Indiana International & Comparative Law Review

Vol. 17 No. 1 2007

TABLE OF CONTENTS

ARTICLES

NOTES

ARTIFICIAL JUDICIAL ENVIRONMENTAL ACTIVISM: *OPOSA V. FACTORAN* AS ABERRATION

Dante Gatmaytan-Magno*

I. INTRODUCTION

Over the years, the Philippine Supreme Court has built a reputation as a proponent of judicial environmental activism. The Court seemed to understand the imperative of tempering economic growth with protecting the environment. In a 1990 case, the Court stated:

> While there is a desire to harness natural resources to amass profit and to meet the country's immediate financial requirements, the more essential need to ensure future generations of Filipinos of their survival in a viable environment demands effective and circumspect action from the government to check further denudation of whatever remains of the forest lands.[1]

In a subsequent case, the Court further stated that the need to promote investments and the growth of the economy should be addressed simultaneously with the "equally essential imperative of protecting the health, nay the very lives of the people, from the deleterious effect of the pollution of the environment."[2]

The Philippine Supreme Court carved a permanent niche for itself in environmental law lore when it promulgated *Oposa v. Factoran*.[3] According to conventional wisdom, the Court in *Oposa*, "granted standing to children in the present generation to represent both their own interests and those of future generations."[4] The Court secured its place in history, and the international environmental community heaped praises on it for its decision. Today,

---

* Associate Professor, University of the Philippines, College of Law; LL.B., University of the Philippines, 1991; M.S.E.L., Vermont Law School, 1995; LL.M., University of California, Los Angeles, 1996. The author wishes to thank Ms. Cielo Magno for her very helpful comments and suggestions and Claudette de la Cerna, Sylvia Patricia S. Rieza and Danielle Marie S. Rieza for their invaluable research assistance. The author also wishes to thank the staff of the Indiana International & Comparative Law Review for their editorial suggestions.

1. Felipe Ysmael Jr. & Co. v. Deputy Exec. Sec'y, G.R. No. 79538, 190 S.C.R.A. 673 (Oct. 18, 1990). (Phil.).

2. Tech. Developers, Inc. v. Court of Appeals, G.R. No. 94759, 193 S.C.R.A. 147, 152 (Jan. 21, 1991). (Phil.).

3. G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.).

4. Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*, 7 ENVTL. L. 321, 342 (2001).

environmental law scholarship cannot resist making some reference to *Oposa*.[5]

In a previous article,[6] I explained that praise for *Oposa* was largely undeserved and rested principally on a misinterpretation of what the Supreme Court actually said. Nevertheless, *Oposa* helped give the Philippine Supreme Court a reputation as a champion of the right to a healthy environment.

One might have expected the Philippine Supreme Court to build on this reputation and create a body of case law consistent with the spirit of *Oposa*. If it had, scholars would be poring over its rulings the way they have with decisions from Indian courts.[7] But they have not. The truth is that *Oposa* was hardly representative of the Court's jurisprudence on environmental law. At best, it represents an aberration in a body of decisions that otherwise portrayed both an insensitivity toward the environment and an inability to appreciate basic environmental legislation.

This Article examines the role of the Philippine Supreme Court in protecting the environment by scrutinizing the Court's record in resolving environmental cases. The Article provides an overview of the framework of Philippine environmental law and analyzes four decisions of the Supreme Court that are representative of Philippine environmental jurisprudence. These

---

5. *See* John Edward Davidson, *Tomorrow's Standing Today: How the Equitable Jurisdiction Clause of Article III, Section 2 Confers Standing upon Future Generations*, 28 COLUM. J. ENVTL. L. 185, 195 n.30 (2003); Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVTL. L. 135, 141 n.20 (2005); Nicholas A. Robinson, *Legal Structure and Sustainable Development: Comparative Environmental Law Perspectives on Legal Regimes for Sustainable Development*, 3 WIDENER L. SYMP. J. 247, 278 n.56 (1998); Nicholas A. Robinson, *Enforcing Environmental Norms: Diplomatic and Judicial Approaches*, 26 HASTINGS INT'L & COMP. L. REV. 387, 390 n.8 (2003); Armin Rosencranz, *The Origin and Emergence of International Environmental Norms*, 26 HASTINGS INT'L & COMP. L. REV. 309, 313 (2003); Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27, 50 (2003).

6. I have taken issue with the conventional interpretation of this case and am of the view that the case provides little by way of protecting the environment. *See* Dante B. Gatmaytan, *The Illusion of Intergenerational Equity:* Oposa v. Factoran *as Pyrrhic Victory*, 15 GEO. INT'L ENVTL. L. REV. 457, 484-85 (2003).

7. Courts in India take a proactive role in creating jurisprudence to secure a clean and healthy environment for their citizens. This judicial activism is believed to have grown out of the lack of commitment of the other branches of government to pursue the same goal. *See* Barry E. Hill et al., *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT'L ENVTL. L. REV. 359, 382 (2004); Jennifer M. Gleason & Bern A. Johnson, *Environmental Law Across Borders*, 10 J. ENVTL. L. & LITIG. 67, 79 (1995). Environmental case law in Indian courts that arose from public interest litigation has been described as both sophisticated and impressive. *See* Parvez Hassan & Azim Azfar, Comment, *Securing Environmental Rights Through Public Interest Litigation in South Asia*, 22 VA. ENVTL. L.J. 215, 230 (2004). For a discussion of significant decisions of the Indian Supreme Court on the environment, see Armin Rosencranz & Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223, 229-32 (2003). For a more critical perspective of environmental law cases in India, see generally J. Mijin Cha, *A Critical Examination of the Environmental Jurisprudence of the Courts of India*, 10 ALB. L. ENVTL. OUTLOOK J. 197 (2005).

decisions clash with the spirit of *Oposa*.

I am not suggesting that all the decisions of the Philippine Supreme Court are hostile to the environment. The Court has decided cases that facilitate the prosecution of criminal conduct[8] or that allow administrative agencies to abate threats to the environment.[9] This study, however, is limited to the more substantive decisions regarding environmental law. The first case defines the jurisdiction of local governments in the protection of the environment and their power to regulate businesses within their territorial jurisdiction. The next three cases represent the only instances when the Supreme Court interpreted the environmental impact system of the Philippines. Ironically, these cases show that the same Court that earned international acclaim for its decision in *Oposa* has become a stumbling block to the development of environmental law.

This undertaking is important in many respects. It provides a view of how Philippine courts deal with environmental issues in their respective jurisdictions and how these courts interpret widely-used laws, such as an environmental impact system. This study also illustrates how judiciaries may become crucial elements in the struggle to protect the environment. Perhaps most importantly, examination of Philippine Supreme Court decisions has become imperative due to the decisions' negative impact on the implementation of environmental legislation and policies. Members of the judiciary and the public at large should be alerted to trends in Supreme Court decisions in order to gauge whether courts are performing their mandate to enforce directives of the Philippine Constitution. Supreme Court decisions should also be studied to see whether the institution is performing its duty to protect the right of every Filipino to a clean environment.

II. THE FRAMEWORK OF PHILIPPINE ENVIRONMENTAL LAW

The Philippines has a hierarchy of laws that can be used to address environmental concerns. At the top of this hierarchy is the Constitution, followed by statutes enacted by Congress (Republic Acts), implementing rules and regulations promulgated by administrative agencies, such as the

8. *See* Mustang Lumber, Inc. v. Court of Appeals, G.R. No. 104988, 257 S.C.R.A. 430 (June 18, 1996). (Phil.). The defendants in this case were charged with the illegal possession of truckloads of lumber in violation of the Presidential Decree No. 705 (1975), otherwise known as Revised Forestry Code. The Court interpreted the word "timber" to include "lumber" to facilitate prosecution of those in possession of partially processed timber without the required legal documents under the Revised Forestry Code. *Id.*

9. *See* Laguna Lake Dev. Auth. v. Court of Appeals, G.R. No. 110120, 231 S.C.R.A. 292 (Mar. 16, 1994) (Phil.). The Court upheld the power of the Laguna Lake Development Authority to issue cease and desist orders under the broad powers of the Authority under its charter. *Id.* at 308. *See also* Pollution Adjud. Bd. v. Court of Appeals, G.R. No. 93891, 195 S.C.R.A. 112 (Mar. 11, 1991). (Phil.). The Court held that the Board may also issue similar orders upon motion of one party without notice to the opposing party. This order may be issued when there is an appearance that there are violations of allowable waste discharge standards, and there is no need to prove an immediate threat to life, public health, or safety. *Id.* at 308.

Department of Environment and Natural Resources (DENR), and local government ordinances. Supreme Court decisions also become part of the law.

The Constitution is the supreme law to which all other laws must conform. "Courts have the inherent authority to determine whether a statute enacted by the legislature [exceeds] the limit[s] [provided] by the fundamental law. [In such cases,] courts will not hesitate to strike down such unconstitutional law."[10]

While Congress enacts laws, the DENR carries out the state's constitutional mandate to control and supervise the exploration, development, utilization, and conservation of the country's natural resources.[11] Like other administrative agencies, the DENR supplements statutes by promulgating rules and regulations, which should be "within the scope of the statutory authority granted by the legislature to the administrative agency."[12] These "[r]egulations are not . . . substitute[s] for the general policy-making that Congress enacts in the form of a law. . . . [T]he authority to prescribe rules and regulations is not an independent source of power to make laws."[13]

Under the Local Government Code of 1991, local governments may enact ordinances to protect the environment.[14] "[T]he power of local government units to legislate and enact ordinances and resolutions is . . . delegated . . . [by] Congress"[15] and ordinances cannot contravene a statute Congress has enacted.[16]

The judiciary settles controversies arising from the implementation of these laws. It exercises judicial power, defined as "the right to determine actual controversies arising between adverse litigants."[17] Courts merely interpret the laws; they do not enact them. Courts' sole function is to apply or interpret the

---

10. Manalo v. Sistoza, G.R. No. 107369, 371 S.C.R.A. 165 (Aug. 11, 1999) (Phil.).

11. *See* Exec. Ord. No. 292, Bk. IV, tit. XIV, ch. 1, §§ 1, 2 (1987) 83 O.G. 1, vol. 38 (Phil.).

12. Smart Commc'n, Inc. v. Nat'l Telecomm. Comm'n, G.R. No. 151908, 408 S.C.R.A. 678 (Aug. 12, 2003). (Phil.). According to the Supreme Court:

> It is required that the regulation be germane to the objects and purposes of the law, and be not in contradiction to, but in conformity with, the standards prescribed by law. They must conform to and be consistent with the provisions of the enabling statute in order for such rule or regulation to be valid. Constitutional and statutory provisions control with respect to what rules and regulations may be promulgated by an administrative body, as well as with respect to what fields are subject to regulation by it. It may not make rules and regulations which are inconsistent with the provisions of the Constitution or a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute. In case of conflict between a statute and an administrative order, the former must prevail.

Id.

13. Ople v. Torres, G.R. No. 127685, 293 S.C.R.A. 141, 153 (July 23, 1998) (Phil.).

14. The Local Government Code of 1991, Rep. Act. No. 7160, §§ 16-17 (Jan. 1, 1992) (Phil.).

15. Lina v. Paño, G.R. No. 129093, 364 S.C.R.A. 76, 84 (Aug. 30, 2001) (Phil.).

16. Tatel v. Virac, G.R. No. 40243, 207 S.C.R.A. 157, 161 (Mar. 11, 1992) (Phil.).

17. Allied Broad. Ctr., Inc. v. Republic, G.R. No. 91500, 190 S.C.R.A. 782, 787 (Oct.18, 1990). (Phil.) (quoting Muskrat v. United States, 219 U.S. 346 (1911)).

laws, particularly where there are gaps or ambiguities.[18] By express provision of law, "[j]udicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines."[19]

A. The Constitution and National Laws

Past President Ferdinand Marcos laid the foundation of environmental legislation in the Philippines in the 1970s. The president promulgated the Philippine Environmental Policy,[20] "which is the national blueprint for environmental protection."[21] He also implemented the Philippine Environment Code,[22] which contains general principles dealing with the major environmental and natural resource concerns of the Philippines. "These laws are very broad . . . and contain few substantive provisions."[23] At best, these decrees established the basic framework for laws on the environment in the Philippines.

In 1978, Marcos issued Presidential Decree No. 1586, which established an environmental impact statement system.[24] It is almost a complete reproduction of the U.S. National Environmental Policy Act.[25] Marcos also promulgated the Revised Forestry Code of 1975[26] and the Pollution Control Decree of 1976,[27] among other statutes. The Marcos Administration ended in 1986 through a massive non-violent uprising that drove the dictator, his family, and allies into exile.[28]

After successfully removing Marcos, President Corazon Aquino promulgated a new Administrative Code that laid out a blueprint for the exploitation of resources.[29] The Code in part provides:

---

18. Pagpalain Haulers, Inc. v. Trajano, G.R. No. 133215, 369 S.C.R.A. 618 (July 15, 1999) (Phil.).

19. CIVIL CODE, ch. 1, art. 8, R.A. 386, as amended (Phil.).

20. Philippine Environmental Policy, Pres. Dec. No. 1151, 73 O.G. 7132, vol. 31 (June 6, 1977) (Phil.).

21. Alan K.J. Tan, *Preliminary Assessment of Philippines' Environmental Law*, http://sunsite.nus.sg/apcel/dbase/filipino/reportp.html (last visited Oct. 31, 2006).

22. Philippine Environment Code, Pres. Dec. No. 1152, 73 O.G., vol. 32 (June 6, 1977) (Phil.); Gordon v. Verdiano II, G.R. No. L-55230, 167 S.C.R.A. 51 (Nov. 8, 1988) (Phil.).

23. Tan, *supra* note 21.

24. The implementing rules of this Decree are now embodied in Interim Implementing Rules and Regulations of Republic Act No. 8749, "The Philippine Clean Air Act of 1999," DENR Admin. Ord. No. 2000-03 (2003), 14:3 NAR 1373-88.

25. *See* 42 U.S.C. §§ 4321-4370 (2006).

26. Revising Presidential Decree No. 389, Otherwise Known as the Forestry Reform Code of the Philippines, Pres. Dec. No. 705, 71 O.G. 4289, vol. 28 (May 19, 1975) (Phil.).

27. Providing for the Revision of Republic Act 3931, Commonly Known as the Pollution Control Law, and for Other Purposes, Pres. Dec. No. 984, 72 O.G. 9796, vol. 42 (July 3, 1992) (Phil.), *repealed by* Philippine Clean Water Act of 2004, Rep. Act No. 9275, § 34, 100 O.G. 5041 vol. 31, (Mar. 22, 2004) (Phil.).

28. For a discussion on the fall of the Marcos regime, see generally Dante B. Gatmaytan, *It's All the Rage: Popular Uprisings and Philippine Democracy*, 15 PAC. RIM L. & POL'Y J. 1, 3-6 (2006).

29. Administrative Code of 1987, Exec. Ord. No. 292 (1987) 83 O.G. 1, vol. 38, bk. IV,

> Sec. 1. Declaration of Policy. – (1) The State shall ensure, for the benefit of the Filipino people, the full exploration and development as well as the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources, consistent with the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment and the objective of making the exploration, development and utilization of such natural resources equitably accessible to the different segments of the present as well as future generations.
>
> (2) The State shall likewise recognize and apply a true value system that takes into account social and environmental cost implications relative to the utilization, development and conservation of our natural resources.[30]

The state policy on the protection of the environment was clear. The Code mandated the development of the country's resources for the Filipino people. It also mandated the judicious use of these resources so that they would be accessible to all segments of present and future generations.

Thereafter, the framers of the 1987 Constitution of the Republic of the Philippines incorporated environmental provisions. The 1987 Constitution provided that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[31]

In *Oposa*, the Supreme Court explained that this provision was not any less important simply because it was not included in the Bill of Rights. It held:

> Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation—aptly and fittingly stressed by the petitioners—the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.[32]

The Court explained that "the right to a balanced and healthful ecology carries with it a correlative duty to refrain from impairing the environment."[33] "The . . . right implies the judicious management and conservation of the country's forests."[34]

---

tit. XIV, ch. 1, § 1-2 (Phil.).

30. *Id.*

31. CONST. (1987), Art. II, § 16 (Phil.).

32. Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792, 805 (July, 30, 1993) (Phil.).

33. *Id.*

34. *Id.* at 805.

After the adoption of the Constitution in 1987, the Philippine Congress produced a series of laws that concerned the environment and natural resources directly or indirectly. Among these laws were: the Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990;[35] the National Integrated Protected Areas System Act of 1992;[36] the Philippine Mining Act of 1995;[37] the Indigenous Peoples Rights Act of 1997;[38] the Animal Welfare Act of 1998;[39] the Philippine Fisheries Code of 1998;[40] the Philippine Clean Air Act of 1999;[41] the Ecological Solid Waste Management Act of 2000;[42] the National Caves and Cave Resources Management and Protection Act;[43] the Wildlife Resources Conservation and Protection Act;[44] the Philippine Plant Variety Protection Act of 2002;[45] and the Philippine Clean Water Act of 2004.[46]

Evidently, there is no single framework that binds the environmental concerns in a comprehensive manner in the Philippines. Instead, there are an abundance of laws and regulations which address separate environmental issues.[47] At the very least, the Philippines has the "most progressive, albeit piecemeal, environmental legislation in place . . . [in] Southeast Asia."[48]

---

35. Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990, Rep. Act No. 6969, 86 O.G. 10057, vol. 53 (Oct. 26, 1990) (Phil.).

36. National Integrated Protected Areas System Act of 1992, Rep. Act No. 7586, 88 O.G. 4641, vol. 29 (June 1, 1992) (Phil.).

37. Philippine Mining Act of 1995, Rep. Act No. 7942, 91 O.G. 3925, vol. 25 (Mar. 3, 1995) (Phil.). Parts of this Act were subsequently declared unconstitutional. *See* La Bugal-B'laan Tribal Ass'n, Inc, v. Ramos, G.R. No. 127882, 421 S.C.R.A. 148 (Jan. 27, 2004) (Phil.). However, on December 1, 2004, the Supreme Court reversed its ruling and upheld the challenged provisions of the law. *See* La Bugal-B'laan Tribal Ass'n, Inc, v. Ramos, 445 S.C.R.A. 1 (2004).

38. The Indigenous Peoples Rights Act of 1997, Rep. Act No. 8371, 94 O.G. 2276 (Oct. 29, 1997) (Phil.).

39. The Animal Welfare Act of 1998, Rep. Act No. 8485, 94 O.G. 40, vol. 25 (Feb. 11, 1998) (Phil.).

40. The Philippine Fisheries Code of 1998, Rep. Act No. 8550, 94 O.G. 23, vol. 28 (Feb. 28, 1998) (Phil.).

41. Philippine Clean Air Act of 1999, Rep. Act No. 8749, 95 O.G. 683, vol. 39 (June 23, 1999) (Phil.).

42. Ecological Solid Waste Management Act of 2000, Rep. Act No. 9003, 97 O.G 60, vol. 11 (Jan. 26, 2001) (Phil.).

43. National Caves and Cave Resources Management and Protection Act, Rep. Act No. 9072, 97 O.G. 4722, vol. 31 (Apr. 8, 2001) (Phil.).

44. Wildlife Resources Conservation and Protection Act, Rep. Act No. 9147, 97 O.G. 6565 vol. 45 (July 30, 2001) (Phil.).

45. Philippine Plant Variety Protection Act of 2002, Rep. Act No. 9168, 98 O.G. 4493, vol. 33 (June 7, 2002) (Phil.).

46. Philippine Clean Water Act of 2004, Rep. Act No. 9275, 100 O.G. 5041 (Mar. 22, 2004) (Phil.).

47. Tan, *supra* note 21.

48. *Id.*

B. Local Government Law

The Local Government Code of 1991 provides two avenues through which environmental concerns may be addressed. The first way is by empowering local legislative councils to promulgate environmental protection measures. The second is by mandating the national government and project proponents to conduct consultations with local governments and other stakeholders before implementing any project or program.

1. Legislation

The Local Government Code of 1991 empowers local governments to enact measures to protect the environment.[49] Some local governments have used these provisions with success and have created legislation to protect their natural resources.[50] These efforts have not gone unchallenged; on at least one occasion, the Supreme Court had to intervene.

In *Tano v. Socrates*,[51] city and provincial ordinances protecting fish and corals were challenged on various constitutional grounds. In that case, the Court upheld the ordinances as a valid exercise of police power under the General Welfare Clause of the Local Government Code.[52] The Court held that local legislative councils were directed to enact "ordinances 'that [p]rotect the environment and impose appropriate penalties for acts which endanger the environment such as dynamite fishing and other forms of destructive fishing . . . and such other activities which result in pollution, acceleration of eutrophication of rivers and lakes, or of ecological imbalance.'"[53]

The Court's ruling in *Tano* provided a link between the constitutional right to a clean environment and the power of local governments to make ordinances, giving local governments a concrete avenue for the protection of the environment. Thus, local legislative councils that are insensitive to environmental rights or sustainable development may be bypassed by residents who invoke "local initiative[s]": "the process whereby the registered voters of a local government unit may directly propose, enact, or amend any ordinance."[54]

2. Consultations

Aside from legislation, the Local Government Code provides for other

---

49. The powers of local governments over environmental issues are found in various provisions of the Code. *See* The Local Government Code of 1991, Rep. Act 7160, §§ 16-17 (Jan. 1, 1992) (Phil.).

50. *See* Tano v. Socrates, G.R. No. 110249, 278 S.C.R.A. 154 (Aug. 21, 1997) (Phil.).

51. G.R. No. 110249, 278 S.C.R.A. 154 (Aug. 21, 1997) (Phil.).

52. *Id.* at 189.

53. *Id.*

54. Rep. Act 7160, § 120.

ways to protect the environment. The Code provides:

> SEC. 26. *Duty of National Government Agencies in the Maintenance of Ecological Balance.* — It shall be the duty of every national agency or government-owned or -controlled corporation authorizing or involved in the planning and implementation of any project or program that may cause pollution, climatic change, depletion of non-renewable resources, loss of crop land, rangeland, or forest cover, and extinction of animal or plant species, to consult with the local government units, nongovernmental organizations, and other sectors concerned and explain the goals and objectives of project or program, its impact upon the people and the community in terms of environmental or ecological balance, and the measures that will be undertaken to prevent or minimize the adverse effects thereof.
>
> SEC. 27. *Prior Consultations Required.* — No project or program shall be implemented by government authorities unless the consultations mentioned in Sections 2 (c) and 26 hereof are complied with, and prior approval of the sanggunian concerned is obtained: Provided, That occupants in areas where such projects are to be implemented shall not be evicted unless appropriate relocation sites have been provided, in accordance with the provisions of the Constitution.[55]

The best interpretation of this provision is that state activities that induce environmental trauma may not be implemented without consultations with stakeholders at the local level. It could be argued that under Section 27, the consent of the local government is required before the project or program can continue. Moreover, the project may continue only if displaced communities are properly relocated. Unfortunately, the Supreme Court has refused to interpret the provision in this way. The Court seems intent on curbing the potential uses of this provision.

III. CASE ANALYSES

The Philippine Constitution recognizes the right to a healthy environment and supplements this right through a number of national laws and local government ordinances, including an arsenal of statutes at its disposal that may

55. *Id.* §§ 26-27.

be used to protect the environment.[56] The Supreme Court's role, however, in interpreting these laws has scarcely been studied outside the routine reference to *Oposa*. The following section of this Article fills that vacuum in scholarship and analyzes the Court's other decisions on environmental issues. The analysis that follows focuses on four decisions of the Supreme Court, decided after the Constitution was adopted, and, therefore, after the right to a balanced and healthful ecology was incorporated into the fundamental law of the land. These cases interpret environmental laws, define jurisdiction over environmental protection issues, and define the breadth of the environmental impact system in the Philippines.

The logic adopted in these decisions is, at best, strained. In the end, they paint a more depressing picture of environmental litigation in the Philippines than the one suggested by *Oposa*.

A. *Technology Developers, Inc. v. Court of Appeals*

Technology Developers, Inc. v. Court of Appeals[57] involved a corporation that manufactured charcoal briquettes. Technology Developers, Inc. (TDI) received a letter from the acting mayor of Sta. Maria Bulacan, ordering it to stop operations of its plant in Guyong, Sta. Maria, Bulacan and to present various local and national government permits to the office of the mayor. TDI did not have a mayor's permit and its request for one was denied. Without providing notice to TDI, the acting mayor ordered TDI's local station commander to close the plant.

TDI sued, claiming that the closure order was issued in error.[58] Consequently, the judge issued a writ of preliminary mandatory injunction on April 28, 1989.[59] Counsel for defendant, however, subsequently filed a motion for reconsideration, and the court set aside the writ of preliminary mandatory injunction.[60] On appeal, the lower court's ruling was upheld.[61] TDI filed a petition for review on certiorari with the Supreme Court, but the Supreme Court also ruled against TDI.[62]

In upholding the decision of the court of appeals, the Supreme Court held that the decision to issue a writ of preliminary injunction rests on the discretion of the trial court.[63] As such, the Court will not disturb that order unless the trial court acted without jurisdiction, in excess of jurisdiction, or in grave abuse of its discretion.[64] Accordingly, "the court that issued such a preliminary relief

56. *See supra* notes 35-46 and accompanying text.
57. G.R. No. 94759, 193 S.C.R.A. 147 (Jan. 21, 1991) (Phil.).
58. *Id.* at xi.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*

may recall or dissolve the writ as the circumstances may warrant."[65]

Technology Developers, Inc. was a simple case and was settled by simple reference to case law. TDI filed a motion for reconsideration of the Supreme Court's decision, however, and the decision was reversed a few months later.[66]

In its motion for reconsideration, TDI presented a completely different set of facts—an act that is highly irregular. Generally, the Supreme Court is not called upon to try facts.[67] The findings of fact of a trial court, particularly when affirmed by the court of appeals, are generally conclusive and binding on the Supreme Court.[68] There was no showing in this case, however, that the factual bases of the lower courts' decisions were erroneous. Factual issues are beyond the ambit of the Court's authority to review upon certiorari.[69] On grant of certiorari, the Supreme Court looks to the issues of jurisdiction or a grave abuse of discretion.[70] A recent decision of the Supreme Court explains this rule:

> The rule in appellate procedure is that a factual question may not be raised for the first time on appeal, and documents forming no part of the proofs before the appellate court will not be considered in disposing of the issues of an action. This is true whether the decision elevated for review originated from a regular court or an administrative agency or quasi-judicial body, and whether it was rendered in a civil case, a special proceeding, or a criminal case. Piecemeal presentation of evidence is simply not in accord with orderly justice.
>
> The same rules apply with greater force in certiorari proceedings. Indeed, it would be absurd to hold public respondent guilty of grave abuse of discretion for not considering evidence not presented before it. The patent unfairness of petitioner's plea, prejudicing as it would public and private respondents alike, militates against the admission and consideration of the subject documents.[71]

---

65. *Id.*

66. Tech. Developers, Inc. v. Court of Appeals, G.R. No. 94759, 201 S.C.R.A. xi (Jan. 21, 1991) (Phil.).

67. J.R. Blanco v. Quasha, G.R. No. 133148, 376 PHIL. REP. 480, 491 (S.C., Nov. 17, 1999) (Phil.).

68. Thermochem, Inc. v. Naval, G.R. No. 131541, 344 S.C.R.A. 76, 83 (Oct. 20, 2000). (Phil.).

69. Don Orestes Romualdez Elec. Coop., Inc. v. Nat'l Labor Relations Comm'n, G.R. No. 128389, 377 PHIL REP. 268, 274 (S.C., Nov. 25, 1999).

70. Negros Oriental Elec. Coop. 1 v. Sec'y of the Dep't of Labor and Emp., G.R. 143616, 357 S.C.R.A. 668, 673 (May 9, 2001) (Phil.).

71. Matugas v. Comm'n on Elections, G.R. No. 151944, 420 S.C.R.A. 365, 377 (Jan. 20, 2004) (Phil.).

Incredibly, the Supreme Court in *Technology Developers, Inc.*, accepted the new facts submitted by TDI and substituted them for the facts established by the lower courts reasoning that the new facts "knocked down [the] factual moorings of our decision."[72]

Additionally, TDI claimed that it actually had a mayor's permit—one issued by a different local government.[73] Regardless of the validity of this claim, TDI did not have the required mayor's permit from Bulacan, where the plant was operating.

TDI also raised a new issue in its motion for reconsideration: whether a mayor may close a place of business for lack of a mayor's permit and for alleged violation of anti-pollution laws.[74] This, too, is anomalous. Usually, the issues in each case are limited to those presented in the pleadings;[75] "[f]or an appellate tribunal to consider a legal question it should have been raised in the court below."[76] "Fair play, justice, and due process dictate that parties should not raise, for the first time on appeal, issues that they could have raised but never did during trial [or] . . . before the Court of Appeals."[77]

Under Philippine law, there are occasions when an appellate court may consider issues that are raised for the first time on appeal. Among others, the issue of lack of jurisdiction over the subject matter may be raised at any stage. A reviewing court may also consider an issue not raised during trial when there is plain error or when there are jurisprudential developments affecting the issues, or when the issues raised present a matter of public policy.[78] In the instant case, however, TDI was no longer filing an appeal. When TDI introduced the new issue for consideration, it was asking the Supreme Court to reconsider a ruling denying their petition for *certiorari*. In other words, TDI introduced a new issue after they had exhausted the appeals process and had been rebuffed by the court of appeals and the Supreme Court. Changing the issue at this late in the judicial process is unprecedented.

Moreover, the Court here did not simply consider a new issue: it completely changed the issue to whether the acting mayor had jurisdiction to order the closure of the plant. In order to decide this issue, the Court applied Presidential Decree No. 984, which created and established the National Pollution Control Commission (presently the Environmental Management Bureau). This Decree, according to the Court, superseded the provisions of the

---

72. Tech. Developers, Inc. v. Court of Appeals, G.R. 947591, 201 S.C.R.A. xi, xiii (Phil.).

73. *Id.*

74. *Id.*

75. Lianga Lumber Co. v. Lianga Timber Co., G.R. No. L-38685, 76 S.C.R.A. 197, 222 (Mar. 31, 1977) (Phil.).

76. Phil. Nat'l Oil Co. v. Court of Appeals, G.R. No. 109976, 457 S.C.R.A. 32, 104 (Apr. 26, 2005) (Phil).

77. Orquiola v. Court of Appeals, G.R. No. 141463, 386 S.C.R.A. 301, 310 (Aug. 6, 2002) (Phil.).

78. Del Rosario v. Bonga, 350 S.C.R.A. 101, 110-11 (Jan. 23, 2001) (Phil.).

Civil Code which had authorized the local officials to abate pollution.[79] The Court then made the following pronouncement: "Inasmuch as the petitioner had been issued a permit by the E[nvironmental] M[anagement] B[ureau] to operate its charcoal briquette manufacturing plant . . . the acting municipal mayor may not capriciously deny a permit to operate petitioner's otherwise legitimate business on the ground that its plant was causing excessive air pollution."[80]

This pronouncement from the Court is puzzling. Under Philippine case law, businesses may be required to satisfy local government requirements before they can operate, even if in compliance with national law.[81] Accordingly, TDI was subject to local government requirements despite its compliance with requirements of national government agencies. Local governments have the power to refuse to issue business permits and licenses and to suspend or revoke these licenses and permits for violations of their conditions.[82] The acting mayor closed the plant because it did not have a mayor's permit and it was allegedly causing pollution.[83] TDI had been allowed to show that it had all the necessary documents relative to its operation. There was nothing capricious about the closure.

Additionally, the Court noted that "it is beyond a municipal mayor's ken and competence to review, revise, reverse, or set aside a permit to operate the petitioner's . . . plant issued by the EMB."[84] The acting mayor did not "review, revise, reverse, or set aside" any order issued by the EMB.[85] The plant was closed down because it did not have a mayor's permit. The Supreme Court seems to have confused the roles of the national and local governments in issuing permits. While the EMB should have addressed complaints against TDI for violating pollution laws, compliance with local laws was a matter for local government authorities to address. Ultimately, the Supreme Court ordered the "immediate reopening of the plant" despite the fact that it did not have a permit from Bulacan.[86]

Technology Developers, Inc., is one of the most poorly-reasoned decisions of the Philippine Supreme Court. It is fraught with procedural anomalies and factual inaccuracies. It also contradicted established doctrines of the Philippine judicial system. The case forces local governments to allow

---

79. Tech. Developers, Inc. v. Court of Appeals, G.R. 947591, 201 S.C.R.A. xi, xvii (Phil.).

80. *Id.*

81. *See* Gordon v. Veridiano II, G.R. No. L-55230, 167 S.C.R.A. 51, 59 (Nov. 8, 1988) (Phil.).

82. Lim v. Court of Appeals, G.R. No. 111397, 387 S.C.R.A. 149, 159 (Aug. 12, 2002) (Phil.).

83. Tech. Developers, Inc., G.R. 947591, 201 S.C.R.A. xi, xii.

84. *Id.*

85. *Id.*

86. *Id* at xviii.

businesses to operate within the "jurisdictions" despite their failure to comply with local laws. Thus, this decision seems to severely undermine the power of local governments to address noncompliance.

Notably, the Court's new resolution was a "minute resolution." The Philippine Supreme Court uses minute resolutions in the majority of its cases:

> [1] where a case is patently without merits [2] where the issues raised are factual in nature, [3] where the decision appealed from is supported by: substantial evidence and, is in accord with the facts of the case and the applicable laws, [4] where it is clear from the records that the petition is filed merely to forestall the early execution of judgment and for non-compliance with the rules.[87]

The substance of the Court's ruling in *Technology Developers, Inc.*, however, does not fall within the aforementioned circumstances. In fact, it seems that minute resolutions are used to shut down frivolous suits. Thus, if the Supreme Court believed that the suit was frivolous, it could have easily dismissed TDI's petition. Instead, the Court admitted new facts, addressed a new issue, and declared several provisions of the Civil Code inoperative.

B. Philippines v. City of Davao

The construction of a sports complex in Davao City triggered the suit at issue in *Philippines v. City of Davao.*[88] The proponents of the project sought a certificate from the EMB that would exclude the project from the Environmental Impact System (EIS). The EMB rejected the application after finding that the project was located in a critical environmental area.[89]

Davao City successfully contested the EMB's ruling in a regional trial court.[90] The trial court explained that nothing in Presidential Decree No. 1586[91] required local government units to comply with EIS law.[92] Only agencies and instrumentalities of the national government, including government-owned or controlled corporations, as well as private corporations, firms, and entities, must go through the EIS process for their respective proposed projects. Further, EIA process need only be followed if projects have

87. Borromeo v. Court of Appeals, G.R. No. L-82273, 186 S.C.R.A. 1, 5 (June 1, 1990) (Phil.).

88. G.R. 148622, 388 S.C.R.A. 691 (Sept. 12, 2002) (Phil.).

89. Under the EIS System, all agencies and instrumentalities of the national government, including government-owned or controlled corporations, as well as private corporations, firms and entities, will prepare an environmental impact statement for every proposed project and undertaking which significantly affect the quality of the environment. *See* Pres. Dec. No. 1586, § 2, 74 O.G. 8651, vol. 44 (June 11, 1978) (Phil.).

90. G.R. 148622, 388 S.C.R.A. 691 (Sept. 12, 2002) (Phil.).

91. Pres. Dec. No. 1586, 74 O.G. 8651 vol. 44 (June 11, 1978) (Phil.).

92. *City of Davao*, 388 S.C.R.A. at 693.

significant effects on the quality of the environment.[93] The trial court held that the site for the complex was neither within a critical environmental area nor was the project environmentally critical.[94] Accordingly, it was mandatory for the DENR, through the EMB Region XI, to approve the proponent's application for certificate of non-coverage after it had satisfied all issuance requirements.[95]

On appeal, Davao City argued it was exempt from complying with the mandates of Presidential Decree No. 1586, but the Supreme Court disagreed. The Court reasoned that as a body politic endowed with governmental functions, a local government unit has the duty to ensure the quality of the environment, which is the very same objective of Presidential Decree No. 1586.[96] Further, the Court added, "[Section] 4 of [Presidential Decree No.] 1586 clearly states 'no person, partnership or corporation shall undertake or operate any such declared environmentally critical project or area without first securing an Environmental Compliance Certificate issued by the president or his duly authorized representative.'"[97] The Court noted that local governments are considered juridical persons and are not excluded from the coverage of the Decree.[98]

The Court, however, still exempted the project from the EIS system. The Court examined a list of environmentally critical projects[99] and areas and held:

> [The project] does not come close to any of the projects or areas enumerated above. Neither is it analogous to any of them. It is clear, therefore, that the said project is not classified as environmentally critical, or within an environmentally critical area.
>
> Consequently, the DENR has no choice but to issue the Certificate of Non-Coverage. It becomes its ministerial duty, the performance of which can be compelled by writ of

93. Pres. Dec. No. 1586, at § 2.
94. *City of Davao*, 388 S.C.R.A. at 693-94.
95. *Id.*
96. *Id.* at 695.
97. *Id.* at 696 (quoting Pres. Dec. No. 1586 at § 4).
98. The Court also stressed the intent of the decree:
> to implement the policy of the state to achieve a balance between socio-economic development and environmental protection, which are the twin goals of sustainable development. . . . [T]his can only be possible if we adopt a comprehensive and integrated environmental protection program where all the sectors of the community are involved . . . .

Id. at 696-97.
99. *See* Proclaiming Certain Areas and Types of Projects as Environmentally Critical and Within the Scope of the Environmental Impact Statement System Established Under Presidential Decree No. 1586, PROC. NO. 2146 (Dec. 14, 1981) (Phil.).

> mandamus, such as that issued by the trial court in the case at bar.[100]

A sad reality in the Philippines is that there are a limited number of environmentally critical projects and areas identified under Proclamation No. 2146.[101] That list, completed more than two decades ago, has scarcely been updated.[102] In the meantime, the evolution of new technology may make other activities more environmentally critical. Furthermore, the intensity and extent of human activity over time has already made other areas environmentally critical. Seemingly harmless activities may pose greater threats to the environment and the population because of climate and geographical changes.

While the responsibility to update the list falls on the executive branch of government, the Supreme Court could have taken a more liberal approach in interpreting the proclamation. For instance, the proclamation includes infrastructure projects, such as major roads and bridges, as environmentally critical projects.[103] Is a sports complex so different that it cannot be considered analogous to a road insofar as its environmental impact is concerned?

The Supreme Court's ruling in *City of Davao* is so rigid that it seems only those few projects enumerated under Proclamation No. 2146 will ever be required to go through the EIS system. The case makes it a "ministerial duty" on the part of the DENR to issue certificates of noncoverage to every project that is not included on the list. It also takes away executive discretion in determining whether a project should be required to undergo the EIS system.[104]

C. Bangus Fry Fisherfolk v. Lanzanas

The case of *Bangus Fry Fisherfolk v. Lanzanas* involved the legality of the issuance of an Environmental Clearance Certificate (ECC) in favor of the National Power Corporation (NAPOCOR).[105] The ECC authorized NAPOCOR to construct a temporary mooring facility in Minolo Cove, in Barangay San Isidro, Puerto Galera, Oriental Mindoro. The municipal council of Puerto Galera had declared Minolo Cove an eco-tourist zone, a mangrove area, and breeding ground for bangus fry.

The mooring facility would serve as the temporary docking site of NAPOCOR's power barge, which, due to turbulent waters at its former mooring site, required relocation to Minolo Cove's safer confines. The power

---

100. *City of Davao*, 388 S.C.R.A. at 701-02

101. PROC. NO. 2146 (Dec. 14, 1981) (Phil.).

102. In 1996, former president Fidel V. Ramos declared the "construction, development, and operation of golf courses" as an environmentally critical project. Declaring the Construction, Development and Operation of a Golf Course as an Environmentally Critical Project Pursuant to PD 1586, PROC. No. 803, 101 O.G. 3042, vol. 19 (June 6, 1996) (Phil.).

103. PROC. NO. 2146 (Dec. 14, 1981) (Phil.).

104. *City of Davao,* 388 S.C.R.A. at 702.

105. G.R. No. 131442, 405 S.C.R.A. 530 (July 10, 2003) (Phil.).

barge would provide the main source of power for the entire province of Oriental Mindoro pending the construction of a power plant in Calapan, Oriental Mindoro.

Members of the local fishing community asked for reconsideration of the decision, but the Regional Executive Director of the DENR denied their request.[106] Thereafter, they filed a complaint with the Regional Trial Court of Manila asking it to cancel authorization of the ECC and to stop the construction of the mooring facility because of alleged violations of environmental laws.[107]

The trial court dismissed the complaint because the fishermen failed to exhaust their administrative remedies before taking this legal action in court.[108] The Supreme Court agreed, holding that the petitioners should have appealed to the DENR Secretary, mandated by article VI of DENR Administrative Order No. 96-37.[109]

The fishermen argued that they were exempt from filing an appeal with the DENR Secretary[110] because the issuance of the ECC violated existing laws and regulations, specifically:[111] (1) Section 1 of Presidential Decree No. 1605, as amended by Presidential Decrees Nos. 1605-A and 1805;[112] (2) Sections 26

---

106. *Id.* at 533.

107. *Id.*

108. *Id.*

109. *See* Revising DENR Administrative Order No. 21, Series of 1992, to Further Strengthen the Implementation of the Environmental Impact Statement (EIS) System, DENR Admin. Ord. No. 96-37, art. VI, (Dec. 2, 1996) (Phil.).

110. The Philippine Supreme Court allows exceptions to the doctrine of exhaustion of administrative remedies, in cases:

> 1) when there is a violation of due process;
> 2) when the issue involved is a purely legal question;
> 3) when the administrative action is patently illegal amounting to lack or excess of jurisdiction;
> 4) when there is estoppel on the part of the administrative agency concerned;
> 5) when there is irreparable injury;
> 6) when the respondent is a Department Secretary whose acts as an alter ego of the President bears the implied and assumed approval of the latter;
> 7) when to require exhaustion of administrative remedies would be unreasonable;
> 8) when it would amount to a nullification of a claim;
> 9) when the subject matter is a private land in land case proceedings;
> 10) when the rule does not provide a plain, speedy, adequate remedy;
> 11) when there are circumstances indicating the urgency of judicial intervention;
> 12) when no administrative review is provided by law;
> 13) when the rule of qualified political agency applies; and
> 14) when the issue of non-exhaustion of administrative remedies has been rendered moot.

Laguna CATV Network, Inc. v. Maraan, G.R. No. 139492, 440 PHIL. 734, 742 (Nov. 19, 2002) (Phil.).

111. *Bangus*, 405 S.C.R.A. at 534.

112. Declaring the Enclosed Coves and Waters Embraced by Puerto Galera Bay and Protected by Medio Island, an Ecologically Threatened Zone and Forbidding Therein the Construction of Marinas, Hotels, Restaurants or any Structures Along Its Coastline Draining into the Endangered Zone and Causing Further Pollution; and Further Forbidding Unwarranted

and 27 of Republic Act No. 7160 (Local Government Code of 1991);[113] and (3) the provisions of DENR Administrative Order No. 96-37, regarding the documentary requirements for the zoning permit and social acceptability of the mooring facility.[114]

The Supreme Court disagreed. The Court pointed out that Presidential Decree No. 1605-A, which declares "the coves and waters embraced by Puerto Galera Bay . . . an ecologically threatened zone,"[115] was inapplicable.[116] The mooring facility at issue was a government-owned public infrastructure and not a "commercial structure; commercial or semi-commercial wharf or commercial docking" as contemplated in the decree.[117] Presidential Decree No. 1605 reads in pertinent part:

> Section 1. Any provision of law to the contrary notwithstanding, *the construction of marinas, hotels, restaurants, other commercial structures; commercial or semi-commercial wharfs [sic]; commercial docking within the enclosed coves of Puerto Galera; the destruction of its mangrove stands; the devastation of its corals and coastline by large barges, motorboats, tugboat propellers, and any form of destruction by other human activities are hereby prohibited.*[118]

The word "commercial," however, does not qualify all the prohibited activities listed under section 1 of the Decree.[119] In other words, section 1 of the Decree prohibits:

1) the construction of marinas, hotels, restaurants, other commercial structures;
2) the construction of commercial or semi-commercial wharfs;
3) the construction of commercial docking within the enclosed coves of Puerto Galera;
4) the destruction of its mangrove stands;
5) the devastation of its corals and coastline by large barges, motorboats, tugboat propellers; and
6) any form of destruction by other human activities.[120]

Only the first three items refer to commercial structures. There appears to be no reason to constrict the application of the Decree to only commercial

---

Ship Docking, Ship Repair Except in Duluruan; and Appointing a Special Committee to Study the Ecologically Endangered Zone's Rehabilitation and Preservation, Pres. Dec. No. 1605-A, 70 O.G. 2961, vol. 20 (Nov. 21, 1980) (Phil.) [hereinafter Structures Decree].

