ACFI CONFERENCE SPEECHES

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American and Caribbean Law Initiative
2004 Summer Conference Overview
The Global Challenge To Legal Education: Training Lawyers For A New Paradigm Of Economic, Political And Legal-Cultural Expectations In The 21st Century
Caribbean Single Market & Economy: What Is It and Can It Deliver?
The Developing Framework of the CSME:
Two Legal Issues Considered
Applying International Trade Remedy Laws in the Caribbean:
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The ADA: A Model for Europe with “Sharper Teeth”?
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In Ocho Rios, on July 23-24, 2004, the American and Caribbean Law Initiative ("ACLI") held a conference entitled "Caribbean Market Forces: Emerging Trends in International and Comparative Law." The conference theme covered these trends from two overlapping perspectives—the teaching of international and comparative law, and international trade developments. Presenting seven engaging panels, the ACLI conference welcomed eighty-five participants from five Caribbean countries and the United States. Norman Manley Law School hosted this conference, the first in a series of annual conferences to be sponsored by ACLI.

The conference theme emerged out of the current process of regionalization in the Caribbean with respect to its judicial institutions and its trade regulation. With the impending establishment of the Caribbean Court of Justice (CCJ) and the Caribbean Single Market and Economy (CSME), the conference sought to provide practitioners and academicians within and without the region with information about how these developments will affect legal practice and legal education within the region. As such, the first conference of the ACLI undertook the task of providing a forum for discourse on important and timely topics.

In opening the conference, John Knechtle, President of the ACLI, remarked that this conference is the first in an anticipated series of conferences on legal
topics relevant to the U.S. and the Caribbean. His opening remarks preceded two inaugural addresses. First, C. Dennis Morrison, chairman of the Council of Legal Education and a partner at DunnCox law firm in Kingston, delivered the welcoming address. He was followed by A.J. Nicholson, Attorney General and Minister of Justice of Jamaica. In his presentation, Attorney General Nicholson discussed the Anti-Terrorism Bill in Jamaica. He noted that in drafting this legislation the government remained cognizant of potential human rights concerns. In particular, he asserted that the new legislation would not erode the rights of Jamaica under that nation's constitution.

In its first day, the ACLI conference addressed the teaching of international and comparative law with three panel discussions: The Globalisation of Legal Education and Practice; Comparative Law; and International Law. The first panel, Globalisation of Legal Education and Practice, consisted of two presentations moderated by Mr. Ronnie Boodoosingh, Course Director, Hugh Wooding Law School. The first presentation by Professor Harold MacDougall, Director, Caribbean Law Program in Jamaica, Howard University School of Law presented an overview of a law program in Port Antonio, Jamaica. The speaker for the second presentation was Professor Winston Nagan, Fellow, Royal Society of the Arts, Samuel T. Dell Research Scholar Professor of Law, Affiliate Professor of Anthropology, and Founding Director, Institute for Human Rights and Peace Development at the University of Florida.

Professor McDougall provided an overview and discussion of the summer law program that he established in Jamaica. In the June 2003 summer program, Professor McDougall instructed sixteen students from the Howard University School of Law, five other U.S. Law Schools, and Norman Manley Law School. By means of clinical study and research, the students conducted a feasibility study concerning the possibility of declaring Portland Parish, Jamaica, an "Environmental Protection Area" pursuant to the Natural Resources and Conservation Act of 1991. The Caribbean Law Program conducted this study as commissioned by National and Environmental Planning Agency of Jamaica ("NEPA") and the Portland Environmental Protection Association ("PEPA").

The second presentation by Professor Nagan of the University of Florida focused how legal education can engage with the complexities of globalization. His article for this presentation entitled "The Global Challenge to Legal Education: Training Lawyers for a New Paradigm of Economic, Political and Legal-Cultural Expectations In the 21st Century" is published in this volume of

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4. Id.

the ILSA Journal of Comparative and International Law. As expressed in this article, Professor Nagan highlighted the ever-expanding role of lawyers to manage conflicts in international society. Ultimately, Professor Nagan advocates for the interdisciplinary training of lawyers in the growing paradigm of global law. He also advocates for the integration and harmonization of private law in the Caribbean region. These efforts would further instill equity and fairness as foundational forces in private law regimes.

The second panel of the first day focused on comparative law from the perspective of the death penalty in the Caribbean. Ms. Carol Aina, Course Director, Norman Manley Law School moderated a panel that included: Dr. David Berry, Lecturer, Faculty of Law, University of the West Indies, Cave Hill Campus; Dr. Stephen Vascianne, Professor of Government, University of the West Indies, Mona Campus; and Professor Jim Wilets, Nova Southeastern University, Shepard Broad Law Center. Dr. David Berry first discussed the recent Privy Council mandatory death penalty trilogy of cases (Boyce, Matthew and Watson). In particular, he examined the three cases to explore the issues underlying the use of international legal authorities before a domestic tribunal. In these cases, he observed that the Privy Council has returned to a traditional approach regarding the use of international law and has departed from its earlier, more permissive approach.

Professor Stephen Vascianne provided a lively, thoughtful discussion of the impact of the three recent Privy Council Decisions on the death penalty. In particular, he focused on the split of opinion among the Privy Council justices and the impact of divided panels on the outcome of death penalty cases. He commented on the problems with having a discretionary death. He also criticized the recent Privy Council decision that ruled Jamaica’s death penalty to be unconstitutional. Ironically, Jamaica, in response to growing concerns about its mandatory death penalty, made a move in 1992 to distinguish in the sentencing of capital and non-capital murders. That distinction was used by the Privy Council as a basis for finding unconstitutional a mandatory death penalty for certain categories of murder in Jamaica.


Finally, Professor Jim Wilets explored how comparative law provides additional legal arguments in domestic law. On that basis, he addressed the application of comparative law, including U.S. Supreme Court decisions, to the death penalty. While he observed the parallel use of comparative law in the Caribbean courts, he focused on the comparative law trend against the death penalty in other parts of the world. He examined how this trend has been critical in teaching death penalty domestic law due to the increasing influence of comparative norms.

International law was the topic for the final panel on the first day of the conference. Moderated by Ms. Fara Brown, Attorney-at-Law, Legal Aid Clinic, Norman Manley Law School, this panel provided two diverse presenters. Mr. David S. Willig, Attorney-at-Law, Florida and France, Immediate Past Chair of the International Law Section of the Florida Bar, provided the practitioners approach to the topic of International Law. Professor Leonard Baynes, St. John’s University Law School, discussed changes in the stereotyping of Asian-Americans and the resulting racial profiling after the attacks of September 11, 2001.

The topic of the second day of the conference was “International Trade Developments: Free Trade Area of the Americas (FTAA) and Caribbean Single Market and Economy (CSME).” Three separate panels tackled this compelling topic. The first panel, moderated by Professor Tim Canova, Chapman School of Law, addressed the question of whether NAFTA is a possible blueprint for the FTAA. This panel featured presentations from three law professors: Professor Ari Afilalo, Rutgers School of Law—Camden; Professor Carmen Gonzalez, Seattle University School of Law; and Professor Alan Swan, University of Miami School of Law. Professor Afilalo focused on the investment chapter (Chapter 11) of NAFTA. He asserted that the dispute resolution mechanism in that chapter illegitimately transferred to international panels the authority to resolve potentially sensitive investments issued without instilling the requisite institutional legitimacy enjoyed by national tribunals. Professor Swan made similar observations concerning Chapter 11 and presented a theoretical paradigm for examining its function in NAFTA. Finally Professor Gonzalez discussed how the WTO has perpetuated inequalities between developed and developing countries. In making this observation, she noted that the prohibition on trade distorting subsidies had the result of eliminating those subsidies in developing nations while allowing them to continue in developed nations. She observed that the resulting imbalances have threatened agricultural markets in developing countries such as Haiti, Jamaica and Mexico.

The second panel discussed the Legal Framework for the CSME. Keith Sobion, Principal of Norman Manley Law School and Adjunct Professor at Florida Coastal School of Law, moderated the discussion of the three panelists for this topic. Ms. Andrea Ewart, Attorney-at-Law and Consultant on Trade and Regulatory/Legislative Reform in Washington D.C., in her presentation entitled “Caribbean Single Market & Economy: What Is It and Can It Deliver?” addressed the question of whether the CSME can accomplish for the Caribbean what the European Union has achieved for Europe. As discussed at length in her article published herein, Ms. Ewart observed the challenges to the CSME as the first step in a longer process of economic union. To provide a governmental perspective, Ms. Michelle Walker, Head, Legal Unit, Ministry of Foreign Affairs and Foreign Trade, Jamaica, focused on the governmental regulations and initiatives necessary to carry out the CSME. Her paper for this conference is scheduled to be published by Norman Manley Law School in the West Indian Law Journal. The final panelist, Mr. Ezra Alleyne, Attorney-at-Law and Legal Consultant to the Cabinet, Barbados, discussed the topic of “The Developing Framework of the CSME: Two Legal Issues Considered.” In his article, Mr. Alleyne discussed the historic development of CSME and the jurisdiction of the Caribbean Court of Justice (CCJ) to resolve CSME disputes. He also outlines the establishment of the CCJ and contemplates the implications of freedom of movement under the CSME.

The final conference panel on “FTAA—Trade and Investment in the Caribbean” was moderated by Dr. Rosalea Hamilton, Chief Executive Officer, Institute of Law and Economics, Jamaica. The panelists included Mr. Vasheist Kokaram, Attorney-at-Law and Trade Law Specialist, M.G. Daly & Partners, Trinidad and Tobago and Mr. Milton Samuda, Attorney-at-Law, Jamaica. Mr. Kokaram delivered a presentation on “The FTAA—Trade and Investment Applying International Trade Remedy Laws in the Caribbean—A Framework for Protection.” In the article published in this journal, Mr. Kokaram argued that the utilization of anti-dumping, countervailing duty, and safeguard actions afforded under the WTO system enhance liberalization and competitiveness. He examined the extent to which these actions have been used in the Caribbean and whether these mechanisms provide an adequate framework for international trade protection under the FTAA and the CSME.

This conference required the collaboration of a number of individuals and organizations in the U.S. and the Caribbean. Principal Keith Sobion of Norman Manley Law School and Professor Jane E. Cross, Nova Southeastern University (NSU) Law Center undertook the direction of this first conference with the capable assistance of many dedicated individuals. In his foreword to the
articles, Principal Sobion highlights the purpose and significance of this first ACLI Conference.

As always, the success of a conference, particularly an international one, requires the support and dedication of key persons. At Norman Manley Law School, the outstanding conference secretariat included Maureen Lindo; Mrs. Yvonne Lawrence; Beverley Phillips; Georgette Johnson; and Delroy Pinto. At Nova Southeastern Law Center, Linda Lahey, Michelle Hurley and Jason Rosenberg provided able assistance.

Various members of the ACLI provided additional assistance and support. These individuals included: Dean Bill Adams, NSU Law Center; Carol Aina, Norman Manley Law School; Victoria Dawson, Thurgood Marshall School of Law; John Knechtle, Florida Coastal School of Law; Dean Joseph Harbaugh, NSU Law Center; Harold McDougall, Howard University School of Law; Principal Miriam Samaru, Eugene Dupuch School of Law; and Principal Annetteine Sealey, Hugh Wooding Law School. In addition, all of the speakers, moderators and panelists participated at their own expense in this successful conference and deserve recognition for their significant contributions. Finally, the conference participants provided a collegial and energetic environment for discussion and debate on the conference topics.

The conference benefited from the co-sponsorship of the International Section of the Florida Bar, the Teaching International Law Interest Group of the American Society of International Law, the Jamaican Bar Association and the Caribbean Bar Association. Moreover, the following business provided contributions for the conference: Acorn Bookstore; Air Jamaica (1968) Ltd.; Creative Craft Plus; Lascelles Wines & Spirits; Pickapeppa Co. Ltd.; Standard Products Co. Ltd.; Walkerswood Co. Ltd.; and Wentworth Charles & Co.
THE GLOBAL CHALLENGE TO LEGAL EDUCATION: TRAINING LAWYERS FOR A NEW PARADIGM OF ECONOMIC, POLITICAL AND LEGAL-CULTURAL EXPECTATIONS IN THE 21ST CENTURY

Winston P. Nagan, FRSA* & Danie Visser**

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* Sam T. Dell Research Scholar; Professor of Law; Director, Institute for Human Rights, Peace & Development, University of Florida; Honorary Professor, University of Cape Town, South Africa. I would like to dedicate this piece to the memory of Elizabeth Anna Mikolajczyk, the first pro bono fellow in the University of Florida, Levin College of Law, Institute for Human Rights, Peace and Development. Dr. Mikolajczyk was passionately committed to the promotion of peace and human dignity. This article is a revised reproduction of oral remarks presented at the American and Caribbean Law Initiative conference entitled “Caribbean Market Forces: Emerging Trends in International and Comparative Law,” held at the Norman Manley Law School in Ocho Rios, from July 23 to 24, 2004.

** Editor of the South African Law Journal, Head of Department of Private Law in the University of Cape Town and Honorary Professor, University of Aberdeen, Scotland
Enormous developments are taking place in the global economy. Initiatives are being taken from the top down, and quite literally, from the bottom up. Changes in economic foundations of the world political economy are already evident. The emergence of China, India, Brazil, and South Africa as major players in the South-South discourse is being complemented by dramatic initiatives on the part of the United States and the European Union to radically expand the structure of global neo-liberal political economy. It may as well be parenthetically noted that while the formula of the neo-liberal political ideology for global economic development is being aggressively promoted, serious problems with the model have emerged within the United States itself, in the light of excessive corporate malfeasance and criminality. In the words of the New York Times, [Sunday, July 18, 2004, Masters of the Universe, Leashed [for Now]: “It has been a humbling summer for the power players of Wall Street, once celebrated as Masters of the Universe.”

In a significant understatement, the Wall Street Guru, Felix Rohatyn stated the following: “There just have been to many aspects of business where people were kind of giving out self-interested advice, or got involved in transactions they shouldn’t have been involved in.”² Perhaps the most dramatic of the concerns with the corporate management of the market was the way in which Enron is alleged to have fleeced the State of California of billions of dollars sufficient to create both a fiscal and energy crisis in the state. If corporate power could achieve such dominance over a powerful state like California, one can only imagine the apprehension that must be felt by small states who might easily succumb to the dominance of private, corporate economic power.

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2. Id.
Nagan & Visser

The list of corporate stars whose luster now illuminates American prison cells or might soon do so includes former Enron Chairman Kenneth L. Lay who has been indicted on conspiracy and securities crimes as well as wire fraud. Jeffrey K. Skilling, has been indicted on conspiracy, securities fraud, and insider trading. They are awaiting trial. Samuel D. Waksal of Inclone Systems is currently serving 7 years for securities fraud and insider trading. Martin L. Grass of Rite Aid is serving 8 years for conspiracy and obstruction of justice. Scott D. Sullivan of WorldCom has pled guilty to accounting fraud. Andrew S. Fastow of Enron has pled guilty to fraud. Frank Quattrone of Credit Suisse has been convicted of obstruction of justice. The list is depressingly extensive. But the deep implications for the global neo-liberal economy are the problem and ubiquity of crony capitalism and the problem of how capitalist institutions might be controlled and regulated in the global public interest. This is the backdrop within which critical developments are taking place for the marginal economies of global society.

On May 18, 2000, President Clinton appended his signature to the Trade and Development Act of 2000. The Act included two important components: the United States-Caribbean Basin Trade Partnership Act of 2000 (CBPTA), the Africa Growth and Opportunity Act of 2000 (AGOA). The fundamental United States interests, from the United States perspective, are the strengthening of United States security interests and the United States interest in economic development and political reform, especially in the Caribbean Basin and

5. Quattrone Sentenced to 18 Months; Ex-banking Star Plans to Appeal, CHICAGO TRIB., Sept. 9, 2004, at C3.
8. Greg Farrell, Enron Figure Pleads Guilty, USA TODAY, Aug. 2, 2004, at 6B.
From the point of view of the Caribbean Basin, it is the sixth largest export market for United States goods. It accounts for 2.7% of United States exports in 1999. Hurricanes Mitch and George significantly impacted these figures in 1998. Evidently, the weather provided an incentive for the CBTPA. The CBTPA provides certain countries of the Caribbean with important preferential tariff treatment. Under Presidential Proclamation 7351, Jamaica is among the states included as a beneficiary country. The CBTPA has been an important marker for a still more ambitious initiative, which is including the Caribbean community (CARICON) into a possible integration into a Free Trade Area of the Americas (FTAA). This United States initiative targets the 34 democracies of the Western Hemisphere. The region includes 800 million consumers and has a gross domestic product of some 14 trillion dollars. This is the relevant context including the rapidly changing environment of political economy, trade, and investment and more within which legal educators and legal practitioners will have to work. These are critical challenges for the future of the Caribbean Basin, the Western Hemisphere, and in a larger sense, the legal profession as a global force for providing structure and process for the complex world of tomorrow.

II. INTRODUCTION

We have survived the last millennium. The last century of the last millennium was one of the worst in recorded history from the standpoint of war, human rights and humanitarian deprivations. On the other hand, the last century of the last millennium has also generated the promise of improvement. Indicators include improvements in science, technology, and communications, improved understandings of law, as well as economic social, ecological and political arrangements, which hold the promise of a better future. Nothing is assured. Everything is a challenge and fundamental human values in the most inclusive sense of the terms, are at the heart of the challenge. There is the paradigm of increased development and privilege for the "haves" of the planet.

14. Id.
15. Id.
16. Id.
18. Proclamation 7351, supra note 11.
20. Id.
and there is the prospect of accelerating poverty and exclusion for the "have nots."

There is, as M.K. Gandhi is reported to have said, more than enough to satisfy all global needs. There is simply not enough to satisfy all global greed. The specific challenges generated by perceived threats to cultural and economic dignity, are reflected in such extreme reactions as the apocalyptic version of terrorism associated with Bin Laden and those who sympathize or identify with him. They seem to fear the process of globalism that they see as a threat to their fundamental identity, political autonomy and religious outlook. On the other hand, there are those who see the war on terror as an important opportunity to extend, however articulated, a peculiar version of old style imperialism. Thus the war in Iraq is simultaneously claimed to be a war against terrorism and by its detractors as a war for an imperialistic agenda by others. Whatever the exact truth, one fact is clear, a vast number of complex, vital and challenging legal issues have confronted the international legal community. If lawyers could not stop or contain the current conflicts in the world community, they still have a critical role in seeking to constrain conflict and often to provide a framework in which order might be generated from the chaos of violent conflict and war.

Although this war may seem remote from the central issues confronting the nations and peoples of the Caribbean, we note that the United States base in Cuba serves as a territorial haven in which the United States might safely deposit suspected terrorists and hold them indefinitely without effective recourse to the courts of the United States. In short, a complex legal issue has been generated in the Caribbean about whether territory located in the Caribbean may be used to avoid the rule of law of the United States and the rule of law of the world community. Is Guantanamo a *sui generis* territory outside of the strictures of any rule of law? Since it is claimed that the treaty that gives the United States occupancy of Guantanamo is an occupancy that is indefinite, are there implicit standards of treaty construction and interpretation that may suggest that the treaty is only valid so long as it does not violate explicit rules of international law.\(^21\) In short, the principle of *pacta sunt servanda* is not a construction that is absolute but assumes that the binding force of the treaty continues so long as the treaty performance remains faithful to international legal obligations.\(^22\) If those obligations are intentionally breached, does this invoke the principle *rebus sic stantibus*?\(^23\) If there are changed circumstances or conditions and if these factors constitute a violation of international law,


\(^22\) *Id.* art. 26.

would this principle become relevant to the continued viability of the treaty itself? Thus, remote as the Caribbean seems to be from the war on terrorism, its territories are currently used as an important part of the effort to prosecute that war.

Even more importantly, the Guantanamo problem simply raises the larger problem of the status of Cuba within the community and the approach of the United States to both Cuba and the larger Caribbean community. The United States maintains a regime of economic coercion against Cuba. It also seeks aggressive economic development for the Caribbean region. The complexity posed by political decisions of the United States will have practical consequences of significance for the Caribbean region as a whole. To square the circle of United States policy will require enormous legal dexterity working under the shadow of powerful political forces, forces often antagonistic to each other.

The countries of the Caribbean are small and even if they pool their resources they confront a dilemma. The United States is their most important political and economic neighbor. They cannot function effectively without a cooperative relationship with the United States. If they cooperate fully with the United States, they will clearly gain. But what exactly will they gain? If they do not cooperate with the United States, they will be disadvantaged, but what exactly are the disadvantages? It is between these two possibilities that the Caribbean nations will have to develop their strategies for political, economic and social development. But they stand to be mightily disadvantaged if they do not engage in the challenge. If they engage in the challenge, the question is how effectively can they secure their interests? Here the role of the law and lawyers it seems to me is going to be critical. For example, if effective progress is made towards a free trade relationship with the United States, there is no question that the United States will penetrate and dominate the Caribbean. On the other hand, if the fine print is taken care of, perhaps there is the possibility of a form of reverse penetration. This requires knowing how to exploit the United States market. One of the first principles in positioning oneself strategically is to have a significant understanding of the legal foundations of the United States system itself. This does not mean that doing business with the United States under a relatively free trade scheme is simple for the practical businessman in the Caribbean. But the overall benefits can be achieved if sound business practice is accompanied by competent and forceful legal advice and advocacy.

Let me give you a simple illustration, drawn from a practical problem of a state that has taken advantage of trade preferences given it by the United States. A small empowerment corporation in state X (a developing country) determines that an American computer product in the process of moving from concept to application would be extremely useful in terms of its ability to compete in the communications market of X and the larger regional
environment. They send a delegation to Washington, review the product with their experts and are given a fairly summarized version of the timing for the practical application of the product in the market. Everything looks great. They will have an exclusive license in their country and a whole chunk of the continent. However, the contract that is to be drawn up is to be drawn by the lawyers of the United States corporation. The third world corporation is to be pay a quarter of a million dollars up front followed by two further payments in the same amount. The initial amount is paid and the contract is signed. There is great pressure on them to sign the contract and pay the money or they will forfeit a lost opportunity. The CEO of the corporation makes it clear that he is doing a favor to a group of unsophisticated third world bums. It more or less goes like this: I understand your lack of sophistication in the real world, of high finance so I will make it simple. If you want to be rich, pay now and sign the contract. The parties sign the take it or leave it deal. The contract turns out to be a one-sided arrangement. The American lawyers draft the contract selecting the forms of dispute resolution, including choice of venue, choice of jurisdiction, and choice of law; the agreement also includes a provision that seeks to exclude the United Nations Convention on the Sale of Goods. After the money is paid, communication deteriorates and becomes non-existent. The third world corporation receives a contact from the chief of technology of the firm indicating that he is leaving and that he can provide them with a different product that would meet their needs if they are interested. He is also willing to sell them all his shares. The third world firm, smelling a rat, declines to have any further conversations with this person. Since they have received no further information from the corporation, they ask for their funds to be refunded. The American firm agrees. They subsequently receive a response from a lawyer in the United States indicating that there is reason to believe they may be implicated in a plot to appropriate the patent of the United States company. Their money will not be returned and they have been reported to the Federal Bureau of Investigation. This is a fairly practical problem and indeed is drawn from real life experience.

The central point for our purpose is that law can be used as an instrument of power. The imperial state does not have to use gunboat diplomacy if it can achieve its objectives by the use of the power appropriated by law. Weak states cannot protect their nationals effectively in a world of gunboat diplomacy. They will have to play the legal game and play it with a lot of skill to develop a relatively level playing field within which constructive developments can happen. Expertise in local and international law is simply not enough. Expertise in narrow legalism is necessary but not sufficient for effective

protection of the range of interests of a small state. The most important asset of a small state will be the extent to which its lawyers are incredibly well trained in local, regional, comparative and international law.

Let me give another illustration of the importance of this matter. A third world country rewrote its Medicines Act to give its Minister more powers with regard to the protection in the context of national health emergencies. The government of the United States challenged the legislation of the country. The basis of the United States claim was to get that country to repeal its legislation on the basis that it violated international intellectual property treaties protecting intellectual property rights to which both states were parties. A significant and escalating conflict developed between the Unites States and that country with the United States threatening to impose economic sanctions on it. The United States assumed that had an unassailable position on treaty interpretation. Initially no one in that third world country challenged this position. However, the NGOs associated with AIDS issues got into the matter and a careful reading of the treaties and United States practice disclosed that the United States position taken in this context, would in itself make the United States a major violator of the treaties because of its extensive use of compulsory licensing and the acceptance of the principle of parallel imports. This technical reading of Trips and its interpretation in the light of the Vienna Convention on the Law of Treaties,25 as well as the understanding of Trips on the light of general international law, including human rights law has significantly changed the fulcrum of power over these matters. In short, one side sought to use law of the legal bulldozer and the other side was sufficiently skilled so as to limit the power of economic hegemony by law. These two illustrations demonstrate that if the trend toward a far greater intense level of integration is to take place, that is to say, if global forces which conspired to erode territorial boundaries in the traditional sense and reproduce the framework of interdependence and inter-determination, lawyers will have the critical role in ensuring that these facts of global social organization do not degenerate into global domination and archaic imperialism.

III. LEGAL EDUCATION AND THE STRUCTURE OF GLOBAL LAW

I have used these two bullets as lead in to the question of how lawyers are trained to meet the new challenges of the international or global environment. As preliminary matter, the first issue that has to be confronted is that behind the practice of law is the brooding omnipresence of the theory of law. And behind both the practice and the theory of law is the theory and practice of legal education as well as continuing legal education of active professionals. It

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believe it was Dicey or Holmes who said that jurisprudence stinks in the nostrils of the practitioner. Please forgive me if I provide a modest reference to some critical aspects of theory that impact on legal education and ultimately on the practical orientation of real world lawyers. The central traditional feature of legal education was and remains largely influenced by legal positivism. And legal positivism posits the creation of all law as a product of the sovereign.26 The precise impact of this on legal education has in effect been to make it parochial—to train lawyers in a system in which there is a sovereign that monopolizes the making, application and enforcement of law. As a model, this is of course a hierarchical model, a model of law coming down from the top to the herd at the bottom.

In Austin's famous formulation, law is the command of a sovereign imposed by a sanction.27 The obvious concern with this model would be the status of law made beyond the boundaries of the sovereign, such as international law. According to Holland, international law is the vanishing point of legal theory.28 And according to Austin, international law is positive morality and not law.29 The practitioner will at once see that this model is unhelpful as a means of training practitioners under current global conditions. [I note that this reference to theory is deliberately simplified. There are of course much more refined versions of modern positivism]. Any statistical indication of the scope of human problems implicating legal institutions which cut across state and national lines, will immediately disclose that this vertical model of law making has great difficulty in accounting for what we might loosely call a horizontal model of law making.

In short, the legal problems that cut across state and national lines from war and peace, to ordinary business transactions, to concessionary agreements, to marriage, divorce and the management of estates and international trusts and a great deal more suggests that the trajectories of law which confront the contemporary practitioner are not simply vertical or horizontal, but indeed, law making application and enforcement come in a range of bewildering trajectories challenging traditional ways of doing law. So our first problem is the problem of whether we can construct a framework and a model of law that is not confined to a single state but includes clusters of states, and multiple clusters of states constituting the larger universe of states within the international community. More than that, there are other players besides states in the world community whose role must be understood and given appropriate legal

27. JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (Scholarly Press 1977).
29. AUSTIN, supra note 26.
relevance: international organizations, international corporations, international criminal syndicates, international political parties and pressure groups, international terrorist groups and, in addition, individuals and groups which constitute the civil society.

Let us explore the implications of modeling global law more fully. The problems of traditional law models manifested themselves in the theory and practice of both international law and constitutional law. In international law positivism influenced the generation of elaborate, alternative or modified structures of international law itself. Two dominant, and indeed elegant, structural models emerged that deeply divided as well as influenced the development of international law. The models were economically styled "monist" and "dualist." The monist model seemed to postulate a "criterion" of validation in a conceptual construct that was "meta-statal." The assumption was that there "existed" a meta-statal "imperative" that determined when, for example, a state was a state, and thus the monist theory had some constitutive properties built into it. The dualist version provided a more anarchic structure for international law by rooting all law making competence in the nation-state (sovereign). Since the sovereign might consent to some limitations, withhold consent or withdraw consent already given, international law could be predicated upon formal and informal agreements and understandings.

How does globalism change these models? How do these models limit the empirical and normative challenges of globalism? If we conceive of legal theory as in part an inquiring system, do these models limit or enhance legal inquiry? It is obvious that the very large and complex social process mosaic of world order includes not only states, but international and regional organizations, private armies of various levels of competence and capacity, vast corporate enterprises and an even vastier complex of non-governmental civil society associations as well as the individuals who constitute the larger global community. These social facts may require that the implicit state-centered view we

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30. Theories of "monism" and "dualism" have been a critical part of the evolving "constitutional" discourse of modern international law. In the United Kingdom, the theories of monism and dualism have been loosely identified with the theories of "transformation" or incorporation relationship between domestic law and international law. The "transformation" theory holds that international law transforms domestic law, but they are two separate and distinct systems. On the other hand, the "incorporation" theory holds that international law is part of domestic law without a ratifying procedure. See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (4th ed. 1990); MALCOLM N. SHAW, INTERNATIONAL LAW (3d ed. 1991). See also George Slyz, International Law in National Courts, 28 N.Y.U. J. INT’L L. & POL. 65 (1997); Trendtex Trading Corp. v. Cent. Bank of Nigeria 1 Lloyd’s Rep. 581 (1997) (Eng.); Maclaine Watson & Co., Ltd. v. Dep’t of Trade & Indus., 3 All E.R. 523 (1989) (Eng.) (accepting the incorporation doctrine). Human rights litigation has added to the force of the incorporation doctrine. See MURRAY HUNT, USING HUMAN RIGHTS LAW IN ENGLISH COURTS 25 (1998).

31. See Slyz, supra note 30.

32. Id.
hold of law be transformed into a global law whose boundaries and structures are still in the unfolding stage.\textsuperscript{33}

Multi-state/transnational law may indeed be structurally more horizontal than vertical. More realistically, there are simply multiple trajectories of law making, law applying and law-enforcing processes. In loose but convenient formulation, we are dealing with the so-called global to local to global nexus. These connections have horizontal, vertical, and other trajectories. This kind of structural complexity will have a critical impact upon conventional methods of both teaching and inquiry about law and law-conditioned processes. In this context, the good news is that the one-dimensional paradigm of top-down, hierarchical law is no longer as professionally interesting as it apparently once was. Law operating in planes of multiple intersecting trajectories does represent an impressive challenge to professional competence in theory and practice. The distinguished legal anthropologist, Leopold Pospisil\textsuperscript{34} who showed that multiple law-generating processes might exist in the same state or body politic, indicates an important insight into the structure of the law. Each of these processes would have distinctive criteria that make them relatively discrete. Simultaneously they have points of important intersection and interaction with each other. What therefore seems to be an ostensibly single legal system upon proper investigation may in fact disclose multiple spheres and levels of legal systematics.

This practical gloss on the relevant context of the global community which now generates problems of global, regional, national and local relevance requires us to do a lot of rethinking about legal education and how it can be relevant to the practical realities lawyers must confront in the new millennium. In short, a central challenge for legal education is to discard parochialism while at the same time recognizing that the outcomes of legal interventions are invariably grounded in some local contexts. On the other hand, the perspective must be broadened to understand the impact of global conditions on regional and local situations as well as the impact and regional situations on global conditions. These are critical challenges in the teaching of law and I now look more specifically at challenges in the structure of the curriculum of a law school sensitive to the new challenges of international environment.

\textsuperscript{33} International law has been the primitive law of an unsocial international society. Itself a by-product of that unsocialization, it has contributed to holding back the development of international society as society. Failing to recognize itself as a society, international society has not known that it has a constitution. Not knowing its own constitution, it has ignored the generic principles of a constitution. See PHILIP ALLOTT, \textit{Eunomia: New Order for a New World} 418 (1990).

\textsuperscript{34} \textit{See} LEOPOLD J. POSPISIL, \textit{Anthropology of Law: A Comparative Theory} (1971).
A. The Curriculum and Globalism

One of the central issues of legal education in the law schools as well as matter of continuing professional obligation is the globalization of the curriculum. W. Michael Reisman states that many of the social arrangements we think of as quintessentially domestic in this country are inextricably interwoven with complex processes in other countries and regions of the globe. Consider our security system, our political-economic system to search, fund, and retain external markets for our products, and our dependence on the national resources without which an advanced industrial, science-based civilization cannot survive. Also consider our health system, and our conceptions of fundamental morality. Even "domestic law" courses can no longer be understood adequately, whether for descriptive or practical professional purposes, without an understanding of the organization and dynamics of the international system. There are large-scale implications in this challenge. For example, there is the challenge of "transnational comprehensiveness" in the teaching of the law. Do we need more "international law courses"? Should all our existing courses be subject to revisions that account for the complexities of multi-state law or law on a "horizontal plane"? In other words, must we radically revise, for example, how we teach the law of sales to account for the International Convention on the Sale of Goods, or must we create a new course based on this latter instrument? How much specific international or transnational content should be added to a traditional (state-centered) private international course? The short but precise answer is that almost every course in the curriculum of any law school to a greater or lesser degree has a trans-state multi-state, transnational dimension to it. Globalization may have to be given a critical curriculum presence by the willingness of "domestic" law teachers to revise their domestic law courses with a sensitivity to the law of multi-state problems.

If realism demands that law school curriculum be more global, it must confront powerfully received ideas, often a part of the implicit jurisprudence of both scholars and practitioners that law and the state are essentially identical. The identification of law with the state has always had technical difficulties with the law of multiple states (both public and private international law). Indeed a distinguished jurist once suggested that if international law really were law, it would also be the vanishing point of legal theory. Of course, an emerging paradigm of global law may be unclear and not intuitively as appealing as the Westphalian/Austinian model of law and state. However, literature in World

36. HOLLAND, supra note 28.
Order studies moves significantly in the direction of global law, building on Judge Jessup's idea of "transnational law" as distinct from state centered international law. The author's own work on the interrelations of public and private international law suggests that they are indispensable and complimentary components of world public order or global law. A practical gloss on these ideas is the recognition that in general the sources of state law rest largely on statute and precedent. The sources of international law, as indicated in Article 38 of the Statute of the International Court of Justice, are much broader, and correspondingly subject to controversy.

The sources of international global law, which includes international law and their relative weight in legal discourse or decision-making contexts, may be a fertile source of broadening the "authority" basis for the interpretation of the law in general. It may also be an important challenge to juridical creativity and innovation in the use of extensive sources of authority not always found in conventional state law sources.


38. See Phillip C. Jessup, Transnational Law 1-16 (1956).

**B. Globalism: Making Context and Interpretation Relevant to Lawyers**

The importance of context to law is both simple and complex. Theories of law in general have sought to make law a discrete discipline. Modern theories have sought to make their discipline more amenable to scientific logical analysis. To do this the trend has been to isolate law from the unruly world of contextual reality. Exclusion comes at a price. That price may sacrifice realism and relevancy. The issue of context is often critical to the practice of law. Context influences interpretation. The less interpretation admits context, the more formulaic the process of a legal decision may be. At the same time, that decision may distance itself from realism and relevancy. On the other hand, formalism may perform an important function in times of crisis of protecting the legal profession from repressive politics. However, it is the case that the exclusion of context also results in the exclusion of the just claims of the marginalized classes. From the perspective of this paper, the exclusion of the global context runs the risk of making the profession itself marginal or irrelevant.

The perspective of “globalism” which implies a new and important context necessarily expands the definition of law. This will influence how law is interpreted. Thus, the methods of construction, interpretation, as well as the authoritative sources of the “law,” all conspire to produce challenges to the appropriate boundaries of our discipline. This could inspire us to rethink the very empirical and normative foundations of domestic law from a global perspective. For example, global law could influence a trend that requires “interpretation” in terms of what is usefully knowable about communications theory, which considerably broadens the theory and method of law, based communications. This in turn may influence what is conventionally labeled “interpretation.” It may also stress an approach to law that is more horizontal than hierarchal, making more complex the weight to be given to different sources of authority in particular cases. Globalism also broadens the context of law. If that context is socially constructed, it may stress interdisciplinary skills in our efforts to improve, as responsibly as possible, the “narrative” of global law.

\(^4\) Id.
IV. MANAGING THE SOURCES OF GLOBAL LAW: THE RELEVANCE OF COMMUNICATIONS THEORY

International lawyers have long grappled with the problems of so called “hard” and “soft” sources of law. The phenomenon has in part been triggered by the communications revolution itself. Resolutions, declarations, and directives flow from a vast aggregate of national, regional and global institutions. To some extent they are expectation-creating communications. Some are formulated with the precision of legal precepts and generate authoritative support in preexisting legal precepts or in the weight and seriousness with which they are received in authoritative fora, or more generally in public opinion. These kinds of signs and symbols may gravitate to general acceptance in the relevant professional and specialist discourses. Sometimes these precepts backed by some form of “authority” and “acceptance” may find confirmation in formal institutions of law making or in informal but effective fora. Sometimes the acceptance of such communications that are policy-specific supported by an authority-signal and by some form of controlling animus, has the capacity to create law in a functional sense. This kind of insight suggests that, however useful the typologies of hard and soft law are, or however broad the boundaries of Article 38 of the International Court of Justice Statute are, we could benefit from a more coherent perspective about the relationship of communications theory to the process of global law making and application.

Lawyers in the international law arena have been keenly aware that we are no longer dealing with the sources of international law, but the sources of a (local to global) global law paradigm. This has been expressed as a form of disenchantment even with the “traditional” sources of international law as being perhaps too narrow a basis for marshaling the sources of authority of global or transnational law. However, as has been earlier indicated, a return to the basis of general communications theory might provide a better multi-level, multi-disciplinary framework for meeting this challenge in both theory and practice. The general model of communications theory asks a series of sequential questions:

43. I.C.J. Statute, supra note 40, art. 38.
As applied to global law the model may be graphically illustrated as follows:

Communicators } Prescriptive Content } Target Audience in
From Global Community } Authority Signal } Global Community
} Controlling Intention

This general model has been applied to the interpretation of agreements and world order, as well as to add insight to the question of how global law is functionally made and applied. In the author’s article, “Law and Post-Apartheid South Africa,” this approach was used to provide some coherence to the flow of communications relating to black expectations of change as found in the Petition of Right, the Freedom Charter, the UDF Declaration, etc. This model provides a good fit for understanding the impact of the modern communications revolution (the internet for example) on global law. This approach, however, implies a greater appreciation of law in context and the interdisciplinary aspect it implies.

This kind of perspective about law as a process of communication has vast implications for how one describes and uses all possible “sources” of law at any level of inquiry. Indeed, the model throws light upon a neglected aspect of human interaction, viz., that interaction is in substantial measure a communicative enterprise. These communications often involve normative or prescriptive elements, they include value-variables and they contain coded signs and symbols of both authority and expectations of coercion. It is perhaps this core


46. See generally Nagan, supra note 44.
insight that has influenced legal anthropologists to explore the empirical foundations of small group law or the "law" of micro social relationships. But the global perspective also is replete with complex communicative processes which have normative or prescriptive force of some sort, designate communications about desired goods, services, honors and indeed basic "values," and contain coded symbols of authority and control to define expectations of conservation and change. The micro and macro implications, therefore, of a more functional design for a contextualized vision of law-making as a process of communication collaboration and conflict has an immense potential impact on how we reconstruct law in an age of globalism.

V. FROM STRUCTURE TO CONTEXT AND FUNCTION

When we refocus our lens about the future of professional responsibility from structure to function, we encounter several important matters of substance. First, the "pre" structural context of law encounters the unruly world of global fact, and the problems generated by that world, some of which demand legal responses of some sort. The systematic articulation and understanding of the legal problems of global reach, which demand the Practitioner's attention, will require a refined and sophisticated form of interdisciplinary theory and method. The focus on decision-making and policy in an era of globalism permits a sharper emphasis on such issues as the relevance of context and more specifically the contextual location or mapping of problems that require some sort of legal intervention. The problem of what a legal or potential problem is a major issue for theory and practice and it is also a critical component of the multi disciplinary dimension of the delineation of context and the outcomes of context, which are the problems to which law must respond.

The discipline of focusing on the problems, which demand or require authoritative and controlling decision-making interventions, serves to place important limitations and potentials to enhance both scholarship and professionalism. Probably the most important element that problems provide to legal culture from a theoretical point of view is the principle of realism and relevancy. When the cliché "relevancy" is invoked, it is usually invoked as an anti-intellectual, crude limitation on inquiry. But in fact, when we tie realism to problems we find that we know very little about problems or indeed the problem of how one determines what a problem is. Even more important, the

idea of being able to anticipate or predict problems before they happen could be one of the most important components of thoughtful scholarly inquiry that is informed by high intellectual standards of professionalism. The particular slant that realism and relevancy in terms of orientation give to law in a global sense is that it focuses on the unsettling dynamic aspect of law, that is to say, that law as decision is a response to problems that actually arise or maybe reasonably anticipated will arise out of the relevant community context.

No less important to the task of lawyering may be the focus on the indices of decision-making interventions, in particular the "conditions" of decision-making. This too may expand our focus from legalism's reliance on logical syntactical modes of expression and appraisal, to those that focus cross-culturally on such factors as social and professional class, cultural orientation, personality predispositions and conditions of crises which may require interdisciplinary skills to meaningfully appreciate the conditions that shape lawyer roles and lawyer conditioned interventions. A still further concern or interest that may implicate the role of lawyers in this context is the effort to understand the consequences for public order of lawyer interventions. These understandings, imperfect as they may indeed be, cry out for tools and skills of appraisal that are in part interdisciplinary.

VI. CONTEXT: LAW AND . . .

One of the important problems posed by partial "law-and" models is that by taking in a selective slice of social organization the consequences of legal or policy decision-making interventions may in fact be astigmatic or myopic since these partial, cognitive and methodological procedures are faced with the disciplinary dilemma of too much exclusion, or if they become too inclusive it is because they take in too much and therefore eviscerate the coherence their approach brings to legal analysis or legal inquiry. Managing a legal context for legal inquiry is therefore a complex business.

Those who emphasize a law and economics approach may have to confront this dilemma. One of the key concerns is the issue of how much economic reductionism law can absorb without significant distortion. This issue has emerged in the form of whether a law and economics approach can digest certain non-economic "values." I am uncertain whether at the back of the economic foundations of the law model there is no testable generalized model of social organization. Possibly this model is well expressed somewhere. If it is there, perhaps it might look something like this: "Human beings purposefully seek to maximize wealth through institutions based on material and technological resources." The basic thrust of this model might be that people maximize wealth to make more wealth. It is of course possible that they maximize wealth for other reasons. Perhaps they want power. Perhaps they want to maximize
their "affective" experiences or improve their professional or educational opportunities, health and wellbeing. Maybe they need wealth to promote God.

These and other objectives might deeply influence what wealth they seek to maximize, how to maximize it, and where to draw the line. Of course, it may also be suggested, just to complicate matters, that these other non-economic values may be used to generate wealth. That is to say, we may use power to leverage wealth, or skill or education or social position or even religion. In other words, the conception of "values," i.e., what is desired may be much broader than the scheme of value assumptions implicit in the model of the social process implied in some forms of legal economic inquiry. Thus, values and the processes they include suggest that the foundations of "political/social economy" are immeasurably more complex than implied in this model. This insight hopefully suggests that the very idea of contextuality, its inclusivity, its systematics, its amenability to effective mapping onto legal/policy processes remain both vital and controverted. It is an important challenge to how lawyers are educated and how effectively a sense of social/economic realism may be successfully brought into the processes of legal inquiry and legal intervention.48

VII. GLOBALISM, NEW FORMS OF CONSTITUTIONAL THINKING

Probably the most central impact represented by the concept of globalism has been the development of the legal expectations imbedded in the United Nations Charter as reflective of a constitution of the world community. But this constitution is different from the traditional concept of a constitution, which seeks to separate the law from basic values. The United Nations Charter is not value free or value neutral. As a constitution, it makes an important contribution to a much more challenging concept of the law imbedded in the idea of constitutionalism itself. The Charter as a constitution is an instrument for promoting peace, human rights, social progress and universal respect for the rule of law. Its importance to global constitution law is its profound influence on the development of regional constitutions, or constitutional-like arrangements or compacts in Europe, the Americas and Africa. Its footprint is also deeply

48. This is an issue that has an interesting parallel in human rights law. Article 17(1) of the Universal Declaration of Human Rights holds that, "Everyone has a right to own property." See G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948). Is this an unlimited universal right? Of course not. Article 17(2) holds that "no one should be arbitrarily deprived of his property." Id. What does this mean? Does the term "arbitrarily" refer to all the other rights in the Declaration in the sense that property can be limited if limitation is to preserve the other rights in the instrument? Can we know what property means without knowing the content and structure of its limitation? Does the same principle apply to "wealth maximization?" There is a great deal of acceptance of interdisciplinary perspectives in law and practice. But I would suggest that the systematic employment of these perspectives in both education and practice is not a goal that is presently realized. The methodological objective here is, of course, to move from "law and" to an inclusive interdisciplinary, "law is" paradigm.
imbedded in new forms of national constitutional development as well as its imprint upon the legal complexity of transitions to democracy. The fact that the United Nations Charter is a peace document, a document that articulates the centrality of human dignity and social progress, means that it does confront forces of reaction in the world community. The United Nations Charter as a constitution is under pressure to secure its destruction as it is equally under pressure to affirm its noble promise. The Charter will continue to be critically relevant when its prescriptions provide explicit normative guidance in domestic fora including domestic courts. The normative foundations of modern constitutional law, which are beginning to take root globally and locally, are included in at least keynote principles rooted in the Charter. These are:

1) The opening of the preamble expresses the first standard—that the Charter's authority is rooted in the perspectives of all members of the global community, i.e., the peoples. This is indicated by the words, "[w]e the peoples of the United Nations." Thus, the authority for the international rule of law, and its power to review and supervise the nuclear weapons problem is an authority not rooted in abstractions like "sovereignty," "elite," or "ruling class," but in the actual perspectives of the people of the world community. This means that the peoples' goals, expressed through appropriate fora, including the United Nations, governments, as well as public opinion, are critical indicators of the "principle of humanity" and the "dictates of public conscience" as they relate to the conditions of war (methods and means).

2) The Charter's second key concept embraces the high purpose of saving succeeding generations from the scourge of war. The drafters clearly did not envision nuclear war in reference to the concept of war here. Nonetheless, as the passage contemplates the destructiveness of war, an enhanced technological capacity for destructive weapons would enhance the relevance of this provision, not restrict its scope. This reflects a reasonable legal interpretation.

3) The third keynote concept is the reference to the "dignity and worth of the human person." In blunt terms, the eradication of millions of human beings with a single weapon hardly values the dignity or worth of the person. What is of cardinal legal, political, and moral import is the idea that international law based on the law of the Charter be interpreted to enhance the

49. U.N. CHARTER pmbl.
50. Id.
51. Id.
dignity and worth of all peoples and individuals, rather than be complicit in the destruction of the core values of human dignity.

4) The fourth keynote concept in the preamble is emphatically anti-imperialist. It holds that the equal rights of all nations must be respected.

5) The fifth keynote in the Charter preamble refers to the obligation to respect international law based not only on treaty commitments, but also on "other sources of international law."\(^\text{52}\)

6) The sixth keynote point in the preamble of the Charter contains a deeply rooted expectation of progress, improved standards of living, and enhanced domains of freedom.\(^\text{53}\) In short, to the extent that we see "legalism" as still a vital part of law as a discipline, its influence will be moderated by the recourse to law as "fundamental policy," and the functional idea of law as a process of authoritative and controlling "decision-making;" guided by a complex but articulate normative agenda.

The normative foundations of the international constitutional system have as earlier indicated, influenced the development of modern constitutional and administrative law in both national and hemispheric arenas. One of the important themes that these norms imply is that the creation and maintenance of the institutions of governance must meet certain general normative criteria: responsibility, accountability and transparency. Stated differently, modern forms of governance must essentially be rooted in indicators of authority deriving from the keynote values of the United Nations Charter. But specifically, they should reflect the principles that touch on questions of openness, participatory access, accountability as well as effectiveness and coherence. These principles obviously require progress and participation, improvements in the quality of policy-making and regulation; a commitment to the rule of law and the realization of the principles of justice, as well as a commitment to effectiveness, efficiency, subsidiary and proportionality, etc. Teaching the law of governance now must take into account a must broader framework of transnational governing competence as well as administrative policy and practice which cuts across state and national lines. These practices today are infused with normative sensitivity.

\(^{52}\) Id.

VIII. THE INTEGRATION AND HARMONIZATION OF REGIONAL PRIVATE LAW

One of the under appreciated components of any kind of rational development paradigm, but particularly one that builds on capitalist principles, is the crucial relevance of the system of private law. It is difficult to imagine how a capitalist system can function with an underdeveloped framework of legal obligations (contract and delict) as well as the institutions which make private relations work reasonably effectively such as agency, partnership, joint ventures, franchises, forms of corporate organization and more. Since enterprise requires a degree of predictability, the reasonable stability of private law institutions provide an important structure of stability for planning and predicting relevant matters of economic enterprise and ordering. In short, private law is the essential deep structure of a working capitalist system. Weak private law means a weak capitalist system. Strong private law institutions will seem to strengthen the capitalist system. Private law largely means private ordering. Private ordering does not mean private license. It means respect for the fundamental rules of give and take, of fairness and equity, which underlie the fundamental policies behind all private law systems. When the private law is strong and effective, we are at the same time giving a genuine meaning to the concept of civil society and civil ordering. Thus the institutions of private law have compelling social functions. It is perhaps for this reason the European theorists today talk in terms of civil society being ineluctably tied to the concept of a private law society. The challenge runs deeper. When we look at economic harmonization of many countries, we are in effect harmonizing critical sectors including the economic sector. It is difficult to imagine effective economic integration without also harmonizing the private law, which must effectively govern and regulate their activities. How do these thoughts apply to the Caribbean and to the development of an integrated regional political economy?

The countries of the Caribbean if they are to buy into a free trade zone with the United States, might be advised to commence if they have already not done so, a process of harmonizing their commercial laws. I have worked on a proposal for the Southern African Development Community (SADC). This proposal envisages the development of a common market and, to secure the expeditious attainment of this objective, it is vital that an effective infrastructure of harmonized commercial law and practices be established. The harmonization of private law will take place on essentially three levels, i.e., 1) domestic law reform; 2) rules facilitating intra-regional commerce and regional economic cooperation or integration, and, 3) rules facilitating worldwide commercial transactions. In the absence of such an initiative, there is no doubt that the development of inter-state trade in goods, services and investment will be retarded. Furthermore, the broad policy objectives of the Caribbean interests could include improved economic performance of the national economies in the
region, and this initiative is also aimed at supporting this aspect of the regional agenda for development. This would be a promising approach to an effective free trade arrangement.

There would have to be discussions with potential multi-party stakeholders and the generation of a consensus that the Caribbean is ready for higher and more sustained levels of co-operation and economic integration. This could create employment, which will enhance the standard of living and provide a broader tax base for the states to create the necessary commercial infrastructure that is an indispensable condition of sustainable development. Modern, rational, and efficient rules for international commercial contracts and financing will contribute to giving all countries in the region equal opportunities to attract both manufacturing and service providing businesses. Moreover, harmonized regulations will promote foreign direct investment, e.g. industry, tourism, etc., that will generate jobs. A free trade regime that enhances joblessness seems to me to be a non-starter.

I have not been privy to the discourse internal to the Caribbean on what areas and what priorities should be given to the harmonization process. As an outsider, I would suggest that consideration be given to the following general principles which might guide a process of harmonization:

1) The body of commercial law that should be the focus of harmonization must be broadly conceived because a commercial law system for the whole region will ultimately be as strong as its weakest link. Any part of the whole can frustrate the smooth and effective workings of enterprisal freedoms. It is therefore our proposal that commercial law for the purpose of regional economic integration should include not only all these branches of law, the approximation of which would remove obstacles to the free flow of goods, services and investment opportunities, but also those that would positively encourage inter-state trade, and foreign direct investment.

2) It is imperative that the rules and policies codified in this way must not reflect national, parochial or special interest concerns, but be rules and principles grounded in sound principles of contemporary commercial practice.

3) There must be acceptance of cross state and regional lines, and a solid majority of stakeholders interested in regional commercial development must support the initiative. Such stakeholders include not only governmental entities, but the private sector (both domestic and foreign) and civil society (universities, research institutes, and NGOs as well).

4) It is of the utmost importance that participating Governments approach this task on an equal footing and that both the experience of interested commercial circles and the most
advanced scholarly expertise available be involved from the outset. The International Institute for the Unification of Private Law (UNIDROIT), Rome, would appear to be the appropriate vehicle for reaching all three objectives.

**IX. VALUE AND PROCESS IN HARMONIZATION**

The value of regionally harmonized modernization of commercial law, through the development of both 'hard' and 'soft'-law instruments and the identification of the proper approach on a case-by-case basis permits to limit the cumbersome process of diplomatic negotiations to those areas where binding international treaties are inevitable.

This kind of intergovernmental, but at the same time commercially oriented and scholarly supported/driven initiative will have the flexibility in its process to produce appropriate instruments in a representative but politically neutral manner, stressing the technical and professional aspects of harmonization. In short, the process will be efficacious, cost efficient, cost efficient and its legitimacy will rest on the professionalism of its product and its collaboration throughout the project with multiparty stakeholders.

The program has a further objective: *viz.*, the training of a new generation Caribbean lawyers and academics in the law and practices relating to the commercial and economic integration of the Caribbean.

**X. POSSIBLE KEY AREAS OF INVESTIGATION**

The key areas for which the regional model codes could be developed as follows:

*A. Company Law*

The primary objective in regard to company law is to facilitate the mobility of companies in the region by ensuring the mutual recognition of the legal personality of companies throughout member states. For example, a Jamaican company would, in terms of this initiative, enjoy legal personality in another Caribbean country and thus the inconvenience of re-incorporation would be eliminated and so facilitate investment. However, mutual recognition of companies requires the establishment of confidence in companies incorporated in other states, and a crucial aspect of bringing about this confidence is the creation of certain common rules relating to the operation of companies. That, in turn, means harmonization of parts of company law such as reporting, accounting and the rules relating to transparency. In this area, as in many other areas, there are harmonization initiatives in progress and this project will take note of work already done.
B. Insolvency

Inter-state trade can be facilitated in a significant way by reducing legal insecurity as far as possible. One of the most important areas in which legal confidence should be sought, is the law relating to insolvency. The possible insolvency of a debtor in a foreign jurisdiction could clearly be a disincentive to cross-border trade and the harmonization of insolvency laws would provide foreign creditors with a single regime throughout the region in regard to the proof of claims in insolvency as well as the order of their claims in relation to local creditors.

C. Recognition and Enforcement of Foreign Judgments, Transnational Civil Procedure, Arbitration and Alternative Dispute Resolution.

The necessity to sue on a foreign judgment could also be a disincentive to cross-border trade. One of the first harmonization projects which should attempted should therefore concern the mutual recognition and enforcement of civil judgments, which would further reinforce the security of creditors in trans-border transactions. The development of principles of transnational civil procedure based on a common core of shared values may facilitate mutual recognition and enforcement. Moreover, the harmonization of the law relating to alternative forms of dispute resolution such as mediation and arbitration should be pursued in order to create a comprehensive envelope of standardized procedure for resolving disputes in the region.

D. Conflict of Laws

To facilitate trans-border contracts it is vital that there should be clarity as to which country’s law will apply to a transaction. A common system relating to the conflict of laws, especially the conflict of laws in the area of contract, would have the advantage of preventing forum shopping, and it would also avoid time-consuming litigation to determine the applicable law in any given dispute.

E. Industrial Property Rights

If inter-state trade is to be fair and investment facilitated then patents, trademarks and copyright should be protected in a way that corresponds to the norm at international level. It is suggested that the aim of harmonization here should be the elimination of any national and regional peculiarities that would tend to weaken the internationally accepted standards of protection of intellectual property rights.
F. Banking Law

To stimulate cross-border trade in banking services and to promote investment, banks established in a particular country should be able to operate in other countries in the region. Harmonization here would aim at mutual recognition of the status of banks. However, as in the case of companies, further harmonization would be necessary to create confidence in the banks. Aspects of banking law would therefore need to be harmonized, and in this respect the most important areas of concern would be control, capital, liquidity, investment and holdings in subsidiaries. The question of the liability of banks for negligent acts would also need to receive attention.

G. Contracts

Although the harmonization of the substantive rules of contract would not be a priority, because the important thing is to know which system of contract applies to any transaction and harmonization of the conflict of law rules would achieve this it can also be argued that common rules in a few key areas of contract would created familiarity amongst traders and thus facilitate certain transactions such as sale and agency. Work has however been done at the global level here and in later phases of this project the harmonization of the relevant area of contract should be investigated, taking as a basis the models that have been developed in other parts of the world. The important developments of harmonization of contract law are happening in Europe. Although a missed opportunity in these discourses is the model of international treaty law, as a model form of general agreement law in the private sphere.

An area where the right choice of approach (type of instrument) can be illustrated and where useful models of the highest quality are already available. One example is the 1980 United Nations Convention on the International Sale of Goods (CISG).\(^4\) This binding treaty is currently in force in sixty states, including six African and two member States of the Southern African Development Community (SADC).\(^5\) Another example is the UNIDROIT Principles of International Commercial Contracts (Part I 1994, Part II forthcoming).\(^6\) This innovative, non-binding international “restatement/ pre-statement” of widely acceptable best solutions is currently used both as a model for domestic law reform and in international commercial arbitration.

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54. CISG, supra note 24.
55. Id.
The investigation would focus on the acceptability of these two instruments, including the need, if any, for adaptation, in the region.

H. Consumer Protection

Many of the investigations mentioned above would envisage heightened consumer protection, e.g., harmonization of company law and banking law. However, the harmonization of consumer credit law should also be considered as this would create consumer confidence in the laws governing lenders in the area as a whole and would thus facilitate the opening of the 'credit' market.

I. Labor

The purpose of harmonizing labor laws would be to create a level playing field for employers in the different states to create minimum standards for workers. It may be asked whether the time is ripe for such harmonization in the Caribbean. A primary objective should be the stimulation of inter-state investment, particularly in poorer members of the Caribbean community. One of the present advantages that these states may have is a lower labor cost structure. Harmonization of minimum labor conditions could interfere with this advantage and discourage investment.

J. Shipping Law

The same remarks apply here as to "contracts." It might be advantageous to have common and familiar rules on certain topics to stimulate business, e.g., carriage and insurance.

