendant asked her to put her tray and seat upright before the aircraft landed.

Shortly after an All Nippon Airways jet left Tokyo, a twenty-eight year old Tokyo man forced his way into the cockpit by attacking a flight attendant with an eight-inch knife. He told the co-pilot to exit, stabbed the pilot, and then took control of the airplane. The plane came as close as 1,000 feet to the ground. The co-pilot and two employees entered the cockpit and overpowered

16. See id.
17. See id.
20. See id.
21. See id.
22. See id.
24. See id.
25. See id.
27. See id.
the man. A non-duty pilot managed to land the plane safely, but tragically, the pilot bled to death.28

All of the above incidents are examples of recent occurrences known as air rage. Air rage has been defined as "extreme misbehavior by unruly passengers that can lead to tense moments in the air, putting crew members and passengers at risk."29 Another definition for air rage is "airline-passenger disruption or violence in flight."30 One article mentioned that "a disruptive passenger is characterized as one who interferes with aircrew duties, the quiet enjoyment of fellow passengers, or creates an unsafe environment."31 It has also been described as "intentional acts that are highly disproportionate to motivating factors, which endanger the flight crew and/or other passengers and potentially jeopardize the safety of the aircraft itself."32

III. ROLE OF AIRLINE UNIONS AND GOVERNMENTS

A. Role of Airline Unions

Airline unions play a strong role in the campaign against air rage. The International Transport Workers Federation (ITF), which represents thousands of aviation workers around the globe, began a worldwide movement.33 They want to decrease the episodes of aggression on aircraft and hope to compel governments into signing an international convention that would end current loopholes allowing air rage offenders to avoid criminal charges.34 The convention calls on all countries to enact laws that prosecute all offenders on all flights that land in their country.35 Airline employees demonstrated and passed out literature on July 6, 2000, in many cities around the globe.36 The cities included Chicago, Montreal, Paris, London, Mexico City, Taipei, Oslo, Stockholm, Zurich, Tokyo, Frankfurt, Buenos Aires, and Lagos, Nigeria.37

28. See id.
34. See id.
35. See id.
37. See id.
Cabin Crew '89, an industry organization working on the British government's air rage study group, wants to see air rage legislation passed by the British parliament.  

According to the Association of Flight Attendants (AFA), an American union, neither the Federal Aviation Administration (FAA) nor the airlines are notifying travelers of a recently passed increase in civil fines. "Passengers don't know the fine is there, so what would deter them from going and acting up?" said Jeff Zack, a spokeswoman for the Washington, D.C.-based flight attendants' group. The Air Transport Association of America (ATA) is a trade organization that assists members in promoting safety, cost efficiency, and technology, and provides representation before governments and informational assistance to passengers. Unions are playing a key role in targeting air rage offenders, hoping to keep the skies safe for crew and passengers.

B. Role of Government

A key government official on the international front, Deputy Prime Minister John Prescott of Great Britain, a former transport worker, has supported the interest in an international treaty against air rage offenders. "I take the issue of air rage extremely seriously," he said. "Not only are these incidents an affront to airline workers and passengers, but, at worst, they threaten aircraft safety." Britain's Civil Aviation Authority requires British airlines to report every occurrence concerning disorderly or dangerous passengers. They must also report if alcohol is a factor in these occurrences.

The International Civil Aviation Organization (ICAO) handles and develops international rules concerning civil aviation matters. Internationally, there are many different legal philosophies and judicial systems, and the ICAO

40. See id.
42. Air Rage: The Mile-High Menace, supra note 6.
43. See id.
44. Hester, supra, note 26.
45. See id.
46. Foundation of the International Civil Aviation Organization, at http://www.icao.int/cgi/goto.pl?icao/en/history.htm. In 1944, fifty-two countries signed the Convention of International Civil Aviation (ICAO), known as the Chicago Convention. After the final 26th ratification was received, the ICAO was formed in April, 1947. In October 1947, the ICAO became a specialized agency of the United Nations linked to the Economic and Social Council. As of 1998, there were 185 member countries. Contracting states can be found at http://www.icao.int/cgi/goto.pl?icao/en/members.htm.
serves to unify countries in certain areas of international aviation law. The ICAO was created as a way to enlist international cooperation and the highest degree of uniformity regarding regulations, standards, procedures, and organization within the airline industry. One of its many functions is to facilitate the adoption of agreements/treaties and to promote their acceptance.

Multiple federal agencies, as well as private organizations, are involved in the effort to keep passengers safe in the skies. The Federal Aviation Administration (FAA), the American counterpart to Britain’s Civil Aviation Authority, is the agency that regulates the aviation industry and ensures compliance with safety standards. It may require civil penalties for violations of its laws. “From what I’ve read, air rage is up. Interference with flight crew members is on the upswing,” said FAA spokesman Mitch Barker.

The United States Department of Justice is aggressively involved in enforcing federal statutes. The United States Attorneys’ Offices prosecute these cases with their help. The Federal Bureau of Investigation has investigative power over air rage statutory offenses. The Office of International Affairs and the Office of Terrorism and Violent Crime Section of Main Justice have knowledge in international affairs. They assist in cases involving violence or terrorism on international flights or on flights that have an international element.

United States Senator Harry Reid of Nevada introduced legislation known as the “Air Rage” bill, which was enacted into law. The United States House of Representatives also heard testimony regarding the issue. The FAA, in concert with airline operators and airline unions, has formed Partners in Cabin Safety (PICS) as part of a government/airline industry initiative. It will assist law enforcement officials to respond more reliably to reports of unruly actions.

47. See id.
48. See id.
50. See id.
51. Kim, supra note 10.
52. Warren, supra note 49.
53. See id.
54. See id.
55. See id.
56. See id.
59. Warren, supra note 49.
60. See id.
PICS works with law enforcement to address civil enforcement options from the FAA, as well as criminal enforcement to help with the problem. It is also looking to create a better database to track air violations.

IV. Statistics

Airline travel is at an all time high. The FAA reports general travel statistics that show air travel passenger volume increasing at a moderate rate domestically (3%-4% per year through 2010), as well as internationally (5% per year through 2010). In 1999, approximately 499 million people boarded one of the ten major American carriers to fly within the United States. In addition, approximately 55 million people that boarded a flight in the United States flew to an international destination. Regional and commuter carriers accounted for another 57 million passengers flying domestically. It is anticipated that airport congestion will get worse before it improves. Because of these growing statistics, it is important to get a handle on the air rage situation now, versus later.

Air rage appears to be a global problem. However, this is pure speculation because there are no firm statistics on the problem. "There is no unified system in the industry for collecting information on these incidents. In fact, we do not know unequivocally that the number of passenger interference events is rising, but anecdotal evidence and statistics kept by some air carriers gives strong credence to that belief." Based on an analysis of reporting airlines, as well as a look at the number of recent occurrences reported, it is clear that air rage is occurring around the world, not just within the United States. The stories about air rage are never ending. The media gives it much attention. However, it is difficult to reveal how extensive air rage is because of conflicting reports from the airlines and from flight crew who actually deal with the disruptive passengers.

61. See id.
62. See id.
64. See id.
65. See id.
66. See id.
67. Firak, supra note 32.
68. Hearings, supra note 1 (statement of Stephen Lackey).
A. Domestic Air Rage Statistics

The airlines' reports to the FAA purport that disruptive passenger episodes decreased between 1997 and 1999, from 320 to 310.70 But according to a confidential reporting system used by flight crews, incidents aboard American carriers increased from 66 to 534 during the same years.71 Oftentimes, airline statistics do not include passenger threats to flight crew that do not involve violent behavior.72 “A recent study by the FAA indicated that some airlines have experienced a 400 percent increase in air rage since 1996.”73 San Francisco International Airport spokesman Ron Wilson said that in recent years, the number of confrontational passengers has risen. The airport has reported 121 cases in which passengers were arrested for interfering with flight crew since 1996.74

The FAA reported that as of the end of the fourth quarter of 2000, there were 266 violations of federal law for unruly passengers.75 Enforcement actions for unruly passengers varied greatly between the years 1999-2000.76 In 1999, the total enforcement actions of unruly passengers were 310, an increase from the prior year, 1998, when there were 282 violations.77 Officials are hoping the decrease in 2000 is related to consumers becoming more educated about the dangers and penalties associated with air rage.78 Even though the domestic statistics purport to show positive signs, it is a little premature to be celebrating. It is more likely that a standardized national database should be created to gather uniform air rage statistics from all airlines and aircrew, and an efficient analysis should then be conducted to study the results.

B. International Air Rage Statistics

British Airways' official statistics show 122 occurrences of air rage through March 1999.79 However, an in-house British Airways document revealed that cabin crew are dealing with more than 644 incidents of physical
and verbal abuse each year. During the first half of 1999, thirteen passengers were restrained by handcuffs on British Airways flights and four flights were diverted because of disorderly travelers.

The first survey of air rage cases was announced by the British Civil Aviation Authority. There were 800 incidents during one seven month period on all British aircraft, or one incident per 870 flights. The British Airways figures reveal a larger frequency of air rage, with flight crew dealing with disruptive passengers on one in 440 flights. Almost 200 airline passengers flying into London airports were arrested for disruptive behavior last year according to statistics. The number of arrests reveals the shocking rise in aggressive and drunken behavior on airplanes. Based on the few international statistics released, along with the continued interest from the media, air rage seems to be a growing global problem.

Since airplane travel is at an all time high, and statistics have only recently been gathered, it is difficult to say whether air rage is just a function of more media attention, or whether it is really an international epidemic. There is a problem with leaving the situation status quo: continued media attention but no uniformity among airlines or other country's laws. As an example, one can only imagine the scrutiny that would result should a major airliner crash as a result of an incident of air rage. It would be tragic to put it mildly. More proactive measures, including training, education, and international cooperation are essential to finding a solution to the problem.

V. HOW DO CULTURE AND SOCIETY PLAY A ROLE IN AIR RAGE?

A. Reasons Associated with the Increase in Air Rage

There are many theories attributed to the increase in air rage and unruly passenger behavior over the past five years. Experts in various fields have given their opinion on the subject. One of the bigger questions is why is it so prevalent now? The United States' aviation industry has led the world for the past ninety years, helping make air travel safer and more available to hundreds of millions of travelers. However, air rage is a recent phenomenon, with statistics just now starting to be gathered and analyzed. Unruly behavior is displayed by all sectors of the population: male, female, young, old, first class,
Statistics compiled by government agencies indicate that twenty-five percent of air rage incidents involve alcohol; sixteen percent, disputes over seating assignments; ten percent, smokers who can't light up; nine percent, carry-on luggage; eight percent, problems with flight attendants; and five percent, food.  

There are many reasons that air travel has become frustrating for fliers. They include more frequent delays, crowded airplanes, busier airports, long lines, stuffy cabin air, and smaller seating arrangements with less legroom. "The planes are crowded. There are delays. I think people in general are just less tolerant of any infringement on their space or their time," said Northwest Airlines spokeswoman Kathy Peach. Experts also theorize that there is a growing feeling of superiority amongst travelers. They also point to factors such as less time, overcrowding, advancing technology, and other demands on the public in the future. Other reasons include fear of flying which may create a sense of powerlessness, or the discrepancy between flier's expectations as shown in advertisements and the reality of flying. Social anthropologists have indicated that crowding generates expanding violence. A recent poll found that seventy-eight percent of Americans think rude and selfish behavior has increased at highways and airports. It also showed that seventy-nine percent said the number of people who get angry at the bad behavior of others has grown.

Another expert commented on blood sugar rates and how they have been demonstrated to cause stress. He also noted that smoking and nicotine withdrawal has been compared, in scope, to opiate addiction, and that it is a factor on a closed airplane. Additionally, the effects of alcohol are magnified with altitude. The inside of the airplane cabin is pressurized to 8,000 feet. Passengers are affected by alcohol more quickly than they realize at high altitudes. Drinking dehydrates people and this can lead to irritability, fatigue, and tunnel vision. Alcohol is known to lower a person's inhibitions, but it also

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89. Powelson, supra note 39.
90. See id.
92. Unruly and Disruptive Passengers, supra note 87.
93. Hearings, supra note 1 (statement of Stephen Luckey).
94. Peterson, supra note 91.
95. Unruly and Disruptive Passengers, supra note 87.
96. See id.
97. See id.
magnifies the emotional reaction to the difficult flying environment. Consequently, many air rage incidents have been alcohol related.  

Yet another expert said air rage could be anything from increased impatience over waiting in airport lines to more selfishness in society. "Certain successful individuals have what is called 'significant narcissistic features' which can be categorized as merely extreme self-confidence. These individuals resent being told what to do but also have expectations of being catered to like royalty." As noted, the outrageous behavior exhibited by airline passengers have many explanations including excessive alcohol consumption, smoking bans, more crowding, longer flights, lack of respect for authority, and powerlessness associated with flying. 

Passengers are not the only cause of air rage. Airlines must also accept a portion of the blame for the problem. "Curtailment of fresh air in airplanes can be causing deficient oxygen in the brain of passengers, and this often makes people act belligerent, even crazy," said Dr. Vincent Mark in a telephone interview, adding "I'm positive about this, and it can be proven with a simple blood test." One passenger stated:

I would suggest that the enraged passenger develops his/her rage at the plane or in the terminal in specific, direct, and immediate response to airline employee arrogance, incompetence, superciliousness, discourtesy, rudeness, ignorance, and disregard for normal courtesy, much less some things called professional standards and professional conduct and professional performance.

Another culprit is cramped seating. "Airline seats are now as small as seats on subway trains, and with many flights lasting longer, passengers feel they are packed like sardines in a can, or chickens in crowded cages." Also, airlines have contributed to the lack of storage room by removing closets, leaving little room for garment bags or heavier outerwear. With eight percent of airline luggage lost or stolen, passengers are more unwilling to check their luggage. Another problem is the difference between coach class passenger expectations for comfort and service, and the actuality of the situation.

98. Fairechild, supra note 23.
100. Hearings, supra note 1 (statement of Stephen Luckey).
102. Fairechild, supra note 23.
103. See id.
104. See id.
105. See id.
B. Global Cultural Differences

Subtle cultural differences could have an impact in the way that air crew and passengers are treated around the globe. Air crew should be able to understand these differences, which can play a major part in the international business scene. For example, there are differences in priorities, protocol, value systems, and methods of reasoning throughout the world. As a case in point, British tend to be pragmatic, French work conceptually, and Germans tend to have a legalistic frame of mind. Attitudes about time are also different. Americans generally think that “time is money.” In contrast, Latins and Mediterraneans are more flexible in their organization of time and time pressures. Northern Europeans, by comparison, tend to tackle agendas in an organized, predetermined sequence.

When an individual negotiates with another from a different country or culture, it makes sense that ideas are usually evaluated, perceived, and understood differently. Even if it is only a small change, a person’s beliefs and ideas are affected by their culture, values, and ways of thinking. Cultural differences can play a large role in today’s global society. Because of this, it is important for airlines, travelers, and governments to be sensitive and aware of these differences, and respond accordingly to the situation.

VI. DANGERS ASSOCIATED WITH AIR RAGE

There are many dangerous situations that can occur in an incident of air rage. Among the more obvious would be a lack of control by the pilot should a passenger enter the cockpit. For example, during a recent confrontation between a pilot and passenger in the cockpit of a flight, a plane took a dramatic dip before the captain regained control. This happened during the scenario described above when the pilot tried to defend himself with an ax. Obviously, rage is especially dangerous in an airplane, versus other locations where assault and battery take place. The airplane is a closed environment with no place to escape. Therefore, everyone on the plane is placed in danger, along with other planes nearby, or any potential people on the ground.

Pilots can become disrupted and make serious flying errors if interrupted by unruly passengers. These errors can threaten safety, as reported by National

107. See id.
108. See id.
109. See id.
110. See id.
111. Hester, supra note 2.
Aeronautics and Space Administration (NASA). In forty percent of 152 studied cases, pilots left the cockpit to allay a commotion, or were interrupted from their flight duties by other crew who needed assistance. In one-fourth of the cases, the pilots made errors such as going too fast, flying at the wrong altitude or taxiing across runways set aside for other airplanes. The report found fifteen pilot errors out of 152 air rage cases over ten years.

A. Pilots' Concerns

Pilots are the ones with the ultimate control and destiny over an airplane while it is flying. Thus, it is important to listen to their concerns regarding the topic of air rage. According to the Air Line Pilots Association (ALPA), passenger interference is the most persistent safety problem facing the airline industry. It is a global problem that creates dangerous risks to passengers and flight crew. ALPA is most concerned about the extreme forms of violence on board airliners, those that have caused injuries to crew members.

B. Passenger Concerns

During the London to Montego Bay flight scenario described above, one female passenger said the scene was like a "bar room brawl," and said she was petrified. Other passengers were screaming and crying during the altercation. The foreman of the jury called for better warnings of the legal dangers of drinking on airplanes. He said, "[w]e feel there should be a spoken warning about it being an offense to be drunk on an aircraft during the safety announcement."

Mr. Thomas J. Payne, Jr., a frequent business traveler and corporate executive who travels both domestically and internationally approximately ten months each year, recently shared his personal experiences and viewpoints regarding the topic of air rage. He has experienced air rage first hand, both in a plane, on the ground, and in the air. In one incident, he described two passengers who fought on a flight triggered when one passenger merely pressed the recline button on his chair. The person sitting behind him slapped the

112. Alan Levin, Air Rage a Threat on Flights; Disruptive Passengers Linked to Pilot Errors, USA TODAY, Jun. 12, 2000, at A1.
113. See id.
114. See id.
116. See id.
118. See id.
119. Telephone Interview with Thomas J. Payne Jr., Senior Vice President of Students In Free Enterprise (Sept. 4, 2000). Mr. Payne also serves as a USA Today Road Warrior travel consultant.
individual who had reclined the chair. Mr. Payne commended the professional crew who responded immediately and prevented the situation from becoming out of control. The crew simply asked one of the parties to exchange seats with another passenger. The other event he described occurred on the ground shortly before takeoff. A couple became incensed with crew members after the male was accused of smoking in the plane lavatory. The crew called security and the couple was physically restrained and removed from the plane before takeoff.