113. *Id.*
114. *Id.*
115. Pres. Dec. No. 1605-A.
116. *Bangus*, 405 S.C.R.A. at 544-45.
117. *Id.* at 543.
118. *Id.* at 542 (quoting Pres. Dec. No. 1605-A at § 1).
119. Pres. Dec. No. 1605-A at § 1.
120. *Id.*

structures as it also prohibits the destruction of mangroves and "the devastation of its coral reefs" and "any form of destruction by other human activities."[121]

The Court then addressed the alleged violation of the Local Government Code by the issuance of the ECC.[122] The Court held that the Code did not apply to the present case because the mooring facility was not an environmentally critical project and hence did not fall under the projects mentioned in section 26 of the Code.[123] The Court held that the Code would have applied if the operation of the power barge was at issue because "[a]s an environmentally critical project that causes pollution, the operation of the power barge needs the prior approval of the concerned *sanggunian*."[124]

This interpretation is incorrect. The Local Government Code does not require that the project be environmentally critical for the provisions on local government approval under sections 26 and 27 to apply.[125]

The Court also construed section 27 narrowly and held that it can only be invoked when the environmental harms mentioned in section 26 are present.[126] This is also incorrect. Section 27 refers expressly to section 2(c) of the Local Government Code before the project or program may be implemented.[127] Rather than referring to this section, however, the Supreme Court quoted section 27, deleting the reference to section 2(c). Thus, in the Court's opinion, section 27 read:

> *Prior Consultations Required.* — No project or program shall be implemented by government authorities unless the consultations mentioned in Section . . . 26 hereof are complied with, and prior approval of the *sanggunian* concerned is obtained: *Provided*, That occupants in areas where such projects are to be implemented shall not be evicted unless appropriate relocation sites have been provided, in accordance with the provisions of the Constitution.[128]

The omission is significant because section 2(c) of the Code does not limit the consent requirement to programs that could lead to environmental damage. It directs national agencies to conduct periodic consultations with

---

121. *Id.*

122. The Local Government Code of 1991, Rep. Act 7160, §§ 26-27, (Jan. 1, 1992) (Phil.). For the text of sections 26 and 27, see *supra* note 55 and accompanying text.

123. *Id.* at § 26.

124. *Bangus*, 405 S.C.R.A. at 544-45.

125. Rep. Act 7160, §§ 26-27.

126. *Bangus*, 405 S.C.R.A. at 544-45.

127. Section 2(c) of the Local Government Code provides: "It is likewise the policy of the State to require all national agencies and offices to conduct periodic consultations with appropriate local government units, nongovernmental and people's organizations, and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions." Rep. Act 7160 at § 2(c).

128. *Bangus*, 405 S.C.R.A. at 544 (emphasis added).

local government units, nongovernmental and people's organizations, and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions."[129] NAPOCOR is a government-owned corporation and is an agency under Philippine law.[130] Thus, section 27 should apply even if the government project or program did not have any severe environmental impacts listed under section 26.

Finally, the petitioners alleged that the ECC was illegal because NAPOCOR did not submit certain documents that were required of project proponents.[131] The Court disagreed again and ruled that while such documents are part of the submissions required from a project proponent, "their mere absence does not render the issuance of the ECC patently illegal."[132] The Court explained:

> To justify non-exhaustion of administrative remedies due to the patent illegality of the ECC, the public officer must have issued the ECC "[without any] semblance of compliance, or even an attempt to comply, with the pertinent laws; when manifestly, the officer has acted without jurisdiction or has exceeded his jurisdiction, or has committed a grave abuse of discretion; or when his act is clearly and obviously devoid of any color of authority."[133]

The Court cited an unreported case, *Mangubat v. Osmeña, Jr.*,[134] to support its position. *Mangubat* was decided in 1959 and did not involve the issuance of an ECC. Consequently, *Mangubat* was not on point and was improperly applied in *Bangus*.

Mangubat involved the termination of a police detective's employment pursuant to the mayor's perceived authority to remove him at any time for loss of confidence.[135] Detective Mangubat challenged the legality of his removal saying it violated the appeals process mandated under Commonwealth Act No. 58, which was the Charter of the City of Cebu.[136] Hence the Court was required to decide "whether the appeal mentioned in . . . [Commonwealth Act No. 58] is a condition *sine qua non* to every suit for the protection of the rights

---

129. *Id.*

130. Under Philippine law, an "Agency of the Government refers to any of the various units of the Government, including a department, bureau, office, instrumentality, or government-owned or controlled corporations, or a local government or a distinct unit therein." Administrative Code of 1987, Exec. Ord. No. 292, § 2(4), 83 O.G. 1 vol. 38-39 (July 25, 1987) (Phil.).

131. *Bangus*, 405 S.C.R.A. at 545.

132. *Id.* at 545.

133. *Id.*

134. G.R. No. L-12837 (unreported) (Apr. 30, 1959) (Phil.).

135. *Id.* at 1.

136. *See id.* at 2.

of an employee who has been suspended or removed by the Mayor."[137]

The Court held generally that the Act's requirement should be followed, but this rule was not absolute:

> However, when, from the very beginning, the action of the City Mayor is patently illegal, arbitrary, and oppressive; when there has been no semblance of compliance, or even an attempt to comply with the pertinent laws; when, manifestly, the Mayor has acted without jurisdiction, or has exceeded his jurisdiction, or has committed a grave abuse of discretion, amounting to lack of jurisdiction; when his act is clearly and obviously devoid of any color of authority, as in the case at bar, the employee adversely affected may forthwith seek the protection of the judicial department. Thus, in Mission v. Del Rosario[,] Uy v. Rodriguez[,] and Abella v. Rodriguez, we did not hesitate to order the reinstatement of detectives of the police force of Cebu, who were dismissed by the City Mayor under identical conditions as those obtaining in the case at bar. Though not involving members of said force, we also, deemed it proper to grant the review prayed for by the dismissed employees, notwithstanding their failure to appeal from the order of dismissal to the department head, in Palamine v. Zagado, Manuel v. de la Fuente F. Jose v. Lacson . . . .[138]

Mangubat supports the contention of the petitioners. There is no need to follow the appeals procedure because the government's action was patently illegal.

It will be recalled that the petitioners were arguing that the ECC was void because the project proponent failed to submit certain documents when applying for the certificate. The Court in *Bangus*, however, either completely misunderstood or avoided the argument. The Court stated, "While such documents are part of the submissions required from a project proponent, their mere absence does not render the issuance of the ECC patently illegal."[139] The Court noted that the Regional Executive Director (RED) is the officer duly authorized to issue ECCs for projects located within environmentally critical areas and that the RED issued the ECC on the recommendation of the Director of the EMB.[140] The Court concluded that the RED acted within DENR regulations: "[T]he legal presumption is that he acted with the requisite authority. This clothes [his] acts with presumptive validity and negates any

137. *Id.* at 6 (emphasis added).

138. *Id.* at 6 (citations omitted).

139. Bangus Fry Fisherfolk v. Lanzanas, G.R. No. 131442, 405 S.C.R.A. 530, 545 (July 10, 2003) (Phil.).

140. *Id.* at 546.

claim that his actions are patently illegal or that he gravely abused his discretion."[141] Petitioners must therefore present their case, "before the proper administrative forum before resorting to judicial remedies."[142]

Evidently, the Court equated patent illegality with the lack of authority to issue the ECC. The petitioners, however, were not questioning the authority of the RED to issue ECCs. Rather, they claimed that since certain documentation was not submitted with the ECC application, the ECC was invalid.[143] The Court's explanation is a study in absurdity; the defects in the issuance of an ECC do not make the ECC void because the RED is authorized to issue an ECC.

Notably, proof that the RED's actions were patently illegal or a grave abuse of discretion must be submitted "before the proper administrative forum before resorting to judicial remedies."[144] This is an intriguing statement from the Court: when a party invokes an exemption from the exhaustion of administrative remedies, that party must present evidence in the administrative forum from which it claims exemption.[145]

D. Otadan v. Rio Tuba Nickel Mining Corp.

Otadan v. Rio Tuba Nickel Mining Corp. involved the issuance of an Environmental Compliance Certificate to the Rio Tuba Nickel Mining Corporation for the operation of a hydrometallurgical processing plant.[146] The petitioners contested the DENR Secretary's issuance of the ECC.[147] The court of appeals, however, did not find grave abuse of discretion on the part of the Secretary.[148] The petitioners filed an appeal before the Philippine Supreme

---

141. *Id.* (footnote omitted).

142. *Id.*

143. *Id.*

144. *Id.*

145. The petitioners also claimed that judicial recourse was justified because NAPOCOR was "guilty of violating the conditions of the ECC, which requires it to secure a separate ECC for the operation of the power barge. The ECC also mandates NAPOCOR to secure the usual local government permits, like zoning and building permits, from the municipal government of Puerto Galera." The Court disagreed and held that "the fact that NAPOCOR's ECC is subject to cancellation" does not mean petitioners may ignore "the procedure prescribed in DAO 96-37 on appeals from the decision of the DENR Executive Director." "Under . . . DAO 96-37, complaints to nullify an ECC must undergo an administrative investigation, after which the hearing officer will submit his report to the EMB Director or the Regional Executive Director, who will then render his decision." The decision may be appealed to the DENR Secretary. "Article IX also classifies the types of violations covered under DAO 96-37, including projects operating without an ECC or violating the conditions of the ECC." *Id.*

146. G.R. No. 161436 (unreported) (June 23, 2004) (Phil.) *available at* http://www.supremecourt.gov.ph/resolutions/2nd/2004/2Jun/161436.htm. The Author thanks Atty. Brenda Jay Angeles for informing me of this case.

147. *Id.*

148. *Id.*

Court.[149]

In a minute resolution, the Supreme Court denied the appeal, finding it "axiomatic that the perfection of an appeal in the manner and within the period prescribed by law is not only mandatory but jurisdictional and the failure to perfect the appeal has the effect of rendering the judgment final and executory."[150] It added:

> The issuance of the ECC is an exercise by the Secretary of the DENR of his quasi-judicial functions. This Court has consistently held that the courts will not interfere in matters which are addressed to the sound discretion of the government agency entrusted with the regulation of activities coming under the special and technical training and knowledge of such agency.
>
> It has also been held that the exercise of administrative discretion is a policy decision and a matter that can best be discharged by the government agency concerned, and not by the courts. This Court has likewise consistently adhered to the principle that factual findings of quasi-judicial bodies which have acquired expertise because their jurisdiction is confined to specific matters are generally accorded not only respect but even finality and are binding even upon the Supreme Court if they are supported by substantial evidence. Further, administrative agencies are given a wide [sic] latitude in the evaluation of evidence and in the exercise of its adjudicative functions. This latitude includes the authority to take judicial notice of facts within its special competence. The petitioners failed to present compelling reasons to warrant the deviation by this Court from the foregoing salutary principles.[151]

This resolution is disappointing. The Court relied on a procedural technicality to defeat an action that potentially provided an opportunity to examine the extent of the DENR Secretary's power to issue ECCs.[152]

Tardiness in filing appeals has never been an absolute bar to review by the Supreme Court.[153] The Court explained:

> If respondents' right to appeal would be curtailed by the mere

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. Trans Int'l v. Court of Appeals, G.R. No. 128421, 285 S.C.R.A. 49, 54-58 (Jan. 26, 1998). (Phil.).

> expediency of holding that they had belatedly filed their notice of appeal, then this Court as the final arbiter of justice would be deserting its avowed objective, that is to dispense justice based on the merits of the case and not on a mere technicality.[154]

Further, this case involved the operation of a hydrometallurgical processing plant. It might have been prudent for the Court to be less inclined to invoke procedural deadlines, considering the potential environmental consequences of the plant's activities. If there is any case that warrants leniency, it should be one that involves serious environmental consequences.

Moreover, the Court referred to the power of the DENR Secretary to issue an ECC as a "quasi-judicial function."[155] This assertion demonstrates the Court's failure to understand the essence of the EIA system. The issuance of an ECC does not involve "the exercise of judgment and discretion as incident to the performance of administrative functions."[156] In *Smart Communications, Inc.*, the Court explained:

> The administrative body exercises its quasi-judicial power when it performs in a judicial manner an act which is essentially of an executive or administrative nature, where the power to act in such manner is incidental to or reasonably necessary for the performance of the executive or administrative duty entrusted to it. In carrying out their quasi-judicial functions, the administrative officers or bodies are required to investigate facts or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them as basis for their official action and exercise of discretion in a judicial nature.[157]

There is nothing "quasi-judicial" about the DENR's power to issue an ECC. Sadly, the Court's pronouncements indicate that it is unwilling to interfere with the power of the Secretary in matters relating to the issuance of ECCs.

IV. SUMMARY

Anyone familiar with *Oposa* might be startled by the quality of the Philippine Supreme Court decisions analyzed in this Article. *Oposa* earned

---

154. *Id.*

155. Otadan v. Rio Tuba Nickel Mining Corp., G.R. No. 161436 (unreported) (June 23, 2004) (Phil.) *available at* http://www.supremecourt.gov.ph/resolutions/2nd/2004/2Jun/161436.htm.

156. Phil. Tobacco Flue-Curing & Redrying Corp. v. Sabugo, 112 PHIL. REP. 1061. (S.C., Aug. 31, 1961).

157. G.R. No. 151908, 408 S.C.R.A. 678, 687 (Aug. 12, 2003) (Phil.).

international acclaim for the Philippine Supreme Court.[158] It inspired hope that judiciaries were beginning to appreciate the gravity of environmental problems facing the world and were willing to adopt new approaches to address them.

The other four cases decided by the Philippine Supreme Court that this Article reviews present a picture of a different judiciary: one that has overlooked facts, disregarded procedure, rewritten laws, and abandoned precedent to the detriment of the environment. On occasion, the Court's pronouncements are simply inexplicable.

Technology Developers, Inc., allowed parties to raise new facts and issues mid-stream. Additionally, the Supreme Court admonished local officials for acts they did not commit. Worst of all, the Court suggested that local governments are powerless to stop businesses cleared by the national government from operating in their jurisdictions.[159]

The other three cases resulted in constriction of the EIS system. *City of Davao* limited the EIA law to a short list of projects drawn up in 1981.[160] In *Bangus*, the Court refused to recognize the defects in the issuance of the ECC.[161] In *Otadan*, the Court invoked procedural deadlines to avoid addressing the validity of the ECC.[162]

Otadan also seems to be sending signals about the amount of deference the Supreme Court is willing to extend to the executive branch in the implementation of the EIS system.[163] This deference, as pointed out earlier, seems misplaced and based on the misconceived nature of the EIS system. Moreover this deference is unwise. The Philippine experience with the DENR's approach to EIA is not encouraging. One author asserts that "EIS procedures can be compromised by the pressure exerted by project proponents, including foreign investors and government figures themselves. Not uncommonly, these procedures are either influenced to support a particular predetermined outcome, or are simply carried out as a perfunctory exercise that has no bearing on the ultimate outcome."[164]

The Philippine EIA System was modeled on the U.S. National Environmental Policy Act (NEPA). But NEPA has attained a quasi-constitutional and even mythic status in the United States.[165] NEPA "is

158. *See supra* note 5.

159. See discussion *supra* Part III A.

160. Philippines v. City of Davao, G.R. 148622, 388 S.C.R.A. 691, 693 (Sept. 12, 2002) (Phil.).

161. Bangus Fry Fisherfolk v. Lanzanas, G.R. No. 131442, 405 S.C.R.A. 530, 544-45 (July 10, 2003) (Phil.).

162. Otadan v. Rio Tuba Nickel Mining Corp., G.R. No. 161436 (unreported) (June 23, 2004) (Phil.) *available at* http://www.supremecourt.gov.ph/resolutions/2nd/2004/2Jun/161436.htm.

163. *Id.*

164. Alan Khee-Jin Tan, *All That Glitters: Foreign Investment in Mining Trumps the Environment in the Philippines*, 23 PACE ENVTL. L. REV. 183, 205 (2005) (footnote omitted).

165. *See, e.g.*, Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 334 (2004).

regarded today as the legal cornerstone of environmental protection. NEPA is the model for environmental laws adopted in almost every jurisdiction across the globe."[166] NEPA has helped Americans preserve their "most treasured places" and helped citizens "protect their communities and enhance the quality of their lives."[167]

Philippine case law on the EIA scarcely resembles its counterpart in the United States. As one author explained:

> The spate of federal environmental legislation enacted in the late 1960's and early 1970's provided a fertile breeding ground for litigation. The federal courts reacted to the resulting proliferation of lawsuits by aggressively promoting the new, pro-environmental legislative objectives. They lowered the barriers to private litigants' access to the federal courts, subjected administrative agencies to procedural requirements not always apparent on the face of applicable legislation, interpreted environmental laws expansively and used common law to fill statutory gaps, and engaged in rigorous review of the substantive merit of agency decisions which seemed to give insufficient weight to legislatively sanctioned environmental values.[168]

As this Article points out, however, the Philippine Supreme Court constricted the interpretation of environmental legislation and deferred to the judgment of the executive branch despite the evident violation of these laws. In the three post-*Oposa* cases discussed herein, the Court stunted the potential of the law, preventing the Philippines from enjoying the same benefits resulting from effective environmental legislation that Americans have in the United States. The Supreme Court has veered away from environmental issues and has relegated environmental law to the sidelines.

It is possible that the Court finds itself confronted with the task of balancing economic progress with environmental concerns. This, however, cannot justify the misinterpretation of laws or the refusal to directly address environmental disputes.

The Supreme Court's performance in environmental law is even more disappointing when juxtaposed with the constitutionally-protected right to a

---

166. Whitney Deacon, *The Bush Administration's Attack on the Environment; Target: Nepa's Environmental Impact Statement*, 10 MO. ENVTL. L. & POL'Y REV. 147, 147 (2003) (footnotes omitted).

167. Sharon Buccino, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. ENVTL. L.J. 50, 50 (2003).

168. Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209, 209 (1987).

balanced and healthful ecology.[169] The Supreme Court in *Oposa* explained:

> Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation—aptly and fittingly stressed by the petitioners—the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.[170]

No other right in the Philippines has been characterized in this manner. No other right's advancement "predates all governments and constitutions" or "need[s] not be written in the Constitution."171 Nor has another right been assumed to "exist from the inception of humankind."172 Still, the decisions analyzed in this study all seem less inclined to uphold this right. Rather, if a theme runs through these decisions, it is the willingness of the Court to overlook the various threats that undermine Filipinos' right to a balanced and healthful environment.

IV. CONCLUSION

Oposa helped the Philippine Supreme Court earn a reputation for judicial environmental activism. An examination of the Court's other decisions, however, reveals a disappointing collection of cases. The Philippine Supreme Court failed to live up to its reputation and has instead produced poorly reasoned decisions. The cases show a court that has narrowed the statutory avenues for environmental protection and has opted to refrain from involvement in environmental litigation.

The Court's decisions have left *Oposa* standing alone as rhetoric while the environment remains in peril. The Philippine experience demonstrates how fleeting and misleading a judiciary's commitment to the environment can be. It calls into question the wisdom of resorting to the courts as an avenue to address environmental problems.

The Philippine experience also indicates that the protection of the environment cannot be guaranteed by the enactment of progressive legislation. Evidently, the constitutional mandate to protect environmental rights is meaningless without a judiciary that is sensitive to its role in protecting the environment. A timid court, or one that sanctions executive ineptitude or

169. CONST. (1987), Art. II., § 16 (Phil.).

170. Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792, 804-05 (July 30, 1993) (Phil.).

171. *Id.*

172. *Id.*

avoids the adjudication of environmental rights, becomes an obstacle to the realization of environmental rights.

THE FEDERAL COMMON LAW OF BAIL IN INTERNATIONAL EXTRADITION PROCEEDINGS

Roberto Iraola*

I. INTRODUCTION

While there is no statutory right to bail in international extradition proceedings,[1] in *Wright v. Henkel*,[2] the Supreme Court recognized that the presence of "special circumstances" may render the grant of bail appropriate to one facing extradition to a foreign country.[3] This acknowledgment by the Court in *Wright* over one hundred years ago spawned the development of a federal common law on the question of bail in international extradition proceedings.[4]

This Article, which is divided into three parts, examines the evolution of that law. First, and by way of background, the Article provides an overview of foreign requests for extradition. Next, the Article discusses the mechanics of international extradition hearings. Lastly, the Article analyzes the Supreme Court's ruling in *Wright* and examines the development of the federal case law regarding admission to bail in international extradition proceedings.

II. OVERVIEW OF EXTRADITION

Foreign requests for extradition,[5] one mode of acquiring jurisdiction over

---

* Roberto Iraola, J.D. 1983, Catholic University Law School, Trial Attorney, U.S. Department of Justice, Office of International Affairs. The views expressed herein are those of the author and do not necessarily represent the views of the U.S. Department of Justice or the United States.

1. *See In re* Extradition of Rouvier, 839 F. Supp. 537, 539 (N.D. Ill. 1993) ("The federal statute implementing United States extradition treaties with other nations . . . does not provide for bail."); *In re* Extradition of Heilbronn, 773 F. Supp. 1576, 1578 (W.D. Mich. 1991) ("There is no statutory right to bail in extradition cases."). *See* Jeffrey A. Hall, Note, *A Recommended Approach to Bail in International Extradition Cases*, 86 MICH. L. REV. 599, 599 (1987) ("[I]n international extradition cases . . . arrestees have no statutory right to bail largely because of the competing national interest in complying with extradition treaties.") (footnote omitted).

2. 190 U.S. 40 (1903).

3. *Id.* at 63 ("We are unwilling to hold that . . . while bail should not ordinarily be granted in cases of foreign extradition . . . courts may not in any case, and whatever the special circumstances, extend that relief.").

4. *See Rouvier*, 839 F. Supp. at 539 ("Given the absence of statutory law governing bail in international extradition proceedings, the question is determined based on federal common law."); U.S. DEPT. OF JUSTICE, CRIMINAL RESOURCES MANUAL, BAIL HEARING § 618 (1997) ("The standards for the release of fugitives in extradition matters are . . . found in case law from the Supreme Court and the lower courts.").

5. Extradition involves "the surrender by one nation to another nation of an individual accused or convicted of an offen[s]e outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender."

international fugitives,[6] are governed by 18 U.S.C. § 3184[7] and, with limited exception, by treaty.[8] Typically, the process is triggered when the Department of State receives a request from a foreign country.[9] Because the preparation of a formal request for extradition is time-consuming and a fugitive is likely to flee if he learns of it, most treaties provide for the provisional arrest of fugitives while the request is being perfected.[10] The Department of Justice's Office of International Affairs reviews the request for a provisional arrest warrant and, if sufficient, sends it to the U.S. Attorney for the district where the person sought

---

Terlinden v. Ames, 184 U.S. 270, 289 (1902). *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 474-75 (1987) ("Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment.").

6. *See* Valerie Epps, *The Development of the Conceptual Framework Supporting International Extradition*, 25 LOY. L.A. INT'L & COMP. L. REV. 369, 371 n.12 (2003) ("The processes of exclusion, deportation, abduction, and rendition or surrender all play a role, together with the historic practice of informal modes of delivery of fugitives by one state to another."). *See also* Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 857-81 (1993) (discussing alternatives to extradition).

7. § 3184 provides, in relevant part:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government . . . any justice or judge of the United States, or any magistrate [judge] authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may . . . issue [a] warrant for the apprehension of [a] person . . . charged [with having committed within the jurisdiction of any such foreign government any of the crimes provided for by treaty or convention], that he may be brought before such justice, judge, or magistrate [judge], to the end that the evidence of criminality may be heard and considered.

18 U.S.C. § 3184 (2006). *See* United States v. Liu Kin-Hong, 110 F.3d 103, 109 (1st Cir. 1997) ("In the United States, the procedures for extradition are governed by statute.").

8. *See In re* Extradition of Lahoria, 932 F. Supp. 802, 805 (N.D. Tex. 1996) ("International extradition proceedings are governed both by statute . . . and by treaty."). Comity allows for the return of third country nationals (persons who are not citizens, nationals, or residents of the United States), absent a treaty, provided certain conditions are satisfied. 18 U.S.C. § 3181(b) (2006). *See* Waits v. McGowan, 516 F.2d 203, 208 (3d Cir. 1975) ("International extradition is governed only by considerations of comity and treaty provisions."). *See generally* Hall, *supra* note 1, at 601 ("Treaties and federal statutes govern the extradition process.") (footnotes omitted).

9. *See* Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1009 (9th Cir. 2000) ("Extradition is ordinarily initiated by a request from the foreign state to the Department of State.").

10. *See* Duran v. United States, 36 F. Supp. 2d 622, 624 (S.D.N.Y. 1999) ("In order to avoid the flight of a defendant during preparation of a full formal request, many extradition treaties permit a provisional arrest to be made upon receipt of an informal request."). *See also* U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL, INTERNATIONAL EXTRADITION AND RELATED MATTERS § 9-15.230 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm ("Because the time involved in preparing a formal request can be lengthy, most treaties allow for the provisional arrest of fugitives in urgent cases."); Nathaniel A. Persily, Note, *International Extradition and the Right to Bail*, 34 STAN. J. INT'L L. 407, 415 (1988) ("Provisional arrest is usually justified as necessary to capture a fugitive who presents a high risk of flight, until such time as the country formally requests extradition.").

to be extradited is located.[11] The U.S. Attorney then files a complaint in support of an arrest warrant before a federal judge or magistrate.[12]

After apprehension of the fugitive, the requesting state, through a formal request, provides the U.S. government with the additional information required to carry out the extradition under the treaty.[13] This ultimately leads to the extradition hearing.[14] If, at the conclusion of that hearing, the judicial officer "deems the evidence sufficient to sustain the charge"[15] – which in international extradition hearings means probable cause[16] – then he must certify the same to the Secretary of State, who will review the case and determine whether to issue a warrant for the surrender of the person sought to be extradited.[17] If the

---

11. *See* U.S. ATTORNEY'S MANUAL, *supra* note 10, § 9-15.700 (explaining how OIA will review request for sufficiency and then forward it to appropriate district).

12. *See* 18 U.S.C. § 3184; Barapind v. Reno, 225 F.3d 1100, 1105 (9th Cir. 2000) ("Once approved, the United States Attorney for the judicial district where the person sought is located files a complaint in federal district court seeking an arrest warrant for the person sought."). *See also* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCES MANUAL, ROLE OF THE DEPARTMENT OF STATE IN FOREIGN EXTRADITION REQUESTS § 615 (1997) ("[I]n urgent cases, the prosecutor immediately drafts a complaint for provisional arrest and executes it before a magistrate judge or district judge in the district where the fugitive is located. The judicial officer issues a warrant under the authority of the treaty and 18 U.S.C. § 3184.").

13. *See* Jeffrey M. Olson, Note, *Gauging an Adequate Probable Cause Standard for Provisional Arrest in Light of* Parretti v. United States, 48 CATH. U. L. REV. 161, 172 (1998) ("After executing the provisional arrest request, the requesting state furnishes the United States with any additional information that is required for extradition under the governing statute or treaty.") (footnote omitted). *See also* Lis Wiehl, *Extradition Law at the Crossroads: The Trend Towards Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. INT'L L. 729, 752 (1998) ("[M]ost extradition laws and treaties provide that the alleged fugitive may be arrested and temporarily detained for a period of time to enable the requesting State to furnish the necessary documentation in support of its request for his extradition.").

14. *See* 18 U.S.C. § 3184 (noting that the purpose of apprehension after issuance of a warrant is so that person "may be brought before such justice, judge, or magistrate [judge], to the end that the evidence of criminality may be heard and considered.").

15. *Id.*

16. *See In re* Extradition of Drayer, 1999 FED App. 0313P (6th Cir.) ("An extradition proceeding is not a forum in which to establish[] the guilt or innocence of the accused; rather, the sole inquiry is into probable cause."). *See also In re* Extradition of Artt, 158 F.3d 462, 467 (9th Cir. 1998) ("[S]ection 3184 authorizes federal district judges to decide whether there is probable cause to believe that the potential extraditee committed an offense covered by a given extradition treaty."). *See generally* Steven Lubet & Morris Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193, 198 (1980) ("The requesting country bears the burden of establishing probable cause to believe that the accused committed the charged offense.") (footnote omitted).

17. *See* 18 U.S.C. § 3184 ("[judicial officer] shall certify the same . . . to the Secretary of State, that a warrant may issue . . . for the surrender of such person"); 18 U.S.C. § 3186 (2006) ("The Secretary of State may order the person committed under section[] 3184 . . . to be delivered to any authorized agent of such foreign government."). *See also* Lo Duca v. United States, 93 F.3d 1100, 1103 (2d Cir. 1996) ("[T]he Secretary of State has final authority to extradite the fugitive, but is not required to do so. Pursuant to its authority to conduct foreign affairs, the Executive Branch retains plenary discretion to refuse extradition.").

The prevailing view is that the Secretary of State will seldom reject an extradition request

extraditee is not surrendered to the requesting country within two months of the commitment order, he may, absent "sufficient cause," be released.[18] While there is no direct appeal from the magistrate or judge's extradition ruling,[19] review of the ruling is available through a petition for a writ of habeas corpus under 28 U.S.C. § 2241.[20]

III. THE EXTRADITION HEARING

Although extradition proceedings are not considered criminal prosecutions,[21] they are analogous to preliminary hearings.[22] The governing

---

after a judicial finding of extraditability. *See* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1486 (1988) ("There is little incentive for anyone in the State Department to refuse an extradition request after a court has allowed it. If extradition *is* then refused by the State Department, it is likely to be for reasons of policy and expediency rather than considerations of fairness or extradition doctrine.") (footnote omitted); John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 96 (2002) ("In practice . . . the Secretary rarely exercises discretion, perhaps because the needs of diplomacy outweigh the concerns of individuals who may have committed crimes.") (footnote omitted); Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 TEX. INT'L L.J. 277, 288 (2002) ("Although the State Department has the choice to refuse to extradite, even after a court has issued a certificate of extraditability, refusal is an exceedingly rare occurrence.") (footnotes omitted); Elzbieta Klimowicz, Note, *Article 15 of the Torture Convention: Enforcement in U.S. Extradition Proceedings*, 15 GEO. IMMIGR. L.J. 183, 197 (2000) ("[T]he probability of having the Secretary of State refuse to surrender an extraditable fugitive because of inadmissible evidence is very low. In fact, in the few instances where the Secretary actually refused to surrender such an individual, the evidentiary findings of the magistrate were not questioned, only his treaty construction.") (footnotes omitted).

18. *See* 18 U.S.C. § 3188 (2006).

19. *See* Valenzuela v. United States, 286 F.3d 1223, 1228 n.11 (11th Cir. 2002) ("There is no direct appeal from extradition decisions."); Bozilov v. Seifert, 983 F.2d 140, 142 (9th Cir. 1993) ("An extradition order cannot be directly appealed.") (footnote omitted); Ahmad v. Wigen, 910 F.2d 1063, 1064-65 (2d Cir. 1990) ("An order granting or denying section 3184 certification is not appealable.").

20. *See* Barapind v. Enomoto, 400 F.3d 744, 748 n.5 (9th Cir. 2005) ("Decisions of an extradition court are not directly reviewable but may be challenged collaterally by a petition for habeas corpus."). In a habeas proceeding, a petitioner may challenge "whether the magistrate had jurisdiction, whether the offen[s]e charged [wa]s within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." Fernandez v. Phillips, 268 U.S. 311, 312 (1925). *Accord* Mainero v. Gregg, 164 F.3d 1199, 1205 (9th Cir. 1999); Sidali v. I.N.S., 107 F.3d 191, 195 (3d Cir. 1997). A final order in a habeas proceeding is subject to review under 28 U.S.C. § 2253 by the United Sates Court of Appeals for the circuit where the district court is located. *See In re* Extradition of Artt, 158 F.3d at 468-69.

21. *See* DeSilva v. DiLeonardi, 181 F.3d 865, 868 (7th Cir. 1999) ("Extradition . . . is not a 'criminal prosecution.'"); Austin v. Healey, 5 F.3d 598, 603 (2d Cir. 1993) ("[A]n extradition hearing is not a criminal prosecution: the order of extraditability expresses no judgment on [petitioner's] guilt or innocence."); *In re* Extradition of Rovelli, 977 F. Supp. 566, 567 (D. Conn. 1997) ("[E]xtradition proceedings pursuant to treaty are not criminal in nature.").

22. *See* Benson v. McMahon, 127 U.S. 457, 463 (1888) (noting that an extradition proceeding is "of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused"); David v. Att'y Gen.

standard at an extradition hearing is probable cause,[23] which is defined as "the existence of a reasonable ground to believe the accused guilty"[24] or "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt."[25] The role of the magistrate or judge at the extradition hearing is "to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction."[26]

The "[a]dmission of evidence in an international extradition proceeding is within the magistrate's discretion."[27] The Federal Rules of Evidence, the Federal Rules of Criminal Procedure, and the Federal Rules of Civil Procedure do not apply.[28] There is no obligation on the part of the government to provide discovery or produce exculpatory evidence.[29] A putative extraditee has no right

---

of the U.S., 699 F.2d 411, 415 (7th Cir. 1983) ("[A]n extradition hearing is of the character of a preliminary hearing and is not to be converted into a full-dress trial.") (footnote omitted).

23. *See* Jimenez v. Aristeguieta, 311 F.2d 547, 562 (5th Cir. 1962) ("With respect to the evidence upon which the extradition magistrate acted, it must be remembered that the extradition magistrate merely determines probable cause, making an inquiry like that of a committing magistrate and no more."); Polo v. Horgan, 828 F. Supp. 961, 965 (S.D. Fla. 1993) ("To certify an extradition warrant, a magistrate need only find probable cause that the evidence [is] sufficient to sustain the charge.") (internal quotation marks omitted).

24. Escobedo v. United States, 623 F.2d 1098, 1102 (5th Cir. 1980) (citing Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971)). *Accord* Collier v. Vaccaro, 51 F.2d 17, 20 (4th Cir. 1931) ("[The magistrate must] determine whether upon the evidence adduced before him there is reasonable ground to believe that the crime charged has been committed."); *In re* Extradition of Valles, 268 F. Supp. 2d 758, 772 (S.D. Tex. 2003) ("Probable cause is the existence of reasonable grounds to believe the accused committed the offense charged.") (citation omitted).

25. Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973). *Accord Sidali*, 107 F.3d at 199.

26. Peters v. Egnor, 888 F.2d 713, 717 (10th Cir. 1989) (quoting Collins v. Loisel, 259 U.S. 309, 316 (1922)); *cf.* Ward v. Rutherford, 921 F.2d 286, 287 (D.C. Cir. 1990) ("[The extradition hearing is] essentially a 'preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation.'") (citation omitted).

27. *In re* Extradition of Kraiselburd, 786 F.2d 1395, 1399 (9th Cir. 1986) (citation omitted); *In re* Extradition of Mainero, 990 F. Supp. 1208, 1219 (S.D. Cal. 1997) (judicial officer presiding over the extradition hearing "has wide latitude in admitting evidence") (citation omitted).

28. *See In re* Requested Extradition of Smyth, 61 F.3d 711, 720-21 (9th Cir. 1995) ("[T]he rules of evidence and civil procedure that govern federal court proceedings heard under the authority of Article III of the United States Constitution do not apply in extradition hearings that are conducted under the authority of a treaty enacted pursuant to Article II."); FED. R. CRIM. P. 54(b)(5) ("These rules are not applicable to extradition or rendition . . . .).

29. *See* Koskotas v. Roche, 931 F.2d 169, 175 (1st Cir. 1991) ("[I]n an extradition proceeding, discovery is not only discretionary with the court, it is narrow in scope."); Montemayor Seguy v. United States, 329 F. Supp. 2d 883, 888 (S.D. Tex. 2004) ("The extradition law, the extradition treaty, and the United States Constitution do not require production of exculpatory evidence at an extradition hearing."). *But see* Demjanjuk v. Petrovsky, 10 F.3d 338, 353-54 (6th Cir. 1993) (recognizing that government must provide exculpatory evidence where it has conducted its own investigation of the offense underlying the extradition request and uncovered exculpatory information); Quinn v. Robinson, 783 F.2d 776, 817 n.41 (9th Cir. 1986) ("Although there is no explicit statutory basis for ordering discovery in

to cross-examine witnesses at an extradition hearing,[30] where the evidence may consist of hearsay,[31] and credibility determinations are the province of the extraditing judicial officer.[32] Additionally, § 3190 permits the demanding country to introduce properly authenticated evidence gathered at home.[33]

The defenses available at an extradition hearing are limited; for example, "evidence of alibi or of facts contradicting the demanding country's proof of a defense such as insanity may properly be excluded."[34] Certified proof of a foreign conviction upon which the extradition request is based[35] and

---

extradition hearings . . . the extradition magistrate has the right, under the court's inherent power, to order such discovery procedures as law and justice require.") (citations and internal quotation marks omitted).

30. *See* Messina v. United States, 728 F.2d 77, 80 (2d Cir. 1984) ("As in the case of a grand jury proceeding, a defendant has no right to cross-examine witnesses or introduce evidence to rebut that of the prosecutor.").

31. *See Collins*, 259 U.S. at 317 ("[U]nsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the State on a preliminary examination."); United States v. Liu Kin-Hong, 110 F.3d 103, 120 (1st Cir. 1997) ("The evidence may consist . . . entirely of hearsay.") (citation omitted); Then v. Melendez, 92 F.3d 851, 855 (9th Cir. 1996) ("[H]earsay evidence is admissible to support a probable cause determination in an extradition hearing . . . .") (citation omitted); Simmons v. Braun, 627 F.2d 635, 636 (2d Cir. 1980) ("Hearsay evidence is admissible.").

32. *See* Quinn, 783 F.2d at 815 ("The credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extraditing magistrate.").

33. § 3190, captioned "Evidence on hearing," states:

> Depositions, warrants or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

18 U.S.C. § 3190 (2006).

34. Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir. 1973); *see* Hooker v. Klein, 573 F.2d 1360, 1368 (9th Cir. 1978) (stating alibi or other evidence contradicting proof of probable cause inadmissible); United States v. Peterka, 307 F. Supp. 2d 1344, 1349 (M.D. Fla. 2003) ("[E]xtraditees may only introduce evidence to explain rather than contradict the evidence presented by the Government, and the court shall exclude evidence that is proffered to contradict testimony, challenge the credibility of witnesses, or establish a defense to the crimes alleged.") *See generally* Jacques Semmelman, *The Rule of Non-Contradiction in International Extradition Proceedings: A Proposed Approach to the Admission of Exculpatory Evidence*, 23 FORDHAM INT'L L.J. 1295 (2000).

35. *See* Sidali v. INS, 107 F.3d 191, 196 (3d Cir. 1997) ("[A] foreign conviction obtained after a trial at which the accused is present is sufficient to support a finding of probable cause for the purposes of extradition."); Spatola v. United States, 925 F.2d 615, 618 (2d Cir. 1991) ("[A] certified copy of a foreign conviction, obtained following a trial at which the defendant was present, is sufficient to sustain a judicial officer's determination that probable cause exists to extradite."); United States v. Clark, 470 F. Supp. 976, 978 (D. Vt. 1979) ("[T]he certified copy of respondent's Certificate of Conviction in Canada . . . is sufficient proof that probable cause exists that the respondent has been guilty of an offense involving criminality and we hold that document satisfies the requirement that the court find sufficient 'evidence of criminality.'").

accomplice testimony[36] are sufficient to establish probable cause. A certificate of extradition ultimately will issue if the judge or magistrate has jurisdiction over the subject matter and the person sought to be extradited, the offense for which extradition was sought was an extraditable offense under a treaty in effect at the time of the request, and competent evidence is presented sufficient to establish probable cause that the extraditee[37] committed the alleged offense.[38]

IV. THE EVOLUTION OF THE SPECIAL CIRCUMSTANCES TEST

As noted previously, although there is no statutory right to bail in international extradition proceedings,[39] in *Wright v. Henkel*[40] the Supreme Court recognized that if "special circumstances" are present, bail is available to those facing extradition to a foreign country.[41] This acknowledgment spawned the development of a federal common law on the question of bail involving foreign extradition.[42] We now turn to a discussion of the development of that

---

36. *See* Bovio v. United States, 989 F.2d 255, 259 (7th Cir. 1993) ("Accomplice testimony can be used to find probable cause[.]"); *In re* Extradition of Mainero, 990 F. Supp. 1208, 1227 (S.D. Cal. 1997) ("[S]elf incriminating statements of accomplices are sufficient to establish probable cause in an extradition hearing.") (citation omitted); *In re* Extradition of Atta, 706 F. Supp. 1032, 1051 (E.D.N.Y. 1989), *aff'd*, 910 F.2d (2d Cir. 1990) ("[T]he accomplice testimony evidence, which is, under the rules governing extradition proceedings, deemed credible even without corroboration, sufficiently demonstrates that probable cause exists to support the certification of [petitioner] for extradition.").

An accomplice's recantation of his or her testimony, however, may affect the probable cause analysis. *See* Eain v. Wilkes, 641 F.2d 504, 510-12 (7th Cir. 1981); *In re* Extradition of Atuar, 300 F. Supp. 2d 418, 427-31, 434-35 (S.D. W. Va. 2003); *In re* Extradition of Strunk, 293 F. Supp. 2d 1117, 1125-26 (E.D. Cal. 2003); United States v. Linson, 88 F. Supp. 2d 1123, 1126 (D. Guam 2000); *Mainero*, 990 F. Supp. at 1221-26; *In re* Extradition of Garcia, 890 F. Supp. 914, 923-24 (S.D. Cal. 1994); *In re* Extradition of Contreras, 800 F. Supp. 1462, 1464-69 (S.D. Tex. 1992); Gill v. Imundi, 747 F. Supp. 1028, 1044-47 (S.D.N.Y. 1990); Republic of France v. Moghadam, 617 F. Supp. 777, 782-84 (N.D. Cal. 1985).

37. *See* Noel v. United States, 12 F. Supp. 2d 1300, 1304 (M.D. Fla. 1998) (identification based on birthday, nationality and appearance in photograph); *cf. In re* Extradition of De Jesus Alatorre Pliego, 320 F. Supp. 2d 947, 950-51 (D. Ariz. 2004) ("[T]here is no probable cause to believe that the [person] who was arrested and sitting in the courtroom at the extradition hearing is the person that was identified by the witnesses as committing the fraud."); *In re* Extradition of Valles, 268 F. Supp. 2d 758, 775 (S.D. Tex. 2003) ("This is a textbook case of mistaken identity, and the governments of the U.S. and Mexico, in the interests of justice, ought to have conceded that fact.").

38. *See, e.g.*, *Atuar*, 300 F. Supp. 2d, at 425 (identifying factors). *See generally* Powers, *supra* note 17, at 290 (same).

39. *See In re* Extradition of Rouvier, 839 F.Supp. 537, 539 (N.D. Ill. 1993).

40. 190 U.S. 40 (1903).

41. *Id.* at 63 ("We are unwilling to hold that . . . while bail should not ordinarily be granted in cases of foreign extradition . . . courts may not in any case, and whatever the special circumstances, extend that relief.").

42. While some courts and at least one commentator have characterized the "special circumstances" test as dictum, it has consistently been applied by judges and magistrates since its formulation over one hundred years ago. *See* Parretti v. United States, 122 F.3d 758, 778 n.24 (9th Cir. 1997), *decision withdrawn and appeal dismissed on other grounds*, 143 F.3d 508

law, starting with an analysis of the Court's decision in *Wright*.

A. The Seed Is Planted—Wright v. Henkel

In *Wright*, petitioner, a U.S. citizen, was arrested for fraud under the extradition treaty with Great Britain.[43] He requested release on bail pending the hearing on the grounds that he suffered from bronchitis, and that his incarceration would aggravate his condition.[44] The commissioner denied the request because the statute did not allow for bail, and petitioner appealed to the circuit court, which affirmed the commissioner's ruling.[45]

In rejecting petitioner's contention on appeal, the Supreme Court observed that no statute authorizing bail in cases involving foreign extradition existed and that § 5270 of the Revised Statutes, the predecessor to § 3184,[46]

(9th Cir. 1998) (en banc) ("Cases applying the 'special circumstances' doctrine rely on the dictum in *Wright*...."); U.S. *ex rel.* Carapa v. Curran, 297 F. 946, 953 (2d Cir. 1924) ("[W]hat was said was at best a dictum not being necessary for the decision of the case."); Persily, *supra* note 10, at 408 ("This dictum planted the seeds of the current federal common law of bail in international extradition proceedings.").

43. *Wright*, 190 U.S. at 40-41. Wright was alleged to have published and circulated false corporate reports with the intent to defraud shareholders. *Id.* at 41.

44. *Id.* at 43 (allegation that "petitioner was suffering from bronchitis and a severe chill, which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment").

45. *Id.*

46. The original law was passed in 1848 and has changed little. *See* An Act for Giving Effect to Certain Treaty Stipulations Between This and Foreign Governments, for the Apprehension and Delivering up of Certain Offenders, ch. 167, 9 Stat. 302 (1848) (giving effect to treaty provisions regarding extradition); Persily, *supra* note 10, at 407 ("The section of the U.S. Code dealing with extradition of international fugitives has remained largely unchanged since its codification over a century and a half ago.") In 1876, section 1 of this act became section 5270 of the Revised Statutes. *See* Wiehl, *supra* note 13, at 730-31 n.2. Section 5270 provided:

> Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District or Territory, with having committed with the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Id. In 1940, section 5270 became codified in 18 U.S.C. § 651 and, in 1948, it became 18 U.S.C. § 3184. *See* Wiehl, *supra* note 13, at 729 n.2. In 1968, the Federal Magistrate Act

was inconsistent with admission to bail after a finding of extraditability; at that point, the statute only called for the commissioner or judge to "issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."[47] In this vein, the Court noted that at the point at which the country demanding extradition performed its obligations under the treaty and the law, it was "entitled to the delivery of the accused on the issue of the proper warrant, and the other government [wa]s under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted."[48] The Court found that this rationale also appeared "generally applicable to release pending examination."[49]

Below, the Second Circuit had ruled that, in the absence of a statute, circuit courts lacked the power to grant bail in foreign extradition proceedings.[50] While affirming the ruling denying Wright's request for bail, the Supreme Court declined to hold that federal courts had "no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief."[51]

B. Early Cases

The first reported opinion applying *Wright* was *In re Mitchell*.[52] That case involved a petitioner arrested for fraud under the extradition treaty with Canada.[53] The arrest warrant was issued on the eve of a civil trial involving petitioner's fortune.[54] Judge Learned Hand determined that while courts had the power under *Wright* to grant bail in cases involving foreign extradition, that power "should be exercised only in the most pressing circumstances, and when the requirements of justice [we]re absolutely peremptory."[55] In the case of *In re Mitchell*, Judge Hand found special circumstances warranted release on bail because of Mitchell's need to engage in "free consultation in the conduct of the civil suit upon which his whole fortune depend[ed]," and the fact that he knew

---

changed the term "commissioner" to "magistrate" in section 3184. *See* Federal Magistrates Act, Pub. L. No. 90-578, § 301(a)(3), 82 Stat. 1107, 1115 (1968).