K. Environmental Law

Strictly, this is public law rather than private law but it is again very relevant in relation to the objectives of promoting inter-state trade and investment. Unduly severe environmental law can discourage investment in the state which has them and impose an unfair burden on operations vis-à-vis their competitors in other states. On the other hand, lax or non-existent environmental standards can unfairly distort not only investment patterns by attracting investment, which might not otherwise be placed, but also competition by placing operators at an advantage because of their minimal or non-existent environmental obligations. It is suggested that harmonization should contribute to solving these problems. The harmonization should aim at a reasonable environmental standard that will level the playing field between operators and at the same time establish a reasonable level of environmental protection. The harmonization should be also aimed at areas where industrial investment involves or may involve substantial pollution problems.
L. Taxation

To create a climate conducive to attracting investors to the region would require that the national tax laws of each country be coaxed in a direction that would facilitate rather than impede business opportunities. The issues that present themselves for resolution in this regard include:

1) Source versus residence basis for taxation;
2) The taxation of controlled foreign entities;
3) The fiscal implications of financing subsidiary companies by means of debt or equity;
4) The taxation of corporations (including tax attributable to dividends declared); and
5) The exempt status of interest income in the hands of no-resident individuals and foreign corporations.

It is probable that these practical suggestions are already part of the evolving legal culture of this region. The central thought that animates this addendum to the paper is that the training and emersion in the legal culture of harmonization is a critical part of what I believe must happen in legal education. An exposure to harmonization, its methods, theories and procedures, must also continue as part of the educational process of those already in practice. The harmonization process could be critical lever for combating an impulse to legal parochialism. It is also critical as an initial step in coming to grips with the forces and impact of globalism on the practice of law.

XI. GLOBALISM, LEGAL SKILLS: FROM RULES TO DECISION

During the war two American theorists Harold Lasswell and Myres McDougal wrote a famous article titled "Legal Education and Public Policy: Professional Training in the Public Interest [1943]." A central theme of the article was the choice of values included in the terms professional training and public interest. During the fight against racism and Nazi fascism, it was obvious that the choice of values would not be the dream of Nazi herenvolkisn. It would be the dream of a free person's commonwealth of democratic states committed to the rule of law and to the political and economic security of their people.

It was the McDougal/Lasswell view that the challenges to professional training required the use of skills more ambitious than those associated with

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58. Id.
what they called arid positivism, with its focus exclusively on rules. To McDougal and Lasswell, professional legal training in the public interest required a broader range of thought skills. These thought skills included goal thinking, trend thinking, scientific thinking, technical analytical thinking as well as predictive and alternative or creative thinking. To give operational effect to these forms of thinking, lawyers need to be more broadly educated in the skills of problem identification and definition as well as the skills of advocacy and decision-making in responding to problems of legal importance.

Today, it is commonplace that lawyers, working in their offices or for economically or politically important organizations, require precisely these skills in order to settle disputes within the framework within which they work. While adjudication is important and critical, lawyers are required to master many techniques other than the judicial settlement of disputes. Article 33 of the United Nations Charter mentions, apart from adjudication, negotiation, arbitration, mediation, conciliation, good offices, and enquiry, a good deal more. These are all forms of decision-making and require many skills in order to make them work effectively. We would submit that this broadened concept of the lawyer as a critical, indeed indispensable decision-maker in the complexity of the new international environment remains the most central challenge and a critical indicator of the success or failure of the international rule of law. The small countries of the Caribbean have a great deal at stake in the integrity of the rule of law. They will confront a great challenge in the near future and I am certain that their lawyers and their talent bank of able professionals will be ready for the challenges they shall confront.

59. U.N. CHARTER art. 33.
CARIBBEAN SINGLE MARKET & ECONOMY: WHAT IS IT AND CAN IT DELIVER?

Andrea Ewart*

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I. INTRODUCTION

The Treaty of Chaguaramas, as amended by the Grand Anse Declaration and other documents pertinent to the creation of the Caribbean Single Market & Economy (CSME), outlines the establishment of a Common Market and eventual creation of an Economic Union. What is an economic union? What benefits can it deliver for the Caribbean?

There is, today, only one economic union in existence—the European Union (EU). The signatories of the Treaty on Economic Union pledged “to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union.” The economic space that comprises the European Community emerged as a powerful trade bloc to which countries aspire to access at the same time that they close ranks against its perceived threat to their own economies. The increasing number of regional

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3. The European Community (EC) can be viewed as the political vehicle that underlies the economic integration process in Europe and emergence of the European Union (EU). The theories and processes of political and of economic integration are quite distinct, however, and it must be made clear that Europe has not embarked on the path of political integration. Rather, the region has created the necessary political vehicles to foster the economic integration process.
trade blocs is typically viewed, at least in part, as countries' response to the growing strength and breadth of the European unified market.

On the one hand, there is a reactive, protectionist trend which anticipates closure or decreased access to the European market with a resultant need to create alternative regional economic space as counterweight.\textsuperscript{4} There is also the impetus promoted by the belief that regionalization offers several advantages in the pursuit of economic development. First, regional trading blocs can create a wider regional market for trade. They also create the potential to achieve regional economies of scale which in turn can spur economic growth and income generation. This is the evolution in the EU that has been most marked.\textsuperscript{5} Secondly, the regional integration process can spur and consolidate internal economic reforms. The EU, for instance, insists that aspiring members accomplish a variety of fiscal and economic reforms in order to be eligible for membership. On the other side of the world, Mexico used its membership in the North American Free Trade Area (NAFTA) to introduce economic reforms.\textsuperscript{6} A third perceived benefit is the enhancement of negotiating capacity with third countries and on the multilateral arena. Yet again, the EU's dominant position in multilateral negotiations is evidence of this benefit.\textsuperscript{7}

Caribbean Community (CARICOM) governments have been propelled toward regionalization by the vision of regionalization as a solution to external and internal threats to the countries' economic security and well-being. The region's expectations for the CSME can best be stated in the words of one of its leading architects and proponents, the Prime Minister of Barbados, the Honorable Owen Arthur, asserts

\begin{quote}
[CSME] offers the societies of the region, individually and collectively, the only realistic and viable option by which to achieve sustainable development, and in the process the prospect of erasing the two great economic deficits which confront the region at the start of this new century. The first is the wide gap between the material progress which our region can, with effective resource use, attain as compared to what has so far been achieved; the second is the gap
\end{quote}

\textsuperscript{4} For example, the literature repeatedly cites the emergence of the European Common Market as a major factor in the U.S. impetus to create first NAFTA, and now the FTAA. See e.g. Richard Bernal, \textit{Regional Trade Arrangements in the Western Hemisphere}, 8 AM. U.J. INT'L L. & POL'Y 683, 691-97, 688-89, 707 (1993).

\textsuperscript{5} The economic emergence of Ireland is testament to the success of the mechanisms the EC uses to pull with them their less advanced members.

\textsuperscript{6} Whalley, John, "Why Do Countries Seek Regional Trade Agreements?" in \textit{The Regionalization of the World Economy}, 71-72 (Jeffrey A. Frankel ed., 1998).

\textsuperscript{7} See Maurice Schiff and L Alan Winters, \textit{Regional Integration and Development}, pp. 6-10 (2003). (Discussing the reasons fueling the recent spurt in regionalism).
between the material expectations and needs of our people and our capacity thus far to meet them. The CSME also represents the most effective means by which the individual economies of the region can be successfully integrated into the proposed new Hemispheric economy and the evolving global economic system on terms that will enable them to minimize the costs and dislocations that ensue from that integration, while maximizing the potential benefits.  

Can the CSME accomplish for the Caribbean what the EU has for Europe?

II. CHARACTERISTICS OF THE ECONOMIC UNION AS A MODEL FOR ECONOMIC INTEGRATION

The 1992 Treaty on Economic Union established “a new stage in the process of creating an ever closer union among the peoples of Europe,” and outlined several objectives toward that end. The first stated objective is “to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency....”

The Treaty clearly states the goal of “establishing a common market and an economic and monetary union” in order to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

The above language very clearly reflects the strong development thrust of the economic integration process in Europe. A primary tool was to be the creation of the European common market which abolished barriers to the free flow of goods, services, and people and remove restrictive practices that divide markets or otherwise interfere with economic integration. A necessary component was the formulation of common policies and harmonized regulations in

9. TEU, supra note 2, at Common Provisions, art. A.
10. Id. art. B.
a wide range of economic, social and other sectors. The ultimate goal was to reach the stage where the flow of goods, capital, services, and capital among the EU member states was similar to that which takes place within the confines of a national territory. In 1995, the states declared that they had successfully established the harmonization necessary to introduce a common currency, the euro, signaling their arrival at the stage of the economic union.

An economic union has four essential characteristics that reflect its position as the last stage in the economic integration process. Each of the following four characteristics exists as a step or stage at which a group of countries can choose to stay, or use as a step toward deeper integration and Economic Union. The characteristics/stages are:

1) Removal of tariffs and other restrictions against the goods (and/or services) of member states, otherwise known as a Free Trade Area;
2) Imposition of a common customs tariff or Common External Tariff (CET) on the goods of non-members entering the free trade area. At this stage, a Customs Union is created in which the CET co-exists with a free trade area;
3) Extension of the right of free movement to all the factors of production, e.g. labor and capital to the members of a Customs Union. This stage is known as a Common Market; and,
4) Harmonization of monetary and fiscal policy with the introduction of one currency into the common market, at which stage Economic Union has been achieved.

Each stage requires increasing degrees of cooperation. The latter two forms require a certain indispensable degree of co-ordination and harmonization of national economic policies. To illustrate, the Free Trade Area of the Americas (FTAA) currently being negotiated envisions only the removal of tariffs and other trade barriers with no plans to advance beyond this first stage. This is true of most regional economic blocs today. On the other hand, the EU began at an even earlier stage—sectoral cooperation with the European Coal and Steel Community—and slowly advanced along various stages until the introduction of the euro signaled its arrival at an Economic Union. At what stage of this continuum does the CSME lie?

III. INITIAL ATTEMPTS BY CARICOM AT ECONOMIC INTEGRATION

The goal of economic integration was envisaged at the initiation of CARICOM with the Treaty of Chaguaramas in 1973. It anticipated the creation of a common market through the removal of trade restrictions and the abolition of migratory constraints among CARICOM countries. The Treaty Annexes provided for five areas of activities toward the creation of the Common Market:

1) Trade liberalization;
2) Establishment of the Common External Tariff;
3) Common Protective Policy;
4) Providing for free movement of factors of production, and;
5) Coordination of economic policies and production integration.

This initial movement was spectacularly unsuccessful, for several reasons.

Externally, almost immediately the countries were catapulted into the world economic crisis triggered by the substantial increase in the price of petroleum and its related products in the early seventies. In the continued climate of dependence, this led to escalation of debt and eventual debt crisis. Most of the countries became distracted from questions concerning intra-regional trade and focused on their survival.

Looking inside the region for reasons for the failure of earlier attempts at economic integration, one finds a lack of political will and misdirected efforts. For example, countries were motivated to develop regional production capacity, for example in the smelting of aluminum and food production to relieve the reliance on food imports. A Regional Food Plan was announced in 1975 under which the countries agreed to develop a livestock complex for milk and dairy products, mutton and lamb, pork, poultry, and hatching eggs. However, efforts focused on state-driven endeavors. At the same time, left intact were the existing barriers to the movement of people, capital, etc. that would have created incentives for a private sector-led approach to this worthwhile endeavor. In sum, the region's early attempts to establish a successfully-operating common market failed.

15. Kenneth Hall, Re-Inventing CARICOM The Road to a New Integration (Ian Randle Publishers 2000).
16. Id. at xvi.
17. Id.
18. In fact, for seven years CARICOM was for all intents and purposes, defunct as none of its organisms, including the annual meeting of the Heads of States, functioned. Id. at 51.
19. Id. at xix.
20. Richard Bernal outlines the combination of internal and external factors that led to the failure of regional integration movements in Latin America and the Caribbean in the 1980s. See Bernal, supra note 4, at 683, 688-89.
IV. TRADE LIBERALIZATION CHARACTERISTICS OF THE CSME

A regional market of six to fourteen million people, and free movement within this market of people, goods, services, and capital are the promised benefits of the CSME. One of the first promised benefits is for the revised Treaty of Chaguaramas to create a free trade area through the removal of tariff and non-tariff barriers to the movement of goods that originate in a CSME member state. Barbados, Jamaica and Trinidad & Tobago have already enacted the implementing legislation and other CSME signatories have pledged to implement by the end of 2005. The second promised benefit is the imposition of a CET on goods that are not of CSME origin. Together, these two benefits aim to create one regional market with preferential access for goods that originate in a CSME member state. In addition, the third promised benefit is the right of free movement. The right of free movement of the factors of production envisages lifting of restrictions on work within the region on certain categories of workers and service providers and lifting restrictions on movement of capital. By the end of 2005 members have committed to lifting restrictions against the nationals of other CSME countries that prevent access to loans or only on terms less favorable to those afforded to nationals, investment and development incentives that are made available only to nationals; and exchange control restrictions that add to the cost of doing business across CARICOM borders. Finally, the states contemplate fiscal harmonization with a more long-term goal of establishing one currency for the CSME.21

In sum, CARICOM has enunciated the goal of establishing by the end of 2005 a common market for the free movement of goods, services, certain categories of labor, and capital within the region. Successful establishment of a common market is a necessary first step toward the longer-term goal of creating an economic union with the eventual introduction of one regional currency. The gap between the two phases can be quite long. Successful operation of the Common External Tariff, something with which the region continues to struggle, is an essential prerequisite to this phase.

21. Hall, supra note 15, at 52-61 (documenting the progress through excerpts from meetings of the Conference of Heads of Government up through the present).
V. ROLE OF THE CET IN THE SUCCESSFUL OPERATION OF THE COMMON MARKET

A common external tariff, which applies one uniform tariff scheme to all imports into the region from other countries, is essential to the successful operation of a common market. The CET performs two main functions to allow the common market to yield the anticipated benefits. The first function of the CET is to maintain privileges only for those that can claim origin as a CSME member state. This eliminates the incentive for non-CSME goods to enter into the member country with the lowest tariff and non-tariff barriers for non-CSME goods. It also removes the even greater concern that goods will be transshipped from those countries to the rest of the region on a tariff-free basis. The CET also functions to attract investors who wish to take advantage of the privileges of membership. In a small region like the Caribbean the similarity in geographic and other conditions means that countries often produce the same products.\textsuperscript{22} With the CET in place, investors wishing access to the regional market on the most advantageous terms will be motivated to establish operations within the region to qualify for the benefits of membership.

One common motive for foreign direct investment is to boost local sales and market access.\textsuperscript{23} The removal of barriers to the intra-regional movement of goods, capital, and services creates a regional, as opposed to a national, base of potential consumers. Additionally, the CET provides a mechanism by which to ensure that access on the most preferential basis to that increased potential market is available only to those who invest directly through the establishment of operations with the region. Of course, the use of rules of origin can serve the same purpose. However, rules of origin pose governance problems for developing countries; they are opaque, difficult to negotiate and complex to operate.\textsuperscript{24} Furthermore, rules of origin do not prevent members from meeting their own requirement for a product from the rest of the world and then transferring its own production to its partners.\textsuperscript{25} Thus, successful operation of a CET can reduce the costs of operating the trade system, while attracting the investments that offer opportunities for diversified economies, increased employment, greater income generation, and the development of the region.

Unfortunately, it is this aspect of the CSME that remains most problematic. The original, and revised, Treaty of Chaguaramas called for the establishment

\begin{footnotesize}
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  \item \textsuperscript{22} Bernal, supra note 4, at 717 (discussing the limitations of regional integration in small areas like the Caribbean where the same products are produced primarily for export outside the region).
  \item \textsuperscript{23} Schiff, supra note 7, at 117.
  \item \textsuperscript{24} \textit{Id.} at 80. Schiff further notes that rules of origin allow customs authorities, and individual customs officers, a good deal of discretion, and that the administrative cost of ensuring that this discretion is not abused is high while the cost of failing to do so is even higher.
  \item \textsuperscript{25} \textit{Id.} at 81.
\end{itemize}
\end{footnotesize}
of a CET, but further allowed the alteration or suspension of the CET by any member where the product is not being produced in the region or the quantity or quality of the CSME good does not satisfy the member applying for the waiver. This provision may be necessary in recognition of the limitations of Caribbean economies as well as the sovereign right of countries to determine their own trade policy. However, the problem is that the CET has never been operational. CARICOM meetings of Heads of Government, the highest organ of the Community, are rife with discussions of the need to implement the CET. Those members that have implemented the CET use the waiver provisions indiscriminately. As of April 2004, six CSME member states continued to impose tariffs on Caribbean origin goods. It is difficult not to hold the suspicion that one underlying factor behind this slow pace and the countries' requests for suspension or alteration of the CET is that there is a greater commitment to a bilateral partner than to the regional integration process. However, for CARICOM to realize the benefits of regionalization, the CSME must do more than create opportunities for freer movement within the region. It needs strong investment vehicles and incentives. The CET is a vehicle that can be used to attract to the region investors wishing to enjoy the benefits of membership in the bloc.

VI. CONCLUSION

Like the EU, the states of the Caribbean Community, have set on the road to creating an economic union in the form of the Caribbean Single Market and Economy. Like the EU, where the process took at least ten years longer than originally envisioned, the road to the establishment of the CSME is prolonged and full of stops and turns. Nevertheless, CARICOM governments remain committed to the process. "The creation of a Caribbean Single Market and Economy is a historic necessity which must be brought to full fruition, no matter how arduous the task may at times appear, how negligible the immediate returns, or how vast the pitfalls and obstacles that threaten to ensnarl it." Some immediate benefits are already apparent. Operation as a region on the multilateral trade arena has raised the visibility and bargaining power of the region. A key question is toward what end and how is it being used? While more work remains to be done to give the concept some specific content, special and differential treatment for small nation states is a primary push and the region has gained support in principle for this approach.

26. Treaty of Chaguaramas, supra note 1, art. 83.
27. See Hall, supra note 15, at 52-54.
Additionally, CSME has been a vehicle for internal economic reform within the region. The region has been closed off even to itself. The regulatory costs of doing business have remained high, and barriers have made it difficult to operate in another country. The removal of legislative and regulatory barriers necessary to create this wider regional market has, to date, been one of the most positive outcomes of the economic integration process in the Caribbean.
THE DEVELOPING FRAMEWORK OF THE CSME:
TWO LEGAL ISSUES CONSIDERED

Ezra Alleyne*

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I. INTRODUCTION

The Caribbean Single Market and Economy (CMSE) is a work in progress. It represents the latest and perhaps the most major advance towards regional integration of Caribbean countries.¹

These countries, which for the greater part are former colonies of the United Kingdom, are small open economies. Their earlier efforts at regional integration floundered on the ragged rocks of a still existent insularity and perhaps a certain selfishness when two of the bigger members of the then ten member federation. Jamaica and Trinidad withdrew from the Federation.² Jamaica’s withdrawal was conditioned and mandated by a critical referendum on whether to remain in or opt out. Trinidad, whose brilliantly irascible but sharp-witted leader, Dr. Eric Williams³, declared as a mathematical certainty

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1. The member states of the CSME are Antigua & Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts & Nevis, St. Lucia, St. Vincent the Grenadines, Suriname, and Trinidad & Tobago. With the exception of Suriname and Haiti, who are associate members, they are all former colonies of the United Kingdom. Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, July 5, 2001, art. 3, http://www.caricom.org/archives/revisedtreaty.pdf [hereinafter Revised Chaguaramas Treaty].

2. For a general survey on the failure of the Federation, see HUGH W. SPRINGER, REFLECTIONS ON THE FAILURE OF THE WEST INDIAN FEDERATION (1962).

3. Dr. Williams earned his Ph.D. at Oxford University. ERIC WILLIAMS, INWARD HUNGER: THE EDUCATION OF A PRIME MINISTER (1969). His dissertation, Capitalism and Slavery, broke new ground
that "one from ten leaves nought," took Trinidad, thereafter, out of the Federation. Perhaps Dr. Williams understood better than most of us that any realistic chance of regional integration would succeed only if the push came from the region itself. Further it needed to be rooted in economic integration with the deeper political integration following sometime after the initial successes of the economic coming together.

The Federation collapsed in 1962 after four rocky years of anxiety filled existence. By July 1963, Dr. Williams convened the first Heads of Government conference in Trinidad & Tobago. The conference was attended by the leaders of Barbados, British Guyana, Jamaica, and Trinidad & Tobago, the so-called "Big Four," former colonies of the United Kingdom.

Emerging from these yearly series of Heads of Governments conferences, a number of decisions were reached on the critical question of regional integration. On August 1, 1973, as fate would have it, the Caribbean Community and Common Market (CARICOM) was established by the Treaty of Chaguaramas in Trinidad. The treaty was signed by Barbados, Jamaica, Guyana, and Trinidad & Tobago. It is the Treaty of Chaguaramas (hereinafter "Treaty"), now amended and revised, which seeks to establish the Caribbean Community, including the CARICOM Single Market and Economy.

The Right Honorable Owen Arthur, Prime Minister of Barbados and the Head of Government, is charged with the lead responsibility of promoting the CSME. Recently, he said, the CSME is "an exercise which will entail our taking the fifteen participating economies stretching from Belize in the West to Suriname in the East which have hitherto existed as separate, distinct economies and reconstituting them as a single market and a single economy."  

4. Treaty Establishing the Caribbean Community, July 4, 1973, 12 I.L.M. 1033 [hereinafter Chaguaramas Treaty]. The Treaty was so named after the American base located in the northern part of the island. Dr. Williams may have held it at the base as a symbolic gesture to his colleagues and the region that the Caribbean had to take charge of its destiny. Some years before, he had successfully negotiated the closure of the base with the United States. This action was replicated some years later by the Barbados Government in relation to a base maintained in the northern part of Barbados. Id.

5. Revised Chaguaramas Treaty, supra note 1.

He also cautioned that it will “unquestionably be the most complex, the most ambitious and the most difficult enterprise ever contemplated in our region ... substantially more difficult to attain than integration on the political plain.”

Mr. Arthur also reminded us that:

Our Caribbean Community has been conceived to be a community of sovereign states. Each sovereign state, in such an arrangement, retains exclusive powers in relation to the implementation of community decisions. There is also no provision for the transfer of sovereignty to any supra-national regional institutions and there is no body of community law that takes precedence over domestic legislation nor is automatically applied in domestic jurisdictions.

And he continues:

The Caribbean has therefore chosen the most difficult political form of integration by which to implement something that is as complex as a Single Market and Economy. A community thus conceived must, of course, depend for much of its formal structure on the legal provisions embodied in its Treaties and Agreements and the formal arrangements devised to support its systems of Governance.

II. ESTABLISHMENT OF CARIBBEAN COURT OF JUSTICE AS AN IMPORTANT COMPONENT OF THE CSME

One of the formal arrangements devised to support the system of Governance within the Caribbean Single Market and Economy, and which has received considerable attention in the regional press, on call-in programs and amongst lawyers is the provision for a Caribbean Court of Justice (CCJ).

Earlier mention was made of the fact that the Caribbean Community is an association or community of sovereign states. Such a state of affairs would normally lead to the situation in which each sovereign state could, through its courts, determine and interpret the extent and meaning of provisions of the Revised Treaty. The potential for uncertainty, conflicting decisions, and general

7. Id.
8. Id.
9. Id.
10. A final Caribbean Court of Appeal, such as the CCJ, has a history predating the discussions on the CSME. See DUKE E. POLLARD, THE CARIBBEAN COURT OF JUSTICE 1-18 (2004). Recently, considerable debate on the CCJ arose because of the rulings by the Privy Council, which had the effect of suspending if not judiciarily abolishing the death penalty.
11. See id.
chaos concerning the legal platform upon which certain investment decisions by business leaders would have to be made, apart from anything else, mandated the creation of a body which would have the final and exclusive jurisdiction to determine the interpretation and applicability of the Revised Treaty. Hence, Article 211 provides that the court shall have:

\[
\text{[C]}\text{ompulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:}
\]

a) Disputes between the member states parties to the agreement;
b) Disputes between the member states parties to the agreement and the community;
c) Referrals from national courts of the member states parties to the agreement;
d) Application by persons in accordance with Article 222 concerning the interpretation and application of this Treaty.\(^{12}\)

The conferment of compulsory and exclusive jurisdiction on the CCJ would therefore seem to definitively rule out any national court seeking to determine disputes which may arise within its jurisdiction. This will likely remove a potent source of potential conflict in the interpretation of matters relevant to the Revised Treaty.

Article 214 further underpins this denial of jurisdiction to the national courts. It provides that where a national court is seized of an issue whose resolution involves a question concerning the interpretation or application of the Revised Treaty, the court or tribunal concerned shall refer the question to the Court for determination before delivering judgment if the national court or national tribunal considers that a decision on the question is necessary to enable that national court to deliver its judgment.\(^{13}\) It would seem to follow that the national court would regard itself as bound to act on the decision of the CCJ in those circumstances.

The combined effect of Articles 211 and 214 not only solves the problem of conflicting and competing decisions on interpretations of the Treaty but it also enhances the ability of the Court to develop a coherent community law. As one learned commentator put it in relation to the importance of a court such as the CCJ:

\[
\text{[A]}\text{entral judicial authority is vital to the progressive pursuit of the aims and objectives of the Treaty. Without such an organ, the community is faced with the competing competence of the courts of}
\]

\(^{12}\) Revised Chaguaramas Treaty, \textit{supra} note 1, art. 211.

\(^{13}\) \textit{Id.} art. 214.
the individual member states in determining questions relating to interpretation and application of the Treaty. This is quite an untenable arrangement for the juridical viability of CARICOM. The establishment of a central judicial organ of the community, endowed with exclusive competence and authority to give rulings on matters of community law, far from eroding the individual sovereignties of member states, will be giving effect, severally and jointly, to these individual sovereignties. For such a central organ, acting on behalf and in the interest of the whole and the several parts of the community, is indispensable for the sustenance of life of CARICOM.14

Another learned observer takes the view that:

On careful analysis of the role envisaged by the West Indian Commission for the proposed CARICOM Supreme Court, it would not be difficult to conclude that the West Indian Commission perceived the Court in the exercise of its original jurisdiction as the institutional centerpiece of the proposed CARICOM Single Market and Economy.15

Such a description is not mere hyperbole, if hyperbole at all, because the observer then goes on to aptly demonstrate why the role of the CCJ is so critical. He writes:

The rights envisaged for community nationals in this expanded economic space include the right of establishment, the right to provide services and the right to move capital. But in order to facilitate the trans-border movement of these rights without unnecessary restrictions, there is need for an institution to authoritatively and definitively interpret and apply the revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy, in the absence of which rights would tend to be illusory and the obligation correlative thereto, merely vacuous commitments on the part of the Governments concerned.

14. See Joseph Cuthbert, Caribbean Economic Integration: Reflections on Some Legal and Institutional Issues, in Essays in Honour of William G. Demas (Laurence Clarke & M.G. Zephrin eds., 1997). The author commented on the case of D.S. Maharaj Furniture & Appliances Ltd. v. Comptroller of Customs and Excise (S-1499/93) (Trin. & Tobago) regarding the applicability of the Community Law. His comments are pertinent on the indispensable need for an institution such as the CCJ in the context of the Community.

15. POLLARD, supra note 10, at 89-90.
And this is where the Caribbean Court of Justice, in the exercise of its original jurisdiction is expected to play a critical role.\textsuperscript{16}

There is no doubt that it is now widely accepted that the CCJ, in its original jurisdiction, does have a vitally critical role to play in the development of Caribbean Community Law, especially in relation to the dispute settlement procedures. Perhaps for this reason, there has developed the need for the CCJ to be seen as free from political interference of any kind and for its independence as a Court to be effectively guaranteed by its non-reliance for necessary funding on any one or more of the regional Governments. For example, Article 5 of the Agreement to establish the CCJ provides for a Regional Judicial Legal Services Commission on which no politicians can have a seat, and which appoints the Judges of the Court except the President who, according to Article 4, Clause 6 shall be appointed or removed by the qualified majority vote of three quarters of the Contracting parties on the recommendation of the Regional Judicial Legal Services Commission.\textsuperscript{17}

Similar insulating or insulatory provisions were applied to the question of funding for the Court. Consequently, an agreement was reached to establish a trust fund in the amount of US $100 million, which would be used to fund the capital and recurrent cost of the CCJ by the income produced from the investment of that sum.

Recently it was announced that the Caribbean Development Bank had successfully floated a US $150 million note on the international capital market of which the sum of approximately US ninety-six million will be used to finance the operations of the Caribbean Court of Justice.\textsuperscript{18} All that is required now, according to this press release, is for the “expeditious completion of loan preconditions by member Governments so that disbursement of the funds can be made to the Caribbean Court of Justice Trust Fund where the monies will be managed and invested by a specially appointed Board of Trustees.”\textsuperscript{19}

Given the history of the region, the nature of the Revised Treaty, and the importance of the CCJ to the Treaty, these arrangements that appear to be unique are necessary. The arrangements speak to the creative ingenuity of the people of the region. It also speaks to the good faith of the regional political directorate in making the effort to ensure that the CCJ as a critical component of the revised Treaty, is as free as possible, in its constituent judicial structures, from any interference whatsoever from politicians.

\textsuperscript{16} Id. at 90.

\textsuperscript{17} Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2001, art. 4-5, http://www.caricom.org/archives/agreement-ccj.htm [hereinafter CCJ Agreement].

\textsuperscript{18} Press release, CDB Successfully Floats USD150 MN Borrowing (July 19, 2004).

\textsuperscript{19} Id.
In fact, one author was driven, in my opinion quite accurately, to indicate that:

[T]he Caribbean Court of Justice is the only regional judicial institution of its kind in the world whose judges will not be appointed, directly or indirectly, by the political directorate of the states participating in the regime. ... financially, too, the CCJ is likely to be the only regional judicial institution in the world which will be financially independent of the executive and, by compelling inference also administratively independent of the central executives of participating member states.\(^{20}\)

Given all that has been done to insulate the CCJ from the vagaries of politics, it is somewhat ironic that at one stage a raging and virulent regional debate arose in which the accusation was made that the CCJ was conceptually nothing more than a hanging Court. The accusation also maintained that the CCJ was being devised in order to reverse some of the more interesting decisions of the Privy Council in which the Privy Council was said:

[T]o have emasculated the hallowed common law doctrine of precedent as it was generally understood in common law jurisdictions, and by allegedly turning on their heads numerous decisions of the judicial committee with the Privy Council of longstanding introduced unacceptable levels of instability and uncertainty in the administration of criminal justice in the sub-region.\(^{21}\)

Sir David Simmons, the present Chief Justice of Barbados, and former Attorney General of Barbados, chaired the Proprietary Committee set up to implement the arrangements for the inauguration of the Caribbean Court of Justice. He met this criticism head on when he delivered an address to the Royal Commonwealth Society in London in 2003.\(^{22}\) Simmons stressed that the development of the CCJ was not the result of a knee jerk reaction to any particular decision of the British Privy Council, but that its establishment became necessary as a dispute settlement mechanism under the Caribbean Single Market and Economy.\(^{23}\) He was also reported to have said that the arguments for and against the Court were carefully examined and that he wanted

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20. POLLARD, supra note 10, at 37-38.
21. Id. at xiii.
23. Id.
to dispel emphatically the notion that the Court was being established to accelerate hangings in the region.\textsuperscript{24} Significantly, it is reported that Lord Hope of Craighead, the Scottish Law Lord indicated at that very occasion that the English Law Lords were very supportive of the idea of a Caribbean Court of Justice and that he, as a Scottish Judge, appreciated the desire of the Caribbean to chart its own course in jurisprudence.\textsuperscript{25} On another occasion, Lord Slynn was moved to declare that, "[t]he arrangements for selecting judges and financing the Caribbean Court of Justice offers useful precedents for the establishment of regional judicial bodies."\textsuperscript{26}

It would not be unreasonable to say that in the conceptualization and establishment of the Caribbean Court of Justice, the people of the region have demonstrated their intellectual creativity, their ability to apply unique solutions to old problems and that if any further proof was needed of the ability of Caribbean people to find solutions for their own problems that the establishment of the uniquely structured CCJ is ample proof thereof.

III. FREEDOM OF MOVEMENT

Clearly the people of the region are important to the whole process of integration, for in many respects it is the people who drive the need for integration. Recognizing this important verity, the revised Treaty in Article 45 declares that, "[m]ember states commit themselves to the goal of free movement of their nationals within the community."\textsuperscript{27}

In a recent speech delivered in Bridgetown, Barbados, Mr. Steven MacAndrew, Specialist, Movement of Skills and Labor, CARICOM Single Market and Economy declared that:

The core task in creating the CARICOM Single Market and Economy is the removal of restrictions to enable the free exercise of national treatment rights, particularly the free movement of goods, the free movement of services, the free movement of persons, the free movement of capital, and the right of establishment. Especially critical are the new areas which seek to transform the common market for goods into a genuine single market and economy namely free movement of services, persons, and capital and the right of establishment, since the free movement of goods have been largely achieved.\textsuperscript{28}

\textsuperscript{24}\textit{ld.}
\textsuperscript{25}\textit{ld.}
\textsuperscript{26} POLLARD, supra note 10, at 39.
\textsuperscript{27} Revised Chaguaramas Treaty, supra note 1, art. 45.
\textsuperscript{28} Steven MacAndrew, Address Before the National Insurance Office on the Occasion of its 37th Anniversary (June 8, 2004), http://www.caricom.org/archives/csme/csme-macandrew.htm.
A study prepared for the Caribbean Policy Development Center by the Caribbean Development Research Services goes even further. It argues that our reliance on services requires a prioritization of the human element in regionalism and therefore freedom of movement is a primary rather than a secondary concern. These observations underscore the importance of the removal of existing restrictions on the free movement of services, capital, and persons and on the right of establishment. The observations reinforce Steven MacAndrew’s view that the free movement of skills is one of the key pillars of the CSME and thus a critical element of the economic and trade agenda as well as the regional labor agenda.

The Revised Treaty of Chaguaramas recognizes the critical importance of the free movement of skills and this recognition is incorporated in Article 45 which states, “[m]ember states commit themselves to the goal of free movement of their nationals within the community.” So stated, Article 45 appears to give some kind of legal flesh to the bare bones of statements made in the 1989 Grand Anse Declaration in which the Heads of Government agreed to, among other things, the elimination by December 1990 of the requirement for passports for CARICOM nationals traveling to other countries and the elimination of the requirement for work permits for CARICOM nationals beginning with the visual and performing arts, sports, and the media traveling to CARICOM countries for specific regional events.

The idealism expressed in Article 45 is tempered by the realism of Article 46 which reads:

Without prejudice to the rights recognized and agreed to be accorded by member states in Articles 32, 33, 37, 38, and 40 . . . [member states] undertake as a first step toward achieving the goals set out in Article 45, to accord to the following categories of community nationals the right to seek employment in their jurisdictions.

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30. MacAndrew, supra note 28.
31. Revised Chaguaramas Treaty, supra note 1, art. 45.
33. Revised Chaguaramas Treaty, supra note 1, art. 46.
The categories so privileged are:

1) University graduates;
2) Media workers;
3) Sports persons;
4) Artists;
5) Musicians.

They are further recognized as such by the competent authorities of the receiving member states.

This state of affairs has provoked comment from authoritative quarters. In the opinion of Steven MacAndrew, "[t]his provision clearly indicates that member states are aware that total free movement of labor is not yet achieved, but merely a work in progress, which most likely would go beyond December 31, 2005."34

The comments of Owen Arthur, Prime Minister of Barbados and the Minister with lead responsibility for the creation of the CSME, were more muscular. Speaking at the beginning of the Estimates Debate in the Barbados Parliament in March 2003, he spoke of his efforts at "[t]rying to underscore the ridiculousness of some aspects of the ways the Caribbean was approaching the Single Market issue . . . [and that] the region had started by saying that graduates, musicians, and sportsmen should move freely while ignoring the rest of the region’s human capital."35 According to him, this "has created a collision with the historic experience of the Caribbean people."36 He went on to point out "that those persons who do not have [u]niversity [d]egrees and other skills have been moving and have effectively made this region their economic space."37 He was also concerned that the CSME would not "resonate in the minds of the ordinary Caribbean man and woman as a benefit to them if there was only provision for the movement of skilled graduates."38

Examined, either from a policy or technocratic perspective, this issue is one that will not go away. However, it requires sensitive legal and political treatment if the region’s people, the intended beneficiaries of the removal of the restrictions, are not to regard regional integration issues as matters which do not concern them, thereby confirming the fears of the Barbadian Prime Minister.

In trying to develop the appropriate legal framework to remove the restrictions, while recognizing the different stages of development of the member

34. MacAndrew, supra note 28.
35. See BARBADOS DAILY NATION, MARCH 18, 2003, (last visited Nov. 6, 2004).
36. Id.
37. Id.
38. Id.
states and catering to the fears that the nationals of those states which are less well off, goods will flood into the common economic space of the more developed countries. The policy makers and technocrats will need the wisdom of a Solomon.

IV. REMOVAL OF BARRIER RESTRICTING FREEDOM OF MOVEMENT REQUIRED TO PROMOTE THE EFFECTIVENESS OF THE CSME

It is ironic that genuine freedom of movement appears to have existed in the Caribbean while it was under colonial rule. But the clamor for independence and the consequent creation of mini-states within the region means that boundaries which did not exist before independence but were created on independence, must now as a matter of economic necessity, be dismantled and torn down.

The legal mechanism for tearing down these barriers to free movement of the skilled community nationals is two fold. In the first place, an Act of the respective domestic Parliaments must be passed incorporating the provisions of Article 45.39 This legal formality must be accompanied by the appropriate administrative and procedural framework for the free movement of university graduates and persons of the other approved categories.

By May of this year, it appeared that:

[F]ree movement of graduates, artistes, musicians, media workers, and sports persons was fully operational in all member states except Montserrat, St. Kitts and Nevis, Antigua and Barbuda, and Barbados. At that time Barbados had the legal and administrative arrangements in place for the free movement of graduates once they had secured a job, all other categories still required a work permit if applicants worked for more than three months.40

But the enactment of this legislation is not enough. There must also be the appropriate administrative and procedural framework for the free movement of university graduates and the other approved categories. While it appears that the free movement of such persons "is currently fully operational in all but four member states,"41 the question of regional integration and the matter of social security will become an increasingly important issue as the integration movement advances and it becomes necessary "to facilitate the movement of labor as a key factor of production."42

39. Revised Chaguaramas Treaty, supra note 1, art. 45.
40. MacAndrew, supra note 28.
41. Id.
42. Id.
So far, the Heads of Government have signed the CARICOM Agreement on Social Security, an Agreement that protects the entitlement to benefits of CARICOM nationals and seeks to give them equality of treatment when they move from one member state to another.43 Speaking from a position of hands-on experience in these matters, Steven MacAndrew, a specialist with the CSME Unit is full of praise for the way in which the Agreement in Social Security has worked. He says:

The CARICOM Agreement on Social Security for some time now has been one of the best if not the best implemented CARICOM Single Market and Economy related measure, since all member states with an existing social security organization have fully operationalized the Agreement, resulting in the fact that in most member states CARICOM nationals are already enjoying benefits under the Agreement."44

The importance of proper and appropriate administrative arrangements is most significantly demonstrated by this statement because the success (so far) of the Agreement on social security has been reached not by the enactment of legislation, but by an administrative and procedural framework which appears to support the written agreement and has resulted in the fact that “[i]n most member states CARICOM nationals are already enjoying benefits under the Agreement.”45 Perhaps the CSME in this respect at least is beginning to “resonate in the minds of the ordinary Caribbean man and woman.”46

Nevertheless, it seems to me that the continuing problems experienced by some community nationals as they travel from island to island constitute perhaps a more significant psychological barrier to the acceptance of the CSME than some of us might think, notwithstanding the completion of the appropriate legal framework for the freedom of movement.

Hassle-free movement is not yet, it would appear, the experience of the Guyanese traveling to Barbados. In a debate in the Barbados Parliament recently on the Freedom of Movement Legislation, the Barbadian Prime Minister was moved to demand of his country’s Immigration Officials that the community nationals traveling from Guyana to Barbados should be treated in a more humane manner.47 Clearly the enactment of legislation and the

44. MacAndrew, supra note 28.
45. Id.
46. BARBADOS DAILY NATION, supra note 35.
imposition of the most beneficial administrative arrangements will mean nothing unless the people, whether they are Immigration Officers or ordinary citizens, without any specific powers accept that they are all members of a Caribbean nation.

During the debate on the Freedom of Movement Bill in the Barbados Parliament, a comment was made that is no less alarming, because it may well be true. Mr. Arthur himself declared that, "[t]here is no sense of Caribbean nationhood, there is no sense of Caribbean citizenship. People in the Caribbean are first and foremost Barbadians, Jamaicans, or Trinidadians but do not speak of themselves as West Indians." 48

In my opinion, hassle-free movement can significantly breakdown this kind of insularity. Continuing insularity is a matter which needs to be addressed urgently if the legal framework for the development of the Caribbean community is to achieve its objectives. Especially with the current legislative framework suggesting that there is a "them" and an "us" and that the vast majority of Caribbean nationals who live the experience of integration should be excluded from the formal legislative and administrative arrangements to facilitate free movement of community nationals.

Integration at any level requires laws and regulations. But in the final analysis, it is about the people of the states which are seeking to integrate their markets and economy. Whether we like it or not—it is not only about politics, economics, and law. People are the center of that intersection.

One of the earliest advocates of the political federation would have understood the current problems only too well. Writing on the reasons for the break up of the federation, Sir Hugh Springer 49 reminded us that:

Our common origins and associations have created and are in process of molding a people. This is shown in our way of life, our food and drink, our sport, our recreations, our arts. Our poets, novelists, playwrights, dancers, painters, and sculptors are recognizably West Indian... Our differences are real. But we are not dismayed by them. Our provincial loyalties are not to be despised; loyalty must begin somewhere. Difference and diversity can enrich and stimulate. Federation is a challenge to move into a new dimension of life and thought, and to achieve a fuller and freer life as members of a wider community. It may well be that the historian of the future will look back on the period of the next few years as being necessary to cure us of some of our sentimentality and some of our immaturity, so that when we next come together we shall do so with greater respect for

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49. Sir Hugh Springer later held the position of Barbados's Governor General and also served as a part time Registrar of the University of the West Indies.
one another and a sounder understanding of what each and all of us will be able to contribute to the common good. If this should come about, as I hope and believe it will, the union we shall create will be a healthier and more propitious one.\textsuperscript{50}

One hopes so, but at this stage our hopes must be qualified.

So far as the Caribbean Court of Justice is concerned, the initial steps have been sure and the prospect for its development and seminal role within the Community seems assured. On the other hand, so far as the Freedom of Movement is concerned, even some well wishers are more than ordinarily concerned that the community's leaders may simply have got it wrong. This sentiment was recently echoed by Sir Roy Trotman,\textsuperscript{51} one of the region's most distinguished labor leaders and legislator. As usual, his opinion was forthright. He said he had never agreed to special treatment for university graduates, or for the creation of an elitist community.\textsuperscript{52} He continued, stating:

I'm of the view that starting from the position of the particular group, we have less chance of integration for the Caribbean than if we start elsewhere. I believe that it is those people who are able to treat one another without the level of the formality of the training, those people are better able to address the level of barriers that there are to Caribbean integration than the sophisticated tertiary level people.\textsuperscript{53}

Sir Trotman reminded the Senate that as far back as 1991, he had said that the movement should start with the artisans, and perhaps there is something to what he says. For if the Treaty represents the foundation of the community, then there is still a great deal of work to be done to construct a genuine Caribbean community on that foundation, for the Caribbean Single Market and Economy is definitely a work in progress.

V. CONCLUSION

There can be no doubt that much genuine effort and energy has been exerted by the Caribbean leaders in order to bring the CSME into effect. It is equally true that the CSME cannot succeed unless, as Prime Minister Owen

\textsuperscript{50}SPRINGER, supra note 2, at 62-63.
\textsuperscript{51}Sir Roy Trotman is General Secretary of Barbados Workers' Union and a Governor General's Appointee to the Senate of Barbados.
\textsuperscript{53}Id.
Arthur of Barbados says, "it resonates with the man and woman in the street." The plans and ideas conceptualized for the establishment of the Caribbean Court of Justice are worthy of the highest commendation; indeed they have already received it.

On the other hand, the practical difficulties notwithstanding, the provisions relating to the freedom of movement are not guaranteed to catch the approval of the man and woman in the street. At a basic level, these provisions appear to be tilted in favor of the graduates of the University of the West Indies and other professional of similar standing. This does not appear to be the best engineered foundation, and a great deal of remedial work may have to be done as the regional leaders continue to develop the framework of the CSME.

54. BARBADOS DAILY NATION, supra note 35.
APPLYING INTERNATIONAL TRADE REMEDY LAWS IN THE CARIBBEAN: A FRAMEWORK FOR PROTECTION

Vasheist V. Kokaram*

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I. INTRODUCTION

What happens in the WTO is part of a broader pattern of neocolonialism in the global economy. This has two strands. The first is the self-interest of the major powers; their close ties with multinational companies ... and their willingness to use their political and economic strength to achieve their ends ...

The second strand is a combination of ideology, paternalism and missionary zeal. The true believers in globalization and liberalization feel sure that they know best—that markets work and globalization benefits all—but that the poor benighted heathens of the South have yet to realize this. The Enlightened Ones, armed with the Gospel According to Adam Smith, therefore have a duty to spread the Word—and to do whatever it takes to bring the unbelievers to the Promised Land of the globalize economy for their own good, even if they don’t realize they want to be there.¹

It is accurate to describe the manner in which the FTAA is being marketed as reflective of a missionary zeal to convert the protectionists to the religion of globalization. Since 1995 with the advent of the WTO, the religion of globalization has spread in the Caribbean, converting the heathens of the closed economies. Through the vehicle of international law in a multilateral trading system, in which the invisible hand of the free market economy is the undercurrent for trade and investment, the cloistered virtues of Caribbean economies were slowly pried open. The workings of the free market economy is not only espoused in such global instruments such as the World Treaty Organization ("WTO"/GATT), but also in bilateral and regional free trade arrangements such as the North American Free Trade Agreement, the subject of this conference. These are the vehicles by which it is hoped we will all be transported to the Promised Land of the globalize economy.

However, the landscape of the Promised Land is as yet unknown. Perhaps those in the Caribbean rushing headlong to it may not yet realize whether they want to be there at all, or may soon realize it was all a mirage. It is true that the open embrace of these international instruments by our domestic institutions have resulted in the creation of a landscape which is open and liberal, but for small vulnerable territories the trading landscape is also being characterized by increasing unemployment, local jobs being exported, closure of “globally uncompetitive” industries, dependence on foreign supply and governments slowly losing control over national economies. In the face of the drastic gaps

in development and economic performance between future member states in the FTAA, the words of Caribbean governments to its manufacturers to become more competitive and to exploit market access opportunities will be hollow words if there are no adequate mechanisms in this Agreement to guarantee to the Caribbean equal access to markets, fair competition and equity in international trade.

The approach by Latin America and the Caribbean ("LAC") to these international treaties, however, is maturing over the years and is reflected in the present state of negotiations for the FTAA. The LAC is now part of a groundswell critically re-examining the treaties through which globalization is being exported. This groundswell, which has gathered force since the Doha Declaration and to a large degree was responsible for the collapse of the Cancun Ministerial, is a demand by the developing world for equity in trading laws and treaties that shape any regional Free Trade Area. It is difficult for small, vulnerable economies to accept the invitation to participate in free trade. It opens them to surges of imports or of dumped or subsidized imports, which will destroy, impede, or retard its local production of goods, thereby destroying that members' export capability or potential and stunting economic growth. Moreover, the Caribbean must also focus on larger institutional efficiency issues, which must be addressed if they are to realistically compete in an environment such as the FTAA.

It is submitted that equity in international law can only be delivered through adequate pressure valves and safety nets that will provide adequate market defense mechanisms while providing the opportunity to exploit new market access. By this means the gap in development between territories will be minimized and there will be an effective leveling of the playing field. There is a rare opportunity therefore to ensure that the final shape of the treaty caters for this need of the Caribbean.

This paper will demonstrate that even in a Free Trade Area such as the FTAA, the application of international trade remedy law of anti-dumping ("AD") actions, Countervailing Duty ("CD") actions and Safeguard actions, as permitted in the WTO system, is necessary to maintain equity in liberalization and enhance a country's competitiveness. This paper will examine the extent to which this law has been utilized in the Caribbean and whether ultimately in a regional Free Trade area these mechanisms provide an adequate framework for protection in international trade or need to be abandoned altogether if we are all to pass through the "pearly gates" of the Promised Land of the globalize economy.
II. THE OFFICIOUS PARENT-GATT/WTO:

The Marrakech Treaty establishing the WTO sets out the general structure in which a multilateral system of trade and investment is expected to function.\(^2\) CARICOM was notified to GATT under Article XXIV as an interim agreement. By 1995\(^3\), almost all the members of CARICOM have ratified the WTO agreements. Insofar as they are now members of the WTO, the GATT and the various agreements have served as guides in their trading practices and trading agreements and much of their legislation is being brought in line with the international trade law. Because the world has become a trading playground, the Caribbean recognizes that it must now play by a new set of rules and principles.

The principles of the WTO, establishing the features of a new global trading landscape, lay the foundation of an equitable trading system. The preamble to the 1947 GATT sets out the ideology for this global trading landscape:

> Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of

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3. The following members of CARICOM are also members of the WTO: Antigua and Barbuda, Jan. 1, 1995; Barbados, Jan. 1, 1995; Belize, Jan. 1, 1995; Dominica, Jan. 1, 1995; Grenada, Feb. 22, 1996; Guyana, Jan. 1, 1995; Haiti, Jan. 30, 1996; Jamaica, Mar. 9, 1995; St. Kitts & Nevis, Feb. 21, 1996; St. Lucia, Jan. 1, 1995; St. Vincent & the Grenadines, Jan. 1, 1995; Trinidad & Tobago, Mar. 1, 1995. As of April 2003, the Bahamas was listed as an Observer government. See Understanding the WTO: The Organization, Members and Observers, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last modified Oct. 13, 2004).
living ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods;

Being desirous of contributing to these objectives by entering into reciprocity and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce

The objective of the multilateral system for trade in goods created by the WTO is to provide industries and business enterprises from different countries a stable and predictable environment in which trade and investment can be conducted under conditions of free and fair competition. This open and liberal trading system is expected to promote, through increased trade, greater investment, production and employment and thus facilitate the economic development of all countries.

The most fundamental set of principles of the WTO which are expected to dot the landscape of the globalize economy are transparency, equity and due process. These principles are reflected in some basic tenets under the WTO:

1) The “MFN” rule: The Most Favoured Nation rule requires that a product made in one member country is treated no less favourable than a “like” (very similar) good that originates in any other country. This basic pillar allows for equity among larger and smaller nations and theoretically puts them on the same level.

2) Reciprocity: Reciprocal concessions are a feature of the negotiating process. It ensures that the gain from negotiating is greater than the gain available from liberalization. Hence a reduction in import barriers will be matched, theoretically, with sector specific export gains. Market access commitments are implemented and maintained by tariff commitments enumerated in schedules of concessions establishing ceiling bindings where the members concerned cannot raise tariffs above bound levels without negotiating compensation with the principal suppliers of the products concerned. Once tariff commitments are bound a member ought not to resort to any other non-tariff measures that have the effect of nullifying or impairing the value of the tariff concession save for as provided in the GATT in trade

4. GATT, pmbl.
5. Id. arts. I-III.
remedy mechanisms such as anti-dumping and countervailing
duties.

3) Transparency: The multilateral system must come with the
assurance that there is a transparent system of enforcement of
the rules in which none can be discriminated against. If a
member State perceives that actions by other governments have
the effect of nullifying or impairing negotiated market access it
may commence bilateral discussions. Failing this it can invoke
the dispute settlement procedures under the WTO. This
involves the establishment of panel of experts charged with
determining whether a contested measure violates the WTO.
Dispute settlement procedures play a central and invaluable role
in ensuring that trade conflicts are settled fairly, in accordance
with the rule of law and on a timely basis.

Whether this treaty is binding on the Caribbean member states without it
being expressly incorporated into municipal law is not as important as the
political sanction for failure to play by the rules of international trade. To this
extent the Dispute Settlement Procedure established under the WTO is a power-
ful tool for compliance and can be a big stick wielded by the more powerful
nations more adept in utilising the dispute mechanisms in international trade.

The WTO administers the trade agreements negotiations by its members
principally the GATT\(^6\), the GATS ("General Agreement on Trade and
Services") and the TRIPS. However in spite of the rulings of the Dispute
Bodies the WTO can be characterized as typically an officious parent scolding
its children with the best of intentions but without the necessary legal efficacy
to adequately keep its members within the path to the Promised Land. In the
recent Panel report in "United States-Sunset Reviews of Anti-dumping
Measures on Oil Country Tubular Goods from Argentina,"\(^7\) the Panel reviewing
a sunset review undertaken by the USITC against imports of tubular oil from
Argentina concluded that, in certain aspects, the USITC breached the
obligations under the Agreement. The action taken by the USITC to extend
the imposition of an anti-dumping duty against imports of tubular oil from
Argentina was considered prima facie to constitute a case of nullification of
impairment of benefits under that Act. It recommended that the DSP request
the United States to bring its measures into conformity with its obligations
under the WTO. However, it saw no reason to accede to Argentina’s request
to revoke the anti-dumping order and repeal or amend its laws and regulations

\(^6\) Report of the Appellate Body, Argentina – Safeguard Measures on imports of Footwear,

\(^7\) See World Trade Organization, Report of the Panel, United States – Sunset Reviews of Anti-
Dumping Measures on Oil Country Tubular Goods From Argentina, WT/DS268/R (July 16, 2004).
at issue. As will be discussed below, the WTO is by and large a moral figure in international trade where the sanctions for not playing by the rules may be distortions in trade and investment through retaliatory action by other member states rather than through orders or rulings from the Dispute bodies.

In the Report of the Panel in Guatemala, titled "Anti-dumping Investigation Regarding Portland Cement from Mexico" the Panel noted that, pursuant to the provisions of the DSU where measures taken by a member state are inconsistent with the WTO agreement, the panel shall recommend that the member concerned bring the measure into conformity with that agreement. In addition to its recommendation the panel may suggest ways in which the member concerned could implement the recommendations. The panel noted that such suggestion is not part of the recommendations and not legally binding on the affected member.

Recourse to a multilateral body is intended to minimize unilateral retaliations and re-emphasize the credibility of a rules-based international trading system. In reality, the application of these principles creates very little confidence that the multilateral system is essentially free and fair. For the local manufacturer, as a complainant of unfair international trade, in such a system it is paradoxical that it is denied access to the highest tribunal where decisions, rulings, concessions, and negotiations may be made which are prejudicial to the complainant's interests. In this respect, it is assumed that the interests of the member state and the local party are the same. When actually, in the mix of policy and negotiations, it is not. The recent WTO rulings in Cotton Subsidies and the Byrd Amendment illustrate the difficulty of enforceability and the "non-binding" nature of these treaties. Where there is a different application of the law to other members, an inequality in the system is set up.

The United States has clearly demonstrated that the WTO cannot assert itself on that nation. WTO agreements have no direct effect on U.S. law. Section 102 of the Uruguay Round Agreement Act provides, "No provision of any of the Uruguay Round Agreements nor the application of any such provision to any person or circumstance that is inconsistent with any law of the United States shall have legal effect." In *Hyundai Electronic Co. v. United States*, the United States Court of International Trade concluded that WTO dispute settlement reports have no binding effect on a U.S. court. In our

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jurisdiction, domestic legislation is necessary to determine whether a treaty
becoming part of municipal law is binding on the courts.\footnote{11}

However it is debatable in our jurisdiction as to whether the rulings of the
Dispute Settlement Body and the organs of the WTO are to be followed by the
local courts. The true view may be that it will seldom do so where there is a
conflict with municipal law. More importantly however for smaller states it is
not so much a legal question as to whether the ruling is binding but a political
one. In \textit{Endo v Japan},\footnote{12} the Court stated, "A violation of a provision of GATT
pressures the country in default to rectify the violation by being confronted with
a request from another member country for consultation and possible retaliatory
measures. However it cannot be interpreted to have more effect than this."\footnote{13}

Therefore, it would seem that those with the political and economic
strength to withstand a finding by an international court of a violation of the
international obligations may be better off than those who cannot. Even though
territories such as the Caribbean may be right in the law not to follow or adopt
the findings of that Court it is impossible to imagine that in a real world of
economic dependency on trade and investment with the other litigants that it
would not.

To illustrate this example one need only to examine two cases: United
States safeguards on steel and Trinidad anti-dumping investigation into imports
of pasta and spaghetti. In the former, the WTO has clearly stated that the
measure is inconsistent with international law. This has prompted no change
in that country's desire to protect its local industry by maintaining the bar and
litigating it to the highest level. They certainly have the resources to do so. In
the latter case, an anti-dumping investigation was conducted by the authorities
of the Government of Trinidad and Tobago at the request of "Cereal Products
Limited" against imports of pasta from a Costa Rican company, "Roma Prince
Sociedad Anónima" of Costa Rica. A provisional measure was imposed against
the imports of pasta and spaghetti from Costa Rica. However, the Government
of Costa Rica requested consultations with the Government of Trinidad and
Tobago.\footnote{14} Costa Rica alleged that the measures were inconsistent with the

\footnote{11} See generally Footwear Distributors and Retailers of Am. v. United States, 852 F. Supp. 1078,
1096 (Ct. Intl. Trade 1994) ("However cogent the reasoning of the GATT panels... it cannot and therefore
does not lead to the precise domestic judicial relief for which the plaintiff prays."); see also Canada v.
Attorney General 1937 A.C. 326, 347 (H.L.) ("Within the British empire there is a well established rule that
the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration
of the existing domestic law, requires legislative action.").

\footnote{12} 530 Hanrei Taimuzu (Kyoto Dist. Ct. 1984).

\footnote{13} Id.

\footnote{14} DSU, \textit{supra} note 9, art. IV; GATT art. XII, para.1; See generally Agreement on Implementing
of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement
Establishing the World Trade Organization, Annex 1A, \textsc{LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY
ROUND TABLE}, 1994, 33 I.L.M. 1154 (1994) [hereinafter Anti-Dumping Agreement], \textit{available at}
obligations of Trinidad and Tobago under the Anti-dumping Agreement. Although no official results of the consultation had been submitted to the Anti-dumping Committee, the Government of Trinidad and Tobago appeared to have retreated by removing the duties and eventually terminating that investigation to the detriment of the local industry. Clearly the State did not have the resources or political will to defend its action to the highest level under the WTO system. Moreover it is reasonable to assume that the overall trading relationship with Costa Rica was given priority over the need to protect one manufacturing sector. This way many manufacturers for whose benefit this trade remedy legislation were enacted may discover that ultimately they have no or no effective voice in the final resolution of these disputes in the international arena. In Development, Trade, and the WTO, the authors' state, 'no one can claim that the WTOs dispute settlement system compensates for an unequal distribution of economic power in the world, but it must be emphasized that this system gives small Members a fair chance they otherwise would not have to defend their rights.'