Despite these and other incidents he has witnessed, Mr. Payne is not terribly concerned about air rage. He believes the events were isolated. Additionally, Mr. Payne believes that air rage is actually a combination of a number of factors, including societal changes, job stresses, and candor of airline employees. "Business travelers have low tolerance for human error. If a flight is late or canceled due to circumstances within the airline's control, people get very irritated and angry, and it is a natural reaction. However, airlines exacerbate the problem when they do not communicate candidly with their customers." His suggestion was simple but valuable. "Ticket and gate agents, flight attendants, and pilots could deal effectively with the situation if they just use common sense and exercise patience when dealing with frustrated passengers." Sometimes, the situation is simply beyond the airline's control, such as weather delays or strikes by unions; these are known as force majeure events. During these times, it seems that positive communication in a timely manner would certainly help to alleviate customer's concerns. Simple gestures such as the airline offering assistance to a delayed passenger or explaining traveler's rights during delays (Rule 240) can go a long way with the traveling public.

120. See id.
121. See id.
122. See id.
123. See id.
124. Telephone Interview with Thomas J. Payne, Jr., supra note 119.
125. See id.
126. See id.
128. See id. Rule 240 is a term used to describe individual airline's policies for late or stranded passengers. If a flight is delayed or cancelled, the policies state what amenities the airline may provide, including free meal vouchers, hotel accommodations, telephone calls, etc. An airline may even book a passenger on a substitute flight with another airline, and may provide compensation if the problems continue.
VII. WHAT MEASURES ARE AIRLINES TAKING TO COMBAT AIR RAGE?

In response to the growing numbers of air rage incidents, airlines are taking necessary steps to prevent injury. These include additional training and more proactive measures in dealing with offenders. "We’re taking a more aggressive approach," said Ron Wilson of the San Francisco Airport. "Airports, police and airlines are not putting up with it any more."129 Northwest Airlines and U.S. Airways mentioned they give a passenger written notice of federal fines only when the passenger is nearing a violation.130 American Airlines also issues written warning notices to disruptive passengers ordering them to stop their disorderly behavior.131 Five airlines are contemplating fortifying airplane cockpit doors on MD-80s and DC-9s after recent air rage occurrences.132 Swissair is one of the latest airlines to install plastic restraints on its airplanes in an effort to control unruly passengers. The handcuffs are rapidly becoming standard equipment on most major airlines because of the increase in air rage incidents.133

Another airline, Airtours is vocal about their policy. Spokesman Debra Saddler said, "Airtours will not accept behavior that puts either the passengers or the crew at risk."134 A British detective, Constable Rod Bird, said, "[w]e treat each case very seriously. It’s a message to everyone who may even consider becoming aggressive on an aircraft."135 Some domestic and international airlines are even attempting to ban air rage offenders from future flights for specific time frames.136 Currently, there is a great deal of discussion and debate in the airline industry and with various governments around the globe, regarding the banning of unruly passengers.

Since deregulation in 1978, the number of competing American airlines decreased, but airlines have more independence.137 In return for this freedom, airlines should improve performance and provide a level of customer service that is acceptable to the flying public. Most American carriers voluntarily enacted passenger-rights plans, avoiding government regulation. In an effort to improve customer service, these airlines promised to respond to complaints faster, provide on-time baggage delivery, offer the lowest fares available, and

129. Kim, supra note 10.
130. Powelson, supra note 39.
132. Woodyard, supra note 78.
135. See id.
136. For an interesting discussion of the United States constitutional right to travel and the attempt by various airlines and governments to ban unruly passengers, see Mann, supra note 131, at 865.
give more information on delays and cancellations. The airlines hope these efforts improve their bottom line, as well as decrease the incidents of air rage. Educating employees is another method airlines are using to address air rage problems. "Rageproofing" is a course taught by professional flight instructors, and includes real world, common sense methods for reducing the risk of becoming involved in an incident. It also provides broad education on federal regulations, as well as conflict management techniques. Training includes teaching crew members to predict and manage potentially dangerous passengers.

When an incident does occur, airlines often divert the flight and make an unscheduled stop to drop off the offending passenger. A United Airlines flight from San Francisco to Newark made an unscheduled stop when they had a person on board who assaulted two flight attendants. On a flight out of Madrid, the captain, fearing a situation was escalating, decided to return to Madrid to the delight of passengers on board. On a Belgian Sabena Airlines flight, the pilot called the control tower and landed the aircraft, with the state police waiting for the passenger who was verbally abusive to crew members. A British Airways spokesman said that a pilot decided to divert a plane due to concern for the safety of the aircraft, and commented that the airline would not tolerate violent behavior on any airplane.

British Airways has had in place since 1998 a “yellow card” system that warns offending passengers they could face charges unless they change their behavior. Some airlines are also experimenting with restraint devices. British Airways is experimenting with a device known as the body restraint package which is designed for the worst offenders of air rage. The device was created by a former police sergeant to help air crew restrain violent passengers. It is supposed to lock down assailants by securing them to their seat.

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139. See id.
140. See id.
141. See id.
146. Walker, supra note 30.
147. Hester, supra note 2.
148. See id.
The device is made up of five components - an upper-body restraint, waist-restraint belt, handcuffs, lower-arm restraint and leg restraints. When a passenger becomes unruly, crew members would approach the offender from behind and lasso him like a rodeo steer, using the strap attached at the end of the upper-body restraint. When the restraint is pulled tight, the offender is effectively immobilized. For total lock-down, handcuffs and additional devices can be engaged.149

One of the more fascinating aspects regarding British Airways is the fact that they do not lock their cockpit doors during flight.150 On the recent holiday flight from London to Nairobi described earlier, the deranged passenger entered through an unlocked cockpit door. Top British Airways officials have concluded that locking the door would cause more problems than not. They stated that flight attendants and pilots need constant communication and a passenger could just kick in the cockpit door even if it was locked.151 Interestingly, most Americans would be shocked to learn about this fact, as American carriers lock their cockpits during takeoff, landing, and in flight.

Sometimes, airline crews have taken too drastic measures, which have caused disastrous consequences. In December of 1998, an unruly passenger onboard a Malov flight between Bangkok and Budapest was tied to his seat with airline headset cords.152 A doctor on the flight injected him with a tranquilizer and the passenger died.153 When the crew noticed the passenger had died, the plane made an unscheduled stop in Istanbul. Five witness passengers were detained by the Turkish police along with the doctor.154 An autopsy showed that the passenger died due to a mixture in his blood of the tranquilizer and some other drug or alcohol.155

There can also be tragic endings when fellow passengers assist in restraining out of control passengers. One episode occurred on board a Southwest Airlines plane to Salt Lake City.156 A nineteen year old man tried to break into the cockpit and began hitting fellow passengers.157 He was restrained by eight of the passengers on board. It was initially reported that the man died

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149. See id.
151. See id.
152. Fairechild, supra note 23.
153. See id.
154. See id.
155. See id.
157. See id.
of a heart attack. However, an autopsy classified his death as a homicide confirming that the man died as a result of intentional actions by another person.\textsuperscript{158} The man died after he was removed from the plane, and the report noted that he had bruises, scratches, and experienced blunt force injuries.\textsuperscript{159}

More recently, a pig that was allowed to ride in first class on board a flight from Philadelphia to Seattle went wild upon landing.\textsuperscript{160} As the aircraft taxied to the gate, the pig squealed and ran down the aisle, even trying to enter the cockpit. Apparently, it was untrained and along the jetway, dropped feces.\textsuperscript{161} The FAA investigated the incident to see if the airline violated any federal safety or sanitation regulations. Jim Peters, a FAA spokesman, announced that the airline and its employees “acted in a reasonable and thoughtful manner, based on a legitimate request to transport a qualified individual with a disability and her service animal.”\textsuperscript{162} One could only speculate as to what may have happened had this incident occurred in air, and if the pig had been successful in getting into the cockpit; would this have been considered air rage?

VIII. CURRENT STATUS OF AIR RAGE LAWS

A. United States Laws

Legislation addressing complex issues arising in criminal airline cases has already been enacted.\textsuperscript{163} There are a few federal laws and regulations which prohibit passenger interference aboard an aircraft. For example, federal statutes protect persons from crimes on an aircraft in flight.\textsuperscript{164} Another statute provides protection against assaults directed towards flight crew “that interfere with performance of the duties of the member or attendant or lessen the ability of the member or attendant to perform those duties.”\textsuperscript{165} Prosecutions under this statute and the previous statute are regular, and include prosecutions for assaults,\textsuperscript{166}

\begin{itemize}
  \item[158.] See id.
  \item[159.] See id.
  \item[160.] Blake Morrison, \textit{No More Hogging the Aisle in Flight}, USA TODAY, Oct. 31, 2000, at 4A. The pig was allowed on board the USAirways flight because the two passengers accompanying the pig provided a physician’s note to the airline stating that the pig was a “service animal” - similar to a seeing-eye dog. Apparently, the pig was described by the accompanying passengers as being thirteen pounds, when in actuality it was 250 pounds.
  \item[161.] See id.
  \item[162.] FAA Says Pig Can, \textit{In Fact, Fly}, ORLANDO SENTINEL, Nov. 30, 2000, at A7. The passenger told the airline the Vietnamese potbellied pig was a therapeutic companion pet, and her heart condition was so severe she needed it to relieve stress.
  \item[163.] Firak, supra note 32.
  \item[166.] See, e.g., United States v. Pelfrey, 166 F.3d 336 (4th Cir. 1998); United States v. Meeker, 527
threats,\textsuperscript{167} and dangerous disorderliness.\textsuperscript{168} Penalties for violations of this statute are serious. Violators may be imprisoned for up to twenty years for a single offense, and up to life for an offense involving a dangerous weapon.\textsuperscript{169} Administrative penalties are also included for those who get in the way of flight crew.\textsuperscript{170} One federal aviation regulation states "No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated."\textsuperscript{171} This statute provides protection within the United States and its territories.

The United States Senate passed a bill that granted even broader authority to the FAA to impose fines for unruly conduct. The FAA's Reauthorization Bill states:

An individual who interferes with the duties or responsibilities of the flight crew or cabin crew of a civil aircraft, or who poses an imminent threat to the safety of the aircraft or other individuals on the aircraft, is liable to the United States Government for a civil penalty of not more than $25,000.\textsuperscript{172}

"Federal law does not require airlines to give travelers notice of the new fine before a flight, but the FAA would not object if airlines voluntarily did so," agency spokesman Paul Takemoto said.\textsuperscript{173} Now, convicted assailants of air rage face up to a $10,000 criminal fine and punishment of up to twenty years in prison.\textsuperscript{174} In addition, the maximum civil fine used to be $1,100, but as previously mentioned was increased by Congress to $25,000.\textsuperscript{175}

\textbf{B. International Laws}

The British government responded to the disturbing air rage trend by creating a new offense of "acting in a disruptive manner" and for using threatening and abusive language or behavior to crew.\textsuperscript{176} It is designed to

\textsuperscript{167} F.2d 12 (9th Cir. 1975). \textit{See also} Warren, \textit{supra} note 49.
\textsuperscript{168} See, \textit{e.g.}, United States v. Compton, 5 F.3d 358 (9th Cir. 1993). \textit{See also} Warren, \textit{supra} note 49.
\textsuperscript{169} See, \textit{e.g.}, United States v. Hall, 691 F.2d 48 (1st Cir. 1982). \textit{See also} Warren, \textit{supra} note 49.
\textsuperscript{170} 49 U.S.C. § 46504. \textit{See also} Warren, \textit{supra} note 49.
\textsuperscript{171} FAA Air Traffic and General Operating Rules, Prohibition on Interference with Crewmembers, 14 C.F.R. § 91.11 (1999).
\textsuperscript{172} \textit{See id.}
\textsuperscript{174} Powelson, \textit{supra} note 39.
\textsuperscript{175} Puit, \textit{supra} note 73.
\textsuperscript{176} \textit{Air Rage: The Mile-High Menace, supra} note 6.
protect the interests of the flight crew. All air rage offenders on incoming flights can be prosecuted.\textsuperscript{177} Since the new law was introduced, offenders face a two-year jail sentence or £2,000 fine.\textsuperscript{178} In Canada, the Air Transport Association of Canada, an organization made up of ten airlines, recently met to establish some guidelines and consistency regarding the topic of unruly passengers.\textsuperscript{179} The group convened to define air rage and determine sanctions against disruptive passengers. They asked the Canadian government to change their criminal code to make it a specific crime to interfere with the work of flight crews, similar to laws in the United States and other European countries.\textsuperscript{180}

Cathay Pacific Airlines has called for tough air rage laws to be enacted in Hong Kong to mirror those of Great Britain. "We would welcome any strengthening of the current law in order to improve safety for our crew and passengers," said an airline spokesman.\textsuperscript{181} Cathay would not give statistics on air rage incidents.\textsuperscript{182} However, the spokesman for the airline believed that the recently enacted British laws, banning airborne acts of violence or insulting or abusive language may be the solution to the problem.\textsuperscript{183} However, as of late 1999, Hong Kong's Civil Aviation Department, was satisfied with the existing air navigation orders there, currently outlawing "reckless or negligent behavior likely to endanger a plane, its crew or passengers."\textsuperscript{184} In recent years, six people have been prosecuted for air rage in Hong Kong. Interestingly, they were fined under their common law, not the navigation order.\textsuperscript{185} Current air rage laws now only subject passengers if the act takes place within SAR airspace or on planes registered there.\textsuperscript{186} In mid 2000, the Hong Kong Secretary for Security, Regina Lau Suk-yee mentioned that the right to prosecute passengers engaged in air rage could be extended to all Hong-Kong bound planes pending a study by international aviation groups.\textsuperscript{187}

C. Tokyo Convention

As a common carrier, an international airline must abide not only to federal regulations, but also international regulations if it operates in more than one
country. Some regulations can lead to jurisdiction and choice of law questions. Local police are not always able to arrest a troublemaker who has just landed in a foreign-flag aircraft. Canada, the United States, Australia, and Great Britain are countries that have rectified this problem with legislation. Internationally, the Tokyo Convention was the first large effort regarding air terrorism. Following it was the Hague and the Montreal Conventions. The Tokyo Convention, which was signed in 1963 and now has 170 member countries worldwide, sets up some legal remedies for passenger disruption. It authorized each contracting country to establish jurisdiction over offenses committed in their territory, over offenses committed on board an airplane registered in the contracting state, and whenever an airplane landed in the country with an offender on board the aircraft.

The Tokyo Convention clearly asserts that the state of registration of the aircraft has the authority to apply its own laws, thus it provides for international recognition to extraterritorial jurisdiction. It also provides the airplane commander authority to deal with those who have or will commit a crime or an act jeopardizing safety on board the aircraft. The commander may use reasonable force without fear of suit. However, when an international act occurs, oftentimes more than one state has jurisdiction to prosecute the offender and jurisdictional conflicts can occur since both states can claim the right to prosecute. The jurisdictional rules in the Tokyo Convention tried to solve this conflict.

However, the Tokyo convention has various flaws. First, it does not define the meaning of an international criminal offense, which leaves it open to different interpretations and inconsistencies among the contracting states. For the definition of criminal acts, the Convention depends on domestic law definitions. A second problem is that it does not require the contracting state
to punish an offender upon disembarkation. If the landing state chooses not to extradite or prosecute the offender, the state must set him free and let him continue to the destination of his choice as soon as possible. In addition, many "jeopardizing" acts are not likely to be accepted as a reason for extradition. The Convention created and defined "jeopardizing" acts, however it did not require states to treat them as "serious crimes." The Convention's procedures for delivery and extradition are applicable only to serious crimes. Therefore:

Since aircraft in flight are legally regarded as part of the territory of the state of registration of the aircraft, the state where the aircraft lands will treat offenses committed on board during the flight as committed on foreign territory (unless it is the state of registration of the aircraft). In most cases of minor offenses and "less serious" crimes, it will, therefore, not have the jurisdiction to investigate and prosecute. The Tokyo Convention of 1963 obliges contracting states to establish their jurisdiction over offenses and crimes only when committed on board aircraft of their own nationality. There is no obligation in the Convention to establish jurisdiction with respect to offenses and crimes committed on board foreign aircraft. Furthermore, the Tokyo Convention does not establish such jurisdiction itself. It therefore leaves a jurisdictional gap in this respect.

The jurisdictional gap is not a problem in the United States because the Justice Department prosecutes inbound offenders regardless of the airplane's nationality. The United States and Great Britain need to encourage efforts to guarantee that the Tokyo Convention's jurisdictional weakness is tackled so that other countries can and will prosecute incoming air rage offenders. "The authority to prosecute does not equal the obligation to prosecute, and minor offenses committed on an airplane landing in other countries may not be prosecuted." The final problem with the Tokyo Convention is that just half of the world subscribes to it, and its impact could be much greater if there were more participants.

198. Abeyratne, supra note 191, at 41.
199. See id. at 44.
201. See id.
202. See id.
IX. CONCLUSION

Air rage is a global problem. As noted above, there are a number of reasons attributed to its increase. In order to provide a solution to the phenomenon, there are steps that can be taken to ensure its decline. Governments and airline unions must become involved and work together to ensure the safety of the flying public. A thorough study and efficient statistical data must be compiled. Without this important data, effective solutions to the problem will not work because it will only be based on a collective hunch. Member countries must gather to talk about ways to amend current loopholes in the Tokyo Convention. Until the members meet, the jurisdictional gap problem will continue. "The United States should encourage other countries to adopt into their national laws - provisions for the prosecution of inbound disruptive passengers, regardless of the nationality of the air carrier involved."