47. *Wright*, 190 U.S. at 62 (quotation omitted).

48. *Id.* The Court explained that "[t]he enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment." *Id.*

49. *Id.*

50. *In re* Wright, 123 F. 463, 464 (C.C.S.D.N.Y. 1903).

51. *Wright*, 190 U.S. at 63. *See generally* Carl A. Valenstein, *The Right to Bail in United States Extradition Proceedings*, 4 MICH. J. INT'L L. 107,109 (1983) ("The Court did not hint at what might constitute special circumstances but it apparently thought that the potential injury to the accused's health did not qualify.").

52. 171 F. 289 (S.D.N.Y. 1909).

53. *Id.*

54. *Id.*

55. *Id.*

about the extradition request for some time but had not fled.[56]

Twenty-five years following *In re Mitchell*, there appear to be only three reported cases addressing the question of bail in foreign extradition proceedings, in more than a passing manner.[57] In two of these cases, the courts denied bail.[58] One held the lapse of "several weeks" between the time of arrest and the hearing, and the "discomfort" associated with jail during that period did not present "unusual circumstances" so as to warrant the grant of bail.[59] In the remaining case, which involved a petitioner arrested in Pennsylvania and charged with obtaining money under false pretenses in Canada, the court initially noted that bail for the offense was available under both Canadian and Pennsylvania law.[60] Balancing "the small risk of default" against "the injustice of imposing imprisonment in advance of a hearing," which was scheduled no earlier than two months later, the court granted petitioner bail.[61]

C. Development of the Special Circumstances Test in Federal Common Law

As foreign extradition requests increased through the years, so did the number of reported district court opinions from magistrates and judges, as well as circuit court decisions, regarding the issue of bail in international extradition matters. In most cases, the requests arose prior to the extradition hearing, either after arrest following the filing of the formal extradition request,[62] or pursuant to a provisional arrest warrant.[63] In some cases, the request for bail arose after

---

56. *Id.* at 290. Judge Hand further held that upon termination of the civil case, petitioner was to be returned to prison to await resolution of the extradition proceeding. *Id.*

57. *See In re* Klein, 46 F.2d 85, 85 (S.D.N.Y. 1930); *In re* Gannon, 27 F.2d 362, 363 (E.D. Pa. 1928); U.S. *ex rel.* McNamara v. Henkel, 46 F.2d 84, 84 (S.D.N.Y. 1912). *See generally* Valenstein, *supra* note 51, at 109-10 (discussing cases).

58. *See McNamara*, 46 F.2d at 84; *Gannon*, 27 F.2d at 363.

59. *Klein*, 46 F.2d at 85.

60. *Gannon*, 27 F.2d at 362.

61. *Id.* at 364. The court reasoned that petitioner could "jump his bail, but so likewise he [could] escape his jailers." *Id.* at 363. As to the consequences befalling petitioner should he jump bail, the court found:

> Should the prisoner default, he will not only forfeit the penal sum of his bond, but will inflict upon himself a punishment many times heavier than any which would follow conviction for the offense with which he is charged, for he must thereafter elude the vigilance of the officers of each and both of two governments whose resources are practically unlimited.

Id. at 364.

62. *See In re* Extradition of Mironescu, 296 F. Supp. 2d 632, 633-34 (M.D. N.C. 2003); *In re* Extradition of Sacirbegovic, 280 F. Supp. 2d 81, 82-83 (S.D.N.Y. 2003); *In re* Extradition of Heilbronn, 773 F. Supp. 1576, 1579 (W.D. Mich. 1991); United States v. Taitz, 130 F.R.D. 442, 443 (S.D. Cal. 1990).

63. *See In re* Extradition of Orozco, 268 F. Supp. 2d 1115, 1115 (D. Ariz. 2003); *In re* Extradition of Molnar, 182 F. Supp. 2d 684, 685-86 (N.D. Ill. 2002); Borodin v. Ashcroft, 136 F. Supp. 2d 125, 127 (E.D.N.Y. 2001); *In re* Extradition of Gonzalez, 52 F. Supp. 2d 725, 728 (W.D. La. 1999); Duran v. United States, 36 F. Supp. 2d 622, 623 (S.D.N.Y. 1999); *In re*

the extradition hearing.[64]

Before analyzing the special circumstances which courts have found will support a grant of bail, the following preliminary observations are in order. First, *Wright* teaches that in foreign extradition cases, there is a presumption against bail.[65] Second, because international extradition proceedings are not considered criminal cases,[66] the criteria governing bail under the sections 3141-60 of the Bail Reform Act do not apply.[67] Third, the absence of a risk of flight does not constitute a special circumstance; it is an independent consideration.[68]

Extradition of Mainero, 950 F. Supp. 290, 292 (S.D. Cal. 1996); *In re* Extradition of Sutton, 898 F. Supp. 691, 692-93 (E.D. Mo. 1995); *In re* Extradition of Rouvier, 839 F. Supp. 537, 538-39 (N.D. Ill. 1993); *In re* Extradition of Nacif-Borge, 829 F. Supp. 1210, 1212-13 (D. Nev. 1993); United States v. Hills, 765 F. Supp. 381, 382-83 (E.D. Mich. 1991); United States v. Tang Yee-Chun, 657 F. Supp. 1270, 1271 (S.D.N.Y. 1987); United States v. Messina, 566 F. Supp. 740, 741 (E.D.N.Y. 1983).

64. *See* Salerno v. United States, 878 F.2d 317, 317 (9th Cir. 1989); Beaulieu v. Hartigan, 554 F.2d 1, 1 (1st Cir. 1977); Hababou v. Albright, 82 F. Supp. 2d 347, 348 (D.N.J. 2000); United States v. Bogue, No. 98-572-M, 1998 U.S. Dist. LEXIS 13208, at *1 (E.D. Pa. Aug. 14, 1998); *In re* Extradition of Lang, 905 F. Supp. 1385, 1388-89 (C.D. Cal. 1995); Spatola v. United States, 741 F. Supp. 362, 368 (E.D.N.Y. 1990). *See also Hills*, 765 F. Supp. at 385 ("This 'special circumstances' test applies to requests for release on bail both before and after an extradition hearing; it also applies to requests for release on bond, made after only a 'provisional' arrest pending the extraditing country's submission of formal extradition documents."). *See* Persily, *supra* note 10, at 414 ("A fugitive facing extradition petitions for bail at every opportunity: from the moment of arrest, to the hearing on extraditability, continuing to the final appeal for habeas relief, and not ceasing until the instant the fugitive is taken to the requesting country to face trial.").

65. As the Court explained in *Wright*:

> The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment.

Wright v. Henkel, 190 U.S. 40, 62 (1903). Relying on *Wright*, lower courts uniformly have held that there is a presumption against bail in international extradition proceedings. *See* United States v. Liu Kin-Hong, 83 F.3d 523, 524 (1st Cir. 1996); Martin v. Warden, 993 F.2d 824, 827 (11th Cir. 1993); *Salerno*, 878 F.2d at 317; *In re* Extradition of Russell, 805 F.2d 1215, 1216 (5th Cir. 1986) (citation omitted); United States v. Leitner, 784 F.2d 159, 160 (2d Cir. 1986); *Beaulieu*, 554 F.2d 1 at 2 ; *Orozco*, 268 F. Supp. 2d at 1116; *Molnar*, 182 F. Supp. 2d at 686; *In re* Extradition of Bowey, 147 F. Supp. 2d 1365, 1367 (N.D. Ga. 2001); *Borodin*, 136 F. Supp. 2d at 128; *Hababou*, 82 F. Supp. 2d at 351; *In re* Extradition of Rovelli, 977 F. Supp. 566, 567 (D. Conn. 1997); *Mainero*, 950 F. Supp. at 293-94; *In re* Extradition of Morales, 906 F. Supp. 1368, 1373 (S.D. Cal. 1995); *Sutton*, 898 F. Supp. at 694; *In re* Extradition of Sidali, 868 F. Supp. 656, 657 (D.N.J. 1994); *Rouvier*, 839 F. Supp. at 539; *Nacif-Borge*, 829 F. Supp. at 1214; *Heilbronn*, 773 F. Supp. at 1578; *Hills*, 765 F. Supp. at 384.

66. *See Mainero*, 950 F. Supp. at 293.

67. *See Mironescu*, 296 F. Supp. 2d at 634; *Molnar*, 182 F. Supp. 2d at 687; *Borodin*, 136 F. Supp. 2d at 128; *Huerta*, 52 F. Supp. 2d at 735; *Mainero*, 950 F. Supp. at 29; *Rouvier*, 839 F. Supp. at 539; *Nacif-Borge*, 829 F. Supp. at 1213. *See also* Bail Reform Act of 1966, 18 U.S.C. §§ 3141-60 (2006).

68. *See Russell*, 805 F. 2d at 1217; *Leitner*, 784 F.2d at 161; *In re* Extradition of Sacirbegovic, 280 F. Supp. 2d 81, 88 (S.D.N.Y. 2003); *Orozco*, 268 F. Supp.2d at 1117;

Lastly, the petitioner has the burden to establish special circumstances warranting his admission to bail.[69] With these considerations in place, we now turn to the factors which courts have evaluated in ascertaining whether special circumstances supporting admission to bail in an international extradition proceeding existed.

Courts have recognized that the following factors, either individually or in unison with one or more other factors,[70] may constitute "special circumstances" so as to support admitting a putative extraditee to bail: (i) a substantial likelihood of success at the hearing;[71] (ii) availability of bail for the underlying charge in the requesting country;[72] (iii) the requesting country's allowance of admission to bail for those facing an extradition hearing for the same offense;[73] (iv) the likelihood of success in defending against the action in the requesting country;[74] (v) a delayed extradition hearing;[75] (vi) a severe health

---

Hababou, 82 F. Supp.2d at 352; *Rovelli*, 977 F. Supp. at 568; *Sutton*, 898 F. Supp. at 696; *In re* Extradition of Siegmund, 887 F. Supp. 1383, 1387 (D. Nev. 1995); *Rouvier*, 839 F. Supp. at 541; *Tang Yee-Chun*, 657 F. Supp. at 1272. *Cf. Salerno*, 878 F.2d at 318 ("[Petitioner] contends that because he is not a flight risk, he is entitled to bail pending the appeal of the denial of his petition for a writ of habeas corpus. That is not the criteria for release in an extradition hearing.") (citation omitted).

Some courts reason that "risk of flight is more in the nature of a condition precedent to going forward with any determination of the existence of 'special circumstances' that could overcome the presumption against bail." *Molnar*, 182 F. Supp. 2d at 687. *See In re* Extradition of Valles, No. M-02-008, 2002 Dist. LEXIS 26710, at * 3 (S.D. Tex. 2002); United States v. Taitz, 130 F.R.D. 442, 445 (S.D. Cal. 1990). Other courts have found that "the best approach first explores special circumstances, and then, only after a finding of special circumstances examines risk of flight." *Nacif-Borge*, 829 F. Supp. at 1216. *See also Mainero*, 950 F. Supp. at 295; *Morales*, 906 F. Supp. at 1373; *Rouvier*, 839 F. Supp. at 542.

69. *See Molnar*, 182 F. Supp. 2d at 686; *Morales*, 906 F. Supp. at 1373; *Taitz*, 130 F.R.D. at 444. Some courts have noted that the putative extraditee must establish special circumstances by clear and convincing evidence. *See In re* Extradition of Gonzalez, 52 F. Supp. 2d 735 (W.D. La. 1999); *Mainero*, 950 F. Supp. at 294; *Nacif-Borge*, 829 F. Supp. at 1215. *See generally* Hall, *supra* note 1, at 616 ("[B]ecause extradition defendants often have a demonstrated propensity to flee, and because the relevant proof is generally more accessible to defendants, the burden of proof in bail decisions in international extradition cases is properly on the accused.").

70. *See Sacirbegovic*, 280 F. Supp. 2d at 88; *Orozco*, 268 F. Supp. 2d at 1117; *Molnar*, 182 F. Supp. 2d at 689; *Nacif-Borge*, 829 F. Supp. at 1216; *Sidali*, 868 F. Supp. at 658.

71. *See* United States v. Liu Kin-Hong, 83 F.3d 523, 524-25 (1st Cir. 1996); *Salerno*, 878 F.2d at 317; *Mironescu*, 296 F. Supp. 2d at 634-35; *Sacirbegovic*, 280 F. Supp.2d at 88; *Gonzalez*, 52 F. Supp. 2d at 735; *Mainero*, 950 F. Supp. at 294; *Sidali*, 868 F. Supp. at 658; *Rouvier*, 839 F. Supp. at 542; *Nacif-Borge*, 829 F. Supp. at 1216.

72. *See Gonzalez*, 52 F. Supp. 2d at 736; *Morales*, 906 F. Supp. at 1376-77; *Nacif-Borge*, 829 F. Supp. at 1221. Some courts, however, have rejected the argument that the availability of bail for the underlying charge in the requesting country can ever constitute a special circumstance warranting the grant of bail. *Sacirbegovic*, 280 F. Supp. 2d at 87; *Orozco*, 268 F. Supp. 2d at 1117; *Sutton*, 898 F. Supp. at 695; *Siegmund*, 887 F. Supp. at 1386; *Rouvier*, 839 F. Supp. at 540-41.

73. *See Taitz*, 130 F.R.D. at 446-47.

74. *See In re* Extradition of Bowey, 147 F. Supp. 2d 1365, 1368 (N.D. Ga. 2001).

75. *See Liu Kin-Hong*, 83 F.3d at 524; United States v. Williams, 611 F.2d 914, 915 (1st Cir. 1979); *Morales*, 906 F. Supp. at 1375.

problem;[76] (vii) probable lengthy delay as a result of the extradition proceeding itself and appeals therefrom;[77] and (viii) the age of the extraditee and availability of a suitable detention facility.[78] Conversely, courts have ruled that the following factors or conditions do not constitute special circumstances in support of admission to bail: (i) American citizenship;[79] (ii) the pendency of naturalization proceedings;[80] (iii) the desire to take the dental board examination;[81] (iv) providing service as a medical doctor;[82] (v) the discomfort of jail;[83] (vi) political status;[84] (vii) the need for a special diet on account of having only one kidney and associated health concerns;[85] (viii) an offer to compromise the underlying charge in the requesting country;[86] (ix) the need to consult with counsel about the extradition proceeding;[87] (x) pending civil or criminal litigation (whether or not related to the extradition proceeding);[88] (xi) availability of electronic monitoring;[89] and (xii) the failure of the requesting

76. *See Salerno*, 878 F.2d at 317; *Rouvier*, 839 F. Supp. at 541-42; *In re* Extradition of Hamilton-Byrne, 831 F. Supp. 287, 290-91 (S.D.N.Y. 1993); *Nacif-Borge*, 829 F. Supp. at 1217. The poor health of a member of the putative extraditee's family was held not to be a special circumstance. Lo Duca v. United States, No. CV-95-713, 1995 U.S. Dist. WL 428636, at *16 (E.D.N.Y. July 7, 1995).

77. *See In re* Extradition of Kirby, 106 F.3d 855, 863 (9th Cir. 1996); *Taitz*, 130 F.R.D. at 445-46; *Sutton*, 898 F. Supp. at 695.

78. *See* Hu Yau-Leung v. Soscia, 649 F.2d 914, 920 (2d Cir. 1981); *cf. In re* Extradition of Sidali, 868 F. Supp. 656, 658 (D.N.J. 1994) ("Here, we are not dealing with a juvenile . . . and, unfortunately or not, the United States contains a proliferation of suitable federal prison facilities for adult detainees.").

79. *See* Martin v. Warden, 993 F.2d 824, 827-28 (11th Cir. 1993); *In re* Extradition of Sacirbegovic, 280 F. Supp. 2d 81, 84 (S.D.N.Y. 2003).

80. *See In re* Extradition of Orozco, 268 F. Supp. 2d 1115, 1117 (D. Ariz. 2003).

81. *See id.*

82. *See In re* Extradition of Heilbronn, 773 F. Supp. 1576, 1581-82 (W.D. Mich. 1991).

83. *See* Borodin v. Ashcroft, 136 F. Supp. 2d 125, 131 (E.D.N.Y. 2001); *In re* Klein, 46 F.2d 85 (S.D.N.Y. 1930).

84. *See Borodin*, 136 F. Supp. 2d at 131.

85. *See In re* Extradition of Nacif-Borge, 829 F. Supp. 1210, 1216-17 (D. Nev. 1993).

86. *See id.* at 1218.

87. *See In re* Extradition of Smyth, 976 F.2d 1535, 1535-36 (9th Cir. 1992); *In re* Extradition of Russell, 805 F.2d 1215, 1217 (5th Cir. 1986); *In re* Extradition of Rovelli, 977 F. Supp. 566, 569 (D. Conn. 1997); United States v. Hills, 765 F. Supp. 381, 388 (E.D. Mich. 1991); *In re* Extradition of Koskotas, 127 F.R.D. 13, 18 (D. Mass. 1989); United States v. Tang Yee-Chun, 657 F. Supp. 1270, 1272 (S.D.N.Y. 1987); United States v. Messina, 566 F. Supp. 740, 743 (E.D.N.Y. 1983).

88. *See Russell*, 805 F.2d at 1217; Hababou v. Albright, 82 F. Supp. 2d 347, 351-52 (D.N.J. 2000); *Rovelli*, 977 F. Supp. at 569; *Hills*, 765 F. Supp. at 387; *Koskotas*, 127 F.R.D. at 18. *But see In re* Extradition of Bowey, 147 F. Supp. 2d 1365, 1368 (N.D. Ga. 2001) ("[T]he civil proceedings in Cobb County Superior Court are directly related to the reasons for [petitioner's] extradition and the resolution of the issues in that matter could directly affect the prosecution of the charges he faces in France."); *In re* Mitchell, 171 F. 289, 289-90 (S.D.N.Y. 1909) (need to engage in "free consultation in the conduct of the civil suit upon which [extraditee's] whole fortune depend[ed]" constituted special circumstances warranting his release on bail).

89. *See Rovelli*, 977 F. Supp. at 569; *Hills*, 765 F. Supp. at 389.

country to provide the putative extraditee with credit on his or her sentence for time served in American custody.[90]

D. A Bump on the Road

The federal common law regarding bail in foreign extradition matters evolved within the framework of the special circumstances test discussed above until the Ninth Circuit decided *Parretti v. United States.*[91] In *Parretti*, the court held, in part, that Parretti's detention without bail before his extradition hearing, after the district court had determined that he did not pose a risk of flight, violated his right to due process under the Fifth Amendment.[92] Although that opinion subsequently was withdrawn by the Ninth Circuit sitting en banc when it applied the fugitive disentitlement doctrine, the panel's treatment and analysis of the bail issue may influence the decisions of judges or magistrates in the future on this question, and thus, merits discussion here.[93]

In *Parretti*, the circuit court began its discussion by recognizing that the district court had not abused its discretion when it determined that petitioner

90. *See In re* Extradition of Kirby, 106 F.3d 855, 863 (9th Cir. 1986).

91. 122 F.3d 758 (9th Cir. 1997), *appeal dismissed on other grounds*, 143 F.3d 508 (9th Cir.) (en banc), *cert. denied*, 525 U.S. 877 (1998). An earlier version of the *Parretti* opinion is found at 112 F.3d 1363 (9th Cir. 1997). Given the court's en banc ruling, the panel decision has no precedential value. *See In re* Extradition of Kyung Joon Kim, No. CV 04-3886, 2004 U.S. Dist. LEXIS 12244, at *3 n.1 (C.D. Cal. July 1, 2004) (recognizing that the earlier *Parretti* opinion "is not the law in th[e] [Ninth] Circuit.").

92. *Parretti*, 122 F.3d at 781. In *Parretti,* petitioner, an Italian citizen, was arrested pursuant to a provisional arrest warrant under the extradition treaty between the United States and France. *Id.* at 761. The warrant was based on the complaint of an Assistant U.S. Attorney acting on behalf of the French government. *Id.* The complaint alleged that petitioner had been charged in an arrest warrant issued in France with various business-related crimes, that the crimes were extraditable offenses under the treaty, and that France had requested petitioner's provisional arrest. *Id.*

Following his arrest, petitioner argued at his bail hearing and his habeas petition that the provisional warrant violated the Fourth Amendment on two grounds. First, it was not based on any evidence that he had committed any of the offenses with which he had been charged in the French warrant. *Id.* Secondly, petitioner maintained that the magistrate judge had failed to make a probable cause determination. *Id.* at 762. The district court denied the petition and, on appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding that the government had failed to make the necessary evidentiary showing of probable cause to believe that petitioner had committed an extraditable crime. *Id.* at 766. The court also ruled that detention without bail violated petitioner's due process rights under the Fifth Amendment. *Id.* at 763-81.

93. *See* Parretti v. United States, 143 F.3d 508 (9th Cir.) (en banc), *cert. denied*, 525 U.S. 877 (1998). The fugitive disentitlement doctrine establishes that a "fugitive from justice may not seek relief from the judicial system whose authority he or she evades." Martha B. Stolley, Note, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY, 751, 752 (1997) (footnote omitted). Equitable in nature, *see In re* Prevot, 1995 FED App. 0212P (6th Cir.), the doctrine has been applied in criminal and civil cases, at both the trial and appellate levels. *See* Pesin v. Rodriguez, 244 F.3d 1250, 1252 (11th Cir. 2001).

had not established special circumstances warranting his admission to bail.[94] But that was not the end of the inquiry, for Parretti argued that even if special circumstances were not present, denying him admission to bail, absent a finding of risk of flight or danger to the community, violated his right to due process under the Fifth Amendment.[95]

In responding to this argument, the court preliminarily noted that *Wright* and its progeny had not foreclosed the due process argument that *Parretti* presented.[96] It then turned to the heart of the government's contention -- that "its interest in fulfilling [its] obligations under extradition treaties [wa]s sufficiently compelling to justify pre-hearing detention regardless of how slight the risk that the detainee will jump bail and make it impossible to deliver him to the requesting government."[97] The court found that the interest, while weighty, was not "materially different from and greater than [the government's] interest in the enforcement of our own criminal laws."[98] In that regard, the only governmental interest generally deemed sufficient to justify pre-hearing detention absent risk of flight was protection of community safety.[99] But the government had not presented a public safety argument, and the court rejected the contention that a comparable interest could be found "in avoiding the risk of being unable to carry out its treaty obligations, however attenuated that risk may be."[100] In its ruling, the court made clear that it was addressing the issue of bail prior to a finding of extraditability.[101]

---

94. *Parretti*, 122 F.3d at 777. Parretti had argued that the following four special circumstances warranted his admission to bail: (i) he was likely to succeed at the extradition hearing; (ii) his detention interfered with his ability to participate in civil suits in which he was engaged; (iii) his detention impacted his health; and (iv) France had not sought his extradition while he was in Italy. *Id.*

95. *Id.*

96. *Id.* at 778 ("[T]he government contends that it cannot be presumed that this court's and the Supreme Court's earlier decisions ignored due process concerns in adopting and applying the 'special circumstances' standard . . . . Not surprisingly, the government cites no authority in support of this startling proposition.") (internal quotation marks omitted).

97. *Id.*

98. *Id.* at 779. The court observed:

> In the last analysis, the purpose of extradition treaties is to strengthen our hand in enforcing our laws through the cooperation of other countries in apprehending fugitives. Yet the government implicitly argues that the law enforcement interest served by extradition treaties is somehow different from and greater than its interest in enforcing our domestic laws. The government fails to suggest any difference, and we can fathom none.

Id.

99. *Id.*

100. *Id.* at 780 (footnote omitted).

101. *Id.* ("Our holding is a limited one: until such time as an individual is found to be extraditable, his or her Fifth Amendment liberty interest trumps the government's treaty interest unless the government proves to the satisfaction of the district court that he or she is a flight risk.") *See In re* Extradition of Campillo Valles, 36 F. Supp. 2d 1228, 1229 (S.D. Cal. 1998) (applying *Parretti* and holding that petitioner was not entitled to bail because he posed a risk of flight and was a danger to the community).

Since the Ninth Circuit's withdrawal of the panel decision in *Parretti*, there have been several opinions from magistrates granting bail in international extradition proceedings.[102] In those cases, special circumstances were found to be present; therefore, there was no need to consider whether, absent the presence of such circumstances and a risk of flight, it would have been a violation of due process not to admit petitioners to bail.[103]

It is reasonable to assume, however, that the due process argument employed by the panel in *Parretti* has been, and will continue to be, made by putative extraditees in international extradition proceedings. In evaluating a due process challenge, at least two points must be considered. First, in *Wright*, the petitioner maintained that denial of access to bail "constitute[d] a deprivation of liberty without due process of law."[104] Therefore, an argument can be made that the Court at least implicitly rejected that contention when it upheld the denial of the bail application.[105] Second, detention in international extradition proceedings is not intended to be punitive;[106] rather, it is designed to protect the government's weighty interests in fulfilling its treaty obligations.[107]

---

102. *See, e.g., In re* Extradition of Bowey, 147 F. Supp. 2d 1365 (N.D. Ga. 2001) (no risk of flight or danger to community; need to participate in divorce proceeding directly related to extradition; likelihood of success in defending against criminal action in requesting country); *In re* Extradition of Gonzalez, 52 F. Supp. 725 (W.D. La. 1999) (no risk of flight; substantial likelihood of success at extradition hearing because identification evidence lacked indicia of reliability). *See also In re* Extradition of Valles, No. M-02-008, 2002 U.S. Dist. LEXIS 26711, at *4-5 (S.D. Tex. Sept. 16, 2002) (alluding to factors identified in a decision by the Board of Immigration Appeals).

103. *See Valles*, 2002 U.S. Dist. LEXIS 26711, at *4-5.

104. Wright v. Henkel, 190 U.S. 40, 43 (1903).

105. The *Parretti* panel concluded that while the issue of due process may have "lurk[ed] in the record," it was not ruled upon by the Court. Parretti v. United States, 122 F.3d 758, 778 (9th Cir. 1997) (internal quotation marks omitted).

106. *See* United States v. Salerno, 481 U.S. 739, 747 (1987) ("Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it.]'") (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

107. *See In re* Extradition of Orozco, 268 F. Supp. 2d 1115, 1116-17 (D. Ariz. 2003); Hababou v. Albright, 82 F. Supp. 2d 347, 352 (D.N.J. 2000); United States v. Hills, 765 F. Supp. 381, 384-85 (E.D. Mich. 1991). As explained by one commentator:

> When a requesting nation has followed the procedures prescribed by an extradition treaty and the accused is found to be extraditable, the United States has a substantial interest in surrendering him in compliance with the treaty. First, the United States has a clear interest in ridding itself of foreign criminals, especially since extradition is normally used only for those charged with, or convicted of, serious, often violent, crimes. Without a reliable extradition practice, the United States would risk becoming a haven for such dangerous international fugitives.
>
> Perhaps a more important reason for the United States to extradite in compliance with its extradition treaties is the likely reciprocal consequences of noncompliance. If the United States fails to deliver a bona fide extraditee, it will breach its obligation under international law. In response, the aggrieved nation

E. Judicial Review of Bail Determinations

As noted earlier, an extraditee can seek review of a ruling certifying his extraditability through a petition for a writ of habeas corpus.[108] But what about bail determination? Is the denial of bail appealable? If so, can the government also appeal the grant of bail?

Putative extraditees denied bail by a magistrate have obtained review before a district court judge by way of appeal,[109] petition for a writ of habeas corpus,[110] or through a motion seeking reconsideration of the original bail application.[111] Some courts have held that the standard for review is whether there were reasonable grounds for the magistrate's denial of bail.[112] Other courts have observed that the magistrate's decision is subject to de novo review.[113] Extraditees also have appealed a district court's denial of a request for admission to bail to the circuit court.[114]

When the government has appealed a magistrate's grant of bail to a district judge, some courts have held that a district court judge lacks jurisdiction to review that decision.[115] Other courts have permitted review by way of

---

> may reciprocate by breaching its own obligation to extradite criminals to the United States, possibly debilitating United States law enforcement in future cases. . . . Releasing an extraditee on bail, which provides an opportunity to abscond, puts this interest in treaty compliance at risk.

Hall, *supra* note 1, at 603-04 (footnotes omitted). *See Parretti*, 122 F.3d 758, 786 (9th Cir.), *appeal dismissed on other grounds*, 143 F.3d 508 (9th Cir.) (en banc), *cert. denied* 525 U.S. 877 (1998) ("The failure of a country to deliver on its promises can have many unpredictable consequences quite apart from the effects on its ability to secure the assistance of others when it is the one that desires to obtain or exercise the right to extradite.") (Reinhardt, J., concurring).

108. *See supra* note 20.

109. *See In re* Extradition of Bowey, 147 F. Supp. 1365, 1366 (N.D. Ga. 2001); *In re* Extradition of Hamilton-Byrne, 831 F. Supp. 287, 288 (S.D.N.Y. 1993); *Hills*, 765 F. Supp. at 384 n.3; United States v. Tang Yee-Chun, 657 F. Supp. 1270, 1271 (S.D.N.Y. 1987). *But see In re* Extradition of Siegmund, 887 F. Supp. 1383, 1385 (D. Nev. 1995) ("Though [petitioner] has filed what he terms an 'Appeal of Magistrate's Detention Order (Pursuant to 18 U.S.C. § 3145(b)),' . . . we can, and do, deem the document a habeas petition and proceed on the merits.").

110. *See* Borodin v. Ashcroft, 136 F. Supp. 2d 125, 128 (E.D.N.Y. 2001); *Hababou*, 82 F. Supp. 2d at 348; United States v. Bogue, No. 98-572-M, 1998 U.S. Dist. LEXIS 16784, at *1-2 (E.D. Pa. May 14, 1998); *Siegmund*, 887 F. Supp. at 1385; *In re* Extradition of Russell, 647 F. Supp. 1044, 1046-47 (S.D. Tex), *aff'd*, 805 F.2d 1215, 1216-17 (5th Cir. 1986).

111. *See* Duran v. United States, 36 F. Supp. 2d 622, 627 (S.D.N.Y. 1999); Lo Duca v. United States, No. CV-95-713 1995, WL 428636, at *15 (E.D.N.Y. July 7, 1995).

112. *See Russell*, 647 F. Supp. at 1047; Koskotas v. Roche, 740 F. Supp. 904, 918 (D. Mass. 1990), *aff'd*, 931 F.2d 169 (1st Cir. 1991).

113. *See Hills*, 765 F. Supp. at 384 n.3.

114. *See* Martin v. Warden, 993 F.2d 824, 827 (11th Cir. 1993); *In re* Extradition of Russell, 805 F.2d 1215, 1216 (5th Cir. 1986); United States v. Leitner, 784 F.2d 159, 160 (2d Cir. 1986); Magisano v. Locke, 545 F.2d 1228, 1229 (9th Cir. 1976).

115. *See In re* Extradition of Ghandtchi, 697 F.2d 1037, 1037-38 (11th Cir. 1983), *vacated as moot*, 705 F.2d 1315 (11th Cir. 1983) ("The district court properly concluded that it lacked jurisdiction to review the magistrate's decision."); *In re* Extradition of Krickemeyer, 518 F. Supp. 388, 389 (S.D. Fla. 1981) ("[S]ince the Magistrate is empowered to make final disposition of the extradition matter, the district court is not vested with the power to review the

appeal,[116] or by a motion for reconsideration of the magistrate's order.[117] At the appellate level, without discussing the source of their jurisdiction, circuit courts consistently have entertained appeals by the government from a district court's order admitting an extraditee to bail.[118] The Ninth Circuit has ruled that a district court's decision to grant bail to a putative extraditee is a "final decision" within the meaning of 28 U.S.C. § 1291, which the government may appeal.[119]

V. CONCLUSION

Generally speaking, under the Bail Reform Act, which governs conditions of release for those accused of domestic crimes, a defendant will be released on bail unless the judge determines that he poses a risk of flight or danger to the community. If a defendant poses such a risk or danger, he will still be entitled to release, if there are conditions that can ameliorate those concerns.[120] An international extradition proceeding, however, is not considered a criminal prosecution.[121] As the cases make clear, "[t]he rationale for not ordinarily granting bail in extradition cases is that extradition cases involve an overriding national interest in complying with treaty obligations."[122] The developing case law reveals that although putative extraditees have been admitted to bail,[123] the presumption against bail in international extradition

---

Magistrate's final decision. . . . An appeal, if available, would be to the court of appeals.").

116. *See Leitner*, 627 F. Supp. at 740, *aff'd*, 784 F.2d 159 (2d Cir. 1986); United States v. Messina, 566 F. Supp. 740, 741 (E.D.N.Y. 1983).

117. *See In re* Extradition of Rouvier, 839 F. Supp. 537, 542-43 (N.D. Ill. 1993).

118. *See* United States v. Liu Kin-Hong, 83 F.3d 523, 523-24 (1st Cir. 1996); In re Extradition of Smyth, 976 F.2d 1535, 1535 (9th Cir. 1992); Hu Yau-Leung v. Soscia, 649 F.2d 914, 920 (2d Cir. 1981); United States v. Williams, 611 F.2d 914, 915 (1st Cir. 1979).

119. *See In re* Extradition of Kirby, 106 F.3d 855, 858-61 (9th Cir. 1996). *See generally* Gina Barry, Note, United States v. Kirby: *The Case for Appellate Review of Grants of Bail by District Court Judges in International Extradition Cases*, 21 W. NEW ENG. L. REV. 565 (1999) (criticizing rationale in *Kirby* and arguing that collateral order doctrine provides justification for review of district court decisions granting bail in international extradition cases absent Supreme Court rule defining what constitutes a final decision or delineating categories of decisions that are immediately appealable).

120. *See* 18 U.S.C. §§ 3142(b)-(c) (2006).

121. *See In re* Extradition of Mainero, 950 F. Supp. 290, 295 (S.D. Cal. 1996).

122. Hababou v. Albright, 82 F. Supp. 2d 347, 352 (D.N.J. 2000); *accord In re* Extradition of Orozco, 268 F. Supp. 2d 1115, 1116-17 (D. Ariz. 2003); *In re* Extradition of Molnar, 182 F. Supp. 2d 684, 687 (N.D. Ill. 2002); United States v. Hills, 765 F. Supp. 381, 384-85 (E.D. Mich. 1991). As noted by the court in *In re Extradition of Sacirbegovic*, "if the accused were to be released on bond and thereafter absconded, the mere surrender of a quantity of cash or other property 'would hardly meet the international demand' and could cause the United States 'serious embarrassment.'" 280 F. Supp. 2d 81, 83 (S.D.N.Y. 2003) (quoting Wright v. Henkel, 190 U.S. 40, 62 (1903)).

123. Putative extraditees have been able to demonstrate special circumstances warranting their admission to bail in a limited number of cases. *See Kirby*, 106 F.3d at 863-65 (delay prior to hearing and afterwards, cast cloud over proceedings by district court ruling section 3184 unconstitutional, uniqueness of case in that it concerned promoting harmony between supporters and detractors of cause of Catholics in Northern Ireland); *Soscia*, 649 F.2d at 920 (petitioner's age and background and lack of suitable detention facilities); *In re* Extradition of Valles, No. M-

proceedings – either prior to or after the extradition hearing – usually carries the day.[124]

02-008, 2002 U.S. Dist. LEXIS 26711 (S.D. Tex. 2002) (alluding to factors identified in a decision by the Board of Immigration Appeals); *In re* Extradition of Bowey, 147 F. Supp. 2d 1365 (N.D. Ga. 2001) (no risk of flight or danger to community; need to participate in divorce proceeding directly related to extradition; likelihood of success in defending against criminal action in requesting country); *In re* Extradition of Gonzalez, 52 F. Supp. 725, 736 (W.D. La. 1999) (no risk of flight; substantial likelihood of success at extradition hearing because identification evidence lacked indicia of reliability); *In re* Extradition of Morales, 906 F. Supp. 1368, 1375-77 (S.D. Cal. 1995) (no risk of flight or danger to community; petitioner in custody for seven months and proceedings likely to be protracted; bail available for similarly situated putative extraditee in requesting country); *In re* Extradition of Nacif-Borge, 829 F. Supp. 1210, 1221-22 (D. Nev. 1993) (availability of bail for the underlying offense in requesting country; no risk of flight or danger to the community); United States v. Taitz, 130 F.R.D. 442 (S.D. Cal. 1990) (no risk of flight or danger to community; complex case involving 434 counts of fraud; health issues; impact on religious practices; requesting country's law allowed bail for one facing extradition); *In re* Mitchell, 171 F. 289, 290 (S.D.N.Y. 1909) (petitioner's need to consult with counsel in civil case involving his "whole fortune").

In cases involving provisional arrest warrants, some courts have applied a more liberal standard when ascertaining whether special circumstances are present. *See Molnar*, 182 F. Supp. 2d at 689 (combination of factors: financial assistance petitioner provided to mother abroad, possible delay in the initiation of formal proceedings, fact that charges in requesting country initially dropped and then reinstated, petitioner had never been a fugitive, and willingness of friends to post home as security). In some cases, when a putative extraditee already has been admitted to bail in connection with a parallel deportation proceeding, bail has been granted in the extradition matter as well. *See* Shapiro v. Ferrandina, 355 F. Supp. 563, 566 (S.D.N.Y.), *aff'd*, 478 F.2d 894 (2d Cir. 1973); Artukovic v. Boyle, 107 F. Supp. 11, 14 (S.D. Cal. 1952), *rev'd*, 211 F.2d 565 (9th Cir. 1953).

124. *See* United States v. Liu Kin-Hong, 83 F.3d 523, 524-25 (1st Cir. 1996); Martin v. Warden, 993 F.2d 824, 827-28 (11th Cir. 1993); *In re* Extradition of Smyth, 976 F.2d 1535, 1536 (9th Cir. 1992); Salerno v. United States, 878 F.2d 317, 317-18 (9th Cir. 1989); *In re* Extradition of Russell, 805 F.2d 1215, 1216-17 (5th Cir. 1986); United States v. Leitner, 784 F.2d 159, 160-61 (2d Cir. 1986); United States v. Williams, 611 F.2d 914, 914-15 (1st Cir. 1979); *In re* Extradition of Mironescu, 296 F. Supp. 2d 632, 634 (M.D.N.C. 2003); *Sacirbegovic*, 280 F. Supp. 2d at 86-88; *Orozco*, 268 F. Supp. 2d at 1117; Borodin v. Ashcroft, 136 F. Supp. 2d 125, 132 (E.D.N.Y. 2001); *Hababou*, 82 F. Supp. 2d at 351-52; Duran v. United States, 36 F. Supp. 2d 622, 627-28 (S.D.N.Y. 1999); United States v. Bogue, No. 98-572-M, 1998 U.S. Dist. LEXIS 16784, at *11-12 (E.D. Pa. May 14, 1998); In re Extradition of Rovelli, 977 F. Supp. 566, 569 (D. Conn. 1997); *Mainero*, 950 F. Supp. at 293-96; Lo Duca v. United States, No. CV-95-713, 1995 WL 428636, at *15-16 (E.D.N.Y. July 7, 1995); *In re* Extradition of Sutton, 898 F. Supp. 691, 694-96 (E.D. Mo. 1995); In re Extradition of Siegmund, 887 F. Supp. 1383, 1385-87 (D. Nev. 1995); *In re* Extradition of Sidali, 868 F. Supp. 656, 657-59 (D.N.J. 1994); *In re* Extradition of Rouvier, 839 F. Supp. 537, 539-43 (N.D. Ill. 1993); *In re* Extradition of Hamilton-Byrne, 831 F. Supp. 287, 290-91 (S.D.N.Y. 1993); *In re* Extradition of Heilbronn, 773 F. Supp. 1576, 1581-82 (W.D. Mich. 1991); *Hills*, 765 F. Supp. at 386-89; United States v. Tang Yee-Chun, 657 F. Supp. 1270, 1272 (S.D.N.Y. 1987); United States v. Messina, 566 F. Supp. 740, 745 (E.D.N.Y. 1983); In re Klein, 46 F.2d 85 (S.D.N.Y. 1930).

LAW AND INVESTMENT IN PALAU: A BRIEF OVERVIEW FOR PROSPECTIVE FOREIGN INVESTORS

Colin P.A. Jones*

INTRODUCTION

The Republic of Palau[1] (ROP) is an island nation located in the Northern Pacific, roughly between Guam and the Philippines. With a population of approximately 18,000, it is one of the world's smallest and newest independent nations,[2] yet it has acquired the status of a highly-regarded tourist destination and is considered one of the world's great diving locations.[3] In addition to being a premier diving destination, Palau's unspoiled beauty and rich marine environment, especially the unique Rock Islands (which include the famous Jellyfish Lake, a marine lake populated by the only non-stinging jellyfish in the world), have ensured Palau a small but steady stream of tourist visitors. The popular reality television program "Survivor" recently featured Palau,[4] indicating that tourism is a trend that can be expected to continue and expand. Palau's rich marine resources also provide it with an additional basis for economic development.

Currently, a core element of Palau's economy is the approximately $20 million in aid the country receives annually from the United States.[5] This aid funds much of Palau's government, which is the country's main employer, and accounts for a significant portion of Palau's $5000 per capita GNP.[6] Since the aid is scheduled to terminate in 2009, the country is seeking new avenues of

---

*Associate Professor, Doshisha University Law School (Kyoto). The author is a member of the bars of New York, Guam, and Palau, and is deeply grateful for the comments and other assistance in writing this article received from Jerry Marugg, Palauan lawyer and past president of the Palau Bar Association. For Akiko, with love.

1. "Belau" in the Palauan language. THE BOOK OF RULE: HOW THE WORLD IS GOVERNED 286 (Dorling Kindersly, Ltd. 2004) [hereinafter THE BOOK OF RULE].

2. EAST WEST CTR., BANK OF HAW., REPUBLIC OF PALAU ECONOMIC REPORT APRIL 2003, at 3 (2003). Palau became an independent nation in 1994. *Id.*

3. NEIL M. LEVY, MOON HANDBOOKS, MICRONESIA HANDBOOK 150 (5th ed. 2003).

4. *See, e.g.*, CBS Broad., Inc., *Meet 'Survivor: Palau' Cast*, (Jan. 13, 2005) http://www.cbsnews.com/stories/2005/01/13/earlyshow/series/survivor/main666612.shtml?CMP=ILC-SearchStories.

5. Richard Paddock, *Palau Is Going to Have to Learn to Say No*, SEATTLE TIMES, Apr. 14, 2006, at A3.

6. THE BOOK OF RULE, *supra* note 1, at 286. *See also* GEOGRAPHICA'S POCKET WORLD REFERENCE 540 (Laurel Glen 2000). More recent accounts give Palau a per capita income of $6870, "one of the highest in the Pacific Ocean region." *Neighbors Seduced by Oceans of Cash*, SEATTLE TIMES, Apr. 14, 2006, at A3.

development to maintain, if not improve, its current economic situation.[7]

A combination of factors makes Palau an interesting study: it is a small nation using its legal system to foster economic development through foreign investment while simultaneously preserving its cultural and economic heritage from domination by foreign interests. The purpose of this Article is to provide a brief overview of some of the salient features of Palau's legal system that may be of interest to prospective investors, focusing on the country's Foreign Investment Act.[8]

HISTORY

Palau is a group of islands in the Micronesian region of the Pacific Ocean southeast of the Philippines. It is believed to have been inhabited for several thousand years, but it had limited contact with European countries until the islands were declared a part of Spain's Pacific empire in the late 19th century.[9] Spain then sold the islands, along with most of its other Micronesian possessions, to Germany during the course of peace negotiations with America following its victory in the Spanish-American war of 1898. This resulted in the United States assuming dominion over the Philippines and Guam.[10] Germany's presence in the Pacific only lasted until World War I, when the League of Nations awarded Japan a mandate over Palau and most of the other German possessions in Micronesia. Palau and most of Micronesia effectively became a Japanese colony, referred to as the *Nan'yo*, and remained such until the end of World War II.[11]

Palau assumed a central importance in the Japanese mandate, and Koror,

---

7. Paddock, *supra* note 5, at A3.

8. Foreign Investment Act, 28 P.N.C. §§ 101-21.

9. THE BOOK OF RULE, *supra* note 1, at 286. Palau's first significant encounter with the West was probably in 1783 when a British ship hit a reef near the Rock Islands. The ship's crew spent several months with the Palauans, who helped them build a new ship. When the British departed, Lebuu, the son of High Chief Ibedul, went with them to England where he attended school, but died of smallpox a few months after arrival. Smallpox was an unfortunate result of Western contact with Palau, which had lost up to ninety percent of its population to the disease by the end of the 19th century. Elizabeth Basset, Palau, http://www.mnsu.edu/emuseum/cultural/oldworld/pacific/palau.html. *See also* NANCY BARBOUR, PALAU 35-36 (Mitchell P. Warner ed., 1995).