This "better than nothing" approach inspires little confidence in the future credibility of the multilateral system. To achieve equity in international trade and investment, the rules must be applied across the board and with the same legal effect. Fully recognized Institutions and Courts must be part of the ultimate package of the Promised Land of a globalize economy that will adjudicate finally on matters of international trade with binding effect on members. Until then international law will be inequitably applied to members ascribing to the same agreements.

III. THE FTAA OFFSPRING?

Within the WTO there have recently emerged several regional agreements which also seek to spread the notion of free trade. Some commentators have viewed the FTAA as a strategic dimension far beyond mere commercial and regional aspects. There is a view that its genesis lies in obtaining leverage in a global world against other trading blocks and in the WTO system as well. The FTAA certainly represents the rise of a new order being the largest economic block on the world. It can also spark a new initiative by other members in the WTO to realign their economic ties in other huge trading blocks to counteract the impact of the FTAA.

The present stall in the FTAA negotiations has spawned even more bastard offspring of bilateral trade agreements between the United States and other


Latin America countries. It will perhaps be difficult to say that the WTO fathered the FTAA. However, with the huge market capabilities and force of the Far East in the form of China, Japan, Indonesia it is not stretching the imagination to view the FTAA as an effective tool to counteract the juggernauts of the East and mount some economic leverage here in the West in the WTO.

The GATT recognizes free trade areas within the multilateral trade system: Article XXII (4) of the GATT provides the following:

The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to trade of other contracting parties with such territories.\(^\text{17}\)

However, insofar as the FTAA has its members in a favourable position in relation to non-FTAA members, it is not consistent with the MFN rule and Article XXIV of the GATT. In the Appellate Body Report, “Turkey-Restrictions on Imports of Textile and Clothing Products”\(^\text{18}\), Turkey attempted to use trade remedy action in the form of safeguards on textiles and clothing and defended its use by reference to the development of a free trade area. The Appellate Body held that Article XXIV can justify the application of such a measure “only if it is introduced upon the formation of a customs union or free trade area and only to the extent that the formation of the customs union would be prevented if the introduction of the measure was not allowed.” It was not demonstrated that the formation of the customs union would be prevented if the measure was not allowed and set strict guidance as to how issues of developing free trade areas should be approached.

The FTAA must therefore, theoretically, be compatible with WTO rules and it is difficult to imagine any properly documented regional agreement being WTO inconsistent. This will certainly set up a strain between globalisation and regionalism. The WTO imposes three basic obligations on member states if they wish to enter into regional trade agreements such as the FTAA:

1) An obligation to notify the agreement to the WTO;
2) An obligation not to raise the overall level of protection and make access to products of third parties not participating in the FTAA more onerous (external trade requirement);

\(^{17}\) GATT art. XXII, para. 4.

3) An obligation to liberalise substantially all the trade among the constituents of the agreement (internal trade requirement).

It is apparent from the Turkey case that the WTO will monitor the measure implemented by a member of a Free Trade Area and the defence of the existence of a FTA will lose currency. For this reason, the trade remedy actions contemplated by the FTAA must be WTO compliant. Furthermore, where there is need for reform of these safety measures, it should be advocated at both the FTAA and WTO levels.

IV. GLOBAL TRADE REMEDY INSTRUMENTS

There are three trade protection instruments or trade remedies permitted under WTO rules allowing for the adoption of import measures in specific circumstances:

1) Article VI of the GATT 1994 and the WTO Anti-dumping Agreement, authorising the implementation of anti-dumping duties or price undertakings in situations of discriminatory pricing;²⁰

2) Article VI of the GATT 1994 and the WTO Subsidies and Countervailing Measures Agreement, authorising countervailing duties or price undertakings where countervailable subsidies are found;²¹

3) Article XIX of the GATT 1994 and the Agreement on Safeguards, authorising the adoption of safeguard measures where there is a surge of imports. Measures can take the form of either additional duties or quotas or both.²²

Generally the objectives of these agreements are to provide relief to affected industries against unfair trade and protect the indigenous supply of goods on the local market and to prevent injury to the local industry from the effects of dumping; to protect the establishment of a local industry from unfair trade (section 3A and to ensure the integrity of the trade remedy process as agreed by the AD Agreement).

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20. GATT 1994, art. VI.
The triggering mechanism for each of these remedies is the concept of injury caused to a local industry due to market distortions caused by exporters and international traders. In the first two actions such distortions are caused by price discrimination or price differentials in the latter, sheer volume of imports creates an "unfair" or uncompetitive trading environment.

The provisions of the GATT and the Agreement on Anti-dumping Subsidies and Safeguard exist as separate instruments and are to be given legal effect. In examining these provisions, legal effect is to be given to all the relevant terms of the WTO agreement consistent with the principle of effectiveness "at rest magisvlaeat quam pereat" in the interpretation of treaties: In the Report United States-Gasoline the panel stated:

One of the corollaries of the "general rule of interpretation" in the Vienna convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing the clauses or paragraphs of a treaty of redundancy or ignitibility.23

In those matters on which the agreement is silent, or ambiguous, or allows room for flexibility in adopting a rule, liberalists argue that national authorities should adopt a less restrictive rule or practice.24 This would permit local legislators to capitalize on the ambiguity or uncertainty of some aspects of the AD Agreement to provide further protection for the local industry without contravening its WTO obligations.

These global laws are useful tools in a member's armoury to maintaining equity in international trade, transparency in the trading process and reciprocity. They are a formidable tool to restrict any unfair international trading practices. In using the anti-dumping remedy for instance Vermulst observed the following in *E.C. Anti-dumping Law and Practice*:

Nevertheless it must be recognized that while anti-dumping duties have a marginal effect on international trade in general they can have drastic consequences for individual suppliers (and for certain industries such as steel, chemicals, consumer electronics, office automation equipment and ... textiles) Imposition of an anti-dumping duty of say 40% to be paid by the importer will in most instances force the importer to shift sources of supply and indirectly drive the foreign

exporter out of the importing country market. In this way the anti-dumping law is effective.\textsuperscript{25}

\textit{A. Anti-Dumping and Countervailing Duty Actions}

Article VI maps out the broad criteria for the determination of the circumstances in which an additional tariff can be imposed against another member who is found to be dumping or subsidising its exports. As this is an exception to the MFN rule, the circumstances in which such a measure is to be imposed will therefore be carefully monitored by the WTO.

Article VI, Paragraph One of the GATT (hereinafter referred to as “The Anti-dumping Agreement”) states:

The contracting parties recognize that dumping by which products of one country are introduced into the commerce of another country at less than the normal value of the products is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry ....

The critical feature of the anti-dumping remedy is that it prevents the price discrimination of the exporter from threatening or effecting material injury on local industries that produces like goods.

Dumping is broadly defined as the sale of a good at a price less than its "normal value," the price for the good in the home market. In other words the export price is below home market prices, fair market prices, normal values, or its cost of production.\textsuperscript{26}

Article VI, Paragraph Two also sets out the governing provision for Countervailing Duty actions:

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the

\textsuperscript{25} ANTI-DUMPING LAW AND PRACTICE (Sweet & Maxwell 1996).

\textsuperscript{26} Gary N. Horlick, \textit{How the GATT Became Protectionist: an Analysis of the Uruguay Round Draft Final Anti Dumping Code}, 27 J. WORLD TRADE 5, 5-17 (1993); Anti-Dumping Agreement, supra note 19, art. 2.1. Article 2.1 defines dumping as:

a product is to be considered dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Anti-Dumping Agreement, supra note 25, art. 2.1.
manufacture, production or export of such product in the country of origin or exportation including any special subsidy to the transportation of a particular product. The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production of export of any merchandise.27

This provision was incorporated into Part V of the Subsidies and Countervailing Measures Agreement ("SCM Agreement") and represents the current WTO law on CD actions.28 A subsidy is broadly defined as a benefit that is not earned. It is defined in the SCM Agreement. This subsidisation may take different forms by a Government in the country of export such as the subsidisation of productions costs or free grants of land. It is of note that Article 14 of the Agreement on Subsidies and Countervailing Measures do not include government provision of equity capital as conferring a benefit unless the investment decision can be regarded as inconsistent with the usual investment practice or private investors in the territory.29 The loan from the government to be considered as conferring a benefit must be preferable to that obtainable on a comparable commercial loan. The Agreement does not set out the methodology of calculating the subsidies and is left to members to work this out in their various enactments.

The counteraction of subsidies in international trade to prevent subsidised exports from threatening or effecting material injury on local industries, that provide like or similar goods, is another form of preventing economic “distortions” in international trade.

Under the Anti-dumping Agreement and SCM agreement an anti-dumping or countervailing duty measure shall only be applied under the circumstances provided for in the Agreement, and pursuant to an investigation initiated and conducted in accordance with the provisions of those agreements.

There are several aspects of these international agreements that are beyond the scope of this paper. In understanding these Agreements as setting an international framework for protection, we should be familiar with the concept of the entity entitled to protection, the triggering mechanism for invoking these remedies, and the scope of the relief available. In doing so we appreciate that the cornerstone of these Agreements is the elimination of injury to domestic industries that may occur when trade barriers have been eliminated as a result of globalisation.

The entity that is entitled to invoke these trade remedies is the domestic industry, which is materially injured by the dumping or countervailing duty.

27. GATT, art. VI(2).
28. Agreement on Subsidies and Countervailing Measures Agreement, supra note 21, at part V.
29. Id. art. 14.
The domestic industry is defined as "domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."\(^{30}\)

The complainant however excludes producers that are related to, or affiliated with, exporters of importers of the project in question or is itself an importer of the product. Those entities are not deserving of relief under WTO law. The complainant must also be a producer of "like products." Hence the focus of the relief is to those industries that wish to participate in the global economy and need protection from unfairly traded goods which are in direct competition with its own products.

A finding of dumping or subsidies however is not determinative of the issue as to whether an anti-dumping or countervailing duty would be imposed on the exported product subject to the investigation. It is the dumping or subsidisation of goods on the international market that causes injury to a local industry in another market producing the same or like goods that is objectionable under the global law. Indeed injurious dumping is inconsistent with the principles on which the WTO was established which was that trade is to be conducted with a view to "raising standards of living ensuring full employment and growing volume of demand."\(^{31}\) Such injury is also inconsistent with the principles we observed that informed the signing of the GATT 1947 as amended. The impact of dumping on many local industries in small or developing markets can be disastrous if left unchecked. This has been the experience recently in the Caribbean.

A finding of injury is made based on an objective examination of positive evidence of both price effects i.e. the effects the dumped goods has on the prices on the local market, and financial effects, i.e. the effect on the economic performance of the local industry.\(^ {32}\) Price effects: An investigation or price cuts analyzes whether the dumped products undercut the prices of like goods on the local market, caused the suppression and/or depression of local prices of

\(^{30}\) See Anti-Dumping Agreement, supra note 14, art. 41.

\(^{31}\) See WTO Agreement, pmbl., which indicates that the parties to the Agreement recognized that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with The objective of sustainable development, seeking both to protected and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concurs at different levels of economic development.

\(^{32}\) Anti-Dumping Agreement, supra note 14, art. 3.1. A determination of injury for purposes of Article VI of GATT VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the evolve of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and (b) the consequent impact of these imports on domestic producers of such products.
like products on the local market. In examining economic effects, the investigative authority would also examine the economic performance of the local industry and in so far as a causal link can be made between the dumping of the good and the poor economic performance of the local industry the anti-dumping duty will be imposed. The examination of the impact of dumping on the local industry would involve an analysis of several economic factors, including actual and potential decline in sales, profits, output, market share, productivity, return on investment, cash flow, inventories, employment, wages, growth, and ability to raise capital or investments. Article 3.4 states that “this list is not exhaustive nor can one or several of these factors necessarily give decisive guidance.”

Indeed, in working out the principles to determine material injury the Australian Customs Services has declared “an industry which at one point in time is healthy and could shrug off the effects of the presence of dumped products in its market could at another time, weakened by other events, suffer material injury from the same amount and degree of dumping.”

The investigative authority may also find that, although the dumping may not have caused material injury, it threatens to cause material injury to the local industry. In making this assessment, the authority would consider principally whether there was a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation, the sufficiently freely disposable or imminent substantial increase in capacity of the exporter indicating the likelihood of substantially increased exports to the importing member’s market, whether the imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices and likely to increase the demand for further imports. In the Final Determination by the Anti-dumping and Subsidies Commission pursuant to section 30 of the Customs Duties (Dumping and Subsidies) Act 1999 in respect of dumped cement originating from Thailand, dumped onto Jamaica, the Commission held that although the dumped cement had not caused material injury to the local industry it threatened to cause material injury on account of the exporter’s ability to potentially increase the supply of dumped imports into the Jamaican market. The Commission concluded “there is a likelihood of

33. Anti-Dumping Agreement, supra note 14, art. 3.2. With regard to the effect of the dumped import on prices the investigating authority shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing member or whether the effect of such imports is otherwise to depress prices to a significant degree or print price increases, which otherwise would have occurred to a significant degree. No one or several of these factors can necessarily give decisive guidance.

34. Id. arts. 3, 4.

substantially increased dumped imports from Indonesia to the Jamaican market in the near future and that this will affect the domestic industry’s ability to supply its product to the market and consequently its viability.”

Anti-dumping investigations are an important feature of this “global law.” The investigations are triggered only by a dumping margin that is more than two percent (the de minimis rule) and a volume of dumping that is more than three percent of the imports of the like product in the importing member (i.e. dumping that is not negligible). The global law, therefore, permits the dumping of goods into another member, even if it causes injury to the local industry, in circumstances where the dumping margin is less than two percent or the volume is less than three percent of the total imports of the good.

B. Relief Available

Both anti-dumping duties, to counteract injurious dumping, and countervailing duties to counteract injurious subsidies, are imposed in addition to the customs duties imposed on imports from the source regardless of the bound rate of the tariff discussed above. Immediately one recognizes these measures as tools to re-create barriers to trade pre-WTO.

The objective of the exercise from the part of the complainant, the local industry, is to secure the imposition of a final anti-dumping or countervailing duty to protect its market from dumping in any form whether it is by way of predatory or long term dumping or subsidisation. It is imposed on a non discriminatory basis on imports of the good from all sources found to be dumped or subsidised and causing injury. For anti-dumping duties the actual amount of the duty would not be more than the assessed dumping margin and in some territories the “lesser duty rule” has been implemented which requires the anti-dumping duty to be no more than is necessary to eliminate the margin of injury.

C. Provisional Duties

This is perhaps the first objective of an anti-dumping investigation or countervailing duty for a complainant. Within the first three months of an anti-dumping or countervailing investigation, the authority is competent to impose a duty based on its preliminary findings on the dumping margins or subsidisation and its assessment of injury. The purpose of this duty is to eliminate any further injury during the course of the investigation.

36. See Anti-Dumping Agreement, supra note 14, art. 5.8.
37. Id. art. 9.2.
38. Id. art. 5.8.
Retroactive duties are rarely imposed. This is the most draconian of the remedies available under the "global law" exposing "guilty" importer to duties levied retroactively on dumped goods entering before the final determination is made and after the date of initiation of the investigation.39 These laws are thus focused not on the motives of trade but on the effects of certain strategies on domestic trade. In this way it is different from competition policy and fair-trading legislation.

D. Safeguard Actions

Unlike the actions examined above, the safeguard action is perhaps a weapon of mass destruction sparingly used against competing traders in the global market. A safeguard measure can take the form of either an increase in import tariffs or quota restrictions on the good under investigation imported from all sources. It is only to be applied if it is found than the good is imported into a territory in such increased quantities absolute or relative to domestic production and under such conditions as to cause or threaten to cause serious injury to the domestic industry.40

The underlying principle of the safeguard measure is reflected in the Report of the Appellate body in United States—Circular welded carbon quality line pipe:

Safeguard measures are extraordinary remedies to be taken only in emergency situations. Safeguard measures are remedies imposed in the form of imports restrictions in the absence of any allegation of unfair trade practice. Safeguard measure may be imposed on the fair trade of other WTO members and, by restricting their imports, will prevent those WTO members form enjoying the full befit of trade concessions under the WTO agreement.41

These remedies are extremely flexible and timely instruments. Its provisions can be broadly interpreted, and the extent of the protection depends in a large degree on the policy of the government, such as whether it is committed to protecting its manufacturers or to providing the consumers with wider and cheaper alternatives and encouraging FDI. The interests of the developing countries of the Caribbean are theoretically addressed in Article 15:

39. Id. art. 10.
40. Agreement on Safeguards, supra note 22, art. 2.1.
It is recognized that special regard must be given by enveloping country members to the special situation of developing members when considering the application of anti-dumping measures under this agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country members.  

This, however, is of little practical assistance because it is vague and ambiguous, and given little efficacy in the WTO. In EC-Bed Line the panel ruled that EC violated Article 15 by failing to explore the possibility of “constructive remedies” in the form of price undertakings. Much could be done, however, to improve special and differential treatment such as re-examining the de minimis test and the burden of proof on complainants to prove a case of dumping or subsidization.

V. OPENING THE PANDORA’S BOX

These trade remedy laws have given new life to the protectionists in the WTO. There has been an increase in the use of trade remedy laws directly proportional to the increasing levels of liberalisation of economies. It is now widely recognized that the increased usage of these laws offers protection to local industries but naturally restricts trade and foreign investment.

Since 1995 several WTO members have quickly implemented and updated its trade remedy laws to maximize their use of the international framework of protection set in the WTO. With regard to the anti-dumping remedy in 1995, fifty-six WTO members had implemented and put into practice legislation in conformity with the AD Agreement. By 2002, that number had risen to 94. In fact China, a country the subject of numerous anti-dumping complaints, recently implemented anti-dumping legislation.

The WTO Secretariat reported that in the period July 1st to December 31st 2001 nineteen members initiated 186 anti-dumping investigations against exports from a total of fifty-five different countries or customs territories. During the corresponding period of 2000, eighteen WTO members initiated 187 anti-dumping investigations. During the first six months of 2002, there were 111 anti-dumping investigations initiated by member states. Chinese exports are topping the list of the countries most subject to anti-dumping investigations. In this survey, the good that is subjected to the most anti-dumping investiga-

42. Anti-Dumping Agreement, supra note 14, art. 15.
tions was base metals followed by chemicals, and machinery, and electronics sector.

**TABLE 1**

Anti-dumping investigations initiated globally

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<tr>
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<td>221</td>
<td>242</td>
<td>232</td>
<td>339</td>
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Safeguard investigation initiated globally

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<td>15</td>
<td>26</td>
<td>53</td>
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This trend suggests that increasingly trade remedy legislation is becoming a fact of life in international trade. It is a natural corollary to the open market economy and is now the most popular form of protecting local markets. Even the Caribbean nations have signified their intention of not being left behind in the implementation of trade remedy law. It must be noted that in the Western Hemisphere the most active and effective users of trade remedy law are the United States and Canada. In spite of the pillars of the WTO of the "MFN rule" and reciprocity, the use of trade remedies is the newest form of "legitimate" inter-trade warfare. The following chart demonstrates, at least in this region, the nature of this warfare and confirms the view that the anti-dumping trade remedy is viewed as one of the ways to equitably level the playing field among trading nations.

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44. R. CRYNBERG & E. TURNER, MULTILATERAL AND REGIONAL TRADE ISSUES FOR DEVELOPING COUNTRIES.
45. Id.
VI. IMPLEMENTATION OF INTERNATIONAL TRADE REMEDY LAW IN THE CARIBBEAN: BRIEF COMPARATIVE ANALYSIS

From this global perspective, one can analyze how, in terms of procedural and substantive law, Trinidad and Tobago and Jamaica have implemented the global trade remedy law into their local trading landscape and whether they remain effective tools to promote equity in the international trading system. Although Trinidad and Tobago is a more active user of trade remedy law, Jamaica has been the more careful but creative user. In spite of this there are WTO non-compliant provisions and gaps in both countries’ legislation, which should be addressed to make it a more viable and effective remedy.

A. Anti-dumping and Countervailing Duty actions:

In Trinidad and Tobago the anti-dumping law is set out in the following legal instruments: the Anti-dumping and Countervailing Duties Act 1992, the Amendment to the Anti-dumping and Countervailing Duties Act 1995, the Anti-dumping and Countervailing Duty Regulations 1996. In Jamaica, the legal
Instruments are the Customs Duties (Dumping and Subsidies) Act 1999 (CDDS Act) 1999 and the Customs Duties (Dumping and Subsidies) (Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations 1999. Unlike its Trinidad and Tobago counterpart the Jamaican legislation specifically incorporates certain aspects of the Anti-dumping Agreement and in particular Annexure II of the Agreement. In both jurisdictions the legislation repeals the previous customs legislation governing dumping and subsidies, thereby taking the process of determining whether an anti-dumping or countervailing duty is to be imposed away from the Comptroller of Customs.

Instead, both countries vest a special tribunal with authority to determine whether dumping or subsidisation exists and whether there is a causal link between the material injury alleged to be suffered by or threatened to the local industry producing like goods and the subsidisation or dumping. In Jamaica, the tribunal is known as the Anti-dumping and Subsidies Commission (hereinafter referred to as “the Commission”). It is an independent Commission. In Trinidad and Tobago the authority is vested with the Minister of Trade and the Anti-dumping Authority. The Anti-dumping Authority (the Authority) has the power to initiate an investigation but thereafter its role is limited to making preliminary and final recommendations to the Minister of Trade. The Minister of Trade is then responsible for the making of the determinations as to the imposition of anti-dumping or countervailing duties. In Trinidad and Tobago, the mix of politics in this legal process is evident. This might perhaps explain the higher usage of the anti-dumping remedy in Trinidad and Tobago than in Jamaica. However, an intricate and involved process such as dumping and subsidy investigations may overwhelm the limited resources of a government.

47. Customs Duties (Dumping and Subsidies) Act, 1999 (Jamaica), http://www.mct.gov.jm/mcst_documents.htm. The long title of both laws is of particular interest: Jamaica “An Act to repeal and replace the Customs Duties (Dumping and Subsidies) Act to establish the Anti-Dumping and Subsidies Commission and for the implementation of Article VI of the General Agreement on Tariffs and Trade for connected matters.” Id.

48. See id. § 36; Republic of Trinidad and Tobago, Act No. 11 (1992), www.sice.oas.org/antidumping/legislation/trinidad/ACTI11.asp.

49. Customs Duties (Dumping and Subsidies) Act, 1999 (Jamaica). The Commission is comprised of a chairman and four other members appointed by the Minister. It carries out its investigations independently and makes independent determinations. The Commission is staffed with legal advisers and economic consultants. The Anti-Dumping Authority of Trinidad and Tobago is not as independent. Pursuant to section 16 of the Anti Dumping and Countervailing Duties Act the Minister designates his Permanent Secretary or such other person as he thinks fit “to be the Anti Dumping Authority.” Republic of Trinidad and Tabago, Act No. 11, c. 11 (1992). Although the functions of both the Authority and the Commission are essentially the same (“to investigate into the existence, degree and effect of the alleged dumping or grant of subsidies of any goods”), the Authority advised the Minister as to the margin of dumping or the nature of subsidies in relation to goods. Id. at part 2. It is the Minister who by section 5 is charged with the responsibility of imposing a duty based upon the recommendations of the Authority. In contrast it is the Commission which makes the finding that the dumping and subsidising of goods has caused or is likely to cause material injury.
Ministry. In any event, both jurisdictions have not gone the way of bifurcating the process, like the United States has done. One body make its findings of dumping as well as injury and causal link. Interestingly in Trinidad and Tobago the anti-dumping or countervailing duty is expressly made a duty of customs for which the Comptroller shall be responsible for the collection of duties whereas an anomaly exists in the Jamaican legislation as no express power is given to the Commission to impose the duty itself.

To date, neither jurisdiction has reported countervailing duty investigations. The comparison that follows, therefore, will focus on anti-dumping investigations. The important phases of an anti-dumping investigation under the respective legislation is the initiation of the investigation, the making of preliminary findings on dumping and injury (the preliminary determination) and the final determination as to whether final anti-dumping or countervailing duties are to be imposed on the goods that are the subject to the investigation (the final determination).

Both these bodies are to be regarded as having their own degree of skill and expertise in trade remedy law. This is an important criterion, especially in matters of appeal or judicial review of their decisions and deference will be made to such a body's findings of fact and it is expected that the same standard of review of specialist tribunal will apply. Article 13 of the Anti-dumping Agreement states that:

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination of review in question50

In Harricrete v Minister of Trade, Myers, J., was of the view that mere “Wednesbury” unreasonableness of a decision of the Authority is not sufficient to warrant an application for judicial review of its decision without resort to the appellate mechanisms set out in the Act. This is an important decision as it recognizes the need to have issues of dumping and material injury to be determined by a specialized tribunal. This highlights the unique nature of the appeal provisions in the Jamaican legislation. It is submitted that the provisions to review a final determination under Section 33 of the CDDS Act, although described as an application for judicial review in fact confers more powers on

50. Anti-Dumping Agreement, supra note 14, art. 13.
the Court and is almost appellate in nature. However insofar as both the Tax
Appeal Board in Trinidad and Tobago and the Supreme Court in Jamaica are
not staffed with the requisite expertise and specialist knowledge in trade
remedy and international law the timing may be right for recourse to specialized
trade courts such as the CCJ as a possible court of appeal for reviews of final
determinations.

B. The Triggering Mechanism

In both pieces of legislation, the onus is on the complainant to establish a
case of dumping, injury, and a causal link before triggering the investigative
functions of the Commission and Authority. Article 5.6 of the Agreement
provides that investigations are initiated on “sufficient evidence” of dumping
or subsidization, injury, and causal link. This is in reality an “anti-
harassment” provision and is designed to prevent the notification of frivolous
and vexatious complaints. The ruling of the Panel in Softwood Lumber sets the
standard of proof as “evidence that provides a reason to believe that dumping
exists and that the local industry is injured as a result of the dumped imports.”

It will appear that the standard of proof in Trinidad is higher than in
Jamaica. In Jamaica, the Commission must be “satisfied” that a complaint is
“properly documented,” as defined in the Act. There is evidence that the
goods are or have been dumped or subsidized, and it discloses “a reasonable
indication” that the dumping or subsidizing of the goods has caused is causing
or is likely to cause material injury. In Trinidad and Tobago, however, the
Authority must be satisfied that there is “sufficient prima facie evidence” of
dumping or the giving of a subsidy and of the quantum actionable injury, and
a causal link between such imports and the alleged actionable injury. It is
submitted that if the Authority is empowered to investigate the existence,
degree, and effect of dumping the standard of proof on a complainant cannot be
high at the initiation stage. In practice, the Authority applies the test liberally.
Also, there is no formal approach to the conduct of the investigation as pertains
in Jamaica. A clarification of this threshold test would open the doors to
expedited initiations and remedies being made available to the local industry.

Related to this evidential issue is the use of the information available to
make determinations where the exporters and producers in the country of export
fail to participate in the investigation or where there is conflicting evidence. In

51. See Customs Duties (Dumping and Subsidies) Act, 1999, c. 34(1) (Jamaica).
52. See Anti-Dumping Agreement, supra note 14, art. 5.6.
53. World Trade Organization, Panel Reports, United States, Final Dumping Determination on
54. See Anti-Dumping Agreement, supra note 14, art. 5.5.
55. See Custom Duties (Dumping and Subsidies) Act, § 22(1)(c) (Jamaica).
these cases, the investigating authority is empowered to make adverse infer-
ences against those parties or rely on the information contained in the com-
plaint. To do otherwise would be to reward parties for their failure to comply
with the importing country's trade remedy laws. Although Annexure II of the
AD agreement sets out in detail the manner in which an authority will rely upon
the facts available which is expressly incorporated in the Jamaican legislation.
However, the Authority in Trinidad and Tobago appears more willing to make
adverse inferences or rely on the complainant's information where exporter's
or foreign producers fail to participate in an anti-dumping investigation than the
Commission in Jamaica. One of the difficulties the Authority will frequently
encounter is the weight to be attached to the Customs invoices and declaration
of the exporter or importer in determining export prices. In Jamaica the AD
legislation dilutes the significance of invoices and underscores that the dumping
determination is an assessment of all the evidence available. However the
Authority seems more prepared to ignore invoices than the Commission and act
on other evidence available where the exporters fail to corroborate the
importers assessment of the export price adequately or at all. The assessment
of evidence in a trade remedy case where foreign parties refuse or fail, as they
usually do, to participate will continue to be a source of great controversy in the
application of these laws in these jurisdictions.

C. The Scope of the Relief Available

In anti-dumping and duty actions, the legislation provides relief to the
local industry by the imposition of provisional, final and retroactive duties. The
AD Agreement recognizes that there are circumstances in which injury may be
incurred by a local industry during an investigation and which would need
interim protection by means of a provisional duty.

The power to impose provisional measures is governed by Sections 24 and
25 of the Trinidad and Tobago Act and Section 15 of the CDDS Act. This is
as close to interlocutory relief as can be obtained under the legislation. It is an
attempt to preserve the status quo by imposing anti-dumping duties during the
investigation to prevent further injury to the local industry. It sanitizes the
trading environment to allow for further investigations to take place in a neutral
trading environment.

The imposition of provisional anti-dumping duties dramatically affects the
importer and exporter. Some importers have adopted the strategy of seeking

56. See Anti-Dumping Agreement, supra note 14, art. 6.8.
57. See Custom Duties (Dumping and Subsidies) Act, c. 19 ("The export price of goods sold to an
importer in Jamaica "notwithstanding any invoice or affidavit to the contrary...").
58. See Customs Duties (Dumping and Subsidies) Act, c. 15; Republic of Trinidad and Tobago,
Act No. 11, § 12.
judicial review at that stage. In light of the Judicial Review Act 2002 (Trinidad and Tobago) and the recent judgment in HCA 1042 of 2000 Harricrete Limited v Minister of Trade to successfully challenge the Minister’s decision at that stage the applicant must show exceptional circumstances exist to resort to judicial review rather than exhaust the alternative remedy allowing the investigation ought not to run its course to a final determination.

The present power to impose a provisional duty is only exercisable within 60 days after an investigation has been initiated.\(^{59}\) However, the Commission is more adept at maintaining this deadline than the Authority in Trinidad. In Trinidad and Tobago all three applications for judicial review of the Minister’s preliminary determination in different anti-dumping investigations were challenged. One of the grounds of challenge was the illegality of the Minister’s making of his determination beyond the 60-day deadline. In Trinidad and Tobago the Authority has argued that the word “shall” in making its preliminary determination is not mandatory but directory only. There is recent case law to suggest that this view is correct but it has yet to be finally determined in those courts.

It is submitted however that the legislators in both territories must explore ways of providing more meaningful interim relief to the local industry such as in the EC. In the EC there is an “immediate intervention” clause.\(^{60}\) Through this provision, beleaguered industries or industries comprising total production can petition the investigative bodies to impose provisional duties immediately upon initiating an investigation. These provisions must be exercised with care so as not to expose the authorities to allegations of breaches of WTO obligations.

**D. Retroactivity**

Anti-dumping and countervailing duties are to be prospectively imposed without discrimination. However, retroactive imposition of duties can occur however where 1) there is a history of dumping causing injury and the importer should or was aware goods dumped and dumping would cause injury; or 2) there were substantial dumped imports in relatively short period of time preclude it from recurring. It is to be imposed on goods entered for home consumption ninety days prior to the preliminary determination.\(^{61}\)

In some scenarios this restriction blunts the effectiveness of the Act as a trade remedy. Anti-dumping and in these scenarios for small market economies ought to be made retroactive to capture shipments which injured the local industry imported prior to the initiation of the investigation. In the Jamaican

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59. *See* Customs Duties (Dumping and Subsidies) Act, c. 15(3).


61. *See* Customs Duties (Dumping and Subsidies) Act, c. 34(1)(c).
legislation the 90-day period is not restricted by the date of initiation and it is probable that duties may be applied retroactively before the date of initiation of the investigation even though this may not be consistent with Article 10.8 of the Anti-dumping Agreement.

E. Availability of Civil Remedies

There is no right to pursue civil remedies against importers who are found to have dumped goods in circumstance where they knew the goods to have been dumped and/or have a history of dumping in this territory. It is regarded as the basic purpose of the anti-dumping and countervailing duties as not to compensate for past injuries only to stop distortion of competition arising from unfair commercial practices like dumping and subsidization. This premise however is defeated by the very condition which satisfies a retroactive duty assessment. In that scenario the commercial practices of the importer and exporter have crossed the border of being merely unfair to being oppressive. The criteria alone that the “importer was aware that the goods were dumped and that the dumping would cause injury” to the local industry satisfies a tortuous ingredient of conspiracy or trading with the intention to dump to cause injury and thereby obtain a competitive advantage to the detriment of the local producer. This may qualify as an economic tort. It can arguably qualify as a “dishonest practice” under the Protection from Unfair Trade Act.

F. Qualifications

There are however two different qualifications to the relief available under the respective jurisdiction in AD and CD. In Jamaica, Section 11 of the CDDS Act incorporates the “lesser duty rule” stated in Article 9 of the Anti-dumping Agreement. In Trinidad the amount of the anti-dumping duty is no more than the dumping margin. In practice the dumping margin will represent the dumping duty imposed. In Jamaica there is discretion to impose a lesser duty “as is considered adequate to compensation for the injury.”

It is difficult to foresee a case where an industry, which is complaining of material injury caused by goods dumped at a margin of 90%, will not expect such a duty to be imposed to illuminate the benefits obtained by the importer of such huge price

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62. Section 801 of the American Revenue Act of 1916 mandates the imposition of treble damages if it could be proven that foreign producers sold their products in the United States with the intent to destroy or injure a United States industry or retrain its development. 15 U.S.C. § 72 (2004).

63. See Anti-Dumping Agreement, supra note 14, art. 9.1 (stating, inter alia, that “[i]t is desirable that the imposition be permissive in the territory of all Members and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the local domestic industry”). These provisions are also incorporated in Article 7(2) and 9(4) of the EC.

64. See Custom Duties (Dumping and Subsidies) Act, c. 11(2)(b).
differentials. To do otherwise will allow the margins enjoyed by the importer to still unfairly compete with the local industry. The practice in Jamaica thus far does not appear to be settled. In the four anti-dumping cases determined since 1999, the lesser duty rule was discussed in one but not applied, as the dumping margin was less than the margin of injury. In any event, there are no binding rules in the AD agreement on how injury margins are to be calculated. It is submitted that the power is discretionary and may not be invoked at all in suitable cases.

Secondly, unlike Jamaica, an anti-dumping or countervailing duty will be imposed if it is in “the public interest” in Trinidad and Tobago. Interestingly no express “public interest” requirement exists in the AD Agreement. Like the EC, however, this is a manifestation of the requirement under the AD agreement that duties be permissive even where there is dumping and resulting injury. The practice in the EC is to assume that protective remedies are necessary unless there are submissions made to the contrary. Some of the public interest factors include user interest, importer’s interest, maintaining competition on the local market and maintaining and developing technology. In Fluorspar the Commission stated, “The Commission considered that the purpose of anti-dumping duties is in general to stop distortion of competition arising from unfair commercial practices and thus to re-establish open and fair competition on the Community market, which is fundamentally in the Community interest.”

To date, the public interest requirement has only been applied in one anti-dumping investigation. However no reasons were provided to refuse to impose a final anti-dumping duty in the public interest although there was a finding of injury caused by dumping.

G. Problems of Enforcement

Although other territories have made guidelines to deal with circumvention of anti-dumping duties, similar guidelines are conspicuously absent in the legislation of both jurisdictions. There is no definition of circumvention. However, the legislations of both jurisdictions describes the process or changes in patterns of trade between one country and another country with the

65. See the Investigation into the Dumping of OPC from Indonesia, Ref. No. AD-01-2002 (July 2, 2002) [hereinafter Indonesia Dumping Investigation], http://www.jadsc.gov.jm/adsc/adsc.nsf/f821ed001c6697b6e85256e270009449c/a706a45d2539a9da05256e5800762004/$FILE/ATT2T16C/Final%20SOR%20CCCL%20FD.pdf. In the dissenting opinion of Mrs. B Morgan the lesser duty analysis was applied. Id.

66. See The Investigation into the Dumping of OPC from China.


68. See the Investigation into the Dumping of Lead Acid Batteries from Thailand.
predominant or sole purpose by the exporter or importer to circumvent the imposition of the duty and to undermine the remedial effects of the duty.

The review provisions in both Acts are clearly inadequate to deal with issues of circumvention. One example is the 1989 imports of photocopiers for the Ricoh plant in California. In spite of the American point of assembly, the photocopiers were found not to have lost their Japanese origin of manufacture and the Commission of the EC took a decision that photocopiers produced by Ricoh in the United States should denied United States origin. The practical effect was that those imports assembled in the United States were subject to a thirty percent duty applicable to photocopiers originating from Japan. What is noteworthy of this investigation is that it was done on the official initiative and not on the receipt of any complaint form interested parties. This is the example of protectionism at work in EC we too to be competitive must protect our markets.

An important factor emerging from the final determination in the investigation into ("OPC") from Indonesia is the Commission’s disapproval of "source switching." "The practice where an importer switches to a new source, subsequently determined to be a dumped source, after anti-dumping measures have been applied against its previous source, is a practice commonly termed as ‘source switching’ and is not regarded in a positive light by this Commission." Therefore, it is apparent that anti-dumping investigating bodies even in the Caribbean are mindful of the realities of international trade and is committed to the prevention of injurious dumping and the circumvention of its protective measures. With the increasing globalization of the world economy anti circumvention cases would be an unavoidable aspect of investigations and reviews and need to be incorporated in the local legislation.

VII. ENGAGING THE ENEMY: RECENT CASES

In the Caribbean there are several recent trade remedy cases, which raise important issues in international trade:

A. Country of origin

In a globalize economy goods are transhipped and distributed from many different sources as distinct from the country of manufacture. The dispute between prices in the country of origin and the country of export in reference to the cement exports was recently examined in the AD 01 2000 Final

69. See Anti-Dumping Agreement, supra note 14, art. 2.5 (providing for a comparison to the price in the country of origin where the products are “merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export”).
Determination by the Anti-dumping and Subsidies Commission under section 30 of the Customs Duties (Dumping and Subsidies) Act 1999 (June 11 2001). This was an investigation into the Dumping of Ordinary Portland Grey cement originating from Thailand into Jamaica over the period 1999 to 2000. In that case the Anti-dumping Commission also investigated “indirect shipments” of cement from Thailand which were routed to Jamaica via Trinidad. The Anti-dumping Commission ruled however that the normal value to be utilised was the price of the cement in Trinidad regardless of the country of origin of the cement. The Commission ruled that the cement was “not merely transhipped through Trinidad. The cement entered Trinidad in February 1999. It cleared Trinidad customs and sat in Harricrete’s warehouse for, in some cases seven months before being shipped to Jamaica.” No doubt the debate as to whether goods are transhipped or exported from one territory to another will feature prominently in future anti-dumping cases.

B. Self initiation- China

After years of experience in Jamaica, signs of a maturing investigation system have been exhibited. The Commission self initiated its own anti-dumping investigation into the dumping of OPC from China. Article 5.6 of the Anti-dumping Agreement provides “[i]f in special circumstances the authorities concerned decide to initiate an investigation (ex officio) they shall proceed only if they have sufficient evidence of dumping, injury and a causal link to justify the initiation of an investigation.” This is a power sparingly used as there is little authority on guidelines by the WTO.

Jamaica however recently successfully self initiated this investigation in much the same manner in which a complainant is expected to prove its case. The material that triggered the investigation appeared to have been obtained while the Commission was conducting a safeguard investigation. Regardless of source the Commission demonstrated an ability to act on credible information in the interests of the local industry and in conformity with the objectives of the CDDS Act.

C. Jamaican Safeguards

Jamaica created a new first in trade remedy law in initiating the only safeguard action on imports of cement. At the time of writing this article, the final determination was due to be published by the Commission.

70. Anti-Dumping Agreement, supra note 14, at art. 5.6.
D. Inconsistent Approaches in the Caribbean

One can argue that the application of trade remedy law should produce the same results in both territories. However in the most recent investigations conducted and completed in 2002 into the dumping of cement originating from Indonesia into the markets of Jamaica and Trinidad there have been inconsistent results. The Anti-dumping Commission of Jamaica imposed an anti-dumping duty of 9.98% on all cement originating from Indonesia imported into the Jamaican market and on February 2003 the Minister imposed an anti-dumping duty of fifty-four percent on all cement originating from Indonesia imported into the Trinidad market. Both investigations were essentially conducted on similar transactions. It would appear that the essential difference between the two findings was the exercise of the discretion of both authorities to make adverse inferences against non co-operating foreign parties. The decision in Jamaica is presently subject to an application for judicial review by the local industry before the Supreme Court of Jamaica.

The Authority in Trinidad and Tobago was of the view that the dumped imports caused material injury. In Jamaica, the Commission determined that there was a threat of material injury and no actual injury. Both bodies were investigating similar local industries, markets, and similar systems of export. The finding that there was a threat of material injury by the Commission was made after a consideration of three factors. First, the exporter and importer’s ability to potentially increase the supply of dumped Indonesian imports into the Jamaican market. The Commission also considered the Exporter and Importer’s ability to indirectly affect the local industry’s ability to supply its product to the Jamaican market and remain competitive. Finally, any other factors that may be deemed relevant in the circumstances whether specific to the firm’s operations or economy wide are prevalent. In this aspect of the investigation, it appears that the Commission has sent a signal to exporters that the more exporters search or are perceived to be searching for new markets to penetrate globally on indiscriminately the more likely will they be susceptible to the imposition of anti-dumping duties (provided of course that the exporter has been found to be dumping the product). It also confirms the international view towards campaigns of long term or short term dumping of cement to other territories as a means of “loading” excess stock.

VII. AREAS FOR REFORM

The TTMA represents many complainants who have utilized the Anti-dumping legislation from 1996 to the present in Trinidad and Tobago. Their complaints of material injury were made against the dumping of goods from countries from as far as China to as close as Venezuela. The goods that were the subject to anti-dumping investigations ranged from polyethylene bags, to
pasta, to batteries, to biscuits, cheese, and cement. Many members however have expressed some degree of exasperation in the use of this legislation. The general concerns to be addressed are delay, enforceability, and scope of remedy.

Key areas of reform that need to be urgently addressed are (1) the effective and uniform use of the best information available; (2) reducing the standard of proof to initiate an investigation; (3) implementing anti circumvention of remedies; and (4) providing for immediate relief mechanisms and imposing retroactive duty impositions beyond the date of initiation.

IX. THE FTAA TRADE REMEDY LAW

Having regard to the fact that some of the active users of trade remedy action are in the West, it is no surprise to learn that trade remedy law is preserved in the FTAA. It must be recognized at the outset that the FTAA differs from the EC which dismantled all internal barriers to trade and substituted trade remedy law in the internal market for competition policy to regulate market forces. Trade remedy law in the EC therefore applies only to non EC states. Dumping theoretically is impossible in a common market. The Messina Conference Report states, “An enterprise can only practice dumping on other markets to the extent to which its own national market is protected. The simultaneous and reciprocal removal of obstacles to trade within the Common Market will tend to eliminate the problem of intra Community dumping automatically.”

FTAA trade remedy law is of limited application. It also competes for its viability with conflicting competition policy, which seeks to regulate the internal market rather than restrict trade generally. It is submitted, however, that the competition policy should have more credence in a customs union rather than in a free trade area.

The trade remedy law preserved in the FTAA incorporates Anti-dumping and Countervailing Duty measures and safeguards remedies. In the Draft Chapter on Subsidies, Anti-dumping and Countervailing Measures it would appear that the minimum set of rights under this chapter to enforce the trade remedy is enshrined in the WTO. One version of Article 1.1 provides “[E]xcept as otherwise provided in this Chapter, the Marrakech Agreement Establishing the WTO and any successor agreements, shall govern the rights and obligations of the parties in respect of subsidies and the application of anti-dumping and countervailing duties.”

71. 1956 Messina Conference Report.
72. FTAA – Free Trade Area of the Americas, Draft Agreement, Chapter on Subsidies, Anti-Dumping and Countervailing Duties, Nov. 1, 2002, art. 1.1, FTAA.TNC/w/133/Rev.2.
The trade remedies have been dramatically watered down in the FTAA and if the Caribbean is looking towards these laws as viable means of protecting their local industries either strong negotiation or re-thinking is needed.

(a) First, it is envisaged in the FTAA that anti-dumping and countervailing duties will be phased out “when the free trade area is established and goods circulate among countries of the FTAA fundamentally free of restrictions.” This is perhaps the Promised Land to which no one can set any definite time frame.

(b) In the interim, the ability to trigger the anti-dumping or countervailing duty has been made more arduous. This is seen in the material injury determination. Article 3.5, as presently framed, states as follows:

In order to determine the existence of material injury there shall normally be a requirement that the domestic industry incur losses during the determined period. The determination of material injury in the presence of positive earnings may be an exception provided that it is justified in terms of special circumstances.  

This eliminates or makes it difficult for an industry, which distinguishes declining profitability and making losses, to make a case that it is suffering material injury. Their case will now be focused on proving threat of material injury or will not be able to cross the bar at all.

Furthermore the onus of proof on the complainant before initiation is greater than previously existed under the Agreement. Previously,

[i]In addition to the provisions of Article 3.5 of the WTO Anti-dumping Agreement and Article 15.5 of the WTO agreement on Subsidies and Countervailing Measures before anti-dumping or countervailing duties can be imposed proof shall be submitted that the dumped or subsidized imports constitute the principal or dominant cause of the injury caused to the domestic industry.

This is expressly stated to be a “WTO plus” requirement and eliminates the “causal link” determination under the Agreement. Additionally, for a positive injury determination to be made the exporter must be found to have a substantial market power in the country of origin or receive a subsidy which enables the practice of dumping.  

This certainly eliminates the possibility of

73.  Id. art. 3.5.
74.  Id. art. 3.7.
75.  Id.

The investigating authority shall determine that the dumped exports cause or threaten to cause injury if the exporters under investigation as a whole have substantial market power in the country of origin or
successfully bringing actions against rogue exporters, middlemen and distress shipments.

The requirement to produce strong evidence before an authority initiates is also expressed in the requirement to impose a provisional measure in Article 7.1:

With regard to article 7.1 of the WTO Anti-dumping Agreement a preliminary affirmative determination shall be based on evidence establishing a strong *prima facie* case and that there is a substantial issue to be investigated. In principle preliminary measures shall not be imposed unless authorities judge that the consequent injury to a domestic industry is not adequately compensable unless interim relief is granted and that the balance of interests favors the granting of the relief sought. In exceptional cases where the threat of consequent injury affect a critical growth industry in an FTAA small economy special flexibility shall be accorded.\(^7^6\)

(c) It is now made mandatory under Article 9.1 of the FTAA to apply the "lesser duty rule." However, the exception for developing countries under Article 12.1 appears to be illusory and of no practical effect.

(d) Article 5 sets firm time limits for the completion of an investigation of eighteen months. This is consistent with the Anti-dumping Agreement. However in Article 5.6 should these time limits be exceeded the investigation will be automatically terminated. Trinidad and Tobago and any other country with limited resources to conduct investigations will do well to take note of this provision.

(e) Although the *de minimis* margin has been increased it is submitted that some qualification should be made for the developing countries.\(^7^7\)

(f) It is noted that the FTAA provides for its own mechanisms for Dispute Settlement. However, it is debatable whether these procedures will have any binding effect. Article 14.11 provides that "[w]hen a dispute settlement mechanism provided for under this Agreement determines that an anti-dumping or countervailing measure is incompatible with this Chapter, it may recommend to the importing Party the way and time in which it shall bring its measure into conformity with the Agreement."

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76. *Id.* art. 7.1  
77. *Id.* art. 5.5; *see id.* art. 12.3.
In such an environment it is still open to the more powerful economies to resist rulings arrived through the dispute settlement procedure, an option which has not to date been contemplated by smaller territories.

X. FINDING HARMONY WITH CSME:

The establishment of a single market and economy by the Revised Treaty of Chaguaramas seeks, in terms of market integration, to incorporate the previous arrangement of a common external tariff but with a move to eliminate impediments to the free movement of goods in the region. Notwithstanding this, it has preserved supporting mechanisms to protect the local industry in laws in relation to subsidies and anti-dumping. Draft legislation is found in Chapters 3, 4 and 5 in Part 5 of the Treaty. It is very likely those Caribbean legislators will face a tough task in harmonising these laws with FTAA requirements in their present form. For instance the Anti-dumping Law of the CSME already sets up obligations, which are inconsistent with FTAA requirements. It is interesting to note that Part 5 of the Revised Treaty of Chaguaramas does not expressly recognize the Anti-dumping Agreement as setting out the minimum bundle of rights in regional Anti-dumping Law. It is difficult to imagine that the CSME will not be WTO complaint. However, its provisions do walk a thin line between strict compliance with WTO and breach of international obligations in certain aspects.

Part 5 sets up a different system altogether for the enforcement of this trade remedy law by allowing investigations to be conducted by both the investigating authority of a member state and COTED. The initiation of an anti-dumping investigation will consist of two phases. First, the local investigating authority may initiate a “preliminary investigation” to verify the existence of dumped imports and injury caused or the existence of a serious threat of injury as the case by a domestic industry. It is noted that in using the term “preliminary investigation” the framers of this anti-dumping law must take cognizance of Article 5.5 of the Anti-dumping Agreement which states that

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78. In Article 12, a member state may take action against dumped imports if such imports cause injury or pose a serious threat of injury to a domestic industry. There is no definition of what constitutes a “serious” threat of injury and it seems to create a higher threshold for the domestic industry in its complaint. Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy, July 5, 2001, art. 125, Caribbean Community (CARICOM) Secretariat [hereinafter Revised Treaty of Chaguaramas], http://www.caricom.org/archives/revisedtreaty.pdf. However, Article 127 defines “injury” to mean material injury to a domestic industry and “threat of material injury to a domestic industry” or material retardation of the establishment of such an industry. Id. art. 127. This is the definition presently used in the TT legislation. It would appear that the requirement to prove “serious” threat of injury is an alternative requirement to imposing anti-dumping duties. It can be argued on a practical level to be an unnecessary requirement unless there is a specific remedy to be imposed if a complainant demonstrates “serious threat of injury.”
The Authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However after receipt of a properly documented application and before proceeding to initiate an investigation the authorities shall notify the government of the exporting Member concerned. 79

While this is a procedural requirement, a breach of this Article is deemed to be a breach of the obligations under the WTO and can jeopardize an investigation. In the Panel Report on Guatemala the serious nature of this Article was examined and explained.

The use of the word “preliminary” must be a matter of semantics, not meant to convey as a matter of substantive law that the Authority has not yet decided to initiate a full investigation. The Authority would have at that time already satisfied itself that there is a properly documented complaint and has in fact initiated an investigation which is two pronged in nature. The first prong, the preliminary investigation, leads to preliminary orders and findings. The second prong, the “investigation,” leads to the final order and findings.

This interpretation would explain Article 129.4 and 129.5. The decision to initiate a preliminary investigation is made public by notice. If the investigation provides sufficient evidence of dumping and serious injury or injury to a domestic industry, the local authority may submit to the appropriate authority of the exporting Member State a request for consultations. The request shall be forwarded to COTED. The purpose of this request is to establish the fact that dumping has occurred, and injury has been caused or threatened, and that there is a causal link between the injury and the dumping. This is an innovative step. It allows the local authority the ability to more effectively acquire information on dumping such as normal values, export prices, and sales information. The local authority is also able to acquire information to affect a better comparison of sales, identity of the producer and their individual dumping margins. The issue of a causal link should still be an issue to be determined in the round, not solely with consultation with a member state. A member state can only provide information, such as volume, and frequency of past and future exports, plans for acquisition, and investment in the local market. Beyond this, it cannot meaningfully add to the effect of dumping on the local industries’ prices and financial performance.

There must also be provision for the individual complainant to participate in the consultations. At the very least, the complainant should be permitted to respond to the submissions made by the member states. The request for

79. See Anti-Dumping Agreement, supra note 14, art. 5.5.
consultations provides the respondent member state to participate in the investigation at an early stage, and assist the local authority in its deliberations. The powerful motivating factor to do this is the local investigating body's authority to impose provisional anti-dumping duties against the member states and refer the request for investigation to COTED if the state fails to "make satisfactory efforts to afford consultations, to provide requested information or otherwise unreasonably impede an investigation."\(^8\)

It is at this state that COTED assumes the responsibility for the further conduct of the anti-dumping investigation and making final findings on injury and the anti-dumping measure to be imposed against a member state. Unlike the Anti Dumping agreement, the duration of the final anti dumping measure is in the discretion of COTED. COTED also has the discretion to authorize the imposition of anti-dumping measures if it is satisfied of the existence of dumping and "if the parties alleged to be responsible for dumped imports refuse to co-operate within the time specified so as to frustrate or otherwise impede an investigation." This measure is to ensure compliance by exporters with the anti-dumping investigation. The final measure itself will be "to the extent necessary to eliminate the margin of dumping."\(^8\) Neither the lesser duty rule nor public interest requirement is authorized in this regime.

The determination of whether injury exists is different from that contemplated by the FTAA. In this regard, it is more in line with the WTO. It remains to be seen whether the early involvement by a member state to actually engage in consultations may have the effect of minimizing the desire of a member state to take action regardless of the position of the local industry. Indeed Article 133.3(f) will dampen the resolve of local authorities to take action against a member state. Article 133.3(f) provides:

\[
\text{If however the investigations reveal that injury was not caused by dumped imports as alleged, but the provisional measures have materially retarded exports of the Member State complained against, COTED shall, upon application by such State, assess the effects of the provisionally applied duties and determine the nature and extent of compensation which is warranted and require the Member State applying provisional measures to withdraw the measure and pay compensation in accordance with its assessment.}^{82}\]

There is a conflict to the extent that the FTAA is making it more onerous on complainants to make a case for the imposition of anti-dumping duties, the CSME is attempting to provide more powers to investigating authorities, and

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80. Revised Treaty of Chaguaramas, supra note 78, art. 129.9.
81. Id. art. 133.3(a).
82. Id. art. 133.3(f).
COTED to impose anti-dumping duties. Under the CSME, COTED will be the body entrusted with the power to investigate allegations of dumping and injury made by a member of CSME against a non-member state. This provides the local industry in the CSME a more advantageous position against other FTAA members. The advantage comes from having the technical expertise and resources of COTED at its disposal rather than its own investigative body established under its municipal laws to undertake the investigation. Furthermore, members of CSME, other than Jamaica and Trinidad, with no or little experience in anti-dumping and trade remedy law will benefit from this provision and provide an adequate interim safety net for market protection against unfairly traded goods from the other FTAA members.

XI. FUTURE OF TRADE REMEDY LAW FOR THE CARIBBEAN IN FTAA&CSME

Reactionary protective trade remedies form part of the framework of the new trading landscape. The establishment of a Free Trade Area will not necessarily decrease the level of trade remedy activity. A useful example is the use of the trade remedy action in particular AD actions within Latin American countries. The trade remedy action was frequently employed between Argentina and Brazil within Mercusor. NAFTA also allows the continued use of anti-dumping and countervailing duty actions by members against their free trade partners. Although the principle behind a FTA is to integrate markets so that domestic and foreign markets are considered one and the same with equal treatment, unlike the European Free Association, the European Union and the Australian New Zealand Closer Economic Relations Trade agreement, both the FTAA and the CSME hold out the AD and CV actions perhaps as an olive branch to those territories suspicious of the benefits of free trade.

Presently in the FTAA, Chile and the Andean Community are the only two groups vocal on the issue of the interaction of trade and competition policy. One of the compromises that may emerge is the inclusion of public interest clauses to balance the competing interest of the consumer and the manufacturer.

For industries with multinational production experience the FTAA may prove to be a stomping ground through tariff jumping FDI. The example of Kodak is the often quoted example that demonstrates this. In August 1993 Eastman Kodak Company filed a US AD petition absent United States imports of photographic paper originating from plants owned by Fuji Photo Film (Fuji) in Japan and the Netherlands. By October 1993, a preliminary decision in the case found dumping margins of over 300% against Fuji plants and ruled that the imports were injuring the domestic industry. Fuji soon established a photographic paper manufacturing plant in the United States. The plan was operational by March 1996. Less than a year after its United States plant
opening, Fuji’s share of the United States photographic paper market had surpassed the market share of Fuji had enjoyed before the United States AD petition was filed by Kodak.

The use of trade remedy law will therefore be the natural reflex of countries entering the FTAA. It is anticipated that their use may decline with the increased patronage of the concept of competition policy. The use of trade remedies may also decline through FDI when members realize that an overworked trade remedy agenda may ultimately cause the collapse of a FTA.

XII. CONCLUSION

Trade remedy laws may not be intended as a feature of the future FTAA landscape. However, until we reach the “Promised Land” of completely free trade, FTAA trade remedy mechanisms will feature prominently as one of the useful tools of the Caribbean to regulate trade and investment. In stark contrast to the EU, the FTAA and CSME cannot truly be seen as a common market by maintaining this resort to protectionist measures against member states. It is predicted that the initial reaction to the FTAA would be the creative use of the existing trade remedies to protect existing markets for local industries to deal with internal competitive forces and external competitors. Trade remedy actions may spark friction among the trading partners in the region but this is a small price to pay for maintaining equity in international trade.

Until we arrive at the “Promised Land,” trade remedy law must remain a tool in the Caribbean’s competitive armory. Perhaps the globalization zealots may even recognize the need to confer real benefits to smaller territories if they are to participate in the FTAA.
THE ADA: A MODEL FOR EUROPE WITH “SHARPER TEETH?”

Carol Daugherty Rasnic*

I wish . . . for the passionate sense of the potential, for the eye which . . . sees the possible. . . .
Soren Kierkegaard, 19th century Danish philosopher

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I. INTRODUCTION

Kierkegaard’s wish might be regarded as a prescient view of a new European legal emphasis on persons with disabilities as human subjects rather than as objects, persons who have the potential and the possibilities to contribute to marketplace productivity. For lawyers representing clients engaging in business in Europe, particularly clients actually establishing European branches, keeping current on work setting discrimination laws is critical. Two major European Commission (EC) Directives announced in 2000 fundamentally expanded anti-discrimination protections for workers.

The first, the so-called Race Directive,1 is the broader of the two in one respect, since it applies across the spectrum. That is, its provisions address not

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only employment discrimination, but also discrimination in other areas, such as housing, transportation, and education.

The second, the Framework Directive, although limited to employment law, protects workers from discrimination based upon religion or belief, disability, age, and/or sexual orientation. The year 2003 was the European Year of the Disabled, probably a direct response to this second mandate from the EC. Unarguably, revisions to workplace discrimination laws for persons with disabilities are now on the agenda of domestic legislation in all European Union countries.

This article focuses on developments in the area of discrimination on the ground of disability. It is not a discourse on the Americans with Disabilities Act; reference is made to that statute only in a comparative sense. The EC has looked to the American statute as a beginning point, and its relevance when analyzing the responses to the directive cannot be over-estimated.