There are more people flying than ever before. The traveling public must be made aware of the penalty associated with air rage. If they are not aware of the penalties, it will not be a deterrent. Airlines must train air crew in a more effective manner. They need to educate their aircraft commanders about the provisions in the Tokyo Convention, so that there is no confusion and offenders will be prosecuted. Law enforcement in other countries also need to be educated about the Convention. Other training suggestions for aircrew include better instruction to deal with unruly passengers, including education in calming measures and training in the use of handcuffs, should it become necessary. Airlines should also provide restraint equipment and better security procedures during the necessary times. Additionally, airlines need to establish zero tolerance policies. The flying public needs to be aware of current regulations. Advertising and distribution of FAA guidelines and circulars would help educate travelers. The public also needs to be educated to treat the crew as "safety officers, not waiters and waitresses." Likewise, air crew should have respect for passenger's needs, and respond in a professional manner. Airlines and governments must work together and become more proactive to ensure prosecution of disruptive passengers, to assist in the decrease of air rage.

204. Hearings, supra note 1 (statement of Stephen Luckey).
205. See id.
206. See id.
207. Inform Passengers Of Penalties for Violence, supra note 69.
208. Powelson, supra note 39.
211. Airlines Conceal Air Rage Attacks, supra note 79.
212. Benham, supra note 38.
Federal Aviation Regulation 91.11, 121.580 and 135.120 state that “no person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember’s duties aboard an aircraft being operated.”

General notes:

- Interfering with the duties of a crewmember violates federal law.
- The FAA’s database contains only those incidents reported to the FAA. Reporting is at the discretion of the crewmember.
- Year 2000 numbers may change due to ongoing reporting of December incidents.
- The repercussions for passengers who engage in unruly behavior can be substantial. They can be fined by the FAA or prosecuted on criminal charges.
- As part of the FAA’s Reauthorization Bill (April 16, 2000) the FAA can now propose up to $25,000 per violation for unruly passenger cases. Previously, the maximum civil penalty per violation was $1,100. One incident can result in multiple violations.

Updated January 10, 2001

http://www.faa.gov/apa/stats/unruly.htm
This sample airline information should be reviewed by each airline’s legal department to assure that it accurately states the airline’s policies and the legal duties, responsibilities, and rights of the airline and airline personnel. The FAA does not provide legal advice about the specifics of tort and criminal law.

<table>
<thead>
<tr>
<th>CATEGORY ONE: Flight attendant requests passenger to comply. (Actions which do not interfere with cabin or flight safety such as minor verbal abuse.)</th>
<th>Passenger complies with request.</th>
<th>There is no further action required by the flight attendant. (Such an incident need not be reported to the cockpit, the carrier, or the FAA.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>CATEGORY TWO: Flight attendant requests passenger to comply.</td>
<td>Passenger continues Disturbance which interferes with cabin safety such as continuation of verbal abuse or continuing refusal to comply with federal regulations (such as failure to fasten seatbelt when sign is illuminated, operation of unauthorized electronic equipment). In addition, the crewmember should follow company procedures regarding cockpit notification.</td>
<td>After attempting to defuse the situation, the captain and the flight attendant will coordinate on the issuance of the Airline Passenger In-flight Disturbance Report or other appropriate actions. The flight attendant completes the report. Completed report is given to appropriate company personnel upon arrival. In turn, company personnel may file the incident report with the FAA.</td>
</tr>
<tr>
<td>CATEGORY THREE:</td>
<td>Examples: 1) when crew's duties are disrupted due to continuing interference, 2) when a passenger or crewmember is injured or subjected to a credible threat of injury, 3) when an unscheduled landing is made and/or restraints are used, &amp; 4) operator has program for written notification and passenger continues disturbance after notification.</td>
<td>Advise cockpit, identify passenger, then cockpit requests the appropriate law enforcement office to meet the flight upon its arrival.</td>
</tr>
</tbody>
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TORTURE OF TERRORISTS IN ISRAEL: THE UNITED NATIONS AND THE SUPREME COURT OF ISRAEL PAVE THE WAY FOR HUMAN RIGHTS TO TRUMP COMMUNITARIANISM

Jason S. Greenberg*

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I. INTRODUCTION

The General Security Service of Israel, also known as the Shin Bet, investigates individuals suspected of being involved with crimes against Israel's security.1 Some people view the various interrogation methods employed by the

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General Security Service as a violation of human rights, while others see them as necessary to uphold Israel's "communitarianism" ideology. Israel has historically prioritized the community's interests over individual human rights because the State of Israel has had reason to be concerned with the safety of its community due to ever-present problems with peace. The State of Israel has been engaged in an immutable struggle for both its security and existence from the day it was founded due to terrorist organizations. These terrorists have attacked major cities in Israel, such as Jerusalem and Tel Aviv, often killing and injuring innocent people. One hundred and twenty-one people were murdered by terrorist attacks between January 1, 1996 and May 14, 1998. In addition to the 121 deaths from terrorism, 707 people were injured. This has concerned Israeli legislators and citizens.

The General Security Service uses specific interrogation methods to quash future terrorist attacks in the hope of saving lives. The question pondered by judges, politicians, and the entire Israeli nation is, "how does Israel maintain a high level of security in the Israeli community by eradicating heinous acts of terrorism and simultaneously protect the human rights of terrorists?" This Note will look at Israel's current "constitution" and analyze some of the implicit laws used to govern Israel's stance on human rights. In addition, this Note analyzes the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and explores the reaction of prominent Israeli leaders after the United Nations asked Israel to become a member of the Convention. Finally, this Note dissects the recent Supreme Court of Israel's decision condemning the interrogation methods used on terrorists by the General Security Service of Israel.

II. ISRAEL'S JUDICIAL INFRASTRUCTURE

A. Constitution

Israel does not have a written constitution. Upon the founding of the State of Israel in May 14, 1948, Israel's Declaration of Independence contained an explicit promise to prepare a written constitution by October 1, 1948. Unfortunately, due to religious parties objecting to the drafting of a written constitution, and the secular parties objecting to a reference of divine authority, a political consensus could not be arrived at concerning the formalities and

2. Id.
3. Id.
4. Id.
language of the constitution. Fortunately, the United States has a written Constitution, so that when constitutional issues arise in day to day life, governmental and judicial entities have a formal guideline setting out what is considered constitutional. Since Israel lacks a written constitution, the Supreme Court uses other means to determine the constitutionality of issues in Israel. Over the years, the Supreme Court sitting as the High Court of Justice, via judicial interpretation and judicial activism, was able to establish several universal human rights that are ingrained in national constitutions elsewhere. Through its jurisdiction as a High Court of Justice, the Supreme Court maintains and strengthens human rights.

B. The Basic Laws

The Proclamation of Independence in Israel states that human rights in Israel are premised upon the appreciation for the value of man, the sanctity of his life and on his being free. Although Israel has no written constitution to regulate and guide constitutional issues, Israel has found an adequate substitute in the Basic Laws. Ten years after the founding of the State of Israel on May 14, 1948, the Knesset invented what eventually became the first of eleven Basic Laws. The following Basic Laws have been adopted: Basic Law: the Knesset, (1958); Basic Law: Israel Lands, (1960); Basic Law: the President of the State (1964); Basic Law: the State Economy (1975); Basic Law: the Army (1976); Basic Law: Jerusalem the Capital of Israel (1980); Basic Law: the Judiciary (1984); Basic Law: the State Comptroller (1988); Basic Law: Human Dignity and Liberty (1992); Basic Law: the Government (1992); and Basic Law: the Freedom of Occupation (1994).

The Basic Law utilized when Israel sets out to protect human rights is Basic Law: Human Dignity and Liberty (1992). This Basic Law states that

7. Id. at 588.
8. Id. at 592.
10. The Knesset as Constituent Assembly, supra note 5, at 2.

1. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic
the fundamental human rights in Israel are based on appreciation of the value of a man's life and his freedom to live. The primary focus of the law is "to defend Human Dignity and Liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state." The Basic Law determines that human liberty in Israel consists of the right to leave and enter the country, the right to privacy and intimacy, the right to immunity from searches involving one's property, body and possessions, and the right to avoid breaches of the privacy of one's speech and writings. Violations of the dignity or freedom of man is not permitted unless it is done in accordance with the law. It is here where the Basic Law starts to resemble fundamental rights that are present in national constitutions elsewhere. The ultimate question for the state.

2. There shall be no violation of the life, body, or dignity of any person as such.
3. There shall be no violation of the property of a person.
4. All persons are entitled to protection of their life, body, and dignity.
5. There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.
6. (a) All persons are free to leave Israel. (b) Every Israel national has the right of entry into Israel abroad.
7. (a) All persons have the right to privacy and intimacy. (b) There shall be no entry into the private premises of a person who has not consented thereto. (c) No search shall be conducted on the private premises of a person, nor in the body or personal effects. (d) There shall be no violation of the confidentiality of conversation, or of the writings or records of a person.
8. There shall be no violation of rights under this Basic law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.
9. There shall be no restriction of rights under this Basic Law held by persons serving in the Israel Defense Forces, the Israel Police, the Prisons Service and other security organizations of the State, nor shall such rights be subject to conditions, except by virtue of a law, or by regulation enacted by virtue of a law, and to an extent no greater than is required by the nature and character of the service.
10. This Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law.
11. All governmental authorities are bound to respect the rights under this Basic Law.
12. This Basic Law cannot be varied, suspended, or made subject to conditions by emergency regulations; notwithstanding, when a state of emergency exists, by virtue of a declaration under section 9 of the Law and Administration Ordinance, 5708-1948, emergency regulations may be enacted by virtue of said section to deny or restrict rights under this Basic Law, provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than is required.

15. Id.
16. Id.
17. Id.
Supreme Court sitting as the High Court of Justice is whether the interrogations at issue in the Torture Case violate the dignity and/or freedom of man, and if so, whether this should be permitted in accordance with the law.

III. UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

On November 2, 1991, Israel consented to becoming a member of the "United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," which was implemented by the United Nations General Assembly in 1984. Section 2 of Basic Law: Human Liberty and Dignity which prohibits the "violation of the life, body, or dignity of any person as such", and Section 4 of the aforementioned Basic Law, which grants all persons the right to protection against such violations, have constitutional status in Israel's legislative framework. Section 2 of the Basic Law gives the Supreme Court of Israel power to scrutinize legislation that could violate an individual's liberty and/or dignity:

The Supreme Court arguably has the power to void any legislation enacted after the entry into force of the Basic Law which violates the above provision. The Court for this reason may not deem previously enacted laws void, but they will be interpreted in accordance with the fundamental principles of sanctity of life, integrity of the body and primacy of human dignity, broadly construed. These provisions in the Basic Law, then, may be deemed to constitute a general prohibition of cruel, inhuman or degrading treatment or punishment, including torture, and are binding vis-à-vis both public and private entities.

Some of the issues raised with the ambit of Israel's presentation before The Human Rights Committee Against Torture were themes regarding the state of emergency in Israel, the right to life, and the techniques used by the General Security Service when interrogating terrorist suspects. The Human Rights

20. Id. § 5.
Committee Against Torture stated that the Committee will have many functions, and, in particular to Israel, will endeavor to scrutinize and watch over the General Security Service’s activities, specifically their interrogation methods that may amount to torture. The question then asked is “what is torture?” Torture is defined as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted upon an individual for purposes such as retrieving vital information and/or a confession...when such pain or suffering is inflicted by the instigation of or with the acquiescence of a public officer or anyone else acting in an official representative capacity...

The founding parties of the Convention were unable to agree on whether or not to completely prohibit both components of the title of the Convention. Although this decision was never officially agreed upon, and Article 1 of the Convention only prohibits “torture,” clear guidelines and detailed instructions have been created for the purpose of guiding the General Security Service in all aspects of the interrogation procedures.

On October 24, 1995, Former Prime Minister of Israel Yitzhak Rabin gave a speech to the United Nations General Assembly on the 50th Anniversary of the United Nations. The speech included a plea to the United Nations to help strengthen and support the war on terrorism:

The United Nations must continue giving expression to the new reality in the Middle East. We must all be at the forefront of the fight against the forces which threaten peace and security in the region, to all countries, to all the peoples of the region and in the entire world...the UN must intensify the international struggle against terrorism and its supporters. Terrorism is the world’s cancer today. Don’t fool yourselves, even if you ignore terror it can enter any of your homes. Terror must be defeated. Peace must win. This is a fight that we cannot afford to lose.

24. St. Amand, supra note 18, at 671. The parties were in disagreement on whether to “prohibit both torture and “other cruel, inhuman or degrading treatment or punishment.” Id.
Yitzhak Rabin, if still alive, would probably be somewhat disheartened after the results of the United Nations General Assembly’s decision on the interrogations in Israel. In fact, many of the political leaders in Israel were dissatisfied with the result of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This discontent stems from an already historically unstable relationship between Israel and the United Nations.\(^{27}\) In the United Nations General Assembly there exists a long-standing history of scrutinizing Israel more than other countries.\(^{28}\) The General Assembly devotes seven out of 140 items of its agenda to Israeli-generated issues.\(^{29}\) Within the General Assembly, the Commission on Human Rights often implements completely lopsided resolutions against Israel.\(^{30}\) "Israel is the object of more investigative committees and special representatives than any other state in the entire UN system."\(^{31}\) The United Nations has continually held Emergency Special Sessions of the General Assembly in Jerusalem.\(^{32}\) During the 48th Special Session of the General Assembly, two resolutions on terrorism were talked about, one in the Third Committee and one in the Sixth Committee.\(^{33}\)

The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment caused anxiety within the Israeli delegation, headed by the Israeli Foreign Ministry Legal Advisor, Alan Baker and Deputy State

Attorney, Yehuda Shaffer. The Israeli delegation alleged that the use of "moderate physical pressure" on detainees in extraordinary circumstances, in order to retrieve vital information concerning present terrorist attacks, cannot be considered torture or cruel, inhuman or degrading treatment. In its statement to the Committee, Israel explained in great detail its dilemma. This dilemma is the need to procure vital information from suspected terrorists about forthcoming acts of terrorism in order to thwart such events from happening and thereby saving human lives; and at the same time, fully practice human rights norms, specifically those emphasized in the Convention Against Torture.

The work of the General Security Service has proven to avoid many disasters. The GSS investigators have foiled some 90 plans for large-scale terrorist activities when time was running out. Unfortunately, some extremist groups, in opposition to talks of peace, are able to slip past the Israeli security; and in doing so, cause many individuals to die or be severely injured. Explosions in Haifa and Tiberias occurred almost simultaneously, and not surprisingly the explosions took place the day following the signing of the

35. Id.
36. The Israeli Foreign Ministry, Israel Reaction to the Conclusions of the Committee Against Torture (1998), at http://www.mfa.gov.il/mfa/go.asp?MFAH01n0 [hereinafter Israel Reaction]. The Justice Ministry Spokeswoman stated that:

The signing of the Declaration of Principles (start of the peace process between Israel and the PLO) between Israel and the Palestine Liberation Organization has given rise to a great deal of opposition amongst the extremist groups on both sides. In fact, the process prompted an unprecedented outburst of atrocities on the part of Palestinian terrorist organizations, which began to carry out acts of terrorism within the State of Israel, in order to shatter the peace process. Terrorists were dispatched to carry out suicide bombings, in which many people were killed and injured. Since September 12, 1993, when the Declaration of Principles was signed, until today, two hundred and fourteen Israelis have been killed in terrorist attacks in Israel; of these, one hundred and forty-three were civilians, and seventy one were members of the security forces. Also, one hundred and fifty one Palestinians were killed in these attacks.

37. Israel Reaction, supra note 36.
39. Id. As noted in paragraph twenty four of the special report: "Among these planned attacks are some 10 suicide bombings, seven car bombings, 15 kidnappings of soldiers and civilians, and some 60 attacks of different types including shootings of soldiers and civilians, hijacking of buses, stabbing and murder of Israelis, placing of explosives, etc." Israel has a top priority for thwarting terrorism and a tremendous importance is given to the importance of saving human lives; this comes as a result of the interrogators' work. See id.
Sharm agreement. The extremist Islamic groups, such as the "Hamas" and the Islamic "Jihad," have decided to choose a murderous path of destruction to express their dismay with the peace process.

The General Security Service's counter-operations and interrogations slow the Hamas' and Islamic Jihads' ability to recruit would-be terrorists. This causes terrorist groups to use alternative methods to recruit, and in desperate circumstances, try to recruit Israeli Arabs. Faced with the uphill battle of trying to protect the land and citizens of the State from terrorism, Israel and the General Security Service must also try to find a way to safeguard the human rights of the suspected terrorists.

IV. INTERROGATION METHODS USED ON TERRORISTS RULED UNCONSTITUTIONAL

The issue in the Torture Case was a complicated one. The Supreme Court of Israel, sitting as the High Court of Justice, was forced to make a decision that would ultimately affect the entire society of Israel. On September 6, 1999, in Public Committee Against Torture in Israel v. The State of Israel, the Supreme Court of Israel ruled that several of the predominantly used interrogation methods applied by the General Security Service in seeking confessions of suspected terrorists, were unconstitutional per se.