10. OFFICE OF COURT COUNSEL, SUPREME COURT OF THE REPUBLIC OF PALAU, THE QUEST FOR HARMONY A PICTORIAL HISTORY OF LAW AND JUSTICE IN THE REPUBLIC OF PALAU 9 (1995) [hereinafter THE QUEST FOR HARMONY].

11. For a history of Japanese involvement in Micronesia, see generally MARK PEATTIE, NAN'YO: THE RISE AND FALL OF THE JAPANESE IN MICRONESIA, 1885-1945 (1988). For a discussion of the German empire in the Pacific, see DIRK H.R. SPENNEMAN, AURORA AUSTRALIS; THE GERMAN PERIOD IN THE MARIANA ISLANDS (1999), RUDOLF VON BENNIGSEN, THE GERMAN ANNEXATION OF THE CAROLINE, PALAU & MARIANA ISLANDS (Dirk. Spennemann trans., 2003). HERMANN JOSEPH HIERY, THE NEGLECTED WAR: THE GERMAN SOUTH PACIFIC AND THE INFLUENCE OF WORLD WAR I (1995). While it is not uncommon for writers to refer to them as being part of the "South Pacific," Palau and most of the other Micronesian islands are located above the Equator.

Palau's previous capital, became the administrative center of Japan's empire in Micronesia.[12] In addition, a pre-war Japanese government policy of encouraging Japanese citizens to migrate to the *Nan'yo* rendered Palau's indigenous people a minority population by the eve of World War II.[13] As a result, a noticeable Japanese influence is evident in Palau today despite decades of post-war American influence. For example, first and last names of Japanese origin abound among Palauans, and Japanese is an official language of Angaur, one of Palau's island states.[14] The Palauan words for utilities, which the Japanese introduced, such as telephones and electricity, are derived from their Japanese terms. The *tochi daicho*, a land survey conducted by the Japanese in the 1930s, is still referenced in land disputes as evidence of historical claims of ownership, and knowledge of its significance is critical to understanding modern Palauan property law and passing the Palau bar exam.[15] The Palauan courthouse, the national legislature building, and several other government buildings were originally built by the former Japanese government.[16]

Palau suffered heavily in World War II, particularly the islands of Peleliu and Angaur, which are now states. The civilian populations of the islands were completely evacuated, and the islands became the scenes of prolonged and bloody amphibious battles when they were invaded by U.S. forces in the fall of 1944.[17] Even today, Palauan courts accord less evidentiary value to *tochi daicho* listings for land in Peleliu and Angaur than in other states, partially due to the destruction and population displacement suffered by the two islands during the war.[18]

With Japan's defeat in World War II, Palau and many of Japan's other island possessions became part of the United Nations-mandated "Trust

---

12. PEATTIE, *supra* note 11, at 170. In fall of 2006, as mandated in Article XIII, Section 11 of the Palauan Constitution, the constitution the capital was relocated to the Northern island of Badeldaob. *See, e.g.*, Mike Leidemann, *Pride in Palau for New Capitol*, THE HONOLULU ADVERTISER (Nov. 12, 2006), available at http://the.honoluluadvertiser.com/article/2006/Nov/12/il/FP611120310.html (last visited January 16, 2007).

13. PEATTIE, *supra* note 11, at 157-60.

14. CIA World Factbook, http://www.cia.gov/cia/publications/factbook/geos/ps.html (last visited Oct. 30, 2006).

15. PEATTIE, *supra* note 11, at 96-100. Although the bar exam in Palau includes a local law essay component that includes questions regarding the *tochi daicho* and other unique aspects of the country's legal system, it otherwise relies completely on the multi-state bar examination components used throughout the United States.

16. *See, e.g.*, ARNOLD H. LEIBOWITZ, EMBATTLED ISLAND PALAU'S STRUGGLE FOR INDEPENDENCE 112 (1996).

17. *See* JIM MORAN & GORDON ROTTMAN, PELELIU 1944 THE FORGOTTEN CORNER OF HELL 15 (2002). For an excellent study of the Micronesian experience of the Pacific War, see LIN POYER, SUZANNE FALGOUT, LAURENCE MARSHALL CARUCCI, THE TYPHOON OF WAR (2001).

18. *See, e.g.* Orak v. Temael, 10 ROP 105 (2003). "A listing of ownership in the Tochi Daicho is presumed to be accurate, and a party seeing [sic] to rebut that listing must present the Land Court with 'especially clear and convincing evidence.'" *Id.* at 108 (citing Llecholch v. Lawrence, 8 ROP Intrm 24, 24 (1999)). *See also* PEATTIE, *supra* note 11, at 298.

Territory of the Pacific Islands" (TTPI), which was administered by the United States until Palau's formation as an independent nation.[19] The United States and the U.N. Security Council administered TTPI under a trusteeship agreement.[20] The agreement gave the United States a broad scope of authority, including full powers of administration, legislation, and jurisdiction over the entire territory, as well as the right (currently not exercised) to maintain military bases and close off certain areas for security reasons. The TTPI was initially administered by the U.S. Navy, which established a system of courts and other governmental institutions.[21] In 1951, administrative responsibility for the TTPI shifted to the U.S. Department of the Interior.[22] Palau adopted its constitution in 1981 and became independent in 1994, though it remains heavily dependent upon the United States for aid, uses the American dollar as its currency, and has a United States zip code (96940).[23]

CONSTITUTION, GOVERNMENT, AND SOURCES OF LAW

Despite its small size and population, Palau uses a federal system with sixteen states whose national government retain all powers not expressly delegated to the individual state governments by the Constitution of the Republic of Palau.[24] The national government is comprised of an executive, legislative, and judicial branch. The Executive branch is headed by an elected president who serves for a maximum of two four-year terms.[25] The president is assisted by a vice president and advised by a Council of Chiefs from each of the states regarding "matters concerning traditional laws, customs and their relationship to this Constitution and the laws of Palau."[26]

---

19. Saipan, Tinian, Rota, and the other Marianas islands combined to form the Commonwealth of the Northern Mariana Islands (a U.S. territory). The Caroline Islands (including Chuk, Pohnpei, Yap, and Kosrae) formed the Federated States of Micronesia, and the Marshall Islands became the Republic of the Marshall Islands. THE BOOK OF RULE, *supra* note 1, at 155, 284.

20. Robert J. Stewart, *The Legal System of Micronesia*, *in* MODERN LEGAL SYSTEMS CYCLOPEDIA VOLUME 2 § 2.120.14 (Kenneth R. Redden ed., 1989).

21. THE QUEST FOR HARMONY, *supra* note 10, at 22-32.

22. *Id.* at 33-45.

23. THE BOOK OF RULE, *supra* note 1, at 286. One of the reasons for the significant lag between the adoption of a constitution and actual independence was the difficulty in resolving the conflict between the new constitution's ban of nuclear and other weapons of mass destruction in Palau and the use of Palauan territory by the U.S. military envisioned in the Compact of Free Association between Palau and the United States. Since the implementation of the Compact was effectively a precondition to Palauan independence, resolution of this conflict, and independence, required a prolonged process including several plebiscites as well as a constitutional amendment. *See* THE QUEST FOR HARMONY, *supra* note 10, at 74-79. *See also* CONST. OF THE REPUBLIC OF PALAU art. XIII, § 6, amend. 1. *See also* The Compact of Free Association, 48 U.S.C. §§ 1931-1962 (2006).

24. CONST. OF THE REPUBLIC OF PALAU art. XI, § 2.

25. *Id.* art. VIII.

26. *Id.* art. VIII, §§ 2, 6.

The legislative branch, the *Olbiil Era Kelulau* (OEK), is a bicameral body comprised of the House of Delegates, to which each state elects a representative, and the Senate, which is elected based on proportional representation.[27] The OEK is vested with a broad range of legislative powers similar to those of the U.S. Congress, including the power of impeachment and a catch-all powers granted by a U.S.-style "necessary and proper" clause.[28]

Under the Palauan constitution, the judiciary consists of a Supreme Court, a National Court, and other courts of limited jurisdiction that the OEK may establish.[29] The judicial power extends to "all matters in law and equity."[30] With the National Court currently inactive, the principal court of general jurisdiction is the Supreme Court, which consists of a trial division and an appellate division.[31] Since the same justices serve in both divisions, the constitution prohibits a justice from sitting on an appellate panel hearing a case at which he or she presided over at the trial level.[32] The president, the vice president, and all members of the OEK must be Palauan citizens and reside in Palau for at least five years prior to election; however, the constitution requires that members of the judiciary only be "admitted to practice law before the highest court of a state or country in which he is admitted to practice for at least five (5) years preceding his appointment."[33] This reflects Palau's continuing need to import trained legal professionals for the judiciary and other government positions requiring legal expertise; the country does not have a university, let alone a law school. Justices of the Palauan Supreme Court hold their respective offices "during good behavior" and are appointed by a judicial nominating commission comprised of the chief justice, members of the bar, and Palauan citizens selected by the president.[34]

The ROP constitution appears to have been modeled after the U.S. Constitution. The federal structure and constitutional provisions for the separation of power among the three branches of government will be quite familiar to a lawyer trained in the United States. Similarly, the fundamental rights enumerated in Article IV of the ROP Constitution correspond roughly to those contained in the U.S. Bill of Rights, with the notable exception of the second amendment: Palau's Constitution specifically *denies* any individual the right to possess firearms.[35] At the same time, however, Palau's constitutional drafters also learned from the American experience; the Constitution deals

27. *Id.* art. IX.
28. *Id.* art. IX, § 5.
29. *Id.* art. X.
30. *Id.* art. X, § 5.
31. Office OF COURT COUNSEL, SUPREME COURT OF THE REPUBLIC OF PALAU, THE WISDOM OF THE PAST, A VISION FOR THE FUTURE THE JUDICIARY OF THE REPUBLIC OF PALAU 1, 5 (2001) [hereinafter THE WISDOM OF THE PAST].
32. CONST. OF THE REPUBLIC OF PALAU art. X, § 2.
33. *Id.* art. X, § 8.
34. *Id.* art. X, §§ 7, 9.
35. *Id.* art. IV; art. XIII, §§ 12-13.

clearly with issues that have been the subject of serious constitutional debate in the United States. For example, while the Constitution forbids the creation of a national religion, it specifically permits government support for parochial schools on a non-discriminatory basis for non-religious purposes.[36] Also, while the federal government is prohibited from most types of discrimination, it is specifically allowed to accord preferential treatment to citizens of Palau and to enact discriminatory laws and policies where such are necessary "for the protection of minors, elderly, indigent, physically or mentally handicapped and other similar groups, and in matters concerning intestate succession and domestic relations."[37]

A number of sources of law other than the Constitution exist in Palau. Statutory sources include the Palauan National Code (PNC), which contains the post-independence national legislation, state legislation, as well as the TTPI-era Palau District Code and Trust Territory Code.[38] Because of its long history as a de facto U.S. territory, Palau remains heavily dependent upon the United States as a source of law and a source of legal professionals. As a result, Palau's judiciary is comprised of lawyers trained in the United States, including non-Palauan nationals.[39] American-trained lawyers also serve in other branches of the Palauan government.

Another sign of Palau's dependence upon the United States within the legal sphere is its almost wholesale adoption of U.S. common law principles. This is accomplished through a provision in the PNC stating that, in the absence of otherwise applicable statutory or customary law, "[t]he rules of the common law, *as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States,* shall be the rules of decision in the courts of the Republic."[40] In addition to common law rules, Palau's courts

---

36. *Id.* art. IV, § 1.

37. *Id.* art. IV, § 5.

38. Stewart, *supra* note 20, at § 2.180.4, § 1.4(B). The constitution specifies that laws predating it remain in force until repealed, revoked, amended, or expired. CONST. OF THE REPUBLIC OF PALAU art. XV, § 3(a).

39. *See, e.g.*, THE WISDOM OF THE PAST, *supra* note 31, at 46-51. The practical need to import legal professionals is suggested by the fact that while Palauan citizenship is a requirement for eligibility for the presidency, the vice-presidency, or a seat in either house of the national legislature, it is not required for appointment to the judiciary. CONST. OF THE REPUBLIC OF PALAU art. VIII, § 3 (executive branch eligibility requirements); art. IX, § 6 (legislative branch); art. X, § 8 (judicial branch). As noted in a recent Palau Supreme Court publication, all of the justices of the Supreme Court combined with most, if not all, court counsel were trained in the United States. *See* THE WISDOM OF THE PAST, *supra* note 31, at 7-10, 15.

40. 1 P.N.C. § 303 (emphasis added). This provision leaves open the question of which common law principles to apply when different U.S. jurisdictions apply different rules. When faced with various possible applicable principles, Palauan judges have apparent discretion to choose the principle most suitable. The Supreme Court of Palau has specifically held that title 1, section 303, of the Palauan National Code does not require that a common law rule have been adopted in a majority of U.S. jurisdictions before it can be considered applicable law in Palau. *See, e.g.*, Renguul v. Airai State Publ. Lands Auth., 8 ROP Intrm. 282 (2001).

look to U.S. case law on the American Constitution and federal statutes as a reference for interpreting comparable provisions of Palauan law.[41]

Palau's courts, however, do not slavishly follow U.S. law. Rather, it only serves as a primary reference tool when local law is uncertain. For example, the appellate division of the Supreme Court has held that Anglo-Saxon concepts of land ownership, such as tenancies in common, fail "to fit within the Palauan framework of property law" and thus, may not be presumed to exist by a trial court.[42]

Palau's constitution also preserves an important role for custom by providing that "statutes and traditional law shall be equally authoritative."[43] Furthermore, in the event of conflicts between a statute and a traditional law, "the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law."[44] Traditional law, rooted in custom, must be proved by "clear and convincing evidence, often through the testimony of expert witnesses."[45]

Lineage, clan affiliation, and status within a clan are important in Palau. For example, title to land may be held in the name of a clan, which has discretion to manage clan assets in accordance with custom.[46] Furthermore, significant determinations, such as the disposition of an intestate decedent's assets and the selection of the bearer of traditional clan titles, may also be made primarily based upon clan custom.[47] While the Palauan courts may recognize and apply the existence of traditional laws in such spheres, once a custom is recognized as being applicable, such recognition also requires the court to defer to those claiming to act in accordance with such custom.[48] Prospective

---

41. Silmai v. ROP, 10 ROP 139 (2003). "Because Palau's Excessive Fines Clause is derived from a comparable clause in the United States Constitution, we have found it appropriate to consider U.S. case law in construing it." *Id. See also* Sedang v. Ongeshii, 10 ROP 100 (2003). "Because ROP Rule of Civil Procedure 60(b) is derived from the Federal Rules, it is appropriate to look to United States authorities for guidance." *Id.*

42. Smau v. Emilian, 6 ROP Intrm. 31, 36 (1996).

43. CONST. OF THE REPUBLIC OF PALAU art. V, § 2.

44. *Id.*

45. THE WISDOM OF THE PAST, *supra* note 31, at 3. *See also, e.g.*, Yangilmau v. Carlos, 7 ROP Intrm. 169 (1995). "Customary law must be proven by clear and convincing evidence, usually through the testimony of expert witnesses." *Id.*

46. Ngeribongel v. Gulibert, 8 ROP Intrm 68 (2001). "It is Paluan custom that the management and distribution of assets within a clan is primarily a private matter in which the clan is entitled to exercise a wide discretion. . . ." *Id.* Such traditions include the *eldecheduch*, a gathering at which the disposition of a decedent's property is decided by his clan. This institution has been formalized to an extent in Palau's inheritance statute, which provides that in the absence of a will, land owned in fee simple by a decedent will generally be disposed of "in accordance with the desires of the immediate maternal or paternal lineage to whom the deceased was related by birth or adoption and which was actively and primarily responsible for the deceased prior to his death." *See* 25 P.N.C. § 301(b).

47. 25 P.N.C. § 301(b).

48. *See, e.g.*, Filibert v. Ngirmang, 8 ROP Intrm. 273, 277 (2001) ("Although the courts have constitutional authority over matters presenting issues of customary law . . . customary matters are best resolved by the parties involved rather than the courts."). "It cannot be disputed

investors need to be aware of the possibility of conflicting claims arising in transactions involving land or other assets that may be owned by a clan rather than an individual.

CONSTITUTIONAL PROVISIONS RELEVANT TO FOREIGN INVESTORS

As noted above, Palau's constitution is clearly modeled on the U.S. Constitution. However, it also contains a number of provisions that are designed to protect Palau's people and customs from being overwhelmed by outside influences. Prospective foreign investors should be cognizant of these provisions.

Of particular note is, Article III, which defines Palauan citizenship as accruing to a person born of at least one parent who is a citizens of Palau.[49] Citizenship is a key prerequisite to the enjoyment of a number of fundamental rights under Palau's constitution.[50] For example, while Palau's Constitution does contain a provision similar to the U.S. Constitution's "contracts clause," it only protects "contracts to which *a citizen* is a party" from impairment by legislation.[51] Thus, foreign investors need to be aware of the possibility that privately negotiated contracts may be subject to post-facto interference by action of the national or state legislatures, a risk which is hardly unique to Palau.[52] Furthermore, while the constitution prohibits governmental discrimination based on a number of categories, it contains a specific exception for the preferential treatment of citizens.[53]

Citizenship is also a key part of another constitutional provision that will affect the structuring of many investments in Palau: "[o]nly citizens of Palau and corporations wholly owned by citizens of Palau may acquire title to land or water in Palau."[54] It is thus impossible for foreigners or even companies with

---

that, in Palauan custom, a decision of a council of chiefs to accept or reject the ourrot's choice of title holder is final and not subject to outside review. . . ." Matlab v. Melimarang, 9 ROP 93 (2002). "Ourrot" is a title which reflects some of the matriarchal aspects of Palauan society. A "senior ourrout" is generally the oldest female of a maternal line of a clan, and may play a significant role in choosing male holders of traditional titles.

49. CONST. OF THE REPUBLIC OF PALAU art. III, § 2.

50. The present constitution prohibits Palauans from having dual citizenship after the age of twenty-one. *Id.* art. III, §§ 1, 3. In 2004, however, a proposed constitutional amendment allowing dual citizenship was approved and may come into force if the requisite vote (a majority of votes and three-fourths of the states) is met in the next general election. *Id.* art. XIV, § 1(a). *See also* Donald R. Shuster, *Micronesia in Review: Issues and Events, 1 July 2004 - 30 June, 2005 Palau*, 18 CONTEMP. PAC. 114, 116 (2006).

51. U.S. CONST. art. I, § 10; CONST. OF THE REPUBLIC OF PALAU art. IV, § 6 (emphasis added).

52. To the extent that the protection the Palauan constitution provides to contract rights extends to acts of the national legislature, it is arguably more extensive in at least one respect than the U.S. Constitution, in that the contract clause only applies to states. *See* U.S. CONST. art I, § 10.

53. CONST. OF THE REPUBLIC OF PALAU art. IV, § 5.

54. *Id.* art. XIII, § 8.

minority foreign ownership to obtain and maintain title to land in Palau.[55] The ability of foreign investors to finance a venture using land as security is, therefore, also limited. But, assuming the secured obligation can be sold or otherwise disposed of to a Palauan citizen who may enforce the security interest against the obligor, mortgages are not necessarily without value to the foreign investor.[56]

It is possible for non-citizens to lease real property in Palau, but only for a maximum of fifty years, inclusive of renewal options.[57] Any lease agreement that violates this restriction is void; case law has held that to the extent a citizen is a co-lessee under such an agreement, it will remain in force as to the citizen.[58] While legislation has been proposed that would extend the maximum lease term for non-citizens to ninety-nine years, it is uncertain whether it will come into force, particularly since the issue of lease terms has been scheduled as a referendum item for the 2008 Constitutional Convention.[59]

OTHER ISSUES RELATING TO LAND OWNERSHIP

A variety of historical factors further complicates the current state of land ownership in Palau. First, clans traditionally held most land, not individuals.[60] Second, no written records existed of traditional land ownership or the metes and bounds of specific tracts. Third, even though individual ownership is

---

55. This prohibition is further strengthened by statute, which prohibits anyone other than a Palauan citizen or corporation wholly-owned by Palauan citizens from "holding title" to land. *See* 39 P.N.C. § 301. This is significant because the Palauan constitution only prohibits "acquisition." Thus, it would otherwise be possible for children having dual Palauan and foreign citizenships to acquire land as minors, abandon their Palauan citizenship, as required to by the constitution within three years of turning eighteen, yet lawfully retain ownership of Palauan land as a foreign national.

56. Title 39, section 604, of the Palauan National Code appears to anticipate this possibility in its definition of the term "Mortgagee," which includes the clear statement that "[a] noncitizen of the Republic may be a mortgagee under the provisions of this chapter, provided, however, that nothing in this chapter shall be construed to mean that a noncitizen mortgagee is entitled to hold title to real property in the Republic." 39 P.N.C. § 604(h).

57. 39 P.N.C. § 302. There are a variety of ways in which foreign lessees may use the lease agreement to protect investments made under long-term land leases. For example, the lease can be drafted to require the Palauan lessor to compensate the lessee for improvements made on the leased property based on the value of the improvements at the expiration of the lease. Another option is to include a provision requiring the parties to negotiate in good faith the execution of a new lease within a few years of the expiration of the original fifty-year lease term. Other leases have been used that require the lessor to compensate the lessee for the value of improvements *or* enter into a new lease. The validity of such provisions has not been adjudicated.

58. Anastacio v. Haruo, 8 ROP Intrm. 128, 130 (2000).

59. Blaire Phillips, *Land Leases Again Center of Controversy*, PAC. MAG., May/June 2006, at 8.

60. THE WISDOM OF THE PAST, *supra* note 31, at 45. "Traditionally, although there was no formal system of land registration in Palau, there was a system of customary land ownership and control. Land was generally divided into public domain, controlled in most cases by the village council and the clan." *Id.* (citing LAND TENURE PATTERNS IN THE PACIFIC ISLANDS 296 (1958)).

becoming more prevalent, the disposition of property upon a person's death can vary depending upon clan custom and clan decisions in individual cases. Fourth, the various foreign powers that administered Palau, particularly Japan, confiscated traditional lands and converted them to government use or turned them over to immigrants. Fifth, while Palauan government entities continue to use some of this land, Palau's Constitution requires that public lands be returned to the "original owners or their heirs," a process started by the Americans during the TTPI period. Often, this involves a factual determination taking place generations after the original owner was dispossessed.[61] With the pending relocation of the nation's capital to the island of Babeldaob, much of the land in Koror will be vacated by government bodies. This will allow claims from the heirs of people dispossessed decades prior to be more easily processed. Moreover, this will prevent the property from being subject to eminent domain exercised by the Palau government.[62] Sixth, while individual ownership of land has become widespread, Palau did not have a statute of frauds until 1977, meaning that many pieces of land may have been subject to multiple unrecorded oral conveyances.[63] Finally, the massive disruption caused by World War II serves as another source of uncertainty as to historic title to land.

While the pre-war Japanese land survey and resulting *tochi daicho* is "presumed to be correct" by a court, it sometimes serves as little more than a starting point.[64] This is in part because its creation was followed by a war and decades of unrecorded oral transactions. In addition, its limited utility in determining historical ownership in the states of Anguar or Pelelieu has already been noted. Furthermore, it is subject to claims that listings of individual ownership, as opposed to clan ownership, are erroneous.[65] Finally, where the *tochi daicho* lists Japanese ownership, it is usually unhelpful in determining the historical title predating such ownership.

As a result of these and other factors, Palau's court system has been

---

61. CONST. OF THE REPUBLIC OF PALAU art. XIII, § 10.

62. In summer 2005, the author was in Koror. He talked to a government official who said that the previous week he had people in his office marking out the dimensions of their claims in anticipation of the government's departure from the city due to the relocation of the capital.

63. *See, e.g.*, Andreas v. Masami, 5 ROP Intrm. 205, 206 (1996). "The Statute of Frauds was enacted by the Palau Legislature in 1976 and first became effective as of April 1, 1977...." *Id. See also* Rengiil v. Ngirchokebai, 1 ROP Intrm. 197, 201 (1985) (citing Llecholch v. Blau, 6 TTR 525 (Palau)). "[A]n oral transfer [of land] is effective and there need be no recordation of an oral transfer." *Id.*

64. Ngiradilubech v. Timulch, 1 ROP Intrm. 625 (1989).

65. *See, e.g.*, Arbedul v. Romei Lineage, 8 ROP Intrm. 30 (1999). *See also* Jeffrey S. Rasley, *The Most Litigious People on Earth On Palau, Land Disputes Are a National Pastime*, PAC. MAG., Dec. 2002, *available at* http://www.pacificislands.cc/pm122002/pmdefault.php?urlarticleid=0013 (last visited Oct. 30, 2006). "The *Tochi Daicho* was incomplete and parts of it were lost. In some cases, the Japanese had designated the chief or a strong member of the clan as registered owner, when, by tradition, the whole clan had rights to the land." *Id.*

nearly overwhelmed with litigation over land title. Indeed, at least one observer called Palauans "*the most litigious people on Earth.*"[66] This should not be surprising given the complicating factors described above, together with the overall context of a revolutionary change in notions of property from a traditional Palauan collective ownership system to a Western-style individual ownership model.

While the United States initially implemented a land registration program in the 1950s, the current registration process began in 1972. A special Land Court was created in 1996 to help facilitate the processing of land disputes. It is expected that resolution of pending and new cases will, at the very least, take several more years.[67]

In light of these circumstances, prospective investors contemplating any arrangement involving a lease or other use of land should conduct suitable due diligence regarding the status of title of the proposed site, as well as the claim of any putative owners. This includes ascertaining whether the land is owned individually or by a clan. If it is the latter, the inquiry proceeds to which clan member is entitled to enter into transactions involving the land on the clan's behalf. The Land Court maintains public files of all determinations it has made to date, together with any certificates of titles issued in connection with its proceedings. Under Palau's recording statute, all transfers of, or encumbrance upon, title to real estate or any interest therein, other than a lease or use right for a term not exceeding one year, are invalid unless recorded with Palau's Clerk of Courts.[68]

FOREIGN INVESTMENT ACT – CERTIFICATION REQUIREMENTS

The cornerstone of Palau's foreign investment regime is the Foreign Investment Act (FIA), which comprises sections 101-121 of title 28 of the Palauan National Code. The FIA specifies the procedures foreign investors must follow in Palau and contains a broad range of substantive limitations intended to limit foreign domination of the Palauan economy. In effect, it "prohibits the inflow of foreign capital investment into the country unless approved by the national government."[69] In this respect, Palau's foreign investment regime is quite different from those in other developing countries, where a principal goal of regulation may be limiting the ability of foreign capital to *exit* the country rather than *enter* it.[70]

---

66. *See id.* (emphasis added). This account gives a total of approximately 30,000 cases for a population of 18,000. *See id.*

67. *See id. See also* THE WISDOM OF THE PAST, *supra* note 31 at 45-46. While I am not the one who will conduct it, Palau would seem to be a wonderful subject for study from a law and society perspective of a traditional "non-litigious" culture adopting and using a modern legal system.

68. 39 P.N.C. §§ 401.

69. Micr. Yachts Co. v. Palau Foreign Inv. Bd., 7 ROP Intrm. 128, 129 (1998).

70. In fact, because of the relative weakness of Palau's anti-money laundering regime,

Foreign investment in Palau is subject to oversight from the Foreign Investment Board (FIB). The FIB is an executive branch body. It consists of seven members appointed by the president with the advice and consent of the Senate.[71] All non-Palauan citizens seeking to do business in the country must first obtain a foreign investment approval certificate (FIAC) from the FIB. This requirement applies in three scenarios:

(a) non-citizens wishing to directly or indirectly "carry on a business enterprise" in the ROP;[72]
(b) business enterprises in Palau that are wholly-owned by citizens and in which a non-citizen wishes to acquire an ownership interest or make an investment (other than lending);[73] and
(c) any grantee of an existing FIAC seeking to engage in any business that it does not cover.[74]

Two important exceptions to FIA certification requirements exist:

(a) companies doing business or making an investment pursuant to a contract with the national government of Palau, and
(b) any entity engaged exclusively in the practice of law or medicine.[75]

Some definitions are necessary before proceeding. "Non-citizen" means any person, natural or legal, who is not a citizen of the ROP, and includes any business enterprise in which a non-citizen owns an interest.[76] Thus, even Palauan majority-owned businesses are subject to certification requirements. "Carry[ing] on a business" is defined as "engaging in any kind of business enterprise, profession or trade, as an owner or part-owner, for the purpose, in whole or in part, of commercial gain or profit."[77] "Business enterprise" is defined as "any sole proprietorship, partnership, corporation, trust, joint venture, association, or any other form of business organization *established in the Republic* for the purpose of carrying on a business."[78]

---

foreign banks have on occasion refused to honor wire transfers originating from Palau. Shuster, *supra* note 50, at 121.

71. 28 P.N.C. § 104.

72. 28 P.N.C. § 103 (a).

73. 28 P.N.C. § 103 (b).

74. 28 P.N.C. § 103(c).

75. The exclusion for investments pursuant to a government contract is provided for specifically in paragraph (d) of section 103, which sets forth the substantive certification requirement, as well as in the exclusions to the section102(c) definition of Business Enterprise discussed *infra*, note 78. The exclusion for medical and legal practices is contained only in the section 102(c) definition.

76. 28 P.N.C. § 102(l).

77. 28 P.N.C. § 102(d).

78. 28 P.N.C. § 102(c) (emphasis added). The definition also includes an exception for non-profit entities engaged in non-political charitable, religious, scientific or other similar activities.

The requirement that a business enterprise be "established in the Republic" is key; it has been interpreted as excluding foreign business entities that conduct transitory business activities in Palau without establishing a significant long-term presence. In *Tulmau v. R.P. Calma & Co.*, the appellate division of the Supreme Court of Palau determined that a Philippine accounting firm which did not maintain a presence in the ROP but which had conducted audits of two Palauan companies was not in violation of FIA certification requirements.[79] The accounting firm's activities included both sending employees to Palau and paying Palauan gross revenue taxes on the revenue generated in the country. Holding that "[s]ome degree of permanency must exist before a business can be deemed 'established,'" the court in *Tulmau* interpreted the FIA certification requirements as being triggered only when a non-citizen carries on a business in the ROP, and the foreigner is "'established in the Republic for the purpose of carrying on a business.'"[80] Therefore, business trips to Palau and other limited activities not involving a long term presence should not trigger the certification requirement.

While the FIA does not contain provisions dealing with the transfer of FIACs, the FIB subjects the issuance of FIACs to conditions, including that they are non-transferable either directly or through a change in ownership of the entity to which the FIAC is issued.[81] While FIA case law is limited, the ROP courts have adopted a substance-over-form approach toward FIA issues. Thus, attempts to subvert the substantive requirements of the law are likely to be invalidated. According to one Supreme Court ruling on the FIA:

> [T]he statute is drafted so that a non-citizen who decides to invest foreign capital in Palau must obtain a foreign investment certificate, and it does not matter whether this investment occurs through sale of stock, is filtered through a series of corporations, or occurs via partnership agreements, purported "employment" contracts, creative business "leases," or any other structural legerdemain.[82]

An FIAC will only be issued for businesses involving an investment of not less than $500,000 *or* which maintains a work force that is comprised of at least twenty percent Palauan nationals.[83] The FIB evaluates FIAC applications

79. Tulmau v. R.P. Calma & Co., 6 ROP Intrm. 54 (1997).

80. *Id.* at 56-57 (citing Tulmau v. R.P. Calma & Co., 3 ROP Intrm. 205 (1992)).

81. While it is not uncommon in project financing-type transactions for lenders to receive a collateral assignment of licenses and permits as supplemental security, such a mechanism seems unlikely to provide tangible benefits in the case of a non-transferable FIAC.

82. Micr. Yachts Co. v. Palau Foreign Inv. Bd., 7 ROP Intrm. 128, 130 (1998). Those tempted to believe that Palau's judiciary might be fooled by particularly complex transaction structures should know that one of its members, Associate Justice Larry Miller, was once an attorney at a major Wall Street law firm.

83. 28 P.N.C. § 106.

based on a variety of criteria, including benefits to the ROP, transfer of skills to Palauan nationals, and the likelihood that similar activities being carried on by citizens will be impacted. Moreover, the FIB requires the submission of an investment analysis, plans for training programs and management participation by Palauan citizens, existing and proposed wage and benefit programs, and other detailed information.[84]

When the FIB grants an FIAC, it must also specify a number of terms and conditions applicable to it including: the scope of the business activity covered, the scope of utilization of raw materials, the scope of services and materials provided by citizens, the participation by citizens in management, training programs for citizens for the transfer of managerial and technical skills, the duration of the permission granted by the FIAC, and any guarantees that may be required from non-citizens.[85]

FIAC issuance may also be conditioned upon the maintenance of a security deposit in a bank in Palau, the purpose of which is to "safeguard the interest of persons doing business with [the] grantee."[86] With some exceptions for agricultural or aquacultural workers, businesses operating under an FIAC are also required to pay a minimum wage, "not less than the minimum wage paid to national government employees."[87] FIAC grantees are also subject to such periodic reporting requirements as may be imposed by FIB regulations.[88]

When rejecting an application the FIB must record the reason for doing so "with as much detail as possible."[89] Aggrieved applicants may request that the FIB reconsider a rejected application. While its determinations are final, the FIA anticipates that judicial remedies may also be available in some cases.[90]

A grantee may request an amendment of an existing FIAC. The FIB may amend an FIAC as long as the amendment would not permit a business activity that is substantially different from or unrelated to that covered by the original FIAC.[91] In such cases, an entirely new application is necessary.[92]

---

84. 28 P.N.C. §§ 107-108. One fact that may *not* be considered is whether a foreign-owned business will provide better service than a local one. In *Masang v. Dengkol*, 9 ROP 243 (Tr. Div. 2001), the Supreme Court ruled that it was an abuse of discretion for the FIB to have granted a foreign investor an FIAC for the establishment of a cellular phone business on the basis that, in the view of at least one FIB member, the foreign company would provide better service than the existing Palauan-owned cellular provider. The Court determined that "[i]f that was the test, there would be no need for a Foreign Investment Board, because any foreign investor who was not providing better service than the local business would not be much competition." *Id.* at 247.

85. 28 P.N.C. §§ 108(k)(1-7).

86. 28 P.N.C. § 108(k)(8).

87. 28 P.N.C. § 108(k)(9).

88. 28 P.N.C. § 111.

89. 28 P.N.C. §§ 108(k)(10).

90. *See* 28 P.N.C. § 109.

91. 28 P.N.C. § 110.

92. *Id.*

FOREIGN INVESTMENT ACT – LOCAL OWNERSHIP REQUIREMENTS

In addition to the certification requirement described above, the FIA also contains a provision that further limits foreign participation in certain areas of business. Since the drafting is somewhat complex and creates different categories, it warrants quoting almost in full, but with some changes to facilitate understanding. Under section 105 of the FIA: "[t]he following business activities are reserved *exclusively for citizens and business enterprises in which citizens have an ownership interest* and shall not be permitted to be undertaken by any business enterprise in which no citizen has an ownership interest."[93]

The statute lists businesses to which this restriction applies:

(a) wholesale or retail sale of goods.
(b) all land transportation including bus services, taxi services, and car rentals.
(c) handicraft and gift shops; provided, however, that handicraft or gift shops located on the premises of hotels or at the Palau International Airport shall be exempt from the prohibition of this section.
(d) bakeries.
(e) bar services not associated and contained within a restaurant or hotel complex. For purposes of this subsection, hotel complex means any lodging facility having at least 50 rooms for the accommodation of guests.
(f) tour guides, fishing guides, diving guides, and any other form of water transportation services.
(g) travel and tour agencies.
(h) operations manufacturing products being produced by wholly Palauan-owned manufacturing enterprises.
(i) equipment rentals for both land and water within the Republic, including equipment for purpose of tourism.
(j) commercial fishing for other than highly migratory species.[94]
(k) any such other business as the [FIB] may determine.[95]

As is probably evident from this list, section 105 infers that many of the business opportunities in which foreign investors are likely to be interested—including many tourism-related opportunities—cannot be conducted without involving a Palauan partner.

Furthermore, section 105 contains a proviso specifying that the types of

93. 28 P.N.C. § 105 (emphasis added).

94. Note that the characterization of fish species as "highly migratory" is of constitutional significance; Palau's constitution grants to each state "exclusive ownership of all living and non-living resources, *except highly migratory fish*, from the land to twelve (12) nautical miles seaward from the traditional baseline." CONST. OF THE REPUBLIC OF PALAU art. I, § 2 (emphasis added).

95. 28 P.N.C. §§ 105 (a-k).

businesses listed in subsections (a), (b), (f), (g) and (j) "are reserved *exclusively* for citizens."[96] Thus, section 105 creates two special categories of business: (1) those in which foreigners can participate, as long as a Palauan has an ownership interest in the business *and* the FIAC requirements of the FIA are followed, and (2) those in which foreigners cannot directly participate even with a Palauan partner.

The business category in subsection (h) may be of concern. The FIB's ability to use the FIAC granting process to impose requirements upon non-citizen investors regarding management participation by citizens and the transfer of knowledge and skills to Palauans may present an additional obstacle for investors. A foreign investor who creates a new and wholly-owned manufacturing operation in Palau under an FIAC with a finite term may discover that they have enabled a local competition, rendering future renewals of the FIAC potentially problematic.[97]

FOREIGN INVESTMENT ACT – SANCTIONS

The FIB may modify, suspend, or revoke an FIAC in a variety of situations. These situations include: the determination that the FIAC was obtained based on fraudulent information or corruption, the grantee violating any law of the ROP or any term or condition applicable to the FIAC, or the grantee engaging in any business activity or making any investment outside the scope of the granted FIAC.[98] Non-citizens who violate the FIA's certification requirements may also be subject to imprisonment for up to one year and/or fines of up to $25,000.[99] Any person, regardless of citizenship, who aids and abets a violator is subject to similar penalties.[100]

Foreign investors should also take note of section 120 of the FIA, which provides that "[a]ny citizen or resident of the Republic of Palau . . . shall have standing and capacity to bring suit to enforce the provisions of this chapter as a private Attorney General."[101] In effect, anyone in Palau has standing to sue under the FIA for alleged violations. This provision both limits the FIB's discretion and makes it difficult to expect that an uncertificated or otherwise non-compliant investment will simply escape attention.[102]

---

96. *Id.* (emphasis added). With respect to subsection (j), farm-raised fish and maricultured species are excluded from the Palauans-only provision.

97. A transitional provision is included that allows non-citizens holding permits for businesses covered by section105 to continue engaging in such businesses, whether solely or jointly with citizens, but only for the current terms of such permits.

98. 28 P.N.C. § 112.

99. 28 P.N.C. § 113.

100. 28 P.N.C. § 114.

101. 28 P.N.C. § 120.

102. Indeed, a private attorney general provision was added to an earlier version of the FIA due to the legislature's concern that the government was not enforcing it. Tulmau v. R.P. Calma & Co., 3 ROP Intrm. 205, 208 (1992). *Tulmau* involved a separation of powers challenge to the private attorney general provision of the FIA, resulting in a finding by the appellate division of

CLOSING REMARKS

The FIA effectively creates three different overlapping categories of foreign investment to which its requirements apply. First, all foreign investments must be conducted under an FIAC, which may be subject to a variety of requirements, including a minimum threshold of $500,000 or twenty percent employment of Palauans. Second, businesses included in the non-exclusive categories specified in section 105 may only be engaged in by enterprises that are at least partially Palauan-owned. Third, the categories of business specified in section105 are reserved exclusively for citizens and are effectively closed to foreign investors.

Given the restrictions imposed upon the ownership and use of land by non-citizens, as well as the importance of clan affiliation and other unique characteristics of Palau's small, close-knit society, a citizen partner or shareholder will often be desirable even when not required under the FIA. Here, as in any foreign investment, careful due diligence should be conducted regarding the prospective partner, as well as the history and legal status of any land or other real property the partner proposes to commit or otherwise make available to a business venture. For example, one common scenario that requires special care and diligence, not to mention delicacy in broaching the issues, occurs when a non-Palauan citizen resident manages a business or land on behalf of a citizen, spouse, or other family member. In such scenarios the non-citizen may indeed have more knowledge and understanding of the business or property. Even though the citizen's participation may be passive, his or her intent to cooperate in the venture or proposed use of land should be confirmed and, if possible, documented.

Financial institutions providing loan financing to ventures in Palau also need to understand that their ability to obtain and enforce security interests may be limited. Debtor-in-possession and other similar managerial arrangements may not be possible in the event of business failure due to the non-transferable nature of FIACs. For significant loans or other investments, offshore security arrangements may be an integral component simply because of the limitations imposed upon collateral enforcement by the FIA and the constitution.

The constitutional and other prohibitions imposed upon the participation by non-citizens in Palau's economy may seem anachronistic in the 21st century climate of free trade and globalization. It should be remembered, however, that in terms of population and economic size, Palau is smaller than many multinational companies. Furthermore, the country is already subject to a high degree of political and economic domination by the United States and other regional powers. Thus, without the protections provided by Palau's constitution and other laws, it would be easy for the Palauan people to become bit-players in their own economy, as has seemingly been the fate of people in many other developing countries.[103] From this perspective, Palau may provide

---

the Supreme Court of Palau that the provision was constitutional. *See id.* at 210.

103. This may be happening anyway; according to one report, three quarters of the labor

a useful reference model for small states seeking to preserve their unique culture in the modern interconnected world.

As noted at the outset, one of Palau's greatest resources is its tremendous natural beauty. This beauty alone, however, is valueless unless people and leaders have the determination and foresight to establish a legal regime that enhances the protection of that tremendous resource. Foreign investment will hopefully continue and increase in a framework that makes the goals of environmental protection, cultural autonomy, and economic development simultaneously achievable.

---

force consists of foreign workers, mostly from the Philippines and China. Paddock, *supra* note 5, at A3.

THE ROLE OF CUSTOMARY LAW UNDER SUI GENERIS FRAMEWORKS OF INTELLECTUAL PROPERTY RIGHTS IN TRADITIONAL AND INDIGENOUS KNOWLEDGE

Paul Kuruk*

INTRODUCTION

Bowing to pressure from developing countries, indigenous groups, and civil society, a number of international organizations have embarked in recent years on measures to enhance the protection of indigenous and traditional knowledge.[1] The United Nations Educational, Scientific and Cultural Organization (UNESCO), for example, responded in 2003 to a perceived disproportionate focus on tangible cultural heritage in its programs[2] by adopting a new instrument for the safeguarding of intangible cultural heritage.[3] A year

---

* LL.B. (Hons.), University of Ghana, Legon, Ghana; LL.M., Temple University School of Law, Philadelphia, Pennsylvania; J.S.D., Stanford Law School, Stanford, California; Professor of Law, Cumberland School of Law of Samford University, Birmingham, Alabama; past Vice Chair, Commission on Environmental Law of the World Conservation Union, Gland, Switzerland.

1. For the definition of the term traditional knowledge see *infra* notes 103-06 and accompanying text. Examples of traditional knowledge noted in legal instruments include: poetry, riddles, songs and instrumental music, dances and plays, productions of art in drawings, paintings, carvings, sculptures, pottery, terra cotta, mosaic, woodwork, metal-ware, jewelry, handicrafts, costumes, and indigenous textiles. Copyright Act, (1988) Cap. 68, § 28(5) (Nigeria). Community leaders describe traditional knowledge to include dispute-settlement processes and systems of governance, hairstyling techniques, traditional methods of preparing food, spices, and drinks, meat-cutting techniques, languages, and historical sites. WORLD INTELLECTUAL PROP. ORG. [WIPO], INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY NEEDS (1998-1999) 86 (2000) [hereinafter INTELLECTUAL PROPERTY NEEDS]. Other examples cited are medicinal uses of plants and environmental and biodiversity conservation-related knowledge, such as knowledge of grass species, grazing and animal tracking systems, weather patterns, and knowledge relating to the preservation and use of natural and genetic resources. Finally, traditional knowledge is said to include farming and agricultural methods, traditional birthing methods, hunting skills, divine worship, and spiritual aspects of healing. *Id.* at 146.

2. The list of matters protected under UNESCO's Convention Concerning the Protection of the World Cultural and Natural Heritage adopted in 1972 revealed a gross over-representation of items from developed nations, which UNESCO attributed to "a weakness in the organization's historic focus on the protection of tangible heritage, rather than intangible heritage, thereby marginalizing a vast range of cultural expressions that often belong to the countries of the 'South,' which are crucial for the map of cultural diversity." U.N. EDUC., SCIENTIFIC AND CULTURAL ORG. [UNESCO], FIRST PROCLAMATION OF MASTERPIECES OF THE ORAL AND INTANGIBLE HERITAGE OF HUMANITY ii (2001).

3. UNESCO, *Convention for the Safeguarding of Intangible Cultural Heritage* (2003), *available at* http://portal.unesco.org/en/ev.php-URL-ID=17716&url-DO-TOPIC&URL-

earlier, the Food and Agriculture Organization (FAO) established a multilateral system to facilitate access to plant genetic resources for food and agriculture.[4] On its part, the World Intellectual Property Organization (WIPO) continues to pursue discussions centered on intellectual property-based solutions.[5]

These efforts to improve the protection of traditional knowledge have been informed largely by a recognition of the need to counter the negative effects on indigenous communities arising from the widespread commercial exploitation of traditional knowledge, especially in the pharmaceutical,[6] cosmetic,[7] and agriculture industries,[8] as well as the entertainment and retail

---

SECTION=201.html.