II. SOME EUROPEAN LAW BASICS

There is frequent confusion among Americans with regard to the terms “European Communities” or EC (originally “European Community”) and “European Union” (EU). Some legal professionals wrongly believe the EC to be defunct and the EU to be the only correct term. “European Union” is the goal pronounced in the Single Europe Act of 1987, but the European Community is the collective body with law-making powers. Thus, one might speak of “EU law,” designating law applicable to those countries in the European Union, or “EC law,” the more official term that refers to the actual source of law. The EU, then, is a geographical entity, whereas, “EC” is the reference to the body with law-making powers.

European law takes either of two forms: the regulation; or the directive. A regulation is a primary source of law and is directly effective in all EU member states, without any need for domestic legislation. The directive, on the other hand, is a mandate from the EC that states an intended result. The means by which each member state attains this result via the enactment of domestic law is left to the individual member state. The directive has no counterpart in American law. As a practical matter, the directive has been the more frequently used form, particularly with regard to law relating to the establishment of a single market.

Currently, the adoption of a European Constitution is a topic of considerable controversy, although passage of the draft was actually anticipated for early

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2004. The purpose of the 1999 Cologne Council was to draft a Charter and Constitution, and the dilemma of how a country once admitted to the EU might later withdraw has finally been addressed in Article 59, Title IX, of the draft. This Charter is incorporated into the proposed constitution as Part II of that document.

Two lingering points of dissension remain: First, the proposed revamping of voting weights; and second, the insistence of countries such as Ireland and Italy that the document contain a reference to the Christian foundation of the European Union.

A revised version was published in June 2004, shortly before the six-month term of Irish Taoiseach (Prime Minister) Bertie Ahern as President of the EU expired. Thus, a European constitution is still in the "wait-and-see" stages.

The fifteen member states prior to May 1, 2004, were Belgium, Luxembourg, the Netherlands, Germany, France, and Italy (the charter members at the adoption of the Treaty of Paris in 1952); Denmark, Ireland, and the United Kingdom (added in 1973); Greece (1981); Portugal and Spain (1986); and Austria, Finland, and Sweden (1995). As of May 1, 2004, ten new countries are now members of the EU: Estonia, Latvia, and Lithuania (the Baltic states); the Czech Republic and Slovakia (the former Czechoslovakia); Slovenia (part of former Yugoslavia); Hungary, Poland, Malta, and Cyprus. Romania has been approved for member status, and Bulgaria and Turkey are hopefuls. The sheer size of the EU should be viewed as an entity with which any transnational business must be prepared to reckon.


Interestingly, the conceptual purpose of the EC was to create a geographical entity comprised of signatory member countries for economic consistency and harmonization. Indeed, the goal of the Treaty of Rome was to extend the Europa-wide communal regulation of the coal and steel industries effectuated by the earlier Treaty of Paris to European economy as a whole. This

5. Currently, votes from those member states with the largest population, such as Germany, France, and Italy, are more heavily weighted than are those from the less populated states, and this lessening of power has not been acceptable to the larger members. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (providing the objective and goal of establishing a common European market).

6. The latter was actually added via a separate treaty executed simultaneously with the Treaty of Rome.
economic basis has undergone a metamorphosis, or at the least, an augmentation. In recent years (particularly since the Amsterdam Treaty), an additional aim of the EC has been human rights. The European Convention of Human Rights has been incorporated into EC law; all fifteen of the pre-2004 enlargement member states have enacted the terms of that Convention into their domestic laws. Professor Gerard Quinn of the law faculty at National University of Ireland Galway has called this human rights direction a "pragmatic goal of interlinking the national economics into a common market so that armed conflict in [post-World War II] Europe was unthinkable and energies were instead diverted into peaceful economic competition." He has termed this a recognition of the premise that "naked power is dangerous and requiring taming" and an effort to "convert the [European] Union into more than just an engine for economic growth and integration." This human rights orientation has much significance for employment law, especially employment discrimination law.

Indeed, in 1969 the European Court of Justice held that European Communities law incorporated through its "general principles" doctrine those fundamental rights modeled on constitutions and common law of member states. Five years later, in *Nold Kohlen- und Baustoffsgrosshandlung v. Commission*, the Court extended this view to include in the same general principles international treaties and the European Convention of Human Rights.

The principal organs of the EC are the European Commission (the true law-making body located in Brussels), the Council of Ministers (Brussels), the Parliament (Strasbourg), and the European Court of Justice (Luxembourg). The function of the first three is legislative. It is somewhat of an anomaly to the American jurist that, although only in the United Kingdom and Ireland among member nations is the common law system used, applying the doctrine of precedent (other members are civil law countries), the European Court of Justice functions under common law principles.

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7. Professor Gerard Quinn, Remarks at the National Forum on Europe, National University of Ireland Galway (Jan. 21, 2004).
8. *Id.* Arguably, this linkage of market economics and human values has also been used on many occasions by the U.S. Congress under its powers under the U.S. Constitution. U.S. CONST. art. I, § 8. cl. 3. One prime example is the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(4) (1990) (citing the Commerce Clause as one of Congress' sources of power in this legislation).
11. The author is grateful to Laurence Pech of the Law faculty at NUIGalway for assistance in locating these sources.
12. The Commission is currently comprised of two members each from these five larger member states, and one each for other member states.
III. EUROPEAN CONVENTION OF HUMAN RIGHTS

This post-World War II (1950) treaty\textsuperscript{13} created a legislative body, the Council of Europe and the European Court of Human Rights (ECHR), both located in Strasbourg, France. The forty original signatory countries later adopted the 1961 European Social Charter,\textsuperscript{14} which expanded the ECHR's power into the areas of health and safety (including that in the workplace), education and vocational training, protection of children and adolescents, and right to social security.

The significance of the EC's official incorporation of the ECHR into European law by approval of the Amsterdam Treaty in 1997\textsuperscript{15} cannot be overemphasized. Additionally, in 2003, Ireland became the last member state in the EU to have enacted the ECHR into domestic law. Such domestic statutes are significant in that they empower the courts of each country to hear and determine charges of breach. This inclusion in domestic law not only negates the necessity for the charging party to travel to the ECHR court in Strasbourg, but also subjects employers to an additional possible forum in which it must respond to alleged breaches of these laws.

IV. THE FRAMEWORK DIRECTIVE AND RIGHTS FOR THE DISABLED WORKER

The deadline for compliance with this directive for each country was December 2, 2003,\textsuperscript{16} but few, if any, have satisfactorily implemented its provisions. Failure to comply with a directive or regulation is a violation of EC law for which the Commission might bring the member state before the Court in Luxembourg. Nonetheless, the Commission has proved to be a patient parent, so no sanctions have been imposed. Indeed, Article 28, Paragraph 2 of the directive expressly provided for an extension of up to three years for compliance with provisions addressing disability and age, and most member states have taken advantage of this grace period.

The directive addresses the "need to take appropriate action for the social and economic integration of elderly and disabled people."\textsuperscript{17} Although "person

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\textsuperscript{14} See Knut Ipen & Volker Epping, Volkerrecht 698 (C.H. Beck ed., 4d ed. 1999) for a discussion of the underlying principles of this agreement, which encompasses workers' health and safety, working conditions, vocational training, protection or children and adolescents, and rights to social security.
\textsuperscript{16} Framework Directive, supra note 2, art. 18.
\textsuperscript{17} Id. art. 6. The Framework Directive has been referred to as the "Article 13 Directive," in reference to the anti-discrimination provision in the Treaty of Amsterdam.
with a disability" is not defined, much of the language in the directive is drawn from the Americans with Disabilities Act. The ADA's "reasonable accommodation" provision is mirrored by the directive's call for the "provision of measures to accommodate the needs of disabled people at the workplace" and the "obligation to provide reasonable accommodation for people with disabilities." The ADA's "undue hardship" defense is reflected by the directive's assurance that an employer need not assume a "disproportionate burden" in its accommodation for an applicant or worker's disability. The Framework Directive takes into account costs, organizational resources and possibility of public funding to make any necessary accommodation, and the ADA's "undue hardship" section lists these same factors.

Typical for EC directives, the language is broad rather than particularized, leaving the specifics of implementation to the parliaments of each member state. The method of tracking members' progress in implementation is through a panel of experts, equal in number of member states, with each country having a designated expert in the area of disability law. This panel was created by way of a bidding process, with legal academic institutions' submission of proposals to chair and form the panel. The law faculty at National University of Ireland Galway prevailed, and its current dean, Professor Gerard Quinn, is chair of the panel. After its proposal was selected, Professor Quinn and his assisting faculty from the Galway law faculty then selected the persons to represent each member state.

Currently, there are similar panels on the grounds of gender, sexual orientation, and religion, but none on age. Traditionally, EU member states have not adopted statutory protections against age discrimination. One exception has been Ireland, which has legislation quite different from the United States' Age Discrimination in Employment Act in which protection is afforded to those aged forty and older, and there is no general maximum age for its coverage. Ireland's 1998 Employment Discrimination Act is a comprehensive statute that covers workplace discrimination on nine grounds, including age. The age protection provisions in the Irish statute begin protection at age

24. The author is grateful to Shivaun Quinlivan, Lecturer in Law at NUI Galway, for this explanation. Ms. Quinlivan, who has considerable expertise in the area of disability law, is a member of the group that drafted the proposal selected by the EU to assemble the monitoring panel and a panel participant.
eighteen and end at age sixty-five. Thus, current EC plans are to disband existing panels and replace them with a "super-panel" that will address compliance on all grounds.

The disability panel's most recent meeting was held on November 14, 2003, in Brussels. Until reports from that conference have not yet been filed, particulars will not be available to the general public. However, as an invited guest at this session, the author is permitted to convey general information to serve as some guidance to the American lawyer with business clients who must adhere to domestic laws implementing the Framework Directive.

In general, European disability law experts have aspired to approval of a model of the American statutes addressing legislation for the disabled from a civil rights perspective, contrary to the typical European welfare approach. Generally, the 1997 Treaty of Amsterdam is credited with requiring that the issue of improving opportunities for persons with disabilities be addressed from a human rights, rather than a social law, perspective. The traditional American approach has been advocated for non-discrimination European mandates in general. Moreover, at the panel's November 2003, meeting, comments clearly indicated that the experts viewed the ADA as a model statute. This was primarily because legislation vested protected persons with enforceable rights, as had the earlier Civil Rights Act of 1964, particularly, Title VII, with its provisions relevant to the employment setting. Notably, one of the invited speakers at the November 2003, meeting was Robert Bergdorf, an American legal academic who had participated in the drafting of the ADA.

A. Pre-Framework Directive Domestic Legislation

The panel of expert's most recently published report was its Baseline Study of March 2003. One tangent of the EU plan that is common to the United States Congress' approach is the remedial nature of proposed legislation, stressing rights of the individual's merit, rather than following the prior social-medical model based on a "handout" or compensation approach.

27. See, e.g., Gesetz zur Bekämpfung der Arbeitslosigkeit Schwerbehinderter (SchwbBAG) [Law Fighting Unemployment of the Handicapped], v. 29 Sept. 2003 (BGBI. I.S. 1394) (F.R.G) (imposing a civil penalty on a company for its failure to meet a statutory quota of workers who are disabled).
30. EU NETWORK OF INDEPENDENT EXPERTS ON DISABILITY DISCRIMINATION, BASELINE STUDY, SYNTHESIS REPORT, DRAFT #4 (March, 2003) [hereinafter BASELINE STUDY].
Contrary to the United States, three EU countries, Austria\(^{31}\), Germany\(^{32}\), and Finland\(^{33}\), have constitutional provisions that address protections for the disabled. Additionally, several European constitutions insure general social rights without specifying disadvantaged groups\(^{34}\).

As of 2003, five of the then fifteen EU countries had enacted civil legislation for disabled persons in the employment setting: Belgium\(^{35}\), Germany\(^{36}\), Ireland\(^{37}\), Sweden\(^{38}\), and the United Kingdom\(^{39}\). The Austrian Federal Legislature had considered a bill on Equal Treatment of People with Disabilities, but it was rejected on second reading in July 2000. This bill was reintroduced on November 1999; it has not passed the committee stage\(^4\). Portugal's 1989 Basic Law on Prevention, Rehabilitation, and Integration of People with Disabilities Law\(^{41}\) is not regarded as anti-discrimination legislation because of the absence of rights conferred on individuals. Rather, violators are subject to civil penalties. The Netherlands' Bill on Equal Treatment on the Ground of Disability and Chronic Disease\(^{42}\) has been introduced into the Dutch parliament, but has not been enacted. Belgium's Legislature has taken the approach of deferring to the major collective bargaining agreement. A collective agreement which evolved

31. BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] art. 7(1) (Aus.).
32. GRUNDGESETZ [GG] [Constitution] art. 3 (3) (F.R.G.).
33. SUOMEN PERUSTUSLAKI [Constitution] ch. 2 § 6(2) (1999) (Fin.).
34. See, e.g., COSTITUZIONE [Constitution] art. 3 (2) (1947) (Italy); CONSTITUIÇÃO [Constitution] art. 71 (1997) (Port.); STATUUT NED. [Constitution] ch. 1 art. 22 (2000) (Neth.). Similarly, article 21, subsections 2 and 3, of the Greek Constitution insure that the state will "care for" disabled veterans. SYNTAGMA [SYNTAGMA] [Constitution] art. 21(2), (3) (2001) (Greece).
35. Convention Collective de Travail No. 38 du 6 December 1983 Concernant le Recrutement et la Selection de Travailleurs [Collective Agreement No. 38 of December 6, 1983 Concerning the Recruitment and the Selection of Workers], ch. 3 (Belg.) [hereinafter Collective Agreement].
39. Disability Discrimination Act, 1995, c. 50 (Eng.).
40. Gleichstellungsgesetz [EQUAL TREATMENT OF PEOPLE WITH DISABILITIES] has been proposed to amend the law Behinderteneinstellungsgesetz (BeinstG) [Law Concerning the Employment of Handicapped Workers], art. 2 § 8A (1969) (Aus.).
41. Lei Fundamental para a Prevenção e Para a Reabilitação e Integração das Pessoas com uma Inaptidão [Basic Law for the Prevention and for the Rehabilitation and Integration of People with a Disability], Law No. 9/89 of May 2, 1989, (Port.).
42. Wet gelijke behandeling op ground van handicap van chronische ziekte [The Netherlands' Bill on Equal Treatment on the Ground of Disability and Chronic Disease] (Neth.) (proposed) [hereinafter Disability & Chronic Disease Equal Treatment Bill).
into statutory status\(^{43}\) prohibits workplace discrimination, a manner often used in Europe's smaller countries.\(^{44}\)

Different from the American approach is the enactment by several EU states of criminal laws prohibiting discrimination on the ground of disability. Finland,\(^{45}\) France,\(^{46}\) Luxembourg,\(^{47}\) and Spain\(^{48}\) are examples of this method. It is submitted that the higher burden of proof, the absence of remedial measures for the person who has sustained a loss, and the effect only upon intentional discrimination would limit any utility of this approach.

Italian law does permit an employer to request governmental reimbursement for costs incurred in making "adjustments," or "accommodations," for a worker's disability.\(^{49}\) In Luxembourg, a judicial decision rather than statutory law requires that a business make those alterations or accommodations which, in a physician's opinion, are necessary for an individual to perform the duties of a position.\(^{50}\) Dutch law imposes on an employer a duty to provide "reasonable accommodations" unless it would result in a "disproportionate burden,"\(^{51}\) a clause similar, but not identical, to the ADA's "undue hardship" provision. The Netherlands' "disproportionate burden" appears to weigh the interests of the disabled worker against the monetary cost to the employer, while the "undue hardship" concept imposes a significant burden of proof on the employer to show that its hardship would be an "undue," or inequitable, one without regard to the degree of the worker's disability.

Austria, Finland, France, Greece, Italy, the Netherlands, Luxembourg, and Spain are several European countries that have comprehensive anti-discrimination legislation, but some do not expressly include disability among the

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44. A comment about Belgium's unique legal structure is instructive: Although smaller than the American state of South Carolina, Belgium has two official languages, French and Dutch/Flemish, and four distinct governmental regions, each with a different official language: Brussels (French and Dutch/Flemish), Flanders (Dutch/Flemish), Wallonia (French), and eastern Belgium (German). B-2 *WORLD BOOK ENCYCLOPEDIA* 227 (2003). Since much legislative authority is subordinated to the regional level, it will be necessary for the federal law-making body in Belgium to enact a comprehensive statute in order to comply with the Framework Directive. Baseline Study, *supra* note 30, at 28-31.
45. *RIKOSLAKI [PENAL CODE]* ch. 11, 9 § Syrjintä (578/1995) (Fin.). This is a criminal provision for discrimination in general, with the underlying assumption that this includes the ground of disability. *See id.*
46. *CODE PÉNAL [C. PÉN.] [PENAL CODE]* art. 225-1 (Fr).
47. *CODE PÉNAL [PENAL CODE]* arts. 454, 455, 456, 457(1)-(2), (Lux.).
48. *CÓDIGO PENAL [C.P.] [PENAL CODE]* (Spain).
49. Note that there is no positive obligation on the part of the employer to provide such accommodation. *See Baseline Study, supra* note 30, at 53.
51. Disability & Chronic Disease Equal Treatment Bill, *supra* note 42, art. 2.
prohibited grounds. This is the current status in Austria,\(^{52}\) Finland,\(^{53}\) France,\(^{54}\) Greece,\(^{55}\) Italy,\(^{56}\) the Netherlands,\(^{57}\) and Spain.\(^{58}\) Denmark has a Disability Ombudsman,\(^{59}\) but no statutory provision prohibiting discrimination on the ground of disability.

**B. Panel of Expert’s Areas of Focus**

The panel is focusing on three areas and how they intersect: 1) the “reasonable accommodation” requirement, the express working of the ADA; 2) pre-employment physical examinations, also addressed in the ADA;\(^{60}\) and, 3) health and safety.\(^{61}\) The inclusion of this third area into anti-workplace discrimination law is typical in Europe, contrary to the United States’ separation of such accident and/or disease preventive legislation into statutes such as the Occupational Safety and Health Act.\(^{62}\)

The Irish experience with the “reasonable accommodation” expectation is of interest. The bill that preceded the current anti-discrimination law (the 1998 Employment Equality Act) was a 1996 bill. In parliamentary forms of government, the prime minister is a member of the legislature. In order to become law, after passage by the law-making body, a bill must be signed by the president, in the case of Ireland or monarch, in the case of Denmark, Luxembourg, Sweden, and the United Kingdom. Then President Mary Robinson, a former barrister, had misgivings about the constitutionality of this provision of the bill as possibly infringing upon employers’ property rights in Articles 40.3.2 and 43. In her referral action to the Supreme Court of Ireland, the Court agreed.\(^{63}\) Consequently, the bill ultimately adopted into law in 1998 requires the employer

\(^{52}\) See, e.g., BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] art. 7(1) (Aus.); see also GLEICHSTELLUNGSGESETZ, supra note 40, and accompanying text (explaining Austria’s general working rights statute).


\(^{54}\) CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. 122-45 (Fr.).

\(^{55}\) ASTIKOS KODIX (ASTIKOS KODIX) [CIVIL CODE] §§ 281/188 & 666 (Greece).

\(^{56}\) See COSTITUZIONE [Constitution] art. 3, § 2 (1947).

\(^{57}\) Algemeine Wet Gelijk Behandeling [General Equal Treatment Act] (1.9.94) (Neth.).

\(^{58}\) Estatuto de los Trabajadores [Spanish Statute on Workers’ Rights, Royal Legislative Decree] (B.O.E., 1995).

\(^{59}\) Deense Arbeidsongeschiktheid Politiek Gelijkbehandelingen Door de Dialoog [Danish Disability Policy Equal Opportunities through Dialogue] (April 2002) (Den.).


\(^{61}\) Email from Olivier de Schutter, panel expert, Belgium, to panel participants (November 13, 2003) (on file with author).


to bear only a "nominal cost."\textsuperscript{64} Note the distinction in this regard between current Irish law and the ADA. Although the United States Supreme Court has determined that the Title VII\textsuperscript{65} requirement for an employer to make "reasonable accommodation" for a worker's religious practices and/or belief reaches on the least extent necessary, \textit{i.e., de minimus},\textsuperscript{66} the United States Congress expressly rejected this lower standard when it enacted the ADA.\textsuperscript{67} This peculiarity in Irish statutory law must change in order to comply with the Framework Directive, so the necessary accommodation for a worker's or job applicant's disability will approximate that required under the ADA.

Olivier De Schutter, the Belgian panel expert, is the overseer of researching domestic laws that might address mandatory pre-employment medical examinations. He has classified the purpose of such examinations as two-fold: first, protective of the worker himself and of his colleagues similar to the ADA's "direct-threat" defense;\textsuperscript{68} and, second, "selective" rationale of using the examination results to void economic costs on the employer because of a job applicant's impairment or condition. The ADA permits pre-employment medical examinations provided they are carried out after a job offer has been made, they are consistently required of all workers in the same job category, and they relate to actual duties required by one in this position.\textsuperscript{69}

The sense of the experts is that any permissible pre-employment medical examinations must be limited to the first purpose and that any "selective" testing is to be prohibited. This inquiry into the purpose is a distinction from the ADA, provided only that the outward characteristics required by the statute are met.

V. HOSTILE ENVIRONMENT, HARASSMENT, AND DISPARATE TREATMENT/IMPACT ENVIRONMENT

Many European Union countries have been particularly harsh on workplace harassment. Although to date, with the exception of Sweden,\textsuperscript{70} legislative

\begin{itemize}
\item \textsuperscript{64} Employment Equality Act, No. 21 § 16 (Ir.).
\item \textsuperscript{65} 42 U.S.C. §§ 2000(e)(1)–(4) (2004).
\item \textsuperscript{66} Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).
\item \textsuperscript{68} 42 U.S.C. §§ 12101(b)(4), 12113(b) (2004). Interestingly, in \textit{Chevron U.S.A. Inc. v. Echazabal}, 536 U.S. 73 (2002), the Supreme Court approved a regulation that extended such protection to the worker himself, a more paternalistic stance than that reflected in the statutory language.
\item \textsuperscript{69} §§ 12112(d)(3)(A)-(B).
\item \textsuperscript{70} See, \textit{e.g.}, Convention for the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13 (entered into force September 3, 1981) (The Convention provided sweeping protection for women, and was signed by more than 100 countries, including most EU member states). Interestingly, the United States is not a signatory to this U.N. treaty. \textit{Id.} An example of a European domestic statute protecting women from workplace discrimination and harassment is the Employment Equality Act, No. 21 § 15 (Ir.). Similarly, section 32 of the Employment Equality Act prohibits racial harassment. \textit{Id.}
\end{itemize}
proscriptions against such activity have been on grounds of race and sex.\textsuperscript{71} Mention should be made of an employment setting tort being increasingly recognized by courts in Europe—"mobbing." This concept makes unlawful workplace harassment for any reason, whether or not related to the worker’s membership in any express group.\textsuperscript{72} The Framework Directive expressly forbids harassment, defined as "unwanted conduct . . . with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating, or offensive environment."\textsuperscript{73}

Several of the federal appellate courts in the United States have extended the principle that harassment is unlawful under the ADA. For example, the Fourth Circuit held that hostile work environment harassment claims are actionable under the ADA in Fox v. General Motors.\textsuperscript{74} The Fifth Circuit, in Flowers v. Southern Regional Physician Services,\textsuperscript{75} and the Eighth Circuit, in Shaver v. Independent Stave Co.\textsuperscript{76} have also held such claims are actionable.

American anti-discrimination legislation does not expressly refer to disparate impact discrimination as unlawful—\textit{i.e.}, an employer’s actions which, although not intended to be discriminatory, nonetheless have that effect. The United States Supreme Court first held disparate impact discrimination to be unlawful under Title VII in Griggs v. Duke Power\textsuperscript{77} and by dictum has extended this doctrine to ADA claims.\textsuperscript{78} European terminology for disparate treatment and disparate impact claims are, "direct" and "indirect" discrimination respectively. The Framework Directive expressly states that both are unlawful.\textsuperscript{79} Presumably, the principles of "hostile environment" and "direct versus indirect" discrimination are examples of the EU’s following the lead of American federal law that predated the European versions.

\textsuperscript{71} Prohibition of Discrimination in Working Life of People with Disabilities Act, art. 132 (Swed.) (Section 9 expressly prohibits harassment on the ground of disability).


\textsuperscript{74} Fox v. General Motors Co., 247 F.3d 169, 175 (4th Cir. 2001).

\textsuperscript{75} Flowers v. Southern Regional Physicians, Inc., 247 F.3d 229, 232 (5th Cir. 2001).

\textsuperscript{76} Shaver v. Independent Shaver Co., 350 F.3d 716, 719 (8th Cir. 2003).


\textsuperscript{78} See Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (holding that the lower court wrongfully applied disparate impact analysis to a claim, which properly should have been decided under the disparate treatment principle.) The Court inferred that both disparate treatment and disparate impact were appropriate in ADA claims. \textit{Id.}

\textsuperscript{79} Framework Directive, \textit{supra} note 2, art. 2 \textsection 1, 3.
VI. ASPECTS OF THE ADA THE PANEL OF EXPERTS APPEARS DESIROUS OF AVOIDING

While looking to the ADA as the ideal statute, those concerned with compliance with the Framework Directive want to avoid any legislative language that might be an invitation to European courts to construe the laws similar to some United States Supreme Court decisions which would restricting the directive’s rights-conferring purpose.

One example is the *Sutton* triad of decisions in 1999. The United States Supreme Court held that one is not a “person with a disability” under the statute if his impairment is correctable. For example, the plaintiffs in *Sutton* were twin sisters whose applications for positions as pilots with defendant airline were rejected because of their eyesight. Although they both had 20/200 vision, prescribed eyeglasses corrected both to 20/20. This resulted in the quixotic situation in which they proved discrimination because of an alleged disability, but they actually were not disabled. The Court did not accept the plaintiffs’ argument that they were “perceived” as persons with a disability, which would have qualified them under the third prong of the statute. Interesting, while the Framework Directive does not expressly require protection of persons because they have a history of a disability or are regarded by others as being disabled, or because of their association with a person with a disability, experts have determined that such protection lies within its spirit.

Another example of a result to be avoided is that in *U.S. Airways v. Barnett*, in which the United States Supreme Court decided that an accommodation which encroached upon another worker’s seniority rights would be unreasonable. In Europe, seniority generally is viewed as vesting one with retirement security from the state, although some countries, such as Germany, give longer-serving workers priority in the event layoffs are necessary.

81. *Sutton* and *Murphy* were decided by like votes of 7-2 because of two distinguishing facts, which Justices Breyer and Stevens viewed as material. *Sutton*, 527 U.S. at 495 (Stevens, J., dissenting); *Murphy*, 527 U.S. at 525 (Stevens, J., dissenting). *Albertson* was decided unanimously because of distinguishing facts. Albertson’s, Inc., 527 U.S. at 577.
83. The ADA extends protection to persons who have been subjected to discrimination because of their association with a person with a disability. § 12112(b)(4).
84. See the rationale in Baseline Study, supra note 30, at 46.
86. German law, for example, requires that workers’ seniority (in addition to age and number of dependents) be taken into account when layoffs become necessary. For a good discussion of this principle, see Manfred Weiss, *The Role of Neutrals in the Resolution of Labor Disputes in the Federal Republic of Germany*, 10 COMP. LAB. L.J. 339, 352 (1988).
A final United States Supreme Court opinion repugnant to the intent of the directive is *Toyota Manufacturing, Kentucky v. Williams.* Here, the Court limited protection to those whose impairments limit their performance of tasks of a central importance to the daily lives of most people. The plaintiff, who suffered from carpal tunnel syndrome, was not a person with a disability under this principle because her condition did not preclude her from performing a wide range of activities.

This author has observed from several legal work assignments in Germany, Austria, Northern Ireland, and Ireland that the general European concept of what constitutes a disability is considerably broader than the American one, whether in anti-discrimination or social security laws. The legal protection for disabled workers and/or job applicants will affect the pre-EU enlargement estimation of some thirty-seven million persons with disabilities, a figure that is presumably considerably greater after the addition of the ten new member states.

Finally, the American company doing business in Europe should be aware of the usual absence of a legislative requirement that coverage requires a minimum number of employees, such as the fifteen specified in Title VII and the ADA. Generally, in Europe an employer is required to comply with employment legislation regardless of the size of its work force.

VII. CONCLUSION

The integration of social policies into the European Communities originally founded on economic principles and the EC’s express adoption of the European Convention on Human Rights place additional burdens on companies with regard to the employer-employee relationship. The European Commission’s emphasis on rights for the disabled has essentially viewed the ADA as its basic model, but the greater focus on human rights relative to American law and the social state reality of all EU member states predictably will impose more particularized duties on the employer in Europe.

The paternalism of the Council of Europe has become an adopted sibling to European Union law in general and more specifically, to legal obligations to

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89. 1 EUROPEAN YEAR OF PERSONS WITH DISABILITIES (EYPD) NEWSLETTER (Summer, 2003).
persons with disabilities. The words may be similar, indeed, often identical, to American federal law, but the meanings to be inferred by the European Commission and the courts is likely to have considerable more breadth.

The American company expanding into Europe must be cognizant of this substantial human rights element in its dealings with employees. A seismic shift can be expected in post-Framework Directive domestic law implementation regarding the extent of protection required for the disabled in the workplace.
THE U.S.-CANADA SAFE THIRD COUNTRY AGREEMENT: SLAMMING THE DOOR ON REFUGEES

Cara D. Cutler*

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I. INTRODUCTION

The United States and Canada are nations comprised predominately of immigrants and their recent descendants. Many fled persecution in their homelands and arrived in the United States and Canada with the hope of seeking refuge. Unfortunately, in times of crisis, people in both countries have been quick to forget that they or their recent ancestors were immigrants that were fortunate enough to get inside one of the two countries’ borders. Both nations have repeatedly forbidden people attempting to seek protection within to enter. For example, during World War Two, Canada and the United States largely refused to admit Jewish refugees seeking protection within their borders. Specifically, in Canada, the slogan regarding its Jewish refugee policy during the period was, “None is Too Many.” This was the answer given by a Canadian official when asked how many Jewish refugees Canada would take.1 Similarly, when the S.S. St. Louis carrying Jewish emigrants fleeing Germany was not allowed to land in Cuba, the U.S. government also refused to allow the vessel to dock in the United States.2 The S.S. St. Louis was forced to return to Europe. There, Holland, France, Great Britain and Belgium accepted many of the German-Jewish emigrants as refugees; unfortunately, many of the refugees’ safe havens soon became occupied by the Nazi regime.3

On August 30, 2002, the United States and Canada completed and initialed a final draft of the U.S.-Canada Safe Third Country Agreement, a bilateral agreement generally requiring asylum seekers to lodge their claims in their “state of first arrival,” and not allowing them to apply subsequently or simultaneously in the second of the two states.4 The two countries signed the Agreement on December 5, 2002.5 The Agreement was drafted to promote national security in the two countries, to defend the integrity of their asylum systems, and to improve their ability to control immigration.6

3. See Rosenberg, supra note 2.
Unfortunately, as with the policies of the United States and Canada towards Jewish refugees during the Second World War, if legislation implementing the U.S.-Canada Safe Third Country Agreement is approved by the Parliament of Canada and the U.S. Congress, refugees will be put at an increased risk.\(^7\) Refugees deserving of a grant of asylum under the laws of one of the two countries but who first apply in the second country will be forced to return to the persecuting country.\(^8\) This will happen most often if a refugee first arrived in the United States, was required to apply for asylum in the United States only, and then was forced to return to the persecuting country. This is so because Canada’s asylum laws are more asylee-friendly than those of the United States.

This essay argues that the passage of implementation legislation fully enacting the U.S.-Canada Safe Third Country Agreement would result in the violation of international legal obligations by the United States and Canada, the violation of the two countries’ moral obligations to refugees, and the ironic effect of potentially harming national security in the United States and Canada. Part II will provide an overview of the Agreement, including background on the Agreement, its objectives, and its application. Part III suggests that the United States and Canadian governments have international legal requirements, moral obligations towards protecting people deserving asylum in their countries, and obligations to their own people to protect national security that will not be undermined by the implementation of the Agreement. This note will conclude by arguing that ideally legislation implementing the Safe Third Country Agreement should not be implemented at all, or in the more feasible alternative, implementation legislation should include greater protections for refugees’ safety, and should also include a well-defined plan for bureaucratically administering the transition, in order to comply with international legal and moral obligations, and to adequately meet the Agreement’s own objective of promoting national security.


II. THE U.S.-CANADA SAFE THIRD COUNTRY AGREEMENT: A BILATERAL MEANS OF SOLVING COMMON PROBLEMS?

On August 30, 2002, the final draft of the U.S.-Canada Safe Third Country Agreement, was initialed by the United States and Canada. The Agreement was solidified on December 5, 2002, when both countries formally signed the final draft. The main objectives of the Agreement are the improvement of national security, the improvement of immigration control, and the preservation of the integrity of the asylum systems of the United States and Canada.9 The Agreement seeks to do this by establishing a "safe third country" relationship between the United States and Canada for the adjudication of asylum claims. A safe third country relationship provides that a refugee may only have a claim for asylum adjudicated in the first country in which the person arrives, and cannot have the claim adjudicated in the country of last presence. In other words, if an asylum applicant were to pass through the United States and then claim asylum in Canada, the responsibility for determining the refugee status claim would lie with the United States and not Canada.

A. Background on the Agreement

The notion of a safe third country agreement is not new. A series of western European nations signed the Schengen Convention, the first safe third country agreement in 1985, and implemented it in 1990. Since then, the number of nations party to safe third country agreements has increased. The possibility of a safe third country agreement between the United States and Canada had been discussed as early as 1995.10 The United States responded to such discussions by implementing section 604(a) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, which, in general, legalized the use of safe third country agreements in American law.11 At that time, Canada was reluctant to legalize the use of safe third country agreements, due to concerns that American and Canadian asylum law are incongruent, brought to light in part by "vigorous objections" of scholars and bad publicity from international human rights groups.12 In 1998, these talks ceased. In June

12. See Immigration Bills Pass House and Senate–Refugee Cap Dropped; Summary Exclusion in, Then Out; Limits on Legal Family Immigration Dropped; Asylum Provisions Relaxed, Vol. XVII, No. 3
2002, however, as part of the Immigration and Refugee Protection Act, Canada implemented a statutory provision allowing for safe third country agreements.\textsuperscript{13}

The talks between the United States and Canada which resulted in the signing of the Agreement on December 2, 2002 resumed largely in response to the terrorist attacks of September 11, 2001. The terrorist attacks mobilized a movement within both countries for bilateral cooperation in improving immigration control, in improving national security, and in preserving the integrity of the asylum systems of the United States and Canada.\textsuperscript{14} The Agreement was signed as a result of the belief that such a document would direct politician’s efforts to satisfy the objectives of the recent bilateral cooperation between the United States and Canada.

B. Purposes of the Agreement

1. For the Preservation of the Integrity of the Asylum Systems of the U. S. and Canada

Proponents of the Agreement argue that its implementation is necessary for preservation of the integrity of the asylum systems of the United States and Canada. This argument is based on the idea that people who apply for asylum in both countries are "usually illegal aliens [that] have broken the immigration law and have no other reason [besides their eligibility for asylum] to be admitted into the country."\textsuperscript{15} In other words, given the fact that many asylum-seekers would not be allowed to remain in the United States but for a grant of asylum, it is argued that grants of asylum to such people "represents a nation's sacrifice of part of its sovereignty over immigration for humanitarian reasons."\textsuperscript{16} It is further argued that, "if people who could have applied for protection elsewhere are allowed to enter into the asylum system, the curbs on the nation's sovereignty implicit in asylum can no longer be justified."\textsuperscript{17} Based on these beliefs about the rationale behind the asylum systems in the United States and Canada and limitations on these systems, it is believed that implementation of the U.S.-Canada Safe Third Country Agreement would allow the preservation

\textsuperscript{13} REFUGEE REP. (Mar./Apr. 1996); U.S., Canada Temporarily Suspend Asylum Agreement Negotiations, 73 INTERPRETER RELEASES 724 – 25 (May 24, 1996); DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 454 (3d ed. 1999).

\textsuperscript{14} Id.

\textsuperscript{15} Id.

\textsuperscript{16} Id.

\textsuperscript{17} Id.
of the integrity of the asylum systems of the two countries by reducing the abuse of their respective asylum systems.\textsuperscript{18}

2. For National Security

Proponents of the Agreement argue that its implementation is necessary for national security, in part because it will improve management of the vast U.S.-Canada border.\textsuperscript{19} It is argued that, "[a] better-managed asylum system resulting from the incorporation of the safe third country principle would also yield security improvements."\textsuperscript{20} As an example, it has been noted that, "[s]ix of the 48 foreign-born al Qaeda operatives who committed crimes in the United States over the past decades were applicants for asylum at some point, three of them at the time they took part in terrorism."\textsuperscript{21}

3. For Immigration Control

In addition to the goals of preserving the integrity of the asylum system and improving national security, proponents of the Agreement further argue that the U.S.-Canada Safe Third Country Agreement would increase the control of the American and Canadian governments over immigration. It is believed that, "[o]nce the option of transiting the U.S. in order to apply for asylum in Canada is eliminated, some significant number of those whose objective was Canada will choose not to come to the U.S. in the first place, opting instead to apply for asylum in an EU country."\textsuperscript{22} Speculation exists that there is a good chance that in the short run there will be an increase in the number of asylum claims made in the United States but that the Agreement will still help to control immigration in the long run as the Agreement can be "seen as a first step in reaching similar deals with other safe countries transited by asylum seekers, notably the member states of the European Union."\textsuperscript{23}


\textsuperscript{19} Id.

\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Krikorian Testimony, supra note 6.
C. Application of the Agreement

1. The Provisions of the Agreement

The Agreement states that, "[t]he Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim." There are, however, exceptions to this rule. In five enumerated instances, the responsibility for determining the "refugee status claim...shall rest with the Party of the receiving country, and not the Party of the country of last presence." These instances are:

1) When the claimant "[h]as in the territory of the receiving Party at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party's territory", 26

2) "Has in the territory of the receiving Party at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party's refugee status determination system and has such a claim pending", 27

3) "Is an unaccompanied minor", 28

4) "Arrived in the territory of the receiving Party: [w]ith a validly issued visa or other valid admission document, other than for transit, issued by the receiving Party", 29

6) Or "[a]rrived in the territory of the receiving Party [and was not] required to obtain a visa by only the receiving Party." 30

2. Scenarios In Which the Agreement Applies

From this, it is clear that the Agreement will "generally require asylum-seekers to make their refugee claims in the first of the two countries entered,


25. Id. art. 4, § 2.

26. Id.

27. Id.

28. Id.


30. Id.
regardless of their desired destination." It is also clear that there are six enumerated exceptions to this general rule. But, in what scenarios will the Agreement, if implemented, actually have an effect?

First, the Agreement will result in people attempting to make claims at American or Canadian land borders that do not fall into one of the five enumerated instances of exception being refused entry. Second, the Agreement only relates to people making claims at land borders, meaning the physical geographical border of a country. Therefore, asylum-seekers that "manage to cross the border (likely in an irregular manner) and make a claim inland will not be affected." Asylum-seekers lodging claims inland are exempt from the Agreement, as it only applies to land borders, and therefore can theoretically apply in both countries.

Third, the Agreement will impact the large number of people who fly into one country and then apply for asylum at the second country's land border, having never attempted to apply for asylum in the first country. This is particularly common when asylum-seekers come from countries that do not offer direct flights to Canada. These asylum-seekers fly to the United States, and then travel to Canada by land and apply for asylum. Such people will now be forced to apply for asylum only in their "country of first presence," which is typically the United States. Lastly, the Agreement will not impact people applying at airport ports of entry. Therefore, if traveling on a connecting flight from one of the two countries to the other, the traveler will be able to apply for asylum in the second country.

III. CONSEQUENCES OF IMPLEMENTATION: CAUSING MORE HARM THAN GOOD?

While the goals of the United States and Canada may include improving national security and immigration control, and preserving the integrity of the

asylum systems of the two countries, the U.S.-Canada Safe Third Country Agreement has serious flaws. These flaws are so great that implementation of the Agreement as it stands would result in violations of international law and moral obligations, and would endanger the national security of both the United States and Canada.

A. Violating Requirements of International Law

1. Asylum in International Law

In 1950, the United Nations General Assembly adopted the Statute of the United Nations High Commissioner on Refugees, which created the Office of the United Nations Commissioner for Refugees (UNHCR). The statute states that the UNHCR has two primary functions; "the functions of UNHCR encompass 'providing international protection' and 'seeking permanent solutions' to the problems of refugees by way of voluntary repatriation or assimilation in new national communities." In 1951, the United Nations adopted the Convention Relating to the Status of Refugees. The Convention deals with protection of the rights of refugees within member countries, the Convention does not, however, require any nation to admit overseas refugees.

The Protocol Relating to the Status of Refugees was adopted by the United Nations in 1967, mainly to remove a stipulation found in the 1951 Convention, which "limited the definition of 'refugee' to those who had fled as a result of events occurring before January 1, 1951." The United States acceded to the 1967 Protocol, and as a part of that decision, accepted the 1951 Convention. The Protocol mandates: "no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of [one of the five enumerated grounds], race, religion, nationality, membership of a particular social group or political opinion." In other words, it requires that member countries do not

38. LEGOMSKY, supra note 10, at 858 (citing GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 129-31 (1983)).
40. LEGOMSKY, supra note 10, at 874.
41. Id. at 861.
43. See Protocol Relating to the Status of Refugees, supra note 42, art. 33.
expel or return a refugee to a place in which he or she will be persecuted. While refoulement of a refugee claimant to a nation where his life or freedom will be threatened based on one of the 1967 Protocol's five enumerated grounds violates the Protocol, it remains unclear whether a country may remove an applicant to a third country.

2. Can Safe Third Country Agreements Comply With International Law?

The Refugee Convention and 1967 Protocol do not explicitly prohibit the use of safe third country agreements. The only requirement under Article 33 of the Refugee Convention and the Protocol Relating to the Status of Refugees is that a country not refoul, or return, a refugee to another country in which he or she would be persecuted under one of the five grounds enumerated in the 1967 Protocol. Indeed, none of the numerous cases of the European Court of Human Rights that discuss the use of safe third country agreements in Europe or international obligations related to asylum, directly question the legality of safe third country agreements. This allows room for expelling an asylum-seeker to any country other than one in which he would be persecuted on account of one of the five enumerated grounds. Under such an argument, a person could be expelled to any country in which the person would be "safe." The problem with such an argument is determining when an asylum-seeker would be safe. Can a country party to the 1967 Protocol assume that because another country is also party to the 1967 Protocol, and has signed a safe third country with the first country, that the second country is safe? Does this mean that a country sharing a safe third country agreement with another country is presumed to be a safe country for any asylum-seeker from any group, regardless of differences in interpretation of the obligations arising from the 1951 Convention and 1967 Protocol between countries? Does this mean that no form of adjudication in the country in which the asylum-seeker requests asylum is required, so long as the asylum-seeker is returned to another country party to a safe third country agreement?

The danger that arises from the use of safe third country agreements is that by removing a refugee to a state party to a safe third country agreement, the refugee may be ejected after returning to the safe country. This type of action

44. Chahal v. United Kingdom comes closest to questioning the legality of safe third country agreements, by stating that "states are...bound...not to send a person to a country where he faces persecution or to one from which he risks being sent to such a country."

23 Eur. Ct. H.R. 413, 489 (1997). Still, Chahal, does not address the question of whether safe third country agreements are international legal violations per se. Id. On the contrary, the Chahal decision, goes on to explain that as a result of international legal obligations, "European nations ... adopt the practice of returning asylum seekers either to a country through which they have transited in order to travel to the country where they are seeking asylum or else to a 'safe third country.'" Id.
is clearly prohibited by Article 33 of the Refugee Convention. A country is not necessarily in compliance with the non-refoulement requirement of Article 33 merely because it abstains from returning an asylum-seeker to the country from which he fled, and then allows that country to make the final decision regarding the refugee’s return to the country of alleged persecution. This process is also known as indirect return.

The UNHCR has the “duty of supervising the application of” the Refugee Convention and the Protocol Relating to the Status of Refugees. The UNHCR has criticized the use of safe third country agreements by Refugee Convention and Protocol member states that violate the non-refoulement obligation of the Convention. In its 1999 General Conclusion, the UNHCR Executive Committee stated that, “policies such as those initiated by the EU, based on notions of ‘safe country of origin’ and ‘safe third country’ lack, in practice, the necessary safeguards to ensure that individuals are not refouled.”

In other words, indirect refoulement is prohibited by Article 33. As defined previously, indirect refoulement occurs when a state returns a refugee to a third state, which is not the state of origin, where the refugee would be at risk of further persecution, or even at risk of being sent from that state to the country of origin.

Non-refoulement is “the cornerstone of asylum and international refugee law.” To ignore refoulement and the effects it may have on refugees is to defy the core objectives of the Refugee Convention and Protocol. Nonrefoulement “reflects: ‘[t]he concern and commitment of those in need of protection the enjoyment of fundamental human rights including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of the person.’”

The chance of non-refoulement becomes more likely where there is a safe third country agreement. Under a safe third country agreement, an applicant can be removed to a member state, typically “the country of last presence.” Then, the procedures of that country are followed in making a determination regarding eligibility for asylum. Safe third country practices rely on the presumption that the country to which the asylum-seeker is being returned is safe. The practices

45. Protocol Relating to the Status of Refugees, supra note 42, art. 2 § 1; Refugee Convention, supra note 39, art. 35 §1.
46. See Jean Allain, The Jus Cogens Nature of Non-Refoulement, 13 INTL. J. OF REFUGEE L., 533 n. 4 (2001); See also General Conclusion on International Protection, UNHCR Executive Committee Conclusion No. 87 (1999).
47. Id. at 478. In addition to being a treaty obligation, non-refoulement is also recognized as a norm of customary international law and jus cogens. See id. at 480; see also Allain, supra note 46, at 548-59.
also assume that the asylum-seeker has the ability to apply for asylum in the third country. Unfortunately, returning an asylum-seeker to another state participating in a safe third country agreement can result in indirect refoulement when the receiving member returns an asylum-seeker to the country from which he had fled persecution.

3. The Agreement as Written Violates International Law

Although the U.S.-Canada Safe Third Country Agreement was signed after the United States and Canada became party to the Protocol, the Agreement does not lessen the American and Canadian obligations under the Convention and Protocol. This is because the Agreement states that it reaffirms the two countries’ obligations under the Convention and Protocol to provide protection for refugees. The Vienna Convention on the Law of Treaties states that, "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Given the fact that the United States and Canada are still subject to international legal obligations, the UNHCR has raised concerns about the general difficulties of successfully abiding by international legal obligations while also participating in a safe third country agreement, due to the potential for refoulement. Moreover, the agreement at issue is particularly problematic because the United States and Canada interpret their obligations under the Refugee Convention and Protocol differently. As written, the Agreement provides no explicit exception to its application for situations in which an asylum-seeker would be ineligible for asylum in one country but would be protected from refoulement in the other country.

UNHCR addresses concerns about the fact that under the U.S.-Canada Safe Third Country Agreement an asylum-seeker may be ineligible in one of the two countries but eligible in the other, apply in the country of ineligibility and therefore be sent back to the country of alleged persecution. "As a result [such asylum-seekers] may be subject to refoulement."

UNHCR notes that one circumstance in which this issue may arise is in relation to statutory bars on eligibility for asylum. The UNHCR has expressed concern that such bars are contrary to international law. "Those at issue include the U.S. bar for failure to meet a filing deadline and criminal and affiliation bars

51. Id. art. 31, § 2.
52. Article 6 of the agreement allows some wiggle room, through its allowance of the use of discretion. Id. art. 6.
53. UNHCR Comments, supra note 8.
54. Id.
in both countries that are broad and automatic in nature."\textsuperscript{55} UNHCR explains that, "refugee claimants subject to a US statutory bar that has no equivalent under Canadian law, and vice versa, may be required under the Agreement to make a claim in a jurisdiction where they would be ineligible for refugee protection."\textsuperscript{56} As a result of these statutory bars, cases will arise under the Agreement "where one country would bar an individual access to the asylum procedure or protection from refoulement and the other country would not."\textsuperscript{57}

UNHCR specifically criticizes elements of U.S. law that could result in refoulement of asylum-seekers who may not be subject to refoulement in Canada. UNHCR has raised concerns that such elements of U.S. law may be contrary to international law. If the U.S.-Canada Safe Third Country Agreement is implemented, Canada’s adherence to its international legal obligations will effectively be gutted by default, due to cases in which the United States is the "country of last presence" and decides cases in its jurisdiction under U.S. laws that are contrary to international legal obligations. For example, UNHCR explains that U.S. law may violate international law through its use of expedited removal procedures. Under current U.S. law, ‘arriving aliens’ with improper travel documents are placed in expedited removal proceedings. UNHCR has expressed concerns about how this expedited removal process functions, given the Office’s view of the need for greater procedural guarantees to ensure that \textit{bona fide} refugees are not inadvertently removed to a country of feared persecution (refoulement).\textsuperscript{58}

B. Ignoring Moral Obligations

In addition to violating international law, the Agreement is contrary to the moral obligations of Canada and the United States. In response to the mass genocide of Jewish people who were denied refuge during World War Two, "there has been a broad effort...to comply with the United Nations Convention within their own domestic refugee law" by states party to the Refugee Convention and Protocol.\textsuperscript{59} Specifically, in the United States since 1947, "the basic policy has remained the same with U.S. immigration law -- to provide a safe haven for homeless refugees."\textsuperscript{60} This is particularly significant as the policy

\textsuperscript{55} Id.

\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} UNHCR Comments, \textit{supra} note 8.


\textsuperscript{60} Id. (citing Stevic, 467 U.S. at 415).
was implemented prior to the United States becoming party to any international agreements regarding refugees. Rather, it arose out of moral obligation.

In Canada, in 1971, a "policy of multi-cultureness" was implemented. Additionally, through The Immigration Act of 1976, a priority system for processing immigrant visas was implemented. The Immigration Act of 1976, "explicitly affirmed the fundamental objectives of Canadian immigration laws, including family reunification, non-discrimination, concern for refugees and the promotion of Canada's demographic, economic and cultural goals." Under the priority system, along with applicants holding family-based visas, "Convention Refugees and the displaced and persecuted (humanitarian category)" are in the first priority group.

C. Harming National Security

Although one of the primary goals of the U.S.-Canada Safe Third Country Agreement is to improve national security, it may, in fact, harm national security. Relatedly, the Agreement could result in increased disorder at the border and increased bureaucratic hassle. Implementation by the United States and Canada would result in a transition period, creating the potential for the additional problem of having disorder during the transition. This could have the ironic effect of harming national security in both nations. Amnesty International has addressed this potential problem by stating that a likely ironic result of implementation of the Agreement would be the undermining of, "orderly and secure procedures at the border. When that door is closed, desperate refugees will try to get across irregularly, putting themselves in the hands of traffickers and becoming victimized yet again."

62. Id. (citing Immigration Act 1976, R.S.C., Ch. 1-2, § 3 (1985) (Can.)).
63. Id. at 61.
65. Press Release, Amnesty International, Amnesty International Warns that new draft Asylum-Seeker Agreement Will Be Bad for Refugees, Bad for United States (Aug. 16, 2002), available at http://www.amnestyusa.org/news/2002/usa08162002.html. (last visited Aug. 7, 2004). Interestingly, The Federation for American Immigration Reform, a conservative, anti-immigration group, also opposes the implementation of the U.S.-Canada Safe Third Country Agreement. Dan Stein, the organization's executive director has predicted that, "People would still be encouraged to try their luck in applying under Canada's lax asylum laws, knowing that even if they were turned away, they would end up in the U.S., rather than home. At that point, they could begin pressing claims to remain here. As in the past, terrorists would be certain to take advantage of a system that is unable to cope with a growing caseload."; Press Release, The
Support for Amnesty International’s prediction that the U.S.-Canada Safe Third Country Agreement would undermine national security at the U.S.-Canada border can be found by turning to the recent exodus to Canada by hundreds of Pakistanis due to a change in U.S. law. This law mandated that Pakistanis over fifteen years of age who are in the United States on visitor, student, or business visas must register with the Immigration and Naturalization Service by March 21, 2003.\textsuperscript{66} Resulting from the implementation of this law, the movement of hundreds of Pakistanis towards Canada led to what \textit{The New York Times} has categorized as a “chaotic exodus.”\textsuperscript{67} This law, which only impacts a small segment of immigrants, has resulted in “jammed land crossings...overwhelming immigration officials and refugee aid groups on both sides of the border.”\textsuperscript{68} Implementation of the U.S.-Canada Safe Third Country Agreement would clearly result in extreme disorder. This disorder would not only bombard American and Canadian officials, but would also have a negative impact on other aspects of American and Canadian society.

Rumors of the U.S.-Canada Safe Third Country Agreement began to increase border traffic before the Agreement was even finalized, when many immigrants thought the border would be closed.\textsuperscript{69} The result was a wave of over 1000 asylum seekers to the one Canadian border crossing alone, from a variety of countries, over the course of just a few weeks.\textsuperscript{70} In 2001, the same border crossing saw 5000 people file asylum applications; in June 2002 alone, approximately 1200 claims were made there.\textsuperscript{71} The Canadian border point of entry could not handle the June 2002 influx smoothly. This large increase in numbers forced immigration officials to work overtime and also forced refugees to camp out at the border crossing.\textsuperscript{72}

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\textsuperscript{67} "In December [2002], the US government added Pakistan to a list of 25 mostly Muslim countries whose men are required to register with the Immigration and Naturalization Service." \textit{Nat'l Public Radio: All Things Considered} (NPR Radio Broadcast Jan. 28, 2003) (transcript on file with ILSA J. INT'L & COMP. L). The use of the Special Registration Program recently came to a close.


\textsuperscript{69} Id.

\textsuperscript{70} Ingrid Peritz & Campbell Clark, \textit{Refugees Jam Border Fearing New Policy: Legislation Taking Effect Today Generates Concern That Canada Plans to Shut Its Doors}, \textit{GLOBE & MAIL}, June 28, 2002, at A8. Additionally, refugees also fled the United States for Canada in the weeks before June 28, 2002, the date on which Canada’s new Immigration and Refugee Protection Act went into effect. Id.

\textsuperscript{71} Sachs, supra note 67.

\textsuperscript{72} Id.
Full implementation of the U.S.-Canada Safe Third Country Agreement would lead to great disorder at the U.S.-Canada border. It would require a "whole new bureaucracy,"\textsuperscript{73} and during the transition to create such a bureaucracy, increased disorder would result.\textsuperscript{74} Perhaps, some of the negative ramifications for national security would lessen with time and increased organization within the system, but the use of smugglers and traffickers would continue even if an efficient bureaucracy were in existence.

IV. OFFERING A SOLUTION

A. Implementing Legislation Should Not be Passed

Legislation implementing the U.S.-Canada Safe Third Country Agreement should not be passed. Both the United States and Canada are obligated to prevent refoulement under international law, specifically under the Refugee Convention and Protocol. Safe third country agreements do not guarantee that this binding obligation will be upheld, as refoulement may still result, due to differences in the interpretations of the Refugee Convention and Protocol by each member state. Canada and the United States also should not pass implementation legislation as the two countries have moral obligations to refugees that would be compromised by increasing chances of refoulement for asylum-seekers. Additionally, if this implementing legislation is passed, it would lead to increased threats to the national security of the United States and Canada. This legislation, if passed, will lead to increased danger for asylum-seekers, increased disorder at the border, and increased bureaucratic hassle.\textsuperscript{75}

Canada's Parliament should be particularly reluctant to approve implementation legislation. Canada provides immigrants with greater protections than the United States, and has affirmatively and consistently focused on complying with international law and self-imposed moral obligations to refugees. For example, Canada has taken a lead among nations by declaring that people in danger of gender-based persecution constitute a social group, and thus are eligible for protection under the Refugee Convention. According to Canadian law, a "social group" is afforded protection under the Refugee Convention. Legislation implementing the U.S.-Canada Safe Third Country Agree-


\textsuperscript{74} The Lawyers Committee For Human Rights, for example, notes that the Agreement will "create new inefficiencies, waste and bureaucracy as the U.S. and Canada each create, staff and maintain new procedures to determine who is and is not barred by the agreement." Lawyers Committee For Human Rights, supra note 64.

\textsuperscript{75} Id.
ment would result in people with legitimate asylum claims being more likely to be sent back to persecution, nullifying Canada's efforts. In addition, Canada should be reluctant to implement the Agreement because such implementation could begin a transgression up a slippery slope. If the U.S.-Canada Safe Third Country Agreement is passed, the United States will likely attempt to make a third safe country agreement with the European Union member-nations. This would mean that after signing the agreement, Canada would be pressured to join more third party agreements.

Canada also should be reluctant to pass implementing legislation, as it will result in Canada frequently having its own asylum laws gutted, and U.S. laws control asylum by default, as U.S. asylum laws are narrower, when claims are to be adjudicated in the United States under the Agreement. 

76. The gross impact that implementation of the Agreement would have on Canada's stance on gender-based asylum and its policy of multi-cultureless is indisputable. Even the Canadian government has openly admitted that the negative treatment of certain groups of asylees would be an inevitable result if the Agreement were to be implemented. The Canadian government has admitted this, despite the fact that such a result is unpopular internationally and among many Canadians. "Even the Canadian Government itself publicly acknowledged the unequal treatment given to refugee claimants in the U.S. In its 'Regulatory Impact Analysis Statement' contained in the Regulations to the Border Agreement, the government recognizes that the Agreement will have discriminatory impact on certain categories of refugee claimants. The Statement admits: 'the proposed regulations will likely have differential impacts by gender and with respect to diversity considerations.'" Canada-U.S. "Safe Third Country" Agreement is Signed but Not Yet Implemented, KAIROS REFUGEE AND MIGRATION PROGRAMME (Mar. 6, 2003), available at http://www.kairocanada.org/e/refugees/safeCountry/index.asp. (last visited Oct. 10, 2004).

77. Krikorian Testimony, supra note 6.

78. In France and Germany, only persecution inflicted on the asylum-seeker by the government itself entitles the applicant to asylum. Catherine Phuong, Persecution by Third Parties and European Harmonization of Asylum Policies, 16 GEO. IMMIGR. L.J. 81, 83 (2001). This means, "those fleeing persecution by one of several rival groups, none of which controls the country, are not entitled to asylum under German [and French] law...[Additionally, no] matter how credible the reports of persecution, if there are multiple sources of persecution and the situation is too anarchic, German courts will conclude that state authority has disintegrated and that, as a consequence, the asylum-seekers are ineligible for asylum." Maryellen Fullerton, Failing the Test: Germany Leads Europe in Dismantling Refugee Protection, 36 TEX. INT'L L.J. 231, 265 (2001). This interpretation has been criticized by the UNHCR, among others. Germany interprets the Convention to an opposite extreme from Canada's interpretation; yet, if the two were a party to a mutual safe third country agreement, Canada would send asylum-seekers who had first been in Germany back there, due to its being deemed a "safe" country. Id.