The purpose of using physical means on terrorists is so that the terrorists confess that they have first-hand knowledge of danger in the public sphere and to extrapolate and use that information for the sake of the general welfare of Israel. While General Security Service interrogators in Israel have used physical means to secure incriminating evidence against suspected terrorists, the United States forbids police interrogators from forcing individuals to be a witness against himself or herself, because the United States Constitution has the Bill of Rights containing the Fifth Amendment, which, among other things, safeguards individuals from self-incrimination. In addition, the United States extends "Miranda Rights" to United States citizens, stemming from the

40. Ronni Shaked, Yedioth Ahronot [Unskilled Terrorists] (1999), at http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0fob0. The Sharm agreement is a peace agreement between the Islamic and Israeli nations, which was rejuvenated at Sharm el-Sheikh, Egypt.
41. Id. The Hamas and Islamic Jihad are two prominent Islamic organizations that are in opposition to the peace process, and therefore are involved in acts of terrorism. However, it has not been proven that the Hamas and/or the Islamic Jihad were behind the attacks in Haifa and Tiberias.
42. Id.
43. St. Amand, supra note 18, at 656. The General Security Service is the main body responsible for trying to fight terrorism in Israel. Id.
44. See generally U.S. CONST. amend. V. In applicable part, the Fifth Amendment of the Bill of Rights states, "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..." Id.
landmark case of *Miranda v. Arizona*, which gives the suspects of crimes “the right to remain silent.” The Israeli Knesset has attempted to ratify a Bill of Rights similar to that of the United States for many years, however opposition from special interest groups has impeded the task. While no “Bill of Rights” exists in Israel, the privilege against self-incrimination is generally upheld. Haim Cohn, a retired justice of the Supreme Court of the State of Israel, said, “[a]lthough it isn’t stated verbatim, the reason for the exclusion of all self-incriminatory evidence is the desire to prevent confessions being elicited by torture or other violent means.” Contemporary Israeli law permits a confession to be used, but only if procured without violent means; the confession must be free and voluntary. Still, many times the General Security Service has been forced to use physical means to gain confessions out of terrorists in the hope of saving lives. The decision to utilize physical means in a specific instance is premised on internal regulations, requiring permission from the various ranks of the General Security Service chain of command. Different interrogation methods are used depending on the suspect, both in relation to what is required in the particular circumstance and to the probability of procuring authorization from within the ranks of the General Security Service hierarchy. The physical means used by the General Security Service were presented to the Supreme Court sitting as the High Court of Justice in *Public Committee Against Torture in Israel v. The State of Israel* by the General Security Service investigators. These are the physical means that will now be discussed.

A. *The Physical Means*

1. Shaking

Among the interrogation tactics cited in the General Security Service’s regulations, shaking is considered the most brutal. Shaking constitutes “the forceful shaking of the suspect’s upper torso, back and forth, repeatedly in a manner which causes the neck and head to dangle and vacillate rapidly.” The shaking is capable of causing severe trauma to the brain, injure the spinal

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46. St. Amand, *supra* note 18, at 663.
48. Id.
50. Id.
51. Id.
52. Id. § 9.
column, causing the suspect to faint, vomit and urinate without control and suffer intense head pain. The State of Israel entered into evidence several contradicting expert opinions as to the effects of shaking. In The Association of Civil Rights in Israel v. The Prime Minister of Israel and The Minister of Justice, the suspect involved in question died after being shaken. The victim's death was caused by an uncommon complication resulting in the atrophy of the lung. Although this may have been an extremely rare case, it shows that shaking has the potential to cause serious injury and, in rare instances, death.

2. The Shabach Position

When the General Security Service puts a suspect in the "Shabach" position, that individual is made to sit in a low chair, with the seat tilted forward towards the ground. The suspect then has his hands tied together behind the chair, and the suspect's head is covered by a hood while powerfully deafening music is emitted within inches of the suspect's head. Affidavits indicate that suspects were exposed to the Shabach position for extended periods of time, and this prolonged exposure may cause severe muscle pains to the upper torso and head. The State contends that the suspect's hands were tied to ensure the safety of the Shin Bet interrogators, and that the playing of noisy music and head covering was done for the purpose of preventing contact among the terrorists in the room.

3. The Frog Crouch

This method appeared in Wa'al Al Kaaqua, Ibrahim Abd'allah Ganimat, and Center for the Defense of the Individual v. The General Security Service and the Prison Commander-Jerusalem. The Frog Crouch required that the suspects "crouch on the tips of their toes" for five-minute intervals.

54. Torture Case, supra note 1, § 9. This is taken from an expert opinion in a prior application in 1995.
55. Id. The State claimed that: 1. Shaking posed no fatal danger to the suspect; 2. The risk to life from shaking is atypical; 3. That no evidence exists that shaking results in any fatal damage to the body; 4. That there was no medical literature on point that could show that shaking alone proximately caused a person to die; and 5. That physicians are present at all interrogations to protect the individual when there is possible danger of medical damage. Id.
56. Id.
57. Id. § 9.
58. St. Amand, supra note 18, at 659.
59. Id.
60. Torture Case, supra note 1, § 10.
61. Id.
62. Id. § 11.
63. St. Amand, supra note 18, at 658.
4. Excessive Tightening of Handcuffs

Many applicants in the recent past have complained of unnecessary tightening of the hand or leg cuffs and the fact that the handcuffs were particularly small, and often disproportionate to the victim’s arm and leg size. Due to this excessiveness and the long duration of the interrogations, the victim may suffer severe harm to the arms, hands, and feet. The State admits to using hand and leg cuffs in their interrogations, but denies using abnormally small cuffs, stating that the cuffs used are of standard size and are applied with normal tightness.

5. Sleep Deprivation

Since the Shabach position and loud music can last for long periods of time, some interrogated suspects have complained that they have been deprived of sleep, although the State claims that loss of sleep is incidental to the process of the interrogation and not done with an intention to exhaust the suspect.

B. Petitioner’s Argument

The petitioners argued that the Shin Bet did not have the authority to conduct interrogations, since no statute existed that would grant the authority necessary to do so. The petitioners also argued that the General Security Service’s physical interrogation tactics constituted an infringement on the suspects’ human dignity, and even more so, constituted a criminal offense on the part of the interrogators. They continued to explain to the court that the General Security Service is not authorized to conduct any physically intrusive interrogations without complete authority from the legislator pertaining to the implementation of such physical interrogations and in compliance with Basic Law: Human Dignity and Liberty. These arguments were countered by a few defenses asserted by the State of Israel, both in defense of the interrogation procedures employed by the Shin Bet and of the possible criminal liability of each individual interrogator.

64. Torture Case, supra note 1, § 12.
65. Id.
66. Id.
67. Id. § 13.
68. St. Amand, supra note 18, at 657-58.
69. Torture Case, supra note 1, § 14.
70. Id. See Basic Law: Human Dignity and Liberty, supra note 13, and accompanying text.
C. Respondent's Argument

Although torture is prohibited under Israeli Law, the 1987 Landau Guidelines allow the use of "moderate physical pressure" of suspected terrorists in limited cases where the information sought is vital to prevent death via terrorist bombings. The State feels the interrogation practices fall within these Landau guidelines and hence do not constitute torture. The General Security Service investigators claim they are in fact authorized to investigate and interrogate those who are suspected of endangering Israel's security. The State also argues that the physical means implemented are legal under the "necessity defense." The necessity defense is a matter open for debate for some time. The General Security Service mentions to the Supreme Court of Israel that the necessity defense should apply because of the "ticking time bomb" argument. This argument is premised on the fact that there is an imminent danger that exists and therefore a corresponding immediate need to preserve human life. Finally, the General Security Service asserted that the necessity defense is available to each individual interrogator if faced with criminal liability for improper interrogation.

V. CONCLUSION

The Supreme Court of Israel, sitting as the High Court of Justice, ruled against the State of Israel, finding that the General Security Service did not have the authority to implement the various physical methods of interrogation on the terrorist suspects. In its decision, the Supreme Court of Israel emphasized that Israeli law forbids the challenged physical interrogation practices, because "1) they offend the general notions of interrogation law, 2) the practices could not be justified by the necessity defense, and 3) no legislation authorized the use of such practices." The Court concluded that any justification for allowing physical means of interrogation should be decided by the legislature, that the
legislature represents the people, and therefore, any discussion about this issue should be presented in front of the legislature.\textsuperscript{80} The effect of the Supreme Court's decision has been to eliminate the uses of the interrogation methods by the General Security Service, producing a wide range of controversy as to whether or not the General Security Service should be allowed to conduct these kinds of interrogations on suspected terrorists.\textsuperscript{81}

This decision by the Supreme Court of Israel to ban the interrogation methods used by the General Security Service has raised many questions. To put it cliché, the State of Israel was caught between a rock and a hard place. What price, if any, should be paid in order to eradicate terrorism in Israel? Should the fundamental human rights of terrorists be compromised for the sake of the Israeli community? The Supreme Court of Israel, along with the United Nations' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, have paved the way for human rights to trump communitarianism. In keeping with their position that individual rights should be the highest priority, human rights activists vehemently support the recent decision, and feel that Israel has taken a step in the right direction. Conversely, members of Israeli security maintain that this decision will lead to enormous problems for the general welfare and citizenry of Israel. Which side is correct remains to be seen.

\begin{flushright}
\textsuperscript{80} Id. at 661. \\
\textsuperscript{81} Id. at 675.
\end{flushright}
THE INVISIBLE WOMEN: THE TALIBAN'S OPPRESSION OF WOMEN IN AFGHANISTAN

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I. INTRODUCTION

Today, we live in a world where the women's movement has given most women the opportunity to excel in professional careers, hold political offices, own their own companies, and hold many other positions of power. Yet, in this

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same world, women in Afghanistan have become powerless. Afghan women have become prisoners in a world that is ruled by the Taliban regime.

Afghanistan is a small country that shares its borders with Pakistan, Iran, Turkmenistan, Uzbekistan, Tajikistan, and China. In 1996, after over seventy-five years of government instability in the country, the Taliban, a fundamentalist Islamic group, extended its control over approximately eighty-five percent of Afghanistan.

Under Taliban rule, women have become virtually invisible. The Taliban's harsh rules prohibit Afghan women from obtaining life's most basic necessities. For example, women are prohibited from obtaining employment outside the home, obtaining a formal education, leaving their homes without a male family member to chaperone them, obtaining medical treatment, and appearing in public without being completely covered by a burqa.

Before the Taliban regime took control of Afghanistan, many women in Afghanistan's urban and metropolitan areas worked outside the home, had access to formal educational facilities, and enjoyed a more liberal lifestyle. Statistics by the Feminist Majority Foundation show that women and girls in Afghanistan's capital city of Kabul, as well as many other parts of the country, have attended co-educational schools since the 1950s. These same statistics also show the following: before the Taliban gained control of Afghanistan, seventy percent of teachers were women; forty percent of doctors were women; women comprised over one-half of the student body of Afghanistan's universities; schools were co-educational at all levels; women were employed as judges, engineers, nurses, and lawyers; and women were not required to cover themselves with a burqa.

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3. There are conflicting accounts of how much of Afghanistan is under Taliban control. Most sources state that the Taliban control between 85% to 95% of the area. Afghanistan and The Taliban: Hearings Before the Subcomm. on Near E. and S. Asian Affairs of the Senate Comm'n. on Foreign Relations, 106th Cong. (2000) (on file with author) [hereinafter Statement of Karl F. Inderfurth].

4. A burqa is comparable to wearing a bed sheet. It is a floor-length covering that only contains an opening across the eyes which is made of a wire-like mesh.


7. Id.
The oppression of women in Afghanistan is one of the most deplorable human rights violations, and it is capturing the attention of leaders and activists worldwide. The goal of this paper is to inform others about the mistreatment of women by the Taliban regime. Section II will discuss the history of political instability in Afghanistan, and how the Taliban rose to power. Section III will discuss some of the laws that have been laid down by the Taliban, and the punishment for breaking these laws. Section IV will discuss the religion of Islam’s views on the rights of women, the proper treatment of women, and the Taliban’s treatment of women. Section V will give a brief account of the United States’ response to the Taliban’s treatment of women and girls in Afghanistan. Lastly, Section VI will discuss the future of women and girls in Afghanistan.

II. THE TALIBAN: WHO THEY ARE AND HOW THEY CAME TO POWER

After more than seventy-five years of government instability in Afghanistan, the fundamentalist-Islamic group, known as the Taliban emerged sometime in the Fall of 1994.8 The Taliban’s leader, Mullah Mohammed Omar, started a reform movement that eventually grew into what is now known as the Taliban.9 The Taliban claims that it was originally formed in response to the widespread civil unrest and crime in Afghanistan.10 The stated goal of the Taliban is “to bring Afghanistan [back] under Islamic rule.”11

Throughout its history, Afghanistan has consistently been plagued with political instability.12 Afghanistan has been referred to as the “crossroads to Central Asia.”13 Because of its coveted location as a trade route, there have been constant struggles for power and control of Afghanistan.14 Alexander the Great, the Turkish Empire, and the Mongol Dynasty of India are a few of the noteworthy historical figures who have struggled to control Afghanistan.15 During the Nineteenth Century, a struggle for the control of Afghanistan erupted between Britain and Russia.16 The most recent power struggle in Afghanistan

10. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Background Notes Archive, supra note 11.
resulted in the ten-year occupation of Afghanistan by the Soviet Union from 1979 to 1989.  

A. Afghanistan’s History of Political Instability

From 1919 to 1929, Afghanistan was ruled by King Amanullah. King Amanullah attempted to end Afghanistan’s isolation as a country by establishing diplomatic relations with most major countries and by attempting to modernize the country. For example, the traditional Muslim veil required as part of the dress code of women was abolished and co-educational schools were opened. Because these changes conflicted with their conservative beliefs, many traditional religious and tribal leaders were alienated. Eventually King Amanullah lost control of Afghanistan to rebel forces in 1929.

In 1929, King Amanullah’s cousin, Prince Nadir Khan, took control of Afghanistan from the rebel forces and became King Nadir Shah. King Nadir Shah’s rule was short; in 1933, he was assassinated by a Kabul student.

In 1933, Afghanistan’s last king, King Nadir Shah’s son, Mohammad Zahir Shah, took the throne and ruled Afghanistan from 1933 to 1973. King Zahir Shah’s cousin, Sardar Mohammed Daoud, served as the Prime Minister of Afghanistan from 1953 to 1963. Under the rule of King Zahir Shah and Prime Minister Daoud, the country appeared to be leaning toward a more liberal government structure. Prime Minister Daoud sought military and economic assistance for Afghanistan from the United States and the Soviet Union. Prime Minister Daoud also introduced new social policies that instantly became a source of controversy. For example, Prime Minister Daoud appeared at the country’s 1959 independence celebrations with his wife and other female members of the royal family not covered by the traditional Muslim veil worn by women.

17. Id.
18. Id.
19. Id.
20. Id.
21. Background Notes Archive, supra note 11.
22. Id.
23. Id.
24. Id.
25. Id.
26. Background Notes Archive, supra note 11.
27. Id.
28. Id.
In 1963, Prime Minister Daoud was dismissed after being accused of giving support for the creation of a Pashtun state at the border of Pakistan and Afghanistan. Because of these allegations, the tensions in an already strained relationship became greater between Afghanistan and Pakistan. Upon the dismissal of Prime Minister Daoud, King Zahir Shah was left to rule Afghanistan directly.

In 1964, King Zahir Shah’s introduced a new constitution. In 1964 and 1969, elections were held by King Zahir Shah as part of an “experiment with democracy,” but the ultimate power was still held by King Zahir Shah. Despite the King’s “experiment with democracy,” political parties were illegal in Afghanistan until 1965.

In 1965, the People’s Democratic Party of Afghanistan, a communist-supported party, was founded. The People’s Democratic Party of Afghanistan “had close ideological ties to the Soviet Union.” The 1965 elections were successful for the communist party, after two communist deputies were elected to the Afghanistan Parliament. In 1967, the People’s Democratic Party of Afghanistan split into two branches, and other political parties were formed that gained overwhelming support from the “students and young intellectuals” of the country.

In the early 1970s, there was an overwhelming number of educated young people whom outnumbered the employment opportunities in Afghanistan. Also during this time, certain regions of Afghanistan were experiencing a

30. Pashtuns are the largest ethnic group in Afghanistan representing approximately thirty-eight percent of the population. Other ethnic groups present in the country include: Tajik, accounting for approximately twenty-five percent of the population; Hazara, accounting for approximately nineteen percent of the population; Aimaq, accounting for approximately six percent of the population; Uzbek, accounting for approximately six percent of the population; and Turkmen, accounting for approximately two percent of the population. There are other small ethnic groups in the country that represent small percentages of the population. Background Notes Archive, supra note 11.

31. Id.
32. Jane’s Sentinel Security Assessment, supra note 29.
33. Id.
34. Id.
35. Id.
36. Id.
37. Jane’s Sentinel Security Assessment, supra note 29; Background Notes Archive, supra note 11.
38. Jane’s Sentinel Security Assessment, supra note 29.
39. One branch of the People’s Democratic Party of Afghanistan was the Khalq branch, which means the “Masses.” Nur Muhammad Taraki was the leader of the Khalq branch. The Khalq branch had the support of the Afghan military. The following of the Khalq branch consisted mostly of the Pashtun-speaking youth. The Parcham, which means “the Banner”, was the second branch of the People’s Democratic Party of Afghanistan. The Parcham branch was headed by Babrak Karmal. The following of the Parcham branch consisted mostly of the urban, Farsi-speaking population. See id.; Background Notes Archive, supra note 11.
40. Jane’s Sentinel Security Assessment, supra note 29.
devastating famine.\textsuperscript{41} In response to the economic crisis student activism began to grow and develop.\textsuperscript{42} A Marxist influence was becoming more prevalent among, and developed by, many student activists.\textsuperscript{43} In response to the growing "Marxist influence" among student activists, Ghulam Mohammad Niazi and Burhanuddin Rabbani, two Muslim professors at Kabul University, began an Islamic-oriented political discussion group for students.\textsuperscript{44} From this political discussion group, the Jawanan-i-Muslimeen, which means "Muslim Youth" was formed.\textsuperscript{45} The Jawanan-i-Muslimeen was a student organization that was headed by Habiburrahman and Gulbuddin Hekmatyar.\textsuperscript{46}

In 1973, former Prime Minister and cousin to King Zahir Shah, Sardar Daoud, returned to power in Afghanistan after seizing power from King Zahir Shah in a coup.\textsuperscript{47} Charges of corruption against the royal family and the unfavorable economic conditions that the country was experiencing after the severe drought and famine of 1971 and 1972 were contributing factors to the success of this coup.\textsuperscript{48}

Sardar Daoud's new government was supported by the Parcham wing of the People's Democratic Party of Afghanistan.\textsuperscript{49} In turn, the People's Democratic Party of Afghanistan was receiving support from the Soviet Union.\textsuperscript{50} After abolishing the monarchy and revoking the 1964 constitution, Sardar Daoud declared Afghanistan a republic and named himself as the first President and Prime Minister of the newly declared republic.\textsuperscript{51}

Shortly after Sardar Daoud seized power of Afghanistan, an Islamic-supported counter-coup was unsuccessful.\textsuperscript{52} In response, Sardar Daoud began ordering the arrests of large numbers of Islamic supporters and political groups.\textsuperscript{53} This forced both Burhanuddin Rabanni, the Muslim professor that founded the Islamic oriented student political discussion groups, and Habiburrahman and Gulbuddin Hekmatyar, the founders of Jawanan-i-Muslimeen, the student organization formed around Rabanni's discussion groups, to flee from Afghanistan to Pakistan along with their followers.\textsuperscript{54}

\begin{itemize}
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Jane's Sentinel Security Assessment, supra note 29.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Background Notes Archive, supra note 11.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Jane's Sentinel Security Assessment, supra note 29.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Background Notes Archive, supra note 11.
\item \textsuperscript{52} Jane's Sentinel Security Assessment, supra note 29.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Id.
\end{itemize}
Pakistan, Rabanni and the Hekmatyars' followers received training from the Pakistani military and began making guerrilla attacks on Sardar Daoud's newly established government. Meanwhile, Sardar Daoud's loyalties to the communist-supported People's Democratic Party of Afghanistan were short-lived. Shortly after he rose to power in Afghanistan, Sardar Daoud formed his own political party, the Revolutionary Party.