4. International Treaty on Plant Genetic Resources for Food and Agriculture, *opened for signatures* Nov. 4, 2002 (*entered into force* June 29, 2004). The treaty addresses the link between traditional knowledge and food security. In exchange for access to plant genetic resources, users are required by the treaty to share, in a fair and equitable way, the benefits arising from the utilization of these resources. *Id.* art. 10.2. In particular, the treaty notes the enormous contribution that local and indigenous communities and farmers of all regions of the world have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agricultural production throughout the world. *Id.* pmbl.

5. In 2000, WIPO's General Assembly created an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to discuss issues relating to traditional knowledge. Actions taken so far by the IGC have focused on trying to understand the needs and expectations of traditional communities, ascertaining the adequacy of current methods for protecting traditional knowledge, and surveying proposals to enhance such protection. The IGC has recommended the use of model access contracts and the creation of databases on traditional knowledge to enable communities protect their traditional knowledge (defensively) under prior art considerations. WIPO, CONTRACTUAL PRACTICES AND CLAUSES RELATING TO INTELLECTUAL PROPERTY, ACCESS TO GENETIC RESOURCES AND BENEFIT-SHARING, WIPO Doc. WIPO/GRTKF/IC/5/9 (2003).

6. Within the pharmaceutical industry, traditional people's knowledge and experiences of the medicinal properties of plants have played a crucial role in the development of drugs. For example, approximately seventy-five percent of the pharmaceutical products derived from plants in one year were reportedly discovered through the study of their traditional medical uses. KERRY TEN KATE & SARAH A. LAIRD, THE COMMERCIAL USE OF BIODIVERSITY, ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING 61 (1999). Similarly, a correlation has been noted between traditional medical use and the commercial use of the base compound in most of the top 150 plant-derived prescription drugs. *Id.* The relevance of ethnobotanical information in the discovery of drugs has been confirmed by others. *See, e.g.*, MICHAEL J. BALICK ET.AL., MEDICINAL RESOURCES OF THE TROPICAL FOREST 19 (1996).

7. Many of the new ingredients in the cosmetic industry are said to be drawn from their traditional uses as antiseptics, anti-inflammatories, anti-infectives, body decoratives and toners (mud packs), wound healers, and mouth and teeth cleaners. Commercial literature has highlighted the significance of traditional knowledge in providing leads to new product development in the cosmetic industry. For example, a publication by Aveda has observed: "Our most valuable resource is indigenous peoples, for they are living libraries of ancient wisdom and ways. Working with them as partners, we have combined their botanical knowledge with today's technology to create a wealth of flower and plant products." KATE & LAIRD, *supra* note 6, at 273.

8. The most important uses of traditional knowledge in the agriculture industry are in seed development and crop protection to improve crop plants' productivity and resistance to pests and disease. With respect to seed development, agriculture research scientists have collaborated with traditional farmers to obtain local crop varieties to improve existing varieties

market sectors.[9]

Indigenous groups have been quite vocal in their complaints about the lack of adequate compensation,[10] loss of community rights,[11] misrepresentation of products[12] and practices as indigenous,[13] and the unauthorized public

---

of seeds and develop new crop species considered vital for sustainable development and food security. For centuries, farmers in traditional areas have improved varieties by adapting germplasm to local conditions and selecting the best seed for each season, and it is this knowledge that modern researchers have sought to tap through various collaborative arrangements.

In the case of crop protection, traditional knowledge has been used to identify chemicals relevant to the production of pesticides used to that kill weeds and insects and microorganisms that destroy crops. This is similar to the ethnobotanical approach and involves the testing of samples known to have certain biological activity based on observations of the practices of traditional people. For example, from the chrysanthemum known as *tanacetum cinerariaefolium*, traditionally used for the control of household pests, scientists have been able to developed a class of compounds called "pyrethroids" which are used as the base for natural crop protection products with annual sales in excess of $1 billion. *See generally id.* at 117-57.

9. Lucrative markets exist in Western countries for traditional arts and crafts acquired from other countries. DARRELL A. POSEY & GRAHAM DUTFIELD, BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES 27 (1996).

10. Here the charge is often made that indigenous communities are not appropriately rewarded for the exploitation of their traditional knowledge, perhaps due to the deliberate refusal of the exploiters to pay, difficulties in identifying the proper owners to whom payment is to be made, or simple mismanagement. *Id.* at 33-41. Even where the communities are compensated, the benefits often pale in comparison to the huge profits made by the exploiters. For example, after the discovery of the tumor-fighting capabilities of Madagascar's periwinkle, the plant was patented and marketed, netting the company some $100 million, eighty-eight percent of which was profit to the company. *See* A.B. Cunningham, *Indigenous Knowledge and Biodiversity: Global Commons or Regional Heritage?*, CULTURAL SURVIVAL Q., Vol. 15.3, July 31, 1991, at 4, 6.

11. A significant source of friction relates to uses of traditional knowledge that result in the expropriation of the interests of traditional communities when valuable pieces of traditional knowledge are removed from the traditional communities and sent to western markets. While some of these items may have been sold or given away by traditional elders, in many cases the items were probably illegally exported or even forcibly removed. Babacar Ndoye, *Protection of Expressions of Folklore in Senegal*, 25 COPYRIGHT MONTHLY REV. WORLD INTELL. PROP. ORG. 374, 375 (1989). Expropriation also occurs when farm seeds are collected by researchers under collaboration arrangements and stored *ex-situ* beyond the reach of traditional farmers who now have to pay high fees to acquire rights to improved varieties of the seeds. Stephen B. Brush, *A Non-Market Approach to Protecting Biological Resources*, *in* INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK 131, 133 (Tom Greaves ed., 1994) [hereinafter SOURCEBOOK]. Furthermore, community rights are diminished when some parties successfully acquire intellectual property rights in other forms of traditional knowledge, such as art and craft, music, and dance. For example, copyright may be claimed for documentation of information about indigenous people, which is used commercially without appropriate acknowledgment as to source of material. POSEY & DUTFIELD, *supra* note 9, at 36.

12. The commercial exploitation of traditional knowledge creates problems of authenticity and misrepresentation as the need to satisfy increasing demand for traditional art and craft often results in the mass-production of cheap imitations and inferior quality goods. Sandra Lee Pinel & Michael J. Evans, *Tribal Sovereignty and the Control of Knowledge*, *in* SOURCEBOOK, *supra* note 11, at 41, 47. The mass-produced items sold as traditional craft raise authentication problems to the extent that they do not have the same attributes as the traditional items. Items of traditional knowledge express important values in traditional societies which the mass-produced

disclosure[14] and use of secret knowledge, images, and other sensitive information pertaining to indigenous communities.[15] An improvement in the regulatory environment, arguably, would provide indigenous groups greater control over the use of traditional knowledge and ensure that access to traditional knowledge would be on terms that are mutually acceptable and respect indigenous culture.[16]

---

items cannot possibly have, since they did not originate in those societies. Indeed, one commentator has characterized the production and sale of fake indigenous items as a "cultural and psychological threat to the authentic practitioners of traditional arts and to the traditional groups whose values those arts express." Alan Jabbour, *Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protections of Folklore*, 17 COPYRIGHT BULL. 10, 11 (1983).

13. For example, some have charged that where African dances are copied and performed abroad, African culture is denigrated to the extent that the "non-African actors cannot lend the gestures that communicate warmth specific to Africa." Ndoye, *supra* note 11, at 376. Another writer contends:

> [I]t is possible to encounter groups and soloists who unscrupulously modernize works of folklore by arranging them in a new manner, by giving folk songs added rhythm and volume at the expense of their melodic character . . . Performances of folk songs often take the form of . . . banal impersonal shows devoid of the characteristics peculiar to . . . folk dances . . . . As for the garishly-colored costumes worn by the dancers, they are a travesty of the originals.

E.P. Gavrilov, *The Legal Protection of Works of Folklore*, 20 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 76, 79 (1984). Such commoditization of traditional performances as entertainment, it is feared, would eventually lead to the erosion of people's cultural identity. POSEY & DUTFIELD, *supra* note 9, at 6.

14. TERRI JANKE, OUR CULTURE, OUR FUTURE: REPORT ON AUSTRALIAN INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS 19 (1998). Indigenous culture is viewed to be degraded when cultural items are displayed outside of their traditional setting and for purposes different from those for which they were originally created, such as when religious artifacts are sold as mere decorative art. David Sassoon, *The Antiquities of Nepal: It Is Time to Start Listening to Communities Whose Possessions Have Become Objects of International Consumption*, CULTURAL SURVIVAL Q., Vol. 15.3, July 31, 1991, at 47, 49. Similar considerations apply to the reproduction of sacred and secret imagery in inappropriate contexts such as T-shirts. JANKE, *supra*, at 19.

15. In the United States, Native American groups have fought against the use of indigenous names in settings they perceive to be demeaning, such as in reference to mascots or sports teams. One commentator notes:

> Images of Indians have advertised and identified products and services too numerous to list . . . . A search of the Trademarkscan-U.S. Federal database in Westlaw reveals that derogatory names–Injun, Braves, Red Man, Squaw, and Redskins–are used to sell everything from corn chips to football. Sports teams parade caricatured Indian mascots, such as Chief Wahoo (Cleveland Indians) or Illiniwek (Fighting Illini of Ilinois). The Seminole activist Michael Haney describes many fans as "cultural cross-dressers" decked out in day glo warpaint and turkey feathers.

Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1006-07 (1995).

16. Control by indigenous farmers over crop varieties would guarantee certain rights to: (a) grow folk varieties and market folk variety seeds and food products, (b) be compensated when folk varieties, folk variety genes, folk variety food products and names are used or marketed by others, and (c) have a say in the manipulation and other uses of folk varieties by outsiders, which may violate the cultural and

As part of this international dialogue on traditional knowledge, the case has been made for the development of sui generis regimes to complement or supplement the intellectual property system.[17] To the extent that the proposed schemes are premised on the protection of traditional knowledge in accordance with the customs of indigenous groups,[18] customary law has become an important area of inquiry. Despite this recognition, however, not much information is available in literature regarding the effectiveness of customary law as a protective mechanism. It is the objective of this Article to remedy this gap by elaborating on the concept of customary law and describing the extent to which it is recognized and enforced in various legal systems around the world.

With reference to regional models and national laws, Section One describes the framework for protecting traditional knowledge under sui generis regimes and notes the central role played by customary law in the process. Following a discussion in Section Two on the extent of recognition of customary law under selected legal systems, Section Three assesses the effectiveness of customary law as an enforcement mechanism. Despite the noted limitations of customary law, this Article urges the formal recognition of customary law as part of national legal systems and the improvement of methods for ascertaining and enforcing it. For maximum protection, however, the use of customary law at the national level needs to be complemented with the adoption of a binding international scheme governing the access to and sharing of benefits arising from the utilization of traditional knowledge.

SECTION ONE: THE SUI GENERIS OPTION

I. ALTERNATIVES TO INTELLECTUAL PROPERTY RIGHTS

WIPO has given serious consideration to the possible protection of indigenous knowledge through various forms of intellectual property rights (IPRs), including copyright, patents, plant varieties, industrial designs, and trademarks.[19] As a practical matter, however, it may be difficult to protect

---

religious values with which folk varieties are often deeply imbued.

Daniela Soleri et al., *Gifts from the Creator: Intellectual Property Rights and Folk Crop Varieties, in* SOURCEBOOK, *supra* note 11, at 24. Control or autonomy over aspects of tourism by indigenous people would also minimize environmental damage to sacred sites or parks caused by noise, depletion of resources such as wood, overcrowding, use of vehicles, and road construction. POSEY & DUTFIELD, *supra* note 9, at 6-9.

17. Many members of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore have called for the establishment of *sui generis* systems in their written submissions to the Committee. They include Ethiopia, Thailand, Brazil, Colombia, the African Group, the Asian Group, Venezuela, the Russian Federation, Iran, Indonesia, Morocco, Egypt, and the Andean Community. *See* WIPO, TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE LEGAL AND POLICY OPTIONS, para. 108, n.42, WIPO Doc. WIPO/GRTKF/IC/6/3 (2003), *available at* http://www.wipo.int/documents/en/meetings/2004/igc/pdf/grtkf_ic_6_3.pdf.

18. *See infra* notes 35 and 47 and accompanying text.

19. *See generally* INTELLECTUAL PROPERTY NEEDS, *supra* note 1.

traditional knowledge through IPRs due to problems fitting traditional knowledge into "certain accepted notions of intellectual property relating to ownership, originality, duration, fixation, inventiveness and uniqueness,"[20] among others.

For example, it has been argued that IPRs are unsuitable for indigenous knowledge because they focus on individual rather than group rights,[21] they offer protection for fixed periods of time unlike the indeterminate periods applicable to indigenous knowledge,[22] and the requirement of a writing for protected works virtually excludes much of the indigenous knowledge that is transmitted orally through generations in traditional societies.[23] Additionally, IPRs are expensive to obtain and the costs of enforcement high.[24] Long and costly administrative and judicial procedures would render the IPR option unattractive for many indigenous people.

Given this perceived incompatibility between IPRs and traditional knowledge, the case has been made for the development of a sui generis regime specifically adapted to the nature and characteristics of indigenous knowledge.[25] The argument for adopting a separate instrument for traditional knowledge is based on the recognition that traditional knowledge is created, owned, and utilized differently.[26] Unlike intellectual property law, traditional knowledge is designed not to confer economic benefits to individual creators but is intended for common exploitation.[27] "Consequently, it does not make sense to try to fit [it] within the rigidities of national intellectual property law."[28]

The establishment of a sui generis regime, however, poses a number of

---

20. Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 793 (1999) [hereinafter Kuruk, *Protecting Folklore*].

21. *Id.* at 794-95.

22. *Id.* at 798.

23. Regarding fixation, it is explained:

> Another requirement to grant copyright protection to a work is that it must have been "written down, recorded or otherwise reduced to material form." Certain rights in folklore such as song and dance are unlikely to satisfy this fixation requirement inasmuch as they are largely verbal and have not been written down or recorded.

Id. at 796.

24. The costs of preparing and prosecuting a patent application in the United States has been estimated at more than $20,000. John H. Barton, *Intellectual Property Rights and Innovation*, *in* CAPITAL FOR OUR TIME: THE ECONOMIC, LEGAL AND MANAGEMENT CHALLENGES OF INTELLECTUAL CAPITAL 123, 127 (Nicholas Imperato ed., 1999).

25. *See generally* JOHN MUGABE, INTELLECTUAL PROPERTY PROTECTION AND TRADITIONAL KNOWLEDGE: AN EXPLORATION IN INTERNATIONAL POLICY DISCOURSE (1998).

26. Theodor H. Gaster, *Definitions of Folklore*, *in* FUNK & WAGNALLS STANDARD DICTIONARY OF FOLKLORE, MYTHOLOGY AND LEGEND 255-64, 399 (Maria Leach ed., 1959) [hereinafter DICTIONARY OF FOLKLORE].

27. Mamie Harmon, *Definitions of Folklore*, *in* DICTIONARY OF FOLKLORE, *supra* note 26, at 399-400.

28. Kuruk, *Protecting Folklore*, *supra* note 20, at 837-38.

complex conceptual and practical issues, including the definition of subject matter of protection, goals for protection,[29] requirements of protection, extent of rights to be conferred, the title holders (individuals or communities), modes of acquisition, and duration and enforcement measures.[30] Presently, no internationally binding sui generis regime exists, although a number of related regional and national instruments have been developed within the past decade in part to assist national governments in complying with their obligations under the Convention for Biological Diversity (CBD).[31]

Specifically, Article 8, Section j, of the CBD calls on Contracting States to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."[32] In addition to "promot[ing] their wider application . . . of such knowledge, innovations, and practices" with "the approval and involvement of the holders [thereof,]" the CBD also encourages the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices.[33]

Essentially, these provisions of the CBD reflect a compromise between the need by parties from the North for access to biological resources of the South versus the demands of the South to restrict such access. The balance struck was to facilitate access to biological resources while ensuring the transfer of some benefits to providers of such resources. The hope, in part, was that such returns would in turn provide the incentive for the preservation of environmentally sound practices.[34] To the extent that mutual arrangements were envisaged as the principal mechanisms for effecting these exchanges, however, the CBD and the sui generis regional and national instruments, which implement its provisions, reflect contract-based solutions.

A. Regional Frameworks

One of the earliest comprehensive regional sui generis instruments on traditional knowledge is the African Model Law for the Protection of the Rights of Local Communities, Farmers, Breeders and Regulation of Access to Biological Resources (African Model Law) adopted by Council of Ministers of

---

29. WIPO, REVISED VERSION OF TRADITIONAL KNOWLEDGE: POLICY AND LEGAL OPTIONS, at 27, WIPO Doc. WIPO/GRTKF/IC/6/4 Rev. (2004).

30. CARLOS M. CORREA, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY 27 (2001).

31. Convention on Biological Diversity, opened for signature June 5, 1992, 31 I.L.M. 818 [hereinafter Convention on Biological Diversity].

32. *Id.* art. 8.

33. *Id.*

34. As noted in the preamble, the CBD provisions were shaped partly by the recognition of "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations, and practices relevant to the conservation of biological diversity and the sustainable use of its components. *Id.* pmbl.

the Organization of African Unity (OAU) in June 1998.[35] The African Model Law reaffirms the sovereignty of the State and people over their biological resources and provides for the establishment of a National Competent Authority[36] to administer the instrument's provisions.[37] Article 16 of the African Model Law recognizes the rights of communities over their innovations, practices, knowledge, and technologies acquired through generations.[38] It also recognizes their right to collectively benefit from the utilization of such resources. These community rights are to be protected in accordance with "norms, practices and customary law found in, and recognized by, the concerned local and indigenous communities, whether such law is written or not."[39]

To be granted access to biological resources and knowledge or technologies of local communities in any part of the country, one must apply for the prior informed consent and written permit of the National Competent Authority. The applicant must also include such details as the identity of the applicant, type and reasons for resources requested, risks in the use of the resources, benefits to the local communities, and proposed benefit-sharing arrangements.[40] To ensure transparency, the African Model Law requires

---

35. Council of Ministers of the Organization of African Unity, *African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, available at* http://www.opbw.org/nat_imp/model_laws/oau-model-law.pdf [hereinafter *African Model Law*].

36. *Id.* art. 57.

37. The Competent National Authority has many duties:

i) create and operate a regulatory mechanism that will ensure effective protection of Community Intellectual Rights and Farmers' Rights, and the regulation of access to biological resources;
ii) carry out the process of consultation and participation of local communities, including farming communities, in the identification of their rights as provided for under the customary practices and laws of the communities;
iii) identify types of Community Intellectual Rights and Farmers' Rights;
iv) identify and define the requirements and procedures necessary for the recognition of Community Intellectual Rights and Farmers' Rights;
v) develop criteria and mechanisms to standardise procedures;
vi) develop a system of registration of items protected by Community Intellectual Rights and Farmers' Rights according to their customary practices and law;
vii) issue licenses for the exploitation and commercialisation of biological resources, including protected species, varieties or lineages, and community innovations, practices, knowledge and technologies;
viii) identify relevant technical institutions that will assist local communities, including farming communities, in the categorisation and characterisation of their biological resources, innovations, practices, knowledge and technologies.

Id. art. 58.

38. *Id.* art. 17.

39. *Id.*

40. The Law provides:

publication of the application in a public registry or newspaper. The consent of the concerned local community must also be obtained and access carried out; without local and State consent, the access is invalid.[41] The National Competent Authority is required to verify with local communities that their consent was in fact sought and granted.[42] Under the African Model Law, the local communities may "withdraw consent or place restrictions on activities relating to access where such activities are likely to be detrimental to their socio-economic life, or their natural or cultural heritage."[43]

Significantly, Article 23 of the African Model Law recognizes Community Intellectual Rights, which are defined to include those rights held by traditional professional groups, especially traditional intellectual property practitioners. Non-registration of any community innovations, practices, knowledge, or technologies will not disqualify protection as community intellectual rights.[44] Neither will publication of information about biological

---

In making an application for access as provided in article three above, the following information shall be provided by the applicant:

i) the identity of the applicant and the documents that testify to her/his legal capacity to contract, including, where appropriate, the identity of all partners with the contracting party;
ii) the resources to which access is sought, including the sites from , its present and potential uses, its sustainability and the risks which may arise from access to it;
iii) whether any collection of the resource endangers any component of biological diversity and the risks which may arise from the access;
iv) the purpose for which access to the resource is requested including the type and extent of research, teaching or commercial use expected to be derived from it;
v) description of the manner and extent of local and national collaboration in the research and development of the biological resource concerned;
vi) the identification of the national institution or institutions which will participate in the research and be in charge of the monitoring process;
vii) the identity of the location where the research and development will be carried out;
viii) the primary destination of the resource and its probable subsequent destination(s);
ix) the economic, social, technical, biotechnological, scientific, environmental or any other benefits that are intended, or may be likely to, accrue to the country and local communities providing the biological resource as well as the collector and the country or countries where he/she operates;
x) the proposed mechanisms and arrangements for benefit sharing;
xi) description of the innovation, practice, knowledge or technology associated with the biological resource; and
xii) an environmental and socio-economic impact assessment covering at least the coming three generations, in cases where the collection is in large quantities.

Id. art. 4, § 1.

41. *Id.* art. 5, § 2.
42. *Id.* art. 5, § 3.
43. *Id.* art. 20.
44. *Id.* art. 23, § 3.

resources or local use or presence of the resources in a genebank "preclude the local community from exercising its community intellectual rights in relation to those resources."[45] The communities are guaranteed a right to at least fifty percent of the access permit fees to be shared equitably with "the full participation and approval of the concerned local communities."[46]

Like the African Region, the Pacific Region has developed a sui generis framework entitled Model Law for the Protection of Traditional Knowledge and Expressions of Culture (Pacific Model Law).[47] The Pacific Model Law recognizes as traditional owners and as holders of traditional cultural rights individuals, clans, or groups in whom the custody or protection of the traditional knowledge or expressions of culture is entrusted in accordance with customary law and practices.[48] Such traditional cultural rights are inalienable,[49] perpetual in duration,[50] and valid whether or not the underlying traditional knowledge or expressions of culture are in material form.[51] The rights are considered to be supplementary to, and therefore, not to affect any rights that may subsist under intellectual property law.[52] In addition to traditional cultural rights, the owners also enjoy moral rights in traditional knowledge.[53]

Under the Pacific Model Law, certain uses of traditional knowledge and expressions of culture are subject to the prior and informed consent of the traditional owners.[54] To obtain such consent, an application must first be addressed to the Cultural Authority required to be created under the Pacific Model Law.[55] Upon receipt of the application, the Cultural Authority is authorized to publish it in the national newspapers and to endeavor to identify and notify the relevant owners of the traditional knowledge that is the subject-matter of the application.[56]

Rights-holders, if interested in the proposal, could at this stage enter into negotiations with the applicants over the terms of access to, or use of, traditional knowledge. Although any agreement reached between the applicant and the traditional group is subject to review by the Cultural Authority, the traditional owners may accept, reject, or modify any comments made by the

45. *Id.* art. 23, § 4.

46. *Id.* art. 22, § 2.

47. Model Law for the Protection of Traditional Knowledge and Expressions of Culture, *reprinted in* SECRETARIAT OF THE PACIFIC COMMUNITY, PACIFIC REGIONAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE 3-15 (2002) [hereinafter SECRETARIAT OF THE PACIFIC COMMUNITY].

48. *Id.* arts. 4, 6.

49. *Id.* art. 10.

50. *Id.* art. 9.

51. *Id.* art. 8.

52. *Id.* art. 11.

53. The moral rights include the right of attribution of ownership, authorship, and non-derogation. *Id.* art. 13.

54. *Id.* art. 18.

55. *Id.* art. 15.

56. *Id.* art. 16.

Cultural Authority after its review.[57] If traditional knowledge is to be used for a commercial purpose, the agreement must contain a benefit-sharing arrangement providing for equitable monetary or non-monetary compensation to the traditional owners.[58]

The Pacific Model Law makes it a criminal offense, punishable by a fine or jail term, to use traditional knowledge in a non-customary manner (whether or not of a commercial nature) and in relation to which the required prior and informed consent has not been obtained.[59] In addition, civil suits can be brought by the traditional owners in relation to such non-customary use of traditional knowledge[60] for remedies including injunctive relief, damages, seizures, and accounting for profits.[61] The term "customary use" is employed in this context to mean "the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of traditional owners."[62] Significantly, while the Pacific Model Law envisages a resort to the national court systems to resolve disputes concerning traditional knowledge, it states quite categorically that it does not preclude the use of customary law and practice as a dispute resolution mechanism.[63]

In September 2000, the Andean Community adopted Decision 486 on a Common Intellectual Property Regime,[64] which sought to create a sui generis system for traditional knowledge. Under Decision 486, the Andean Community member states undertook to safeguard and respect "their biological and genetic heritage, together with the traditional knowledge of their indigenous, African American, or local communities."[65] The Decision also recognizes "the right and the authority of indigenous, African American, and local communities in respect of their collective knowledge."[66]

The Decision requires any application for a process or product patent obtained from or developed on the basis of the traditional knowledge of indigenous, African American, or local communities in the member states to include written proof from a member country of authorization to use such knowledge.[67] It also provides for the invalidation of patents based on such knowledge but in respect of which proper evidence of authorization was not provided at the time of the application.[68] Furthermore, unless an "application is

57. *Id.* art. 21.
58. *Id.* art. 12.
59. *Id.* art. 26.
60. *Id.* art. 30.
61. *Id.* art. 31.
62. *Id.* art. 4.
63. *Id.* art. 33.
64. Andean Community Commission, *Decision 486: Common Intellectual Property Regime* (Dec. 1, 2000), *available at* http://www.sice.oas.org/trade/junac/decisiones/DEC486e.asp.
65. *Id.* art. 3.
66. *Id.*
67. *Id.* art. 26, § i.
68. *Id.* art. 75, § h.

filed by the community itself or with its express consent," the Decision bars from registration as trademarks, signs that "consist of the name of indigenous, African American, or local communities, or of such denominations, words, letters, characters, or signs as are used to distinguish their products, services, or methods of processing, or that constitute an expression of their culture or practice."

B. National Frameworks

In addition to the regional frameworks discussed above, some national measures are equally noteworthy. For example, Panamanian legislation on the intellectual property rights of indigenous communities subjects "the rights of use and commercialization of the art, crafts and other cultural expressions based on the tradition of the indigenous community, [to] . . . the regulation of each indigenous community approved and registered in the DIGERPI or in the National Copyright Office of the Ministry of Education."[69] For purposes of the law, indigenous collective rights means "[i]ndigenous intellectual and cultural property rights law relating to art, music, literature, biological, medical and ecological knowledge and other subject matter and manifestations that have no known author or owner and no date of origin and constitute the heritage of an entire indigenous people."[70]

On its part, Ecuador's Law on Intellectual Property of 1998 provides that protection given to industrial property should ensure the protection of the country's biological and genetic heritage.[71] The 1998 Law also conditions the grant of product or process patents that relate to such heritage on the legal acquisition of elements of the heritage from the relevant traditional owners.[72]

In 1997, the Philippine Congress passed the Indigenous Peoples Rights Act[73] to "recognize and promote all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs),"[74] including "the rights of ICCs/IPs to preserve and develop their cultures, traditions and institutions."[75] The Act recognizes rights of indigenous peoples to ancestral domains,[76] self-

69. On the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Communities, for the Protection of their Cultural Identities and Traditional Knowledge, Law 20, art. 15 (June 26, 2000) (Pan.).

70. *Id.* art. 2, § v.

71. Law on Intellectual Property, Registro Oficial No. 320, § 120 (May 19, 1998) (Ecuador).

72. *Id.* § 120.

73. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes, Rep. Act No. 8371 (1997) (Phil.).

74. *Id.* § 2(a).

75. *Id.* § 2(c).

76. *Id.* ch. III.

governance and empowerment,[77] social justice and human rights,[78] and cultural property.[79] With respect to cultural property, the Act affirms the right of ICCs/IPs to the full ownership and control and protection of their cultural and intellectual rights.[80]

Under the Philippine Act, access to biological and genetic resources and to indigenous knowledge related to the conservation, utilization, and enhancement of these resources is permitted within ancestral lands and domains of the ICCs/IPs "only with a free and prior informed consent of such communities, obtained in accordance with customary laws of the concerned community."[81] As used in the Act, the term "free and prior informed consent" means "the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community."[82]

The Philippine Act guarantees ICCs/IPs the right to practice and revitalize their own cultural traditions and customs[83] and obligates the State to "develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs."[84] The Act also recognizes the right of ICCs/IPs "to practice and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access to their religious and cultural sites; the right to use and control of ceremonial objects; and, the right to the repatriation of human remains."[85]

---

77. *Id.* ch. IV.
78. *Id.* ch. V.
79. *Id.* ch.VI.
80. The Act provides indigenous groups:
> the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and hearth practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.

Id. § 34.
81. *Id.*
82. *Id.* § 3(g).
83. *Id.* § 32.
84. *Id.*
85. *Id.* § 33.

II. THE RELEVANCE OF CUSTOMARY LAW

A. Nature of Customary Law

Common to the sui generis instruments just surveyed is the requirement to ascertain and enforce traditional knowledge in accordance with the practices of indigenous groups. Customary law, as the system of rules and customs that governs conduct and rights in such groups,[86] would therefore be relevant to any analysis of rights and obligations under traditional knowledge provided for under the sui generis models.

The scope of customary law rules can be traced to the structure of indigenous societies. In Australia, for example, Aboriginal customary rules have evolved based on social relations with the family as the basic social unit.[87] Kinship relations in Aboriginal societies involve rights and obligations with respect to such matters as "marriage and private arrangements, food gathering, distribution and sharing of the other goods, certain trading relationship and educational roles."[88] Aboriginal customary law also recognizes procedures for the conduct and resolution of disputes,[89] and "responsibilities . . . for land and for objects and ideas associated with land."[90]

On their part, the Maori of New Zealand observe customary law rules[91]

---

86. AKINTUNDE O. OBILADE, THE NIGERIAN LEGAL SYSTEM 83 (1979).

87. Groups of families make up a band which in turn combines with other bands to form a tribe. An important aspect of the social organization is the spiritual and physical relationship Aborigines maintained with the land. They considered certain portions of the land to be of special and sacred importance and therefore kept secret from all uninitiated persons certain knowledge or practices relating to land. Bruce Debelle, *Aboriginal Customary Law and the Common Law*, *in* INDIGENOUS AUSTRALIANS AND THE LAW 81-83 (Elliot Johnston QC et al. eds., 1997).

88. *Id.* at 83.

89. One commentator describes early Aboriginal customary law:

> [a] body of rules backed by sanctions and . . . a set of dispute resolution mechanisms. At a more informal level, it was also a series of accepted behaviors which allowed daily social life to proceed. The formal rules are backed by sanctions and are clearly articulated in terms of what one should do and why. These shade into more informal areas of behavioral controls which may never be clearly stated, but which are the stuff of interpersonal relationships, the self-regulating patterns of interaction.

THE LAW REFORM COMMISSION, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS para. 37 (1986) (citing Dianne Bell, *Aboriginal Women and the Recognition of Customary Laws in Australia*, *in* COMMISSION ON FOLKLORE AND LEGAL PLURALISM (1983)) [hereinafter ABORIGINAL CUSTOMARY LAWS].

90. *Id.* at para. 37.

91. The social organization of the Maori is comprised of three constituent groups: the *whanau* (extended family) as the basic social unit, *hapu* (sub-tribe), and the *iwi* (tribe). Moana Jackson, *Justice and Political Power: Reasserting Maori Legal Processes*, *in* LEGAL PLURALISM AND THE COLONIAL LEGACY 243, 245 (Kayleen M. Hazlehurst ed., 1995). Under this social arrangement, an individual, from the moment of birth, became a part of a kinship collective, enjoying rights within the collective, but also owing obligations to other members of the

consisting of the "values, standards, principles or norms to which the Maori community generally subscribed for the determination of appropriate conduct."[92] Maori customary law is synonymous with the concept of *tikanga*, a Maori term for "a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual."[93]

In general, customary laws are not uniform across ethnic groups in indigenous societies.[94] Differences in the customary laws of indigenous groups can be traced to such factors as language, proximity, origin, history, social structure, and economy. For example, the customary law system of an ethnic group in one region of an African country may be different from the customary law system of the ethnic group in a neighboring region even though the two ethnic groups speak the same language.[95] Generally, the customary law rules among ethnic groups speaking a common language tend to be similar, but the rather significant differences that can sometimes exist make it misleading to talk of a uniform customary law rule applicable to all members of the language group.

An important characteristic of customary law is its dynamism.[96] Customary law is not static, and its rules change from time to time to reflect evolving social and economic conditions. As noted in one judicial decision, "one of the most striking features of native custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character."[97] Like any system of unwritten law, customary law has a capacity to adapt itself to new and altered facts and circumstances as well as to changes in the economic, political, and social environment.[98] As Maori jurist Eddie Durie has noted in relation to the Maori, customary law rules are "established by

---

collective. RICHARD BOAST ET AL., MAORI LAND LAW 31 (1999). *See also* Jackson, *supra*, at 246.

92. Eddie Durie, *Will the Settlers Settle? Cultural Conciliation and Law*, 8 OTAGO L. REV. 449, 452 (1996).

93. LAW COMMISSION, MAORI CUSTOM AND VALUES IN NEW ZEALAND LAW para. 72 (2001), (citing Hirini Moko Mead, *The Nature of Tikanga* (paper presented at Mai i te Ata Hapara Conference, Te Wananga o Raukawa, Otaki, August 11-13, 2000) 3-4) [hereinafter MAORI CUSTOM AND VALUES].

94. A.N. Allott & Eugene Cotran, *Restatement of Laws in Africa: The Need, Value and Methods of Restatement*, *in* INTEGRATION OF CUSTOMARY AND MODERN LEGAL SYSTEMS IN AFRICA 17, 32 (Law Faculty, Univ. of Ife ed., 1971).

95. For example, among the Kusasi language group in Ghana, to which the author belongs, it is possible to identify component ethnic groups such as the Toende and Agolle, each with its separate customary law system.

96. E. Cotran & N.N. Rubin, *Introduction*, *in* READINGS IN AFRICAN LAW xix (E. Cotran & N.N. Rubin eds., 1970) [hereinafter READINGS IN AFRICAN LAW].

97. Lewis v. Bankole, [1908] 1 N.L.R. 81, 100-01 (Nig.).

98. READINGS IN AFRICAN LAW, *supra* note 96, at xx. Thus, in Africa customary law has adjusted to such influences as the introduction of European and other foreign legal systems, urbanization, and the growth of a money economy. This dynamism of customary law can be illustrated by customary law rules now permitting individual land ownership where previously land belonged strictly to the family as a group, and an individual could neither own any piece of land absolutely, nor sell it. *Id.*

precedents through time, are held to be ritually correct, are validated by usually more than one generation, and are always subject to what a group or an individual is able to do to."[99]

Similar elements are found in the definitions of folklore, traditional knowledge, and indigenous knowledge, suggesting a link with customary law. In relation to folklore, it has been noted that "[d]escriptions of the amorphous term *folklore* tend to emphasize its diverse nature, as consisting of, for example, the traditional customs, tales, sayings, or art forms preserved among a people," applicable "not only to ideas, or words, but also to physical objects."[100] Other characteristics of folklore include "its oral nature, group features, and mode of transmission through generations of people."[101]

Similarly, WIPO defines traditional knowledge as "tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields."[102] In this context, tradition-based refers to "knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; have generally been developed in a non-systematic way; and are constantly evolving in response to a changing environment."[103] With respect to the use of the term indigenous knowledge as alternative terminology, one can distinguish between a broad and narrow meaning,[104] with the former for all

---

99. Like other customary law systems, Maori customary law is dynamic, with a capacity to adapt to new circumstances. To deal with new influences, it has evolved and adapted a number societal structures including the Maori parliaments, the Kingitanga of the Waikato, and the pan-Maori movements such as the Kotahitanga. MAORI CUSTOM AND VALUES, *supra* note 93, at para. 72.

100. Kuruk, *Protecting Folklore*, *supra* note 20, at 776.

101. *Id.* at 776-77.

102. *See* INTELLECTUAL PROPERTY NEEDS, *supra* note 1, at 25.

103. There are many categories of traditional knowledge recognized under the WIPO definition:

> agricultural knowledge; scientific knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity related knowledge; "expressions of folklore" in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description of traditional knowledge are items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of "heritage" in the broad sense.

Id.

104. The term "indigenous" has been used to refer to communities that, having historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of society now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories and ethnic

practical purposes being equated with traditional knowledge.[105]

Therefore, like customary law, all these definitions focus on communal rights of particular ethnic groups and practices that are constantly evolving and not static. In this sense customary law on the one hand, and traditional knowledge and indigenous knowledge on the other, are interrelated. Accordingly, one cannot seek to understand traditional knowledge without reference to customary law which is the system within the scope of rights in such knowledge is determined.

B. Customary Law Principles

The link just noted between traditional knowledge and customary law confirms the relevance of customary law as the primary regulatory mechanism over uses of traditional knowledge. This link also suggests that solutions to traditional knowledge issues drawn from customary law are likely to be more successful than the western oriented top-down approaches reflected in current international instruments on traditional knowledge.[106] From the preceding

---

identities as the basis of their continued existence as peoples, in accordance with their cultural pattern, social institutions, and legal systems. *See* TONY SIMPSON, INDIGENOUS HERITAGE AND SELF-DETERMINATION: THE CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES 22-23 (1997). Critical elements in this description include self-determination of the relevant community, experience of subjugation, marginalization, exclusion, discrimination, and priority in time with respect to the occupation and use of a specific territory. For example, indigenous peoples are defined in the International Labour Organisation Convention Concerning Indigenous and Tribal Peoples:

> [P]eoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 1, June 27, 1989, 28 I.L.M. 1384.

105. While useful in describing minority groups in the Americas and Australasia who were marginalized by the majority European settlers, the indigenous label, as defined, may not be apt for other regions not having similar history. As one commentator has observed, the term "indigenous people" appropriately describes "regions with a colonial history that has left a predominant national culture and autochthonous cultures that coexist and compete for limited resources, especially land." Stephen B. Brush, *Whose Knowledge, Whose Genes, Whose Rights?*, *in* VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS 5 (Stephen B. Brush & Doreen Stabinsky eds., 1996) [hereinafter VALUING LOCAL KNOWLEDGE]. Therefore, it may not be appropriate for parts of Africa and Asia, where a single hybrid or creole culture is not dominant. Some writers distinguish between broad and narrow definitions of the term indigenous, where it could also apply to traditional groups that do not necessarily come under the restrictive U.N. definition. Patel notes, for example, "the word indigenous is also used in its broader connotation, . . . including all those people who were native to the lands where indigenous knowledge, as contrasted to modern or technological knowledge, originated. In this sense, the reference would no longer be simply to the narrow groups of aboriginal tribes." Surendra J. Patel, *Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?*, *in* VALUING LOCAL KNOWLEDGE, *supra*, at 308.

106. Professor Riley notes:

survey of the model laws, a number of principles emerge as central to the protection of traditional knowledge under customary law.

First is the recognition that indigenous groups own or have rights of custodianship over indigenous resources. Accordingly, the African Model Law provides for the rights of communities over their innovations, practices, knowledge, and technology acquired over generations.[107] The Pacific Model Law emphasizes the rights of individuals, clans, and groups as owners and holders of cultural rights.[108] Such formal recognition is significant because it confirms the primacy of rights of indigenous groups to traditional knowledge and relegates to a secondary right any claim the State may purport to assert in relation to traditional knowledge. It also clarifies the rather tenuous basis of claims in some international instruments that purport to provide for State "sovereign" rights in traditional knowledge.[109]

As a corollary to this fundamental right of ownership, custodianship, or other relevant right in traditional knowledge by indigenous groups, there is also an acceptance in the model laws of the principle that the scope of such rights would be determined with reference to customary practices and not qualified by rules laid down by States. The African Model Law incorporates this principle by noting that community rights are to be "*protected under the norms, practices and customary law found in, and recognized by, the concerned local and indigenous communities.*"[110]

Given the objective under the sui generis models to mitigate the problems posed by the application of intellectual property criteria to traditional knowledge,[111] the model laws permit deviations from established IP criteria where necessary to effectively protect traditional knowledge. For example, the African Model Law tackles the bias evident for "individuals" under intellectual property law by emphasizing instead the "collective" nature of indigenous rights in traditional knowledge.[112] To remedy the problem caused by the IP requirement that protected matter be recorded or reduced to some form of

---

> Tribal law is drawn from a tribe's traditional customary law, tribal belief systems, and other contemporary forms of tribal governance, including ordinances and tribal constitutions. It therefore reflects not only substantive legal principles, but also the cultural context from which they evolved. Through tribal law, indigenous governance of cultural property and traditional knowledge will correlate specifically to the works tribes seek to protect, allow for forms of punishment consistent with the community's values, and properly incentivize behavior that is good for the community at large.

Angela Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 90 (2005) (footnote omitted).

107. *African Model Law*, *supra* note 35, art. 16.

108. SECRETARIAT OF THE PACIFIC COMMUNITY, *supra* note 47, arts. 4, 6.

109. *See, e.g.*, Convention on Biological Diversity, *supra* note 31, art. 3.

110. *African Model Law*, *supra* note 35, art. 17 (emphasis added).

111. *See* J.A. EKPERE, OAU'S MODEL LAW: THE PROTECTION OF THE RIGHTS OF LOCAL COMMUNITIES, FARMERS AND BREEDERS, AND FOR THE REGULATION OF ACCESS TO BIOLOGICAL RESOURCES 11 (Organization of African Unity ed., 2000), *available at* http://www.blauen-institut.ch/Tx/tpT/t_oaumodellaw.pdf.

112. *See African Model Law*, *supra* note 36, art. 16.

writing, the sui generis models dispense with such a requirement altogether. Thus, traditional knowledge would be protected under the African[113] and Pacific Model Laws[114] whether or not it is in writing or material form.

Another difference between IP and customary law taken up in model laws is the duration of rights.[115] Unlike the limited period of protection for IP rights, customary law rights in traditional knowledge are held for an indefinite period. Accordingly, the Pacific Model Law provides that such rights "continue in force in perpetuity."[116]

While there is a general disposition under customary law to allow free use of traditional knowledge under notions of reciprocity,[117] the right to such use is not automatic. Access to traditional knowledge could be denied on account of the sacred secret nature of an item or simply out of a desire of the indigenous group not to commercialize it.[118] The right to refuse access as an important means of protecting traditional knowledge is also incorporated into the sui generis models. The African Model Law not only recognizes this right, but like the Pacific Model Law, provides elaborate rules on prior informed consent to ensure that indigenous groups have sufficient information on proposed uses of traditional knowledge to make a decision on whether or not to grant access.[119] Even where approval has been granted, such consent can be withdrawn for reasons including the failure to comply with the conditions of the grant or unauthorized uses of traditional knowledge.[120]

Significantly, the sharing ethic, which is part of the concept of reciprocity, imposes an obligation on the individual who benefits from the exploitation of communal property or rights to pass on some of the benefits from the exploitation, either in the same form or in kind to other members who may require such assistance.[121] Because this sharing ethic has been threatened by exploiters who have taken undue advantage of indigenous groups by not rewarding them appropriately for uses of traditional knowledge,[122] it is

---

113. *Id.* art. 17.

114. SECRETARIAT OF THE PACIFIC COMMUNITY, *supra* note 47, art. 8.

115. Kuruk, *Protecting Folklore*, *supra* note 20, at 798.

116. SECRETARIAT OF THE PACIFIC COMMUNITY, *supra* note 47, art. 9.

117. In many traditional communities, property is expected "to be automatically shared with one's kin and others in need and refusal to respond to a reasonable request was considered to be stingy, a particularly despised behavior." Candace S. Greene & Thomas D. Drescher, *The Tipi with Battle Pictures: The Kiowa Tradition of Intangible Property Rights*, 84 TRADEMARK REP. 418, 428 (1994).

118. JANKE, *supra* note 14, at 21.

119. *See African Model Law*, *supra* note 35, art. 5.

120. *Id.* art. 20.

121. Each member of the traditional society has a direct interest in the welfare of other kinsmen and therefore recognizes a duty to help them when they are in need. Paul Kuruk, *Refugeeism, Dilemma in International Human Rights: Problems in the Legal Protection of Refugees in West Africa,* 1 TEMP. INT'L & COMP. L.J. 179, 194 (1987).

122. *See generally*, CORREA, *supra* note 30, at 5-6 (noting that arguments for protection of traditional knowledge are frequently based on equity considerations of compensation by breeders and seed companies for free samples of plant varieties obtained from indigenous

imperative that a protective scheme based on customary law incorporate some form of benefit-sharing arrangement.

The scheme should require that a portion of the benefit obtained from access to traditional knowledge be assigned to indigenous groups to be applied in accordance with traditional practices. Also, such benefits need not be in monetary terms only; they could include in-kind arrangements such as the construction of schools, hospitals, or roads to benefit traditional communities. Accordingly, the Pacific Model Law provides for equitable monetary or non-monetary compensation,[123] while the African Model Law guarantees indigenous groups at least fifty percent of the benefits gained from the utilization of indigenous resources.[124]

Regarding the enforcement of these rights and obligations, the expectation under the African Model Law is for the enforcement of rights and obligations in accordance with traditional practices.[125] The Pacific Model Law contemplates use of national courts but does not preclude a resort to customary dispute resolution mechanisms.[126] Unfortunately, both model laws do not elaborate on the enforcement mechanisms under customary law. For an understanding of the effectiveness of customary law in protecting traditional knowledge, relevant issues surrounding such mechanisms must be clarified.