79. Press Release, Amnesty International, USA/Canada: Open Letter to U.S. and Canadian Government Officials (last visited Aug. 15, 2002), http://www.amnestyusa.org/news/2002/usa08152002.html. Chris McGann, New Agreement May Reduce Number of Asylum Seekers, SEATTLE POST-INTELLIGENCER, May 24, 2003, http://seattlepi.nwsource.com/local/123472_canada24.html (last visited Oct. 5, 2004) [hereinafter New Agreement]. For example, the U.S. requires asylees to demonstrate that they are applying for asylum within one year of entry to the U.S., while Canada does not. In the past, this has meant that those with bona fide asylum claims who have been in the U.S. for less than one year, but are without documents proving that they have been in the U.S. for less than one year, have been unable to earn grants of asylum in the U.S.; they have, however, then been able to go to Canada and successfully assert asylum claims there. If the Agreement
legislation is currently being addressed by the Canadian Parliament.\textsuperscript{80} It is particularly important during this period for the UNHCR and NGOs to focus efforts on encouraging Canada’s Parliament not to pass such legislation. It is also critical for the Canadian Parliament to consider the potential consequences of such legislation on Canada’s international and moral obligations, and national security.

B. If Implementation Legislation Is Passed, It Should Be Passed With Reservations

Despite all this, implementation legislation will likely be passed. Currently, the issue of passing legislation implementing the goals of the Agreement is being discussed in Canada’s Parliament and the U.S. Congress.\textsuperscript{81} In regards to the European Union’s Conventions, “A representative of the United Nations High Commissioner for Refugees has stated that ‘the safe third country rules are here to stay, in one form or another.’”\textsuperscript{82} Additionally, the Office of the United Nations High Commissioner for Refugees states that it, “focuses its energies not on eliminating the practice, but on providing guidelines for its improved implementation.”\textsuperscript{83} Such agreements are already prevalent in Europe.\textsuperscript{84} Less as written is implemented, asylum applicants who lack documents proving that they entered the U.S. within one year will, in most cases, no longer be able to receive a grant of asylum in the U.S. or Canada. \textit{Id.}

\textsuperscript{80} It should be noted that while the U.S.-Canada Safe Third Country Agreement has not yet been implemented, the use of an informal system with a similar initial result has commenced. Due to the large number of asylum applicants departing from the U.S. and presenting themselves at the Canadian border, in February 2003 Canada began to require appointments with border officials in Canada prior to allowing asylees to enter Canada. When they are told to go back to the U.S. and to come back at a later date, often the following day, Homeland Security officials in the U.S. arrest them upon their return. Francis X. Donnelly, \textit{Refugees Seek Safe Harbor in Canada}, \textit{DETROIT NEWS}, Mar. 4, 2003. These asylum applicants are then allowed to apply for asylum in the U.S., but are often detained until their asylum hearings before immigration judges unless they come up with adequate bond money. While, unlike under the U.S.-Canada Safe Third Country Agreement in theory these applicants may apply in asylum in Canada if they are denied asylum in the U.S., as under the Agreement, they are not given the option to choose which country to apply in first and thus if granted asylum in the first country must immigrate to that country. Also, if they are denied asylum and are ordered removed from the U.S. not on their own recognizance (e.g., if they are denied voluntary departure), the result is the same, and they will be returned to their country of citizenship. \textit{Id.}

\textsuperscript{81} Krikorian Testimony, \textit{supra} note 6.

\textsuperscript{82} UNHCR Comments, \textit{supra} note 8.

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} Convention Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, June 19, 1990, 30 I.L.M. 84 [hereinafter Schengen Convention]; see also Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 427 [hereinafter Dublin Convention] Additionally, in 1992, the Resolution on a Harmonized Approach to Questions
broad-reaching but similar agreements in other regions are also starting to emerge that involve other regions. 85

Still, legislation implementing the Agreement as written should not be passed. Implementation would mean that persons seeking refugee status in the United States prior to seeking it in Canada would be subject to the laws of the United States, and those that first arrived in Canada would be subject to the laws of the United States. For Canada, whose asylum laws are less stringent than those of the United States, implementation of the Agreement would mean modifying Canada's own laws to parallel those of the United States. In order to preserve its own laws, Canada should impose exceptions to the instances in which the Agreement would be implemented.

Canada should include an exception to the Agreement as it stands for applicants who make gender-based persecution claims as members of a particular social group before passing implementation legislation. Canada has made it a social obligation to recognize gender-based persecution under the enumerated category of particular social group. 86 If Canada the United States on this issue it will likely be met with success, or even with the slight loosening of U.S. asylum laws, as U.S. Attorney General John Ashcroft is currently "considering new gender-persecution regulations for asylum seekers," for use in the United States. 87 Second, Canada should demand an exception for cases in which the United States would detain an asylum-seeker just as it would detain

Concerning Host Third Countries (The Resolution on Host Third Countries) was adopted. Due to the introduction of The Resolution on Host Third Countries and increased European Union membership, the use of safe country agreements has greatly expanded. In fact, "expulsion to a third State is no longer the exception but the rule." Gretchen Borchelt, Note, The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards, 33 COLUM. HUM. RTS. L. REV. 473, 498 (2002).

85. For example, in January 2003, Switzerland and Senegal signed an agreement allowing "Switzerland to deport to Senegal any West African whose asylum application has been rejected and whose country of origin is not clear...The Swiss say the agreement is a first step in combating human traffickers operating in West Africa." Swiss Sign Pact to Curb the Rise of Political Asylum Requests, N.Y. TIMES, Jan. 19, 2003.

86. There are five enumerated categories under which an applicant is entitled to asylum under the Protocol: race, religion, nationality, political opinion, and membership in a particular social group. Refugee Convention, supra note 39.

87. George Lardner, Jr., Ashcroft Reconsiders Asylum Granted to Abused Guatemalan: New Regulations Could Affect Gender-Based Persecution, WASH. POST, Mar. 2, 2003, at A02. Attorney General Ashcroft is not only considering new gender-persecution regulations, but also reconsidering a Board of Immigration Appeals case from 1999, In re R-A-, 22 I & N Dec. 906 (1999) (vacated Jan. 19, 2001), in which the Board found that the respondent, Rodi Alvarado, was credible but that the rape, beating, and vows to kill Ms. Alvarado inflicted upon her by her husband did not "qualify" her for asylum. Id. While Attorney General Ashcroft did vacate the decision in R-A-, he has not yet approved any gender-based guidelines. The fact that this issue is under consideration in the United States makes it an issue that Canada could pressure the United States about prior to implementing the Agreement.
a convicted criminal. Canada should also exert pressure onto the United States, urging it to provide an exception to the Agreement for asylum-seekers who would be detained and would not be guaranteed counsel, as it is frequently hard for detained asylum-seekers to find counsel in the United States.\textsuperscript{88} Lastly, "the applicant should be able to challenge—in an individual procedure—the presumption that he or she could find safety in the third country."\textsuperscript{89} Such a safeguard should be an explicit part of any implementation legislation passed by either country.

The United Kingdom's Asylum and Immigration Act of 1996 contained a provision allowing for the use of safe third country agreements. This provision allowed:

\begin{quote}
\textbf{a} person who ha[d] made a claim for asylum [to be] removed from the United Kingdom if, inter alia, the Secretary of States certifie[d] that in his opinion 'the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention.'
\end{quote}

Clearly, the British Act lacked an explicit statutory provision addressing whether an applicant could challenge the presumption that he or she could find safety in a third country. In other words, the statute did not explicitly state whether the third country’s interpretation of the Refugee Convention or the British interpretation of the Refugee Convention dominated such conflicts, when the two countries interpreted their obligations under international law differently. Thus, in the United Kingdom, a court case arose dealing with the issue, \textit{Regina v. Secretary of State for the Home Department, Ex Parte Adan}, which was appealed up to the House of Lords.\textsuperscript{90} The House of Lords found that in order to prevent the usurpation of British asylum law, it was necessary to allow asylum-seekers to challenge whether an asylum-seeker would be safe in the third country.\textsuperscript{92} The House of Lords eventually came to a decision on this

\begin{quote}
\textbf{90.} Regina v. Sec' y of State for the Home Dep't, Ex parte Adan, 40 A.C. 727, 728 (H.L. 2001) (citing The Asylum and Immigration Act of 1996 § 2(2)(c)(1996)).
\end{quote}

\begin{quote}
\textbf{91.} Id.
\end{quote}

\begin{quote}
\textbf{92.} In \textit{Adan}, Lord Slynn stated that, "the sole or core question is therefore whether as a matter of law it is open to the Secretary of State to certify that in his opinion that condition has been fulfilled...[or in the case at hand, can] he as a matter of law say that the government of Germany and France would not send Adan or Aitseguer back respectively to Somalia and Algeria 'otherwise than in accordance with the Convention.'" \textit{Id.} at 728. Lord Slynn then found that, "the question is not whether the Secretary of State thinks that the alternative view is reasonable or permissible or legitimate or arguable but whether the Secretary of State is satisfied that the application of the other state's interpretation of the Convention would mean that
issue, but it did not impact the parties at issue. The asylum-applicants were sent back to "safe" countries which would later return them to the potentially persecuting countries before the case was heard by the House of Lords. In order to avoid such errors, if legislation implementing the U.S.-Canada Safe Third Country Agreement is implemented, Canada and the United States should each include explicit statutory provisions allowing for an asylum-seeker to challenge the presumption that he or she could find safety in the third country in their respective implementation legislation. Currently, Article 6 of the Agreement allows room for discretion, but what constitutes discretion is undefined.93

V. CONCLUSION

Now the United States and Canada have signed the U.S.-Canada Safe Third Country Agreement, enacting a bilateral possibility that has been talked about in North America since the mid-nineties. The Agreement, which has sparked much debate among scholars, immigrants’ rights activists and politicians, is coming closer to being a reality. To comply with their international legal and moral obligations, and for the sake of the preservation of national security, the United States and Canada must not implement the Agreement.

While in the context of today’s terrorism-fearing climate a safe third country agreement appears rational on its face, the resulting negative ramifications outweigh the justifications for the Agreement. In Europe, there has been an increase in the number of countries party to safe third country agreements. Under these agreements, if a person from within a European member country applies for asylum in another member country, the application will automatically be denied as it will be assumed that all member countries adequately promote human rights and their individual asylum systems. Additionally, if a person from a non-member country, most commonly Eastern Europe, Asia or Africa, enters from the east, the person must apply for asylum in one country only, the first country the person enters. As more and more countries become members of the agreements, less and less asylum-seekers will be able to have their claims for asylum fully adjudicated in a manner consistent with the legal obligations found in the Refugee Convention and Protocol.

the individual will still not be sent back otherwise than in accordance with the Convention.” Id. Lord Slynn also addressed the concern that such an interpretation of England’s role within its safe third country agreements, which included its relationship with Germany which was at issue, could negatively impact relations between the two countries or any pair of countries. He stated, “If some other states interpret the Convention differently in a way which he considers not to be in compliance with the Convention he must carry out his obligations in the way in which he is advised or is told by the courts is right. To do so is not in any way contrary to the comity of nations or offensive to other states who interpret it differently and it does not begin to suggest malafides on their part.” Id. at 729.

This dangerous trend is reminiscent of the trends that led to the failed attempts by European Jews to enter other countries during World War Two, in order to avoid persecution. Most countries, including the United States and Canada, largely turned a blind eye to these people. As more and more countries sign safe third country agreements, even if a country wishes to help asylum-seekers, it will likely feel no obligation to.

The Canadian Council For Refugees has noted the similarity between the denial of protection of Jews fleeing Nazi persecution and the U.S.-Canada agreement by stating, "during the Second World War, Canada denied protection to Jewish refugees fleeing Nazi persecution. The slogan from that period was, ‘None is Too Many!’ the answer given by a Canadian official when asked how many Jewish refugees Canada would take.” The Canadian Council for Refugees calls the U.S.-Canada agreement a “[n]one is too many Agreement” because it is about keeping refugees out, “just as we closed the door on Jewish refugees in the 30s and 40s.”

If safe third country legislation is implemented by the United States and Canada, the rights of asylum-seekers will be severely restrained. Though Canadians have chosen to implement relatively liberal immigration and asylum laws and practices, these laws and practices will become lost to asylum-seekers who first enter the United States, and therefore become subject to the immigration and asylum laws and practices of the United States, particularly in the context of specific claims, such as those of gender-based persecution. The member countries of the European agreements have expanded, and it is likely that with time these agreements in North America and Europe will continue to expand. It is dangerous precedent to set up a system in which it is possible that an asylee would have no safe country to turn to in a flight from persecution.

It is not surprising that in a time like this, when many Americans and Canadians feel vulnerable to terrorism, that there is a desire to increase security at our borders and to limit asylum. However, at what cost should these protections come? The United States and Canada are countries of immigrants, who largely came to their respective countries to flee persecution and obtain freedom. It is no less important during these times than during other times that the United States and Canada not inhibit legitimate asylum-seekers from seeking refuge within their borders.

94. See 10 Reasons Why, supra note 1.
RE-CHARACTERIZING ABORTION IN NIGERIA: AN APPRAISAL OF THE NECESSITY TEST

Victor Nnamdi Opara

ABSTRACT

The Nigerian criminal jurisprudence prohibits abortion in all instances except when necessary to save the life of a woman. This has driven many women and girls seeking abortions to non-physician providers. These non-physician procedures turn out to be unhygienic and unsafe. Nigerian abortion statistics reveal an unacceptable high rate of maternal mortality and morbidity. This analysis undertakes a close contextual examination of the exceptions to outright prohibition, pointing out that the couching of some of the words make the attainment of the legislative aim a mirage or at least illusory. The analysis equally points out the heuristic discretionary potentials of some of the clauses, which the Nigerian medical community could creatively utilize to a woman’s advantage. This paper calls for fundamental rethinking of the abortion life-saving provisions. Fortunately, towards the completion of writing of this paper, a bill was introduced in the Nigerian National Assembly which has the concomitant potential of amending the present abortion laws. The balance of

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this interplay is reflected in a postscript. The general thrust of this paper is to generate the momentum that will lead to a liberalizing amendment to the present over-restrictive abortion regime in Nigeria.

I. INTRODUCTION

Nigerian criminal jurisprudence prohibits abortion in all instances except when necessary to save the life of a woman. Although there is no specific body of laws known as “the Abortion Act” in Nigeria, the prohibitions and their accompanying strict exceptions are embodied in the provisions of both the Criminal and Penal Codes of Nigeria. This restrictive statutory formula has driven many pregnant women and girls to non-physician providers in a bid to avoid reluctant parenthood by accessing secretly illegal and septic abortions. These procedures turn out to be unhygienic and unsafe. Moreover, abortions by some physician providers equally result in risks to users. This medical negligence is underpinned by the restrictive laws as well because the inefficiency of physician providers appears to be strengthened by the ignorance or general apathy of women seeking abortion. The effect is that most of these women and girls pay the price either through their lives or complications to their health. Abortion statistics in Nigeria reveal an unacceptable high rate of maternal mortality and morbidity, with unsafe abortion constituting the highest percentage within the myriad of contributory factors.

This analysis undertakes a close contextual examination of the exceptions, pointing out that the couching of some of the words and clauses in the exceptions make the attainment of the legislative aim a mirage or at least illusory. Some of the exceptions end up confounding and complicating the problems of pregnant women and girls rather than providing a veritable haven for them. Those confounding parts of the exceptions are so sweepingly drawn that they appear to empower non-physician providers to procure abortion. Moreover, the framing of the exceptions makes it difficult for medical practitioners to figure out when to legally render abortion services in line with the legislative aim. The analysis recognizing this quagmire points out the heuristic discretionary potentials of some of the clauses, which the Nigerian medical community could creatively utilize to the advantage of women.

On the whole, this paper calls for a fundamental rethinking of the abortion life-saving provisions and concludes by calling for an amendment of some of the exception clauses in order to incorporate the requisite life-saving devices in line with the proper legislative aim of the drafters. The effects of these restrictions on the reproductive and sexual health of Nigerian women once led the Nigerian Society of Gynecology and Obstetrics to sponsor a Bill in the Nigerian National Assembly called the Termination of Pregnancy Bill of 1981. This Bill sought to legalize abortion where two registered doctors were
 convinced that the life of the pregnant woman was endangered, and where there was a substantial risk that the child would be born with a physical or mental handicap.\textsuperscript{1} Although public opinion was in favor of the Bill, not surprisingly, two small but powerful pressure groups, one of which was composed of conservative women, vehemently opposed it. Ironically, that Bill was sponsored by the Nigerian medical community due to "the increasing number of illegal abortions carried out under inadequate health conditions which lead to high death rates among [women and girls]."\textsuperscript{2} The reaction of the women can easily be explained. Nigerian women have always been subservient to their male counterparts as a result of the paternalistic and androcentric bias that pervades the entire sub-Saharan African society.

Fortunately, another opportunity has come in 2004. Towards the completion of the writing of this paper, Senator Stella Omu sponsored a bill in the Nigerian National Assembly. The bill entitled "Maternal and Child Welfare, Health Services (Procedure, etc) Bill [of] 2004" seeks a holistic reform of Nigerian reproductive health care system. The provisions of the nine-section bill are so embracing that it is not within the scope of this analysis to engage all the sections. Of particular relevance to this paper are sections 5 and 6 which impact abortion. The proposed bill, if passed, will provide the legal framework for overhauling the present Nigerian abortion regime; it will concomitantly repeal the present abortion laws as contained in the Criminal and Penal Codes.\textsuperscript{3} In response to this recent development, this analysis includes a postscript, which charts the potentials of the proposed bill against the backdrop of a changing legal climate. The balance of the complex interplay of the present abortion laws and the proposed bill is dealt with accordingly.

The general thrust of this paper is to generate momentum that will lead to a liberalizing amendment to the present over-restrictive abortion regime in Nigeria. Structurally, the paper is divided into four parts. Part I introduces the topic, lays down a compendium of abortion statistics in Nigeria, delineates the statutory framework and gives an overview of the origin of dual criminal jurisdiction in Nigeria. Part II undertakes a close contextual analysis of the necessity test and carefully engages all the threshold matters that make up the test. In this regard, the paper compares the present Nigerian abortion regime with those of other advanced commonwealth jurisdictions, namely Britain and Canada. Part III seeks to appraise the extent to which the proposed bill is a

\textsuperscript{1} For a detailed review of the Bill, see I.E. Adi, \textit{The Question of Abortion}, July 1982 NIG. CURRENT L. REV. 191.

\textsuperscript{2} \textit{See} REBECCA J. COOK \& BERNARD M. DICKENS, \textit{EMERGING ISSUES IN COMMONWEALTH ABORTION LAWS} (1983).

departure from its hopeful predecessor – the present abortion laws in Nigeria. Finally, Part IV embodies recommendations and conclusion.

A. Abortion Statistics in Nigeria

Unsafe abortion is one of the most serious problems facing thousands of Nigerian women and girls. As it turns out, non-physician abortion procedures lead to greater percentage of complications and death for women. The first survey of physician abortion providers in Nigeria in 1998 reveals that each year, Nigerian women and girls obtain approximately 610,000 abortions, which is at the rate of twenty-five abortions in every one-thousand women and girls between the reproductive ages of fifteen to forty-four; it also reveals that only an estimate of 40 percent of these abortions are performed by physicians in established health facilities while the remaining 60 percent are performed by non-physician providers. In other words, 366,000 abortions are performed by non-physician providers annually. Moreover, abortions by physician providers equally result in complications. The survey equally estimates that annually 183,000 women and girls experience complications from abortions by non-physician providers, and do not receive treatment. The 1998 survey was not significantly different from an earlier study carried out in 1996, which happens to be “the first comprehensive population-based study of unwanted pregnancy and induced abortion ever undertaken in any part of Nigeria.” This 1996 study categorically reveals that as a result of the restrictive stance of the law, “women frequently resort to clandestine abortion performed by unskilled practitioners, leading to high rates of maternal mortality and morbidity. Of the 50,000 maternal deaths that are estimated to occur in Nigeria annually, nearly 20,000


5. See Id. (observing that “this is the first time a national survey of physician abortion providers has been conducted in a developing country where abortion is largely illegal”).

6. Id. at 161-62. The survey points out the percentage of complications emanating from different classes of non-physician providers and physician providers:

Respondents considered pharmacists or chemists as one of the two most common providers of abortions resulting in complications (mentioned by 50% of respondents), followed by paramedics (40%), nurses or midwives (35%) and other doctors (22%). “Quacks”—individuals with no formal training who nonetheless provide medical treatment—were mentioned by 23% of respondents.

Id. The survey also noted that, “[a]ccording to a recent household survey of more than 3,700 women in Edo and Lagos, 8.8% of women who had had an abortion performed by a doctor had experienced complications that were treated in a private or government clinic.” Id. at 159-60.

7. Id. at 159. The survey asserted that, “half of all women who have nonphysician abortions [that is 183,000] experience complications requiring treatment by a physician.” See Henshaw, supra note 4, at 160.

are attributable to complications of unsafe abortion.\(^9\) The study also reveals that most abortions carried out by private doctors operating in private medical clinics had attendant high rates of complications.\(^10\) It is estimated that in Nigeria, 1000 maternal deaths occur in every 100,000 live births, while in West Africa, the World Health Organization estimates that 12,000 deaths occur annually due to unsafe abortion.\(^11\)

There is growing concern over teenage pregnancies in Nigeria and other African countries. Nearly two-thirds of cases of septic abortions come from girls between the ages of fifteen to nineteen.\(^12\) Notwithstanding this shocking discovery, domestic African governments and their legal systems are still reluctant to squarely address the abortion quandary. It has been observed that, "the risk of maternal death for African women is 1 in 20 compared to 1 in 10,000 in developed countries."\(^13\) What a shocking vacuum between two seemingly intertwined worlds. It is evident that the wide vacuum in maternal death rate between the developed and the developing world demonstrates that a large proportion of these unexpected and premature deaths arising from unsafe abortion are preventable.\(^14\)

The above analysis reveals that the high rate of maternal mortality and morbidity in Nigeria is mainly as a result of women’s recourse to non-physician providers, which in turn is due to the unduly restrictive abortion regime in Nigeria. Moreover, notwithstanding that non-physician providers perform more abortions in Nigeria than physicians, which leads to a high rate of complications, abortions by some private physician providers are equally shrouded with complications. Invariably, no matter the angle from which one views maternal mortality and morbidity in Nigeria, the law is always implicated. Complications resulting from physician providers translate to some degree of inefficiency on the part of medical practitioners in Nigeria. This inefficiency is underpinned by the restrictive stance of abortion laws. It is submitted that a liberalized abortion climate will make medical practitioners more responsible in the delivery of abortion services for four main reasons:

9. Id. at 1.
10. Id. at 25.
13. Id.
1) Reporting of the number of abortions performed will be improved and the government would have better records for statistical purposes. However, it should be cautioned that the names and personal details of users need not be included in the reports since the record is only needed for statistical purposes. This will help preserve the confidential information of abortion-seekers;\textsuperscript{15}

2) Victims of medical negligence will be more willing to pursue their tort claims against erring practitioners;

3) The regulatory body of medical practice in Nigeria will be alert to discipline its members for breach of expected standard of practice;

4) The Nigerian Medical Council may be more willing to organize continuous medical education aimed at retraining its members on the use of current and safer procedures for the management of abortion and post-abortion complications.\textsuperscript{16}

From an economic perspective, the reasons for the preference of non-physician providers might not be far fetched. The basic truth is that most of the women and girls seeking and accessing abortion are poor and lack the professional fees that physician providers require.\textsuperscript{17} Besides, even when the financial constraint is removed, societal moral and religious predilections to abortion create substantial hindrance to the achievement of a safe reproductive community for women and girls. Almost all women and girls seeking and accessing abortion in Nigeria prefer having abortion in secret because of the

\textsuperscript{15} See Okonofua, supra note 8, at 17. (stating that the 1996 study observes: "that a high proportion of the women [interviewed] mentioned the lack of confidentiality attendant with the use of doctors as an additional deterrent to the use of qualified doctors for the procurement of abortion."); See also M.K. Jinadu, et al., Traditional Fertility Regulation Among the Yoruba of Southwestern Nigeria 1 AFR. J. REPROD. HEALTH 56, 61 (1997) (describing a study conducted in 1990 among Nigerian Yoruba women and traditional healers, which aimed at identifying and describing the practice, preparation, and administration of traditional contraceptives, that observed the following: "When [the women were] asked why they preferred the use of traditional contraceptive methods to orthodox methods, approximately 85 percent of respondents mentioned the easy accessibility of the TMPs [traditional medical practitioners] and the assurance of privacy during consultation") (alteration not in original).

\textsuperscript{16} The 1996 study indicates that the most frequently used abortion procedure in Nigeria was dilation and curettage (D & C) whereas the most current, safest and effective method of pregnancy termination worldwide—manual vacuum aspiration (MVA)—was never mentioned. Okonofua, supra note 8, at 18. Moreover, RU was also not used. \textit{Id.}

\textsuperscript{17} The 1996 study indicates that although most abortion costs are paid by the partners of the women (husbands or boyfriends), some women pay for the abortions themselves. \textit{Id.} at 14. The study went on to observe that women "most frequently mentioned the high fees charged by doctors as the major deterrent to the use of doctors." \textit{Id.} at 17. It is submitted that abortion dilemmas are mainly suffered by poor women in Nigeria because most rich women are financially capable of circumventing the restrictive domestic regime by traveling to foreign countries to access safe legal abortion. See \textit{id.}
religious, cultural, and moral prejudices associated with it. Additional health consequences that result from unsafe abortion are infertility, chronic disability, transfusion-related infections, and lack of emergency care for complications.

B. Exemption Clauses

The full-prohibitive sections are sections 228, 229, and 230 of the Criminal Code, and sections 233 and 234 of the Penal Code. Abortion is totally prohibited under these sections, except when it is necessary to save the life of the mother. The relevant sections embodying the necessity test are section 297 of the Criminal Code and sections 232 and 235 of the Penal Code:

Section 297 of the Criminal Code:

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

Section 232 of the Penal Code:

WHOEVER VOLUNTARILY CAUSES A WOMAN WITH CHILD TO MISCARRY shall, if such miscarriage be not caused IN GOOD FAITH FOR THE PURPOSE OF SAVING THE LIFE OF THE WOMAN, be punished with imprisonment for a term which may extend to fourteen years or with fine or with both (emphasis added).

Section 235 of the Penal Code:

WHOEVER before the birth of any child DOES ANY ACT WITH THE INTENTION of thereby preventing that child from being born alive or causing it to die after its birth and DOES BY SUCH ACT prevent that child from being born alive or causes it to die after its birth, shall, IF
SUCH ACT BE NOT CAUSED IN GOOD FAITH FOR THE PURPOSE OF SAVING THE LIFE OF THE MOTHER, be punished with imprisonment for a term which may extend to fourteen years or with fine or with both (emphasis added).  

These exceptions constituting the necessity test cover voluntary abortion and not involuntary abortion that may occur as a consequence of prescriptions or administration of medical procedures. Of course, if abortion occurs through involuntary conduct, the mental element of the crime, intent, which is core to most offenses, will be lacking. As such no offense will arise. The only exception to this intent requirement is in rare instances of strict liability offenses, which do not require proof of mental elements.

C. Origin of Dual Criminal Jurisdiction in Nigeria

All the sections of the Nigerian Criminal Code impacting abortion, in line with the abortion laws of most African commonwealth jurisdictions, are substantially adopted from the Offences Against the Person Act (Britain) of 1861, and the Infant Life (Preservation) Act (Britain) of 1929, but do not include the changes achieved in R v. Bourne and the subsequent Abortion Act (Britain) of 1967, as amended, which reformed the 1861 Act. These sections form part of the ‘received’ English law. On the other hand, the Penal Code, which operates in the Northern states of Nigeria only, is drawn from both the

24. § 235.
25. It is beyond the scope of this paper to attempt an exhaustive exploration of strict responsibility. For a comprehensive analysis of strict responsibility regime in the Nigerian criminal jurisprudence, see Victor N. Opara, An Appraisal of the Doctrine of Strict Responsibility under the Criminal Code, 5 JURIST 33 (1996).
26. Offences Against the Person Act, 1861, 24-25 Vict., c. 100, § 1 (Eng).
27. Infant Life (Preservation) Act, 1929, 19 & 20 Geo. 5, c. 34, §1(1) (Eng.).
29. See Abortion Act, 1967, c. 87, § 1 (1967) (Eng.). The Act does not apply to Northern Ireland. On a more general note, the Nigerian Criminal Code was substantially based on the Queensland Criminal Code of Australia which itself was based on a code drafted by Sir James Fitzpatrick in 1879 and aimed at replacing the common law of crime in England, although the code was rejected by the British Parliament for whom it was initially drafted. See generally James S. Read, Criminal Law in the Africa of Today and Tomorrow, 7 J. AFR. L. 5 (1963).
30. The introduction of the main body of English law in Nigeria dates back to 1863 when the British colonial authorities enacted Ordinance No. 3 of 1863 following the creation of the Colony of Lagos in 1862. See generally A.E.W. PARK, THE SOURCES OF NIGERIAN LAW 1-12 (1963). More than a century and four decades after, the sources of law which the British colonial authorities established for the Colony of Lagos has remained a standard for the whole of Nigeria without many substantial changes. Id. Historically Nigerian law is derived from three sources, which are: (a) English Law—this comprises the general law of England which was introduced into or received by Nigeria; (b) Nigerian domestic legislation and case law; and (c) Nigerian customary law. Id. For a detailed historical analysis of the Nigerian legal system see id.
Indian Penal Code and the Scottish laws which are based upon the customary or common law of Scotland. The enforcement of two codes with criminal liability content under one jurisdiction might appear strange to some legal systems since criminal laws are to a greater extent regulated by federal or central legislatures. In 1954 there was a major regulatory shift in the Nigerian legal system. Prior to 1954 Nigeria had a unified system of law, and there was only one legislature for the entire country. Steps to decentralize the unified legislative body started in 1952 with the establishment of regional legislatures. In 1954 a full-fledged federal system of government with tripartite legislative jurisdictional lists was born in Nigeria. As a result, Nigeria was divided initially into three regions and a federal territory. The Northern region appointed a panel of jurists in 1958 to act as an advisory body to its government. The main task of the panel was to advise the Regional government on the application of both Moslem and non-Moslem laws. The panel came up with the recommendation that a Penal Code Law and a Criminal Procedure Code Law be enacted and made applicable throughout the Region and that these laws should replace the Nigerian Criminal Code Ordinance and the Nigerian Criminal Procedure Ordinance both of which were, prior to the panel’s recommendations, applicable throughout Nigeria. The adoption of the recommendations by the Regional government led to the enactment of the Penal Code in 1963.

II. CONTEXTUAL ANALYSIS OF THE NECESSITY TEST

The issues raised by the exception clauses will be discussed in the course of this analysis. Some recurrent thresholds are that performance of the abortion be done “in good faith” through “surgical operation” with “reasonable care and skill” by “a person/whoever” and for the purpose of “preserving the mother’s

31. The Penal Code is substantially a replication of the Penal Code of Sudan, which in tum was drawn from the Indian Penal Code drafted by Lord Macaulay in 1834. See generally ALAN GLEDHILL, THE PENAL CODES OF NORTHERN NIGERIA AND THE SUDAN (London: Sweet & Maxwell 1963). Lord Macaulay had used the common law of England and Scotland as the corner stones of his draft.

32. In the defunct Northern Region and the present Northern states of Nigeria, the major substantive law that the courts administer is the Moslem Law of the Maliki School. See ASAF A. A. FYZEE, OUTLINES OF MUHAMMADAN LAW 18-20 (3 ed., 1964).

33. Nigerian Laws, 1948, c. 42 (In 1958 this Ordinance became known as the Criminal Code); CODE CRIMINAL ch. 42, § 228-30 (Federation of Nig.).


35. See PENAL CODE [PENAL C.] (1963) (N. Nig.).
life” or “saving the life of the woman.” These thresholds constitute core parts of the necessity test.

A. Reasonable Care and Skill

One of the thresholds in section 297 of the Criminal Code is that the abortion provider must exercise “reasonable care and skill.” Moreover, the performance of the abortion is required to be “reasonable” when viewed from “the patient’s state at the time and to all the circumstances of the case.” These thresholds indicate that the context under which an abortion is performed invariably matters a lot, and that there are many areas of uncertainty that appear to be left to the discretion of the abortion provider. Section 297 is substantially adopted from subsection 1(1) of the Infant Life (Preservation) Act (Britain) of 1929. However, that subsection does not contain the “reasonable care and skill,” “reasonable performance,” and “circumstantial” evidence requirements of section 297, all of which appear to have been imported from the decision of R. v. Bourne. With respect to the reasonable performance requirement, every performance does not necessarily render abortion unreasonable. Where the performance is illegal, then even objectively reasonable good faith cannot transform such an illegal abortion into a reasonable one. Such abortion-without-consent will amount to criminal battery. In that case, if the woman dies, the physician will be liable, since death will be as a result of intended abortion. The man equally may be punished as a criminal conspirator or principal offender.

36. See Code Criminal [C. Crim.] ch. 21, § 228-30 (1990) (Federation of Nig.).
37. See Infant Life (Preservation) Act, 1929, 19 & 20 Geo. 5, c. 34, §1(1) (Eng.).
38. See Bourne, 1 K.B. at 690 & 694. (“A MAN OF THE HIGHEST SKILL, ... performs the operation ... ON REASONABLE GROUNDS AND WITH ADEQUATE KNOWLEDGE, ... the jury are quite entitled to take the view that the doctor who, UNDER THOSE CIRCUMSTANCES AND IN THAT HONEST BELIEF, operates, is operating for the purpose of preserving the life of the mother”) (emphasis added).
39. For example, this may occur where an abortion is intentionally performed on a woman without her consent for the convenience of her husband or boyfriend and the physician. The man could instruct the physician to cause his girlfriend to miscarry, probably because he is already married and does not want to obstruct the harmony in his home or does not desire a polygamous marriage. This scenario was played out in State v. Ade-Ojo, 12 C.C.H.C.J. 27 (1972), where a man hired two medical practitioners to perform an abortion on his girlfriend. The man was charged and convicted, but the practitioners were not charged since they acted as prosecution witnesses. Id. However, the fact that the practitioners were neither charged nor convicted does not mean that their conduct was legally permissible. Id. Their escape route was simply a question of legal technicality: the State needed independent evidence to prove its case which largely depended on the evidence of the man or the practitioners. Id. The Court frowned at the conduct of the practitioners and the presiding Judge expressed his disgust in Page 31 of his judgment by promising to send a copy of the judgment to the Attorney General and the Nigerian Medical Council for appropriate disciplinary actions against the practitioners. Id. Although the statutory reasonable-performance threshold was not under review in this case, it appears the facts of the case fit nicely to the circumstances contemplated by this threshold.
40. See Penal C. §§ 96 & 97, section 96 of which provides the following: “(1) When two or more
Moreover, as the Criminal Code does not define "skill," one is to conjecture whether nurses, midwives and, paramedics are repositories of contemplated abortion skill.

**B. Surgical Operation**

Abortion by purely medical procedures such as the administration of drugs will appear not to be accommodated within the Criminal Code exemption. This is because in medical parlance, surgery and medicine are considered to be somewhat different notwithstanding that they may appear inextricably intertwined in some material particular. The words "surgeon," "surgery," and "medicine" have been defined respectively as:

[surgeon is] one who applies the principles of the healing art to external diseases or injuries, or to internal injuries or malformations, requiring manual or instrumental intervention. [In other words, he is] one who practices surgery.... The term surgery, comes from two Greek words signifying the hand and work, meaning a manual procedure by means of instruments.... The practice of medicine, in contradistinction to the practice of surgery, denotes the treatment of disease by the administration of drugs or other sanative substances.  

In *R. v. Edgal,* the now defunct West African Court of Appeal was of the opinion that section 297 of the Criminal Code applied to surgical operations only. This surgical operation requirement indicates that this threshold adds to the risk of abortion users in Nigeria by unnecessarily exposing them to greater danger. Surgery is a complicated procedure and Nigerian health facilities may not boast of modern sophisticated surgical instruments and equipment which would guarantee safety to a higher degree, unlike their counterparts in

persons agree to do or cause to be done—(a) an illegal act; or (b) an act which is not illegal by illegal means, such an agreement is called a criminal conspiracy." Section 97 outlines the punishment for criminal conspiracy. § 97.

41. C. CRIM. ch. 2, § 7. The man may equally be punished under the Criminal Code as a principal offender. *Id.* Section 7 of the Criminal Code provides the following:

When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:—(a) every person who actually does the act or makes the omission which constitutes the offence; (c) every person who aids another person in committing the offence; (d) any person who counsels or procures any other person to commit the offence.

*Id.*


developed countries that are technologically current. If the same result could be achieved through a purely medical procedure, like administration of drugs, why limit the woman’s choice to surgery?

The health implications of this limitation would be highly appreciated when viewed from the alarming increase in the spread of HIV infection especially, in sub-Saharan Africa and Nigeria in particular.\(^44\) There are cases where patients have contracted HIV infections through their surgeons.\(^45\) Surgeons equally stand the risk of infecting or being infected with HIV from their patients. They are constantly exposed to patients’ blood, and when their equipment or surgical instruments are not adequately sterilized, their facilities may be a disguised infection-transmitting channel. Improperly sterilized surgical instruments are basic means of spreading HIV infections to women and girls receiving abortions. Moreover, as a result of the possibility of hemorrhage during surgical operations, women and girls accessing abortion stand the risk of contracting HIV through transfusion of contaminated blood.\(^46\) While it is acknowledged that surgeons owe a professional duty of care and skill to patients, abortion users may not have the moral support to bring up claims due to societal predilections towards abortion.\(^47\) Moreover, even where such claims are sought, prosecutions on grounds of failure to provide such duties are rare in Nigeria.\(^48\) Although the risk of patients’ exposure to surgeons’ HIV-infected

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44. According to the Federal Ministry of Health, reproductive health in Nigeria is highly deteriorating. Draft of the National Reproductive Health Policy and Strategy 9-10 (Federal Ministry of Health 2000). One major national indicator of this is “the continual increase of HIV sero-positivity rate among antenatal clinic clients from 1.4% in 1991/92 to 4.5% in 1995/96 and 5.4% in 1999.” Id. The Ministry further observed that “there are at least 2.7 million sexually active Nigerians infected with the AIDS virus. Eighty per cent of HIV infections in Nigeria are contracted through sexual intercourse. Other causes of [HIV] infection are through unsterile injections and the inadvertent transfusion of unsafe blood and body piercing, scarification or cutting.” Id. (emphasis added).


46. See Draft of the National Reproduction Health Policy, supra note 44.

47. Stigmatization can foster a climate of abandonment of one’s rights. It may also mean that a woman who has a claim may not pursue it for fear of being labeled. A great deal of discrimination faced by abortion users is underpinned by social construct of morality and “normality.”

48. To my knowledge, among the scant abortion cases in Nigeria, only two reported cases involved the prosecution of medical practitioners. Comm’r of Police v. Modebe, 1980 (1) NCR 367; State v. Johnson Oke, 9 C.C.H.C.J. 1305 (1975). Not surprisingly, the defendants were acquitted in both cases. See Isabella Okagbue, Pregnancy Termination and the Law in Nigeria, Vol. 21 No.4 STUD. FAM. PLAN. 197, 199 (1990) (observing that “[b]oth public prosecutors and the courts have traditionally been reluctant to prosecute and convict members of the medical profession for acts performed as part of their professional functions. With regard to abortions, in particular, the issue is compounded....”).
body is so low that some commentators regard it as non-existent, it has been correctly observed that:

Surgeons or dentists may cut themselves through their protective gloves particularly in undertaking procedures in which they do not have sight of their hands, and they may then bleed into patients' bodies before it is surgically or otherwise appropriate for them to remove their hands.

This observation is in line with current realities. Therefore, the exemption clause in the Criminal Code is a flagrant exposure of abortion users in Nigeria to greater risks of HIV infection to the extent that it permits abortion to save the woman's life only when it is performed through surgical operation. Comparatively, the Penal Code exemption, which is silent in section 232 as to the manner of achieving the life-saving objective and in section 235, which permits the life-saving objective to be achieved by "any act" appears preferable.

C. Performance of the Act by a Person or Whoever

The Criminal Code and the Penal Code permit "a person" and "whoever" respectively to carry out the necessary life-saving abortion. In other words, provided abortion is carried out in good faith to save the life of the mother, it appears the qualification of the person providing abortion is immaterial. These words are so sweeping that non-physician providers appear empowered. To that extent, the couching of the laws may be responsible for the high rate of maternal mortality and morbidity in Nigeria resulting from non-physician abortions. It must, however, be pointed out that in this regard, the Criminal Code exemption seems better than that of the Penal Code in that it requires the exercise of "reasonable care and skill" as seen above. But this comparison cannot be stretched too far because although the Penal Code does not specifically use the "reasonable care and skill" supplement, its definition of "good faith" accords with the Criminal Code requirement of "reasonable care and skill." Deference should be made for some non-physician providers such as nurses, midwives and paramedics who may provide abortion services with reasonable care and skill since they are professionally qualified health personnel and may have observed

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51. See the analysis on "good faith" infra section II(E).
physicians carry out such procedures. However, the inability to manage complications that may result occasionally is the more crucial point to note.

Due to the shortage of medical practitioners in most rural communities in Nigeria and the high cost associated with accessing medical practitioners, which most poor women and girls in Nigeria cannot afford, it is advisable that nurses, midwives, and paramedics be permitted to perform abortion at early stages of pregnancy. The international and African medical communities have endorsed nurses, midwives, and paramedics in the providing of abortion in the early stages of pregnancy, although with a requirement that they act under the supervision of a medical doctor who would intervene in case of potential emergencies.

The necessity test raises a paradox in that while the "any person/whoever" threshold permits any person to perform an abortion, another threshold requires the use of reasonable care and skill, which has professional underpinnings. While it could be argued that physicians, as well as nurses, midwives, and paramedics, owe duty of care and skill to their patients, such duty cannot be expected of laypersons. An herbalist who does not know the medical composition of the herbs he administers to procure abortion cannot be expected to owe duty of care and skill, nor will a hospital clerk. Such professional duties are beyond laypersons. While such duties can be enforced against professionals through license-withdrawal, it is difficult to enforce these duties against people who have no license to protect. Accordingly, the law

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52. It has been acknowledged that, "since some non-physician providers such as midwives, nurses and paramedics have obtained medical training ...[they] should be able to perform abortions that do not result in medical complications." See Henshaw, supra note 4, at 160.


54. It has been observed that traditional healers and, for instance, birth attendants significantly practice health care in many areas. A legal distinction remains, however, between academically qualified, professionally licensed health care practitioners such as physicians and nurses, and practitioners who have received no training that complied with widely recognized standards, who accept allegiance to no enforceable code of ethical practice, and whom the law would not hold to higher standards of knowledge, proficiency and care than are expected of a layperson. The legal rights, duties and liabilities of those who deliver health care services differ, depending on their status and the expectations
should specifically mention the category of persons contemplated within the necessity test as is the case with abortion laws of most commonwealth jurisdictions.\(^5\)

\section*{D. Preserving/Saving the Woman's Life}

This phrase appears to be central to the necessity test. An important issue that arises from an analysis of this threshold is the contextual meaning of "preservation of the mother’s life" and "saving the life of the woman." These sections do not provide any specific criteria that would serve as a barometer for determining when abortion becomes necessary to save the life of the mother. The inability of the law to lay down any tangible criteria for determining when a pregnant woman’s life deserves to be saved appears to be a welcome discretionary tool. It gives wide discretion to a medical practitioner to address a pregnant woman’s circumstances based on his or her personal interpretation of the situation. Moreover, the use of phrases such as "reasonable," "ground of performance," "patient’s state," and "all the circumstances of the case" reveal that the determination of the life-saving/life-preserving context is essentially a question of fact, and there is no absolute formula or bright line test. By permitting the medical practitioner to act within his discretion, the fear of inadequate evidence to prove reasonable grounds in the event of alleged illegal inducement or criminal participation is removed, thereby making it possible for medical practitioners to act when saving the life of the woman becomes apparently necessary.

This appears to heighten the object and purpose of the legislature, which is to create an exception to outright prohibition when saving the woman’s life becomes paramount. The English abortion precedent-setting case, \textit{R v. Bourne},\(^5\) \textsuperscript{56} construed section 58 of the British Offenses Against the Person Act of 1861, which is similar to the sections of the Nigerian Codes under review, as impacting on a physician abortion provider. While considering the meaning of the phrase "for the purpose of saving the life of the mother" the court opined:

\begin{quote}
In cases where the doctor anticipates, basing his opinion upon the existence of the profession, that the child cannot be delivered without the death of the mother, it is obvious that the sooner the operation is
\end{quote}

they reasonably create of the availability and calibre of the services they offer.

\textit{Dickens, supra} note 50, at 67-68.

\(^{55}\) \textit{See e.g.,} Abortion Act 1967, ch. 87, s. 1 (Eng.) (specifically using the words "registered medical practitioner(s)" to refer to the class of persons permitted to "terminate pregnancy"); \textit{CODE CRIMINAL} ch. 46, § 287(1) (Can.) (Specifically using the words "a qualified medical practitioner ... in an accredited or approved hospital" to label the persons eligible to "procure miscarriage").

\(^{56}\) \textit{Bourne,} 1 K.B. 687.
performed the better. The law does not require the doctor to wait until the unfortunate woman is in peril of immediate death. In such a case he is not only entitled, but it is his duty to perform the operation with a view to saving her life ... I think those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother.  

In other words, the threshold is not limited to danger to life, but covers danger to therapeutic health as well. A physician, who is of the opinion that a woman’s life or health is likely to be endangered by the continuance of pregnancy, is protected by this phrase if he or she performs the abortion. The opinion need not be based on full conviction, but rather any reasonable belief, since the gathering of complete evidence might lead to the woman’s death or irreversible danger to her health. In other words, only prima facie evidence is required if the object and purpose of the necessity test is to be achieved. According to the Supreme Court of Canada in R v. Morgentaler, it is a basic tenet of the criminal justice system that when a legislature creates a defense to a criminal charge, the defense should not be illusory or so difficult to attain that it is practically impossible. Accordingly, the discretion given to the Nigerian medical community in this life-preserving threshold is a welcome development that aims to achieve the desired legislative aim of the drafters. The West African Court of Appeal in the Nigerian case of R. v. Edgal, where four people were charged with unlawfully supplying drugs to procure an unlawful abortion, applied the thrust of the Bourne decision. The Court, in adopting the Bourne analysis, held that no abortion is unlawful when performed to save the life of the woman.

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57. Id. at 693-94.
58. Unfortunately, it appears Nigerian courts are keeping sealed lips on this creative aspect of the Bourne decision. Even in Edgal, where the reasoning in Bourne was applied, the West African Court of Appeal steered away from engaging in this issue. 1 W.A.C.A. 133. However, at least one legal scholar is optimistic that although this aspect of Bourne remains to be judicially explored in Nigeria, it is likely that the courts will adopt the entire reasoning in Bourne because English decisions are persuasive authorities in Nigeria. See Okagbue, supra, note 48, at 198.
60. See Edgal, 4 W.A.C.A. 133.
61. Id.
Another issue that arises under this life-preserving theme is the legitimacy of the invocation of conscientious objection by medical personnel under the circumstances of a life-threatening pregnancy. Although Nigerian criminal jurisprudence does not make provisions for right of conscientious objection in abortion matters, the Nigerian Constitution does provide for such right. Moreover, it has become part of the criminal justice system of most commonwealth jurisdictions to include such rights in abortion laws. The exercise of right of conscientious objection is limited, however; it is not available to a medical practitioner when a treatment is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman. Accordingly, the Nigerian medical community cannot validly invoke this right as a mechanism for refusing to perform abortion when the life of a pregnant woman is jeopardized. Apart from the fact that such a refusal will constitute an element of criminal negligence under the Nigerian criminal jurisprudence, it would also go against medical ethics, which is founded on the saving of life. Besides, such a refusal to render life-saving abortion will serve no public interest.

In addition, the life-preserving threshold plays an important role in determining the duties of medical practitioners when confronted with women experiencing complications as a result of unsafe or incomplete abortion. It is not uncommon to see instances where women who are experiencing complications are denied emergency care in hospitals as a result of either misinterpretation of the legal restrictions of abortion or the moral/religious inclination of the medical practitioner. The bleak atmosphere is even more complicated when a girl or unmarried woman is involved; most hospitals find it unreasonable to provide such services. It has been argued that:

[C]omplications require emergency assessment and management. These women need emergency care which must be provided even

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62. See NIG. CONST. (Constitution of the Federal Republic of Nigeria, 1999) ch. IV (Fundamental Rights), § 38(1) ("Every person shall be entitled to freedom of thought, conscience and religion...").
63. See e.g., Termination of Pregnancy Act (Zambia) 1972 § 4; See also the Abortion Act, 1967, § 4 (Eng.).
64. This limitation of right to conscientious objection is embodied in abortion laws of most commonwealth countries as follows: "Nothing shall affect any duty to participate in any treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman." Termination of Pregnancy Act, 1972, § 4(2) (Zambia); see also The Adoption Act, 1967, §4(2) (Eng.).
65. This argument is supported by the observation that "if a case arose where the life of the woman could be saved by performing the operation and the doctor refused to perform it because of his religious opinions and the woman died, he would be in grave peril of being brought before this Court on a charge of manslaughter by negligence." Bourne, 1 K.B. 687.
where there are legal restrictions on induced abortion. Assessment of the woman’s condition and provision of services must be available on a 24-hours-a-day basis from the point at which the woman first contacts the health care system to the point at which she receives the care she requires.66

It is against health doctrines for women presenting with complications emanating from unsafe or incomplete abortion to be denied emergency assessment and treatment. As the medical profession is founded on the saving of lives, and as the overarching legislative aim of creating the exceptions to outright prohibitive abortion in Nigeria is to save the life of pregnant women who are prejudiced by the continuation of pregnancy, the Nigerian medical community must live up to its expected professional standards, and must, as a matter of necessity, provide adequate medical treatment to victims of unsafe or incomplete abortion.

E. Good Faith

While the Criminal Code is silent on the meaning of “good faith,” the Penal Code in section 37 defines “good faith” as “nothing is said to be done or believed in good faith which is done or believed without due care and attention.”67 In 1979, the Federal Court of Appeal in Dr. D.I. Pam Tok v. The State had the opportunity of construing the Penal Code “good faith” threshold as it applies to abortion providers in Nigeria.68 Dr. Tok, a medical practitioner, was charged with causing the death of a woman in the process of procuring abortion contrary to section 232 of the Penal Code. The prosecution argued that Dr. Tok performed an operation and thereby caused a secondary school student to miscarry a “three month” old child.69 Dr. Tok’s defense was that he performed the operation when the student had a partial miscarriage, was bleeding, and the operation was necessary to save the life of the student.70 There was evidence that the deceased had unsuccessfully attempted to procure her own abortion before consulting the practitioner.71 Although the surgical operation was performed in a hospital, several irregularities surrounded Dr. Tok’s conduct including non-registration of the patient in the hospital roster.72 Dr. Tok’s defense of treating for an incomplete abortion was rejected by both

68. Pam Tok v. The State FCA/K/84/78 (unreported decision) (Federal Court of Appeal 1979) (Nasir, Uwais & Ademola J.J.F.C.A).
69. Id.
70. Id.
71. Id.
72. Id.
the trial and appellate Courts because his general conduct did not portray "good faith." Moreover, The Federal Court of Appeal held that the onus was on the appellant practitioner to show that he acted in good faith for the purpose of saving the life of the patient. He was accordingly convicted under section 232 of the Penal Code.

The combined effect of a purposive statutory interpretation and judicial construction of good faith appears to be very clear; it restricts the procurement of a life-saving abortion to any person who can prove that they exercised due care and attention during delivery of the medical services. This is a question of fact to be proved by the amount of evidence gathered by the abortion provider and their general conduct during delivery of the services. While the legislative aim of the drafters may have been well intended, the omnibus word "whoever," as analyzed in section C of this paper, renders the legislative intention a mere formality. In other words, the diligence requirement is not restricted to qualified medical personnel, but transcend all categories of people who can prove they acted with "due care and attention" while providing abortion. To that extent, "good faith" in its present form, irrespective of its statutory interpretation in the Penal Code, appears devoid of procedural content. Of course, non-physician providers can equally claim to have acted diligently in their services to women and girls accessing abortion. The rest will be left for evidence to determine whether due diligence was actually exhibited, which determination may not require the exhibition of medical professionalism. However, this unfortunate situation could be avoided if "whoever" and "a person" are replaced with the proper professional class contemplated by the drafters. In that case, "good faith" would have more effective procedural underpinning since the observance of "due care and attention" will be restricted to only the permitted class of medical personnel. As such, the due diligence requirement will transform to a creative discretionary tool that most trained medical personnel sympathetic to the course of women can effectively rely upon in making their services available to women seeking abortion.

On the other hand, a broader construction of "good faith" might reveal some hidden legislative intentions. The traditional notion of good faith is to require a physician abortion provider to obtain an independent medical opinion of his colleagues before undertaking any abortion procedure. This traditional meaning is given content and expression in the British Abortion Act of 1967 which exempts a physician abortion provider from criminal responsibility if two other registered medical practitioners concur that the continuation of pregnancy

73. Pam Tok v. The State FCA/K/84/78 (unreported decision) (Federal Court of Appeal 1979) (Nasir, Uwais & Ademola JJ.F.C.A).
74. Id.
75. See Abortion Act, 1967, c. 87, § 1 (Eng.).
would endanger the life of the pregnant woman, or cause injury to the physical or mental health of the pregnant woman, or cause substantial physical or mental handicap to the unborn child. However, this peer-concurrence requirement does not apply where the physician abortion provider is unilaterally of the opinion that abortion is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman. Another commonwealth jurisdiction that de jure requires peer concurrence is Canada. Section 287 of the Criminal Code of Canada is the abortion law in Canada de jure. This section exempts a physician abortion provider from criminal responsibility only where he, among other requirements, obtains the approval of a three-person therapeutic abortion committee. The procedural technicalities required in obtaining this committee approval was vehemently disapproved by the Supreme Court of Canada in the celebrated abortion-liberalizing case of R. v. Morgentaler. The Court was of the opinion that the interest in the life or health of a pregnant woman, which Parliament held out to take precedence over the interest in prohibiting abortions when the continuation of the pregnancy of the woman would be likely to endanger her life or health, was entrenched at least as a minimum when the right to life, liberty and security of the person was enshrined in section 7 of the Canadian Charter of Rights and Freedoms. It noted that

[a]n aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state ... The decision of a woman to terminate her pregnancy falls within this class of protected decisions. It is a decision which has profound psychological, economic and social consequences for the pregnant woman. Section 251 clearly violates this right to liberty since it takes the decision away from the woman and gives it to a committee.

Discussing the impact of this committee-approval requirement the Court argued that the present legislative scheme in Canada not only subjects a pregnant woman to considerable emotional stress as well as unnecessary physical risk but that it leads to an even deeper flaw in asserting that a woman’s capacity to

76. § 1(1).
77. § 1(4).
78. See CODE CRIMINAL ch. 46, § 287(1) (Can.).
79. See Morgentaler, 44 D.L.R. (14th) at 385-86.
81. See Morgentaler, 44 D.L.R. (14th) at 388.
reproduce is not to be subject to her own control. The Morgentaler Case is the de facto abortion law in Canada, having overruled the abortion provision of the Criminal Code of Canada.

This extended construction of good faith operates as an access-limiting factor. Apart from the delay associated with it, there is also the danger of financial impediment on women accessing abortion. Accessing professional medical opinion of the would-be committee may involve some cost to the woman. In Nigeria, the overall cost of procuring abortion in most cases is borne by the partners of the women accessing abortion. However, in some cases, the women pay for the abortions themselves. This is unlike what occurs in some advanced commonwealth jurisdictions where such costs are paid through government health insurance plans. As such, the requirement of committee approval will likely increase the overhead expenses of women and girls seeking and accessing abortion. Therefore to require that a medical committee be consulted before a pregnant woman or girl could access abortion indirectly means denying the "pregnancy victim" an opportunity of accessing abortion. This creates a dichotomy between appearance and reality, between availability and accessibility of abortion. In other words, a systemic inequality is triggered by this extension in as much as poor women and girls will be unwittingly excluded from accessing abortion. This obviously will run counter to internationally endorsed instruments of equal rights jurisprudence. As such, it is thought that Nigerian society is not ripe for the extended traditional committee-approval model of good faith.

The maintenance of the present statutory meaning appears to be a better viable option. The failure of the traditional committee-approval model in Canada, for instance, illustrates that the model only adds to the vulnerability of women and girls. Hence this model will serve no public purpose in Nigeria. Besides, it has the potential to defeat the overarching legislative aim of the drafters in creating exception to outright prohibition of abortion when saving the life of the woman becomes necessary. In addition, one of the reasons why Nigerian women and girls patronize backstreet abortionists is because of the secrecy associated with such clandestine services.

Invariably, an imposition of committee-approval requirement will amount to more publicity which Nigerian women and girls are likely to shy away from. This will have the negative effect of forcing them back to backstreet providers at the detriment of their lives and health. Already abortion statistics have

82. Id.
83. See Okonofua, supra note 8, at 14.
85. See Jinadu, supra note 15; see also Okonofua, supra note 8, at 17.
revealed an enormous increase in the death as well as complications in the health of women accessing abortion through backstreet abortionists; there is therefore no public purpose served by a further complication of the bleak atmosphere. Accordingly, the extended traditional committee-approval meaning of good faith should be resisted in Nigeria since our present medical history does not give room to that. Such extensions will only muffle and gag the legislative intention. As the present statutory definition in section 37 of the Penal Code is clear, no attempt should be made to undertake any further voyage of discovery; at best that would only amount to a fishing expedition which may not properly address present realities in Nigerian society.