During the mid-1970s, the original political parties of Afghanistan began to reorganize, reunite, and reemerge. In 1976, Burhanuddin Rabanni and the Hekmatyars began to disagree politically, and the Hekmatyars established their own political following, the Hizb-i-Islami. In 1977, the People's Democratic Party of Afghanistan re-united and re-organized after its division ten years earlier in 1967.

In April, 1978, there was another coup, that ended with the death of Sardar Daoud. After the coup, the People's Democratic Party of Afghanistan took control of the country and named Nur Mohammad Taraki, the Secretary General of the People's Democratic Party of Afghanistan, as President. The Soviet Union acted promptly to take advantage of the political situation in Afghanistan. In December 1978, the Soviet Union and Afghanistan signed a "bilateral treaty of friendship and cooperation." Shortly after the execution of the treaty, the Soviet Union began to increase its military assistance to Afghanistan. Ultimately, the survival and existence of the new Afghan government became increasingly dependent upon the Soviet Union's military assistance.

During the first eighteen months Nur Mohammad Taraki was in power, the People's Democratic Party of Afghanistan began to aggressively impose a "Marxist-style reform program" on the country. The reform program conflicted with many of Afghanistan's deeply-rooted and traditional Islamic roots, beliefs, and customs. For example, there were many changes in the law,

55. Id.
56. Id.
58. Hizb-i-Islami means "Islamic Party." Id.
59. As previously discussed, the People's Democratic Party of Afghanistan split into two rival wings in 1967. See supra note 39.
60. Background Notes Archive, supra note 11.
61. Id.
62. Id.
63. Id.
64. Id.
65. Background Notes Archive, supra note 11.
66. Id.
67. Id.
including changes in marriage customs and land reform. These changes were highly controversial in many of Afghanistan’s extremely conservative villages, and resulted in thousands of conservative Muslims being imprisoned, tortured, or killed, including members and leaders of the religious establishments, government officials, and affluent members of society. Because of these reform efforts and the uprising that they caused among Afghanistan’s conservative Islamic population, Islamic exiles were encouraged to return to Afghanistan from Pakistan. These returning exiles encouraged the resistance against the Afghan government’s reforms, and this eventually resulted in control of Afghanistan changing hands again.

In the Fall of 1979, Hafizullah Amin had Nur Mohammad Taraki killed, and seized control of Afghanistan. When Amin took control of Afghanistan, the majority of the Afghan countryside was under rebel control, and the support of the Afghan people for the People’s Democratic Party of Afghanistan began to diminish. In October 1979, the relationship between Hafizullah Amin and the Soviet Union became very tense after Hafizullah Amin refused to accept guidance from the Soviet Union on how to gain stability in Afghanistan’s government. Fearing a collapse of Hafizullah Amin’s entire government structure, the Soviet Union invaded Afghanistan and killed Hafizullah Amin in December 1979. After the invasion, the government of Afghanistan changed hands again. The Soviet Union named the Parcham leader, Barbrak Karmal, as

68. Id.
69. Id.
70. Background Notes Archive, supra note 11.
71. Many Islamic supporters fled to Pakistan after the 1973 coup of Sardar Daoud, including members of the Islamic student organization Jawanan-i-Muslimeen (“Muslim Youth”), founded by Habiburrahman and Gulbuddin Hekmatyar, and Hizb-i-Islami (“Islamic Party”), the organization later formed by the Hekmatyars after splitting from the Jawanan-i-Muslimeen. Jane’s Sentinel Security Assessment, supra note 29.
72. Id.
73. Haifzullah Amin was the former Prime Minister and Minister of Defense of Afghanistan. Together Hafizullah Amin and Nur Mohammad Taraki headed the Khalq, one of the two branches of the divided People’s Democratic Party of Afghanistan. As previously discussed, in 1967 the People’s Democratic Party of Afghanistan split into two rival wings and reunited in 1977. The newly reunited People’s Democratic Party of Afghanistan launched the coup in 1978, which resulted in the Afghan leader Sardar Daoud’s death. Id.
74. The rebels opposed the People’s Democratic Party of Afghanistan due to its reform in the country, which conflicted with traditional Islamic traditions and beliefs. For example, there were changes made to the marriage laws and highly controversial land reform policies. Background Notes Archive, supra note 11.
75. Id.
76. Jane’s Sentinel Security Assessment, supra note 29.
Prime Minister of Afghanistan. This marked the beginning of a ten-year occupation of Afghanistan by the Soviet Union.

Like his predecessor, Hafzullah Amin, Prime Minister Karmal was also unsuccessful in establishing a stable and centralized government outside of Afghanistan's capital, Kabul. During Prime Minister Karmal's rule, the majority of Afghanistan's countryside still remained in rebel hands. The biggest factor in the inability to achieve stability in Afghanistan's government was the Mujahidin, the "Afghan freedom fighters." Initially, the Mujahidin organization was poorly organized and lacked power; however, the Mujahidin's power strengthened with time because they were receiving weapons and training from outside sources, including the United States. The Mujahidin vigorously opposed the Soviet Union's control of Afghanistan, and made it virtually impossible for the Afghan government to establish any stable system of government outside of Afghanistan's major urban cities. The Mujahidin actively and frequently launched attacks on Kabul and assassinated high Afghan government officials. Despite the fact that the Mujahidin was almost entirely responsible for the majority of the civil unrest in Afghanistan, the burden of the blame landed squarely on the shoulders of the Soviet Union. This was one of the biggest factors contributing to the Soviet Union's failure to win the support of the Afghan people.

In 1986, Prime Minister Karmal was replaced by Muhammad Najibullah, the former chief of the Afghan secret police. Again, like his predecessors, Najibullah was unsuccessful in bringing stability to the Afghan government, and the country continued to remain highly dependent on support from the Soviet Union. During this same time period, the rebel resistance against the Soviet Union's control was aided by the United States, Saudi Arabia, and Pakistan.

In May 1988, the Afghanistan-Pakistan-Union of Soviet Social Republics-United States Accords on the Peaceful Resolution of the Situation in Afghanistan (the "Peaceful Accords") resolved certain disputes between

77. The Parcham was one of the two rival wings of the People's Democratic Party of Afghanistan during its split in 1967. Background Notes Archive, supra note 11.
78. Id.
79. Id.
80. Id.
81. Id.
82. Background Notes Archive, supra note 11.
83. Id.
84. Id.
85. Id.
86. Id.
87. Background Notes Archive, supra note 11.
88. Id.
Afghanistan and Pakistan. 89 In Geneva, certain agreements were executed at the Peaceful Accords between Afghanistan and Pakistan in order to resolve the conflicts in Afghanistan. 90 The Soviet Union and the United States also signed the agreements at the Peaceful Accords as guarantors. 91 One of the crucial issues addressed and resolved at the Peaceful Accords provided that there would be no further interference by the United States or the Soviet Union in Afghan or Pakistani affairs. 92 To assure that this provision would be followed, the agreements reached at the Peaceful Accords provided for the Soviet Union’s full withdrawal from Afghanistan by 1989. 93 Interestingly, the Mujahidin neither participated in the negotiations, nor signed the agreements reached at the Peaceful Accords. 94

In accordance with the agreements reached at the Peaceful Accords, the Soviet Union withdrew from Afghanistan in 1989. 95 After the Soviet Union’s withdrawal from Afghanistan, the country still continued to be plagued by civil war. 96 Ironically, Muhammad Najibullah continued to remain in power until 1992 despite his lack of support from the Afghan people, and his lack of recognition by the international community. 97

In 1992, the Mujahidin were successful in taking control of Kabul. 98 The Mujahidin immediately established a fifty-one member leadership council to assume temporary power and leadership in Kabul, and made provisions for the establishment of a new government. 99 According to the Mujahidin’s plan, the fifty-one member leadership council would turn over leadership to a ten-member leadership council after three months. The ten-member leadership council was to be headed by Professor Burhanuddin Rabbani. 100 Burhanuddin Rabbani made a radical departure from the Mujahidin’s plan and formed the ten-member leadership council prematurely in May, 1992. 101 Burhanuddin Rabbani was then elected President by the leadership council. 102

90. Id.
91. Id.
92. Id.
93. Id.
94. Background Notes Archive, supra note 11.
95. Id.
96. Id.
97. Id.
98. Id.
99. Background Notes Archive, supra note 11.
100. As previously discussed, Professor Burhanuddin Rabbani was one of the professors at Kabul University in the late 1960s and early 1970s who began the Islamic student discussion groups. Jane’s Sentinel Security Assessment, supra note 29.
101. Background Notes Archive, supra note 11.
102. Id.
The fighting in Afghanistan continued because of the ethnic and religious differences among the Afghan people.\textsuperscript{103} There was also fighting between Burhanuddin Rabanni’s supporters and his rivals.\textsuperscript{104} The country remained in a state of civil war and divided into various war zones, with each war zone being governed by a different “warlord.”\textsuperscript{105} The warlords expanded the already flourishing criminal trades of smuggling and narcotics, and strengthened their ties with the international criminal community.\textsuperscript{106} As a result, Afghanistan’s economy became supported primarily by criminal activity.\textsuperscript{107}

In the Summer of 1994, the Taliban, a fundamentalist and radical religious student militia, emerged in South Afghanistan in reaction to the widespread civil unrest and lawlessness in Afghanistan.\textsuperscript{108}

\textbf{B. The Origins of the Taliban: Claims by Outside Sources}

Little is known about the group of religious students that make up the Taliban. The only information that seems not to be contradicted, wholly or partly, is that the Taliban is lead by Mullah Mohammed Omar. Likewise, little is known about Mullah Mohammed Omar. The Taliban are reported to be a group of “militant Sunni Muslim Afghan tribesman” from South Afghanistan.\textsuperscript{109}

The sources are not clear, and there are often conflicting accounts as to the exact origins of the Taliban, and their role in Afghanistan’s turbulent past. One account is that the members of the Taliban are from the rural villages of Afghanistan, where they lived radically conservative lives in conformity with a strict interpretation of Islamic law.\textsuperscript{110} The customs, traditions, and beliefs of these rural villages are said to give women no rights. It is reported that the women residing in these rural villages are required to be completely covered by a burqa, and are often sold off to the highest bidder as child-brides, and then resold when their husbands grow bored with them.\textsuperscript{111}

There are some reports claiming that the members of the Taliban fought as a Mujahidin during the Soviet Union’s occupation of Afghanistan.\textsuperscript{112} Other sources claim that the Taliban were appointed by Pakistani officials to protect

\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Jane’s Sentinel Security Assessment, supra note 29.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} O’Toole, supra note 8.
and escort trade convoys on a developing trade route from Pakistan to Central Asia.\textsuperscript{113} These sources claim that after the Taliban provided service to the Pakistani government, they became more developed and organized, and moved on to take control of the city of Kandahar in South Afghanistan, which would be the group's first step toward taking control of the majority of the country.\textsuperscript{114}

However, other sources speculate that there is more behind the Taliban than just a group of religious students passionate about bringing Afghanistan under pure Islamic rule. There are theories by some, that the Taliban is a military and political operation created solely to give Pakistan "indirect control over the policies made in Afghanistan."\textsuperscript{115} Propositions asserted under this theory are: that the high-ranking Taliban officials are former officials of the communist government, and that Pakistan and Saudi Arabia are using these high-ranking Taliban officials as "puppets" to control the internal affairs of Afghanistan.\textsuperscript{116} The supporters of this theory claim that it provides justification for the Taliban's questionable swift ascension to power in Afghanistan. While there are many conflicting accounts as to the exact evolution of the Taliban and the role that they played in Afghanistan's history, most sources agree that members of the Taliban did flee to Pakistan during Soviet occupation in Afghanistan, and it was there that they received training in religious schools.\textsuperscript{117}

C. The Origins of the Taliban: Claims by the Taliban

The only claim that has been consistently made by the Taliban is that they are a group of students of pure Islam, Islam jurisprudence and the laws of the Sharia, and that their ultimate goal is to bring Afghanistan under Islamic rule, thereby creating a pure Islamic-Afghan government.\textsuperscript{118} The Taliban's claims about their origins, backgrounds, and goals are also conflicting. Because media coverage is rarely allowed by the Taliban, most of the conclusions about the Taliban must be drawn from a combination of information from a variety of sources and speculation about the facts missing from that information.

\begin{itemize}
    \item \textsuperscript{113} Id.
    \item \textsuperscript{114} Id.
    \item \textsuperscript{115} The Taliban Story, supra note 8.
    \item \textsuperscript{116} Id.
    \item \textsuperscript{117} Id.
    \item \textsuperscript{118} The primary source for Islamic law is the Qur'an. The Qur'an contains the teachings of the Prophet Muhammad, who is held up as the greatest prophet in the Muslim faith. The Sharia is a supplement to the Qur'an that contains the rules under which a Muslim society should organized and governed. The Sharia provides the Muslim society with guidelines for resolving conflicts between individuals and between individuals and the state. The Sharia is based upon the Qur'an. There are also other supplementary sources, the Hadith and the Sunna. The Hadith and the Sunna can both be used to help interpret the meaning of the Qur'an, but they cannot be used in a way that is inconsistent with the teachings of the Qur'an. M. Cherif Bassiouini, Introduction to Islam, available at http://www.mideasti.org/library/islam/introislam.htm (last visited Mar. 17, 2001).
\end{itemize}
The Taliban claims that they have been in existence since the Soviet occupation\textsuperscript{119} of Afghanistan in 1979.\textsuperscript{120} They also claim that, during the occupation, they were affiliated with Harakat-e Inqelab-e Afghanistan (Afghanistan's Movement of Islamic Revolution) and Hizb-e Islami (The Islamic Party), two political parties which opposed Soviet occupation.\textsuperscript{121} This claim is consistent with some reports given by other outside sources.

The Taliban claim their movement began in 1994, in the city of Kandahar, in Southern Afghanistan.\textsuperscript{122} They claim that its calling was to "rescue" the Afghan people who have suffered through years of chaos and devastation under the rule of the warlords, who were in control of the countryside.\textsuperscript{123} The Taliban also claim that their leader, Mullah Mohammad Omar, formed the movement in order to restore law and order to the area of Kandahar, which was plagued by crime and civil unrest.\textsuperscript{124}

While there are numerous conflicting accounts as to the exact origins of the Taliban and their role in the history of Afghanistan, most sources seem to agree that the Taliban are religious students that were trained in Pakistan during the Soviet Union's occupation in Afghanistan. Their goal is to establish a pure Islamic government in Afghanistan. Their ascension to power began in the city of Kandahar in Southern Afghanistan and eventually led to the capture of Afghanistan's capital of Kabul in 1996.

\section*{D. The Taliban's Ascension To Power}

The Taliban ascended to power in Afghanistan's capital city of Kabul, in 1996.\textsuperscript{125} Strategically, Kabul is considered to be an important city for the Taliban because it is considered "the gateway to the Indian subcontinent in the south and to the central Asia republics to the north."\textsuperscript{126} Immediately after taking control of Kabul, the Taliban captured and killed Afghanistan's former President, Muhammad Najibullah, and his brother, Shahpur Ahmedzi.\textsuperscript{127} The

\begin{enumerate}
\item As previously discussed, the Soviet Union occupied Afghanistan from 1979 to 1989. In 1989, the Soviet Union withdrew from Afghanistan pursuant to the Geneva Accords Agreement signed by Afghanistan and Pakistan, and guaranteed by the United States and the Soviet Union. The Geneva Accords Agreement required full withdrawal from Afghanistan by the Soviet Union.
\item \textit{Id.}
\item \textit{The Taliban Story,} supra note 8.
\item \textit{Taleban,} supra note 120.
\item \textit{The Taliban Story,} supra note 8.
\item \textit{Jane's Sentinel Security Assessment,} supra note 29.
\item Muhammad Najibullah was President from 1987 to 1992, until he was overthrown Burhannuddin Rabbani. Burhannuddin Rabbani spared the life of Najibullah after he took power. When the Taliban ascended to power in Kabul in 1996, Najibullah was residing in a United Nations compound. The
Taliban then made a gruesome statement of their arrival and presence in Kabul by displaying the corpses of Muhammad Najibullah and Shahpur Ahmedzi hanging in the center of the city.\textsuperscript{128}

When the Taliban first ascended to power in Kabul, they were welcomed by the majority of the population of Afghanistan.\textsuperscript{129} After years of war, instability, civil unrest, and living under the rule of the various warlords who ruled the countryside of Afghanistan, the people of Afghanistan viewed the Taliban as an organization that would provide them with the stability and security that they craved.\textsuperscript{130} However, almost immediately after the Taliban’s occupation of Kabul, they suspended the constitution and changed the name of Afghanistan to the “Islamic Emirate of Afghanistan,” with their leader, Mullah Mohammad Omar, carrying the title of “Commander of the Faithful.”\textsuperscript{131} Currently, there are no constitutional protections or any other basic law in place in Afghanistan.\textsuperscript{132} The only law is the law of the Taliban, which is erratic, illogical, and inconsistent. The Taliban’s law is based upon their own strict interpretations of Islamic law.\textsuperscript{133}

\section*{III. THE LAW OF THE TALIBAN}

The Taliban subscribe to a radical interpretation of Islam that mandates extreme conservatism. The Taliban belong to the Sunni sect of Islam.\textsuperscript{134} While

\textsuperscript{128} 128. Id.