Of prime importance is whether customary law is recognized as a viable component of the national legal system; no legal basis will otherwise exist for the enforcement of customary law rules. An equally important consideration is how the relevant institutions ascertain and apply customary law rules. These issues are examined in the remaining part of the Article, beginning with a comparative analysis of the practice of recognition in selected regions of the world.

SECTION TWO: RECOGNITION AND APPLICATION OF CUSTOMARY LAW

I. FORMAL SYSTEMS OF RECOGNITION

A. Africa

During the colonial era in Africa, European colonialists introduced their own metropolitan law and system of courts into their colonies, but retained so much of customary law and the African judicial process which they did not deem contrary to basic justice or morality.[127] The result of the imposition of

---

farmers).

123. SECRETARIAT OF THE PACIFIC COMMUNITY, *supra* note 47, art 12.

124. *African Model Law*, *supra* note 35, art 22, § 1.

125. *Id.* art 17.

126. SECRETARIAT OF THE PACIFIC COMMUNITY, *supra* note 47, art. 33.

127. ANTONY ALLOTT, ESSAYS IN AFRICAN LAW 72-74 (1960) [hereinafter ALLOTT,

colonial rule, therefore, was to produce a dual or parallel system of courts and laws in African countries.[128] Dualism was reflected in the establishment of Western-type courts. Expatriate magistrates and judges, whose jurisdiction extended over all persons in criminal and civil matters,[129] presided over these courts and applied European law and local statutes based on European statutes.[130]

A second group of courts was also established by statute. They were composed of either traditional chiefs or local elders with jurisdiction only over Africans and which, for the most part, applied the customary law prevailing in the area of the jurisdiction of the court.[131] Creation of such statutory customary courts,[132] however, did not mean the abolition of the traditional non-statutory adjudication systems that pre-dated colonialism.[133]

At first, statutory customary law courts and the general courts developed separately. But toward the end of the colonial period, an integration of the dual court system was initiated by conferring supervisory jurisdiction on the general courts over statutory customary court proceedings.[134] Gradually, a change of personnel in the statutory customary courts occurred, from the traditional chiefs

---

ESSAYS].

128. Muna Ndulo, *Ascertainment of Customary Law: Problems and Perspectives with Special Reference to Zambia*, *in* FOLKLAW: ESSAYS IN THE THEORY AND PRACTICE OF LEX NON SCRIPTA 339, 340 (Alison Dundes Renteln & Alan Dundes eds., 1994) [hereinafter FOLKLAW].

129. *Id.* at 341-42.

130. These courts are hereinafter referred to as the "general courts."

131. For example, the Native Tribunals Ordinance of Kenya provided as follows: "Subject to the provisions of this Ordinance, a native tribunal shall administer . . . the native law and custom prevailing in the area of the jurisdiction of the tribunal . . . ." Native Tribunals Ordinance, (1930) § 30 (Kenya), *reprinted in* WILLIAM BURNETT HARVEY, AN INTRODUCTION TO THE LEGAL SYSTEM IN EAST AFRICA 423 (1975).

132. "African courts," "native courts," "native authority courts," "primary courts," "local courts," or "peoples courts." Carlson Anyangwe, *The Whittling Away of African Indigenous Legal and Judicial System*, 30 ZAMBIA L.J. 46, 46 n.2 (1998). In this Article, this second group of courts will be referred to as "statutory customary courts" to denote their creation by statute.

133. The statutory customary courts only formalized selected aspects of the traditional systems that suited the practical purposes of the colonial administration. While not recognized at an official level, the traditional adjudication systems left intact by the colonial administration continued to be used by the parties as they wished. *See generally* T.O. ELIAS, NATURE OF AFRICAN CUSTOMARY LAW (1956).

Although the statutory customary courts were created mainly to apply customary law, their jurisdiction in this area, even at a formal level, was not exclusive. Provision was also made for the general courts to determine and apply customary law when it was raised in legal proceedings For example, the Judicature Act of Kenya, Act 16 of 1967 provides:

> The High Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or affected by it, so far as applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

PHILIPS, REPORT ON NATIVE TRIBUNALS IN THE COLONY AND PROTECTORATE OF KENYA (1945), *reprinted in* HARVEY, *supra* note 131, at 431.

134. Anyangwe, *supra* note 132, at 49.

and elders to young lay magistrates who were given some basic training in law. Some of the procedures at the general courts were also slowly introduced into the statutory customary courts.[135] These broad features in the development of the dual legal system are evident in the evolution of the legal systems in Ghana,[136] Malawi,[137] and Zambia.[138]

---

135. READINGS IN AFRICAN LAW, *supra* note 96, at xxi.

136. Pre-colonial law in Ghana was essentially customary in character, having its source in the practices and customs of the people. During the colonial era, the colonial administration continued to recognize customary law but also passed local laws in addition to the existing English law it incorporated into the colony. Reflecting this dichotomy in the types of law, the colonial administration in Ghana divided formal judicial power between two systems of courts, one administering the customary law of the bulk of the African population and the other applying received English law and the recently developed national law adopted by the local legislature. English law was administered by the subordinate courts, the High Court and the Court of Appeal, all of which are referred to in this paper as the general courts. The practice and procedure followed by these courts was in substantial conformity with the law and practice observed in English courts.

Customary law was administered in Ghana mainly through the native courts that the colonial governor was empowered to create. Appointment to membership of a native court was not based on one's position or status in the community, although the governor, for the most part, selected chiefs and elders. Special training of the appointees was not required, but it was generally assumed that they were conversant with the customary law practices of their respective areas. Personal jurisdiction of the native courts was based on ethnicity. Subject matter jurisdiction was limited to civil claims under native customary law and certain customary offenses.

The system of native courts was retained after Ghana's independence in 1957. However, under the Local Courts Act of 1958, the native courts were renamed local courts, a nationally uniform system of local courts was established without the hierarchy of grades formerly used, and an effort was made to eliminate the racial criterion for jurisdiction over persons which had applied in native courts. The new Act also reflected an effort to maintain a higher quality of operation in the local courts through standards of efficiency for appointment as a court officer and the periodic inspection of court records. *See*, ALLOTT, ESSAYS, *supra* note 127, at 99-116.

137. Throughout Malawi's colonial history, jurisdiction over Africans in cases involving issues of customary law and in simple criminal cases was left to be determined by the traditional courts. Unlike Ghana, Malawi maintains a clear hierarchy of traditional courts consisting of Grades B and A traditional courts at the lowest level, then the district traditional courts, district traditional appeal courts, regional traditional courts and the National Traditional Appeal Court. All these traditional courts exercise both civil and criminal jurisdiction except the regional traditional courts, which have original criminal jurisdiction only. Generally, the jurisdiction of traditional courts is exercised in cases where the parties are Africans, but the Minister in charge of traditional courts may extend the jurisdiction of any traditional court to include non-Africans. The hearing of a civil case is conducted in accordance with the customary law prevailing in the area of the court's jurisdiction. *See* Boyce B. Wanda, *The Role of Traditional Courts in Malawi, in* THE INDIVIDUAL UNDER AFRICAN LAW 76 (Peter Takirambudde ed., 1982).

138. Zambia's Native Courts Ordinance of 1939 initially governed its native court system. The governor during the colonial period had the exclusive authority to establish native courts upon which were conferred jurisdiction in civil matters involving Africans. The courts also exercised criminal jurisdiction where the accused was an African, except in cases where a non-African could be called as a witness and/or where the governor had directed that any party not be subject to the jurisdiction of native courts. The practice and procedure of the courts were determined by customary law and their records subject to review by the Commissioner of Native

In no African country is customary law totally disregarded or proscribed.[139] Customary law continues to be recognized and enforced, albeit to a different degree depending on the jurisdiction.[140] National constitutions and statutes authorize it as a major source of law to be determined and applied in legal proceedings when it is raised by the parties. For instance, the Constitution of the Fourth Republic of Ghana describes the laws of Ghana to include the "common law," which in turn comprises the rules of customary law.[141] Under the same constitution, customary law refers to "rules of law which by custom are applicable to particular communities in Ghana."[142]

Similarly, the constitution of South Africa provides that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."[143] A ruling from the Constitutional Court of South Africa even suggests that customary law as a component of the legal system may not necessarily be dependent on formal recognition by the government. In *Alexkor Ltd. v. Richtersveld Community*,[144] the Constitutional Court held that the Richtersveld indigenous people of South Africa had, and still have, a right of ownership of their land under their own indigenous, unwritten law, despite the fact this was not recognized or protected by the government.[145]

Courts. In 1966, Zambia's native courts were reorganized and renamed the Local courts. They received limited civil and criminal jurisdiction. The Judicial Service Commission now appoints members of the local courts, whose decisions can be appealed to the subordinate courts, then to the High Court, and finally to the Supreme Court. Supervision of the work of the court is ensured through advisors and officers appointed for this purpose. *See* Muna Ndulo, *Customary Law and the Zambian Legal System*, *in* THE INDIVIDUAL UNDER AFRICAN LAW, *supra* note 137, at 121.

139. In places such as the Sudan, while there may not have been much interest in enforcing customary law, that system of law has not been proscribed. Cliff Thompson, *The Sources of Law in the New Nations of Africa: A Case Study from the Republic of the Sudan*, *in* AFRICA AND LAW 133 (Thomas W. Hutchison ed., 1968).

140. Three basic approaches can be identified regarding the place of customary law in the legal systems of post-independent Africa. The anglophone countries have retained much of the dual legal structures created during colonial rule while attempting to reform and adapt customary law to notions of English law. On their part, the francophone and Portuguese-speaking countries have pursued an integrationist course by trying to absorb customary law into the general law. Only in Ethiopia and Tunisia have some radical measures been adopted to legislatively abolish carefully-selected aspects of customary law. Anyangwe, *supra* note 132, at 47.

141. REPUBLIC OF GHANA CONST. art. 11, § 2.

142. *Id.* § 3.

143. S. AFR. CONST. art. 211, § 3 (1996).

144. Alexkor Ltd. v. Richtersveld Cmty, 2003 SACLR LEXIS 79 (CC) (2003) (S.Afr.).

145. The Constitutional Court held "a dispute between indigenous people as to the right to occupy a piece of land has to be determined according to indigenous law without importing English conceptions of property law." *Id.* at para. 50. The Court ruled that laws that fail to recognize indigenous law ownership are racially discriminatory explaining that protection is given to registered land title but not to indigenous law ownership amounts to racial discrimination. *Id.* at para. 99. Regarding the independent status of customary law, the Court noted:

> While in the past indigenous law was seen through the common law lens, it must

B. United States

Unlike the African region, the United States has not formally recognized customary law as part of the general national legal system, although provision is made for its application where necessary by Indian tribal courts. Initially, the federal government's Bureau of Indian Affairs (BIA) created the tribal courts[146] as part of a strategy to assimilate Indians under a detribalization process,[147] facilitated by the system of education[148] and the government's land tenure policy.[149] The federal government has moved away from its policy of assimilation, however, and under the Indian Reorganization Act of 1934 (IRA), has allowed tribal groups to set up their own systems of governance,[150] including tribal courts and laws.[151]

> now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with Customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights.... Our Constitution does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights].... It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values.

Id. at para. 51 (footnotes omitted).

146. Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 998 (1991).

147. For example, the Courts of Indian Offenses were created in 1883 "to civilize the Indians" by compelling them "to desist from the savage and barbarous practices that are calculated to continue them in savagery, no matter what exterior influences are brought to bear on them." Newton, *supra* note 15, at 1033-34. Prohibited acts included: participating in dances or feasts; entering into plural or polygamous marriages; acting as medicine men; destroying property of other Indians; and engaging in immorality, intoxication, and misdemeanors and vagrancy. *Id.*

148. According to Newton:

> Education of children was also seen as a sure way to create a generation of assimilated Indians. Congress entrusted various Christian denominations with control over education on specific reservations; conversion of Indian children to Christianity was seen as a first step to assimilation. Toward the end of the nineteenth century, Indian boarding schools were preferred. Youngsters would be taken by force, if necessary, and sent away to schools, such as the Carlisle Indian School in Pennsylvania, founded in 1879, whose headmaster, Richard Pratt, promised to "Kill the Indian in him, and save the man."

Id. at 1032-33.

149. Separate land allotments in favor of individuals were authorized as an encroachment upon traditional ideas of communal land ownership. *Id.* at 1032.

150. *See generally* Indian Reorganization Act, 25 U.S.C. §§ 461-479 (Lexis through 2006).

151. Under a Code of Indian Offenses published in 1935, Indian tribes were allowed to create their own courts and enact their own laws. At first, the government controlled the courts that were set up under the IRA process. However, not every tribe chose to go with the IRA

Affirming the significance of tribal courts,[152] the U.S. Supreme Court has referred to tribal courts as "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[153] The Supreme Court has also acknowledged the wide jurisdiction of the tribal courts, emphasizing, for instance, that "[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law."[154]

Generally, Indian tribal courts are required to apply tribal law first[155] and to resort to federal and state law only to fill in gaps.[156] However, perhaps due to lack of resources[157] or in deference to hints from federal courts, a disturbing pattern has been reported where some courts seem to apply state law regardless of its relevance to tribal culture.[158] Reflecting the nature of their historical development, the tribal courts tend to be preoccupied with criminal matters, although there is a noticeable trend in their use for civil litigation.[159] Although subject to review by federal courts, tribal court decisions are given deference,[160] especially as to the tribal courts' findings on what constitutes tribal law.[161]

---

scheme; some preferred to rely on traditional systems. Even for those utilizing the IRA procedures, a conscious effort was made to encourage the use of traditional systems as well. Tribes that did not have traditional adjudication systems and did not want to operate under the IRA framework went on to develop new systems. Newton, *supra* note 15, at 1035.

152. Tribal courts have become popular among, and are resorted to in an unprecedented manner, by Native Americans. The wide appeal of tribal courts has been attributed to "[t]he pan-Indian movement, the struggles of other racial minorities in changing the boundaries of the acceptable, the increasing number of Native-American attorneys . . . the critical legal jurisprudence that has questioned the foundations of Federal Indian law, and the concomitant flowering of tribal court systems." Newton, *supra* note 15, at 1036 (footnotes omitted).

153. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) (footnote omitted).

154. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987).

155. Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1611 (2004).

156. Newton, *supra* note 15, at 1038.

157. The courts are said to be constrained financially, operate with inadequate staff and can barely afford more than the tribal code and some state reporters. *Id.* at 1038-39.

158. The Supreme Court's tough approach to jurisdictional matters involving tribal courts may have forced some of the tribal courts to resort to notions of state law as way of preserving a respectable degree of jurisdiction. *See* Robert A. Williams Jr., *The Algebra of the Federal Indian: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence,* WIS. L. REV. 219, 274, 288 (1986). *See also* Brandfon, *supra* note 146, at 1006-09; Porter, *supra* note 155, at 1610-12.

159. Newton, *supra* note 15, at 1037.

160. Such deference is based on the notion of full faith and credit generally extended by a court to a judgment made by another court from a different state. *See generally*, Robert Laurence, *Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity and the Unlikely Case of* Eberhard v. Eberhard, 28 N.M. L. REV. 19 (1998) (arguing that a tribal court need not give full faith and credit to a state court order).

161. *See* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 509, 558-61 (1998). *See also* Lona N. Laymon, Note, *Valid Where Consummated: The Intersection of Customary Law Marriages and Formal Adjudication*,10 S. CAL. INTERDISC. L.J. 353, 365 (2001).

C. *New Zealand*

Under the Treaty of Waitangi, the main indigenous Maori group in New Zealand effectively ceded New Zealand territory to the British.[162] During the period of colonial rule that followed, Maori customs, values, and practices were initially recognized but soon came under great stress.[163] In this context, the Resident Magistrates system ensured "some official recognition of Maori custom, norms and institutions" until it was abolished in 1893 and replaced by the Stipendiary Magistrate, who was assigned strictly judicial functions.[164] Although section 71 of the New Zealand Constitution Act of 1852 authorized the Queen to set aside certain districts in which Maori customs were to be observed,[165] the districts envisaged under the Act were never created despite the valiant efforts of some Maori groups, including the Kingitanga, Kauhanganui, and Kotahitanga movements. In several pronouncements the Chief Justice even denied the existence of Maori customary law,[166] while the government sought through legislation to prohibit ritualistic practices believed by the Maoris to provide medical and psychological benefits.[167] Government policies as typified

---

162. For analysis of the significance of the Treaty of Waitangi, see David Williams, *The Constitutional Status of the Treaty of Waitangi, An Historical Perspective*, 14 N.Z. UNIV. L. REV. 9 (1991).

163. Alex Frame, *Colonising Attitudes Towards Maori Custom*, [1981] N.Z.L.J. 105 (1981). Early on, the colonial administration suggested the incorporation of some Maori customs into the legal system and tentatively recognized Maori customary law in a number of statutes passed between 1844 and 1893. The Native Exemption Ordinance of 1844, for instance, incorporated Maori perspectives, norms, and values into the British justice system by limiting jurisdiction of the colonial courts in crimes involving Maori only to cases where the Maori requested such intervention and also prohibiting the imprisonment of Maori for certain civil offenses such as debt or breach of contract. MAORI CUSTOM AND VALUES, *supra* note 93, at para. 85. The law was repealed in 1846 following a backlash from white settlers over perceived inequalities in the law.

Another statute, the Resident Magistrates Court's Ordinance of 1846, conferred summary jurisdiction on Resident Magistrates in disputes between Maori and non-Maori. *Id.* at para. 87. Where the cases involved only Maori, the Ordinance provided for the appointment of two Maori chiefs as Native Assessors with power to decide the cases. The magistrate could only intervene in cases where the assessors disagreed and no judgment was to be enforced unless all three members of the court unanimously agreed. Furthermore, in deference to Maori custom of *muru*, another statute, the Resident Magistrate's Act of 1867, provided that in lieu of a sentence, a Maori convicted of theft or receiving could be required to pay up to four times the value of the goods. *Id.*

164. *Id.* at para. 90.

165. New Zealand Const. Act, § 71 (1852) (N.Z.).

166. In *Wi Parata v. Bishop of Wellington* [1877] 3 Jur (NS) 72, Chief Justice Prendergast implicitly denied the existence of Maori customary law by observing that "[h]ad any body of law or custom capable of being understood and administered by the Courts of a civilized country been known to exist, the British Government surely would have provided for its recognition." *Id.* A year later, he ruled in another case that a marriage according to Maori customary law was not valid under New Zealand law. *See* Rira Peti v. Ngaraihi Te Paku, 7 N.Z.L.R. 235, 240-41 (S.C. 1888).

167. The Tohunga Suppression Act of 1907 criminalized *tohunga* practices under the

by a fisheries quota system effectively put land and resources beyond the reach of the Maoris and "undermined their relationships with their valued resources in accordance with their cultural preferences."[168] Despite these pressures, Maori custom law has survived.

The concept of native title[169] is the primary basis for the current recognition of customary law in New Zealand. The concept can be traced to judicial decision in In Re *The Lundon & Whitaker Claims Act 1871*, where the Crown was held to be "bound, both by the common law of England and its own solemn engagements, to a full recognition of the Native proprietary right . . . [w]hatever the extent of that right by established Native custom appear[ed] to be."[170] Subject to the important qualification that lands held under native title are inalienable to third parties except the Crown, the scope of other aspects of native title, including the "kinds of rights protected, the descent groups who can lay claim to such rights, the rules of succession and transfer by marriage" is determined exclusively by the "indigenous customary law."[171]

The second way in which customary law has been incorporated into the New Zealand common law is through statutory directives requiring courts, tribunals, and officials to take customary law into account in rendering decisions. The Native Lands Act of 1865,[172] Resource Management Act of 1991,[173] Conservation Act of 1987,[174] and Treaty of Waitangi Act of 1975[175]

---

mistaken view that their practitioners were "charlatans or pseudo priests." Malcolm Voyce, *Maori Healers in New Zealand: The Tohunga Suppression Act 1907*, 60 OCEANIA 99, 101(1989).

168. The privatization of fisheries under the fisheries quota management system enabled non-Maoris to acquire control over the fisheries resource base. With that came a corresponding diminution in the application of Maori law in the fisheries industry. MAORI CUSTOM AND VALUES, *supra* note 93, at para. 115.

169. For comprehensive discussion of the concept of native title, see generally KENT MCNEIL, COMMON LAW ABORIGINAL TITLE (1989).

170. *In re* the Lundon & Whitaker Claims Act, 1871, 2 N.Z.C.A. 41, 49 (C.A. 1875).

171. BOAST ET AL., *supra* note 91, at 13.

172. Section 23 of the Native Lands Act directs the Native Land Court to base land titles on native custom. Native Lands Act 1862 (N.Z.). The Maori Land Court, which has been in existence since 1865, is required under its enabling legislation to award land titles on the basis of Maori custom. *Id.* § 23. The Court's records to date indicate extensive documentation of Maori customary law to support land titles claims, typically by evidence showing that particular tracts of land had been managed in accordance with Maori custom. BOAST ET AL., *supra* note 91, at 23. Beside this general jurisdiction, the Court also has special jurisdiction to apply customary law on the basis of another statute permitting the Minister of Maori Affairs, or the Chief judge, to refer any matter for inquiry to the Court. Te Ture Whenua Maori Act 1993, § 29 (N.Z.), *available at* http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes.

173. Resource Management Act 1991, § 39(2)(b) (N.Z.) *available at* http://www.mfe.govt.nz/publications/rma/everyday/overview-jun06/index.html. This act authorizes local authorities to "recognize tikanga Maori where appropriate." *Id.*

174. Conservation Act 1987, § 26ZH(1) (N.Z.), *available at* http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes. Like the now repealed Section 88(2) of the Fisheries Act of 1981, the Conservation Act provides that nothing in the Act was to affect "any Maori fishing right." *Id.*

175. The Waitangi Tribunal, set up under the Treaty of Waitangi Act 1975 to investigate claims arising under the Treaty of Waitangi, is authorized to refer to the Maori Appellate Court

exemplify this. Outside these two specific bases relating to native title and statutory incorporation, Maori customary law is enforceable more generally through the discretionary powers of the courts, although relevant case law on this third method of recognition is said to be rather "scanty."[176]

D. Australia

As was the case in New Zealand, after the arrival of British settlers in Australia in 1788,[177] some limited form of recognition was extended initially to Aboriginal customary laws.[178] As time went on, however, this limited recognition[179] was whittled down. By 1850, Aboriginal customary law was

---

questions of fact that arise under the tribunal proceeding regarding (1) Maori custom or usage, (2) rights of ownership of land or fisheries according to Maori customary law, and (3) the determination of Maori tribal boundaries, whether of land or fisheries. Treaty of Waitangi Act 1975, § 6A(1)(a)-(c) (N.Z.), *available at* http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes.

Since its inception, a wide diversity of claims have been referred to the Waitangi Tribunal, including those related to land, hunting, and fishing rights; claims regarding rivers, lakes, foreshores, and harbors; claims for the maintenance of Maori customs, tradition, and identity; and rights to self-determination through tribal bodies. In determining whether these matters fall within its jurisdiction, the tribunal has chosen to focus on the spirit of the Treaty of Waitangi rather than on the strict terms of the treaty. MAORI CUSTOM AND VALUES, *supra* note 93, at para. 329. To this end, the tribunal has developed a number of principles to guide it in this process. *Id.* at para. 339. Significantly, the Custom Principle is interpreted to encompass not only the promise under the treaty to protect Maori custom and cultural values but also two subsidiary principles. The first relates to control of property in accordance with custom and having regard for cultural preferences, while the second involves the recognition of the full authority, status, and prestige of Maori possessions and interests. *Id.* at paras. 334-51. Similarly, the Property Principle has been read to require the protection and preservation of Maori property and *taonga*, which is Maori terminology denoting "tangible (such as fisheries) or intangible (such as Maori language)." *Id.* at para. 338. As interpreted by the tribunal, the promise under the treaty not only includes a duty to preserve Maori customary title but also to oblige the Crown to ensure that the Maori have full, exclusive, and undisturbed possession of their culture. *Id.* para. 325.

176. BOAST ET AL., *supra* note 91, at 15.

177. By the time the First Fleet arrived in Sydney in January 1788, the Aborigines had already been living there for over 40,000 years. Debelle, *supra* note 87, at 81 *See also* ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 37.

178. Viewing Australia to be a "settled" rather than a conquered colony, the early British settlers treated the Aborigines in Australia as British subjects and applied English law to them to the exclusion of Aboriginal customary laws, except in the rare case where legislation provided otherwise. For example, in a directive to the Governor of New South Wales, the Colonial Office emphasized:

> It is necessary from the moment the Aborigines of this country are declared British subjects they should, as far as possible, be taught that the British laws are to supersede their own, so that any native, who is suffering under their own customs, may have the power of an appeal to those of Great Britain, or, to put this in its true light, that all authorized persons should in all instances be required to protect a native from the violence of his fellows, even though they be in the execution of their laws.

ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 1.

179. The limited recognition of customary law was part of the government's policy of

neither formally recognized in cases arising between Aborigines and settlers nor in cases between the Aborigines themselves.[180]

Responding to pressures that had built up since the early 1920s for a review of the policy of non-recognition,[181] the Federal, State, and Territory legislatures in Australia adopted through various initiatives, including the conferral of land rights on the basis of traditional claims,[182] the protection of sacred sites,[183] the recognition of traditional food gathering rights,[184] Aboriginal child care practice,[185] and intestate property distribution in accordance with Aboriginal traditions.[186]

Significantly, in Queensland[187] and Western Australia,[188] the respective legislatures created local courts or other systems staffed by Aborigines to improve the administration of justice to the Aborigines. Provision was also

---

peaceable coexistence and dictated largely by the desire of the administration not to interfere in Aboriginal disputes that did not affect British settlements. *Id.* at para. 41.

180. The refusal to accord recognition extended to Aboriginal customary laws as they related to land, criminal law, and the recognition of Aboriginal marriages and child care arrangements. *Id.* paras. 47-48.

181. Factors for such a reappraisal included perceived injustice in the denial of recognition to "distinctive and long-established Aboriginal ways of belief and action" and the need for a supplementary mechanism to address the legal system's apparent failure to "deal appropriately with many Aboriginal disputes." *Id.* at para. 2. The disproportionately high levels of Aboriginal contact with the criminal justice system epitomized this failure and pointed to discrimination within the legal system. At a more general level, the demands for recognition of Aboriginal customary law were also influenced by changes at the federal, state, and territory levels from policies of assimilation and integration to those based on self-management and self-determination. *Id.*

182. The Aboriginal Land Rights Act of 1976, for example, provides:

> Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that the entry, occupation or use is in accordance with Aboriginal tradition governing the rights of the Aboriginal or group of Aboriginals with respect to that land. . . .

Aboriginal Land Rights (Northern Territory) Act, 1976, § 71(1) (Austl.), *available at* http://www.austii.edu.au/au/legis/nsw/consol_act/alrta1976444/index.html.

183. Beginning with the South Australian Government in 1965, all State governments have now passed legislation protecting Aboriginal sites. ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para 78.

184. Section 47 of the Aboriginal Lands Act of 1983 authorizes, in limited cases, access by Aboriginals to land for hunting and fishing purposes. Aboriginal Land Rights Act, 1983, § 47 (Austl.), *available at* http://www.austlii.edu.au/au/legis/nsw/consol_act/alra1983201/.

185. The Community Welfare Act, 1983, § 69 (Austl.), http://www.austlii.edu.au/au/legis/nt/consol_act/cwa208/s69.html.

186. The Administration and Probate Act of 1979 provides for a traditional distribution of property to be ordered in certain cases where an Aborigine dies intestate. Administration and Probate Act, 1979, div. 4A (Austl.), *available at* http://www.austlii.edu.au/au/legis/nt/consol_act/aapa259.

187. Aboriginal courts operate on fourteen former Aboriginal reserves in Queensland, though not on a regular basis. The courts are staffed by Aborigines and have jurisdiction over a range of minor offenses committed within the reserves. ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para 83.

188. A system of Aboriginal courts was set up in Western Australia in 1979 on an experimental basis for a number of Aboriginal communities in the northwestern part of the State. *Id.*

made by statute in South Australia to give effect to the customs and traditions of the Pitjantjatjara people in the hearing of certain disputes.[189] Complementing these legislative measures, the Australian courts recognized Aboriginal customary laws and traditions by taking them into account in the development of interrogation rules,[190] the exercise of prosecutorial discretion,[191] the application of defenses based on provocation,[192] and the award of damages.[193] Customary law issues were also addressed in other cases involving land rights,[194] breach of confidence,[195] and copyright claims.[196]

II. REFERENCES TO CUSTOMARY LAW IN TRADITIONAL KNOWLEDGE RELATED JUDICIAL DECISIONS

Customary law arguments have been made to support claims to intellectual property rights in traditional knowledge. A few cases from Australia illustrate this trend. For example, in *Milpurrurru v. Indofurn Party Ltd.*, the court found copyright infringement in relation to indigenous artworks

189. The Pitjantjatjara Lands Act of 1981 authorizes the appointment of a tribal assessor to whom an appeal from a decision of the body corporate may be lodged. Anangu Pitjuntjatjard Yankunytjatjara Land Rights Act, 1981 §§ 35, 36(1) (Austl.). The tribal assessor is not bound by the rules of evidence but is required to observe and, where appropriate, give effect to the relevant customs and traditions. Similar provisions are found in the Maralinga Tjarutja Land Rights Act of 1984. Maralinga Tjarutja Land Rights Act, 1984, §§ 35-37 (Austl.).

190. According to the Australian Law Reform Commission, "[a]boriginal people, and particularly more traditionally oriented Aborigines, are, because of language difficulties, differing concepts of time and distance, cultural differences and other problems, at a considerable disadvantage when interrogated by police." ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 75. To mitigate against this adverse impact of standard criminal law interrogation rules on Aborigines, guidelines were developed for application during interrogation. The guidelines would require an interpreter to be present during the interrogation of an Aborigine, that the right to silence be respected, and that legal assistance be be provided. R. v. Anunga (1976) 11 A.L.R 412 (Austl.).

191. Under the new rules, prosecutorial discretion is expected to be informed by customary law, particularly in relation to decisions whether or not to prosecute Aborigines for certain offenses, to reduce murder charges to manslaughter, or to the State's entry of a plea of nolle prosequi. This is especially warranted where a criminal offense is committed under circumstances indicating a customary law basis for the crime or where the matter has been resolved satisfactorily under customary law or the relevant Aboriginal community indicates a desire not to have the case proceed. Debelle, *supra* note 87, at 92.

192. In some cases, the courts took account of the fact that an Aboriginal defendant had been provoked by the uttering of prohibited words or the disclosure of tribal secrets in the development of standards for the defense of provocation. *See, e.g.*, R. v. Williams, (1974) 14 S.A. St. R. 1 (Austl.).

193. Loss of traditional status as a result of brain damage or other incapacity following a motor accident is a factor considered by some courts in making damage awards. ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 73.

194. Mabo v. Queensland, (1992) 175 C.L.R. 1 (Austl.); Wik Peoples v. Queensland (1996) 187 C.L.R. 1 (Austl.).

195. Foster v. Mountford (1976) 14 A.L.R. 71 (Austl.).

196. Yumbulul v. Reserve Bank of Austl. (1991) 21 I.P.R. 481.

and awarded exemplary damages to three Aboriginal artists for the personal and cultural harm they suffered as a result of the unauthorized reproduction of their work, since the artists remained ultimately responsible and liable to punishment under Aboriginal customary law for the reproduction.[197] However, in *Yumbulul v. Reserve Bank of Australia*, an Australian court agreed with the claim that an indigenous painting reproduced on bank currency was an original artistic work in which copyright subsisted; the court recognized the plaintiff as the owner of the copyright.[198] Similarly, in *Bulun Bulun v. R & T Textiles Party Ltd.*, which involved an action for copyright infringement in connection with the importation and sale of fabric on which an indigenous painting had been reproduced, the court rejected the argument that Australia's Copyright Act of 1968 recognized the communal ownership interests of an indigenous group with rights to the painting under customary indigenous law.[199]

Other cases have involved aspects of trademark law. For example, some Native Americans initiated action in a tribal court seeking to enjoin the use of the name Crazy Horse on a malt liquor product.[200] Crazy Horse was the name

197. Milpurruru and Others v. Indofurn Party and Others, (1995) 30 I.P.R. 209 (Austl.). The court made other concessions to Aboriginal custom in the case, including its observance of an Aboriginal custom not to use the names of deceased Aboriginal artists in the proceedings and its award of damages as a lump sum to enable Aboriginal clans to take account of collective ownership of the designs in the allocation of damages amongst the members of the clan. *Id.* at 239.

198. *Yumbulul*, 21 I.P.R. at 490. In this case, the plaintiff asserted claims against the Federal Reserve Bank of Australia and the agency that represented the plaintiff in connection with a license agreement to reproduce on a commemorative ten dollar note an indigenous design that he made. The court found that the plaintiff inherited from his mother, a member of the Galpu clan, the right to make the traditional design that was the subject matter of the law suit. *Id.* at 123. Unchallenged evidence was presented to the court that the "attainment of the right to make such a [design] is a matter of great honour, and accordingly abuses of rights in relation to the careful protection of images on such poles is a subject of great sensitivity." *Id.*

199. Bulun Bulun v. R & T Textiles Party Ltd. (1998), 41 I.P.R. 513, 525 (Austl.). The suit was based in part on a claim of equitable ownership of the design by one of the plaintiffs, an artist, on behalf of his indigenous group. The plaintiffs contended that under indigenous customary law the indigenous people were the traditional owners both of the body of ritual knowledge from which the painting was derived and of the subject matter of the painting. While acknowledging the possible application of indigenous intellectual property law from 1788 (when Australia was first occupied by the Europeans) to 1912 (when the Copyright Act was passed), the Court held that the notion of "communal title" advocated by the plaintiffs could no longer be supported under Australia's legal system where copyright matters were now governed entirely by statute. *Id.* The court decision is supported by the language in section 8 of the current Copyright Act that "copyright does not subsist otherwise than by virtue of this Act." Section 8, Copyright Act 1968 (Cth). The Court observed that under the Copyright Act, copyright is owned by the "author of a work," a concept held to exclude any notion of group ownership in a work unless it is a "work of joint authorship" within the meaning of the Act. *Bulun Bulun*, 41 I.P.R., at 525. In support of its ruling, the Court referred to judicial authority, holding a person who suggests an idea is not, on that ground alone, a joint author in any work embodying that suggestion. *See, e.g.*, Kenrick & Co. v. Lawrence & Co. (1890) 25 Q.B.D. 99 (Austl.).

200. Greene & Drescher, *supra* note 117, at 418-19.

of a very popular Sioux leader who advocated against alcoholism. The petitioners argued that the use of the name resulted in defamation, caused emotional distress, and violated the trademark law. The tribal court found in their favor.[201] On appeal, the tribal court decision was reversed on technical grounds; the tribal court lacked jurisdiction because the acts complained against had not occurred on reservation land.[202] It is significant, however, that the court of appeals did not criticize the tribal court's ruling on the merits. Subsequently, the defendants settled the action by issuing a public apology and paying damages in accordance with customary law.[203] The case clearly underscored the critical role customary law could play in the protection of indigenous intellectual property rights.

Even in non-IPR related actions, such as land claims, customary law arguments have gained prominence. For example, in *Mabo v. State of Queensland (No. 2)*, the Court held that under Australian common law indigenous rights in land survived European occupation unless a valid and express appropriation of those rights had been made by the Crown.[204] A similar result was reached in *Wik Peoples v. State of Queensland*, where the central issue concerned whether certain pastoral and mining leases granted under statute from the Crown extinguished native title.[205] Citing to the *Mabo (No. 2)* decision, the Court held the leases did not confer exclusive possession on the grantees because the rights of the grantees under the leases coexisted with the rights and interests of the indigenous inhabitants whose occupation derived from their traditional title.[206]

---

201. Terence Dougherty, *Group Right to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 389-90 (1998).

202. Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1093 (8th Cir. 1998).

203. The measure of damages was "seven race horses and thirty-two Pendleton blankets, braids of tobacco and sweet grass." Sarah La Voi, Comment, *Cultural Heritage Tug of War: Balancing Preservation Interests and Commercial Rights*, 53 DEPAUL L. REV. 875, 886 (2003).

204. Mabo v. Queensland (No. 2), (1992) 66 A.L.R. 408 (Austl.). Analogizing the position of indigenous people to that of a conquered society, the court ruled that local law would subsist to the extent it did not conflict with received British law, or until it was abolished by the colonial administration. *Id.* at 448. By this decision, the Court not only rejected the long-held view that Australia was an uninhabited territory country at the time of the European invasion but also the view that no concept of law existed. The Court determined there was some semblance of a system of rights and obligations observed by the traditional community. *Id.* In this sense, the case validated as indigenous customary law practices which until recently were the subject of anthropological study.

205. Wik v. Queensland, (1996) 141 A.L.R. 129 (Austl.).

206. In construing the effect of the leases, the Court focused not only on the language of the statute authorizing the leases but also on the customs and practices of the particular Indigenous community claiming rights derived from native title. It was clear from the Court's ruling that both the statutorily-based rights and indigenous rights could coexist as long as there was no conflict. While noting that native title rights would yield in the case of a conflict, the Court did not rule on whether native title rights were merely suspended or were extinguished during the period of the inconsistency. *Id.* at 159-60, 185. However, that matter has now been settled in a subsequent case. In *Fejo v. N. Territory of Austl.*, [1998] H.C.A. 58 (unreported), it

More recently, in *Alexkor Ltd. v. Richtersveld Community*, the Constitutional Court of South Africa upheld the right of the Richtersveld indigenous people of South Africa to occupy land as determined according to indigenous law without importing English conceptions of property law.[207] In its decision, the Constitutional Court emphasized the "originality and distinctiveness of indigenous law as an independent source of norms within the legal system."[208]

The determination of non-IPR-related rights in traditional knowledge through customary law has not been limited to land cases. In the United States, the superior courts have validated customary law claims in indigenous art and craft. For example, in *Chilkat Indian Village v. Johnson*, a tribal court authorized the return of artifacts and carvings on grounds that they constituted the property of an Alaskan village.[209] The tribal court's claim was based in part on an ordinance adopted by the Indian tribe pursuant to the tribe's IRA-authorized constitution prohibiting the removal of artifacts from the village.[210] In an action by the tribe seeking return of the artifacts and monetary damages, the Ninth Circuit Court of Appeals upheld the power of tribal courts to act pursuant to local authority conferred on them, especially on matters affecting members of the tribe.[211]

Customary law has also been invoked to prevent the disclosure of sacred and secret traditional knowledge. In *Foster v. Mountford*,[212] an indigenous group prevailed in its breach of confidence claim against an anthropologist planning to publish a book containing information he received from tribal leaders about tribal sites, objects, communal legends, secrets, paintings,

---

was held that native title rights were extinguished to the extent of any conflict. AUSTL. COPYRIGHT COUNCIL, PROTECTING INDIGENOUS INTELLECTUAL PROPERTY: A DISCUSSION PAPER 28 (1998).

207. Alexkor Ltd. v. Richtersveld Cmty, 2003 SACLR LEXIS 79 (CC) (2003) (S. Afr.).

208. *Id.* at para. 51.

209. Chilkat Indian Village v. Johnson, 870 F.2d 1469 (9th Cir. 1989).

210. As quoted in the court's decision, the Chilkat Indian Village Ordinance of 1976 provided:

> No person shall enter on to the property of the Chilkat Indian Village for the purpose of buying, trading for, soliciting the purchase of, or otherwise seeking to arrange the removal of artifacts, clan crests, or other traditional Indian art work owned or held by members of the Chilkat Indian Village or kept within the boundaries of the real property owned by the Chilkat Indian Village, without first requesting and obtaining permission to do so from the Chilkat Indian Village Council.
>
> No traditional Indian artifacts, clan crests, or other Indian art works of any kind may be removed from the Chilkat Indian Village without the prior notification of and approval by, the Chilkat Indian Village Council.

Id. at 1471 (quoting Chilkat Indian Village Ordinance of 1976).

211. As the court noted, "[i]n the overwhelming majority of instances, a tribe's enforcement of its ordinances against its members will raise no federal questions at all. Such cases primarily raise issues of tribal law, and they are the staple of the tribal courts." *Id.* at 1475-76 (citation omitted).

212. Foster v. Mountford, (1976) 29 F.L.R. 233 (Austl.).

engravings, drawings, and totemic geography.[213] In granting the group's request for injunctive relief, the Australian court noted the serious harm to the traditional community that would result from publication of material the court found to have religious and cultural significance.[214] The findings of this case were echoed in another case brought by the indigenous group in relation to lantern slides taken by the same anthropologist of secret sacred material.[215]

While these cases illustrate the relevance of customary law in matters involving traditional knowledge, the impression must not be left that customary law plays a perfect role in this context. Indeed, there are several issues with the application of customary law that could negatively impact its use as an enforcement scheme:[216] such as the inadequate recognition of customary law under national legal systems, weaknesses in the bases for the application of customary law sanctions, jurisdictional limitations, the indeterminate character of customary law, and the subjection of customary law to English concepts.[217] Some of these problems are inherent in the concept of customary law itself while others can be traced to specific rules developed for the ascertainment of customary law. These limitations of customary law are presented in the next section.

SECTION THREE: EFFECTIVENESS OF CUSTOMARY LAW AS AN ENFORCEMENT MECHANISM

I. STATUS OF CUSTOMARY LAW

Of the selected regions surveyed in the preceding section, the strongest recognition of customary law appears to be in Africa, where it is provided for in national constitutions. In general, the application of customary law in other areas is rather piecemeal. Although Australian case law demonstrates the sensitivity of the courts to issues pertaining to indigenous communities, the

213. AUSTL. COPYRIGHT COUNCIL, *supra* note 206, at 24.

214. In the opinion of the Supreme Court of the Northern Territory, the tribal community's cultural and social life would be disrupted by the "revelation of the secrets to their women, children and uninitiated men [which] may undermine the social and religious stability of their hard-pressed community." *Id.*

215. In *Pitjantjatjara Council, Inc. v. Lowe*, (1982) 30 ABORIGINAL LAW BULL. 11 (Austl.), the Court held that disclosure of the slides to the public would breach the trust reposed on Dr. Mountford when the slides were originally taken and would disrupt the social and religious structure of the Pitjantjatjara people. An order was issued turning over the slides to the council for examination as to whether they contained references to the philosophical or religious traditions of the Pitjantjatjara people. JANKE, supra note 14, at 73 (referring to an unreported decision of the Supreme Court of Victoria). Significantly, the Court held the property in and ownership of these selected slides, photographs and negatives vested in the Pitjantjatjara Council for and on behalf of the Pitjantjatjara Yankunjatjara and Ngaayatjara peoples. *Id.*

216. *See supra* note 107 and accompanying text.

217. See footnotes 219 to 312 and accompanying text.

judicial responses cannot be said to accurately reflect a formal acceptance of customary law as part of the legal system. A criticism of the Australian judicial responses is that the recognition of customary law has tended to be particular rather than general, confined to particular jurisdictions, and often depended on the exercise of discretion by the courts rather than existing as of right. This is unsatisfactory, and in the words of the Australian Law Commission, has rendered "the recognition of Aboriginal customary law [to be] erratic, uncoordinated and incomplete."[218]

Similarly, in New Zealand, the recognition of customary law has been characterized as "very limited and constricting, treating Maori customary law as analogous to foreign law or local custom in England."[219] The danger with this approach is that "in many contexts, Maori customary law will simply be supplanted by statute."[220] As one writer concluded rather pessimistically, "[i]t is difficult to see how this situation could be changed by the courts, given the strong tradition of parliamentary sovereignty characteristic of New Zealand law. A more substantial recognition of Maori customary law could only be brought by Parliament."[221] The creation of tribal courts in the United States is also welcome, but a great deal still needs to be done in terms of financial and other logistical support to improve the efficiency of the tribal courts.[222]

Even in Africa, where customary law is formally recognized as part of national legal systems, evidence of a weakening in the status of customary law[223] is a cause for great concern. As customary law becomes less important as a source of law, it also loses its effectiveness as a method of protecting traditional knowledge. Factors responsible for this weakening of customary law in Africa include the lack of official recognition of traditional non-statutory adjudication systems in some areas, the general assumption that Western law is superior, and the abandonment of teaching of customary law in educational institutions.[224]

In some African countries, no serious effort has been made to study and implement customary law, relegating it to the unenviable status of the "nearly forgotten source of . . . law."[225] Similar reasons account for the subordinate position of Maori customary law in New Zealand.[226] Customary law would remain an effective method of protecting traditional knowledge only in so far as

---

218. ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 85.

219. BOAST ET AL., *supra* note 91, at 18.

220. *Id.*

221. *Id.*

222. *See supra* note 159 and accompanying text.

223. Anyangwe, *supra* note 132, at 48.

224. *Id.* at 59.

225. Thompson, *supra* note 139, at 148-49.

226. Factors contributing to the undermining of Maori law include: "(a) the belief that English . . . law was superior; (b) the desire to create an ideal society in New Zealand; (c) the introduction of English laws and internalising colonial values; and (d) the settlers' desire for land resulting in land alienation from the Maori." MAORI CUSTOM AND VALUES, *supra* note 93, at para. 97.

it is recognized and applied in national legal systems by the courts. Consequently, unless concrete remedial steps are taken to enhance the status of customary law where it is already recognized and secure its recognition where it is not, the benefits of its application to traditional knowledge would be lost.