III. POSTSCRIPT ON PROPOSED LEGISLATION: THE MATERNAL AND CHILD WELFARE, HEALTH SERVICES BILL OF 2004

Nigeria has always been less poised than other Commonwealth jurisdictions to pursue a holistic reform of abortion law. This reluctance may be due to the fact that in a secular and constitutional democracy like Nigeria, the sensitive issue of abortion generates pluralistic and dichotomous views, which are played out in the moral, religious, ethical, cultural, political, and legal perceptions of society. Our experience under the present abortion laws thus far has not been entirely satisfactory and Nigerian case law has had a checkered history with respect to the issue of abortion. In 1981, as a result of the toll of abortion on the life and health of Nigerian women and girls, the Nigerian Society for Gynecology and Obstetrics sponsored a Termination of Pregnancy Bill. Unfortunately, the National Assembly did not approve that benign gesture. Fortunately another attempt has been made in 2004 to stamp an era of emancipation of Nigerian women and girls from untold abortion hardship. Senator Stella Omu, of the House of Senate recently introduced the Maternal and Child Welfare, Health Services (Procedure, etc) Bill of 2004 (“the Bill”) to the National Assembly. The Bill will concomitantly provide a legal framework for overhauling an abortion regime that has marginalized, oppressed and killed thousands of women and girls; it will revolutionize abortion law in Nigeria. The Bill avoids most of the confounding technicalities of the present laws. Undoubtedly, it is resounding success for those scholars who have advocated for a liberal abortion climate in Nigeria. This section does not aim at

86. See Adi, supra note 1.
88. Id.
89. J.B. Akingba & S.A. Gbajumo, Procured Abortion: Counting the Cost, 7(2) J. Nig. Med. Ass’n 17 (1970). For a sequential ordering of compendious scholarly papers on Nigerian abortion medico-legal regime, see J.B. Akingba, THE PROBLEM OF UNWANTED PREGNANCIES IN NIGERIA TODAY (1972); J.B. Akingba, Abortion, Maternity, and Other Health Problems in Nigeria, 7(4) Nig. Med. L.J. 465 (1977); Adi,
considering the Bill in its entirety, but rather closely engages only the provisions that either expressly, implicitly or potentially impact on abortion. These provisions are charted in line with their concomitant effect of amending or reforming the abortion provisions of the Nigerian Criminal Code and Penal Code.

Section 5(1)(c) of the Bill makes it an offence for

any person who through any act of negligence or omission or dereliction of his lawful duties causes or influences, however remotely, the miscarriage or termination of the pregnancy of any woman; provided [that] no medical doctor or nurse/midwife shall be criminally liable for termination of a pregnancy to save the life of a woman.90

The punishment for this offence is “a fine of 350,000 naira or imprisonment for a period not exceeding five years or both such fine and imprisonment” (section 6(2)).91 These two sections are the only sections that impact on abortion apart from the interpretative section 9, which defines the terms as used in the Bill. These sections will potentially repeal sections 228, 229, 230, and 297 of the Criminal Code and sections 232, 233, 234, and 235 of the Penal Code all of which presently govern abortion in Nigeria. Of more particular interest to this paper are the balances of the complex interplay of the abortion sections of the Bill and sections 297 of the Criminal Code and 232 and 235 of the Penal Code. These provisions in the present laws make up the necessity test.

At first blush, it is clear that the Bill has succeeded in eliminating most of the confounding clauses of the necessity test such as “performance of abortion by any person (or whoever).”92 The Bill expressly permits “medical doctor or nurse/midwife” to perform abortion.93 This categorization will assist in containing backstreet abortion providers. One shortcoming of this welcome categorization formula is the elimination of paramedic personnel. Common sense knowledge will reveal that paramedics are as competent as nurses or midwives, and in some cases may be more qualified. This observation is due to the fact that some paramedics are qualified doctors from foreign jurisdictions who have not yet been licensed by their jurisdiction of residence. Accordingly, shutting them out from the list of permitted abortion providers may not be the

91. Id.
92. See C. CRIM. ch. 21, § 297; PENAL C. §§ 232, 235.
93. Supra, note 87, at § 5(1)(c).
best option. In view of the somewhat high rate of maternal mortality and morbidity resulting comparatively from Nigerian physician abortion providers, nurses, midwives and paramedics, it is recommended that all classes of legal abortion providers—medical practitioners, nurses, midwives, and hopefully paramedics, be required to undergo some prescribed retraining. This goal can easily be achieved through section 8 of the Bill, which grants the Federal Minister of Health the “power and responsibility to oversee performance of the instructions of this Act.”

The Bill has also succeeded in getting rid of “reasonable care and skill.” This riddance is a welcome development in that the categorization of permitted abortion providers invariably accomplishes this task. All registered medical personnel are under statutory regulatory bodies. These bodies have rules of professional responsibility that include duties of professional skill and competence in service delivery to patients. The clause “surgical operation” is not part of the Bill. This riddance is a good development because it leaves open the suitable abortion procedure to the permitted abortion providers. A cursory review of Nigerian abortion cases reveals that most abortions are achieved through administration of drugs. The Bill does not make any reference to “good faith” which is one of the thresholds in the present law. This silence is good because it avoids the potential danger of interpreting “good faith” broadly to encompass medical peer-approval and consent, which will obviously pose a lot of delays in abortion matters. The existing interpretation of this nebulous concept has too much uncertainty and ambiguity for effective application within the Nigerian criminal justice system.

More importantly the Bill reinforces the need to provide abortion “to save the health and life of a woman” (emphasis added). This is an extension of the “preserving/saving the woman’s life” threshold in the present laws and appears to be the only footprint of the necessity test thresholds that is retained by the Bill. The Bill, while recognizing the need to provide abortion to save

94. See Henshaw, supra note 4, at 162.
95. See C. CRIM. ch. 21, § 297.
96. Id.
97. Id.
99. See C. CRIM. ch. 21, § 297.
100. Abortion Act, 1967, ch. 87, § 1 (Eng.); see also C. CRIM. ch. 46, § 287(1).
101. See C. CRIM. ch. 21, § 297; PENAL C. §§ 232, 235.
102. Id.
life of the woman, goes beyond strictly saving the life of the woman, which is the only permitted ground under the present laws, to include saving the health of the woman,\textsuperscript{103} which includes therapeutic health. This is a great achievement. It literally codifies the \textit{Bourne} decision. Moreover "health" is defined in section 9(1) of the Bill to mean "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."\textsuperscript{104} This is in accord with World Health Organization's meaning of health. As a result of this subtle but fundamentally important shift in the life-saving analysis, it is possible for much to be achieved theoretically through this medium. The heuristic potentials of this provision, which advocates can harness, include demanding for abortion for any of the following grounds:

\begin{enumerate}
\item[a)] Where the continued pregnancy would endanger the life of the pregnant woman or constitute a serious risk to her physical health;
\item[b)] Where the continuation of the pregnancy would constitute a serious threat to the pregnant woman's mental health and create a danger of permanent damage to her mental health;
\item[c)] Where there was a serious risk that the child to be born would suffer a physical or mental defect of such a nature as to be irreparably handicapped;
\item[d)] Where the pregnancy was a result of unlawful sexual intercourse including rape, incest or intercourse with a minor or mentally defective female unable to appreciate the consequences of intercourse or bear parental responsibilities.
\end{enumerate}

With respect to the last option, theoretically the expanded clause could be axiomatic to advocacy in abortion for victims of rape and incest, however some practical and technical difficulties may defeat this benign and rationally connected objective. There is the need to reduce the trauma and emotional distress of victims of rape and incest by broadening the grounds for legal abortion to expressly include rape or incest, contrary to observations canvassed elsewhere.\textsuperscript{105} In the English case of \textit{R. v. Bourne}\textsuperscript{106} mentioned earlier, an obstetric surgeon performed an abortion on a 15-year old girl who was raped on the grounds that she would otherwise have become a mental wreck. This case


\textsuperscript{104.} \textit{Id.}

\textsuperscript{105.} \textit{See} Okagbue, \textit{supra} note 48, at 203 (observing that "[r]ape and incest sometimes serve as indications for abortion in various jurisdictions. As a separate indication, this ground may be somewhat superfluous because it may be more properly subsumed under the medical indication of risk of injury to the physical or mental health of the pregnant woman.").

\textsuperscript{106.} \textit{See Bourne}, 1 K.B. 687.
is very popular in most commonwealth jurisdictions mainly because of its expansive defense of therapeutic abortion far beyond the necessity test to encompass the protection of the physical or mental health of the woman.  

An express inclusion of rape or incest as permissible grounds for abortion will create a more practical climate for victims to have recourse to abortion facilities without much difficulty, and will also place the burden on the state to prove the contrary. Otherwise, using the health definition of the Bill may not easily achieve this objective for victims of rape or incest, as the burden of proving rape or incest may be placed on them. The high cost of accessing expert evidence, coupled with the general bureaucracy that surrounds most Nigerian facilities may severely inhibit this worthwhile legislative intention. It is disheartening to prevent victims of rape from accessing abortion considering the general circumstances surrounding their dilemma. Arguably, government is to blame for the porous security in the country, which intensifies the vulnerability of women. Failure to treat rape as an indication for abortion translates into government insensitivity of national realities. This joining of the theoretical concerns of rape and incest with their practical impact on abortion should be a central concern of policy makers and advocates.

Overall, although the Bill may not achieve a veritable haven for those seeking abortion, since abortions by physician providers have had some consequences on women's reproductive health as well, the Bill's abandonment of the confounding thresholds characterizing the present laws appears to have

107. Id.

108. From my experience in campus journalism as Senior Staff Writer, Editor, Associate Editor and Editor in Chief of a Nigerian campus magazine—KAMPUSWATCH, University of Benin—from 1993 through 1998, there was hardly any week during academic sessions that at least one girl was not raped on campus. Most of the victims chose not to report the violation because of a myriad number of factors, including humiliations from colleagues and peers; rejection by friends; potential effects on the victim's future chances of marriage; security concerns, and most, if not all, of the rape offenders were members of secret cults who could go to the extent of killing to defend their selfish interests and lopsided anti-social cult values. A rape victim who reported the incident would be subjecting herself to further risks, gang rape and possible death; and finally, the university communities do not have enough programs that could enhance detection of campus crimes or encourage victims to report their ordeals. Unfortunately, Nigerian campus magazines do not report all the anomalies occurring on campus because of inadequate security measures to protect their writers in the event of attacks from clandestine cults. These secret cult activities fly in the face of the clear wording of section 38(4) of the Nigerian Constitution: "Nothing in this section [right to freedom of thought, conscience and religion] shall entitle any person to form, take part in the activity or be a member of a secret society." NIG. CONST. (Constitution of the Federal Republic of Nigeria, 1999) ch. IV (Fundamental Rights), § 38(4). See Lambert Oghenerobo Jr., Cult War: Uniben Under Siege, 1(8) KAMPUSWATCH 9 (1996); Who Killed Williams Ubong? 1(9) KAMPUSWATCH 8 (1997). On the national scene, rape incidence is also high especially during inter-ethnic riots or religious conflicts. Soldiers and police personnel deployed to quell those riots and conflicts seize the opportunity to rape innocent women and girls. See, e.g., HUMAN RIGHTS WATCH, BACKGROUND REPORT: THE DESTRUCTION OF ODI AND RAPE IN CHOBA (1999), http://www.hrw.org/press/1999/dec/nibg1299.htm.
the potential of downplaying or reducing the consequences emanating from physician providers. Medical practitioners will be more willing to provide abortion services based on their subjective interpretation of "saving the health and life of a woman." Abortion will be performed in a more secure atmosphere; secrecy is bound to dwindle as a result of the Bill's openness. The close supervision of the law will encourage users to pursue their claims in the event of medical negligence, and will also have the effect of improving the efficiency of physician providers. On the whole, the Bill will result in a win-win situation. Another important accomplishment of the Bill will be the creation of a uniform abortion law in Nigeria. By concomitantly repealing the abortion provisions of the Criminal and Penal Codes, the Bill would achieve an incremental harmonization of the somewhat divergent Codes.

IV. CONCLUSION & RECOMMENDATIONS

While the objective of the necessity test is to provide an escape route from a fully prohibitive abortion regime, some of the means chosen to advance that objective appear unsuitable. Some of the thresholds in their present state neither present a veritable haven nor viable refuge for women and girls whose lives are jeopardized by the continuation of pregnancy. The words "whoever" and "a person" should be expunged from the exception clauses; in their place, words capable of specifically identifying the contemplated class of persons permitted to perform abortion should be substituted. This categorization is in order to exclude backstreet abortionists. On the other hand, the present statutory meaning of "good faith" should be maintained since an extended meaning will trigger technicalities and procedural dangers.

It is advisable that qualified nurses, midwives, and paramedics be permitted to perform abortions at early stages of pregnancy. This is for practical accessibility purposes in view of the dearth of medical practitioners in most Nigerian rural communities, coupled with the high cost of accessing medical practitioners. This may bridge the gap between availability and accessibility. In Nigeria, maternities are recognized birthing centers that are owned and run by nurses and midwives. So far, the Nigerian public appears satisfied with their services. Permitting them to diversify into abortion at early pregnancy will presumably be acceptable too. However, they should be made to consult and work with a medical practitioner in case of potential emergencies. The statutory means of achieving life-saving abortion must be expanded to include purely medical procedures, like administration of drugs. Unfortunately, the present "surgical operation" channel is too restrictive and appears to permit only

medical practitioners to perform abortion. This narrow channel should be abandoned.

It is recommended that the National Assembly set up a law reform commission with the aim of carrying out a program of research into abortion. The commission should be given the task of conducting opinion polls aimed at getting the perceptions of society towards abortion. The public opinion that existed as at the time the laws were enacted might have shifted substantially. As the current opinion of members of society help to determine what the law should be, it is not jurisprudentially justifiable for laws enacted many decades ago to remain in force without revision. It does not help our legal system to have a jurisprudence that is static and rigid, undermining innovations, technology and modern realities. It does not improve our legal system to have a jurisprudence that holds tenaciously to old time tradition and belief even when it has dawned on us that the world is changing for the better. Accordingly, it has been argued that:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind limitation of the past.¹¹⁰

The text of the British Offences against the Person Act of 1861, which substantially constitutes the abortion laws in Nigeria, is more than two centuries old.¹¹¹ It therefore makes no practical sense nor serves any public purpose that an antiquarian law should continue to exist without regard to social dynamics and prevailing realities. There is no justifiable reason for Nigeria to continue its tenacious loyalty to the outdated Act.

It is further recommended that the Nigerian Judiciary should bring creativity to bear in abortion matters. As this paper has revealed, it was the creative interpretation of Justice Macnaghten in *R. v. Bourne* that motivated the British Parliament to amend and clarify the Offences Against the Person Act of 1861.¹¹² This is embodied in the present Abortion Act of 1967. In a similar vein, the Canadian example is equally illustrative of judicial creativity. It is the creative judgment of the Supreme Court of Canada in *R. v. Morgentaler* that is presently the de facto abortion law in Canada. That case overruled the statutory abortion provisions in Canada. Moreover, a look at three U.S. Supreme Court


¹¹¹. *See Bourne* 1 K.B. at 690 (in which Macnaghten J. observed that: “The defendant is charged with an offence against s. 58 of the Offences Against the Person Act, 1861. That section is a re-enactment of earlier statutes, the first of which was passed at the beginning of the last century in the reign of George III.”).

¹¹². *Id.*
cases: *Griswold* (1965); *Eisenstadt* (1972) and *Roe v. Wade* (1973) reveals that although the U.S. Congress did not at anytime in between these cases change the law, the Court brought about a fundamental change which virtually heightened the jurisprudence of individual autonomy and to some reasonable extent equality rights jurisprudence in the American legal system. Nothing prevents Nigerian courts from flexing similar judicial creative muscles.

This analysis has shown that induced abortion is prevalent in Nigeria notwithstanding the restrictions of the law. It would therefore be necessary for Nigerian government to face present realities by developing policies that aim to address this critical issue in order to reduce the high rate of maternal mortality and morbidity arising from this practice. The present abortion laws, from all indications, appear to have failed in that the aim of unduly restricting abortion is to prevent women and girls from seeking and accessing abortion, notwithstanding, the rate of abortion still continues to escalate daily. Invariably, the end that the law was designed to achieve has been defeated. Justice Holmes noted, "[A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it serves...."\(^{113}\)

Nigerian women and girls do not seem to be deterred by the legal consequences of the "crime" of abortion. The aftermath, however, is that most of the abortions are carried out in medically unsafe environments, thereby endangering the lives of users. The law is responsible for this loss of life. It therefore behooves the Nigerian National Assembly to amend the law in order to make it conform to modern reality. A viable alternative mechanism would be the adoption of a somewhat liberal approach. This anticipated liberal formula can easily be achieved through the enactment of the abortion provisions (section 5) of the Maternal and Child Welfare, Health Services Act of 2004, with thorough amendments to some other parts of the Bill. It is hoped that this second opportunity will not be wasted again.

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SOVEREIGN IMMUNITY: RAMIFICATIONS OF ALTMANN

Jenny Adelman*

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I. INTRODUCTION

The Altmann family has tried for half a century to recover their valuable paintings from the Austrian government.¹ Their troubles began when Austria was overthrown by Nazi Germany.² The Altmann family had two choices - flee the country or be transported to Nazi concentration camps and an uncertain future. The Altmanns chose to flee and had to leave almost everything they owned behind, including their cherished and valuable works of art.³ After a change of Austrian law in their favor, and several failed attempts to work things out with the Austrian National Museum, litigation finally commenced in 1999.⁴ Originally, Maria Altmann intended to file and proceed with this lawsuit in Austria.⁵ However, due to the extraordinarily high court costs of approximately $200,000, Ms. Altmann was forced to voluntarily dismiss her suit in Austria and re-file the action in United States federal court.⁶ In response, Austria filed a Motion to Dismiss, arguing various defenses including a claim of sovereign

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2. Id.
3. Id.
5. Altmann, 124 S. Ct. at 2245.
6. Id.
immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA). The United States District Court for the Central District of California denied Austria's Motion to Dismiss and the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.

Austria applied to the United States Supreme Court for review on the sole issue of whether the FSIA applied to claims that were based on conduct occurring before the passage of the Act. On June 7, 2004, the Court concluded that the FSIA could be applied retroactively to claims that occurred before the passage of the Act, and before the official adoption of the restrictive theory of sovereign immunity in 1976. While this ruling does not determine whether Ms. Altmann will win her original lawsuit, it does grant her a small victory—she may proceed with her suit against Austria and attempt to reclaim the paintings her family once cherished.

The pending cases of Joo v. Japan and Nationale Des Chemins De Fer Francais v. Abrams share many similarities with Altmann. In both cases, which revolve around events occurring during WWII, the foreign sovereigns claim immunity under the FSIA in order to escape any liability they may face if forced to defend themselves in a lawsuit. The United States Supreme Court granted a review to both cases, Joo and Abrams. However, in light of the Altmann decision, the Court vacated the decisions of the lower courts and remanded the cases back to their respective courts of appeals. Part I of this paper will provide a recitation of the facts of Austria v. Altmann. Part II will discuss the background, history, and confusion surrounding whether the FSIA will be retroactively applied. Part III will analyze the Altmann decision and examine the reasoning of the Supreme Court, which held that the FSIA should be applied retroactively. Part IV will apply the analysis of Altmann to the Joo and Abrams cases, and will speculate as to how the courts of appeals will decide these cases in light of Altmann.

7. Id. at 2246.
9. Id.
10. Id.
11. Id.
14. Id.
II. BACKGROUND: AUSTRIA V. ALTMANN

Maria Altmann, the plaintiff in this case, seeks to recover six paintings by the famous Austrian artist Gustav Klimt which were owned by her family before the annexation of Austria by Nazi Germany. These paintings are currently housed in the Austrian National Gallery, which is owned and operated by the Republic of Austria. The paintings, valued at several million dollars, were once owned by and displayed in the home of Altmann's uncle, Ferdinand Bloch-Bauer, a wealthy sugar baron. Bloch-Bauer's wife, Adele, was the subject of two of the paintings. Mrs. Bloch-Bauer died in 1925, and in her will, asked her husband to bequeath the paintings to the Austrian National Gallery after his death. Bloch-Bauer, who was the legal owner of the paintings, never executed any documents transferring ownership to the Gallery. His will bequeathed his estate in its entirety to Ms. Altmann and two other family members.

In 1938 the Nazis invaded and annexed Austria. Ferdinand, a Jew, was forced to flee the country and leave everything behind. The Nazis took over his home in Vienna and divided up his artwork, which included several other valuable paintings and a large porcelain collection. The Nazi lawyer in charge of liquidating Mr. Bloch-Bauer's estate "donated" two of the paintings to the Gallery in exchange for another painting. The "donation" included a note claiming to deliver the paintings as per the request in Adele Bloch-Bauer's will. The note was signed "Heil Hitler." Two of the other Klimt paintings were sold to museums, one to the Austrian National Museum and one to the Museum of the City of Vienna. The fifth painting was sold to a third party,

18. Altmann, 124 S. Ct. at 2243.
19. Id.
20. Id. at 2243-44.
21. Id. at 2244.
22. Id.
23. Altmann, 124 S. Ct. at 2244.
24. Id.
25. Id.
26. Murray, supra note 17, at 304.
27. Altmann, 124 S. Ct. at 2245.
28. Id.
29. Murray, supra note 17, at 304.
who later donated it to the Gallery.\textsuperscript{30} The fate of the sixth painting is not known.\textsuperscript{31}

In 1946, Austria passed a law declaring all transactions motivated by Nazi ideology to be null and void.\textsuperscript{32} The artwork, however, was not automatically returned to the rightful owners.\textsuperscript{33} Austrian law required anyone wishing to export seized art to gain permission from the Austrian Federal Monument Agency.\textsuperscript{34} The agency usually required the original owners of the art to re-pay the purchase price to the government or to trade other artworks in exchange for the seized property.\textsuperscript{35} In response to this new law, Ms. Altmann’s brother hired an Austrian lawyer to recover the artwork stolen from their uncle by the Nazis.\textsuperscript{36} In 1948, the attorney contacted the gallery, requesting the paintings be returned.\textsuperscript{37} The Gallery stated that the paintings were donated in accordance with the will of Adele Bloch-Bauer and would not be returned.\textsuperscript{38}

Recently, Austria passed a new law under which individuals who had been forced to donate art in exchange for export permits could reclaim their “donated” art.\textsuperscript{39} This new law prompted Ms. Altmann to initiate a lawsuit against the government in Austria.\textsuperscript{40} Unlike the United States court system, court costs in Austria are proportional to the value of the damages or property sought.\textsuperscript{41} In this case, the artwork is worth several million dollars, and for the suit to proceed in Austria, Ms. Altmann would have been required to pay approximately $200,000.\textsuperscript{42} Unable to pay this amount, Ms. Altmann voluntarily dismissed her suit and re-filed it in the United States District Court for the

\begin{appendices}
\begin{enumerate}
\item Id.
\item Altman, 124 S. Ct. at 2244.
\item Id.
\item Id. The Austrian Republic required the original owners of the property to re-pay the purchaser of the property, seized and sold to them by the Nazis, the purchase price before the property was returned to the original, rightful owner. Id.
\item Id.
\item Id.; Murray, supra note 17, at 304.
\item Altman, 124 S. Ct. at 2244.
\item Id.
\item Id.
\item Id. at 2245. The law provides restitution to those whose artwork had been donated to the gallery in exchange for export permits to transport other works of art from the country. Id.
\item Id.
\item Altman, 124 S. Ct. at 2245. Austrian filing fees are determined by the amount in controversy. Id.
\item Id.
\end{enumerate}
\end{appendices}
Central District of California. As previously stated, Austria moved to dismiss, claiming foreign sovereign immunity under the FSIA.

III. FSIA

The Foreign Sovereign Immunities Act of 1976 codified the "restrictive theory" of sovereign immunity that was established in 1952. By enacting the FSIA, Congress intended to clarify the circumstances in which federal courts would have jurisdiction over foreign nations and transfer immunity decision-making to the judiciary. The responsibility of sovereign immunity decision-making had previously rested with the executive branch. The United States Congress determined that because of the long, convoluted history of foreign sovereign immunity, a statute was necessary to determine exactly which entity had the power to decide the immunity of a country.

It is generally accepted that the concept of foreign sovereign immunity originated from Chief Justice Marshall’s opinion in Schooner Exchange v. M’Faddon. In that case, the Chief Justice understood the concept of foreign sovereign immunity to be a jurisdictional issue, not one of substantive law. Marshall reasoned that foreign sovereign immunity is a matter of comity, and one in which the executive branch is best suited to make decisions. In accord with that opinion, the Supreme Court generally deferred to the decisions of the executive branch. Foreign states who were sued in the United States usually requested sovereign immunity from the executive branch, and in most cases it was granted. This all changed in 1952, with the Tate Letter.

Before 1952, the United States adhered to the theory of absolute sovereign immunity, and the executive branch requested immunity in actions against

43. Id.
44. Id. at 2246.
47. Altmann, 124 S. Ct. at 2247.
49. See, e.g., Murray, supra note 17, at 306; Altmann, S. Ct. at 2247.
51. Id. at 137.
53. Verlinden B.V., 461 U.S. at 486.
54. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, CH. 5, pt. IV, introductory note (1987); Altmann, 124 S. Ct. at 2248.
foreign sovereigns who were "friends" of the United States. Under this theory, a sovereign could not be sued in the courts of another country without its permission. However, in 1952, the State Department determined that immunity should no longer be granted in all cases. In what is now known as the "Tate Letter," Jack Tate, the Acting Legal Adviser to the Secretary of State, announced to the Attorney General that the State Department would now apply the "restrictive" theory of sovereign immunity. Under the restrictive theory, the sovereign is immune from claims arising from governmental activity, but not from activities stemming from commercial activities conducted by the state.

This policy change had little impact on the procedures used by sovereigns who wanted to be granted immunity; the foreign state still asked the executive branch for immunity. However, problems now arose from the executive branch attempting to grant immunity to a sovereign under the new restrictive theory of sovereign immunity. The executive branch attempted to confer sovereign immunity on countries that now had no right to it under the newly adopted restrictive theory. In addition, if a sovereign did not request immunity through the executive branch, the responsibility of resolving the question of immunity was left to the courts to determine. Thus, decisions of whether to grant foreign sovereign immunity were made by two different branches of government, yielding non-uniform decisions.

Congress attempted to rectify these problems by passing the FSIA. Generally, the Act grants immunity to foreign states. However, a certain number of exceptions, including an commercial activity exception, may subject foreign countries to lawsuits in the United States. Generally, the commercial activity exception disallows the granting of sovereign immunity to countries that engage in commercial business transaction within the United States. The Supreme Court recognized that the FSIA removed existing federal jurisdiction

55. *Altmann*, 124 S. Ct. at 2248.
56. Id.
58. Id.
60. *Verlinden B.V.*, 461 U.S. at 487.
61. Id. at 487-88.
62. Id. at 487.
63. Id.
64. Id. at 488.
over foreign sovereigns from a number of statutes and placed federal jurisdiction exclusively in the FSIA. The statute simply reallocated jurisdictional granting authority. The statute did not create jurisdiction where none existed previously. This all seems pretty clear, and courts have not had problems with this proposition. Courts have had problems, however, determining when to apply the statute to certain cases.

Confusion over which cases the FSIA is to be applied to stems from the vague language of the statute. Section 1602, the preamble of the FSIA, states “claims of foreign states to immunity should henceforth be decided by courts of the United States...in conformity with the principles set forth in this chapter.” Courts have interpreted the use of the word “henceforth” in many different ways. Unfortunately, the House Report on the FSIA provides no clarity for the courts.

In Princz v. Federal Republic of Germany, the United States Court of Appeals for the District of Columbia Circuit interpreted the use of the word “henceforth” to mean that the FSIA should apply to all cases after its enactment, regardless of when the cause of action accrued. In addition, that court found that application of the FSIA to the case would only effect a change of jurisdiction, not a change of substantive law, and applying it retroactively would not prejudice either of the parties. The Court of Appeals for the Ninth Circuit, in its decision of Altmann agreed with the Princz court, and further stated that Austria could not have had any expectation that foreign sovereign immunity would have been extended to it for the wrongful appropriation of Jewish property. In fact, the United States government made it clear in 1949 that it would not condone any transactions in which property was wrongly

69. Id.
70. Id.
72. See, e.g., Princz v. Federal Republic of Germany, 26 F.3d 1166, 1170 (D.C. Cir. 1994); Altmann, 317 F.3d at 963; Joo, 332 F.3d at 687; Abrams, 332 F.3d at 185.
73. Altmann, 142 F. Supp. 2d at 1199.
75. See, e.g., Princz, 26 F.3d at 1170; Altmann, 317 F.3d at 963; Joo, 332 F.3d at 686; Abrams, 332 F.3d at 185.
77. Princz, 26 F.3d at 1170.
78. Id.
79. Altmann, 317 F.3d at 965.
appropriated by the Nazis.\textsuperscript{80} It is well settled that the FSIA does not infringe on any substantive rights held by a country at the time an act occurred; it only affects the jurisdiction of the country when pertaining to its commercial activities.\textsuperscript{81}

The District of Columbia circuit and the second circuit in per curium opinions did not interpret the use of the word "henceforth" in the same manner.\textsuperscript{82} These courts concluded that the word "henceforth" can support several different meanings, and that Congress did not clearly express how to apply the statute with respect to events occurring before the statute was passed.\textsuperscript{83} With that in mind, these courts have decided to apply a plain language interpretation to the word, and simply apply the FSIA only to events occurring after its enactment.\textsuperscript{84} Past decisions notwithstanding, it is clear that courts did not agree on how the FSIA should be applied and were in need of some type of direction from the Supreme Court. This direction finally came in June of 2004 with the announcement of the ruling in Republic of Austria v. Altmann.

\textbf{IV. ANALYSIS OF AUSTRIA V. ALTMANN}

On June 7, 2004, the U.S. Supreme Court issued its ruling in the case of Republic of Austria v. Altmann.\textsuperscript{85} The Court considered whether the FSIA applied to claims that were based on conduct occurring before the passage of the Act.\textsuperscript{86} The Court concluded that the FSIA does apply retroactively to claims occurring before the passage of the Act, and before the official adoption of the restrictive theory of sovereign immunity in 1976.\textsuperscript{87} The Altmann case was granted review after the ninth circuit denied Austria's Motion to Dismiss.\textsuperscript{88} Austria raised an argument of foreign sovereign immunity in two ways. First, it argued that as of 1948, when the alleged events occurred, Austria would have been protected by absolute immunity.\textsuperscript{89} Second, it contended that the FSIA cannot be applied retroactively, thereby maintaining its privilege of absolute

\textsuperscript{80} Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the attorneys for the plaintiff in Civil Action No. 31-555 in the U.S. District Court for the Southern District of New York (Apr. 27, 1949) Jack Tate, Letter from the Acting Legal Advisor to the Attorney General, reprinted in 26 Dep't St. Bull. 984 (1952).

\textsuperscript{81} See, e.g., Murray, supra note 17, at 304; Altmann, 317 F.3d at 966; Altmann, 124 S. Ct. at 2246.

\textsuperscript{82} Joo, 332 F.3d at 686; Abrams, 332 F.3d at 184.

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Altmann, 124 S. Ct. at 2256.

\textsuperscript{86} Id. at 2243.

\textsuperscript{87} Id.

\textsuperscript{88} Id. at 2246.

\textsuperscript{89} Id.
Specifically, Austria argued that it enjoyed the privilege of absolute immunity in 1948, and that retroactive application of the FSIA would strip it of this privilege, which would be impermissible. Both the district court and the court of appeals ruled that applying the FSIA retroactively to Austria's alleged wrongdoing in 1948 was not impermissible because the United States had made it well known to all nations that it would not condone any transactions in which property was wrongly appropriated by the Nazis.

The Court first clarified an assumption of the district court concerning Landgraf v. USI Film Products, a case on which the district court relied heavily. The default rule announced in Landgraf is as follows: if Congress has made no clear expression of its intent, a court must then determine if applying the statute retroactively would affect substantive or procedural rights. If the statute affects either of these rights, it may not be applied retroactively. However, when the Landgraf rule had been applied in the past, it did not yield a uniform result. Due to the nature of jurisdictional granting statutes, they can be viewed as both substantive and procedural law. As a result, the Court of Appeals for the Second Circuit has suggested that the decision of retroactive application be made on a case-by-case basis.

In Landgraf, the Court considered whether Section 102 of the Civil Rights Act of 1991 applied to an employment discrimination case that was pending on appeal at the time the new law was passed: the law in effect at the time the decision was rendered, or the law in effect at the time the incident occurred. The Court recognized that "retroactivity is not favored in the law," and that "congressional enactments ... will not be construed to have retroactive effect unless their language requires this result." The presumption against retroactive application stems from considerations of fairness replete in American law, that individuals should be able to know what the law is in order
to conduct themselves accordingly.\textsuperscript{101} Generally, if Congress has not made its intention clear, courts have declined to apply legislation retroactively.\textsuperscript{102}

The Court recognized that retroactive application was extremely important to statutes concerning substantive law, or rights that an individual or entity has, but that it was not as important in statutes concerning jurisdiction.\textsuperscript{103} Jurisdictional statutes merely change the court that is to hear the case, and do not seek to change the substantive law on which the case will be decided.\textsuperscript{104} Thus, arguably to apply a statute of this type retroactively would neither grant nor take away any substantive rights because it affects jurisdiction only.\textsuperscript{105} However, the Supreme Court determined that the FSIA is not capable of categorization; it is an amalgamation of both procedural and substantive law.\textsuperscript{106}

Next, the Court examined the specific language of the FSIA.\textsuperscript{107} The Court found it patently clear from the preamble of the Act that the FSIA would apply to all post-enactment claims of immunity.\textsuperscript{108} In doing so, it found convincing evidence that Congress intended the Act to apply to pre-enactment conduct.\textsuperscript{109} The Court examined the language surrounding the word "henceforth."\textsuperscript{110} Specifically, the Act states "claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."\textsuperscript{111} The Court examined the Congressional intent and determined that the purpose of the word "henceforth" is for the statute to apply to all claims of immunity arising after the Act was passed.\textsuperscript{112} Therefore, all claims of immunity should be decided in accordance with the FSIA regardless of when the events occurred.

Lastly, the Court looked at the congressional purpose behind the passage of the FSIA. Congress sought to accomplish two main goals by enacting the FSIA: to clarify the rules judges apply when dealing with claims of sovereign immunity and to clarify separations of powers between the judiciary and executive with respect to these claims, by affirmatively conferring this power

\textsuperscript{102} J.N.S, 533 U.S. at 325.
\textsuperscript{103} Landgraf, 511 U.S. at 274.
\textsuperscript{104} Id. at 275.
\textsuperscript{105} Id. at 274.
\textsuperscript{106} Altmann, 124 S. Ct. at 2257.
\textsuperscript{107} Id. at 2252.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 2253.
\textsuperscript{110} Id.
\textsuperscript{112} Altmann, 124 S. Ct. at 2253.
on the judiciary.\footnote{See generally H.R. REP. No. 94-1487 (1976), reprinted in 1976 U.S.C.C.A.N. 6604.} To accomplish these goals, Congress crafted a statutory framework around the concept of foreign sovereign immunity.\footnote{Altmann, 124 S. Ct. at 2253.} Rebutting an argument that the FSIA should not be applied to claims that pre-date its enactment, the Court stated that if this were allowed, the entire jurisdictional scheme of the statute would be frustrated.\footnote{Id.} Moreover, the Court determined that applying the FSIA to all pending cases, regardless of when the events occurred, is most consistent with the Act’s two main purposes.\footnote{Id.}

The structure of the FSIA supports this conclusion.\footnote{Id.} Many provisions of the Act apply to events occurring before its passage.\footnote{Id.} There has never been any doubt that the Act’s procedural provisions relating to venue, service, or removal apply to all cases, irrespective of when the event occurred.\footnote{Id.} The Court held that the FSIA should apply at the time the suit is brought, not the law in effect at the time the events originally occurred.\footnote{Id.} Based on this, the Court reasoned that it would be “anomalous” to assume that the FSIA should only be applied in a prospective manner with regard to jurisdiction.\footnote{Id.}

Consequently, the decisions of the district court and the court of appeals were affirmed.\footnote{Id.} However, the Supreme Court acknowledged that the executive branch was still free to file amicus briefs, asking for a country to be granted immunity.\footnote{Id.} This acknowledgement seems to suggest an alternate course of action for foreign sovereigns desiring immunity. Finally, the Court cautioned that this holding was extremely narrow, only answering only the question of whether the FSIA could be applied retroactively.\footnote{Id.} The Supreme Court refused to address any of the other issues brought up in the opinions of the lower courts.\footnote{Id.} Although the holding may be narrow, the consequences of this case may have a profound effect on two other cases pending before the Court.

\begin{itemize}
\item \footnote{Verlinden B.V., 461 U.S. at 497.}
\item \footnote{Altmann, 124 S. Ct. at 2253.}
\item \footnote{Id. at 2256.}
\item \footnote{Id. at 2255.}
\item \footnote{Id. at 2254.}
\item \footnote{Altmann, 124 S. Ct. at 2254.}
\end{itemize}
V. Joo and Abrams: Ramifications of Altmann

This year, the United States Supreme Court granted review to two cases where, like Altmann, foreign sovereigns rely on the FSIA in their Motions to Dismiss. Both sovereigns, Japan and France, raise the FSIA as a defense to jurisdiction by arguing that the underlying events in their respective cases occurred before the Act was passed, and thus, the FSIA cannot be applied to them. However, instead of hearing oral arguments from all parties, the Court vacated the decisions of the lower courts and remanded the cases back to their respective courts of appeals in light of the Altmann decision. The following two sections will apply the analysis employed by the Supreme Court in Altmann, and will proffer an opinion as to how the courts of appeal will eventually decide these two cases.

A. Joo v. Japan

Fifteen former Japanese "comfort women," have brought suit against Japan seeking monetary damages for being victimized through sexual slavery and torture by members of the Japanese Army during World War II. The women allege the government of Japan abducted and forced them to serve as "comfort women" i.e. sex slaves, for the Japanese Army near the front lines of the war. The women, who were not citizens of the United States, were able to file suit under the Alien Tort Claims Act (ATCA), which allows foreign citizens to bring claims against each other in American courts. Since 1991, comfort women from several countries have attempted to seek redress in Japanese courts; all have been unsuccessful. The unfortunate legal situation in Japan may be attributed to the fact that, unlike Germany or Austria, Japan has yet to pass legislation requiring the government to compensate victims from its wars. In addition, it may be difficult to render an impartial verdict in the courts of Japan because women filing lawsuits of this type have been met with numerous technical barriers as well as hostility from the courts. Presumably, comfort

126. See cases cited supra note 12
127. Joo, 332 F.3d at 680; Abrams, 332 F.3d at 175-76.
128. See cases cited supra note 12.
129. Joo, 332 F.3d at 680.
130. Id. at 681.
133. Fisher, supra note 132, at 36.
women have been met with this response because the lawsuits are not supported by concurring legislation or executive orders. These factors have rendered the Japanese courts virtually impenetrable to the claims of comfort women, and therefore, the group filed suit in the United States.

In 2000, the women filed a complaint in the United States District Court for the District of Columbia. Japan raised a defense of sovereign immunity under FSIA in its Motion to Dismiss, and the motion was granted. The district court failed to reach a conclusion on the issue of whether the FSIA applies retroactively to events occurring before its enactment. That court did, however, conclude that the case presented a non-justiciable political question, inappropriate for judicial review.

The women appealed to the United States Court of Appeals for the District of Columbia Circuit where the decision of the lower court was affirmed. That court held that the FSIA did not apply to events occurring before the Act's passage. The court of appeals recognized that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court. However, the court declined to apply the statute retroactively because it would "upset the settled expectations of foreign sovereigns." This proposition stems from the fact that, in the 1940s, when these events occurred, the United States operated under the doctrine of absolute sovereign immunity.

In Altmann, the Supreme Court addressed these concerns directly by stating that the main purpose behind the concept of foreign sovereign immunity has not been to help foreign countries shape their action in reliance of immunity, but to allow countries to avoid the inconvenience of a lawsuit in another country as a matter of comity. Japan's argument that its expectations of immunity would be frustrated if the FSIA were applied retroactively must fail. Japan or any other country for that matter, engaging in behavior of this type should not be granted a protection of immunity simply because the country thought at the time it was immune from lawsuits.

135. Park, supra note 134, at 409.
136. Park, supra note 134, at 413.
137. Joo, 332 F.3d at 681.
139. Id. at 58.
140. Id. at 67.
141. Joo, 332 F.3d at 687.
142. Id. at 681.
143. Id. at 682.
144. Id. at 683.
Notably, the court of appeals in *Joo* argued that it can be distinguished from *Altmann* because of the existence of the Treaty of Peace, signed by Japan and the Allied Powers in 1951. The Treaty waives "all claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." The Treaty explains that any war-related claims would be resolved through inter-governmental agreements. The court of appeals reasoned that it was because of this treaty that jurisdiction could not be exercised over Japan. In Austria there was no similar treaty. The court reasoned that in the absence of any specific direction from Congress as to how the FSIA should be applied, it should interpret the statute using its plain meaning, and not apply it retroactively.

However, foreign sovereign immunity could be denied sovereign immunity under the FSIA for two reasons. First, Japan may have explicitly waived immunity when it accepted the terms of the Potsdam Declaration concerning war crimes committed during World War II. Second, Japan may have executed an implied waiver of sovereign immunity when it violated *jus cogens* norms by violating the human rights of its citizens. The FSIA states that a foreign sovereign shall not be entitled to immunity if it has explicitly waived its sovereign immunity. Japan may have done so when it accepted the terms of the Potsdam Declaration, acknowledging that it would be subject to war crime litigation.

Nonetheless, implicit waiver could be found in the second instance, where a violation of a *jus cogens* norm has occurred. *Jus cogens* norms, which developed out of the customs and common law of civilized nations, are so fundamental to basic human rights that they cannot be affected by treaty or otherwise. Generally, *jus cogens* norms have included rules prohibiting

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147. *Joo*, 332 F.3d at 684.
149. *Id.*
150. *Joo*, 332 F.3d at 685.
151. *Id.*
152. *Id.;* I.N.S., 533 U.S. at 325.
154. Park, *supra* note 134, at 433. The Potsdam declaration stated the terms under which the allied powers would halt their war against Japan, *Id.*
157. Park, *supra* note 134, at 433. Although, there may be a problem with this agreement because unless the agreement expressly states that the foreign sovereign is subject to lawsuits in the U.S., entering into the agreement will not constitute an explicit waiver under the FSIA. *Id.*
genocide, slave trade and slavery, apartheid, and other extreme violations of human rights.\textsuperscript{159} These norms prevail over all agreements and invalidate rules of international law in conflict with them.\textsuperscript{160} Therefore, if Japan is found to have violated a \textit{jus cogens} norm, its sovereign immunity should be stripped, and it should be made to answer for its actions. However, one of the main problems for the comfort women in \textit{Joo} is that most human rights claims have not been brought against foreign sovereigns, but individuals.\textsuperscript{161} Courts in the United States have not yet allowed an exception to immunity under the FSIA for a \textit{jus cogens} violation.\textsuperscript{162} If citizens of a foreign country are allowed to sue their resident country in American courts, the fear is that the United States may interfere too deeply into foreign relations, and courts will venture outside the boundaries of the judiciary and interfere with the powers of another branch.\textsuperscript{163} In spite of this, the courts of the United States should consider an exception to their past decisions maintaining sovereign immunity over countries that have engaged in civil rights abuses.

There have been examples of waiving immunity as a result of a \textit{jus cogens} norm violation in other countries. In \textit{Prefecture of Voioitia v. Federal Republic of Germany}, a Greek court disallowed Germany to retain sovereign immunity because it found the country had violated a \textit{jus cogens} norm.\textsuperscript{164} The court determined that the actions of the Nazis were an "abuse of sovereign power," on which Germany was not entitled to raise an immunity defense.\textsuperscript{165} United States courts have not ruled in conformity with this idea, but that they have addressed the issue in dicta. In the \textit{Princz} decision, Judge Wald, in her dissent, advocated the disallowance of sovereign immunity where a \textit{jus cogens} violation was found.\textsuperscript{166} Thus, the violation of a \textit{jus cogens} norm provides an alternate means of disallowing sovereign immunity in this case. On remand, the court of appeal should follow Judge Wald’s urging and carve out an exception, since this group of individuals would not be able to receive a fair and impartial verdict in their own country.

Ultimately, since courts have determined that the FSIA does not affect the substantive rights of a country, there seems to be no reason why the statute

\begin{thebibliography}{9}
\bibitem{159} Restatement (Third) of Foreign Relations § 702 (1987).
\bibitem{160} Restatement (Third) of Foreign Relations § 102, cmt. k (1987).
\bibitem{162} Schnably, \textit{supra} note 161, at 770.
\bibitem{163} Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1242 (S.D. Fla. 1997).
\bibitem{165} Caplan, \textit{supra} note 164, at 14-15.
\bibitem{166} \textit{Princz}, 26 F.3d at 1179 (Wald, J., dissenting).
\end{thebibliography}
could not be applied retroactively in this case. A country should not be able to determine the type of activities it engages in based on an expectation of immunity; that would be an unethical use of the sovereign immunity doctrine. Nevertheless, it appears that is the situation the court is presented with here. Japan should not have condoned this activity of its military knowing it was in violation of its own laws, or even international law. This country should be made to answer for the human rights abuses committed by its own soldiers. In light of this, the Court of Appeal for the District of Columbia Circuit should deny the Motion to Dismiss. However, this case is distinguishable from Altmann. There was no treaty to consider in Altmann, and here there is. The Treaty of Peace effectively gives Japan immunity from suit in a legal forum. As the Treaty of Peace is in place, the court will have to weigh the policy considerations of conferring immunity on Japan and determine the best course of action of all involved parties. If not for the Treaty, the court of appeals would reverse the district court, allow the suit to go through, and rule in accordance with Altmann.

B. Abrams v. Societe Nationale des Chemins de Fer Francais

The Abrams case is a class action against the French National Railroad Company (FNRC) for the alleged deportation of Jews and others from France to Nazi death camps during World War II. The twelve plaintiffs allege that when the FNRC transported these individuals to the Nazi camps, it committed war crimes and crimes against humanity under international law. The FNRC moved to dismiss for lack of subject matter jurisdiction, maintaining that it had sovereign immunity under the FSIA. The United States District Court for the Eastern District of New York granted the FNRCs Motion to Dismiss. The district court concluded that the claim did not fall within any of the FSIA exceptions, and thus was not subject to jurisdiction in a United States court. In dicta, the court stated that the FSIA applies to all legal action initiated after its enactment, regardless of when the underlying events occurred.

In the appeal at the circuit court level, the appellees (plaintiffs) argued that the FSIA should not be applied retroactively, because it would affect the rights

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167. See, e.g., Murray, supra note 17, at 305; Altmann, 317 F.3d at 967; Altmann, 124 S. Ct. at 2246.
169. Id.
170. Id.
172. Id. at 428-29, 50.
173. Id. at 450.
of the FNRC at the time the underlying events occurred, and render the appellees powerless to pursue the claim (emphasis added). The appellees believe that questions of jurisdiction and immunity should be answered based on the law in effect at the time the events occurred, the 1940s. In the 1940s, the FNRC would not have been entitled to foreign sovereign immunity because it was privately owned. Now, the railroad is owned and operated by the French government, thus raising sovereign immunity as a defense to jurisdiction in United States courts. The circuit court wrestled with the question of whether the FSIA can be applied to this case even though the events that precipitated it occurred before the act was passed. The court agreed with the appellees that there is no clear legislative intent directing how the statute should be applied with respect to the timing of the events.

The court applied the Landgraf analysis. It determined that there was no clear guidance as to whether the statute should be applied retroactively. The court then considered whether applying the FSIA would upset settled expectations, change, or take away certain vested rights. The court determined that if a new statute is phrased in jurisdictional terms, but also deprives a plaintiff of a claim, applying it retroactively is impermissible. The court encounters the same situation in this case. If applied to the case today, the FSIA would bar suit against the FNRC because it is now controlled by the French government which is entitled to sovereign immunity. Although it is recognized that the FSIA does not infringe on any substantive rights held by a country at the time an act occurred, if applied in this case, the FSIA will infringe on the rights of the plaintiffs to bring suit. Therefore, if applied retroactively in Abrams, the FSIA would extinguish the claim altogether.

In Altmann, the Supreme Court recognized that retroactivity is not favored in the law, but that retroactive application was permissible for jurisdiction-conferring statutes. The Court determined that if a statute only affects

174. Abrams, 332 F.3d at 175.
175. Id.
176. Id.
177. Id. at 176.
178. Id. at 180.
179. Abrams, 332 F.3d at 180.
180. Id. at 184.
181. Abrams, 332 F.3d at 185.
182. Id.
183. Id.; Lupu, supra note 96, at 245.
184. Abrams, 332 F.3d at 186.
185. Id. at 185.
186. Altmann, 124 S. Ct. at 2250.
procedure, it may be applied retroactively.\textsuperscript{187} In this case, however, retroactive application of the statute will not just affect procedure, it will deny the claim altogether.\textsuperscript{188} In light of this, the court of appeals should reverse the decision of the district court and allow the suit to proceed. If the court issues this ruling, it will not affect the sovereign immunity of France. France will still retain sovereign immunity, but it will be subject to litigation from the actions of the railroad under its private ownership. The court, however, may elect to employ the doctrine of forum non conveniens and refuse to hear the case.\textsuperscript{189}

This doctrine gives a court the discretion to dismiss a suit otherwise properly before it.\textsuperscript{190} The first step in any forum non conveniens analysis, before a court considers the public and private factors, is to determine whether a suitable alternate forum exists to hear the dispute in another country.\textsuperscript{191} If no suitable alternative exists, then the analysis should end there and the court should proceed with its adjudication.\textsuperscript{192} The court must then balance public and private interests to determine whether it is in the best interest of all involved parties to move the case to another forum.\textsuperscript{193} Private considerations include "relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses...and all other practical problems that make trial of a case easy, expeditious and inexpensive."\textsuperscript{194} Public factors to consider include judicial economy, conflict of laws, or the application of foreign law.\textsuperscript{195} However, the Supreme Court in \textit{Piper Aircraft Co. v. Reyno}, stated that the plaintiff's initial choice of forum deserves substantial weight and defendants should not be allowed to engage in reverse forum shopping through the employ of forum non conveniens.\textsuperscript{196} What is most important to consider in this case is that if personal jurisdiction may be exercised over the defendant, France, it should be. Since the claim stems from atrocities of the Holocaust, the courts of the United States

\textsuperscript{187} Id.

\textsuperscript{188} Abrams, 332 F.3d at 185.

\textsuperscript{189} The court of appeals is unlikely to consider forum non convenience at this point in the litigation. This section of the paper focuses on how the court of appeals will decide the Abrams case on remand, and the sole issue of determination is whether the FSIA will be applied retroactively.

\textsuperscript{190} Paul B. Stephan, \textit{A Becoming Modesty—U.S. Litigation in the Mirror of International Law}, 52 DEPAUL L. REV. 627, 634 (2002).


\textsuperscript{192} Id.

\textsuperscript{193} Stephan, supra note 190 at 634.

\textsuperscript{194} Gulf Oil Corp., 330 U.S. at 508.

\textsuperscript{195} Id. at 508-09.

\textsuperscript{196} Piper Aircraft Co. v. Reyno, 454 U.S. 235, 244 (1981).
should not shrink from this opportunity to force countries participating in these events to answer for their crimes.

Abrams should be distinguished from Altmann. The Abrams case is couched in a manner that explains the consequences for the plaintiff. Altmann speaks to the harm that may or may not befall the defendant. The ruling of the court of appeals will affect whether this group of individuals, whose family members were transported to Nazi concentration camps by the French railroad company in the 1940s, will be able to seek legal relief for their injuries. By allowing an exception to retroactive application of the FSIA, and allowing this class action to proceed, the court of appeals will act in compliance with the Altmann decision. More importantly, the court of appeals must not forget that this case arose from events occurring during the Holocaust, and in the interest of public policy, the claims of the group must be addressed. However, if the court does not carve out an exception, and simply applies the statute retroactively, without regard to the underlying facts, the claim will be extinguished altogether, and the parties who initiated the suit will never see justice done.

VI. CONCLUSION

Although the legal system strives for equality and justice, it is hard to please everyone, and many times, justice may not necessarily prevail. Even if the ultimate goal of the courts is to avoid unfair prejudice to a party, it is inevitable that one party will leave the courtroom unhappy. Suits involving sovereign immunity are no exception. The concept of sovereign immunity developed from a sense of comity between nations. Foreign nations, recognizing that the cost of defending a lawsuit in a foreign country and possible resulting damages could have dire economic consequences, came to an understanding that they must protect themselves via sovereign immunity. Sovereign immunity additionally preserves the concept of non-intervention in international affairs. The Altmann decision, which addresses these concepts, has the potential for far reaching effects for victims of repressive regimes throughout the world, and the effect that Altmann has over other cases has only just begun with the two cases discussed here.

In Altmann, the Supreme Court addressed the issue of retroactive application of the FSIA. Recognizing that sovereign immunity should not help foreign countries shape their actions in reliance of immunity, but allow them to avoid the inconvenience of a lawsuit in another country, the Court allowed

retroactive application of the FSIA. Japan argued in Joo that the FSIA should not apply retroactively, because this type of application would upset settled expectations of immunity. Japan's argument must fail because it directly opposes the purpose of sovereign immunity, allowing countries to avoid lawsuits as a matter of convenience, not helping to shape their actions in reliance of it. Therefore, Japan, or any other country for that matter, engaging in behavior of this type should not be granted a protection of immunity simply because the country thought at the time it was immune from lawsuits. The plaintiffs in Joo will have a strong argument by contending that a violation of jus cogens norms waives any shield of immunity. United States courts have been reluctant to rule in this manner in the past, and the argument will probably prove unsuccessful. However, as the Treaty of Peace is in place, Japan is immune from lawsuits, and the court of appeals will have no choice but to grant Japan's Motion to Dismiss.

Recognizing that retroactivity is not favored in the law, the Supreme Court supports retroactive application for jurisdiction-conferring statutes. The Abrams decision shows that a United States citizen who brings suit against a foreign sovereign could be prejudiced unfairly. In this case, retroactive application of the statute affects procedure, but extinguishes a claim simultaneously. That an entire country could be allowed immunity from a lawsuit for actions that should have never occurred in the first place does not correlate.

To allow countries to retain sovereign immunity because of possibly upsetting their settled expectations of immunity is a questionable practice. Granting immunity based on this idea would allow countries to act however they wish, without limits, and may even encourage illegal or immoral behavior. Behavior of this type should never be condoned by the United States. This is not to say that the United States should attempt to right every wrong in the world. The concept of sovereign immunity also touches on the doctrine of non-intervention, that each country has a realm of authority unto its own. When countries begin to venture outside of their realm into that of another, problems arise. The Vietnam War or the War in Iraq stand as modern day examples of this. Certainly, there are some instances in which the United States could use its power in the judiciary to address concerns from foreign citizens, and not delve too deeply into foreign affairs. The three cases discussed here are illustrative of the limited circumstances in which the United States should step

203. *Caplan, supra* note 164, at 753.
in and take action. Human rights abuses are a violation of *jus cogens* norms. By allowing this type of behavior to escape legal consequences, the United States is implicitly condoning it. Accordingly, the courts of the United States should apply the FSIA in a retroactive fashion, as in *Altmann*, and address the abuses committed by these countries. In doing so, courts will adhere to the basic principles of *Altmann*, and still allow parties that bring suit to have a fair chance at justice.
WAS THE UNITED STATES JUSTIFIED IN RENEWING RESOLUTION 1487 IN LIGHT OF THE ABU GHRAIB PRISONER ABUSE SCANDAL?

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I. INTRODUCTION

On May 19, 2004, the United States introduced a Resolution to the United Nations Security Council for a third year in a row, requesting it to exempt from the International Criminal Court (ICC) all current and former troops and personnel from non-International Criminal Court member states, like the United States, who serve on United Nations' missions.1 If approved this year, the Resolution would have renewed Resolution 1487, which was adopted by the Security Council on June 12, 2003 and which was itself a renewal of Resolution 1422, adopted by the Security Council on July 12, 2002.2 The vote for the Resolution was scheduled for May 21st, but was later postponed indefinitely when the Security Council realized that the United States might not receive enough support to secure the passage of the Resolution, given the recent revelations of prisoner abuse at the Abu Ghraib prison in Iraq.3 In order for the Resolution to pass, nine out of the fifteen members of the Security Council had

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to vote in favor of it. However, seven member countries including Spain, Brazil, France, Germany, Benin, Chile and China, had already made clear their intentions to abstain during this round of votes, thus making it impossible for the Resolution to attain the required votes.

In light of the ubiquitous reports published around the world, revealing United States soldiers torturing Iraqi prisoners, and given the Security Council members refusal to immunize from the International Criminal Court’s jurisdiction United States troops and personnel, especially those responsible for the prisoner abuses, the United States decided not to pursue the renewal of Resolution 1487 any further. Finally on June 23rd, the United States withdrew its request from the Security Council to renew Resolution 1487. The decision not to seek a renewal of Resolution 1487, which expired on June 30, 2004, did not change, however, the position of the United States regarding the exemption of United States troops from the International Criminal Court’s jurisdiction. In fact, during a State Department’s Press Briefing carried out on the same day the United States announced its decision to withdraw the Resolution, the United States spokesman, Richard Boucher, expressed the following:

[W]e believe that the jurisdiction of the International Criminal Court ... can’t be established over nationals of states that are not party to the Rome [S]tatue and that, therefore, that Americans and others who are not members of the Rome [S]tatute, who participate in United Nations peacekeeping, need to be protected from some kind of misguided prosecution because of actions they might undertake while participating in those operations.

The question that arises then, is whether despite withdrawing the Resolution, the United States was justified this year in seeking an exemption for its troops and personnel from the International Criminal Court’s jurisdiction, in light of the Abu Ghraib prisoner abuse scandal?

This issue deserves some attention for various important reasons. Since the International Criminal Court, which prosecutes criminals that have committed war crimes, crimes of genocide, and crimes against humanity, came into being

4. Id.
5. Id.
7. Id.
9. Id.
on July 1, 2002, the United States has consistently opposed it and has expressed its opposition by seeking exemptions for its troops from prosecution by the International Criminal Court.\(^{11}\) The exemption the United States sought this year was the third consecutive one.\(^{12}\) The reason this exemption deserves attention, is that it was sought at a time when the United States was being criticized for committing the same type of crimes it went to war with Iraq to prevent.\(^{13}\) This issue deserves additional attention because although American troops tortured the Abu Ghraib prisoners, they will not, however, be prosecuted for these crimes by the International Criminal Court, given that the International Criminal Court currently has no jurisdiction over the action of United States soldiers in Iraq.\(^{14}\) This means that current United States war crimes committed in Iraq will go unpunished by the International Criminal Court.\(^{15}\) There is a possibility in the future, however, that United States troops accused of engaging in massive human rights violations in International Criminal Court member states could be subject to prosecution by the International Criminal Court.\(^{16}\) In such cases, if the Security Council had granted the United States an exemption for its troops from prosecution by the International Criminal Court, then it would have placed the United States above international law and these crimes would have once again gone unpunished by the International Criminal Court.\(^{17}\)

In light of the aforementioned facts, this article aims to establish that the United States was not justified in seeking an exemption of its troops from prosecution by the International Criminal Court, in light of the prisoner abuse scandal. The first section of the article will provide the background history of the International Criminal Court and the detailed reasons why the United States has opposed the International Criminal Court in the past and continues to do so today. The second section of the article will illustrate the past and current efforts made by the United States to exempt its troops from the International Criminal Court’s jurisdiction. Lastly, this paper will analyze why the United States was not justified in seeking the exemption for its troops from the International Criminal Court this year.