\textsuperscript{129} 129. Statement of Karl F. Inderfurth, supra note 3.

\textsuperscript{130} 130. Id.


\textsuperscript{132} 132. Id.

\textsuperscript{133} 133. Id.

\textsuperscript{134} 134. Id. The Sunni Muslims account for approximately 85\% to 90\% of all Muslims. The other sect of Islam is Shia. The Sunni and Shia Muslims differ over their interpretations of the Sharia. Both sects share the same belief in the Car’s and the Sharia; however, they differ in their opinions of how the Sharia should be interpreted. For example, one difference is that Sunni Muslims believe that the Muslim society’s government should be a democracy, with an elected leader called the khilafa. In contrast, the Shia Muslims believe that the Muslim society’s governing power should a descendent of the great Prophet Muhammad. While both groups honor and obey the Qur’an and Sharia, their interpretations of the Qur’an and the Sharia are different. The Sunni Muslims are more apt to closely follow the letter of the Qur’an, whereas the Shia Muslims are more apt to closely follow the spirit of the Qur’an. There are four schools of thought on jurisprudence in the Sunni sect of Islam: the Hanbali, Hanafi, Maliki and Shafei. The difference in these four
other Muslim countries that belong to both the Sunni and Shia sects of Islam have imposed rules on women that would be termed "strict" by western standards, it has been said that no other Muslim country in the world shares the Taliban's extreme and harsh interpretation of the principles of Islam.135

Some of the first official acts of the Taliban after taking control of Kabul were: to make it mandatory for women to wear a burqa; to prohibit women from working outside their homes; to prohibit girls from attending school; and to prohibit women from going outside their homes without a male family member serving as a chaperone.136 Under the rules of the Taliban, women are not allowed to wear white burqas, white socks, or white shoes, and are subject to being beaten if their shoe heels click when they walk.137

The laws of the Taliban have had the greatest effect on the women in the metropolitan and urban areas of Afghanistan and have virtually made them prisoners in their own homes.138 For example, as part of the implementation of their plan to create their "pure Islamic state," the Taliban immediately placed a ban on televisions, movies, music, and photographs.139 The Taliban have also prohibited activities such as kite flying and chess, along with dolls and stuffed animals.140 Under its religious interpretations, the Taliban have declared that dolls, stuffed animals, televisions, and photographs represent graven images, which are prohibited in the religion of Islam.141 The Taliban require that a man's beard must hang from his chin at a length that is longer than a fist clamped underneath his chin, that men wear head coverings, and may not have long hair.142 A man can be imprisoned for ten days for shaving his beard, or alternatively, required to attend instructions in the Islamic faith.143 The Taliban have also established mandatory prayer schedules.144 Anyone who does not observe the mandatory prayer schedules, or who is late to the mandatory prayer session, runs the risk of being punished, which could include a severe beating.145

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135. Statement of Karl F. Inderfurth, supra note 3.
139. O'Toole, supra note 8; See also Afghanistan Statistics on Religion, supra note 131.
141. Id.
142. Id.
143. Id.
144. Id.
The Taliban has also made it mandatory that all children be given Muslim names by their parents.146

Because there is no law or constitutional provision in place, other than the law of the Taliban, the Taliban freely enter homes, without permission, notification, or consent, to search for violations of the Taliban law.147 The Taliban rely on the Ministry for Promotion of Virtue and the Suppression of Vice to enforce its rules, and the Ministry is notorious for regularly checking for compliance with the Taliban's edicts on the streets of Afghanistan's cities.148

A. Life for Women Before the Taliban Regime

The Taliban's harsh rules have had the greatest impact on Afghan women who reside in the urban areas, and less of an impact on women in rural areas. This is because enforcement of the Taliban's law is not as consistent in Afghanistan's rural areas because the Taliban's presence is not as substantial.149 Additionally, because most women in Afghanistan's rural villages have always lived a conservative lifestyle, the Taliban has brought some security and stability to their lives.150 During the years when the country was ruled by warlords and plagued by crime, these women lived with the constant threat of becoming the victims of rape and other criminal acts.151 Some reports indicate that the Taliban have stopped, or at least significantly reduced, the rapes and other crimes that were common during the rule of the former President, Muhammad Najibullah.152 While the Afghan women in rural areas may breathe a sigh of relief because some order has been restored to their world, the women in Afghanistan's urban cities are feeling the greatest impact of the Taliban rule.

The country began its attempt to modernize its treatment of women in 1919 under the rule of King Amanullah and Queen Soraya.153 During the 1920s, there were other laws enacted that were favorable to women pertaining to marriage, dowry, and circumcision.154 During this time period, the first women's organizations were established and education for women was encouraged.155

146. Id.
147. Id.
148. Id.
149. Id.
151. Id.
152. Carla Power, When Women are the Enemy: Afghanistan's Taliban Fighters Have Taken the War Between the Sexes to a New Extremie, NEWSWEEK, Aug. 3, 1998, at 37.
154. Id.
155. Id.
These reforms were opposed by many conservative Afghans, and it resulted in many girl's schools being closed shortly thereafter.\footnote{156}{Id.}

From 1929 to 1963, women were again forced into a period of extreme conservatism, which included the return to the customs of veiling and seclusion.\footnote{157}{Id.} There was segregation of the sexes in all sectors of Afghan society, including movie theaters, schools, and universities.\footnote{158}{The Crisis of Afghan Women, supra note 153.}

In 1959, women were again encouraged to remove their veils and many women began appearing unveiled in public.\footnote{159}{Id.} In 1964, the Afghanistan Constitution was enacted.\footnote{160}{Id.} During the same year, the government of Afghanistan got its first female cabinet member as Minister of Health.\footnote{161}{Id.} During the 1970s, many women were dressing in clothing that was very similar in style to that of some Western countries.\footnote{162}{Id.} Again, many conservative Afghans opposed these changes in custom and there was bloodshed as a result.\footnote{163}{Id.}

In 1978, the communist party took power of Afghanistan.\footnote{164}{Id.} Under communist rule, there were substantial changes to the woman's role in society.\footnote{165}{Id.} For example, there were laws enacted forbidding forced marriages and establishing a minimum age requirement for marriage.\footnote{166}{Id.} Under communist rule women were also given the right to work.\footnote{167}{Id.}

Statistics show that in 1992, women made up approximately fifty percent of the Afghan workforce.\footnote{168}{Id.} Before the Taliban came into power in 1996, women worked outside the home, were not required to cover themselves with a burqa, and were not subjected to the harsh rules imposed upon them by the Taliban.

\section*{B. Life for Women Under the Taliban Regime}

Under Taliban rule, women have no rights. They are unable to obtain access to things that most consider to be a right, not a privilege. For example, they do not have access to sufficient medical care, or in most cases any medical care, education, employment, or their mosques.\footnote{169}{Id.} The Taliban claim that their

\footnote{156}{Id.}
\footnote{157}{Id.}
\footnote{158}{The Crisis of Afghan Women, supra note 153.}
\footnote{159}{Id.}
\footnote{160}{Id.}
\footnote{161}{Id.}
\footnote{162}{Id.}
\footnote{163}{Id.}
\footnote{164}{Id.}
\footnote{165}{Id.}
\footnote{166}{Id.}
\footnote{167}{Id.}
\footnote{168}{The Crisis of Afghan Women, supra note 153.}
\footnote{169}{A mosque is an Islamic house of worship. Bassiouni, supra note 118.}\footnote{158}{The Crisis of Afghan Women, supra note 153.}
goal is "preserving women's honor" and further claim that "the restrictions on women are for their own protection." In response to the negative media coverage on the Taliban's treatment of Afghan women, the Taliban leader Mullah Mohammad Omar expressed the following opinion about the Western world's treatment of women: "their interpretation of women's rights is only those ugly and filthy western cultures and customs in which women are insulted and dishonoured [sic] as a toy."

Justifications given by the Taliban and their supporters for the strict restrictions on women have ranged from the need to restore civil unrest in the country, to the theory that Western women are not truly respected in their culture. The Taliban and their supporters assert that Muslim women are the queens of their homes and it is their husband's duty to care for them; therefore, they do not need the same rights as Western women.

C. The Taliban's Prohibition of Working Women

When the Taliban took control of Kabul, women were immediately banned from all employment outside the home, apart from the traditional agricultural work performed by women in the rural areas of the country. The ban on working outside the home has, perhaps, been one of the Taliban's harshest rules. The Taliban claim that they are gradually making exceptions by allowing some women to return to work as doctors and nurses, but under very restricted conditions. For the most part, the ban on working outside the home still continues in full force for the majority of Afghan women.

The ban on employment outside the home has been devastating to the thousands of widows residing in Afghanistan. Because of Afghanistan's long history of civil war and political instability, reports estimate that there are approximately 30,000 widows in Kabul alone. Because of the loss of their husbands and other male family members, these widowed-women are the sole source of support and income for their families. Because the Taliban has forbidden these women from working, many are forced to beg in the streets and

174. Id.
175. Id.
176. Id.
177. Id.
sell their personal belongings in order to provide food for themselves and their children.\textsuperscript{179}

\textbf{D. The Taliban's Mandated Dress Code for Women}

While the Islamic faith encourages women to cover their bodies, it does not prescribe the covering of their faces, and it also requires that men properly cover their bodies from their chest to their knees.\textsuperscript{180} Many women comply with the obligations of their faith by covering their bodies with common clothing that sufficiently covers their limbs, and scarves that cover their heads. While the requirement that women should be covered may seem oppressive to Western women, for Muslim women it is simply an observance of their traditional religious beliefs and is done out of respect for the teachings of their religion and the Qur'an.

As it has with many of its laws, the Taliban has taken a principle of the Islam religion and distorted it into an extreme and harsh rule. The Taliban has prohibited women from appearing in public without wearing the traditional burqa.\textsuperscript{181} The burqa can best be described as resembling a long bed sheet. It covers the woman from head to toe, with a small opening over the eyes that is covered by mesh.\textsuperscript{182}

Prior to the Taliban’s control of the country, many women in the rural areas of Afghanistan wore the burqa when appearing in public, but it was not a required dress code for women.\textsuperscript{183} In contrast, prior to the Taliban’s control of the country, many Afghan women in the cities only covered their heads with scarves.\textsuperscript{184} Now, the Taliban requires that a burqa be worn by all women. Women caught without a burqa, or who have failed to completely cover themselves with a burqa, are subject to a beating on the street from the Taliban’s Ministry for Promotion of Virtue and the Suppression of Vice.\textsuperscript{185}

Another problem created by the requirement that all women wear a burqa is that not all women can afford to purchase a burqa.\textsuperscript{186} As previously discussed, because the Taliban have banned women from working outside the home, most women have no income because their husbands, brothers, fathers, and sons have been killed fighting in Afghanistan’s many civil conflicts. Because they have no income, these women cannot afford to purchase the burqa. Without a burqa, these women are forced to remain in their homes, or

\begin{itemize}
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Bassiouni, supra note 118.
\item \textsuperscript{181} Statement of Karl F. Inderfurth, supra note 2.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id.
\item \textsuperscript{186} Afghanistan Statistics on Religion, supra note 131.
\end{itemize}
risk receiving a severe beating from the Taliban, along with the possibility of the punishment of the elders of their family.\textsuperscript{187}

Similarly, women who are disabled and require a prosthesis or walking aid are forced to remain inside their homes because the burqa will not properly fit over these devices so as to completely cover the woman.\textsuperscript{188} These women are forced into imprisonment within the confines of their homes or run the risk of being subjected to the Taliban's harsh and barbaric forms of punishment for disobedience of its law.

Sources have reported that women who cannot afford a burqa, or who cannot properly wear a burqa because of a disability, have been unable to obtain access to the limited medical care available.\textsuperscript{189} It has been reported that at least one woman died because she could not access medical care because she either did not own a burqa or could not properly wear one and, thus, could not leave her home.\textsuperscript{190}

\textbf{E. The Taliban's Ban on Educational Facilities for Women and Girls}

Statistics by the Feminist Majority Foundation show that women and girls in Afghanistan's capital city of Kabul and many other parts of the country have attended co-educational schools since the 1950s.\textsuperscript{191} These same statistics also show that prior to the Taliban taking control of Afghanistan, over half of the student body of Afghanistan's universities were women.\textsuperscript{192} Prior to the Taliban regime, women were educated as nurses, engineers, doctors, lawyers, and teachers.\textsuperscript{193}

Most educational opportunities offered to women and girls abruptly ended when the Taliban took control of Kabul in 1996. The Taliban has prohibited most girls from attending school and closed the majority of girls schools almost immediately upon taking control of Kabul.\textsuperscript{194} While the Taliban have prohibited females from attending school, most males still have the opportunity to continue to their education.\textsuperscript{195} There are a few home based schools and schools in the rural areas of the country that operate secretly, offering limited educational opportunities to girls; however, they live under constant fear of severe punishment for disobedience of the Taliban's law prohibiting educational

\begin{itemize}
  \item \textsuperscript{187} Id.
  \item \textsuperscript{188} Id.
  \item \textsuperscript{189} Id.
  \item \textsuperscript{190} Id.
  \item \textsuperscript{191} Testimony of Mavis Leno, \textit{supra} note 6.
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} Id.
  \item \textsuperscript{194} Statement of Zohra Rasekh and Holly Burkhalter, \textit{supra} note 136.
  \item \textsuperscript{195} Id.
\end{itemize}
facilities for females. It is reported that one teacher, who denounced the laws of the Taliban and insisted that she would continue to teach, was struck with a rifle butt, and then killed after being shot in the head and stomach. Her death was witnessed by her students, her husband, and her daughter.

The Taliban claim that they do not oppose educational opportunities for females and that some of the schools for girls have been reopened. However, despite their claims, it appears that the Taliban have made no real effort to provide females with educational opportunities. The lack of educational opportunities is a substantial factor that contributes to the despair that the Afghan women are experiencing.

F. The Taliban Requirement that Women have Male Chaperones

In addition to requiring that women be covered by a burqa, the Taliban also require women to be escorted outside their homes by a male relative. This rule also presents another obstacle for women because, as previously discussed, a substantial number of Afghan families are headed by widows, because the male members of the family have been killed fighting in Afghanistan's many civil conflicts. Enforcement of this harsh and irrational rule results in women being forced to become even more isolated.

G. The Taliban Refusal to Provide Women with Access to Adequate Medical Care

The Taliban have prohibited and/or severely limited the availability of medical care for women and girls. The Taliban have severely restricted the male doctors' ability to treat female patients, and have prohibited females from being employed as doctors and nurses. Reports from the Physicians for Human Rights indicate that the Taliban segregated hospitals by gender in January 1997. In September 1997, the Physicians for Human Rights claim that the Taliban suspended all medical care for women. The result was that the only medical facility available to women was a temporary structure that contained thirty-five beds with no clean water, electricity, surgical equipment,
or other medical supplies.\textsuperscript{206} Women were forced to deliver their children in a filthy, unsanitary maternity wards, which were poorly equipped and contained insufficient medical equipment.\textsuperscript{207} After the Taliban received international condemnation for these practices, they opened a few beds for women in several of the men’s facilities. However, the medical care currently available to women is severely limited and inadequate at best.\textsuperscript{208}

Because of the Taliban’s restrictions, many women are unable to gain access to any medical care.\textsuperscript{209} For example, if a woman is fortunate enough to convince a male physician to treat her, he is not allowed to examine the woman or speak to her directly.\textsuperscript{210} All communication is done by and through her male chaperone.\textsuperscript{211} Many times, the male chaperone demonstrates on his own body the area of the body that is the source of the woman’s discomfort or illness.\textsuperscript{212}

Because of no access, or poor access, to medical care, most Afghan women have experienced an alarming decline in their health and well-being since the Taliban took control of the country.\textsuperscript{213} There have been reports of women and girls who have died after being turned away from male-only facilities, or because they were unable to seek medical care because they did not own a burqa or have a male relative that can escort them on the city’s streets.\textsuperscript{214}

\textbf{H. Miscellaneous Rules of the Taliban that are Directed Towards Women}

The rules of the Taliban outlined above are some of the harshest of the Taliban’s edicts. However, there are many other rules that are directly aimed at women, and further contribute to their feelings of despair, oppression, and isolation. For example, women are not allowed to be seen in their homes from the street.\textsuperscript{215} In order to implement this rule, the Taliban requires that every window of all houses with female occupants be painted over.\textsuperscript{216} The Taliban have prohibited women from driving.\textsuperscript{217} The only form of transportation for women are the buses that the Taliban have designated as “women’s buses.”\textsuperscript{218} Because there are only a few of these buses, the wait for transportation can be
long. The Taliban requires that the windows of the women’s buses be covered by curtains and that the driver’s area also be separated by a curtain. The Taliban requires bus drivers to employ boys under the age of fifteen to collect the bus fares on women’s buses. As mentioned above, women are not allowed to wear white burqas, white socks, or white shoes, and are subject to a beating if the heels of their shoes make any noise while they walk or if they are found to be in violation of any of the Taliban’s laws.