\(^{11}\) See also U.S. Renews Demand for ICC Exemption for UN Peacekeepers, supra, note 1.
\(^{12}\) Id.
\(^{13}\) See Matua, supra note 10.
\(^{14}\) See Associated Press, U.S. Drops U.N. Bid for War Crime Shield, N.Y. TIMES, June 24, 2004 (explaining that American troops in Iraq are currently not open to prosecution by the ICC, given that neither Iraq nor the US are member states of the ICC).
\(^{15}\) See id.
\(^{16}\) See Colum Lynch, U.S. Alters Its Plan for Exemption at Court, WASH. POST, June 23, 2004, at A13, (explaining that US troops that have committed human rights violations could be subject to prosecution by the ICC if US courts refuse to try them).
\(^{17}\) See id.
II. HISTORY OF THE INTERNATIONAL CRIMINAL COURT AND THE UNITED STATES OPPOSITION

Attempts by the international community to create a permanent international war tribunal have not been a recent trend. The international community had attempted numerous times in the past to establish an international tribunal responsible for prosecuting egregious crimes against humanity. For example, after the failed attempts to establish an International Tribunal after World War I, the international community successfully established the Tribunals of Nuremberg and Tokyo, and in so doing, laid the foundation for international criminal justice.\(^\text{18}\) A few decades later international justice was further pursued when the ad hoc Tribunals of Rwanda and former Yugoslavia were also established, and which have now been operating for nearly ten years.\(^\text{19}\) Most recently, in 1995, negotiations on the Rome Statute of the International Criminal Court began at the United Nations, based on a draft statute prepared and then adopted by the International Law Commission in July 1994.\(^\text{\text{20}}\) If ratified by sixty states, the Rome Statute, which details the Court's jurisdiction, structure, and function, would enter into force, thereby establishing the world's first independent and permanent International Criminal Court.\(^\text{21}\)

Finally, on July 7, 1998, the Rome Statute establishing the International Criminal Court was adopted at an international conference in Rome by 120 states.\(^\text{22}\) Four years later, on July 1, 2002, after the sixtieth instrument of ratification was delivered to the Secretary General, the Statute entered into force, making the International Criminal Court the first permanent international tribunal.\(^\text{23}\) As of May 2004, with the ratification of Congo, the International Criminal Court currently has ninety-four state parties, those states that have ratified the Rome Statute, and 137 signatories.\(^\text{24}\)

Although the United States supported the creation of the International Criminal Court back in 1994, it nevertheless, remained highly critical of the Court.\(^\text{25}\)

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19. See id.
20. Id.
22. Id.
23. Id.
In 2000 when President Clinton signed the Rome Statute, he brought to light the concerns he had over the scope of the International Criminal Court's expansive jurisdiction. In a statement made by President Clinton the same day he signed the Rome Statute, he expressed that although he had signed the statute, he did not support its ratification since significant flaws still remained in the statute. His main concern was that when the Court would start functioning, it would not only exercise jurisdiction over troops and personnel of states that had ratified the Rome Statute, but would also claim jurisdiction over troops and personnel of states that had not ratified the Statute. Despite his dissatisfaction with the scope of the International Criminal Court's jurisdiction, President Clinton acknowledged that he had approved the signing of the Statute to "reaffirm the United States strong support for international accountability." 

The concerns articulated by President Clinton in 2000, were similar to those shared by President Bush in 2002, when he decided to nullify the United States signature of the Rome Statute. President Bush was concerned that aside from having jurisdiction to prosecute war crimes, crimes of genocide and aggression, and crimes against humanity, the International Criminal Court would have jurisdiction not only over crimes committed by officials and personnel from states that are a party to it, but also over crimes committed on
the territory of a party state. In this way, citizens from countries that have not joined the Court might still be subject to trial before it, if they are accused of committing any of the crimes mentioned above in a country that is a member of the International Criminal Court. In light of this, given that the United States has not ratified the Rome Statute and thus is not a member state of the International Criminal Court, the only time that American soldiers or personnel can be prosecuted by the International Criminal Court without the consent of the American government, is if the crime was committed in a state other then the United States and the other state is a state party of the International Criminal Court. Due to this expansive jurisdiction of the Court and given that United States military forces and civilian personnel are active in peacekeeping and humanitarian missions in almost 100 countries at any given time, the United States fears that International Criminal Court member states will use the International Criminal Court to pursue politically motivated war crimes prosecutions against American soldiers and personnel abroad. Ambassador John Negroponte clearly articulated this concern in a United Nations Security Council Press Release, when he stated “[w]e cannot accept a structure that may transform the political criticism of America’s world role into the basis for criminal trials of Americans who have put their lives on the line for freedom.”

The international community, however, believes that United States fears are greatly exaggerated, given that the Rome Statute contains numerous safeguards, which limit the possibility of the International Criminal Court pursuing cases for political rather then legal motives against United States troops. One of the safeguards that the Rome Statute provides in order to preclude politically motivated prosecutions, is that the crimes that fall under the International Criminal Court’s jurisdiction have been meticulously defined to exclude random

34. Id.
39. See Dworkin, supra note 33.
and isolated acts that a peacekeeper might conceivably commit. For example, according to Article five of the Rome Statute, the jurisdiction of the International Criminal Court is limited only "to the most serious crimes of concern to the international community as a whole," which include genocide, war crimes, and crimes against humanity. The Statute further prevents the International Criminal Court from pursuing politically motivated crimes by restricting its jurisdiction to cover only acts that have been committed as part of a "widespread or systematic attack" (crimes against humanity), or crimes that have been committed "as a part of a plan or policy" (war crimes).

The most important safeguard provided by the Statute is that the International Criminal Court was created as a "complementary court system," which means that its jurisdiction will not take precedence over a competent national court. In other words, the Statute allows the International Criminal Court to begin investigation and prosecution only "where a state that has jurisdiction over the case shows itself unwilling or unable to genuinely carry out the prosecution." Thus, under Article Seventeen, the International Criminal Court cannot take a case if a state is already investigating or prosecuting it or if a state has investigated and then decided not to prosecute. This principle, essentially, makes the International Criminal Court a court of last resort.

Despite these numerous safeguards, the United States still insists that it is inappropriate to subject United States troops participating in United Nations peacekeeping operations to the International Criminal Court, which cannot provide adequate guarantees of due process. The United States further asserts that United States courts and not the International Criminal Court should be responsible for investigating and prosecuting its own citizens for committing war crimes, crimes against humanity or genocide. Only this way will citizens be afforded constitutional guarantees of due process. As a result of these concerns, the United States has launched an aggressive campaign to exempt its troops from prosecution by the International Criminal Court.

42. Id.
44. Dworkin, supra note 33.
46. Dworkin, supra note 33.
49. Hoge, supra note 37.
50. See U.S. POLICY ON THE ICC, supra note 2 (explaining that not only has the United States sought exemption for its troops from the ICC by introducing Resolution 1422 and 1487 to the Security Council, but
III. UNITED STATES EFFORTS TO EXEMPT ITS TROOPS FROM ICC JURISDICTION

On July 12, 2002, just eleven days after the International Criminal Court came into being, the United Nations Security Council adopted the first resolution, Resolution 1422, which provided troops and personnel from non-International Criminal Court member states participating in United Nations authorized missions, with one year exemption from the International Criminal Court. The Resolution was adopted only after the United States/United Nations Ambassador, John Negroponte vetoed the extension of the Bosnian peacekeeping mission, and other Bush Administration officials further threatened to veto the renewal of all peacekeeping operations in the future, if Council members did not adopt Resolution 1422. Eager to preserve peacekeeping operations, the Security Council members had little choice, but to adopt Resolution 1422 despite its serious flaws and despite the aggressive opposition voiced by numerous countries during the Security Council meeting, just two days before the adoption of the Resolution.

At the July 10th meeting at the United Nations Security Council, Ambassador Negroponte expressed on behalf of the United States, that the United States veto of the resolution on the United Nations Mission in Bosnia and Herzegovina did not in any way reflect its rejection of peacekeeping in Bosnia. The veto did reflect, however, the United States frustration over its inability to persuade Security Council members to seriously consider United States concerns with regards to the legal exposure that United States peacekeepers have under the Rome Statute. The United States further conveyed, that while peacekeepers do act in a lawful manner, they still find themselves in difficult and ambiguous situations. As a result, the United States stressed that peacekeepers from states that are not parties to the Rome Statute should not face additional unnecessary legal jeopardy, in addition to the hardships of deployment that they already face.

it has also pursued bilateral agreements with countries around the world to prevent the surrender of U.S. nationals to the ICC).

51. Id.
53. Id.
54. Id.
56. Id.
57. Id.
58. Id. at 10.
The countries that participated in the Security Council meeting did not, however, agree with United States justifications for seeking a one year exemption for its troops.\(^5\) Instead, they saw United States insistence on receiving immunity for its troops as an attempt by the United States to place its troops and personnel above international law.\(^6\) As Mr. Heinbecker, the Canadian representative who participated in the debate, put it: "[a]t stake today are ... issues that raise questions about whether all people are equal and accountable before the law...."\(^61\) At the end of his speech Mr. Heinbecker called for an end to impunity from prosecution for genocide, crimes against humanity, and war crimes.\(^62\) Mr. MacKay from New Zealand, who also participated in the debate, similarly saw no need for exemptions of peacekeepers from the jurisdiction of the Court.\(^63\) Instead, he argued that the exemptions placed peacekeepers above the law, in addition to placing the moral authority of the peacekeepers and the United Nations in serious jeopardy.\(^64\)

All together, across the board, countries generally argued that Resolution 1422 was unnecessary, given the numerous safeguards imbedded within the Statute, that it was outside the scope of the Security Council's authority, and that it was inconsistent with the Rome Statute.\(^65\) Even leading Non-Governmental Organizations (NGOs) expressed similar views.\(^66\) In fact, Amnesty International's eighty two page legal memorandum analyzing Resolution 1422, is by far the most complete and thorough compilation of arguments expressed against this Resolution.\(^67\) It stressed two main points already shared by the international community.

First, Amnesty International stressed that Resolution 1422 is contrary to the Rome Statute.\(^68\) Resolution 1422 in part reads as follows:

> Acting under Chapter VII of the Charter of the United Nations, 1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the International Criminal Court, if a case arises involving current or former officials or personnel from a contributing

\(^{59}\) See id.
\(^{60}\) See U.N. SCOR, 57th Sess., 4568th mtg., supra note 40.
\(^{61}\) Id. at 3.
\(^{62}\) Id. at 4.
\(^{63}\) Id. at 5.
\(^{64}\) Id.
\(^{65}\) U.S. POLICY ON THE ICC, supra note 2.
\(^{67}\) See id.
\(^{68}\) Id. at 36.
State not a Party to the Rome Statue over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.  

Article sixteen of the Rome Statute, which the Resolution speaks of, allows the Security Council to request the International Criminal Court, pursuant to Chapter VII of the United Nations Charter and in the interest of peace and security, to postpone an investigation or a prosecution for twelve months. The drafting history of Article sixteen reveals that the Article was only intended to be used in rare cases, such as when the Security Council considers that the peace negotiations which it is overseeing with a government leader, would be impeded by an investigation or prosecution.

Resolution 1422, however, sought to invoke Article sixteen contrary to the drafter’s intent. Article sixteen requires the Security Council to request the International Criminal Court to grant a temporary deferral of investigation or prosecution of a case, on a case by case basis. With each case the Security Council has to determine, whether the deferral would be necessary to help it maintain international peace and security. Resolution 1422, on the other hand, was not adopted after an ad hoc determination. Instead, the Resolution provided a general exception for a whole class of people before any case had arisen, and the Security Council had not determined whether special circumstances existed to make the deferral necessary to maintain peace and security. In addition, the fact that the United States included in Resolution 1422 its intention to “renew the request... under the same conditions each July for further 12-month periods for as long as maybe necessary,” makes this Resolution further contrary to Article sixteen. Article sixteen includes a specific twelve month deferral, after which time the Security Council can renew the request under the same conditions. However, considerations of any proposal for renewal have

70. AMNESTY INTERNATIONAL, INTERNATIONAL CRIMINAL COURT: SECURITY COUNCIL MUST REFUSE TO RENEW UNLAWFUL RESOLUTION 1422 (May 2003), http://www.iccnow.org/documents/otherissues/1422/Amnesty1422SumMay2003Eng.pdf [hereinafter REFUSAL TO RENEW].
71. PERMANENT IMPUNITY, supra note 66, at 42-43.
72. REFUSAL TO RENEW, supra note 70, at 4.
73. Id.
74. Id.
75. Id.
76. Id.
77. REFUSAL TO RENEW, supra note 70, at 4.
to be made on a case by case basis at the time the resolution is to be renewed.\textsuperscript{78}
In light of the aforementioned facts, Amnesty International stressed that the Security Council’s intention to renew Resolution 1422 automatically, as expressed in the Resolution, illustrates the Council’s complete disregard for the true purpose of Article sixteen and its intentions to provide perpetual impunity to officials and personnel of non-International Criminal Court member states from International Criminal Court’s jurisdiction.\textsuperscript{79}

The second point that Amnesty International stressed, also shared by the international community, is that Resolution 1422 is contrary to the United Nations Charter (UNC).\textsuperscript{80} The Security Council, which is a political organ of the United Nations established pursuant to international law, can only exercise those powers contained under the United Nations Charter.\textsuperscript{81} Like any other political organization established under law, it cannot act beyond its own powers.\textsuperscript{82} However, by adopting Resolution 1422, the Security Council exceeded its powers set out in the United Nations Charter.\textsuperscript{83}

In Resolution 1422, the Security Council purported to act under Chapter VII of the United Nations Charter.\textsuperscript{84} Chapter VII gives the Security Council specific powers that it can use to take action with respect to threats to the peace, breaches of peace, and acts of aggression.\textsuperscript{85} However, the Security Council cannot act under this Chapter unless it first complies with certain procedural requirements of the United Nations Charter, by making the specific determinations that Article thirty nine requires.\textsuperscript{86} Article thirty nine of the United Nations Charter expressly provides that, “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression....”\textsuperscript{87} Thus, any action, which the Security Council takes under Chapter VII, must be based upon a determination of the existence of a threat, breach of peace, or an act of aggression.\textsuperscript{88} The drafting history of Resolution 1422 illustrates, however, that for the first time in fifty seven years,\textsuperscript{89} the Security Council failed to make such determination before acting under Chapter VII.\textsuperscript{90}

\textsuperscript{78.} Id.
\textsuperscript{79.} Id.
\textsuperscript{80.} See PERMANENT IMPUNITY, supra note 66, at 51.
\textsuperscript{81.} REFUSAL TO RENEW, supra note 70, at 5.
\textsuperscript{82.} Id.
\textsuperscript{83.} Id.
\textsuperscript{84.} Id.
\textsuperscript{85.} Id.
\textsuperscript{86.} PERMANENT IMPUNITY, supra note 66, at 59.
\textsuperscript{87.} Id. at 60.
\textsuperscript{88.} Id.
\textsuperscript{89.} REFUSAL TO RENEW, supra note 70, at 6.
\textsuperscript{90.} PERMANENT IMPUNITY, supra note 66, at 60.
The third major point stressed by the international community in opposition of Resolution 1422 is best articulated by another NGO, the Human Rights Watch. Resolution 1422 exempted officials and personnel from non-International Criminal Court member states participating in United Nations peacekeeping missions from the International Criminal Court. However, Human Rights Watch stressed that this Resolution is in clear violation of Article twenty seven of the Rome Statute. Article twenty seven of the Rome Statute which reads in part, "[t]his Statute shall apply equally to all persons without any distinction based on official capacity ...", expressly prohibits any state or international organization from making distinctions on the basis of official capacity. This provision, contained in the Rome Statute, was a crucial one because it encompassed the fundamental purpose of the Statute, to ensure that no person is placed above the law, including politicians, heads of state, and United Nations peacekeepers. Contrary to this provision, Resolution 1422 exempted an entire class of individuals from prosecution by the International Criminal Court and thus opened the door to impunity in cases where national courts of non-International Criminal Court member states fail to carry out good faith prosecutions of its own troops and personnel.

Despite the visible opposition voiced by NGOs and countries around the world against Resolution 1422, the exemption for United States troops and personnel from International Criminal Court’s jurisdiction was renewed for a second year in a row on June 12, 2003. The second time around, however, Security Council members, France, Germany, and Syria, abstained from the vote. Kofi Annan, along with more then seventy countries, also expressed their strong disapproval for Resolution 1487 during an open meeting at the Security Council.

In his opening speech, Kofi Annan conveyed the reasons why the Security Council was compelled to renew the Resolution in spite of the strong opposition. Although he felt that the request to renew Resolution 1422 was unnecessary, due to the numerous safeguards provided by the Rome Statute, he nevertheless understood that the Council members felt it necessary to renew the

91. See Policy Analysis, supra note 52.
92. Id.
93. Id.
95. Policy Analysis, supra note 52.
96. Id.
97. Id.
98. See U.S. POLICY ON THE ICC, supra note 2.
99. Id.
101. Id. at 3.
Resolution for another year, given that the "Court [was] still in its infancy and no case [had] yet been brought before it."\footnote{Id.} The main concern that Kofi Annan and the other countries expressed at the debate, was over United States insistence that the Security Council renew the Resolution as a "technical rollover."\footnote{Id.} Kofi Annan along with the other countries, have expressed the opposite view, that this Resolution was never intended to be renewed indefinitely as a technical rollover.\footnote{Id.} As Kofi Annan pointed out, "allow me to express the hope that this does not become an annual routine. If it did, I fear the world would interpret it as meaning that the Council wished to claim absolute and permanent immunity for people serving in the operations it establishes or authorizes."\footnote{Id.} Other countries expressed similar sentiments.\footnote{Id.}

The United States attempts to exempt its troops and personnel from the International Criminal Court’s jurisdiction did not stop, however, with the adoption and renewal of Resolution 1422.\footnote{See Coalition for the International Criminal Court, U.S. Bilateral Immunity or So-Called “Article 98” Agreements (2003), http://www.iccnow.org/pressroom/factsheets/FS-BIAsSept2003.pdf [hereinafter U.S. Bilateral Immunity].} The United States government representatives have been seeking Bilateral Immunity Agreements (BIAs) with countries around the world to shield its citizens from prosecution by the International Criminal Court.\footnote{Id.} These bilateral agreements provide that neither country that is party to the agreement would transfer the other’s government officials, military and other personnel to the International Criminal Court’s jurisdiction.\footnote{Id.} Contrary to the assurance provided by high-level United States officials that the United States would respect the rights of those countries that support the International Criminal Court; the Bush Administration has used coercive tactics to secure bilateral agreements with these countries.\footnote{Id.} The most coercive of these tactics involves the American Servicemembers’ Protection Act (ASPA), which was signed into law by President Bush on August 2, 2002, and

\begin{itemize}
  \item \footnote{Id.}
  \item \footnote{U.N. SCOR, 58th Sess., 4772nd mtg., supra note 100, at 3.}
  \item \footnote{See Fact vs. Fiction, supra note 103 (explaining that Sir Jeremy Greenstock from Great Britain also expressed that, “[w]e regard Security Council Resolution 1422 (2002) as an exceptional measure. It is not permanent; nor is it automatically renewable.”). See also U.N. SCOR, 58th Sess., 4772nd mtg., supra note 100, at 24 (explaining that Mr. Duclos, the French representative that abstained from the vote, also expressed the following: “Paragraph 2 of Resolution 1422 (2002) did not contain a commitment to automatic renewal...Such a renewal risks lending credence to the perception that such exemptions are permanent. That appearance of permanency can only weaken the Court and harm its authority.”).}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id.}
\end{itemize}
which allows him to cut off United States military assistance to International Criminal Court member states that have not signed the Bilateral Immunity Agreement’s.\textsuperscript{111}

This coercive law allows the Administration to pick and choose, which countries should continue receiving United States military aid in spite of not signing the Bilateral Immunity Agreement’s with the United States.\textsuperscript{112} Broad waivers and exemptions included within the Act allow the President to continue providing aid to countries that choose not to conclude these agreements and which the President deems important for United States national security.\textsuperscript{113} In accordance with ASPA, major United States allies including the nineteen members of NATO and other major non-NATO allies have been exempted from it.\textsuperscript{114} On July 1, 2003, the deadline set out in the ASPA for the cut off of United States military assistance to International Criminal Court member states that had not signed the Bilateral Immunity Agreement’s, President Bush granted waivers to twenty two International Criminal Court member states that receive United States military aid and which had not signed agreements.\textsuperscript{115} Since then, he has issued additional waivers, covering a total of thirty two countries.\textsuperscript{116} According to the most current figures, as of May 28, 2004, eighty nine countries had signed a Bilateral Immunity Agreement with the United States.\textsuperscript{117} Of the International Criminal Court member states, fifty eight out of the ninety four currently existing member states refused to sign a Bilateral Immunity Agreement’s with the United States, leaving only thirty six International Criminal Court member states which had signed these agreements with the United States under the threat of loosing military aid.\textsuperscript{118} Out of those International Criminal Court member states that have refused to sign Bilateral Immunity Agreement’s, over twenty states to this day have been left without any military assistance from the United States.\textsuperscript{119}

In addition to aggressively pursuing Bilateral Immunity Agreement’s with other countries, the United States requested the Security Council to renew Resolution 1487 in May of this year for a third year in a row.\textsuperscript{120} This year, however, the circumstances were different than in the previous two years. This

\textsuperscript{111.} U.S. POLICY ON THE ICC, supra note 2.
\textsuperscript{113.} Id.
\textsuperscript{114.} U.S. BILATERAL IMMUNITY, supra note 107.
\textsuperscript{115.} U.S. IMPUNITY AGREEMENTS: A SUMMARY, supra note 112.
\textsuperscript{116.} Id.
\textsuperscript{118.} Id.
\textsuperscript{119.} Id.
\textsuperscript{120.} U.S. Renews Demand for ICC Exemption for UN Peacekeepers, supra note 1.
year the United States was requesting from the Security Council an exemption for troops of non-International Criminal Court member states, at a time when the Abu Ghraib prisoner abuse scandal took a prominent place on the front page covers of newspapers around the world. The question that has remained unanswered then, is whether the United States was justified this year in seeking an exemption for its troops from prosecution by the International Criminal Court, given that its own troops committed grievous war crimes against Iraqi prisoners at the Abu Ghraib prison?

IV. WAS THE UNITED STATES JUSTIFIED IN SEEKING THE EXEMPTION FOR ITS TROOPS FROM THE INTERNATIONAL CRIMINAL COURT THIS YEAR?

The United States has always been an active advocate of international justice. Not only did it help establish the Nuremberg tribunals and the International Criminal Tribunals for the Former Yugoslavia and Rwanda, but it also became a key signatory to numerous international humanitarian treaties, such as the Geneva Convention. However, despite being at the forefront of international justice and despite its role as the world’s policeman and as a major contributor to United Nations peacekeeping missions around the world, the United States demonstrated this year that it too is capable of committing heinous war crimes, as the Abu Ghraib prisoner abuse scandal illustrated.

On April 28, 2004, the Abu Ghraib prisoner abuse became public when the first images depicting Iraqi prisoners at the Abu Ghraib being subjected to a variety of abuses by United States soldiers, were broadcast on “60 Minutes II.” Following this broadcast, other photographs depicting Iraqi prisoner abuses became public. These photographs speak for themselves. One photograph shows that an Iraqi prisoner is naked. His hands are clasped behind his neck and he is leaning against the cell door with great fear, as the dogs bark at him a few feet away. Another photograph depicts an Iraqi prisoner who is

123. Id.
125. Seymour M. Hersh, Chain of Command, NEW YORKER, May 17, 2004 [hereinafter Chain of Command].
126. See id.
127. Id.
128. Id.
lying on the ground in great pain, with a soldier sitting on top of him, with his
knees pressed to his back and blood is streaming from this prisoner's leg.\(^{129}\) In
yet another photograph, a naked prisoner from his waist to his ankles is
captured, lying on the floor, with a bite on his right thigh.\(^{130}\) There is another
larger wound on his left leg, covered with blood.\(^{131}\)

These abuses were not uncommon, however, during Saddam Hussein's era.
During his regime, the Abu Ghraib prison was one of the world's most
notorious prisons for the weekly executions and the vile living conditions.\(^{132}\)
Torture was also a common practice at the Abu Ghraib, which included isolation,
beatings, rapes, attack dogs, electric shocks, and starvation.\(^{133}\) Following
the collapse of Saddam's regime, the United States turned the Abu Ghraib into
a military prison.\(^{134}\) Unlike in Saddam's times, most of the prisoners captured
by United States troops were civilians, including women and teenagers, many
of whom had been picked up randomly during the military sweeps and at
highway checkpoints.\(^{135}\) The other prisoners fell into three distinct categories:
1) common criminals, 2) security detainees suspected of "crimes against the
coalition", and 3) a small number of suspected "high-value" leaders of the
insurgency against the coalition forces.\(^{136}\) What stunned the world as the images
of United States soldiers torturing Iraqi prisoners flooded newspapers and T.V.
news, was the United States was committing the same crimes it went to war
with Iraq to prevent.\(^{137}\) Instead of ending the prisoner abuses and human rights
violations prevalent during Saddam's regime, the United States was contributing
to the abuses.\(^ {138}\)

Before the pictures were released to the media, however, on January 31,
2004, Commander, Coalition Forces Land Component Command (CFLCC)
Lieutenant General David McKiernan, appointed Major General (MG) Antonio
Taguba to conduct an investigation under Article fifteen-six into the 800th
Military Police Brigade's detention and internment operations.\(^{139}\) This investiga-
tion came about as a result of the criminal investigation initiated by the
United States Army Criminal Investigation Command of the specific allegations
detainee abuse committed by members of the 372nd Military Police

\(^{129}\) Id.

\(^{130}\) Chain of Command, supra note 125.

\(^{131}\) Id.

\(^{132}\) Seymour M. Hersh, Torture at Abu Ghraib, NEW YORKER May 10, 2004.

\(^ {133}\) Remnick, David, Hearts and Minds, NEW YORKER, May 10, 2004.

\(^{134}\) Hersh, supra note 132.

\(^{135}\) Id.

\(^{136}\) Id.

\(^{137}\) See Matua, supra note 10.

\(^{138}\) Id.

\(^{139}\) Article 15-6 Investigation of the 800th Military Police Brigade,
Company, 320th Military Police Battalion in Iraq, all which are part of the 800th Military Police Brigade.\textsuperscript{140} MG Taguba was specifically asked to inquire into all the facts and circumstances surrounding the allegations of detainee abuse, especially over the allegations of the mistreatment of the Abut Ghraib prisoners.\textsuperscript{141}

Following his investigation, on February 26th, MG Taguba submitted his report.\textsuperscript{142} His report concluded that between October and December of 2003, at the Abu Ghraib prison, numerous incidents of sadistic, blatant and wanton criminal abuses were inflicted on several detainees.\textsuperscript{143} He further concluded that the systemic and illegal abuse of the detainees was intentionally perpetrated by several members of the 372nd Military Police Company, 320th Military Police Battalion, 800th Military Police Brigade.\textsuperscript{144} The intentional abuse of detainees by military police personnel included the following acts: “a) punching, slapping and kicking detainees … b) videotaping and photographing naked male and female detainees, c) forcibly arranging detainees in various sexually explicit positions for photographing … f) forcing groups of male detainees to masturbate themselves while being photographed and videotaped … k) a male MP guard having sex with a female detainee….”\textsuperscript{145} These allegations were substantiated by detailed witness statements and the discovered graphic photographs.\textsuperscript{146} Several detainees also described the following acts of abuse performed on them: “a) breaking chemical lights and pouring the phosphoric liquid on detainees … d) beating detainees with a broom handle and chair, e) threatening male detainees with rape … h) using military working dogs to frighten and intimidate detainees with threats of attack.”\textsuperscript{147}

After learning about these abuses, the international community heavily criticized the United States for having violated multiple international treaties, which the United States had ratified and upheld in the past.\textsuperscript{148} For instance, the United States currently stands in violation of both the Third and the Fourth Geneva Conventions of 1949.\textsuperscript{149} In time of war, every person in enemy hands must have some kind of status under international law.\textsuperscript{150} If the person caught in enemy hands is a prisoner of war, then that person will protected by the Third

\begin{itemize}
\item \textsuperscript{140} Id. at 6.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Chain of Command, supra note 125.
\item \textsuperscript{143} Investigation Report, supra note 139, at 16.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id. at 17.
\item \textsuperscript{147} Id. at 17-18.
\item \textsuperscript{148} See U.S. ABUSE OF PRISONERS AND THE NEED FOR INTERNATIONAL LAW, supra note 124.
\item \textsuperscript{149} See id.
\item \textsuperscript{150} Id.
\end{itemize}
Geneva Convention. If, on the other hand, that person is a civilian, then he will be protected by the Fourth Geneva Convention. In this case, because United States soldiers tortured both prisoners of war and civilians at Abu Ghraib prison, they violated both Article thirteen of the Third Geneva Convention of 1949, and Article twenty seven of the Fourth Geneva Convention of 1949. The United States also violated Article seven of the International Covenant on Civil and Political Rights of 1966, and Article two of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

The inhumane treatment and the torture performed on Iraqi prisoners by United States soldiers, is not only a grave breach of these international treaties, but it is also considered a war crime under the International Criminal Court. The International Criminal Court is based in part on the Geneva Conventions, therefore some of the protections extended to prisoners of war and civilians under the Conventions are also included under the definition of war crimes in the Rome Statute. Under Article eight, war crimes mean:

a) grave breaches of the Geneva Conventions of 12 August 1949, namely any of the following acts against persons ... under the provisions of the relevant Geneva Convention ... ii) torture or inhuman treatment ... iii) willfully causing great suffering or serious injury to body or health ... b) xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment ....

151. Id.
152. Id.
153. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. (“Prisoners of war must at all times be humanely treated.... Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.”).
154. Geneva Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (“Civilians who are not classified as POW’s...shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”).
If any one of these war crimes enumerated by the Rome Statute and committed by United States soldiers is broken down into its elements, one will find that every element of the crime has been met by the actions of United States soldiers, thereby making them guilty of war crimes. For instance, looking closely to the war crime committed upon personal dignity under Article eight (two)(b)(xxi), the elements of the crime are:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons. 2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity. 3. The conduct took place in the context of and was associated with an international armed conflict. 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

As to the first two elements, both the graphic photographs and the Taguba Report have confirmed, not only that United States soldiers did violate the dignity of Iraqi prisoners by using torture and inhumane ways of extracting information from them, but that these actions do rise to a level that could be considered an outrage upon personal dignity. As to the last two elements, the conduct of United States soldiers did take place in the context of and was associated with an international armed conflict, the War in Iraq. Furthermore, the perpetrators, in the case United States soldiers, were aware of the factual circumstances that established the existence of an armed conflict, given that they were fully aware that they had gone to Iraq to put an end to Saddam’s terror and human rights abuses. As a result, the International Criminal Court currently does not have any jurisdiction over the actions of United States troops in Iraq and cannot prosecute them. Therefore, the aforementioned evidence clearly shows that United States troops are, nevertheless, guilty of committing war crimes in violation of Article eight of the Rome Statute of the International Criminal Court.

Given that the United States breached international treaties and is guilty of war crimes under the Rome Statute for torturing the Abu Ghraib prisoners, was the United States justified this year in requesting impunity for its troops serving on United Nations missions from prosecution by the International Criminal Court? The answer to that question is of course, no. With this incident, the United States has demonstrated that even its own troops are capable of committing heinous war crimes. The United States insists, however, that because it is not a signatory to the Rome Statute, The United States courts instead of the

161. Id. at 33.
International Criminal Court should prosecute its own troops guilty of committing war crimes in another country. The United States objects to its troops being prosecuted by the International Criminal Court not because it refuses to bring to justice its own citizens, who have committed war crimes in other countries, but because the Court does not provide adequate guarantees of due process, which United States courts do provide. In fact, the United States maintains that the international community has nothing to fear because United States citizens guilty of committing egregious war crimes will not go unpunished, especially since the United States already has a well-functioning system for military justice that does ensure accountability. The United States Constitution, for instance, gives Congress the power to order court-martials for war crimes committed by United States troops. The Uniform Code of Military Justice, gives general court-martials jurisdiction over any person who by the law of war is subject to trial by a military tribunal, including for crimes under international law. Lastly, the War Crimes Act of 1996 gives United States courts authority to try either troops or civilians for violations of the laws of war.

If granting United States troops impunity from prosecution by the International Criminal Court means not that they will escape criminal liability, but that they will be prosecuted by United States courts with adequate guarantees of due process, which the United States Constitution affords them, then has the United States punished those responsible for the prisoner abuses? It has been recently reported that seven American soldiers have been already charged. The first soldier to face court martial proceedings went on trial in Iraq on May 19. But seeing that these charges were brought only against lower-level soldiers, the Human Rights Watch has publicly criticized the United States for not investigating the superiors of these soldiers to see whether they ordered or knowingly tolerated these abuses. In fact, recent press reports have uncovered that the torture the United States soldiers submitted Iraqi prisoners to at Abu Ghraib, was not an isolated act of a few deviant soldiers. On the
contrary, interviews and government documents have brought to light, that true responsibility for the torture at Abu Ghraib lies not within a few Army reservists, but within the very highest levels of the Bush Administration.\textsuperscript{173}

It has been revealed and verified by numerous sources, that Defense Secretary Donald Rumsfeld, assisted by his Undersecretary for Intelligence, Stephen Cambone, set up a secret program in 2001 called Special Access Program (SAP) to assassinate targeted individuals in the Bush Administration’s war on terror.\textsuperscript{174} This program was subsequently brought to Iraq in the summer and fall of 2003 to remedy the growing insurgency United States forces faced in Iraq.\textsuperscript{175} The solution to stopping this growing insurgency, which Rumsfeld endorsed and Combone carried out, was to get tough with the Iraqis in the Army prisons who were suspected of being insurgents.\textsuperscript{176} This entailed turning United States prisons in Iraq into torture camps to extract information from the prisoners about the resistance.\textsuperscript{177} To achieve this, Cambone removed the military intelligence officers carrying out the interrogations from the authority of the normal military chain of command, and incorporated them into the Special Access Program.\textsuperscript{178} Rumsfeld and Combone even went a step further and expanded the scope of Special Access Program, by bringing unconventional methods to Abu Ghraib, such as exposing the prisoners to sexual humiliation.\textsuperscript{179} These operations did not go unnoticed, however, by both Condoleezza Rice, the national-security advisor who approved the operations, and President Bush who was informed of the existence of the programs.\textsuperscript{180}

If United States courts fail to prosecute the top officials for the prisoner abuse committed at Abu Ghraib, then these war crimes would go unpunished here in the United States. The International Criminal Court, which normally ensures accountability when national courts either fail or refuse to punish its own nationals, would not be able to step in and prosecute these officials, given that the International Criminal Court currently has no jurisdiction over United States actions in Iraq. As a result, these heinous crimes committed at Abu Ghraib will go unpunished. But what if United States soldiers and top officials had committed war crimes in one of the fifty eight International Criminal Court member states that did not sign Bilateral Immunity Agreements with the United States, and which are member states of the International Criminal Court? In such a case, even if United States courts failed to prosecute its own troops and

\begin{itemize}
  \item \textsuperscript{173} \textit{Id.}
  \item \textsuperscript{174} Seymour M. Hersh, \textit{The Gray Zone}, \textsc{New Yorker}, May 24, 2004, http://www.newyorker.com/fact/content/?040524fa_fact.
  \item \textsuperscript{175} \textit{Id.}
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} Lefebvre, supra note 172.
  \item \textsuperscript{178} \textit{Id.}
  \item \textsuperscript{179} \textit{The Gray Zone}, supra note 174.
  \item \textsuperscript{180} \textit{Id.}
\end{itemize}
officials in order to protect them, the International Criminal Court would, nevertheless, have jurisdiction to prosecute them in its tribunal. The International Criminal Court in that case would ensure accountability for the grievous war crimes committed by United States soldiers and officials. The Resolution sought this year by the United States, however, would have exempted those responsible for committing war crimes in International Criminal Court member states from prosecution by the International Criminal Court, for a period of one year. This means that, if in the future United States courts decide not to prosecute its own troops and officials, once again the heinous war crimes would go unpunished by both national United States courts and the International Criminal Court. Given that United States troops are capable of committing war crimes in any part of the world, the United States was not justified in protecting its troops from the rule of law by seeking exemptions for their actions from the International Criminal Court.

United States insistence this year on an exemption for its troops and personnel from the International Criminal Court, in light of the prisoner abuses, sent a powerful message throughout the world, that the United States is placing itself above international law and does not have to abide by it. This is not a good message for the United States to advocate if it wants to maintain the support of the international community in the future. At the moment, the ramifications of United States policy and practice in Iraq, in light of the prisoner abuse scandal, have already been severe. Not only did the United States lose credibility in Iraq, the very same country it was trying to rebuild, but it also hurt America’s prospects in the war on terror. The United States further undermined its ability to demand humane treatment for its soldiers and civilians in the hands of its enemies. Given that the United States has already secured a bad name for itself due to prisoner abuse, it does not need to alienate itself further from the international community by attempting to place itself above the rule of law. Doing so would further impair United States credibility.

V. CONCLUSION

The United States started out by demanding the Security Council to renew Resolution 1487, which it was not justified to do. In the end, however, it did the right thing by withdrawing the Resolution from the United Nations floor. Its reasons for doing so are questionable. However, actions speak louder than words, and for now the withdrawal of the Resolution could be the sign the international community needs from the United States, to assure it that the United States will not seek special treatment from international law any time soon.

182. Id.
2004 PHILIP C. JESSUP
INTERNATIONAL MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE
THE HAGUE, NETHERLANDS

CASE CONCERNING THE INTERNATIONAL CRIMINAL COURT

THE KINGDOM OF ARKAM
Applicant

v.

THE STATE OF RANDOLFIA
Respondent

SPRING TERM 2004

MEMORIAL FOR THE APPLICANT

Universidad Catolica Andres Bello, Venezuela

Team Members:
Anneliese Fleckenstein, David Rodrigues, Ricardo Chirinos
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I. STATEMENT OF JURISDICTION

The Kingdom of Arkam and the State of Randolfia have submitted, by Special Agreement, their differences concerning the Rome Statute, and transmitted a copy thereof to the Registrar of the Court pursuant to Article 40(1) of the Statute. Therefore, both parties have accepted the jurisdiction of the International Court of Justice (ICJ) pursuant to Article 36(1) of the Statute of the Court.

II. STATEMENT OF FACTS

In 1918, the monarch of the Duchy of Lengians and Arkamians abdicated, resulting in the creation of three new states: Randolfia (Respondent); the Kingdom of Arkam (Applicant); and the Kingdom of Leng. All are developing states, each with a population of approximately one million. All states share common borders. The populations of Arkam and Leng are made up of two ethnic groups: Arkamians and Lengians. In Arkam, Arkamians constitute nearly ninety percent of the population, while in Leng, Lengians constitute slightly more than ninety percent. There have not been a significant number of intermarriages between members of each ethnic group, and their relationship has been highlighted by episodes of armed conflict. Randolfia has a multi-ethnic population, with an equal number of Lengians and Arkamians. Arkam and Leng are constitutional monarchies, with the thrones and legislative controls held by the ethnic majorities. Randolfia is a democracy whose parliament has been peacefully contested by several ethnic-based political parties, and the Lengian party is currently in power. Randolfia’s annual trade with Arkam constitutes about 40% percent of Randolfia’s worldwide commerce.

In January 2003, a trans-border armed conflict erupted between ethnic Lengians and Arkamians in both Leng and Arkam, for which the United Nations convened an international peace conference in the Randolfian capital. The
conflict in Arkam ceased, but no accord was reached over the conflict in Leng. Under the Peace Agreement signed on March 1, 2003, Arkam established a Truth and Reconciliation Commission (TRC) empowered to grant a full amnesty for all crimes committed during the armed conflict between the two ethnic groups. The TRC has been cited as "a shining example of how truth and reconciliation can bring peace to a troubled region."

In Leng, sporadic small-scale fighting continued in the primarily Arkamian province of Yuggott. This fighting was spurred by the Greater Arkamian Liberation Army (GALA), a militia dedicated to the secession of Yuggott from Leng and its unification with Arkam. On May 1, 2003 the Rome Statute entered into force for Leng and Randolfia but not for Arkam. Although Randolfia has enacted domestic legislation implementing the Rome Statute, it lacks domestic legislation criminalizing genocide, crimes against humanity, and war crimes committed by non-Randolfian nationals outside its borders.

Dr. Herbert West is a citizen of Arkam and a professor at a University in Arkam, whose scholarship is recognized around the world. In April 2003, West recorded an audiotape in Arkam, urging his Arkamians to achieve Arkam’s unity with Yuggott. West gave the only copy to his neighbor, also a member of GALA, but nothing evidences that he gave any instructions as to what use, if any, should be made of it. GALA members duplicated the recording, which was then played on Radio Yuggott. On May 16th, bands of ethnic Arkamians began to conduct nighttime raids, attacking ethnic Lengians in several towns in Yuggott. By the end of May, a percentage of the Lengian population of Yuggott had been killed. On June 20, 2003, the Security Council adopted Resolution 2241, which created Multinational Force for Lengian relief created by Security Council Resolution 2241, (IFLEN) a multinational force, with a threefold mandate: to enter Yuggott, shut down Radio Yuggott, and put a stop to the bloodshed. Resolution 2241 read, in part, “officials or personnel of contributing states, not parties to the Rome Statute, shall be subject to the exclusive jurisdiction of that contributing state for all alleged acts or omissions related to ... IFLEN, unless such exclusive jurisdiction has been expressly waived by that contributing.” The Resolution was adopted with ten votes in favor, and five abstentions.

Lieutenant Joseph Curwen, a citizen and resident of Arkam, led one of IFLEN’s platoons. On June 28, 2003, GALA attacked Curwen’s platoon, killing twelve soldiers and injuring four others. As a response, Curwen ordered his platoon to attack Exhamtown, a village which was a GALA stronghold. On June 29, 2003, the platoon killed a number of ethnic Lengians and ethnic Arkamians. On June 30th, GALA and the Lengian government agreed to a United Nations-monitored cease-fire, which continues to this day. IFLEN dismissed Curwen, and Arkam ordered him to return home. On July 3rd, the Royal Arkamian Army (RAA) Commander in Chief (CIC) ordered him to
resign, and to appear before the TRC within thirty days. Between July 20th and 22nd, Curwen and West, while in Randolfia for different reasons, were arrested for minor offences. On July 23rd, Randolfia’s press urged the government of Randolfia to send these individuals to the International Criminal Court (ICC). Eliza Tillinghast, the Randolfian Minister of Justice, dispatched a communiqué on July 25, 2003, informing the ICC’s Registrar about Randolfia’s holding in custody of West and Curwen and requesting the Rome Statute to take jurisdiction over these two men.

On July 26, 2003, the King of Arkam sent a diplomatic note to the President of Randolfia, indicating that Arkam would not appear before the ICC to challenge admissibility in light of its well-publicized characterization of the ICC as an illegal court. On July 29th, the Prosecutor of the ICC sent written notifications to Arkam, Leng and Randolfia, establishing that there was a reasonable basis to commence investigations pursuant to the allegations contained in Tillinghast’s communiqué. In August 2003, the ICC’s Prosecutor carried out investigations and two Pre-Trial Chambers were constituted. On September 1, 2003, the ICC’s Prosecutor charged West with incitement to genocide and attempted genocide. Curwen was charged with war crimes and acts of violence in Leng. The Pre-Trial Chambers issued arrest warrants for both individuals. On the same day the arrest warrants were issued, the King of Arkam sent a diplomatic note to Randolfia’s President, indicating the possible adoption of economic restrictions toward Randolfia in response to such Government’s decision to attempt the surrender of both Arkamian nationals to the ICC. As a consequence, the two states entered into negotiations, agreeing to submit their dispute to the International Court of Justice (ICJ). Leng declined to intervene in this case.

III. SUMMARY OF PLEADINGS

A. It is illegal under international law for Randolfia to surrender Curwen to the ICC pursuant to the warrant for his arrest.

Arkam has not waived its jurisdiction to try Curwen, as is expressly required under Security Council Resolution 2241. Indeed, Security Council Resolution 2241, adopted under Chapter VII of the United Nations Charter (UN Charter) for the purpose of maintaining peace and security in Leng, was adopted in accordance with international law, as it complied with Security Council voting procedures and was a perfectly justified measure in light of the wide powers conferred upon the Security Council under the UN Charter, and as evidenced from past practice of such United Nations body in similar situations. In any case, the ICJ itself has recognized that it does not have the power of judicial review over Security Council decisions. Hence, Randolfia must comply with Security Council Resolution 2241 and must therefore abstain from
surrendering Curwen to the ICC, as it would otherwise be acting contrary to its international obligations under the UN Charter, which must prevail over all other obligations it may have, including obligations under the Rome Statute Statute.

B. The exercise of jurisdiction by the Rome Statute over Curwen is in breach of Article 34 of the Vienna Convention of the Law of Treaties (VCLT).

Indeed, Arkam, Curwen's nationality, is not a party to the Rome Statute. Article 34 provides that treaties cannot modify existing rights of third party states. In this case, the Rome Statute is modifying Arkam's right to exercise exclusive jurisdiction over its nationals. In addition, there is no customary rule of international law which allows the delegation of criminal jurisdiction by states to international tribunals. Thus Randolfia may not argue that Article 12 of the Rome Statute codifies customary international law. Should Article 12 of the Rome Statute be deemed customary, Arkam is a persistent objector to said rule.

C. Given the ongoing investigation by the Arkamian TRC into the acts of Mr. Curwen, the exercise of jurisdiction over him by the ICC would violate the principle of complementarity, since Arkam has exclusive jurisdiction over Curwen, and it is carrying out a genuine investigation through a TRC.

This cannot be mistaken for unwillingness to investigate or prosecute, since TRCs have been supported by the United Nations as valid alternative forms of justice. Moreover, the granting of amnesty by the TRC should not be regarded as unwillingness because international law today does not support a general duty to prosecute international crimes. Finally, the amnesty does not shield Curwen from punishment, which has been delivered by ordering him to resign his commission without benefits.

D. It is illegal under international law for Randolfia to surrender Herbert West to the ICC pursuant to the warrant for his arrest.

Neither West nor his allegedly criminal conduct demonstrates the necessary nexus with a state party to the Rome Statute. Indeed, West's alleged crime was committed in Arkam. Since all of his actions took place in said state, the result theory and the continued crime doctrine do not apply. Furthermore, West's alleged complicity was perpetrated in Arkam. West's actions preceded the date that the Rome Statute entered into force with respect to Leng and Randolfia, and are thus barred from the ICC's consideration, as established under the doctrine of Intertemporal Law and by the Rome Statute.
West’s alleged acts do not constitute a crime of the competence of the ICC. Indeed, the evidence does not support a *prima facie* case of West’s guilt, since the physical and mental elements of the crime of incitement to genocide are not fulfilled. Furthermore, West cannot be held responsible under the doctrine of superior responsibility, nor as an accomplice. Additionally, there is no causal link between West’s acts and the actual commission of the crime. Finally, West is not responsible for genocide or attempted genocide under the *Nahimana* decision.

**IV. QUESTIONS PRESENTED**

1. Whether it would be illegal under international law for Randolfia to surrender Joseph Curwen to the ICC pursuant to the warrant for his arrest given that

   a) Arkam has not waived its exclusive jurisdiction to try Joseph Curwen, pursuant to Security Council Resolution 2241;
   
   b) The exercise of the jurisdiction of the ICC over a national of a state, not a party to the Rome Statute, violates the VCLT and Customary International Law; and,
   
   c) Given the ongoing investigation by the Arkamian TRC into the acts of Mr. Curwen described in the indictment, the exercise of jurisdiction over him by the ICC would violate the principle of complementarity.

2. Whether it would be illegal under international law for Randolfia to surrender Herbert West to the ICC pursuant to the warrant for his arrest given that

   a) Neither Mr. West nor his allegedly criminal conduct demonstrates the necessary nexus with a state Party to the Rome Statute;
   
   b) Mr. West’s actions preceded the date upon which the Rome Statute entered into force with respect to Leng and Randolfia, and are thus barred from the ICC’s consideration; and,
   
   c) Mr. West’s alleged conduct does not constitute a crime within the competence of the ICC.
V. Pleadings

A. It Would Be Illegal Under International Law for Randolfia to Surrender Joseph Curwen to the ICC Pursuant To the Warrant for His Arrest.

1. Arkam Has Not Waived Its Exclusive Jurisdiction To Try Joseph Curwen, Pursuant To Resolution 2241 And Therefore The ICC Is Without Jurisdiction To Try Him.

In June 2003, the Security Council adopted Resolution 2241, Operative Paragraph 7, which provides that states contributing with IFLEN that are non-parties to the Rome Statute enjoy exclusive jurisdiction over their agents, unless expressly waived. Arkam, a contributing state non-party to the Rome Statute, has not waived its exclusive jurisdiction over Curwen, hence he may not be tried by the ICC.

a. Resolution 2241 is in Accordance with and Justifiable under International Law.

In the United Nations system, each organ is empowered to define its own competence. However, the UN Charter confers upon United Nations organs the powers required to duly discharge their functions, including those which, though not expressly provided, are conferred by necessary implication as being essential to the performance of their duties. This holds true for the Security Council, which has primary responsibility for the maintenance of international peace and security. In discharging this crucial duty, the Security Council enjoys a wide margin of discretion, as it is empowered to take whatever

5. U.N. CHARTER, art 24, para. 1.
measures it deems necessary to fulfill its responsibility. In that context, its actions enjoy a presumption of legality, as recognized by this Court. In adopting Resolution 2241, the Security Council acted explicitly under Chapter VII of the UN Charter, hence it enjoyed the most ample discretion to decide which measures were necessary in order to maintain peace and security.

Moreover, on previous occasions, United States pressure has led the Security Council to include provisions similar to Operative Paragraph 7 in its Resolutions in order to safeguard the continuity of United Nations missions. Such was the case of Resolution 1422, where the extension of the United Nations mandate in Bosnia and Herzegovina was threatened by a United States veto, unless United Nations peacekeepers who were nationals of contributing non-party states were exempted from ICC jurisdiction. Under such circumstances, Security Council members acceded to adopt the provision in order to guarantee extension of the United Nations Mission in Bosnia and Herzegovina mandate. Similarly, the United States successfully exercised this kind of pressure in the Liberia affair. After twelve votes in favor and three abstentions, France -who disagreed with Operative Paragraph 7- did not veto the resolution, recognizing as did others, the urgent need to authorize deployment of troops. In the present case, the insistence of one permanent Security Council member led it to include Operative Paragraph 7 in Resolution 2241 as a necessary condition to authorize IFLEN operations in Yuggott. Hence the adoption of Security Council Resolution 2241 is one more instance where states


have confirmed the necessity of investing the Security Council with the power to exclude certain agents from ICC jurisdiction.

Finally, to be deemed valid, Security Council resolutions must observe Security Council rules of voting procedure. Voting procedures require resolutions to be in accordance with the UN Charter. This requires its adoption by nine affirmative votes, including the concurring votes of permanent members. In this case, Resolution 2241 was approved with ten affirmative votes and five abstentions. Further, the Security Council was validly exercising its wide discrentional powers under Chapter VII to maintain international peace and security. Moreover, although not always necessary, a possible third requisite, as argued among scholars, consists in the prior determination of the existence of a threat to the peace when the Security Council acts under Chapter VII. In this case, though the text of Resolution 2241 is not available, such determination is inferable, since: no one contested the Resolution’s validity, which has been done before when such determination was omitted; Yuggott’s situation was a threat to peace, since neither civil war nor internal strife are considered as such; and, the Security Council acted explicitly under Chapter VII, which sufficiently implies such a threat. Hence, Security Council Resolution 2241 was validly adopted.

14. U.N. CHARTER, art. 27, para. 3.
20. CONFORTI, supra note 17, at 173.
b. Alternatively, Resolution 2241 is not Subject to Judicial Review.

The Security Council has ample powers to determine the existence of threats to peace, and such determination cannot be questioned. Indeed, no procedures exist for determining the validity of acts of United Nations organs. Moreover, this Court has recognized the inherent limitations to its judicial function, and that it lacks the power of judicial review of Security Council decisions. In fact, neither the UN Charter nor the ICJ Statute nor their travaux preparatoires indicate that such power was to be attributed to the Court. Even those who argue that such power exists, limit its application to pronouncements on the validity of Security Council determinations of legal responsibility. This is not the case here. Hence, Resolution 2241 is not subject to judicial review.

c. Randolfia is Bound to Comply with Resolution 2241.

To ensure the maintenance of international peace and security, the Security Council enjoys a binding decision-making power, evidenced by a specific provision imposing on United Nations members the obligation to accept and carry out Security Council decisions. The binding nature of Security Council resolutions depends on the wording and the UN Charter provisions invoked. In Resolution 2241, the Security Council acted explicitly under Chapter VII, and imperative language, such as the word decides, was used. Hence, Resolution 2241 is binding upon Randolfia under Article 25 of the UN Charter. Moreover, states must comply with treaty obligations in good faith, including their

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28. See generally Namibia Case, 1971 I.C.J. at 16; SCHWEIGMAN, supra note 6, at 49; See Delbrück, supra note 7, at 413.
29. U.N. CHARTER, art. 25.
obligations under the Charter, including compliance with Security Council decisions directly and through their action in international agencies, including United Nations specialized agencies and other international organizations, such as the ICC. Curwen’s surrender to the ICC would subject him to a jurisdiction other than Arkam’s, which is contrary to Resolution 2241. Hence, by executing the ICC arrest warrant, Randolfia would breach its obligation under the Charter to accept and carry out Resolution 2241.

Finally, Randolfia may argue that its obligation under the Rome Statute to surrender Curwen collides with Resolution 2241. However, in the event of conflict, obligations under the Charter prevail over those assumed by virtue of other agreements. Indeed, measures deriving from binding Security Council decisions give rise to obligations that members must fulfill irrespective of any other commitments. Thus, obligations deriving from Resolution 2241 prevail over any other obligation binding upon Randolfia, including its obligation to surrender Curwen to the ICC.

d. Arkam has Exclusive Jurisdiction over Curwen, Which it has not Expressly Waived.

Under Resolution 2241, Arkam has exclusive jurisdiction over its IFLEN agents, unless expressly waived. This entails that Arkam would have to make a clear and unambiguous statement to that effect, and no inference of action would establish an implicit waiver. The Compromis shows no evidence of such waiver by Arkam; rather, it has asserted jurisdiction over Curwen by taking disciplinary measures and serving upon him a subpoena. Moreover, the granting of amnesty by the TRC does not represent an implicit waiver, since TRCs are recognized as legitimate exercises of jurisdiction, constituting an alternative form of justice. Hence, in the absence of an express waiver by Arkam, Randolfia may not surrender Curwen to the ICC.


33. U.N. CHARTER, art. 48, para. 2.


35. U.N. CHARTER, art. 103; Vienna Convention, supra note 31, art. 30(1).


2. The Exercise of Jurisdiction by the ICC over a National of a State not Party to the Rome Statute Violates the VCLT and Customary International Law.

Under Article 12 of its Statute, the ICC has jurisdiction over crimes: committed in the territory of a state party, regardless of the nationality of the offender; or committed by a national of a state party. In this case, Randolfia intends to surrender Curwen, an Arkamian, to the jurisdiction of the ICC for crimes committed in Leng, a party to the Rome Statute. However, this exercise of ICC jurisdiction would breach international law, as proven below.

a. The Exercise of Jurisdiction over Curwen Would Breach Article 34 of the VCLT.

Under Article 34 of the VCLT, ratified by both parties to the present case, treaties cannot create obligations or rights for third non-party states. This rule is considered a codification of customary law, and has been acknowledged by this court and its predecessor. The ILC and international tribunals have interpreted this rule to mean that treaties cannot modify legal rights of states not parties to them. One of such customary rights of states that derives from state sovereignty is the right to exercise jurisdiction over nationals. This implies that states must expressly consent to their nationals being tried by other jurisdictions either by ratifying a treaty creating such jurisdiction or by giving ad hoc consent. Accordingly, the exercise of ICC jurisdiction over nationals of third parties, such as Curwen, abrogates pre-existing rights of such states, and thus breaches Article 34 of the VCLT.

38. Vienna Convention, supra note 31, art. 34.
42. OPPENHEIM'S INTERNATIONAL LAW 456 § 136 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1996); REBECCA WALLACE, INTERNATIONAL LAW 111 (3d ed. 1997); SHAW, supra note 39, at 403.
43. A. Diane Holcombe, Comment: The United States Becomes a Signatory to the Rome Treaty Establishing the International Criminal Court: Why are so any Concerned by this Action?, 61 MONT. L. REV. 301, 314 (2001); Madeline Morris, High Crimes and Misconceptions: The ICC and Non-Party States, 64 LAW & CONTEMP. PROBS. 13, 26-27 (2001); Damir Arnaut, When in Rome...? The International Criminal Court...
b. The Exercise of Jurisdiction over Curwen Cannot be Accepted under Custom.

The provisions of a treaty that has not been ratified by a state will only bind it through international custom.\textsuperscript{44} In order to justify ICC jurisdiction, Randolfia will argue that Article 12 of the Rome Statute codifies customary law, based on the theories of delegated universal jurisdiction or delegated territorial jurisdiction.\textsuperscript{45} However, no customary rule binds states to delegate their criminal jurisdiction to international tribunals.

Randolfia may argue that the exercise of jurisdiction over nationals of non-parties is based on the theory that the signatory states have delegated their customary right to exercise universal jurisdiction over the crimes prescribed in the Rome Statute.\textsuperscript{46} However, this argument is not accepted under international law for three reasons. First, Article 12 of the Statute was not drafted with the intention of establishing universal jurisdiction.\textsuperscript{47} In fact, Germany’s universal jurisdiction proposal was expressly rejected by the majority of states, \textit{e.g.}, Colombia, Indonesia, India, Russia, France, Brazil, Uruguay, Sweden, Norway, Israel, Iraq, Iran, Qatar. Secondly, no precedent under international law supports the delegation of universal jurisdiction by treaty.\textsuperscript{48} Indeed, delegation of jurisdiction on previous international tribunals was based on states’ consent, \textit{i.e.} Germany and Japan consented to the Nuremberg and Tokyo tribunals,\textsuperscript{49} and the International Criminal Tribunal of Rwanda (ICTR) and International Criminal Tribunal for the Former Yugoslavia (ICTY) were created by Security

\textsuperscript{44} CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 34 (1993); REUTER, INTRODUCTION TO THE LAW OF TREATIES 140 (Kegan Paul International 1995); CASSESE, supra note 39, at 119.


\textsuperscript{48} supra note 47, at 874; Morris, supra note 43, at 37; Haffner et al, supra note 47, at 116-17.
Council resolutions. Finally, some crimes of the Rome Statute are not subject to universal jurisdiction. Moreover, the exercise of universal jurisdiction is questionably a customary rule, as recognized by most justices of this Court.

Randolfia may also argue that state parties to the Rome Statute have delegated their territorial jurisdiction to the ICC in the same way that a state can delegate its territorial jurisdiction to another state. However, delegation of territorial jurisdiction from one state to another is only possible with the consent of the defendant’s national state. Thus, the same should apply to the delegation of territorial jurisdiction to an international court. Hence, said argument would be unreasonable in the absence of state practice to that effect.

Any effort to argue the customary status of the ICC’s power to exercise jurisdiction over nationals of non-parties is futile, since state practice is clearly against it. Indeed, several states have not ratified the Rome Statute precisely for this reason, and numerous contracting parties at the Rome conference considered this rule excessive, e.g., India, Russia, France, Libya, Japan, Colombia, Sudan, Indonesia, Brazil, Sweden and Spain. Accordingly, many contracting parties have executed treaties with non-parties to the Rome Statute, specifically the United States, to exclude its jurisdiction over their nationals, e.g., Argentina, Australia, Belgium, Colombia, Cameroon, Egypt, Georgia, Honduras, Israel, Ireland, Thailand, Uganda. Furthermore, Security Council resolutions have excluded ICC jurisdiction over United Nations peacekeeping personnel who are nationals of non-party states, not only in the case of Yuggott, but also in the cases of Bosnia-Herzegovina and Liberia. State practice shows that Article 12
of the Rome Statute establishes a jurisdictional regime that many states unequivocally reject, thus, it is not a codification of customary jurisdictional principles.

c. Arkam is a Persistent Objector to the ICC’s Jurisdictional Regime.

As often recognized by this Court, the persistent objector is a state that constantly objects to a customary rule during its development, and is thus not bound by it. In this case, Arkam has rejected the existence of the ICC since its developing stages and thus neither signed nor ratified its Statute. Therefore, arguments suggesting that the Rome Statute has created instant customary law must be dismissed, since Arkam is unquestionably a persistent objector. Hence, Randolfia’s surrendering of Joseph Curwen to ICC jurisdiction would violate the VCLT and customary international law.

3. Given the Ongoing Investigation by the Arkamian TRC into the Acts of Mr. Curwen Described in the Indictment, the Exercise of Jurisdiction over him by the ICC Would Violate the Principle of Complementarity.

The principle of Complementarity—the governing principle upon which the operation of the ICC is based—implies that in the presence of an international and national criminal justice system, only if the former fails shall the latter intervene. Hence, ICC jurisdiction may not be invoked if a national court with jurisdiction over a certain matter is willing and able genuinely to investigate or prosecute. In this case, there is a state with jurisdiction which is able and willing to investigate the matter of Curwen’s alleged crimes. Consequently, the ICC should not exercise jurisdiction over him.

59. El Zeidy, supra note 37, at 870.
60. Johan D. van der Vyver, Personal and Territorial Jurisdiction of the International Criminal Court, 14 EMORY INT’L L. REV. 1, 66 (2000); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 67 (2001); Llewellyn, supra note 37, at 194.
a. Arkam has Jurisdiction over Curwen.

Generally, adjudicatory jurisdiction—the jurisdiction to subject persons to the process of the courts of a state—61 is based on territoriality or nationality.62 Under the nationality principle, a state may exercise jurisdiction over its nationals wherever they may be and in respect of offences committed abroad.63 In this case, although Curwen has allegedly committed a crime in Leng, said state, which would have jurisdiction under the territoriality principle, has chosen not to intervene in Curwen’s prosecution. Therefore, Arkam, Curwen’s national state, has uncontested jurisdiction over Curwen and his conduct.

b. Arkam is Carrying out a Genuine Investigation.

Under the Rome Statute, a case shall be inadmissible if a state with jurisdiction over said case is carrying out or has carried out an investigation or prosecution, unless said state is unwilling or unable genuinely to carry out the investigation or prosecution.64 The use of the conjunction “or” in this rule reflects that the primacy of national process is preserved through either investigation or prosecution, hence an investigation, regardless of its nature, suffices.65

As has been done in numerous previous cases,66 Arkam has created a TRC to investigate crimes committed during and in furtherance of the ethnic conflict. Indeed, following Argentina’s example, at least twenty-five states have implemented TRCs to facilitate transitions to a public order of human dignity.67 States such as Chile, Argentina, South Africa, and Guatemala have created panels to investigate human rights abuses of prior regimes or resolve civil

61. SCHACHTER, supra note 39, at 255; OPPENHEIM’S INTERNATIONAL LAW at 462 §138; WALLACE, supra note 42, at 114; SCHABAS, supra note 60, at 59.
62. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 161 (2d ed. 2001); Stratatsas, supra note 47, at 1; SCHACHTER, supra note 39, at 255.
63. BROWNLIE, supra note 57, at 306; WALLACE, supra note 42, at 114; OPPENHEIM’S INTERNATIONAL LAW at 462 §138; CASSESE, supra note 39, at 288.
64. Rome Statute, supra note 58, art. 17(1).
65. Llewellyn, supra note 37, at 203.
conflict emerged from political agreements. The validity of these TRCs as investigative bodies has been supported by the United Nations. In El Salvador, a TRC was appointed and administered by the United Nations to investigate the abuses of a twelve-year civil war. Another example of a successful TRC is South Africa’s TRC, a unique United Nations supported and Non-Government Organization (NGO) praised tripartite institution with powers to prepare a record of the apartheid era, recommend reparations, and grant amnesty on the basis of individual application. Arkam’s TRC is modeled after South Africa’s, hence it constitutes a genuine form of investigation established to perform as a psychological balm for victims of human rights violations and their families, and in the interest of the legitimate goals of peace and national healing, which the Court should not mistake for unwillingness.

c. The Granting of Amnesty should not be Regarded as Unwillingness toProsecute.

Unwillingness to prosecute exists when proceedings are undertaken for the purpose of shielding the accused from criminal responsibility. However, TRCs do not fit this description, since they are deemed alternative forms of justice. Moreover, the granting of amnesty within the context of a recognized TRC has been accepted as a form of achieving peacekeeping, nation-building and reconciliation. Although some question the validity of amnesties, as international law stands today, a general duty to prosecute international crimes is not supported by state practice. In fact, modern history is replete with cases

69. Hayner, supra note 68, at 30-32.
71. RATNER & ABRAMS, supra note 62, at 229-38; El Zeidy, supra note 37, at 943.
72. SCHABAS, supra note 60, at 69.
73. Rome Statute, supra note 58, art. 17(2).
74. El Zeidy, supra note 37, at 943; Klosterman, supra note 37, at 840; Llewellyn, supra note 37, at 198.
where amnesty has been granted for serious international crimes, such as in Guatemala, Uruguay, Cambodia, El Salvador, South Africa, Haiti, and more recently Colombia. Furthermore, the United Nations encouraged and helped negotiate amnesties in several cases as a means of restoring peace. Accordingly, the granting of amnesty to Curwen and other individuals in the context of the Arkamian TRC constitutes a valid alternative form of justice and should not be regarded as unwillingness to prosecute on the part of Arkam.

Finally, Randolfia may argue that an amnesty would shield Curwen from punishment. However, punishment can take many non-criminal forms, including removal from office and reduction of ranks. In this case, Curwen was ordered to resign his commission without benefits. Hence, even the TRC’s amnesty would not shield him from punishment. Consequently, the Arkamian TRC is a valid and effective assertion of jurisdiction over Curwen that precludes the complementary intervention of the ICC.

B. It Would be Illegal under International law for Randolfia to Surrender Herbert West to the ICC Pursuant to the Warrant for his Arrest.

West has been charged with incitement to genocide under Article 25(3)(e) of the Rome Statute and attempted genocide under Articles 6(a) and 25(3)(f). Such charges are based on Article 28 (responsibility of superiors), and Article 25(3)(b) (responsibility for ordering, soliciting or inducing). Noting that under Article 28 responsibility only derives from omissions, Arkam will refer to West’s conduct, rather than merely his actions or acts, to establish that the facts do not support a prima facie case, i.e. evidence amounting to an overwhelming body of proof of potential guilt of his criminal responsibility for said charges.

77. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS, CONFRONTING STATE TERROR AND ATROCITY app. I (2001); Dugard, supra note 67, at 694; CASSESE, supra note 39, at 302.
79. Dugard, supra note 67, at 694; Scharf, supra note 78, at 5-7.
82. MUELLER & BESHAROV, EVOLUTION AND ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW; 1 M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 278 (2d ed. 1999).
1. Neither West nor his Allegedly Criminal Conduct Demonstrate The Necessary Nexus with a State party to the Rome Statute.

The ICC may exercise its jurisdiction if the crime is committed in the territory of a state party to the Rome Statute, or the perpetrator is a national of a state party to said Statute.\(^{83}\) Randolfia will argue that the ICC has jurisdiction since West’s alleged crime took place in Leng, a party to the Rome Statute. However, as proven below, should West’s conduct be considered as criminal, it occurred in Arkam, excluding the ICC’s jurisdiction.

\(a\). West’s Alleged Crime of Incitement to Genocide was Committed in Arkam.

Under the principle of territoriality, a crime is deemed to have been committed in the territory of the state where it is consummated.\(^{84}\) West’s alleged responsibility must be established by determining the territoriality of his conduct, such as where the conduct took place,\(^{85}\) noting that the conduct under analysis is the recording of a tape and its delivery to a neighbor. This is done by adopting the reasoning of the Quebec Superior Court in *United States v. Novick*. In that case the Court restricted the territoriality of the crime to the place where the act was executed. In *United States v. Novak* the crime was mail fraud. The Court reasoned that the crime took place where the letter was posted.\(^{86}\) As with mail fraud, incitement to commit genocide is an inchoate crime,\(^{87}\) meaning that the act alone is punishable,\(^{88}\) irrespective of its results.\(^{89}\)

\(^{83}\) Rome Statute, *supra* note 58, art. 12(2).
Such crimes are consummated instantaneously when the criminal conduct is performed. Additionally, criminal responsibility is individual and a person can only be liable for conduct performed voluntarily. Thus, West will only be responsible for conduct in which he voluntarily engaged, even though the crime might have been committed in Leng, since conduct in Leng was performed by others, as proven in Section C. Notwithstanding, Randolfia may argue that the locus commissi delicti must be determined according to the result theory. The result theory considers the crime as committed where its result takes place (Leng). Since an incitement is an inchoate crime, it is not subject to this doctrine. Accordingly, Randolfia may try to further argue that, under the effects doctrine the crime was consummated in Leng. The effects theory determines the territoriality of crimes by the place where their effects occur. However, this doctrine is highly controversial. It implies the extraterritorial application of the law, which is not contemplated in the Rome Statute.

Finally, Randolfia may argue that incitement is a continuous crime, perpetuated in time and space into Leng. Such assertion is incorrect, since a continuous crime only exists when all of its elements are present throughout its duration, while incitement, as indicated above, is consummated instantaneously. Consequently, West’s conduct was performed entirely in Arkam, representing no nexus with a state party to the Rome Statute.


94. PAUST ET AL, INTERNATIONAL CRIMINAL LAW 125 (Carolina Academic Press, 1996); CASSESE, supra note 92, at 280; SCHABAS, supra note 60, at 63.

95. SHAW, supra note 39, at 423; BROWNIE, supra note 57, at 310; OPPENHEIM’S INTERNATIONAL LAW at 472 §136.

b. West's Alleged Complicity was Perpetrated in Arkam

The conduct of the accomplice is subject to the jurisdiction of the state in the territory of which it takes place.97 Should West be found responsible for participating in the commission of incitement to genocide and genocide, only, Arkam would have jurisdiction because West's conduct took place entirely in Arkam, hence there would be no territorial nexus. Consequently, West's conduct—whether considered as constituting an inchoate crime, or an act of participation—was entirely executed in Arkam, which excludes ICC jurisdiction, since the necessary nexus is not fulfilled.

2. West's Actions Preceded the Date on which the Rome Statute Entered into Force with Respect to Leng and Randolfia and are Thus Barred from the ICC's Consideration.

Under the principle of intertemporal law, when dealing with different legal systems prevailing at successive periods of time, a "jurisdictional fact must be appreciated in light of the law contemporary."98 This principle is embraced by the Rome Statute. The Rome Statute provides that no one shall be criminally responsible for conduct prior to its entry into force.99 Accordingly, even if West's acts of recording a tape and delivering it to his neighbor were considered crimes within the competence of the ICC, such acts, which took place April 2003, are not contemporary with the jurisdiction ratione temporis of the ICC. This statute was entered into force for Leng and Randolfia on May 1 2003; therefore, a breach of international law would occur if Randolfia surrendered West to the ICC.

3. West's Alleged Acts do not Constitute a Crime of the Competence of the ICC.

In order to justify West's surrender to the ICC under international law, Randolfia must establish that there is a prima facie case of West's responsibility. However, the evidence does not support the construction of a prima facie case against West. An analysis of his actions in relation to the killings in Leng does not prove his guilt beyond the reasonable doubt required by international tribunals.100

99. Rome Statute, supra note 58, art. 11.
a. West is not Responsible for the Crime of Incitement to Commit Genocide.

As stated above, West has been charged with incitement to genocide and attempted genocide. These charges are based on two forms of participation: responsibility of superiors and participation by order, solicitation, or induction. Although Arkam will not rebut the commission of the crime of incitement to commit genocide, it is submitted that West cannot be held responsible for said crime under either form of participation, as proven below.

i. West cannot be held responsible under the doctrine of superior responsibility.

The superior responsibility doctrine requires proof of three elements: 1) a superior-subordinate relationship; 2) knowledge by the superior of his subordinates’ actions; and, 3) failure by the superior to exercise due control over his subordinates or inform of their illegal actions. However, at least two of these elements are not fulfilled.

A superior-subordinate relationship implies that the perpetrator of the underlying offence is under a superior’s effective control and authority, which entails that the latter be in position—political or military—to order the commission of a crime or punish the perpetrators thereof. However, mere leadership does not imply that a person has such authority or can exercise effective control and authority over others. Moreover, in the specific case of non-military leadership, the civilian superior’s degree of control must be similar to that of a military commander, and the “material ability” to intervene to prevent or punish offences is required. In the Musema case, the ICTR set

certain parameters to the Doctrine of Superior Responsibility applied to civilians, finding that Musema, as director of the Gisovu Tea Factory, had "legal and financial control over [his] employees, particularly through his power to appoint and remove these employees from their positions in the tea factory," and used his authority and power to order his employees to kill Tutsis in the surrounding communities. The ICTR used these facts to determine that Musema had the "material ability" to order crimes as well to prevent them. In this case, West's abilities and competencies are not sufficiently demonstrated to establish that he had such a control over GALA members. Indeed, the facts show that West's leadership was more ideological than military. Consequently, he cannot be deemed guilty under the superior responsibility doctrine.

In order to be held responsible for the actions of subordinates, the superior must also know or disregard information indicating that the subordinates are committing or about to commit a crime. Knowledge implies awareness that a circumstance exists or that a consequence will occur in the ordinary course of events. Further, although it can be established through circumstantial evidence, knowledge cannot be presumed. In this case, nothing evidences that West had actual knowledge of the actions of other GALA members, and the recording of the tape and subsequent delivery to his neighbor do not prove that, in the normal course of events, it would have been broadcast through Radio Yugott, much less incited Arkamians to conduct killing raids. Consequently, West cannot be said to have known that such criminal actions would be committed. Hence he is not guilty under the superior responsibility doctrine.

ii. West was not an accomplice of the GALA members who incited genocide.

International Tribunals have considered instigation as a form of consummating the actus reus of complicity. Instigation is defined as the prompting of a person to commit an offence. Ordering, soliciting, and inducing are

109. Rome Statute, supra note 58, art. 30(3).
forms of instigation. When a person orders, solicits or induces the commission of a crime that is in fact perpetrated or attempted, he is an accomplice to such crime. However, ordering implies a superior-subordinate relationship, and, as established above, there is no evidence of such relationship. Soliciting or inducing also implies commanding, authorizing, urging or affecting, causing or influencing a course of conduct by persuasion or reasoning. There is also no evidence that West engaged in such conduct. Indeed, the ICTR in its Kayishema and Ruzindanda decision, found instigating conduct in the promises of money or food, giving weapons to the perpetrators, taking them to the places where they would commit the crimes, or being physically present while the crimes were committed. There is no evidence whatsoever that West ordered or otherwise caused by means of persuasion or reasoning the subsequent conduct of GALA members. Hence, West cannot be held responsible as an accomplice to such a crime.

Additionally, the accomplice's conduct entails individual criminal responsibility only when it presents a direct causal link to a crime which is indeed perpetrated or attempted. Indeed, under the principle of novus actus interveniens, in a sequence of a person's action, the intervention of another bars the causal responsibility of the first person. In this case, the existence of a causal link between West's actions and those of the broadcasters of the tape is highly questionable, given the intervention of other GALA members in the sequence of events (copying, distributing, and broadcasting) and the lack of evidence of West's actual instructions. Therefore, West is not an accomplice to incitement to genocide.

b. West is not Responsible for Genocide nor Attempted Genocide.

Randolfia may try to use the ICTR's Nahimana decision to argue that there is a prima facie case of West's responsibility. In said case, the Trial Chamber

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116. Eser, supra note 92, at 796.
118. ENRIQUE GIMBERNAT, AUTOR Y CÓMPlice EN DERECHO PENAL 168-74 (1966); MUÑOZ, TEORÍA General del Delito, EDITORIAL TEMIS, 1990, at 207-09.
evaluated a series of contextual factors that presented a strong case against Nahimana and Barayagwiza. The first factor was based on their role as directors of Radio Television de Miles Colines (RTLM) and the Coalition pour la Défense de la République (CDR), a radio station and a political party with militias. They set course over the purposes and actions of those organizations. The second factor found was that they exercised de facto control over RTLM and the CDR. Finally, their organizations were aimed at creating ethnic violence and hatred. Unlike the Nahimana case, it is not sufficiently clear whether West was in a position to set course over its member's purposes or actions. In fact, there is no evidence that West exercised authority or control over GALA members or Radio Yuggott. Moreover, GALA's purpose is the secession of Yuggott from Leng to create a "Greater Arkam," not the generation of ethnic hatred or violence. The facts that were crucial to determine responsibility in Nahimana cannot be proven in this case, especially since the evidence provided here derives from local press, which has little evidentiary value in criminal law. Consequently, a prima facie case of West's responsibility cannot be elaborated on that basis.

VI. REMEDIES SOUGHT BY ARKAM

States are liable for the wrongful acts attributable to them in violation of international law. Indeed, violations of international obligations give rise to state responsibility and to the state's correlative duty of reparation, which must reestablish the situation to the conditions that would have existed if the wrongful act had not been committed. In this case, Randolfia intends to surrender two Arkamian citizens to the jurisdiction of the ICC, wrongfully intervening in Arkam's internal affairs and abrogating its right to exercise jurisdiction over its nationals. Declaratory judgements provide satisfaction for certain breaches of international obligations. This Court and its predecessor have willingly granted declarations as a form of satisfaction. Accordingly,

121. RATNER & ABRAMS, supra note 62, at 256.
123. Draft Articles on the Responsibility of States, supra note 122, art. 31(1); Polish Agrarian Reform (Ger. v. Pol.), 1933 P.C.I.J. (ser. C) No. 45, 296 (July 29); Reparations Case, 1949 I.C.J. 174, 184 (Apr. 11).
126. Concerning the Aerial Incident of July 27, 1955 (Isr. v. Bulg.), 1959 I.C.J. 127 (May 26);
based on all that has been sufficiently proven above, Arkam requests this Court declare that it would be illegal for Randolfia to surrender Joseph Curwen and Dr. Herbert West to the ICC pursuant to the warrants for their arrest.

VII. PRAYER FOR RELIEF

Based on the foregoing reasons, Arkam respectfully requests that this Court DECLARE that it would be illegal under international law for Randolfia to surrender Joseph Curwen to the ICC pursuant to the warrant for his arrest; and DECLARE that it would be illegal for Randolfia to surrender Herbert West to the ICC pursuant to the warrant for his arrest.

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E. Additional Information

2004 PHILIP C. JESSUP
INTERNATIONAL MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE
THE HAGUE, NETHERLANDS

CASE CONCERNING THE INTERNATIONAL
CRIMINAL COURT

_________________________
THE KINGDOM OF ARKAM

Applicant

v.

THE STATE OF RANDOLFIA

Respondent

_________________________
SPRING TERM 2004

_________________________
MEMORIAL FOR THE RESPONDENT

University of Queensland, Australia

Team Members:
Caitlin Elizabeth Goss, Michael Colin Hogan, Marion Alice Isobel
Annaliese Jackson and Tamerlan Van Alphen
CASE CONCERNING THE INTERNATIONAL CRIMINAL COURT

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I. STATEMENT OF JURISDICTION

The Kingdom of Arkam and the State of Randolfia have agreed to submit their dispute to the International Court of Justice. The Court has jurisdiction to decide the case pursuant to Article 36(1) of the Statute of the International Court of Justice.

II. QUESTIONS PRESENTED

1. Whether Randolfia’s decision to surrender Lieutenant Joseph Curwen to the custody of the International Criminal Court would be consistent with international law?

2. Whether Randolfia’s decision to surrender Dr Herbert West to the custody of the International Criminal Court would be consistent with international law?

III. STATEMENT OF FACTS

In January 2003, a trans-border conflict erupted in the Kingdom of Arkam and the Kingdom of Leng. There have been centuries of tension and periodic conflict between ethnic Arkamians and ethnic Lengians. Following the outbreak of conflict in 2003, high-level delegations from both States attended an international peace conference, convened by the United Nations, in the Randolfian capital of Cimmeria. Randolfia shares a common border with both States. The Cimmeria Peace Agreement was brokered on 14 February and concluded the conflict in Arkam. The conflict in Leng continued.

In accordance with the terms of the Peace Agreement, the government of Arkam established a Truth and Reconciliation Commission (TRC) which commenced operation on April 15, 2003. The TRC was modelled on the South African Truth and Reconciliation Commission. There are however, differences between the Arkamian and South African Commissions.

During the early months of 2003, sporadic fighting continued in the ethnically-mixed Lengian province of Yuggott. The conflict was spurred by the Greater Arkamian Liberation Army (GALA), a militia dedicated to the secession of Yuggott from Leng and its unification with Arkam.

On May 1, 2003, the Rome Statute of the International Criminal Court (Rome Statute) entered into force for Leng and Randolfia. Arkam is not a party to the Statute.

Dr Herbert West, an Arkamian national, is a leader of GALA. In April 2003, West recorded an audiotape in Arkam, in which he urged his “Arkamian brothers and sisters to rid Yuggott ... of its Lengian occupiers. Eliminate them all: men, women and children. Eliminate them all!” West passed the audiotape to another member of GALA. The recording was subsequently duplicated and
circulated. Between May 15 and May 25, 2003, the recording was broadcast repeatedly on Radio Yuggott, a private radio station controlled by members of GALA which has supported GALA's goals in its broadcasts.

On May 16, 2003, bands of ethnic Arkamians began to conduct a series of raids in Yuggott. By the end of May, nearly ten percent of the Lengian population of Yuggott had been massacred. Local newspapers surmised that the raids were inspired by West. West then subsequently traveled to Randolfia.

On June 17, 2003, the Lengian ambassador to the United Nations formally requested that the UN Security Council authorise the deployment of troops to Yuggott. On June 20, the Security Council adopted Resolution 2241 which provided for the IFLEN multilateral peacekeeping force. Operative Paragraph 7 of Resolution 2241 included provisions concerning the jurisdiction of the ICC. The paragraph granted exclusive jurisdiction to contributing States over their nationals, if those contributing States were not party to the Rome Statute. Several states expressed concerns about this paragraph. Five members of the Security Council abstained from the vote on Resolution 2241.

Lieutenant Joseph Curwen, an Arkamian national, was a member of the IFLEN peacekeeping mission. On June 28, 2003, GALA forces attacked the IFLEN platoon under Curwen's command. Curwen ordered the remaining members of his platoon to attack and destroy Exhamtown, which was purported to be a GALA stronghold. During the attack, which later became known as the "Massacre at Exhamtown", 200 unarmed civilians were killed. On June 30, GALA and the Lengian government agreed to a UN monitored cease-fire.

As a result of his involvement in the massacre, Curwen was dismissed from IFLEN, and subsequently ordered to return home to Arkam. On July 3, Curwen was subpoenaed to appear before the Arkamian TRC and promptly left Arkam to visit family in Randolfia. His departure from Arkam was not forbidden by the subpoena or by Arkamian law generally.

Both West and Curwen were arrested in Randolfia for minor offences and were indicted in accordance with Randolfian law. Randolfia has not enacted municipal laws criminalising genocide, crimes against humanity, or war crimes committed by non-Randolfian nationals outside of its borders. Thus on July 25, 2003, the Randolfian Minister of Justice dispatched a communiqué to the Registrar of the ICC, requesting that the Court exercise jurisdiction over Curwen and West to the custody of the ICC.

Arrest warrants for West and Curwen were issued by the ICC on September 9, 2003. Curwen has been charged under Articles 8(2)(a), 8(2)(b), 8(2)(c) and 8(2)(e) of the Rome Statute. West has been charged under Articles 6(a), 25(3)(b), 25(3)(e), 25(3)(f), and 28 of the Rome Statute. On the same day, the King of Arkam warned the President of Randolfia that the surrender of West and Curwen to the custody of the ICC would result in an immediate disruption of economic and diplomatic relations between the two States.
The potentially crippling economic consequences of this disruption precipitated diplomatic negotiations between the foreign ministers of Arkam and Randolfia. These negotiations concluded with an agreement to submit the dispute to the International Court of Justice. Leng has declined to intervene in the matter.

IV. SUMMARY OF PLEADINGS

A. The International Court of Justice has jurisdiction to review the operation of United Nations Security Council Resolutions. The exercise of power by the Security Council is limited by the principles and purposes of the United Nations Charter and general international law. Randolfia has no obligation to comply with Resolutions 1487 or 2241. The assertion of exclusive jurisdiction by Arkam through its TRC would undermine the **jus cogens** prohibition of war crimes. Therefore, Resolution 2241 is not binding upon Randolfia. Resolution 1487, which invokes the Rome Statute, is not binding upon Randolfia due to its inconsistency with that Statute.

B. The surrender of Curwen to the ICC is consistent with the *Vienna Convention on the Law of Treaties* and customary international law. The Rome Statute does not create obligations for Arkam. The surrender of Curwen to the ICC does not abrogate Arkam’s rights. Accordingly, the surrender of Curwen does not violate of the principle of **pacta tertiiis nec nocent nec prosunt**.

C. The surrender of Curwen to the ICC would not violate the principle of complementarity. An investigation of Curwen by the Arkamian TRC is incompatible with a genuine willingness to investigate or prosecute. Furthermore, a Randolfian surrender of Curwen to the ICC would not give rise to State responsibility.

D. The issue of jurisdiction of the ICC is distinct from the merits of any claim of criminal responsibility before the ICC. Consequently, it is only necessary for the International Court of Justice to be satisfied that there is a sufficiently plausible case of ICC jurisdiction in order to justify the surrender of West to the ICC. There is a sufficiently plausible case that the crimes for which West is responsible occurred within the territory of Leng. This satisfies the nexus requirement.

E. There is a sufficiently plausible case that West’s acts fall within the temporal jurisdiction of the ICC. He is charged with responsibility for the genocide, which occurred in Yuggott after the entry into force of the Rome Statute for Leng. Furthermore, West’s conduct
constitutes continuing crimes, which fall within the temporal jurisdiction of the ICC.

F. In order to justify the surrender of West to the ICC, it is only necessary to establish a sufficiently plausible case that a crime within the jurisdiction of the ICC has occurred. Genocide has occurred in Yuggott. While it is not necessary for this Court to establish West’s individual criminal responsibility, there is sufficient evidence to support each of the charges against West under Articles 25 and 28 of the Rome Statute.

V. PLEADINGS

A. Randolfia’s Decision to Surrender Joseph Curwen to the Custody of the International Criminal Court is Consistent with International Law.

1. Arkam Does Not Have Exclusive Jurisdiction Over Curwen.

Randolfia has no obligation under United Nations Security Council Resolutions 1487 or 2241 to recognise Arkam’s claim to exclusive jurisdiction over Curwen. The International Court of Justice has jurisdiction to review Security Council resolutions in order to determine the nature of obligations created therein. Curwen has been charged by the International Criminal Court (ICC) with war crimes. The prohibition of war crimes is a rule of jus cogens. States are obliged under international law to extradite or prosecute (aut dedere aut judicare) persons accused of war crimes. The granting of an amnesty to Curwen by the Arkamian Truth and Reconciliation Commission (TRC) would violate these obligations. Recognition by this Court of Arkam’s claim to exclusive jurisdiction would therefore undermine the obligations to prohibit war crimes and to extradite or prosecute persons accused of such crimes. Resolutions 1487 and 2241 are not binding upon Randolfia to the extent that they conflict with these obligations.
a. The International Court of Justice has Jurisdiction to Review the Operation of Security Council Resolutions.

Security Council resolutions are subject to international law. Obligations created by the Security Council are limited by the purposes and principles of the United Nations Charter and rules of general international law. The obligations under Article 25 to carry out decisions of the Security Council are limited to those decisions made in accordance with the Charter. The International Court of Justice, as the principal judicial organ of the United Nations, has jurisdiction to review obligations created under the Charter.


The third preambular paragraph of the United Nations Charter refers to the determination "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." Articles 1 and 2 of the Charter address the purposes of the UN, and require that organs and members of the UN act "in conformity with the principles of justice and international law ... in the settlement of international disputes.”

Principles of justice and international law require that States prohibit the commission of war crimes, and extradite or prosecute those accused of war crimes. Randolfia and Arkam, as parties to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Compromis ¶ 30), are obliged to extradite or prosecute those accused of war crimes. In particular, such an obligation exists in relation to the crime of intentionally directing attacks against a civilian population. Furthermore, under general international law there is a duty to extradite or prosecute individuals accused of war crimes committed in both international and non-international armed conflicts.

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7. U.N. CHARTER art. 1 ¶ 1.
10. ROME STATUTE, art. 8(2)(b)(i); See generally supra note 9 and accompanying text.; Illegality of the Threat or Use of Nuclear Weapons Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).
11. See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Oct. 21, 1950, art. 49, 75 U.N.T.S. 970; Geneva Convention for the
Resolution 2241 purports to confer exclusive jurisdiction on States not party to the Rome Statute of the International Criminal Court (Rome Statute) in relation to crimes committed by their nationals whilst serving in the IFLEN peacekeeping mission. The prohibition of war crimes is a peremptory norm (jus cogens) of international law. Article 103, which addresses conflicts between the Charter and other treaty obligations, does not apply to conflicts involving rules of general international law. A fortiori, Article 103 has no application in relation to peremptory norms.

The Arkamian TRC was established on March 1, 2003 (Compromis §7). Curwen ordered the destruction of Exhamtown on June 29, 2003 (Compromis §17). This assertion of jurisdiction in a prospective manner by the Arkamian TRC in relation to Curwen is contrary to Arkam’s obligation to prohibit war crimes. Thus, Resolution 2241 effectively obliges member States having custody of an accused to become “supporters” of Arkam’s non-fulfilment of its jus cogens obligation to prohibit war crimes. Notwithstanding Articles 25 and 103 of the United Nations Charter, “in strict logic” Resolution 2241 is not binding on Randolfia.
c. Resolution 1487 is Not Applicable

The Security Council, in paragraph one of Resolution 1487, adopted in purported reliance on Article 16 of the Rome Statute, "requests" that the ICC not commence investigations or prosecutions of members of UN peacekeeping missions for a renewable period of twelve months, commencing July 1, 2003.\(^{19}\) The Security Council in paragraph three of the same Resolution decided that member States take no action inconsistent with such a Security Council request, or with their international obligations. As paragraph one explicitly envisages consistency with Article 16 of the Rome Statute, the scope of any obligation imposed by paragraph three of the resolution is dependent on such consistency. It is inconsistent with the intention of the drafters of Article 16 of the Rome Statute to allow a broad, prospective deferral of ICC jurisdiction in respect of a general class of conflicts.\(^{20}\) Article 16 only envisages a Security Council request for deferral of investigation or prosecution on a case-by-case basis.\(^{21}\) The request contained in Resolution 1487 is inconsistent with Article 16. Therefore, Randolfia's surrender of Curwen to the ICC would not be inconsistent with paragraph three of the Resolution. Furthermore, Randolfia has an obligation under international law to surrender Curwen to the ICC [Rome Statute, Article 89(1)].

2. The surrender of Curwen to the ICC is Consistent with the Vienna Convention on the Law of Treaties and Customary International Law.

It is a general rule of customary international law that a treaty cannot impose obligations or confer rights on States not party to the treaty without their consent \((\text{pacta tertiis nec nocent nec prosunt}).\)\(^{22}\) Article 34 of the Vienna Convention on the Law of Treaties (VCLT) embodies this principle. For the purposes of the \text{pacta tertiis} rule, however, non-party States have no grounds of


complaint regarding "incidentally unfavourable effects of lawful and valid treaties."24

The Rome Statute does not create obligations for Arkam. The obligations created by the Rome Statute are expressly limited to State parties.25 The principle of complementarity recognizes Arkam’s entitlement to exercise criminal jurisdiction over Curwen, but does not impose any obligations on Arkam.26 To the extent that Arkam is obliged to extradite or prosecute persons accused of war crimes, this is a pre-existing obligation under general international law.

The surrender of a national of a non-party State to the ICC does not violate the *pacta tertii* rule. States are entitled under customary international law to exercise jurisdiction over foreign nationals without the consent of the State of nationality.27 States are entitled to delegate this jurisdiction to an international tribunal.28 States are also entitled to extradite foreign nationals to third States without the consent of the State of nationality of an accused.29 The incidental and potentially unfavorable effect of a Randolfian surrender of Curwen to the ICC is consistent with international law.

A foreign visiting military force does not enjoy immunity from the jurisdiction of the receiving state.30 This means that Arkam is unable to claim that the Rome Statute abrogates its rights under the rules of sovereign immunity.

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24. FITZMAURICE, id. at 100-101.
26. See id. at art. 17, 18.
Arkam is also unable to claim that the surrender of Curwen undermines a right to exercise exclusive jurisdiction under Security Council Resolution 2241. To the extent that any right was created by Resolution 2241, Arkam, by its initiation of an inappropriate TRC process, has relinquished any such right.

3. The Exercise of Jurisdiction over Curwen Does Not Violate the Principle of Complementarity.

Arkam contends, in the alternative, that "given the ongoing investigation by the Arkamian TRC into the acts of Mr. Curwen, ... the exercise of jurisdiction over him by the ICC would violate the principle of complementarity" (Compromis ¶ 31), and that therefore any prosecution by the ICC is inadmissible. In order to succeed on the issue of admissibility, Arkam must establish that the case against Curwen is inadmissible under the Rome Statute, and that the surrender of an accused in relation to an inadmissible case would give rise to State responsibility. The obligation to surrender and the issue of admissibility are distinct legal questions.

The issue of admissibility raised by Arkam is addressed in the Rome Statute in Article 17. Article 17(1)(a) provides that a case is inadmissible before the ICC where the case is being "investigated or prosecuted" by a State having jurisdiction over the matter. A case is admissible, where a State is "unwilling or unable genuinely" to carry out an investigation or prosecution.

In order to determine whether there is an unwillingness to investigate or prosecute for the purposes of the Rome Statute, the ICC is required to consider several factors. These include: whether national proceedings have been taken for the purpose of shielding the accused from criminal responsibility and whether the proceedings are being conducted independently or impartially, and consistently with an intent to bring the accused to justice.

a. Investigations by Truth and Reconciliation Commissions Do Not Preclude Admissibility of Cases Before the ICC.

For the purposes of Article 17, an investigation by a TRC is not sufficient to render a case inadmissible before the ICC. An "investigation" within the terms of Article 17(1)(a) must be undertaken with a view to subjecting an

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31. ROME STATUTE, art. 17(1)(a).
32. Id.
33. Id.
34. ROME STATUTE, at art. 17(2).
accused to criminal prosecution. The preamble to the Rome Statute affirms the need for effective prosecution of international crimes, and recalls the duty of every State to exercise its criminal jurisdiction. If Curwen makes full disclosure to the TRC then he will be granted amnesty in respect of his alleged war crimes (Compromis ¶ 7). The preclusion of the possibility of prosecution is incompatible with a genuine willingness to investigate.

b. Investigation of Curwen by the Arkamian TRC Does Not Preclude Admissibility of his Case Before the ICC.

Furthermore, in relation to the Arkamian TRC, the following factors evince an unwillingness to investigate or prosecute. First, unlike the South African and other TRCs, which have only been able to investigate crimes that have occurred prior to their establishment, the jurisdiction of the Arkamian TRC is prospective (Clarification 6). The TRC was established on March 1, 2003 (Compromis ¶ 7). Curwen ordered the destruction of Exhamtown on June 29, 2003 (Compromis ¶ 17). The prospective jurisdiction of the Arkamian TRC creates carte blanche to commit war crimes.

Secondly, the purported exercise of extraterritorial jurisdiction by the Arkamian TRC in respect of crimes committed against Lengian nationals, and the evidentiary difficulties created thereby, demonstrate the inappropriateness of an exercise of TRC jurisdiction in these circumstances. Granting amnesty to Curwen is not conducive to the national healing and reconciliation for which the Arkamian TRC was established. The determination of the Arkamian authorities to proceed with the TRC process notwithstanding these considerations demonstrates an unwillingness genuinely to investigate or prosecute.


39. Id. § 20(2).


41. ROBINSON, supra note 35, at 501-02; See HOLMES, supra note 35, at 49.
c. The Surrender of Curwen to the ICC Does Not Give Rise to State Responsibility

The applicant claims that surrender of Curwen to the ICC would be illegal under international law. As noted above, admissibility and surrender are discrete legal issues. Even if Curwen's case is inadmissible before the ICC, a Randolfian surrender of Curwen would not be wrongful under international law. Therefore, it does not give rise to State responsibility.

B. Randolfia's Decision to Surrender Dr. Herbert West to the Custody of the International Criminal Court Would Be Consistent With International Law.

The ICC is entitled to exercise jurisdiction over West, as the following jurisdictional requirements are satisfied. First, the conduct in question occurred on the territory of Leng, demonstrating a territorial nexus to a party to the Rome Statute (ratione loci). Secondly, the crimes for which West is accused occurred after the entry into force of the Rome Statute for Leng (ratione temporis). Finally, West has been charged with responsibility for crimes within the jurisdiction of the ICC (ratione materiae). However, before addressing these jurisdictional issues in more detail, it is necessary to consider, as a preliminary matter, the role of this Court in examining the jurisdiction of the ICC.

The issue of the ICC's jurisdiction is distinct from the merits of any claim of criminal responsibility before the ICC. This means Randolfia is not required to establish before this Court that it has an "unassailable legal basis" for its arguments regarding ICC jurisdiction. Furthermore, the International Court of Justice has drawn a distinction between the determination of its own jurisdiction, and the determination of the jurisdiction of another body. This Court considered the jurisdiction of an arbitral body in the Ambatielos case and effectively concluded that a claim of a "sufficiently plausible character" would establish that body's jurisdiction. Therefore, Randolfia need only establish a sufficiently plausible basis for ICC jurisdiction over West in order to justify his surrender.

42. Ambatielos Case, Merits: Obligation to Arbitrate (Greece v. U.K. 1953 I.C.J. 10, 18 (May 19).
43. See Id. at 14.
44. Id. at 10-35.
45. Id. at 18; Oil Platforms (Islamic Republic of Iran v. U.S.) 1996 I.C.J. 803 ¶ 824, 833, 869 (Dec. 12) (Preliminary Objection) (Shahabuddeen, J., separate opinion; Rigaux, J., separate opinion); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.) (Jurisdiction of the Court and Admissibility of the Application) 1984 I.C.J. 392 ¶ 637 (Nov. 26) (Judge Schwebel, dissenting).
1. West’s Conduct Demonstrates the Necessary Nexus With a State Party to the Rome Statute.

The ICC is entitled to exercise jurisdiction where there is a sufficiently plausible claim that the requirements of Article 12(2) of the Rome Statute have been satisfied. Pursuant to Article 12(2)(a), jurisdiction arises when conduct proscribed under the Rome Statute has occurred on the “territory” of a State party to the Statute. This requirement of a territorial nexus is based on the principle of territorial jurisdiction under general international law. In accordance with the territorial principle, States have jurisdiction to prescribe laws, adjudicate and enforce in relation to crimes committed “in whole or in part” within their territory. A crime is committed in part within the territory of a State if a constituent element of the crime occurs, or if the crime is consummated, within the State’s territory.

The massacres which occurred in the Lengian province of Yuggott (Compromis 12) constitute genocide within the terms of Article 6(a) of the Rome Statute. This issue is discussed in further detail below. Leng is a party to the Rome Statute (Compromis 30).

West has been charged (Corrections 2) with ordering, inducing or soliciting genocide as well as command responsibility for genocide. These offences were all consummated within the territory of Leng when the killing of ethnic Lengians occurred. West has also been charged with direct and public

46. ROME STATUTE, art. 12(2)(a).


51. See ROME STATUTE, art. 25(3)(b).

52. Id. at art. 28.
incitement to genocide\textsuperscript{53} and attempted genocide.\textsuperscript{54} The consummation of these offences occurred in Leng when the audiotape was broadcast on Radio Yuggott (Compromis \textsuperscript{11}). There is a sufficiently plausible case that West has directed the broadcast in Leng, and that he is responsible for conduct that occurred in Leng.

2. West's Actions Fall Within the Temporal Jurisdiction of the International Criminal Court.

In order for the ICC to exercise jurisdiction, there must be a sufficiently plausible claim that the crimes alleged fall within the Court's temporal jurisdiction. Article 11(2) of the Rome Statute provides that "[i]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State."\textsuperscript{55} This Article should be read in conjunction with the general principle of law embodied in Article 24, which prohibits the Rome Statute from having retrospective effect. Article 24 is inapplicable in this case because it only restricts the Statute from having retrospective effect prior to July 1, 2002, the day on which the Statute came into force generally. All the relevant acts of West occurred in 2003.

In April 2003, West recorded the relevant audiotape (Compromis \textsuperscript{9}). The Rome Statute entered into force for Leng on May 1, 2003 (Compromis \textsuperscript{10}). Radio Yuggott began broadcasting West's audiotape on May 15, 2003 (Compromis \textsuperscript{11}). The massacres in Yuggott commenced on May 16, 2003 (Compromis \textsuperscript{12}). Notwithstanding the date of the recording, West is charged with responsibility for genocide, which occurred after the entry into force of the Rome Statute with respect to Leng. The ICC's temporal jurisdiction is therefore established.

\textit{a. The Charges of Command or Superior Responsibility Are Within the Temporal Jurisdiction of the ICC.}

Article 28 of the Rome Statute addresses criminal responsibility of superiors for crimes committed by their subordinates.\textsuperscript{56} West is charged with command or superior responsibility for the massacre of ethnic Lengians, which occurred after the entry into force of the Rome Statute with respect to Leng. Therefore, the ICC has temporal jurisdiction over this charge.

\textsuperscript{53} Id. at art. 25(3)(e).
\textsuperscript{54} Id. at art. 25(3)(f).
\textsuperscript{55} Id. at art. 11(2).
\textsuperscript{56} ROME STATUTE, art. 28.
b. The Continuing Crimes of Inciting, Ordering, Soliciting, Inducing and Attempted Genocide Are Within the Temporal Jurisdiction of the ICC.

Certain crimes are, by their very nature, continuing. The International Criminal Tribunal for Rwanda (ICTR), in considering its temporal jurisdiction, has accepted that the crime of conspiracy to commit genocide constitutes a continuing crime. The Trial Chamber of the ICTR has endorsed the following passage from a decision of the English House of Lords:

When the conspiratorial agreement has been made, the offence of conspiracy is complete, ... But [that] ... does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged. The ICTR has applied this reasoning to the crime of incitement to genocide. By parity of reasoning, a similar approach should apply in relation to the crimes of ordering, soliciting or inducing genocide. These crimes continue “to the time of the commission” of the genocide. The ICC is therefore not precluded from exercising jurisdiction over West as his acts constitute continuing crimes, which resulted in the commission of genocide after the entry into force of the Rome Statute.


60. Director of Public Prosecutions v. Doot, 1973 A.C. 807, 827.


62. Id.
Furthermore, the charge of attempted genocide also falls within the temporal jurisdiction of the ICC. The broadcast of the audiotape occurred after the Rome Statute came into force for Leng. This broadcast forms a basis for the charge that West is responsible for attempted genocide. The determination of West’s role in the broadcast is a matter to be determined on the merits before the ICC. As the charge of attempted genocide is sufficiently plausible, the ICC therefore has temporal jurisdiction.

3. The ICC Has Jurisdiction Over West.

a. The Role of the International Court of Justice in Determining the Jurisdiction of the ICC

This Court was established to adjudicate upon disputes between States, and to provide advisory opinions to certain international organisations. It is not empowered to determine individual guilt or innocence. Accordingly, the Respondent need not make submissions on the merits of West’s individual criminal responsibility. It is only required to establish a sufficiently plausible case that a crime within the jurisdiction of the ICC has occurred. On this basis, the case against West may then be submitted to the ICC for a determination on its merits. Arguments set out below that appear to relate to the merits “are clearly designed as measures of defence” which it would be necessary to examine only in the alternative that the Court adopts a standard of proof other than that submitted by the Respondent.

b. ICC Jurisdiction Over the Crime That Occurred in Yuggott.

In order for the ICC to have subject-matter jurisdiction over West, there must be a sufficiently plausible case that a covered crime under Article 5 of the Rome Statute has occurred. Under Article 5, the ICC has jurisdiction with respect to the most serious international crimes, including the crime of genocide. There is ample evidence to establish a sufficiently plausible case that the crime of genocide has occurred in Yuggott.

Pursuant to Article 9 of the Rome Statute, the Elements of Crimes assists the ICC in the interpretation and application of the crime of genocide. The

63. **STATUTE OF THE INTERNATIONAL COURT OF JUSTICE**, art. 34, at 64.
64. Anglo-Iranian Oil Co. Case (U.K. v. Iran) 1952 I.C.J. 93 ¶ 114 (July 22) (Preliminary Objection).
Elements of Crimes elaborates upon Article 6(a) of the Rome Statute, and sets out the following requirements for the crime of genocide:

I) The perpetrator killed one or more persons.

II) Such person or persons belonged to a particular national, ethnical, racial or religious group.

III) The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

IV) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

(i) The Perpetrator Killed One or More Persons

On May 16, 2003, ethnic Arkamians began to conduct a series of nighttime raids, massacring ethnic Lengians in Yuggott. By the end of May, nearly ten percent of the Lengian population of the province had been killed by the end of May (Compromis ¶ 12). Such killings are sufficient to satisfy this element.

(ii) Such Person or Persons Belonged to a Particular National, Ethnical, Racial or Religious Group.

The massacred Lengians were part of a particular ethnical, racial, and religious group. Lengians share a common culture, distinctive physical characteristics, and religious beliefs (Compromis ¶ 2, 3; Clarification ¶ 1).

(iii) The Perpetrator Intended to Destroy, in Whole or in Part, That National, Ethnical, Racial or Religious Group.

The ethnic Arkamians who carried out the massacres intended to destroy, in part, the group of ethnic Lengians. There is evidence that they possessed the special intent (dolus specialis) required for genocide, "which demands that the

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66. Elements of Crimes, art. 6(a).
perpetrator clearly seeks to produce the act charged." Intent may be inferred from their "words or deeds." Intent can be inferred from the fact that the Arkamians conducted a series of night-time raids in several towns in which ethnic Lengians were targeted and massacred. Within three weeks, nearly ten percent of the Lengian population of the province had been killed (Compromis ¶ 12). Intent can also be inferred from evidence that the perpetrators were chanting "Eliminate them all!" while carrying out the massacres.

(iv) The Conduct Took Place in the Context of a Manifest Pattern of Similar Conduct Directed Against That Group or Was Conduct That Could Itself Effect Such Destruction.

This element contains two alternative limbs. The second appear to be satisfied in the present case. Approximately ten percent of the Lengian population of Yuggott was killed within a three week period by ethnic Arkamians. (Compromis ¶ 12). These killings, in themselves, effected the destruction required to constitute genocide.

4. West’s Criminal Responsibility For Genocide

As noted above, this Court is not empowered to determine individual guilt or innocence. Therefore, for the purposes of determining whether the ICC has subject-matter jurisdiction, it is not for this Court to determine that West is criminally responsible for genocide. It is only necessary to consider whether genocide has occurred. However, should this Court find that West’s individual criminal responsibility under Articles 25 and 28 of the Rome Statute is relevant to the determination of ICC jurisdiction, there is a sufficiently plausible case in support of each of the charges against West.

68. Id. ¶ 498.


71. See id. ¶ 93.

West has been charged with responsibility for the crime of genocide that has occurred in Yuggott. A critical requirement of any criminal responsibility for genocide under Article 25 of the Rome Statute is that West possessed the necessary genocidal intent (dolus specialis). However special intent is not necessary, for the charge of command/superior responsibility under Article 28 of the Rome Statute.

a. Genocidal Intent

There is evidence that West intended to destroy, in part, the distinct group of ethnic Lengians. He possessed the dolus specialis required for genocide, "which demands that the perpetrator clearly seeks to produce the act charged." In the absence of a confession, the intent of an accused may be inferred from his "words or deeds." There are two key inferences that may be drawn from West’s actions and words. First, the language in the audiotape evinces an intent to destroy the ethnic Lengians. Secondly, West’s intention to destroy can also be evidenced by the fact that he intended that the audiotape be disseminated.

The language on the audiotape clearly evinces an intention to destroy ethnic Lengians. Ethnic Lengians were deliberately targeted by West’s language by virtue of their membership of a specific group. West urged Arkamians to rid Yuggott of its “Lengian occupiers,” and directed them to “[e]liminate them all: men, women, and children. Eliminate them all!” (Compromis ¶ 10).

Furthermore, West’s intention to destroy may be evidenced by the fact that he has “frequently recorded audiotapes with messages denouncing ethnic Lengians and supporting GALA.” (Clarification ¶ 4). The repetition of destructive or discriminatory acts is a fact from which intention to destroy may be inferred.

West’s intention to disseminate his audiotape can be inferred from his language and from his actions. West specifically addressed his audio recording to “my Arkamian brothers and sisters” (Compromis ¶ 10). By necessary implication, his intention was that the recorded message be communicated to a wider audience than the GALA member to whom he handed the audiotape. The medium through which West communicated his message further demonstrates an intention that the message be widely disseminated. An audio recording can be readily re-produced and re-played.


75. Id. ¶ 524.
West, a GALA leader, passed his audiotape to a fellow member of GALA (Compromis ¶ 10). The tape was played on Radio Yuggott, a station controlled by members of GALA, repeatedly for a ten day period (Compromis ¶ 11). GALA is “organized in a formal hierarchy with corresponding command structures.” (Clarification ¶ 2). These facts are relevant in establishing an intention to disseminate, from which an intention to destroy may be inferred.

b. Charges Pursuant to Article 25 and Article 28 of the Rome Statute

West has been charged with 4 crimes:
1) Ordering, soliciting or inducing genocide;
2) Directly and publicly inciting genocide;
3) Attempted genocide;
4) Command responsibility for genocide.

In relation to each of these individual charges, the Elements of Crimes will be modified “mutatis mutandis” as necessary. That is, the elements that define the crime of genocide in relation to Article 6(a) of the Rome Statute vary according to the type of criminal responsibility charged.

c. Ordering, Soliciting or Inducing Genocide.

Pursuant to Article 25(3)(b) of the Rome Statute, West has been charged with ordering, soliciting or inducing genocide. In the context of Article 6(a), this charge does not require that West actually killed any Lengians. The Elements of Crimes, as modified mutatis mutandis, to address criminal responsibility under Article 25(3)(b) requires that West ordered, solicited or induced the killing of ethnic Lengians. It also requires that West possessed the requisite intent to destroy Lengians, as a distinct group, which has been dealt with above.

Ordering implies a superior-subordinate relationship, in which “the person in a position of authority uses it to convince another to commit the offence”. West is a leader of GALA, which has a “formal hierarchy with corresponding command structures” (Compromis ¶ 10, Clarification ¶ 2). West’s employment of imperative language reflects his position of authority, and constitutes an order.

Soliciting means to "command, authorise, urge, incite, request or advise" another to commit a crime. Inducing is broader and encompasses solicitation as well as any other behaviour that would influence another person to commit a crime. There is evidence that West solicited and induced genocide, by urging Arkamians to rid Yuggott of its "Lengian occupiers." His precise words were "[e]liminate them all: men, women, and children. Eliminate them all!" (Compromis ¶ 10). West provided a justification for a potential genocide. In doing so, influenced the ethnic Arkamians to carry out the killings in Yuggott. Contemporaneous media reports surmised that the killings in Yuggott were influenced by West (Compromis ¶ 12).

To be responsible for ordering, soliciting or inducing the commission of genocide, Article 25(3)(b) also requires that genocide either be committed or attempted. As previously established, the massacres which occurred in Yuggott constitute genocide.

d. Directly and Publicly Inciting Genocide

Pursuant to Article 25(3)(e) of the Rome Statute, West has been charged with directly and publicly inciting genocide. In the context of Article 6(a), the Elements of Crimes, as modified mutatis mutandis for this charge, does not require that West actually killed any Lengians, nor that genocide occurred or was attempted. The Elements of Crimes requires that West possessed the requisite intent to destroy Lengians, as a distinct group, which has been dealt with above.

The element of direct incitement requires "specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion." West's language constitutes a direct incitement. He calls for the elimination of Lengians living in Yuggott. His words were "Eliminate them all—men, women and children" (Compromis ¶ 10). He urged the commission of genocide against a specific group in a specific area. This is not a vague or indirect suggestion. It was acted upon immediately.

79. See ESER, supra note 76, at 796.
81. See ESER, supra note 76, at 796; AMBOS, supra note 76, at 480-81.
Euphemistic language can satisfy the directness requirement. However, in inciting the "elimination" of Lengians, West did not appear to have relied upon euphemism.

Public incitement "requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large." The employment of technological means of mass communication such as radio constitutes a public incitement. Indeed, "this public appeal for criminal action ... encourages the kind of mob violence in which a number of individuals engage in criminal conduct."

West handed his audiotape to a GALA member who then distributed this to Radio Yuggott, a private radio station controlled by members of GALA, which has supported GALA's goals in its broadcasts (Compromis ¶ 11). The recording was repeatedly played on Radio Yuggott between May 15 and 25. The massacres commenced on May 16 and approximately ten percent of the Lengian population of Yuggott was killed by the end of the month. Contemporaneous media reports acknowledged the likely impact of West's broadcasted message on the massacres (Compromis ¶ 12).

e. Attempted genocide

Pursuant to Article 25(3)(f) of the Rome Statute, West has been charged with attempted genocide. This charge only becomes applicable if the ICC finds, on the facts that no genocide occurred in Leng. Thus, in the context of Article 6(a), the Elements of Crimes, as modified mutatis mutandis for this particular charge, requires only that West, with dolus specialis, attempted the genocide of ethnic Lengians and failed to effect the commission of that genocide.

Article 25(3)(f) provides for criminal responsibility where a person "forms the intent to commit a crime, commits an act to carry out this intention and fails to successfully complete the crime only because of some independent factor." As previously established, West had the intention to destroy, in part, the relevant group. West committed acts to carry out this intention through his involvement in the recording and dissemination of his message. West's actions

88. Id. ¶ 17.
thus constitute "a substantial step"\textsuperscript{89} in relation to the crime of genocide and the non-occurrence of that genocide could only conceivably be "for reasons that are independent of [West's] intentions."\textsuperscript{90}

\textbf{f. Command/Superior Responsibility}

Pursuant to Article 28 of the Rome Statute, West has been charged with command/superior responsibility. The \textit{Elements of Crimes}, as modified \textit{mutatis mutandis} for this particular charge, does not require that the commander/superior possessed an intention to destroy. Both Article 28(a) and Article 28(b) are potentially applicable.

Pursuant to Article 28(a), there is evidence that West effectively acted as a military commander. While GALA has no clear distinction between its military and political organs (Clarification \textsuperscript{91}), this lack of distinction implies an indivisibility of the two functions. Regardless of what official title West holds, his order to attack Yuggott, eliminate the Lengians within the territory of Yuggott and subsume the territory into Arkam, is a statement of a military nature. Furthermore, the perpetrators of the genocide appear to have acted in response to GALA commands and in a manner consistent with GALA objectives. This is sufficient to satisfy the requirement that the forces were under the effective command and control of West.\textsuperscript{91}

There is evidence that West knew, or should have known,\textsuperscript{92} of the massacres in Leng. Radio Yuggott is a radio station controlled by members of GALA. It is a reasonable inference that West, as a leader of GALA, knew of the broadcasts which were played repeatedly for a ten day period (Compromis \textsuperscript{91}). There is no evidence that West took any action to prevent or repress the commission of the massacres.

If the ICC finds that West is not a military commander, he may still be liable as a non-military superior under Article 28(b) of the Rome Statute. Non-military superiors can include political leaders, business leaders, and senior civil servants.\textsuperscript{93} West clearly falls within the category of a non-military superior.

\textsuperscript{89} R\textit{OME STATUTE}, art. 25(3)(f).
\textsuperscript{90} \textit{Id.}
The Arkamians who committed the massacres in Yuggott were subordinates acting under West's "effective authority and control." This is evidenced by the fact that his instructions to "eliminate" Lengians were acted upon immediately. West's recording was first broadcast on May 15. The massacres began the next day.

West's recording was repeatedly broadcast over a period of ten days on Radio Yuggott. Furthermore, there was media coverage of the massacres being committed in Yuggott (Compromis ¶ 12). Therefore, it may reasonably be inferred that West "consciously disregarded information which clearly indicated" that the massacres were occurring and failed to take "all necessary and reasonable measures" to "prevent or repress" the commission of the massacres.

VI. PRAYER FOR RELIEF

The Respondent respectfully requests that the International Court of Justice:

(a) Determine that Randolfia's decision to surrender Mr. Joseph Curwen to the custody of the International Criminal Court would be consistent with international law, and on that basis reject Applicant's request for relief concerning Mr. Curwen; and

(b) Determine that Randolfia's decision to surrender Mr. Herbert West to the custody of the International Criminal Court would be consistent with international law, and on that basis reject Applicant's request for relief concerning Mr. West.

VII. TABLE OF AUTHORITIES

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95. Id. at art. 28(b)(i).
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105. The Commissions of Inquiry Act Legal Notice No.5 (May 16 1986) (Uganda). 10