1. Punishment for Breaking the Law of the Taliban

The Taliban maintains order in the areas that it controls by issuing extreme, and sometimes barbaric, penalties for violations of its self-declared law. The Ministry for the Promotion of Virtue and the Suppression of Vice and Islamic courts, both established by the Taliban, enforce the harsh rules of the Taliban. In the Taliban’s courts, judges render swift decisions in summary criminal trials, according to the Taliban’s extreme interpretation of Islamic law, and punishment quickly follows these decisions. For example, Taliban justice prescribes that the punishment for murder is public execution in front of a stadium audience of thousands, and punishment for thieves is the amputation of one or both hands and feet. It is reported that some executions have taken place before crowds of up to 30,000 people. Executions are sometimes carried out in such barbaric methods as throat slitting, stoning, beheadings, collapsing walls, and hangings. While rape and murder are serious crimes and certainly worthy of some form of serious punishment, Afghan citizens are called to the country’s stadiums to witness executions for alleged crimes that would not even merit a citation in most other countries in the world. For example, adulterers are stoned to death or publicly whipped, and homosexuals are crushed to death by having walls toppled on them.

In addition to the severe punishment that is rendered after a decision is handed down by the Taliban’s courts, the Ministry for the Promotion of Virtue and the Suppression of Vice patrols the streets of Afghanistan, and will often issue beatings on the spot if they deem one’s behavior not to be in compliance

219. Id.
221. Id.
222. Id.
223. Id.
224. Id.
226. Id.
with their strict interpretations of Islamic law. For example, a woman reportedly received a severe beating because she purchased ice cream from a street vendor and was eating it in public. The ice cream vendor was also beaten and jailed for selling the ice cream to an unchaperoned woman. A woman will also run the risk of receiving a beating if any part of her limbs is exposed underneath her burqa, for making noise, for being found on the streets without a male family member escorting her, or for simply being found on the street with an excuse that is unacceptable to the Taliban. The elders of the women who allegedly break the rules are also subject to punishment by the Taliban.

A 1998 survey conducted by the Physicians for Human Rights indicates that sixty-eight percent of women that took the survey reported that they or a family member had been stopped or detained by the Taliban in Kabul. Fifty-four percent of the women detained by the Taliban were beaten and twenty-one percent of the women detained were tortured. The international community recently got a first-hand look at the Taliban’s harsh theories of punishment when the Taliban shaved the heads of the visiting Pakistani soccer team for wearing shorts while playing a soccer match.

Because of the Taliban’s irrational rules there are extraordinary high levels of mental stress and depression among women. Most women feel there is no hope, no future, and experience constant anxiety that they or a family member will receive harsh punishments if the Taliban thinks that they are not complying with their interpretation of Islamic law.

IV. THE RELIGION OF ISLAM’S VIEW OF WOMEN

The Taliban’s treatment of women has been condemned by some members of the international community and the Muslim faith. For example, the Muslim Women’s League has said that the Taliban’s seclusion of women is not derived from Islam, but is a “political maneuver disguised as Islamic law.”

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229. Id.
231. Id.
232. One report claims that the Taliban instructs young boys to lie on the ground and report whether or not the woman’s limbs are visible under the garment. Id.
234. Statement of Zohra Rasekh and Holly Burkhalter, supra note 136.
235. Id.
236. Id.
238. Statement of Zohra Rasekh and Holly Burkhalter, supra note 136.
239. Id.
Muslim Women's League points out that the Qur'an gave women rights almost 1400 years ago, such as the right to sell property.\textsuperscript{241} The Muslim Women's League claims that the religion of Islam promotes equality among men and women to facilitate the economic growth of society, and that it mandates education for all Muslims, including women.\textsuperscript{242} The Muslim Women's League has publicly denounced the Taliban's treatment of women, and emphatically stated that the Taliban's treatment of women is not derived from the religion of Islam.\textsuperscript{243}

Women played a vital role in early Muslim society and were among some of the strongest and earliest supporters of Islam.\textsuperscript{244} The religion of Islam teaches that the Prophet Muhammad, who is the cornerstone of the religion of Islam, indicated through his actions that he respected and honored women.\textsuperscript{245} For example, he was a dedicated and devoted husband to his first wife, Khadijah, for twenty-six years until her death, despite the traditional practice of polygamy.\textsuperscript{246} After his first wife died, another wife of the Prophet Muhammad, Aishah bint abu Bakr, was notorious for her education, specifically her ability to read and write, and was often consulted by the early Muslim community about the teachings of Muhammad after his death.\textsuperscript{247}

The Islamic religion claims to recognize the woman's right to own property as being identical to that of a man's, and provides that male family members cannot handle a woman's finances without her permission.\textsuperscript{248} Islam also claims to provide that a woman must consent to marriage, and that it grants women exclusive custody of the children up to the child's early adolescent years in the event of a divorce.\textsuperscript{249} Islam claims that men and women share the same rights to obtain an education, and that the teachings of the Qur'an lend support for, and encourage, women to obtain their life goals.\textsuperscript{250} While there are some cases in which women and men are treated differently, Islam claims to provide a logical explanation for the differential treatment. For example, a man will inherit twice as much as a woman because he is responsible for providing for his wife, children, and his own family.\textsuperscript{251}

Other teachings in Islam support the claim that the Taliban's harsh treatment of women is in no way supported by the true religion of Islam. For

\begin{itemize}
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id.
\item \textsuperscript{244} Bassiouni, supra note 118.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id.
\item \textsuperscript{247} Id.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Bassiouni, supra note 118.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id.
\end{itemize}
example, a quote from the Prophet’s Hadith states: “The most perfect of the believers in faith is the best of them in moral excellence, and the best of you are the kindest of you to their wives.” All accounts indicate that the Taliban have taken an otherwise beautiful and dedicated religion and distorted it to further their goals of oppression and power.

V. THE UNITED STATES’ REACTION TO THE TALIBAN

It appeared that the United States initially welcomed the Taliban’s control of Afghanistan because it hoped that the Taliban would restore order to a country that was, by all standards, out of control. However, both former First Lady Hillary Rodham Clinton and President Clinton have acknowledged that they are aware of the crisis of Afghan women, and the issue is also frequently addressed by the State Department. On a recent visit to the refugee camps in Pakistan, former Secretary of State Albright is quoted as saying that the Taliban’s treatment of women and girls is “despicable.”

Former Secretary of State Albright is also quoted as saying that the United States is “opposed to [the Taliban’s] approach to human rights, to their despicable treatment of women and children and their lack of respect for human dignity . . .”

The United States alleges that the Taliban is harboring the terrorist organization of Osama bin Laden in exchange for warriors willing to join the Taliban’s cause. The United States has labeled Osama bin Laden as a “threat to the national security interests of the United States.” On July 4, 1999, former President Clinton signed an Executive Order that imposed financial and commercial sanctions against the Taliban for its alleged support of Osama bin Laden. On July 5, 2000, former President Clinton extended the financial and commercial sanctions on the Taliban, originally imposed on them pursuant

252. Id.
254. Id.
256. Id.
257. The United States claims that Osama bin Laden and his organization (the “al Qaeda”) were responsible for the bombings of the United States embassies in Nairobi, Kenya and Dar Es Salaam, Tanzania in 1998. These bombings killed twelve Americans, nearly three hundred Kenyans and Tanzanians, and wounded almost five thousand others. The United States claims that Osama bin Laden “continue[s] to plan new attacks against Americans without regard to [the] innocence of [his] intended victims or for those non-Americans who might get in the way of [the] attack.” James Foley, State Dep’t Spokesman, State Department Briefing on Presidential Executive Order Imposing Sanctions on Assets of the Taliban (July 6, 1999) (on file with author).
258. Id.
260. State Department Briefing on Presidential Executive Order Imposing Sanctions on Assets of the Taliban, supra note 257.
to his 1999 Executive Order. The United States has made it clear that there is no possibility of United States trade or investment in Afghanistan unless Osama bin Laden is turned over to the proper authorities.

While the United States has denounced the Taliban's treatment of women and its alleged support of Osama bin Laden, allegations have been made by some that suggest the United States is partially responsible for the conditions in Afghanistan. Pakistan and Saudi Arabia are international allies of the United States, and among a few that recognize the Taliban as the official government of Afghanistan. Saudi Arabia continues to receive military equipment and assistance from the United States, as it has for many years. Pakistan also receives assistance from the United States. Pakistan and Saudi Arabia have been among the major sources of financial support and arms for the Taliban. However, Saudi Arabia has recently reduced its support of the Taliban after encouragement from the United States. Unfortunately, the Taliban continues to receive recognition as the official government structure of Afghanistan from Pakistan and Oman.

The Taliban craves and seeks international recognition. However, the United Nations seat for Afghanistan continues to be occupied by the Rabanni faction, and the United States has refused to grant official recognition to the Taliban as the government of Afghanistan, and has vowed to only recognize a "broad based government . . . which restores the human rights of women and girls."

VI. THE FUTURE OF WOMEN IN AFGHANISTAN

The Taliban has exhibited hostility toward many humanitarian aid agencies. For example, in July 1998, the Taliban issued an order requiring all foreign aid workers to be housed at a college campus outside Kabul, which had been partially destroyed by bombs and had no electricity or running water. The Taliban have made it clear that if the aid workers do not follow their


262. State Department Briefing on Presidential Executive Order Imposing Sanctions on Assets of the Taliban, supra note 257.

263. Testimony of Mavis Leno, supra note 6.

264. Id.

265. Id.

266. State Department Briefing on Presidential Executive Order Imposing Sanctions on Assets of the Taliban, supra note 257.

267. Id.

268. As discussed earlier, Burhanuddin Rabanni became President after the Mujahidin took control of the country in 1992. The Taliban later ousted Rabanni in 1994. See infra Part II.A.

269. Testimony of Mavis Leno, supra note 6.

270. Statement of Zohra Rasekh and Holly Burkhalter, supra note 136.
instructions, they will be expelled from the country. Consequently, the United Nations and most foreign aid workers evacuated the country after the bombing of Osama bin Laden's terrorist camps by the United States in August, 1998. As a result, the maternal and child healthcare clinics that were run by these workers have now been closed. These were some of the only facilities available to some Afghan women.

Humanitarian assistance for these women has been provided by a number of foreign aid agencies. However, a 1998 survey done by the Physicians for Human Rights indicates that only six percent of the women participating in the survey have received some type of foreign aid. The failure of Afghan women to receive any aid can be partially attributed to the Taliban preventing women from entering the humanitarian aid group's offices and other distribution centers.

Pakistan is home to the largest Afghanistan refugee population. Some of the newly arrived refugees are provided with basic necessities, such as health care, education, and water. However, the aid is limited and many of the newly-arrived Afghan refugees report that they are not receiving foreign aid or services. There are reports that the Pakistani police are requiring bribes from the refugees in order to gain access to the aid. It has also been reported that the refugees in the camps are subject to abusive conduct by the Pakistani police, which can range from rapes, thefts, assaults, to mere threats. The Physicians for Human Rights has also received reports that the Taliban move freely back and forth between the borders of Afghanistan and Pakistan, and they also threaten the refugees with abuse.

The United States has categorized the future of the Taliban as "bleak" as it faces "increasing international isolation." The Taliban's primary enemy is the Northern Alliance in Northern Afghanistan, which is under the leadership of Burhannudin Rabanni and his Defense Minister, Ahmad Shah Masood.

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271. Id.
272. Id.
273. Id.
274. Id.
275. Statement of Zohra Rasekh and Holly Burkhalter, supra note 136.
276. Id.
277. Id.
278. Id.
279. Id.
280. Statement of Zohra Rasekh and Holly Burkhalter, supra note 136.
281. Id.
282. Id.
283. State Department Briefing on Presidential Executive Order Imposing Sanctions on Assets of the Taliban, supra note 257.
The Feminist Majority Foundation reports that the quotas for refugees accepted by the United States is only 4,000 for the entire region of the Near East and South Asia, which includes Afghanistan. The Feminist Majority Foundation also reports that the refugees accepted from Afghanistan into the United States since the Taliban took control of the country have been very low. The Feminist Majority Foundation’s findings indicate that no Afghan refugees were accepted in 1996 or 1997 and only eight-eight refugees were accepted in 1998. However, the United States claims it has now launched a resettlement program for Afghan women and their families. The United States claims it expects to admit about 1,500 individuals in the year 2000 alone. This will be a substantial increase from the admissions in past years.

In March 2000, there were reports that the Taliban brought 700 women to health care facilities in Kabul for treatment. It has also been reported that the Taliban claim that it is reopening some of the educational facilities for girls that have been closed. The Taliban have also claimed that they are allowing women teachers to educate girls at home and allowing women to work in limited sectors of the workforce, such as the health care field. There is widespread speculation that the Taliban are taking these steps because of their desire to end the international isolation of Afghanistan. However, any changes in the Taliban’s treatment of women seem to be a slow process, and these alleged changes cannot be accurately verified.

VII. CONCLUSION

While there is continuous speculation about the Taliban’s less than promising future, it is a fact that the future of Afghan women is uncertain at best. Even if there is a complete collapse of the Taliban regime, it will take years for Afghan women to recover, psychologically, physically, and emotionally, from the deplorable treatment and abuse they have endured. Using the exact words of the Taliban, one should note that “the [Taliban’s] restrictions on women are for their own protection.” It seems that the proper question to be addressed is, “what do Afghan women need protection from?” The totality of the facts and circumstances can lead a reasonable person to only one answer. These women need protection from the Taliban.

286. Id.
287. Id.
289. Id.
290. Id.
291. Taliban ‘Flexibility’ on Women’s Rights, supra note 172.
292. Id.
I. INTRODUCTION


Although the Human Rights Act seems to be a step forward for the British government, there is an important link missing. When Parliament incorporated
the Human Rights Act into domestic law, it failed to retain Article 13 of the Convention, which gives national courts the power to provide the injured party with an effective remedy. Therefore, Parliament still forces its citizens to take their human rights complaints to Strasbourg for an effective remedy.

II. THE COUNCIL OF EUROPE AND THE CREATION OF HUMAN RIGHTS IN EUROPE

In 1946, Winston Churchill declared that the European countries needed "a remedy which, as if by miracle, would transform the whole scene and in a few years make all Europe as free and happy as Switzerland is today. We must build a kind of United States of Europe."2 The European countries were devastated by five years of World War II and needed to pull together a common agreement to promote human rights throughout the countries. On May 5, 1949, ten countries came together and signed a treaty that established the Council of Europe (the Council).3 The Council opened itself up to any European state, provided the state agreed to accept the same principles of democracy, human rights, and the rule of law.4 Since its inception, the Council has thrived. It now includes forty-one member states stretching from the Atlantic to east of Russia.5 Throughout the decades, the Council has strived to promote human rights through supervision and protection of fundamental freedoms and rights.6 It has also identified new threats to human rights, developed public awareness of its importance, and trained officials through human rights education.7 The Council's most significant step toward human rights was the introduction of the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950.8 This unprecedented international treaty gave individuals inalienable rights and freedoms. It also obligated states to guarantee these rights

3. THE COUNCIL OF EUROPE'S PUBLISHING AND DOCUMENTATION SERVICE, THE COUNCIL OF EUROPE (1999). The original signatories to the treaty included Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom.
4. Id.
5. Id. The Council is currently made up of Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and United Kingdom.
7. Id.
to everyone within their jurisdictions. In 1953, the European Convention on Human Rights came into force.

A. Scope of the European Convention on Human Rights

The Convention provides citizens with a constantly evolving list of fundamental rights. The Universal Declaration of Human Rights created by the General Assembly of the United Nations in 1948 inspired the creation of the Convention. The first article introduced required all states to secure fundamental human rights for citizens. Section one of the Convention lists the fundamental rights and freedoms given to European member states. The Council consistently updates the Convention with Protocols, which have added more rights to the original Convention, inter alia. Protocol 1 gave the right to education and Protocol 6 provided the abolition of the death penalty.

B. Enforcement of the European Convention on Human Rights

The unique aspect of the Convention was the opportunity for individuals to bring claims against states for human rights violations, as well as allowing state actions against other states. Violations of human right laws were originally reported to the European Commission of Human Rights in Strasbourg (Commission). The Commission determined the admissibility of the claim and attempted to make a peaceful settlement before referring the case to the European Court of Human Rights. However, in 1998, the Council created a

9. EUROPE ACTIVITIES & ACHIEVEMENTS, supra note 6.
10. Id.
12. Id.
13. Id. Section one provides for the right to life (Article 2); prohibition of torture (Article 3); prohibition of slavery and forced labour (Article 4); right to liberty and security (Article 5); right to a fair trial (Article 6); no punishment without law (Article 7); right to respect for private life and family (Article 8); freedom of thought, conscience, and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); right to marry (Article 12); right to an effective remedy (Article 13); prohibition of discrimination (Article 14); derogation in time of emergency (Article 15); restrictions on political activities of aliens (Article 16); prohibition on abuse of rights (Article 17); and limitation on use of restrictions on rights (Article 18).
15. WADHAM & MOUNTFIELD, supra note 8, at 2.
new European Court of Human Rights that individuals could access directly with complaints of human rights violations.\(^\text{17}\)

All decisions, whether by the Commission or the European Court of Human Rights, are binding on the respondent states concerned.\(^\text{18}\) The Committee of Ministers is responsible for supervising the execution of final judgments in the states.\(^\text{19}\) The Committee of Ministers is obligated to verify whether states have taken adequate remedial measures to comply with the specific or general obligations arising out of the European Court of Human Rights' judgments and report back to such Court.\(^\text{20}\)

The Convention has, therefore, provided all of its European citizens a sense of comfort that their lives, beliefs and freedoms will be protected by a larger, more powerful union than their own state. Additionally, almost every member state of the Council has incorporated some variation of the Convention into domestic law. In 1998, the United Kingdom finally committed to its own citizens a set of domestic human right laws.

III. THE UNITED KINGDOM'S LEGAL FRAMEWORK

The United Kingdom has no written constitution or comprehensive bill of rights.\(^\text{21}\) British rights are scattered throughout conventions, customs, and statutes.\(^\text{22}\) The only Act titled the Bill of Rights 1689 set forth the exercise of the royal prerogative and succession to the Crown to those permitted by Parliament.\(^\text{23}\)

Traditionally, the British legal system provided some remedies to deal with human right violations. For example, the legal system has been able to provide "habeas corpus," which secures an individual's right to freedom from unlawful detention.\(^\text{24}\) However, British courts did not always have jurisdiction to hear human rights cases because there were no laws guaranteeing protection against human right infringements. Parliament has the ultimate power to enact any law and change any previous law.\(^\text{25}\) Courts only have the power to review the law

\(^{17}\) Id.

\(^{18}\) Id.; see also WADHAM & MOUNTFIELD, supra note 8, at 4.

\(^{20}\) The United Kingdom's "Constitution," supra note 21.

\(^{25}\) Id.
and make rulings consistent with such laws. Preceding under British law, citizens could bring proceedings against the government or a local government authority to protect their legal rights and to obtain a remedy for any injury suffered. Generally, Britain has not codified its law, but the courts have adopted a relatively strict and literal approach to the interpretation of statutes.

On an international level, the United Kingdom's ratification of a treaty or international convention does not automatically make the agreement part of its domestic law. However, when it is necessary, the government amends domestic law to bring it in line with the Convention. When there is a conflict between British law and the Convention, the Convention overrides national law. The European Court of Human Rights hears an abundant amount of cases of Convention violations arising in the United Kingdom. Subsequently, the Court frequently finds the United Kingdom has violated its citizens' Convention rights. The major issue for British courts is the requirement that they apply British law as if it were created with the Convention in mind.

While interpreting any provision in domestic legislation which was ambiguous, the British courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it. The court can only review administrative discretion in accordance with conventional principles of judicial review, which did not include a test of proportionality.

The test of proportionality is a principle of review that the European Court of Human Rights has used to determine whether the interference is "necessary in a democratic society." The essence of this principle is to decide whether a particular limitation on a right is proportionate to the aim being pursued. "If the minister has used a sledgehammer to crack a nut, when a set of nutcrackers were [sic] available, without any pressing social need, he cannot satisfy the test of proportionality." With the introduction of the Human Rights Act in October, British courts are now required to apply the proportionality test to Parliament's acts and British public officials to determine whether they are within the scope of their powers. "The more substantial the interference with

26. Id.
27. Id.
28. Id.
30. Id.
31. Id.
33. Id.
34. WADHAM & MOUNTFIELD, supra note 8, at 13.
36. See Regina v. Secretary of State for the Home Department, ex parte Brind and Others, 2 W.L.R. at 797.
human rights, the more the court would require by way of jurisdiction before it was satisfied that the decision was reasonable.\textsuperscript{37}

IV. THE UNITED KINGDOM'S ENACTMENT OF HUMAN RIGHTS

The United Kingdom was among one of the first signatories on the Convention in 1951.\textsuperscript{38} In 1966, the United Kingdom granted the right of petition for its citizens to seek redress for human right violations in the European Court of Human Rights provided there were no effective remedies in domestic courts.\textsuperscript{39} However, the British government did not, until recently, feel it was necessary to make the Convention part of its domestic law. The government felt that there was no need to incorporate human rights into domestic law because its citizens already enjoyed those rights that flowed from British Common Law.\textsuperscript{40} "The rights and the freedoms of the Convention have not been expressly incorporated by statute into domestic law, because it has been considered unnecessary to do so, successive governments correctly assuming that the existing arrangements within the domestic legal system comply with its [sic] obligations pursuant to the Convention."\textsuperscript{41}

The British political and constitutional tradition of freedom was a large reason for the delay in enacting the Convention into law.\textsuperscript{42} The government customarily operated on its Common Law idea of "negative" freedom, which was the freedom from government interference. It created negative rights by giving its citizens absolute freedom unless otherwise taken away by statute.\textsuperscript{43} According to the Nineteenth-century Diceyan theory, "[w]e are free to do everything except that which we are forbidden to do by law."\textsuperscript{44}

It is important to note that the legislature has used the Act as an aid in deciding ambiguous cases.\textsuperscript{45} However, public authorities have no duty to exercise administrative discretion in a manner that compiles with the Convention,\textsuperscript{46} unless the administrative body has expressly stated it would act in conformance with the Convention.\textsuperscript{47}

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\textsuperscript{37} R. Ministry of Defence, ex parte Smith, [1996] Q.B. 517.
\textsuperscript{38} \textsc{Wadhams} \& \textsc{Mountfield}, \textit{supra} note 8, at 4.
\textsuperscript{39} \textit{Id.} at 10.
\textsuperscript{40} \textit{Id.} at 10.
\textsuperscript{41} \textit{See} Regina v. Secretary of State for the Home Department, ex parte Brind and Others, 2 W.L.R. at 795.
\textsuperscript{42} \textsc{Wadhams} \& \textsc{Mountfield}, \textit{supra} note 8, at 4.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{See} Regina v. Secretary of State for the Home Department, ex parte Brind and Others, 2 W.L.R. at 798.
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textsc{Wadhams} \& \textsc{Mountfield}, \textit{supra} note 8, at 2; \textit{see}, e.g., Britton v. Secretary of State for the Environment, [1997] JPL 617.
\end{flushleft}
The British government has also used the Convention to provide the judiciary with the amount of discretion to use in determining cases for human right violations. Prior to the Convention, the test for challenging actions of public authorities by way of judicial review was that they must be unlawful or else irrational. Lord Diplock explained that this irrational test is judged by "a decision, which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." Finally, the British government used the Convention to establish the scope of common law.

In 1997, the Labour Government, in its election manifesto, pledged to increase individual rights by incorporating the Convention into domestic law. The success of the party brought the Human Rights Act Royal Assent on November 9, 1998. The Labour Government’s White Paper “Rights Brought Home” set forth important principles that are reiterated consistently in British publications. The government wants to make it easier for individuals to enforce their rights under the Convention without the cost and delay of going to the European Court at Strausbourg. In addition, it wants to increase awareness of human rights in society, particularly among young people, to form part of the government’s commitment to constitutional reforms, and to provide British based remedies for human rights breaches.

An advertisement that the United Kingdom Government created to inform people of the introduction of the Human Rights Act stated, “You’ll probably never need it, but it’s nice to know it’s there.” The advertisement also listed some of the new fundamental rights.

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48. WADHAM & MOUNTFIELD, supra note 8, at 12.
50. WADHAM & MOUNTFIELD, supra note 8, at 1; see, e.g., Derbyshire County Council v. Times Newspapers Ltd., [1992] Q.B. 770, 812.
52. Id.
53. Id.
54. Id.
55. See McMurchie, supra note 51; see also THE GOVERNMENT’S WHITE PAPER, supra note 1.
56. Id.
V. THE HUMAN RIGHTS ACT OF 1998

The United Kingdom, through the incorporation of the Convention into domestic law, has selected certain articles from the Convention. In addition to Articles 2-12 and 14 from the Convention, the United Kingdom is ratifying Article 1, peaceful enjoyment of possessions; Article 2, right to education; and Article 3, the right to take part in elections by secret ballot from the first Protocol. The Act also adopted Article 1, prohibition of imprisonment for debt; Article 2, freedom of movement within the territory of a state; and Article 3, prohibition of expulsion of nationals from the Fourth Protocol. Finally, in Article 1, the government endorses the abolition of the death penalty and Article 2, the exception in times of war from the Sixth Protocol.

The Human Rights Act incorporates these articles into domestic law and determines how the new rights will be enforceable in British law. The most significant aspect of the Human Rights Act is the development of holding a public official accountable for his or her acts that are not compatible with the Convention.

A. Public Authority

The Human Rights Act gives a very broad definition of people acting with public authority. A person acting in public authority includes any “court or tribunal, and any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.” However, the House of Lords is not considered a public official when working in its judicial capacity. Parliament kept its name out of the definition of public authority to keep its sovereignty.

The Human Rights Act also provides that when a public authority acts in compliance with primary or subordinate legislation which prevents it from acting in conformity with the Convention, the rule creating him or her a public authority will be set aside. In such circumstances, the higher court may give a declaration of incompatibility. The courts are, nonetheless, to presume that

58. THE GOVERNMENT’S WHITE PAPER, supra note 1.
59. Id.
60. Id.
61. Human Rights Act, 1998, c. 42, § 6(3) (Eng.).
62. Id. at § 6(4).
63. WADHAM & MOUNTFIELD, supra note 8, at 34.
64. Id.
65. Id.
the act of the public authority, intended by legislation, is compatible with the Convention. 66

When a public authority has acted inconsistently with the Convention, the injured party may use the Human Rights Act as a ground for judicial review based on illegality. 67 Also, the injured party may bring a private lawsuit against the public authority for breach of statutory duty, or use the public authority's illegal action as a defense. 68

In general, it is not possible to make a claim for damages against a court or tribunal that has breached the Convention rights, although it is a public authority. 69 The courts are not accountable for damages because an injured party can always take the bad decision in his or her case up on appeal. However, there is a provision that allows damages against the Crown where any judicial body has been guilty of a breach of the Convention rights. 70

There is no violation when an act or failure to act by the Parliament causes the breach of the Convention. Parliament is free to establish, change and abolish laws as it sees fit. Parliament is not accountable for acting inconsistently with the Convention.

B. Courts' Role Under the Human Rights Act

The essential mechanism of the Human Rights Act is that it reserves Parliament's sovereignty. 71 Although it alters the way that the judiciary can scrutinize legislation and the ways in which judges can interpret common law, courts still cannot overturn any legislation created by the Parliament.

The Human Rights Act, like the Convention, is a "living instrument which must be interpreted in the light of present day conditions." 72 Previous interpretations are not binding on court decisions. They are able to build a new body of case law, taking into account Convention rights and case law. 73 The House of Lords has accepted that in order to interpret legislation, the courts need to consider authorities from other jurisdictions to build its case law. 74 However, decisions from the European Court of Human Rights are only persuasive and not binding.

66. Id. at 35.
68. WADHAM & MOUNTFIELD, supra note 8, at 34.
69. Id. at 46.
71. WADHAM & MOUNTFIELD, supra note 8, at 10.
73. THE GOVERNMENT'S WHITE PAPER, supra note 1.
74. WADHAM & MOUNTFIELD, supra note 8, at 27.
Courts are required to read primary and subordinate legislation as compatible with Convention rights. The courts can not strike down any primary legislation; they can only make a "Declaration of Incompatibility." This ensures Parliament's sovereignty.

1. Declarations of Incompatibility

When the courts are not convinced that the legislation is compatible with Convention rights, they can make a declaration of incompatibility. The power to make declarations of incompatibility is only available in the high British courts. If a lower court cannot make a decision compatible with the Convention, then it is required to follow the statute and not the Convention. Courts and tribunals of limited jurisdiction are not able to award such a remedy if it is outside their statutory power to do so. If the court finds the legislation incompatible with the Convention, it makes a declaration of incompatibility and reports it to Parliament.

The purpose of a declaration of incompatibility is to create public interest and put pressure on the government to change such law. However, the courts are unlikely to want to make a declaration of incompatibility. Instead, courts strive to find meanings for statutory provisions to conform to the Convention.

A declaration of incompatibility does not, however, "affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and it is not binding on the parties to the proceedings in which it is made." Although a higher court can make a declaration of incompatibility, it will not be able to set aside a statute. Consequently, when a statute is incompatible with the Convention, the Parliament must attempt to amend the legislation. Even following a declaration of incompatibility, the government is not bound to act either by way of primary or subordinate legislation. In order to introduce the incompatibility before the Parliament, the Minister of the

75. Human Rights Act, supra note 61, § 3(1).
76. Id.
77. THE GOVERNMENT'S WHITE PAPER, supra note 1.
78. WADHAM & MOUNTFIELD, supra note 8, at 48.
79. Id.
80. Id. at 46.
82. WADHAM & MOUNTFIELD, supra note 8, at 47.
83. Id.
84. Human Rights Act, supra note 61, § 4(a), (b).
85. WADHAM & MOUNTFIELD, supra note 8, at 48.
86. Id. at 51.
Crown may make amendments to the legislation, as he considers necessary, to remove the incompatibility.\textsuperscript{87} The declaration of incompatibility goes before Parliament as a document that contains a draft of the proposed change in legislation and the "required information."\textsuperscript{88} The required information includes an explanation of the incompatibility that the proposed order seeks to remove, including particulars of the court decision that prompted the Minister to propose a remedial order.\textsuperscript{89} In addition, the Minister must provide Parliament with a statement of the reasons for the order according to the Act.\textsuperscript{90}

2. Scope of Judicial Remedies

The main Article missing from the Human Rights Act is Article 13 which states: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."\textsuperscript{91} However, the British government thought the inclusion of this article would be redundant to the remedy section of the Human Rights Act.\textsuperscript{92} The Parliament only wants the court to apply remedies which they think are "sufficient and clear" and does not permit courts to fashion their own remedies.\textsuperscript{93}

Without the power for courts to award an effective remedy, citizens may be forced to take their complaints to the European Court of Human Rights who can in turn apply an effective remedy. Parliament wanted to keep the decision-making power out of the hands of the judiciary. It wanted to keep the power to make laws away from the unelected and the unaccountable judiciary.\textsuperscript{94} Therefore, courts and tribunals of limited jurisdiction will not be able to award a remedy if it is not in their statutory power to do so.\textsuperscript{95}

Scholastic and informed commentators pressed for the inclusion of Article 13 in order to insure effective protection of Convention rights.\textsuperscript{96} However, the government felt that inclusion of such an act would put a "wild card" in the

\textsuperscript{87} Human Rights Act, \textit{supra} note 61, § 10(2).
\textsuperscript{88} \textit{WADHAM & MOUNTFIELD, supra} note 8, at 50.
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} The Convention, \textit{supra} note 12, at art. 13.
\textsuperscript{92} \textit{E.g., 475 PARL. DEB., H.L. (5th ser.) (1997) 475}; section 8 of the Parliamentary debate, which provides remedies the courts can utilize for violations of human rights. \textit{Id.}
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{WADHAM & MOUNTFIELD, supra} note 8, at 11.
\textsuperscript{95} \textit{Id.} at 46.
\textsuperscript{96} \textit{Id.} at 52.
hands of the judiciary. The Parliament also felt that the judiciary, through precedent of the European Court of Human Rights, could somewhat apply Article 13.

Given Parliament's failure to incorporate Article 13, it is not clear how the Human Rights Act intends "just satisfaction" to be afforded in cases where the breach of the Convention is a consequence of a statutory provision. The only hope is for the government to take steps to act in compliance with the Convention to avoid a declaration of incompatibility. Otherwise, the applicant must go to the European Court of Human Rights to obtain an effective remedy.

C. The Executive Branch and its Control

Originally, the Human Rights Act provided that the executive branch could make corrections to Parliament's breaches of human rights. However, Parliament amended this section in order to keep absolute sovereignty. It wanted to avoid the excessive use of provisions King Henry VIII created, which empowered the executive branch to legislate without reference to the Parliament. Under such acts, the executive branch has the power to repeal acts of Parliament.

The consequence of this amendment is that a declaration of incompatibility may go by unnoticed and unchanged for a long period of time in the Parliament. The questionable statute might also go untouched if it relates to an unpopular group or a controversial cause. Therefore, the amendment has the hidden effect of weakening the structure of the Human Rights Act by making it less likely that people will bring actions for violations of human rights seeking a declaration of incompatibility. It is precisely this domination of majority over minority's interests that the Human Rights Act is designed to prevent.

VI. CONCLUSION

The Human Rights Act has been a long-awaited and cautiously anticipated action from the Parliament. There are many pros and cons to the enactment of

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97. WADHAM & MOUNTFIELD, supra note 8, at 52.
98. Id.
99. WADHAM & MOUNTFIELD, supra note 8, at 47.
100. Id.
101. WADHAM & MOUNTFIELD, supra note 8, at 48.
102. Id.
103. Id.
104. Id.
105. Id.
a written human rights act. Some citizens have been eagerly awaiting the arrival of their new guaranteed rights. However, some citizens criticize that a written form of fundamental rights is not necessary because the written document will not change and evolve like unwritten laws.

The overall concern, however, is that although Parliament has taken this unprecedented step in incorporating human rights into domestic law, it has kept its sovereignty. It will not give the British courts the power to use its judicial discretion, and it therefore denies citizens an effective remedy when the courts consider a statute is simply "incompatible with the Convention." The end result is that if a citizen is looking to have a declaration of incompatibility, then there is no need to waste time in the domestic courts. Taking the case to Strasbourg would better serve the injured party.

Since October, the Human Rights Act only effected 45 of the 87 cases tried in the British courts. Additionally, 67 of the 87 cases received no remedy from the British court.

The European Court of Human Rights offers more beneficial remedies than the remedies offered by the Human Rights Act. In particular, it offers claims for damages if the government has failed to properly give effect to European law. In contrast, the Human Rights Act expressly excludes the possibility of damages for failure to legislate.

The solution to providing an effective Human Rights Act in the United Kingdom is twofold. First, Parliament must relinquish some control over statues that the British courts find incompatible with the Convention. Second, the Parliament and citizens must have some faith in the judiciary and allow it to provide the effective remedies as set forth by the Convention in domestic courts. When there is a compromise, there will truly be human rights in the United Kingdom.

106. STOTT AND FELIX, PRINCIPLES OF ADMINISTRATIVE LAW (photo. reprint 2000).
107. Id.
109. Id.