II. PRINCIPLES OF LIABILITY

Customary law sanctions may include censure, fines, or even ostracism and expulsion in more serious cases.[227] Generally, the bases for the application of customary law sanctions can be traced to a variety of factors, including religious and magical beliefs, notions of collective responsibility, and fears of ridicule and ostracism.[228]

The religious sanction is premised on the view of the social unit[229] as a continuous entity consisting of both the living and the dead who are equally concerned about the due observance of the law.[230] The fear that the spirits of ancestors would unfailingly punish offenders ensures compliance with society's rules.[231] Where the offense has already been committed, legal compensation is urged to avoid the spiritual retribution that could befall the offender.[232]

Magical sanctions are similar to religious sanctions in that they are also believed to apply automatically after breaches of taboo.[233] Thus, invoking a public magic ritual or even making a threat of witchcraft can create such a

---

227. Greene & Drescher, *supra* note 117, at 427-28.

228. *See* J.H. Driberg, *The African Conception of Law*, 16 J. COMP. LEGIS. & INT'L L., 230, 238-41 (1934).

229. As noted earlier:

> The social organization of traditional societies is based on a strong pattern of kinship groups with the lineage as the basic constituent. The lineage forms the foundation of a wide social group called the clan. A system of interclan lineages in turn results in a tribe made up of people belonging to different lineages but speaking the same language with the same traditions.

Kuruk, *Protecting Folklore*, *supra* note 20, at 781 (footnotes omitted).

230. Driberg, *supra* note 228, at 238.

231. As Driberg notes:

> The ancestors are just as much concerned as the living in the due observance of law. The law has moral support, not only of the living tribe, but of all the tribesmen who have ever lived and died. This terrific antiquity, remote but ever present, is in itself a very potent force in securing due regard for the law. But it does more: it introduces a religious sanction, which is perhaps the most potent factor of all. . . . Every offence has to be legally compensated and ceremonially purged, and until both are done the offender and his community are in danger of spiritual retribution.

Id.

232. Proposed amounts of compensation are generally flexible and take into account factors including the capacity of the guilty party to pay as well as the victim's willingness to accept a lower or substituted assessment, such as an acceptance of 6 goats instead of a cow. ELIAS, *supra* note 15, at 261.

233. Driberg, *supra* note 228, at 239.

strong fear of retribution to secure reparation from a recalcitrant offender.[234]

Under the concept of collective responsibility, all kinsmen are responsible for the actions of other kinsmen and are required to protect them. The concept is important to the system of punishment in several ways. First, collective responsibility serves to deter unnecessary wrongdoing because of the inherent belief that any offense committed by kinsmen would be avenged against any member of the social unit.[235] Second, it increases the deterrent effect of expulsion as a form of punishment since an offender who has been expelled can no longer count on the support and protection of his ethnic group.[236] Finally, the sanctions of ridicule and ostracism are premised on the importance indigenous societies attach to status.[237] Though less effective than the preceding sanctions, the effect of public ridicule and ostracism is to put the victim out of status and no longer in a position to participate in communal activities until his offense has been purged and his status restored.[238]

All these sanctions would be useful in securing compliance with the customary law rules on traditional knowledge. For instance, since sacred objects tend to be associated with ancestral worship, the desecration or unauthorized uses of such items could be checked through fears of the inevitable infliction of religious retribution by the ancestors upon the offender. Similar considerations apply to the practice of traditional medicine, which is believed to be reserved only to individuals chosen by ancestors.[239] Because punishment will not be limited to the individual but could apply to his children, spouse, relatives, and even clansmen under the notion of collective responsibility, a party would not deliberately set out to ignore rules regarding use of a sacred object considered part of traditional knowledge.

However, the bases for the application of customary law sanctions by indigenous groups may be inadequate to ensure compliance with rules governing access to traditional knowledge. Customary law in indigenous

---

234. Kuruk, *Protecting Folklore, supra* note 20, at 781.

235. Driberg, *supra* note 228, at 238.

236. Writing on the consequences of ostracism, one commentator notes,

> [D]isobedience could lead to the offender being ostracized by the larger family, or by the entire community. This was often the worst kind of punishment. The community would not buy from him or sell to him or members of his immediate family. If he was still obdurate (depending on the offence), he could either be banished from the community or he would leave of his own accord because he would not be able to bear the shame. Such exit usually must be for a distant community. Neighboring communities would probably know that the newcomer was an offender from another community. He would then be seen either as bringing ill luck, or as a danger to the new community since he might be disobedient and cause an upset in the new community.

BANKOLE SODIPO, PIRACY AND COUNTERFEITING: GATT, TRIPS, AND DEVELOPING COUNTRIES 43-44 (1997).

237. Driberg, *supra* note 228, at 241.

238. *Id.* at 240.

239. *See, e.g.*, JOHN ROSCOE, THE BAGANDA: AN ACCOUNT OF THEIR NATIVE CUSTOMS AND BELIEFS 277-78 (1965) (discussing the role of medicine men among the Baganda).

societies generally relies on norms and sanctions that seem to make sense only to members of the groups. As noted, with reference to the Kiowa in the United States, sanctions are effective only "within a community of small size in which individuals generally knew other and many of whom were also linked by ties of kinship and personal obligation."[240] Within the groups there is pressure to recognize and respect the rights and privileges associated with traditional knowledge in the common interests of members of the community.[241] Inherent in this system, however, is a defect that may limit the usefulness of customary law in tackling the problems of unauthorized uses of traditional knowledge. Since many of the individuals engaged in the unauthorized use of traditional knowledge are non-indigenous,[242] they may not have the incentive to respect the norms in the interest of the general community. Where those individuals using traditional knowledge are outside of the relevant community, fear of sanctions as a factor in securing compliance is simply non-existent due to lack of communal and ritual interests.[243]

---

240. Greene & Drescher, *supra* note 117, at 427-28.

241. The Author has previously described the nature of African customary law rights in traditional knowledge:

> [R]ights are vested in particular segments of the community and are exercised under carefully circumscribed conditions. For instance, with regard to song, the recitation of oriki, a praise-singing poetry among the Yoruba in Nigeria, was preserved exclusively for certain families. Among the Lozi in Zimbabwe, each traditional leader has his own praise songs containing both historical lore and proverbial wisdom that are recited on important occasions by a select group of bandsmen.
>
> Precise rules also govern who can make or play certain musical instruments, and at what time and for what reasons they are played. Thus, the great national drums of the Lozi which are beaten only for war, or in national emergencies, are under the watchful eye of a special council of elders. Each Baganda king in Uganda has a select group of drummers who play special drums to ensure the permanency of his office. Among the Bahima of Uganda, only women keep harps which they use at home. Among the Baganda, fifes are owned and played mainly by herd boys. In Nigeria, certain musical instruments are dedicated to particular cults.
>
> . . . Among the Tonga of Zimbabwe, crafts are subject to the sexual division of labor, in which wood and metals is assigned to men, the making of pots, baskets and mats to women...The making of Banyoro pottery, which is known for its excellent quality, is reserved to a distinct class separate from the ordinary peasants. In Nigeria, the Dakakari people have given exclusive rights to women to make grave sculpture. With respect to cloth-making, the chief of the Ashantis in Ghana is the trustee of interests in all designs in fabrics which he would either reserve for himself or allow prominent royals or dignitaries to copy for their use.

Kuruk, *Protecting Folklore*, *supra* note 20, at 783-85 (footnotes omitted).

242. This term is used broadly to refer not only to non-citizens of the country but also to citizens who are not members of the particular ethnic group to which the folkloric rights are relevant.

243. Soleri et al., *supra* note 17, at 22 (noting that U.S. guidelines for collecting folk varieties only call for respect of the local farmer and do not mention requesting permission or any form of recognition compensation).

Even with respect to indigenous collaborators residing in the community, who should be bound by the norms, socioeconomic factors seem to have eroded the significance of norms otherwise applicable to them.[244] Initially, the simple nature and small size of traditional societies made it possible to accommodate a system of specialists providing for other members without any commercial motives. This was due largely out of necessity[245] and as a gesture of generosity emanating from abundant resources.[246]

The advent of the modern state, however, has dispensed with the need for mutual cooperation to protect the community.[247] In some areas, notions of collective ownership have been contaminated by concepts of private ownership and of production for profit as resources became scarce and the competition for them keen.[248] As a result, considerations of communal interests seem to have given way to individualistic notions with their attendant commercialism.[249] This modern individualism[250] explains why customary law norms may not be quite as significant in traditional societies as they used to be and why some indigenous people are now willing partners in the unauthorized transfer of the community's traditional knowledge.

III. NATIONAL SYSTEMS OF ENFORCEMENT

In addition to the traditional adjudication systems comprising elders and chiefs in indigenous societies,[251] national court systems have been established in some areas by statute with a mandate to ascertain and apply customary law only. In the United States, Native American tribal courts are required to apply

---

244. According to T.O. Elias, "[t]he introduction of the money economy and of western legal and political ideas and values has meant the partial, and in some cases total, dissolution of the traditional ways of life of the peoples." T.O. Elias, *The Problem of Reducing Customary Laws to Writing*, *in* FOLKLAW, *supra* note 128, at 321 [hereinafter Elias, *Problem of Reducing*].

245. *See* GAIM KIBREAB, AFRICAN REFUGEES: REFLECTIONS ON THE AFRICAN REFUGEE PROBLEM 68 (1985) (explaining that people in traditional societies found it necessary to unite to protect life and property and to overcome problems caused by natural forces over which they had little control because of their poorly developed productive forces).

246. *See id.* (discussing the fact that the absence of private ownership of the basic means of production and the concomitant absence of any profit motives in the primarily low subsistence level economies that existed made it possible for visitors to be accommodated materially).

247. *See id.* The modern African state, with its developed system of defense in the form of large standing armies and efficient police units, provides adequate security for the community, making mutual cooperation for defense unnecessary. *Id.*

248. *See* Samuel K.B. Asante, *Interests in Land in the Customary Law of Ghana: A New Appraisal*, 74 YALE L.J. 848, 857 (1965) (discussing evolving concepts of land ownership in response to social and economic changes).

249. *See id.*

250. A principal effect of the introduction of capitalism to traditional societies is that "the extended family ties weakened in a number of places." Irina Sinitsina, *African Legal Tradition: J.M. Sarbah, J.B. Danquah, N.A. Ollennu*, *in* FOLKLAW, *supra* note 128, at 272.

251. John C. Messenger Jr., *The Role of Proverbs in a Nigerian Judicial System*, *in* FOLKLAW, *supra* note 128, at 422-25.

customary law as the primary law.[252] In Queensland and Western Australia, special courts staffed by Aborigines have also been created to apply Aboriginal law.[253] In Africa, the customary law courts created by statute were given various designations depending on the country, such as "African courts," "native courts," "native authority courts," "primary courts," "local courts," or "people's courts."[254]

Complementing these statutory customary law courts are the general courts of the national legal system with jurisdiction to apply other types of law, including customary law. In areas where statutory customary courts coexist with general courts, the latter tend to have supervisory jurisdiction over the statutory customary courts.[255] In other areas, however, like New Zealand, where statutory customary courts have not been set up, the general courts would apply customary law more or less on a discretionary basis.[256]

An advantage of judicial enforcement through the national courts is their complementary nature to the authority of elders and chiefs, particularly in cases where such authority is flouted. Thus, parties could be compelled to appear before the national courts and judgments against them enforced through sanctions specified by law.[257] The effectiveness of such courts[258] could be circumscribed by jurisdictional problems, however, since powers of these courts tend to be defined in terms of ethnicity, territoriality, and nationality. For example, the statutory customary courts in Africa have no jurisdiction over non-natives[259] or even natives who have moved out of the courts' local spheres of influence within the country. In addition, the statutory customary courts, along with the general courts, will be denied personal jurisdiction where

252. Newton, *supra* note 15, at 1038; Porter, *supra* note 155, at 1611.

253. ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 83.

254. Anyangwe, *supra* note 132, at 46 n.2.

255. The Nigerian Constitution authorizes the creation by each state of a customary Court of Appeal to exercise appellate and supervisory jurisdiction in civil proceedings that involve customary law. However, no person is to be appointed as a judge in the state Customary Court of Appeal unless shown to have "considerable knowledge of and experience in the practice of Customary law." Constitution of the Federal Republic of Nigeria, Section 281(3)(b) (1999) *available at* http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm. Appeals from a state Customary Court of Appeal lie as a matter of right to a Federal Customary Court of Appeal created under the Constitution. At least three of the fifteen-member Federal Customary Court of Appeal are to be learned in customary law. *See* CONSTITUTION, arts. 280-81 (1999) (Nig.).

256. BOAST, supra note 91, at 15.

257. *See, e.g.*, OBILADE, *supra* note 86, at 188-216 (describing the jurisdiction and powers of the national courts in Nigeria).

258. These include the general and statutory customary courts in Africa, tribal courts in the United States, and the courts administering justice to Aborigines in parts of Queensland and Western Australia.

259. According to Allott, "the most characteristic feature of native or African courts everywhere in Africa is that their jurisdiction is mainly or solely limited to persons of African race." ALLOTT, ESSAYS, *supra* note 127, at 114.

potential defendants leave the country.[260]

IV. PROCEDURES FOR THE ASCERTAINMENT AND APPLICATION OF CUSTOMARY LAW

Special rules have been developed in Africa for the ascertainment of customary law. Members of the statutory customary courts are presumed to know the customary law and are authorized to apply it on the basis of their knowledge. Judges in the general courts are not presumed to be familiar with the customary law, however, and are prevented from relying on such personal knowledge as their prior experience might provide.[261]

As a rule, the party relying on customary law in the general courts is required to establish an adequate basis by allegation and proof before the court can apply it.[262] After proper pleading, customary law can be "proved in the first instance by calling witnesses acquainted with the native customs."[263] Such proof may come from chiefs, linguists, assessors, or others who qualify as experts on customary law. One could also prove customary law by referring to books or manuscripts recognized as legal authority, statutes, case law, or reports from statutory customary courts on questions referred to them.[264]

Recognizing that the determination of customary law as fact by the introduction of evidence is inconvenient, time-consuming, and sometimes fraught with uncertainty, the landmark case *Angu v. Attah* has also suggested the possibility of dispensing with evidence when "the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them."[265] Therefore, it opened the door for the ascertainment of customary law as a question of law through the taking of judicial notice by the general courts of well-established rules of customary law.

Once ascertained, customary law is to be applied by the courts, subject to the following conditions.[266] First, the customary law rule cannot be repugnant to natural justice, equity, and good conscience. Second, it is not incompatible either directly or by implication with any law for the time being in force.[267]

---

260. However, they will have jurisdiction over "native foreigners," i.e. non-nationals from other African countries found within the jurisdiction and who accept such jurisdiction. *Id.*

261 A.N. Allott, *The Judicial Ascertainment of Customary Law in British Africa*, *in* FOLKLAW, *supra* note 128, at 296 [hereinafter Allott, *Judicial Ascertainment*].

262. It was held by the West African Court of Appeal in Bonsi v. Adjena that customary law, if relied upon by a party in to a civil case, must usually be specifically pleaded. Bonsi v. Adjena, (1940) W.A.C.A. 241.

263. *Id.*

264. Allott, *Judicial Ascertainment*, *supra* note 261, at 302-13.

265. *Angu*, PRIVY COUNCIL DECISIONS 1874-1928 43 (1916).

266. C. OGWURIKE, CONCEPT OF LAW IN ENGLISH-SPEAKING AFRICA 68 (1979).

267. *Id.* Although some statutes have identified public policy as another possible ground for invalidating a rule of customary law, it was apparently not a significant factor affecting the validity of customary law. Only a few reported cases make references to public policy in relation to customary law, and even then rather tangentially. For example, in discussing the

While the repugnancy clause is intended to invalidate "barbarous" or uncivilized customs,[268] in applying the repugnancy test, it is not within the province of the courts to modify an uncivilized custom and apply the modified version of the custom.[269] The second test, regarding that of incompatibility, has generally been limited to laws specifically enacted by the local legislature.[270] A rule of customary law on a subject matter is perceived to be incompatible with a local statute if the statute is manifestly intended to govern that subject matter to the exclusion of customary law.[271] It is equally clear that where the coexistence of a rule of customary law and the statute is not inconsistent with the manifest object of the statute, no issue of incompatibility is raised. In every case, it is a question of construction whether a statute on a particular matter abolishes or modifies the customary law on the matter or is intended to coexist with the customary law.[272]

To some degree, the rules for ascertaining customary law in other regions of the world resemble African practice. For example, New Zealand courts, relying on African precedent, have laid down tests for enforcing customary law. These tests are based first on whether the alleged custom exists and second on whether it is contrary to statute and third onwhether it is reasonable.[273]

In the United States, the indigenous law required to be applied in some tribal courts may derive from two main sources: the applicable laws of the tribe and the customs and usages of the tribe.[274] The former are the written regulations adopted by the tribal governments in contrast to the latter, which may be ascertained from the advice of persons generally recognized in the community as being familiar with such customs and usages. For example, the Navajo Tribal Code permits the receipt of evidence from witnesses or elders or through independent investigation while the court is in recess.[275] Where a legal

---

possible existence of a Yoruba custom of legitimation by acknowledgment of paternity, one court held only that if such a custom encouraged promiscuity it would be contrary to public policy. Re Adadevoh, (1951) 13 W.A.C.A. 304. The court did not refer to any statute authorizing the application of the test of public policy, but appeared to have considered the test on the basis if the common law. *Id.* at 310.

268. OBILADE, *supra* note 86, at 100. N.L.R. 65.

269. "The Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience." Eshugbayi Eleko v. Officer Administering the Government of Nigeria, [1931] A.C. 662, 673 (Nig.).

270. The term "any law in force" has been held to refer to rules of the common law which include other classes of the received English law such as equity and statutes. OBILADE, *supra* note 86, at 106.

271. *See* Salau v. Aderibigbe, [1963] W.N.L.R. 80, 81 (Nig.).

272. OBILADE, *supra* note 86, at 109.

273. Public Trustee v. Loasby, [1908] 27 N.Z.L.R. 801, 806 (S.C.). Furthermore, in *Huakina Development Trust v. Waikato Valley Authority,* it was held that "customs and practices which include spiritual elements are cognisable in a Court of law provided they are properly established, usually by evidence." [1987] 2 N.Z.L.R. 188 (H.C.).

274. Newton, *supra* note 15 at 1038-39.

275. Andrew M. Kanter, *The Yenaldlooshi in Court and the Killing of a Witch: The Case for an Indian Cultural Defense*, 4 S. CAL. INTERDISC. L.J. 411, 431 (1995).

rule is not found in the particular tribe's laws, some tribal codes authorize tribal courts to examine "the law of any tribe or state which is consistent with the policies underlying tribal law, custom and usages."[276]

It has been argued that the particular methods relied upon by the general courts and the statutory customary courts in ascertaining customary law may be prone to error.[277] Contrary to expectations, members of statutory customary courts may not have deep knowledge of the relevant customary law rules in their areas of jurisdiction, especially where diverse practices are found among sections of an apparently homogenous tribe. Therefore, the danger exists that the rule applied by a member of a statutory customary court on the basis of his personal knowledge may not accurately reflect the rule of the particular locality. In some cases, the courts have declared customary law without reference to evidence or authority, relying purely on their own preconceptions of what the law should be.[278] In other circumstances, the courts have used logic "to extend or discover rules of customary law."[279]

Where witnesses are used, whether by general or statutory customary

---

276. Title 7, Section 204, of the Navajo Nation Code provides:

> A. In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws.
>
> B. Where any doubts arise as to the customs and usages of the Navajo Nation, the court may request the advice of counselors familiar with these customs and usages
>
> C. Any matters not covered by the traditional customs and usages or laws or regulations of the Navajo Nation or by applicable federal laws and regulations, may be decided by the Courts of the Navajo Nation according to the laws of the state in which the matter in dispute may lie.

NAVAJO NATION CODE tit. vii, § 204 (1985).

277. As noted by Cliff Thompson:

> What little is known about customary law from the judgments of the state courts is potentially suspect because the judges who are expert in dealing with custom are outnumbered by those who, through no fault of their own, have neither experience nor training in either the nature or substance of customary law. The potentiality of error is increased by the surprising fact that there are no official guidelines for determining customary rules. Where relevant anthropological research is available, a court may use it, but otherwise the methods of determination vary considerably, particularly in the lower courts. Within a single province there may be one district judge who relies on the evidence of tribal elders, another who depends on the advice of his clerk because he happens to be a member of the tribal group concerned, and yet another who strictly applies his predecessor's memorandum on the local customs. Because some of these judicial techniques are of doubtful merit, there is an urgent need for a study leading to the drafting of minimum standards for the methods by which courts determine the substance of customary law.

Thompson, *supra* note 139, at 151 (footnotes omitted).

278. Gordon R. Woodman, *Some Realism About Customary Law—The West African Experience*, *in* FOLKLAW, *supra* note 128, at 88.

279. In this context, the courts reason that "this must be the customary law, because in the circumstances it is the only logical possibility." *Id.*

courts, there would be the usual problems of misrepresentation through witness bias, ignorance, corruption, tendency to idealize the law, and failure to appreciate that traditional law may have been modified by subsequent practice.[280] Where chiefs are relied upon to declare customary law, problems of accuracy may exist; chiefs concurrently exercise executive and judicial powers and it may be difficult to know whether the declared law is a customary practice or a directive of the chief.[281] Additionally, chiefs often tend to be behind their communities in terms of the current legal thought and practice, leading to further problems of divergences.[282]

Given the different objectives anthropologists and lawyers appear to have when they examine social practices,[283] some concerns may also be raised about the use of anthropological works by general courts and the statutory customary courts. While the lawyer may be concerned about the binding nature of customary law, and thus, with rules that can be enforced by the courts, this concern is not central to the work of the anthropologist.[284] Therefore, not every practice referred to in an anthropological work rises to the level of customary law, and indiscriminating use of anthropological works as customary law could

---

280. Allott, *Judicial Ascertainment*, *supra* note 261, at 299.

281. Elias, *Problem of Reducing*, *supra* note 244, at 324.

282. According to Elias, "[W]ith but few important exceptions [the chiefs] are the least competent to make an effectual synthesis of the old and the new rules of conduct in a fast changing social and economic side." *Id.* at 324-25.

283. As Allott explains:

> The aim of anthropology is wide, to record custom as one of the various phenomena of social life in the tribe or people under investigation. The anthropologist seeks to show the social purpose of customary rules, and how they fit into the structure of behavior. The aim of legal research is narrow, to record those rules of custom or usage which are either enforced in the courts, or are a kind which the courts would enforce. Appreciation of the part which these rules play in the social structure is therefore irrelevant, or at most only needed as background-knowledge, or for the better elucidation of the meaning of these rules.

A.N. Allott, *Methods of Legal Research into Customary Law*, *in* FOLKLAW, *supra* note 128, at 286 [hereinafter Allott, *Methods of Legal Research*].

284. One commentator noted:

> [T]he tension between customary and formal law is deeply rooted in the very nature of each system of law, and it parallels inherent tension between the goals of anthropology and the goals of the legal system. For the anthropologist, the accommodation of customary law means more than the mere enforcement of marriage [social practice] in the formal system: it means preservation of customary law in a way that preserves cultural meaning and significance. Anthropologists would view the accommodation of customary law as treatment of "custom on custom's terms" with emphasis on oral narration, cultural growth and change, the subjective significance of the custom, and its varied, community based nature. The aims of the legal system are often in stark opposition to these anthropological principles: written or "hard" evidence, consistency, objective fact-based tests, and emphasis upon national or state society rather than smaller, community units.

Laymon, *supra* note 161, at 380-81 (footnote omitted).

sometimes lead to error. The problem with the statement of normative rules by anthropologists is not that the rules are erroneous per se. Indeed, the rules are accurate as representing what the anthropologists were told by the people they studied. The error, however, is in failing to recognize that the asserted rules are often subject to important qualifications not noted by those consulted.[285] Even where anthropological works identify proper legal rules, they may be viewed as too authoritative and treated as a type of legislation exhibiting the same ossification problem noted in connection with codified customary law.[286]

Similarly, rules compiled through interviews of members of traditional communities are sometimes unreliable as customary law; the interviews are often directed toward obtaining abstract rules that fail to show the function of the rules in the social system.[287] Besides, the interviews may yield distorted views of customary practices owing to individual opinions and pre-conceptions of the interviewer or the interviewee.[288] Rules obtained through observation of actual cases of the non-statutory adjudication systems are more reliable than interviews; the cases tend to be more accurate and comprehensive, show what kinds of problems actually arise for resolution, and provide an insight into procedural aspects of customary law.[289] Reliance on observed cases alone may not be practical, however, as it may be necessary to follow the activities of the non-statutory adjudication systems for years before a picture of the law

---

285. Moore explains this problems as follows:

> There is no doubt that rule statements which sound exact are often made by the peoples anthropologists study. When Gutmann reports rules . . . he was surely not misrepresenting what his Chagga informants told him. Old ethnographies are full of legal rules stated as practices. For example Gutmann tells us that among the Chagga the wergild for the homicide of a man was seven steer and seven goats. But despite that apparently exact statement, anthropological knowledge of the way such matters work in practice suggests that matters were much more indefinite. What is meant by a steer? Were castrated male animals the only acceptable payment? Or was whatever Chagga term was used simply generic for cattle? Were cows ever used in payment? Could substitutions be made? And the age and sex of the goats? And what about the timing of payment—all at once, some immediately after the death, some later? Some perhaps never? What might lead to adjustment in the amount or kind of payment? And what happened if payment were delayed? Might a creditor choose to accept a few goats now rather than a calf later on? Negotiations were always necessary to answer these questions despite seemingly "exact" rules. The same kind of variability is often inherent in systems of bridewealth payment. The rules are "exact" but actual instances do not necessarily conform. Institutionalized forms of negotiation are standard adjuncts of these types of rules, demonstrating their inexactitude in practice.

SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW IN KILIMANJARO, 1880-1980, at 39-40 (1986) (citation omitted).

286. Elias, *Problem of Reducing*, *supra* note 244, at 319.

287. Simon Roberts, *The Recording of Customary Law: Some Problems of Method*, *in* FOLKLAW, *supra* note 128, at 332.

288. *Id.* at 333.

289. *Id.* at 333-34.

emerges. Even then, there may be gaps in knowledge where customary law matters of interest have not come up for resolution.[290]

With respect to proof through case law, no clear doctrine has emerged regarding the effect of previous judicial decisions on customary law. Where customary laws are treated as authority, problems may arise over the relative status of case law and customary practice, particularly in the general courts.[291] Reliance on codified legislation on customary law[292] is also problematic since codification freezes customary law in time; its rules become less customary, fossilized, and "far removed from the experience and comprehension of the people . . . [especially] as the processes of legislative amendment or adjustment to the changing needs of society are notoriously slow."[293]

Similar problems arise with proof of customary law through judicial notice. Although useful as a convenient and clear method of ascertaining customary law, judicial notice could impede the development of customary law and divorce it from the on-going life of the community, or even be applied improperly to actions involving parties from different tribes.[294] Therefore, strict reliance by the national courts on case law, codified customary law, and judicial notice would only lead to gaps between customary law as practiced by the people and what is administered by the courts. At a more theoretical level, a related problem is that the basis of the application of customary law would change. Customary law is based on the fact that it is habitually obeyed by those subject to it. But, once customary law is codified or settled by judicial decision, its binding force then depends on the statute or the doctrine of precedent; it ceases to be customary law.[295]

There is a greater preference for legal textbooks as sources of customary law. They lack official authority and are, therefore, more flexible than statutes, and are more precise in the formulation of legal rules than anthropological works.[296] As renowned jurist Elias stated quite eloquently, legal textbooks separate the "wheat of legal principles from chaff of cultural and economic irrelevancies."[297] With rather few authoritative textbooks on the subject available,[298] however, use of this method of ascertaining traditional knowledge

290. *Id.* at 335.

291. Allott notes that it is in magistrate courts that questions of precedent are likely to arise. Allott, *Methods of Legal Research*, *supra* note 283, at 285.

292. A well-known example of a comprehensive attempt at codification was in the Natal Province of South Africa with the compilation of the Natal Code of Native Law in 1875-1878 and 1891 respectively, and its revision in 1932. Allott, *Judicial Ascertainment*, *supra* note 261, at 312.

293. Elias, *Problem of Reducing*, *supra* note 244, at 326.

294. According to Gordon Woodman, "once a rule has been judicially recognized, it is liable to be applied to ethnic groups other than those whose customs were in issue in the decisive cases." Woodman, *supra* note 278, at 91.

295. Allott, *Judicial Ascertainment*, *supra* note 261, at 309.

296. Elias, *Problem of Reducing*, *supra* note 244, at 320.

297. *Id.* at 328.

298. The best known examples in Africa are Mensah Sarbah's *Fanti Customary Laws* and

may be quite limited.

V. *IMPRECISION AND FLEXIBILITY OF CUSTOMARY LAW*

The largely unwritten character of customary law[299] would contribute significantly to problems with ascertaining and enforcing it in the national courts.[300] Because it is transmitted orally from generation to generation, customary law contains a margin of error that makes it impossible to achieve the same level of clarity and precision frequently sought in Western legal concepts.[301] Compounding the problem of imprecision and uncertainty in customary law rules are the different goals of non-statutory traditional adjudication systems, where the emphasis is on "negotiation leading to compromise and reconciliation of the parties, rather than the rigid application of rules to facts."[302]

Thus, customary law is applied flexibly in traditional non-statutory adjudication systems[303] with only arbitrary distinctions drawn between legal rules and other types of social conduct. Chiefs and elders in traditional societies would as easily invoke social norms to supply the criterion of right and reasonable behavior as they would rebuke or condemn the offender on the basis of such non-legal rules. This is justified to "maintain peace in the community and heal breaches in the social fabric, rather than to right wrongs."[304]

Due to this mixture of legal and non-legal rules, it would be necessary for the general and statutory customary courts to exercise caution when called upon

---

Whitfield's *South African Native Law*. *See* JOHN MENSAH SARBAH, FANTI CUSOMARY LAWS (1968); GEORGE MAXWELL BRUCE WHITFIELD, SOUTH AFRICAN NATIVE LAW (1948).

299. Elias, *Problem of Reducing*, *supra* note 244, at 320.

300. Laymon, *supra* note 161, at 362.

301. T.W. Bennett & T. Vermeulen, *Codification of Customary Law*, 24 J. AFR. L. 206, 212 (1980).

302. Allott, *Judicial Ascertainment*, *supra* note 261, at 296.

303. As explained by Moore:

> There is a widespread assumption outside of anthropology that preindustrial peoples are somehow more rigid about their oral rules than postindustrial ones are about their written laws. That is simply not so. Among peoples such as the Chagga, the flexibility of many supposedly rule-governed arrangements was and is a basic fact of life even as it is among ourselves. In all legal systems there is a tension between standardization through rules of general application and the negotiability and discretionary arrangement of specific affairs. Further, many rules that are stated as if they were universally "applied" are in practice selectively used. Choices about these matters exist in some form in all societies. This plasticity is no less present in a system of oral customary law than in written law. Certainly some rules are much more frequently followed than others, but in the absence of statistical data comparing rules with practices, there is no reason to be literal about rule statements. They must not be read as invariable practices in any society, nor as representing the way the system "works."

MOORE, *supra* note 285, at 38.

304. Greene & Drescher, *supra* note 117, at 427. *See also* Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law*, 21 BERKELEY J. INT'L L. 62, 70 (2003).

to apply as customary law all rules claimed to have been derived from non-statutory adjudication systems. Failure by the general and statutory customary courts to discriminate "between custom having the force of law and that which lacks that force though having a moral or religious sanction"[305] would inevitably result in errors as to what constitutes customary law.[306]

Indeed, research into the activities of the statutory customary courts has called into serious question whether those courts even actually apply "customary law" as such. The following comments reveal the basis for such skepticism:

> Bohmer's study of the lower courts of Upper Volta, which was based on an acceptance of definitions of African law of Allott and Elias which stress that there was "indeed law", separable and distinct in African societies, was unable to observe the use of it by the customary courts, which did not appear to apply it. Judges and assessors, she found, were ignorant of it and thought such knowledge to be irrelevant, disputes were solved by what "seemed 'fair' in the circumstances." This was not necessarily based on idyllic reconciliation: community values projected from the audience could be oppressive, so could judicial homilies, and scorned women litigants were led sobbing from the courtroom. Van Binsbergen, observing the post-colonial "law" of the Nkoya in Zambia, concludes that courts and rules were peripheral to the judicial process and the settlement of conflict in those areas in which customary law is supposed by lawyers to apply. Regarding inheritance, he wrote, there was not a set of rules but a set of expectations and no formal redressive action could be taken if they were not met. "The relatives are left with their resentment and are likely to turn to sorcery for revenge." Action outside of a court arena might be taken by the headman to prevent this but he would be concerned not with rules and justice, or rights and obligations, but with the dulling of animosities. Conflict was regarded "not as a matter of right or wrong against abstract, unalterable criteria of formulated rules of behaviour, but as a direct threat to group unity . . . the awareness of continually being on the edge of disruption."[307]

These findings are consistent with the conclusions of another study that "actual court cases were not concerned with the identity of rules and that courts did not

305. Allott, *Judicial Ascertainment*, *supra* note 261, at 297.
306. Bennett & Vermeulen, *supra* note 301, at 214.
307. MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER 65-66 (1985).

develop a rule-orientation of their own initiative."[308]

VI. DEFINITIONAL ISSUES

Finally, courts seeking to ascertain customary law rules would be confronted with a basic definitional question regarding the size of the group whose practices ought to be taken into account. Because social groups rarely have clear-cut boundaries and may involve "a gradient of more or less inclusive groups that live in a certain region, have similar histories, and share many cultural traits,"[309] significant variances in customary law could exist based on the size of the group that is the subject of focus such as the lineage, clan, tribe, or language group. For instance, a problem with the view of customary law as a question of law is the tendency to assume that customary law rules are uniform in an apparently homogenous group[310] and to ignore significant differences in customary practices among sections of a tribe where a customary rule is defined broadly in terms of the tribe. Thus, the absence of an acceptable definition for the social group relevant to the formation of folklore rights would continue to frustrate efforts to identify and enforce those rights.

CONCLUSIONS

Other than the reference to broad principles governing access to and sharing of benefits in traditional knowledge in accordance with rules of customary law, the sui generis regional model laws do not elaborate on the specific content of such rules. The omission is understandable. Given the extreme diversity in customary law amongst indigenous groups, it would not have been feasible to provide such details in model instruments. The drafters very prudently left that matter to be addressed under additional legislation or other guidelines to be developed on the basis of the model laws.

As envisaged under the model laws, anyone interested in exploiting an item of traditional knowledge would first need to approach the relevant national agency for information regarding the identity of rights-holders when unknown. When contacted, the rights-holders would apprise the resource-seekers of the specific customary law rules that govern the particular item of traditional knowledge. Beyond the national agency and the rights-holders themselves, other sources of information regarding the content of customary law rules may consist of the secondary sources discussed in the Article, including anthropological works, treatises, case-law, statutes, and interviews.[311]

Despite the limitations of customary law noted in the preceding section,

---

308. *Id.* at 66.

309. Fernando Santos Granero, Commentary, *Can Culture be Copyrighted?* 39 CURRENT ANTHROPOLOGY 214 (1998).

310. Elias, *Problem of Reducing*, *supra* note 244, at 319.

311. *See supra* notes 283-299 and accompanying text.

disuse of customary law in protecting traditional knowledge is not recommended. Indeed, such a move would be highly impractical or even illogical; it is the customary practices that define what constitutes traditional knowledge in the first place.[312] Rather than discourage the use of customary law, the approach preferred here is to recognize formally the legal status of customary law in the legal system and then to improve on the current methods of ascertaining and applying rules relating to traditional knowledge.[313] While significant, the problems surrounding the utility of customary law as an enforcement mechanism are clearly not insurmountable.

Complementing the formal recognition of customary law under legal systems should come with the creation of suitable mechanisms for its enforcement. In the specific context of traditional knowledge, a national agency could be set up to oversee arrangements governing access, use, and benefit-sharing in relation to traditional knowledge as found in the regional model laws from Africa and the Pacific. Where the national agency is able to provide information regarding the location and owners of indigenous resources, it would reduce significantly the problem of biopiracy caused by the exploiters' ignorance of the identity of the owners of indigenous knowledge.[314] The agency could also assist in the effective participation of the indigenous groups in the negotiations for access and could ensure that the indigenous groups are provided full prior and informed consent. For the agencies to be able to discharge their obligations in the interests of indigenous groups without interference from the government, however, the composition of the national bodies must reflect a significant presence of indigenous persons and experts.

In addition to the creation of national agencies, procedures must be created to allow cases involving misappropriation of traditional knowledge to be enforced through an effective court system. This will remedy a defect in the African Model Law, where the revocation of permits appears to be the contemplated remedy for breaches of transfer resource contracts.[315] The possibility of an indigenous group filing suit before a national court would afford a means of enforcing the customary law decisions of indigenous groups regarding uses of traditional knowledge and thereby complement traditional non-statutory judicial systems, especially in cases where the traditional

---

312. *Supra* notes 87-106 and accompanying text.

313. It has been suggested that in evaluating customs:

> [T]he courts are urged to consider among others, the place of the custom in the community, its value and influence, and whether its application is in accordance with the rule of law and the spirit of the constitution. In this way, the courts will not be saddled with the problem of determining different standards of natural justice, equity, and good conscience to be applied to the various communities, and whether the custom violates their notion of public policy.

Derek Asiedu-Akrofi, *Judicial Recognition and Adoption of Customary Law in Nigeria*, 37 AM. J. COMP. L. 571, 592 (1989).

314. Janet McGowan & Iroka Udeinya, *Collecting Traditional Medicines in Nigeria: A Proposal for IPR Compensation*, *in* SOURCEBOOK, *supra* note 11, at 59.

315. *African Model Law*, *supra* note 35, art. 14.

enforcement methods are weakened because the defendants are non-indigenous.

To improve on methods of ascertaining and applying customary law, the national agencies should undertake to identify rules governing the use of items of traditional knowledge and compile them in a database that would be available to the public, including the courts. The rules may deal with relevant issues such as the identity of rights-holders, types of traditional knowledge subject to commercialization, permitted uses, and forms of payment. As much as possible, the rules should be gleaned from contemporary interviews with indigenous persons to limit excessive reliance on anthropological works. To avoid the problem of freezing customary law, departures by courts from the compiled rules should be permitted where the evidence suggests that the compiled rule has changed. Furthermore, in deciding whether to enforce a customary law rule, a court should not test its validity with reference to intellectual property statutes unless such statutes expressly abolish or modify the related traditional knowledge claim.

Premised as they are on access and benefit-sharing principles, the regional model laws, like the Convention on Biological Diversity from which they were inspired, contemplate contracts between indigenous communities and users of traditional knowledge as the central mechanism for achieving the objectives of the instruments. However, dependence by indigenous peoples on contractual agreements as a method of protecting their rights raises significant concerns. The first major problem is that indigenous peoples lack not only the expertise to negotiate and ensure a fair deal but also the technological and scientific capacity to capitalize on commercial collaborations and opportunities that could be created under contractual arrangements. Second, because very few discoveries resulting from bio-prospecting arrangements actually translate into profits, the benefit-sharing provisions are rarely implemented with a concomitant economic loss to traditional communities. Third, the contributions of indigenous communities could be ignored by manipulating the rules of the game where, for instance, recipient-parties to the contracts claim that no compensation is payable because they made use of ex-situ collections rather than the resources of the provider-country. Fourth, contractual arrangements could be used to weaken the bargaining power of developing countries, especially where a particular resource is found in several countries. These agreements would enable biotechnology companies to shop around and play communities against each other in the companies' bids to attract the lowest possible prices to the detriment of traditional communities.

Despite these misgivings, contractual arrangements as an essential part of sui generis model laws cannot simply be ignored. The concerns noted could be mitigated by subjecting all negotiated contracts to review by the proposed national agency. Such review would ensure that the contracts are fair and equitable for the traditional communities concerned.

It is also recommended that work be continued for the adoption of a binding international instrument on access- and benefit-sharing to overcome jurisdictional and other enforcement issues certain to arise in cases that have

international dimensions. Customary law sanctions, even if supplemented or reinforced by effective government systems, provide only domestic remedies, which are useless in the event the party in breach of an access- and benefit-sharing contract leaves the country where the parties entered into the contract. Without the cooperation of the country to which the party has moved, the authorities in the first country can neither acquire jurisdiction over him nor enforce any judgment they may have obtained against him. A binding international access scheme, however, which, imposes responsibilities on both the traditional knowledge provider and user countries in terms of cooperation in connection with these jurisdictional and enforcement matters would significantly improve the framework of protection under the current sui generis regional models.

THE AGREEMENT BETWEEN THE UNITED STATES AND VIETNAM REGARDING COOPERATION ON THE ADOPTION OF CHILDREN: A MORE EFFECTIVE AND EFFICIENT SOLUTION TO THE IMPLEMENTATION OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION OR JUST ANOTHER ROAD TO NOWHERE PAVED WITH GOOD INTENTIONS?

Lindsay K. Carlberg*

Following today's news story of the tragic death of two-year old Russian-born Nina Hilt, allegedly at the hands of her adoptive mother, the National Council for Adoption (NCFA) convened a meeting of leaders of accredited adoption agencies working in Russia. Together, the group is calling for immediate action and implementation of reforms, in order to prevent future cases of abuse. Unfortunately, Russian law currently also allows independent adoptions,[1] which do not meet the same strict requirements that the accredited agencies do. Nina Hilt's adoption was, in fact, an independent adoption.[2] Eliminating independent adoptions and a swift implementation of the Hague Convention by both the American and Russian government is necessary to greatly reduce the risk of future tragedies such as Nina Hilt's.[3]

---

*J.D. Candidate, Indiana University School of Law-Indianapolis; expected graduation date, May 2007.

1. An independent adoption is an adoption that is arranged by the birth parent with an identified family and is frequently facilitated by an attorney. Adoption Open, Adoption Terms – Definition of Adoption Legal Terms – Adoption Dictionary, http://www.adoptionopen.com/adoptionterms.html (last visited Dec. 20, 2006). Independent adoptions, however, are not without risk, and often occur without an exchange of information, making them susceptible to the risks involved in for-profit adoptions. On the other hand, an agency adoption is "an adoption that is facilitated by a State Licensed Agency that provides counseling to birthparents, home studies to prospective adoptive parents, relinquishment services and post-placement programs for triad members. These Agencies may also provide Intercountry and Special Needs adoption services." *Id.* Further, a private agency adoption is an adoption handled by a private, licensed agency. A private agency is not government-sponsored, but must meet state requirements to obtain and keep its licensed status. "The agency will provide services to birth families, adoptive families and children." *Id.*

2. Lee Allen, *U.S. Adoption Leaders Express Grief and Outrage Over Death of Russian-Born Nina Hilt, Call for Immediate Changes to International Adoption Policies*, U.S. NEWSWIRE, July 8, 2005, *available at* http://releases.usnewswire.com/GetRelease.asp?id=50123.

3. *Id.*

I. INTRODUCTION

Children are the most precious resource we have for the future.[4] Tragically, however, natural disasters, such as war, disease, and changing governmental regimes, have left children throughout the world with neither family to turn to nor resources to utilize.[5] With approximately 9.5 million children now confined to orphanages around the world,[6] intercountry adoption has become an attractive alternative for many Americans that have always dreamed about adopting.[7]

Intercountry adoption is the "process by which a married couple or single individual of one country adopts a child from another country."[8] It is an "instrument for giving a family to a child who does not have one and not the other way around."[9] Statistics show that the adoption of orphans around the world by citizens of the United States has "'doubled over the last decade, exceeding 16,000 in 1999,' with four out of five internationally adopted children being adopted by U.S. parents."[10] More recent statistics report that in 2005, 22,728 immigrant visas were issued to orphans coming to the United States.[11]

Intercountry adoption does not always assure the adoptive parents, the biological parents, or the child that the experience will be pleasant.[12] Unique social and cultural factors coupled with the ongoing heightened demand among wealthy countries for infants from poorer countries have led to corruption that inevitably seeps in and distorts the humanitarian aspect of intercountry

---

4. Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFF., Nov./Dec. 2003, at 115.

5. Notesong Srisopark Thompson, Note, *Hague is Enough?: A Call For More Protective, Uniform Law Guiding International Adoptions*, 22 WIS. INT'L L.J. 441, 441 (2004) [hereinafter Thompson, *A Call for More Protection*].

6. Kapstein, *supra* note 4, at 115.

7. Shannon Thompson, *The 1998 Russian Federation Family Code Provisions on Intercountry Adoption Break the Hague Convention Ratification Gridlock: What Next? An Analysis of Post-Ratification Ramifications on Securing a Uniform Process of International Adoption*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 703, 703 (1999) [hereinafter Thompson, *Post-Ratification Ramifications*].

8. Thompson, *A Call for More Protection*, *supra* note 5, at 442. International adoption is also interchangeably referred to as intercountry adoption or transcountry adoption. *Id.* (citing CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, INTERCOUNTRY ADOPTION GUIDELINES 97 (1980)).

9. Thompson, *Post-Ratification Ramifications*, *supra* note 7, at 703.

10. Amy Grillo Kales, Note, *The Intercountry Adoption Act of 2000: Are Its Laudable Goals Worth Its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 GEO. WASH. INT'L L. REV. 477, 477 (2004) (citing Press Release, Congressman Bill Delahunt, House & Senate Clear Delahunt Global Adoption Treaty Bill, Senate also Poised to Enact Delahunt for Automatic Citizenship (Sept. 20, 2000), *available at* http://www.holtintl.org/update/092000.html.

11. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, IMMIGRANT VISAS ISSUED TO ORPHANS COMING TO THE U.S., *available at* http://www.travel.state.gov/family/adoption/stats/stats_451.html (last visited Dec. 20, 2006).

12. Kales, *supra* note 10, at 477.

adoption.[13] The development of a general, uniform solution to intercountry adoption has thus been hindered.[14]

Two prominent groups are involved in intercountry adoptions: "(1) countries consisting of low birth rates and small numbers of children in need of homes, such as the United States, and (2) countries with high birth rates and large numbers of homeless children."[15] Countries in the latter group, such as Vietnam, have a poor economic state; unfortunately, the incentives for trading human life have become too high for some biological parents to forego.[16] When this occurs, the price tag placed on these children can be anywhere from $5,000 to $25,000.[17] As a result, there has arguably been a shift away from the best interest of the child and the suitability of the adoptive parents and a shift toward awarding the child to the highest bidding prospective parents.[18]

Through the innocence of intercountry adoption, the most pervasive and startling effect of adoption corruption occurs through the purchase and sale of babies on the black market.[19] In addition to trading children for items such as cameras or watches, the *New York Times* discovered a family who sold their infant for twenty dollars to a woman living in a nearby village, who then decided to sell the infant to an orphanage, which in turn arranged for the infant to be adopted abroad.[20] The lack of uniform laws and procedures, combined

---

13. Kapstein, *supra* note 4, at 115.

14. *See generally* Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. L. 181 (1996).

> To some, [international adoption] presents in extreme form problematic issues they see at the heart of all adoption. It can be viewed as the ultimate form of exploitation, the taking by the rich and powerful of the children born to the poor and powerless. It does tend to involve the adoption by the privileged classes in the industrialized nations, of the children of the less privileged groups in the poorest of nations, the adoption by whites of black-and brown-skinned children from various Third World nations, and the separation of children not only from their birth parents, but from their racial, cultural, and national communities as well.

Id. at 182.

15. Thompson, *A Call for More Protection*, *supra* note 5, at 444.

16. Kapstein, *supra* note 4, at 115; Sarah Sargent, *International Adoption and Cultural Transformation: Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania*, 10 TEX. WESLEYAN L. REV. 351, 358 (2004).

17. Kapstein, *supra* note 4, at 115.

18. Thompson, *Post-Ratification Ramifications*, *supra* note 7, at 704; *see* Kales, *supra* note 10, at 483-84 (looking at Peru in the early 1990s, with increased malnutrition from rising prices, a cholera epidemic on the rise, rabies and tuberculosis, and a guerilla war, children were the one thing people could demand high prices for and count on Western prospective adoptive parents to supply much needed cash that was in short supply in Peru). *Id.*; *see also* Sargent, *supra* note 16, at 359. *But see* Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006) ("It almost seems like putting them up for adoption would ultimately be the best option if their parents are willing to sell them for only $20. So while this sounds inhumane, it actually is in the best interest of the child.").

19. Kapstein, *supra* note 4, at 115.

20. *Id.*

with intercountry adoptions performed or assisted by unethical adoption intermediaries, facilitators, and professionals, have contributed to this problem.[21]

The discovery of this shift toward corrupt adoption practices has prompted countries to attempt to regulate adoption on an international level.[22] Several conventions and conferences have laid the groundwork for more uniform and cooperative standards and practices for intercountry adoptions.[23] The 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption represents the first considerable effort.[24] Unfortunately, this Convention was not particularly successful in implementing change because it lacked an effective enforcement mechanism. Most notably, a provision in the Convention allowed countries to disregard any provision that was against the countries' public policy.[25] Consequently, only three nations ratified it.[26]

The next wave of efforts began in 1986 when the U.N. General Assembly Resolution guidelines entitled "The Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption" (U.N. Adoption Declaration) were adopted.[27] The U.N. Adoption Declaration promoted national adoption over intercountry adoption and regarded intercountry adoption as a last resort only to be used after a child was not adopted in its state of origin.[28]

Next, in 1989 intercountry adoption was addressed at the United Nations Convention on the Rights of the Child (U.N. Convention).[29] The U.N. Convention lacked any significant power due to its reliance on national laws to provide specific legal measures.[30] Although the U.N. Convention had good intentions of curtailing the black market-selling of babies, it failed to specify uniform measures specifically directed at reducing the problem; the measures

---

21. Kales, *supra* note 10, at 483.

22. Mary Ann Candelario McMillan, Comment, *International Adoption: A Step Towards a Uniform Process*, 5 PACE INT'L L. REV. 137, 157 (1993).

23. *See* Crystal J. Gates, *China's Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 IND. J. GLOBAL LEGAL STUD. 369, 369 (1999).

24. *Id.* at 377.

25. *Id.* at 378. "This is not the only reason that it failed; however, this loophole provision is used as an example of a common thread throughout all of the attempted solutions and conventions that has been a factor in their failure." Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

26. Gates, *supra* note 23, at 377.

27. Jennifer M. Lippold, Note, *Transnational Adoption from an American Perspective: The Need for Universal Uniformity*, 27 CASE W. RES. J. INT'L L. 465, 490 (1995).

28. *Id.* at 490-91. The U.N. Declaration's guidelines even chose to promote national foster care over intercountry adoption. *Id.* This Convention also had the loophole provision allowing countries to disregard any provision of the Convention that was against the countries' public policies. *Id.*; *see generally* Gates, *supra* note 23.

29. Susann M. Bisignaro, *Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow*, 13 DICK. J. INT'L L. 123, 134 (1993).

30. *Id.* at 134.

lacked the necessary tools to be truly successful in combating the heart of the problem.[31] Further, the U.N. Convention was weakened by the failure of the United States to finalize ratification.[32]

Today, without uniform, global regulations for intercountry adoptions in place, children throughout the world continue to wait for permanent and stable homes.[33] Thus, the inadequacy of current adoption regulations is both detrimental to countries that have the resources and desire to adopt children from poorer countries and to countries that have an overabundance of children that will continue to struggle for survival because the odds are continually being stacked against them.[34]

In response to these ensuing concerns regarding the lack of consistent, worldwide regulations,[35] the Hague Conference on Private International Law completed the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (Hague Convention) in May 1993. This Convention represents the most recent step taken to normalize and systemize the process of intercountry adoption.[36] The Hague Convention distinguishes itself by setting out the importance of children as a nation's first priority and focuses on the fact that "a child's only opportunity for a permanent family life" might be through intercountry adoption.[37] Unfortunately, it too is fraught with problems.

This Note focuses heavily on the cost and efficiency problems with implementing the Hague Convention in many poorer countries.[38] This Note will argue that problems of cost and inefficiency are associated with

---

31. *Id.* at 135. The U.N. Convention promoted intercountry adoption only when a child could not be cared for properly in the child's original state. Thus, the U.N. Convention promoted goals aimed toward national care as the best alternative. Alexandra Maravel, *Implementation of the United Nations Convention on the Rights of the Child: II. Implementation and International Bodies: The U.N. Convention on the Rights of the Child and the Hague Conference on Private International Law: The Dynamics of Children's Rights Through Legal Strata*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 309, 314 (1996). In contrast, the Hague Convention seems to move away from a main focus of intracountry adoption and focuses on placing children into the intercountry adoption system to further the best interests of the child. *See id.* at 317.

32. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

33. *See* Thompson, *A Call for More Protection*, *supra* note 5, at 442.

34. *See id.*

35. The ideas and goals towards the unification of private law are accomplished through developing multilateral treaties called "conventions." Sargent, *supra* note 16, at 353.

36. *See* Hague Conference on Private International Law: Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *opened for signature* May 29, 1993, 1870 U.N.T.S. 182, *reprinted in* 32 I.L.M. 1134 [hereinafter Hague Convention].

37. Gina M. Croft, Note, *The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 GA. J. INT'L & COMP. L. 621, 629 (2005).

38. *See generally* Caeli Elizabeth Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT'L L. & POL'Y 561 (2005).

implementing the Hague Convention, thus rendering it a less promising solution than originally hoped for regarding resolution of intercountry adoption issues.[39]

As one solution to the problems created by the Hague Convention, the United States and Vietnam recently signed a treaty that embodies everything the Hague Convention is trying to accomplish. At the same time, it also allows Vietnam to attain these goals without going through all of the burdensome requirements that would inevitably prevent Vietnam from being able to fully implement the Hague Convention.[40] If this type of treaty is successful, it could be an effective way to enable poorer sending countries to implement new adoption standards in order to curtail the corruption in intercountry adoptions.

A bilateral treaty has the potential to address more appropriately the specific issues of individual nations and create a more efficient process than the Hague Convention.[41] It can do so by avoiding the vague definitions and lack of enforcement and accountability mechanisms that will likely render the Hague Convention another failed attempt at establishing uniform intercountry adoption.[42] Unfortunately, it is unclear how another failure of the Hague Convention would affect countries that have already invested a great deal of time and money implementing the Hague Convention. In addition, although the treaty between the United States and Vietnam embodies the goals of the Hague Convention, it has problems of its own and therefore, might not have the desired impact of furthering the international goal of curtailing corruption in intercountry adoption.[43]

Part (II) of this Note will briefly examine the history of intercountry adoption, including a discussion of current intercountry adoption trends throughout the world. Part (III) will examine the current role of U.S. law and international law in intercountry adoptions and consider the difficulties in meaningful implementation of the Hague Convention. Part (IV) will examine how the United States is currently in the process of implementing the Intercounty Adoption Act of 2000. Part (V) will examine the future of intercountry adoptions with an emphasis on the critical state of Vietnam orphans as a realistic illustration of the need for the implementation of uniform global requirements. It will also explore the recent agreement between the United States and Vietnam regarding cooperation on the adoption of children as

---

39. *Id.*

40. Agreement Between the United States of America and The Socialist Republic of Vietnam Regarding Cooperation on the Adoption of Children, U.S.-Vietnam, June 21, 2005, *available at* http://travel.state.gov/pdf/vn_final_agreement.pdf [hereinafter Vietnam Bilateral Treaty].

41. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

42. *See* Lippold *supra* note 27, at 497; *see also* Thompson, *A Call for More Protection*, *supra* note 5, at 460.

43. Vietnam Bilateral Treaty, *supra* note 40; *see also* Hague Convention, *supra* note, 36, art. 1.

an example of the possible new trend to accomplish these goals. Finally, Part (VI) will provide a brief conclusion.

II. CHILDREN ON THE MOVE

a. Brief History of Intercountry Adoption

Historically, adoption was unheard of under common law tradition because it did not create the proper parent-child relationship under the law.[44] In the middle of the twentieth century, however, domestic adoption became more acceptable.[45] Thereafter, intercountry adoptions became prevalent in the United States in the 1950s due to the abundance of newly orphaned or abandoned children in the aftermath of two renowned wars.[46]

World War II produced the first major wave of intercountry adoptions.[47] Due to soldiers stationed abroad and expanded media coverage of the war, the struggles of these children forced into displacement came home to a U.S. audience.[48] The Korean War resulted in the second major wave that brought global awareness of intercountry adoption.[49]

Since intercountry adoption became popular in the 1950s, it has been subject to a tangled web of conflict of laws and bureaucratic red tape in both sending and receiving countries.[50] Despite these problems, between 1953 and 1981, huge increases in adoptions by U.S. citizens seem to have been a win-win situation; adoptive parents were receiving children they had wished for and in return the burden of poverty on war-torn countries began to lessen.[51]

Many American adoptive parents choose to adopt because of philanthropic motives that go beyond the mere desire to raise a child for their personal benefit; instead, they are motivated by a sense of saving their adopted child from a possible life of poverty in his or her country of origin.[52] In addition to facilitating an increase in adoptions by U.S. citizens, news stories

---

44. Lisa M. Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283, 285 (1995).

45. *Id.*

46. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 141 (1993).

47. *Id.* Although there were extraordinary numbers of children available for adoption after World War II, it was the aftermath of the Korean War that brought global awareness of intercountry adoption. Katz, *supra* note 44, at 286.

48. Kales, *supra* note 10, at 479.

49. Thompson, *A Call for More Protection*, *supra* note 5, at 445; Katz, *supra* note 44, at 286.

50. Kimball, *supra* note 38, at 562.

51. Thompson, *Post-Ratification Ramifications*, *supra* note 7, at 705-06.

52. Kelly M. Wittner, Comment, *Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?*, 12 PAC. RIM L. & POL'Y J. 595, 598 (2003).

involving child trafficking and baby-selling also prompted international organizations to establish some uniform standards and requirements to regulate intercountry adoptions.[53]

b. The Current State of Intercountry Adoption

The number of intercountry adoptions has continually increased over the last fifty years. This is due in part to the recognition of sending countries that adoption serves as a viable solution to the problem of an overabundance of orphans.[54] The desirability of adopting and its steady increase has been due to a variety of social and legal changes in receiving countries, such as the "advent of contraception, legalization of abortion, and the increased tendency and social acceptance of single parents choosing to keep their children."[55] These changes have led to a further reduction of U.S. infants available for adoption and thus, have made the option of intercountry adoption increasingly popular.[56]

Currently, citizens of more economically stable nations are primarily adopting children from underdeveloped countries.[57] For example, the U.S. Department of State reported that in 2001, over 34,000 intercountry adoptions took place worldwide, with the United States receiving over 19,000 adoptees.[58] Further, from October 2004 to September 2005, approximately 22,739 foreign-born children were received by the United States.[59] Of these children, 13,241 were from countries that have joined the Convention, and thus account for approximately fifty-two percent of incoming intercountry adoptions in 2005.[60] In 2005, U.S. citizens adopted the majority of children from the following ten

---

53. Kimball, *supra* note 38, at 562.

54. *Id.* at 564.

55. Thompson, *A Call for More Protection*, *supra* note 5, at 446. There are many other factors that have contributed to the desirability and increased interest in intercountry adoptions:

> (1) The decline in the number of healthy American babies due to the increased availability of abortion and contraceptive use; (2) the increasing number of unwed mothers now keeping their babies due to the decreased stigma; (3) society's acceptance of adoption by single persons; (4) the increased number of Americans who postponed marriage and childbearing, only to find they are unable to conceive; (5) the shorter waiting period for a foreign adoption (six months to one year, compared to as long as ten years for a healthy American Caucasian child); (6) the procedural "red tape" and stringent requirements for domestic adoption complicated by the involvement of United States adoption agencies in the adoption process; and (7) Americans' increased acceptance of people from other cultures.

McMillan, *supra* note 22, at 138-39.

56. Thompson, *A Call for More Protection*, *supra* note 5, at 446.

57. *Id.*

58. Kimball, *supra* note 38, at 564-65.

59. U.S. OFFICE OF THE SPOKESMAN, U.S. DEP'T OF STATE, IMPLEMENTATION OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION (February 15, 2006), http://www.state.gov/r/pa/prs/ps/2006/61274.htm.

60. *Id.*

countries: China, Russia, Guatemala,[61] South Korea, the Ukraine, Kazakhstan, Ethiopia, India, Colombia, and the Philippines.[62]

While allowing children to be adopted internationally *does* facilitate the wants and needs of both sending and receiving countries by helping "unwanted" children find homes and helping childless couples to have a family, intercountry adoption also opens the door to people who are only interested in turning a profit.[63] This has led to receiving countries being skeptical about "doing business" with sending countries that do not have legitimate safeguards in place, as those countries fear they might inadvertently contribute to corrupt adoption proceedings.[64] Further, since use of the Internet has become so widespread, prospective parents can find children at minimal costs, making baby trafficking more profitable for the sending country.[65] The Internet has also made traffickers more difficult to track down and prosecute.[66]

Due to reports of corrupt adoption procedures and horror stories about mistreated children and child trafficking in countries like Vietnam, many receiving countries, such as the United States, have condemned and put a hold on doing business with them.[67] This has lead to an ongoing internal struggle between not wanting to promote the corrupt behavior of some sending countries and the many benefits that come from the practice of intercountry adoption.[68]

Therefore, the desire to legitimize intercountry adoptions in countries like Vietnam has been a primary goal of the United States. While this goal has been complicated due to the need to adhere to the laws of three separate jurisdictions—foreign domestic law, U.S. federal immigration law, and individual state law regulations[69]—the Hague Convention has provided the first

---

61. Guatemala is a party to the Hague Convention; however, Guatemala's adoption procedures are not up to the minimal standards required by the Hague Convention. *Id.*

62. U.S. BUREAU OF CONSULAR AFFAIRS, *supra* note 11. China was ranked first with 7,906, Russia was second with 4,639, Guatemala was third with 3,783, South Korea was fourth with 1,630, the Ukraine was fifth with 821, Kazakhstan was sixth with 755, Ethiopia was seventh with 441, India was eighth with 323, Colombia was ninth with 291, and the Philippines was tenth with 271. *Id.*

63. Kimball, *supra* note 38, at 567.

64. *Id.*

65. Wittner, *supra* note 52, at 602.

66. *Id.* While this could have happened, the safeguards in place make the percentage of occurrences of this type very minimal. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

67. Kimball, *supra* note 38, at 567-68. This hold on adoptions from a country is referred to as a "moratorium." *See id.* at 580. A moratorium is defined as "a period of permissive or obligatory delay; specifically, a period during which an obligor has a legal right to delay meeting an obligation." BLACK'S LAW DICTIONARY 1009 (6th ed. 1990). Also, it is defined as a "suspension of an ongoing or planned activity." *Id.*

68. Kimball, *supra* note 38, at 568.

69. Jordana P. Simov, Comment, *The Effects of the Intercountry Adoptions on Biological Parents' Rights*, 22 LOY. L.A. INT'L & COMP. L. REV. 251, 251 (1999). These drastically different adoption procedures and rules create confusion and frustration for adopting parents. Bisignaro, *supra* note 29, at 125-26. Many countries, especially receiving countries, have failed to modify immigration and adoption laws to facilitate these adoptions. *Id.* Consequently,

inclusive step toward completing this mission. The Hague Convention, at least in part and from the outset, seeks to develop safe and consistent guidelines to prevent child trafficking and other abuses, all in the best interest of the child.[70]

c. *The Current Process of Intercountry Adoption in the United States*

Currently, the requirements for intercountry adoption lie primarily with the states;[71] however, there are some general federal rules imposed on all states by the U.S. Citizenship and Immigration Services (USCIS), formerly known as the Immigration and Naturalization Services.[72] Once a child is found, the prospective parents residing in the United States must comply with the foreign government, federal government, and individual state government regulations.[73] After complying with the sending country's procedures, prospective parents must meet the standards of the United States.[74] While U.S. immigration standards can be complicated, they have been the one constant element throughout the process.[75] Although state law governs almost all adoptions, the USCIS puts the final stamp of approval on intercountry adoptions.[76]

An immigration petition must meet two requirements: (1) the prospective parents must show that they can provide a stable and loving home for the child, and (2) the child must be an "orphan" according to U.S. federal regulations.[77] Once U.S. federal requirements are met, the requirements of the adopter's state of residence within the United States have to be met.[78] Most states have two requirements that must be met: (1) termination of the biological parents' parental rights and (2) a determination by the court that the adoption is in the best interest of the child.[79]

---

intermediaries or agents become the primary contact for many adopting parents because of the intermediaries' expertise and knowledge in circumventing bureaucratic channels, which shortens the adoption process. *Id.*

70. Kimball, *supra* note 38, at 568.

71. *See* Peter H. Pfund, *Implementation of the Hague Intercountry Adoption Convention in the United States: Issues and Problems, in E. Pluribus Unum, Liver Amicorum Georges A.L. Droz on the Progressive Unification of Private International Law*, 321, 322-26 (1996).

72. U.S. Citizenship and Immigration Services, About Us, http://uscis.gov/graphics/aboutus/index.htm (last modified Jan. 20, 2006). "On March 1, 2003, service and benefit functions of the U.S. Immigration and Naturalization Service (INS) transitioned into the Department of Homeland Security as the U.S. Citizenship and Immigration Services (USCIS)." *Id.*

73. Lisa K. Gold, Comment, *Who's Afraid of Big Government? The Federalization of Intercountry Adoption: It's Not as Scary as It Sounds*, 34 TULSA L.J. 109, 111 (1998).

74. *See* 8 U.S.C. § 1101 (2006). This statute codified the U.S. Adoption and Immigration requirements.

75. Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 205 (1994).

76. Bisignaro, *supra* note 29, at 130.

77. Gold, *supra* note 73, at 114.

78. Liu, *supra* note 75, at 208. After the federal immigration standards are met, the next step is to meet the requirements of the parents' state of residence. This process is referred to as "readoption." *Id.*

79. Gold, *supra* note 73, at 115-16.

Although intercountry adoption has amazing potential, the system unfortunately has many defects.[80] Because definitions of key terms such as "orphan" and the procedures to meet these requirements differ in every country, they tend to frustrate the overall systematic flow of adoptions.[81] The increase in bureaucratic red tape, problems with immigration and obtaining visas, and the constantly changing laws and economic climates in various sending countries, coupled with an increasing demand for children, all have prompted corruption in intercountry adoption.[82]

III. THE HAGUE CONVENTION: A UNIFORM APPROACH TO INTERCOUNTRY ADOPTIONS

To date, no gathering of the international community has resulted in the implementation of a measure that satisfactorily addresses and effectively curtails baby trafficking.[83] In response to prior ineffective attempts to regulate intercountry adoption, representatives from sixty-six nations[84] met in 1993 to develop a legal framework for intercountry adoption.[85] The final text of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), a multilateral treaty, was approved by sixty-six nations[86] on May 29, 1993.[87]

The Hague Convention has been the most ambitious and monumental action taken so far regarding the need to protect children, birth parents, and adoptive parents involved in intercountry adoptions from child trafficking and other abuses.[88] The Hague Convention applies to adoptions between countries that are parties to it and sets out certain internationally agreed-upon minimum norms and procedures for adoption.[89] According to the Hague Convention, by

---

80. Katz, *supra* note 44, at 298.

81. *Id.* For example, the United States only recognizes "unconditional abandonment." Thus, until the birth parent(s) relinquish their rights to the child in a legal proceeding or are otherwise divested of their rights, the child will not be ready for adoption in the United States. Gold, *supra* note 73, at 113 n.39. This could be a probable cause for extensive baby trafficking because birth parents who have not "legally" relinquished their rights but have abandoned their children simply sell their child for the highest price they can get. *See id.*

82. Wittner, *supra* note 52, at 599; *see* Sargent, *supra* note 16, at 358. Each country's rules and procedures differ regarding eligible children and prospective families. Katz, *supra* note 44, at 299. This is not so much the problem as the fact that there is no international central agency to keep track of the ever changing standards caused by outside forces such as politics. *Id.*

83. Holly C. Kennard, Comment, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions*, 14 U. PA. J. INT'L ECON. L. 623, 629 (1994).

84. Thompson, *A Call for More Protection*, *supra* note 5, at 442.

85. Gates, *supra* note 23, at 380.

86. Thompson, *A Call for More Protection*, *supra* note 5, at 442.

87. *See generally* Hague Convention, *supra* note 36.

88. Thompson, *A Call for More Protection*, *supra* note 5, at 442.

89. *See generally* Hague Convention, *supra* note 36.

signing the Convention a state expresses its intention to become a party to the Convention.[90] Being a party to the Hague Convention, however, does not in any way oblige a state to take any further action toward ratification.[91] Therefore, if a country never takes the additional step of ratification, it is not bound by the Hague Convention's terms even though it has affirmed its commitment to accede to the policy.[92] Ratification of the Hague Convention by a country *does*, however, create a legal obligation to incorporate the terms of the Convention in its domestic and international law.[93]

For example, the United States is a signatory to the Hague Convention and has taken several steps in preparation of ratification, but it has not yet finalized ratification.[94] As of November 2006, there are sixty-nine contracting countries to the Hague Convention.[95]

a. Requirements of the Hague Convention

"The Hague Convention consists of five Parts, seven Chapters, and forty-eight Articles."[96] The Hague Convention's overall goals are to organize the intercountry adoption process, to ensure the recognition of such adoptions, and to prevent baby selling.[97] Specifically, the goals of the Hague Convention are:

> (1) to ensure that the international adoption is in the child's best interest; (2) to create a cooperative system amongst participating nations, in efforts to curtail child trafficking and prevent other abuses; (3) to ensure that intercountry adoptions that conform to the Hague Convention's requirements are recognized; and (4) to ensure proper consent to the adoption.[98]

---

90. Sargent, *supra* note 16, at 354.

91. *Id.* Countries that are a part of the Hague Convention vote on the final draft and then ultimately sign it as a way of showing they are in favor of the policies it encompasses. If a country is a signatory to the Hague Convention, it can then choose to ratify it in their own country. If a country is not a member to the Hague Convention, it can choose to "accede" to it. The next step after either "acceding" or "ratifying" is implementation; the process of incorporating the Hague Convention into their countries domestic laws. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

92. Kimball, *supra* note 38, at 569.

93. Sargent, *supra* note 16, at 354.

94. *Id.* at 355. The United States has drafted legislation titled "The Intercountry Adoption Act of 2000 in order to implement the Hague Convention." Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (2000).

95. Elizabeth Bernstein, *Rules Set to Change on Foreign Adoptions*, WALL ST. J., Nov. 2, 2006.

96. Lippold, *supra* note 27, at 493.

97. *Id.*

98. Kimball, *supra* note 38, at 569; *see* Hague Convention, *supra* note 36, art. 1; *see also* U.S. CITIZENSHIP AND IMMIGRATION SERV., U.S. DEP'T OF JUSTICE, FACT SHEET: THE INTERCOUNTRY ADOPTION ACT OF 2000, APPROVAL OF THE HAGUE CONVENTION REGARDING

To accomplish these goals, Article 1 of the Hague Convention sets out three generalized categories of compliance: (1) to safeguard appropriate intercountry adoptions and ensure they are in the best interest of the child, (2) to establish a national "Central Authority" in each country to carry out the duties of the Hague Convention, and (3) to secure with reasonable certainty that adoptions decreed pursuant to the Convention will be recognized and given effect in all other countries that are parties to the Hague Convention.[99]

Articles 4 and 5 require that an adoption covered by the Hague Convention take place only after competent authorities of the respective state of origin ensure that the necessary consents have been given and that the child is eligible for adoption under the provisions of the Hague Convention.[100] In addition, the state receiving the child is responsible for establishing that the prospective parents receive adoption counseling, and if the prospective parents *are* found eligible to adopt, the receiving state then has to ensure that the child will be allowed to enter.[101]

Articles 6 through 13 require the creation of a "Central Authority" and other accredited bodies to oversee intercountry adoptions and to delegate responsibilities.[102] Articles 14 through 22 set forth significant procedural requirements, including the requirement that both states provide reports concerning the parents of the receiving state and the child of the sending state, which include information such as identity, eligibility or adoptability, background, family, medical history, reasons for adopting, and the social environment the children will be entering.[103]

Articles 23 through 27 discuss the procedure for recognizing adoptions and the effects of an adoption.[104] Specifically, Article 24 permits a contracting state that is a signatory to the Hague Convention to refuse to recognize an adoption, but only when it is "manifestly contrary to its public policy, taking into account the best interests of the child."[105]

The general provisions of the Hague Convention are set forth in Articles 28 through 42. Article 32, however, specifically requires that the Central Authorities take all appropriate measures to prevent improper financial benefit or other gain in connection with adoptions.[106]

The initial investigation of the child and prospective parents between the sending and receiving countries is divided: the sending country establishes that the child is an orphan, while the receiving country must go to the home of the

---

INTERCOUNTRY ADOPTIONS (Jan. 22, 2001), *available at* http://uscis.gov/graphics/publicaffairs/factsheets/adoption.htm [hereinafter FACT SHEET].

99. Hague Convention, *supra* note 36, art. 1.

100. Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q. 53, 57 (1994).

101. *Id.* at 58.

102. *See generally* Hague Convention, *supra* note 36, arts. 6-13.

103. *Id.* arts. 14-22.

104. Lippold, *supra* note 27, at 496.

105. Hague Convention, *supra* note 36, art. 24.

106. *Id.* art. 32.

prospective family to determine whether it is in the best interest of the child.[107] The sending country must ensure that: "(1) the child is adoptable, (2) that the adoption is in the child's best interests, and (3) that there is consent from necessary parties, such as persons, institutions, and authorities that have been 'duly informed of the effects of their consent,' and have given their consent freely."[108] The receiving state must ensure that: "(1) the prospective adoptive parents are both 'eligible and suited to adopt'; (2) the prospective parents have been counseled on intercountry adoption and the process; and (3) the child is authorized to enter and permanently reside in the receiving state."[109] The possibility of birth parents coming forward in the future to declare that the child is not an "orphan" is greatly reduced by requiring these investigatory procedures.[110]

1. A Closer Look at the Most Important Safeguards

To ensure that the proper investigations and duties are performed, every signatory country to the Hague Convention must establish a national, government-level Central Authority to carry out certain non-delegable functions. These functions include cooperating with other Central Authorities around the world, overseeing the implementation of the Hague Convention in its country, and providing information on the laws of its country.[111] The Central Authorities are to maintain "information on all children entering and leaving the authority's borders through intercountry adoption," establish "the suitability and eligibility of the prospective adoptive parents," and grant "authorization for the child to enter and permanently reside in the receiving state."[112]

The Central Authority, however, is not meant to locate children available for adoption, "become directly involved in the adoption process in another country," or "act as an attorney" for prospective parents.[113] These requirements ensure that the Central Authority is informed at all times and therefore, able to prevent "any potential financial gain by disallowing corrupt adoption practices" to escape the attention of the authorities.[114]

Other functions under the Hague Convention *are* delegable to public authorities and, in many cases, to adoption agencies and other intercountry

---

107. Kimball, *supra* note 38, at 570.

108. *Id.* (quoting Hague Convention, *supra* note 36, arts. 4, §§ a-c).

109. Kimball, *supra* note 38, at 570 (quoting Hague Convention, *supra* note 36, arts. 4, §§ a-c).

110. Kimball, *supra* note 38, at 570.

111. Hague Convention, *supra* note 36, at arts. 6-7.

112. Kimball, *supra* note 38, at 571.

113. U.S. Bureau of Consular Affairs, U.S. Dep't of State, Information Booklet, http://travel.state.gov/family/adoption/notices/notices_473.html (last visited Dec. 20, 2006).

114. Kimball, *supra* note 38, at 571.

adoption service providers.[115] Services provided by persons or entities other than adoption agencies are permitted if both the country of origin and the receiving country permit them.[116] Persons wishing to adopt a child residing in another member country must apply to the designated Central Authority in their own country.[117] The Hague Convention provides that, with limited exceptions, there can be no contact between the prospective adoptive parents and any person who cares for the child until certain requirements are met.[118] Finally, adoption service providers must be accredited or approved to provide services under the Hague Convention.[119]

The Hague Convention addresses accreditation only briefly and leaves the establishment of most of the requirements up to the Central Authority. According to the language of the Hague Convention, accreditation is to be established in order to prevent financially motivated adoption transactions,[120] and provides that "[a]ccreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted."[121] More specifically, the requirements of an accredited body are that it shall:

> (a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation; (b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and (c) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.[122]

Countries that have become parties to the Hague Convention have generally incorporated its requirements and compliance standards in the form of implementing legislation.[123] Therefore, countries that have signed, ratified, or acceded to the Hague Convention have finalized their intent and commitment to promoting safe and legitimate intercountry adoptions.[124]

In sum, the most positive aspect of the Hague Convention is its potential to provide a uniform international and intergovernmental set of minimum

---

115. Sargent, *supra* note 16, at 356.
116. *See* Hague Convention, *supra* note 36, art. 12.
117. *Id.* art. 14.
118. *Id.* art. 29.
119. *Id.* arts. 9-12.
120. Wittner, *supra* note 52, at 616.
121. Hague Convention, *supra* note 36, art. 10.
122. *Id.* art. 11.
123. ANNA MARY COBURN ET AL., STATUS OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION AND THE INTERCOUNTRY ADOPTION ACT OF 2000 (IAA) (Oct. 19, 2004), *available at* http://www.abanet.org/intlaw/hubs/publications/familylaw2003yir.pdf.
124. *See generally* Sargent, *supra* note 16, at 354.

standards that member countries must adhere to in order to complete an intercountry adoption. It also has many potential benefits because of its actual acknowledgment of and attempt to stop baby trafficking,[125] its mandated recognition by operation of law of any intercountry adoption that complies with the Hague Convention,[126] and its potential to eliminate problems concerning the differing definitions of consent and orphan.[127]

2. *Problems with the Hague Convention*

Some have argued that there has been remarkable improvement in the clarity of the language of the Hague Convention.[128] Others insist that that the Hague Convention merely enlarges and supports the U.N. Convention of 1989; therefore, it adds nothing of value toward furthering the goal of safe and cooperative intercountry adoptions.[129]

One problematic issue of the Hague Convention is its failure to prohibit intercountry adoptions with non-members, which would be an incentive for both sending and receiving countries to comply with the Hague Convention regulations.[130] The Hague Convention not only fails to specifically make baby trafficking illegal, but also fails to punish those that attempt these practices.[131] The Hague Convention's guidelines are too general to prevent countries like Vietnam, which have interests in the profit aspect of the adoptions, from continuing to process illegitimate adoptions.[132]

Another provisional issue involves the requirement that a Central Authority be established in each contracting state.[133] Within this language, "the treaty's operation depends on each member nation's good faith and . . . the willingness of adopting parents to report an impropriety . . . to the [C]entral [A]uthority in that country."[134] More specifically, the treaty lacks enforcement mechanisms to hold the Central Authorities accountable for their own actions.[135]

Countries that ratify and implement the Hague Convention are in charge of developing their own laws that merely incorporate the minimal requirements

---

125. Lippold, *supra* note 27, at 496; *see generally* Hague Convention, *supra* note 36.

126. Bisignaro, *supra* note 29, at 148. This will cause no state process to be necessary and will therefore eliminate the redundancy of the current procedures. *Id.*

127. Stacie I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT'L L.J. 163, 177 (1995).

128. William L. Pierce, *Accreditation of Those Who Arrange Adoptions Under the Hague Convention on Intercountry Adoption as a Means of Protecting, Through Private International Law, the Rights of Children*, 12 J. CONTEMP. HEALTH L. & POL'Y 535, 538 (1996).

129. Maravel, *supra* note 31, at 316.

130. Kimball, *supra* note 38, at 572.

131. Croft, *supra* note 37, at 635.

132. *See id.*

133. Bisignaro, *supra* note 29, at 142.

134. Lippold, *supra* note 27, at 497.

135. *Id.*

of the Hague Convention, leaving the implementing country's government with a great deal of latitude on how it wants to handle intercountry adoption.[136] A supervisory international body designated by the Hague Convention should be established to ensure compliance by participating countries and to evaluate whether the regulations designed by a respective Central Authority are in line with the goals of the Hague Convention.[137] Leaving punishment, such as sanctions or fines, up to the individual countries could encourage corrupt adoption practices that will go unpunished without a non-partisan governmental organization overseeing compliance and administering enforcement when needed.[138] Therefore, due to the leeway that the Hague Convention continues to give to its signatories, it has been argued that Central Authorities are just an example of "unnecessary inefficiency" because they merely "replace one form of bureaucratic red tape with another."[139]

A third criticism of the Hague Convention has been its failure to provide definitions of many important terms.[140] As of now, the burden of clarifying what adoption means is up to each individual Central Authority, resulting in global piecemeal of wide-ranging and non-uniform definitions and understandings of adoption.[141]

A final criticism of the Hague Convention has focused on the substantial

---

136. *Id.*

137. Thompson, *A Call for More Protection*, *supra* note 5, at 467.

> If there is an international body designated for international adoption, [sic] its purpose should not be to oversee every Central Authority, [sic] its job should be to promote legal international adoption, educate people on how to do it, and only monitor complaints. A complete overarching regulating body in place could lead to too much micromanaging. This ultimately could make the adoption process even longer, making healthy children wait for adoption possibly until after their second birthday, which is not in the best interest of [sic] the child to take this long. These additional restrictions could also lead to further corruption if families and agencies begin to circumvent the required process and start entering into more unlicensed adoptions.

Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

138. Kimball, *supra* note 38, at 572.

139. Michelle Van Leeuwen, Comment, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants From China)*, 8 PAC. RIM L. & POL'Y J. 189, 213 (1999).

140. Thompson, *A Call for More Protection*, *supra* note 5, at 459-60. These terms include "best interest of the child," "abandonment," "orphan," "special needs," and "exorbitant costs." *Id.* at 465; Van Leeuwen, *supra* note 139, at 208.

141. Thompson, *A Call for More Protection*, *supra* note 5, at 460. As an example, the text of the Hague Convention provides:

> the sending state must determine that the child being considered for adoption is (1) 'adoptable,' (2) that 'international adoption is in the child's best interest,' and (3) that 'consent from all necessary parties has been freely obtained without any illicit inducement.' [T]he term 'adoptable,' however, is not defined anywhere in the Hague Convention, which inevitably leads to arbitrary and unpredictable of what constitutes an adoptable child or orphan.

Id.

loophole under Article 24, which provides that "a state may refuse recognition of an adoption if it is manifestly contrary to public policy when taking the child's best interests into consideration."[142] This provision seems appropriate on its face to prevent illegal adoptions.[143] In practice, however, it allows each country to use its discretion, which creates a broad loophole that could encompass a wide range of political, social, religious, and cultural reasons to decline to recognize an adoption[144] and promote very different agendas and public policies.[145]

While the Hague Convention should be sufficiently flexible so that countries have some control over their adoption policies, "too much discretion and power placed in the hands of the Central Authority to unilaterally" interpret the Hague Convention's definitions could lead to a further lack of uniformity.[146] In turn, this only creates more bureaucratic steps and paperwork that the child, the birth parents, and the adoptive family must deal with to get through the adoption process, eliminating one of the advantages of adopting abroad.[147] These deficiencies contribute to the overall weakness and reality that the Hague Convention merely provides a minimal framework for the promotion of intercountry adoption and does little to ensure that implementation of a more uniform intercountry adoption process will become a reality for the countries involved.[148]

On paper the Hague Convention seems to make the whole intercountry adoption process more uniform; however, in practice each country still has sole discretion to decide which of its children will be allowed to leave the country.[149] By failing to create an immediate incentive for countries to ratify the Hague Convention, sending countries are permitted to put off compliance until they become more stable, which could result in indefinite non-compliance.[150] Thus, the unrealistic and costly requirements of the Hague Convention leave the countries involved no other choice but to draft treaties or other provisions with realistic cost and efficiency standards that benefit every party involved.[151]

142. Thompson, *A Call for More Protection*, *supra* note 5, at 460 (quoting Hague Convention, *supra* note 36, art. 24).

143. Katz, *supra* note 44, at 324.

144. Van Leeuwen, *supra* note 139, at 211.

145. Thompson, *A Call for More Protection*, *supra* note 5, at 460.

146. *Id.*

147. *Id.*

148. *See id.* at 461.

149. Katz, *supra* note 44, at 325.

150. *See* Kimball, *supra* note 38, at 572.

151. *See* Bartholet, *supra* note 14, at 196.

IV. THE INTERCOUNTRY ADOPTION ACT OF 2000: UNITED STATES IMPLEMENTATION OF THE HAGUE CONVENTION

a. Passage of the IAA

The United States signed the Hague Convention on March 31, 1994,[152] signaling its intent to proceed with efforts to ratify the Hague Convention.[153] On June 11, 1998, President Clinton analyzed the provisions of the Hague Convention, article-by-article, and gave it to the Senate for advice and consent for ratification.[154] On September 20, 2000, the Senate provided its advice and consented to the United States' intentions to ratify the Hague Convention, subject to the completion of preparations for its implementation in the United States.[155] Finally, on October 6, 2000, President Clinton signed into law the Intercountry Adoption Act of 2000 (IAA), which is the official United States' implementing legislation for the Hague Convention.[156]

b. Summary of Provisions of the IAA

In order to facilitate intercountry adoption, the sending and receiving states are to cooperate with each other and exchange statistics through the required Central Authority.[157] The IAA will only apply to intercountry adoptions where both countries have adopted the Hague Convention.[158] The U.S. Central Authority will be established in the U.S. Department of State.[159] The Bureau of Consular Affairs, Office of Children's Issues, will have primary responsibility for Central Authority functions.[160] The U.S. Central Authority will be the point of contact from within the United States and from abroad for all matters related to the Hague Convention and will have oversight responsibility for the United States' implementation of the Hague Convention.[161] Therefore, the Office of Children's Issues will have supreme authority to act within the United States to implement the requirements of the Hague Convention.[162] Actual adoption services will still be provided by

---

152. Kales, *supra* note 10, at 485.

153. *See generally* Hague Convention, *supra* note 36.

154. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 31,8064, 31,8064 (Feb. 15, 2006) (to be codified at 22 C.F.R. pt. 96); *see* COBURN ET AL., *supra* note 123.

155. *Id.*

156. Kales, *supra* note 10, at 485.

157. Croft, *supra* note 37, at 631.

158. Wittner, *supra* note 52, at 619.

159. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 101(a)(1), 114 Stat. 825 (2000).

160. *See id.* § 101(b)(2).

161. *See id.* § 102.

162. Croft, *supra* note 37, at 633.

individual adoption agencies; however, the new addition requires these agencies to qualify for accreditation through the U.S. Central Authority.[163]

The U.S Central Authority will manage a computer-based, case-tracking system through the Department of Homeland Security in order to track all intercountry adoptions, accredited agencies, and personnel to ensure that they perform in line with both U.S. federal *and* Hague Convention regulations.[164]

More specifically, the Hague Convention requires adoption agencies to qualify in order to provide their services through one of the following Hague Convention accreditation options: Hague Convention approval, registration for temporary accreditation, or by providing such services under the supervision and responsibility of an accredited agency or approved person.[165]

To qualify as accredited, the agency must:

> pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation; be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and be subject to supervision by competent authorities of that State as to its composition, operation, and financial situation.[166]

The Department of State is required to designate one or more non-federally qualified accrediting entities to perform the Hague Convention accreditation/approval function pursuant to published standards and procedures.[167] Once the steps in the accreditation process are finalized and published in the *Federal Register*, the Department of State is required to announce the timeframe for adoption agencies to obtain Hague Convention accreditation.[168] All Hague Convention accredited agencies and Hague Convention approved persons will need to meet the same standards to qualify as providers of adoption services for Hague Convention adoptions and to maintain the accreditation or approval.[169]

---

163. *Id.*

164. *Id.*; Kales, *supra* note 10, at 487-88; *see* Intercountry Adoption Act of 2000, Pub. L. No. 106-279.

165. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, §§ 201(a)(1-2), 114 Stat. 825 (2000); *see* Kales, *supra* note 10, at 488-89.

166. Kales, *supra* note 10, at 488-89; Hague Convention, *supra* note 36, art. 11, §§ a-c; Intercountry Adoption Act of 2000, Pub. L. No. 106-279, §§ 201(a)(1-2).

167. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, §§ 201(a)(1-2); *see* Kales, *supra* note 10, at 487.

168. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 201(a)(2); *see* Kales, *supra* note 10, at 489; *see also* COBURN ET AL., *supra* note 123.

169. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, HOW WILL THE UNITED STATES IMPLEMENT THE HAGUE CONVENTION? (2005), http://travel.state.gov/family/adoption/convention/convention_2313.html [hereinafter DEP'T OF

Accreditation and approval will be subject to suspension, loss, or non-renewal if an agency or person fails to maintain the required standards.[170] There are minimum requirements for an agency to maintain its accreditation and for an individual or for-profit entity to maintain approval: "adequate liability insurance for professional negligence and any other insurance that the Secretary considers appropriate,"[171] "[capability] of maintaining such records and making such reports as may be required by the Secretary, the United States Central Authority, and the accrediting entity that accredits the agency,"[172] and familiarity with other administrative capabilities.[173] The accreditation or approval by the Hague Convention are for a designated number of years and are subject to renewal.[174]

c. The IAA's Amendment to the Immigration and Nationality Act

The IAA also amends the Immigration and Nationality Act (INA) by adding two sections that apply only to intercountry adoptions occurring between the United States and other countries that have enacted the Hague Convention.[175] A child adopted from a non-Hague Convention country will still need to meet the standards as an orphan or adopted child under section 101(b)(1)(E) or (F) of the INA.[176] The proposed section 101(b)(1)(G), however, modifies the existing immigration laws for children who come from Hague Convention countries; it requires that the child's parent or parents were unable to provide a suitable environment and that the parents have given written, irrevocable consent to terminate their parental rights with the child free of coercion.[177]

The next step in the new section 204(d)(2) requires the sending country's Central Authority to issue an adoption certificate as final evidence of the intercountry adoption.[178] In contrast to the previous burdensome process, this conclusive evidence of the relationship between the prospective parents and the child will help smooth out immigration requirements for Hague Convention countries, such as by not requiring parents to readopt the child in the United

---

STATE: HOW WILL THE UNITED STATES IMPLEMENT THE HAGUE CONVENTION?].

170. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 204(b); *see* Kales, *supra* note 10, at 489.

171. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 203(b)(1)(E). Specifically, "the agency will have to carry a minimum of $1 million in liability insurance, and in many cases will be held responsible for staff working in other countries. This will make it more difficult for shady operators to work in adoption both in countries of origin and in the U.S." Bernstein, *supra* note 95.

172. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 203(b)(1)(D).

173. *Id.*

174. DEP'T OF STATE: HOW WILL THE UNITED STATES IMPLEMENT THE HAGUE CONVENTION?, *supra* note 169.

175. Wittner, *supra* note 52, at 620.

176. FACT SHEET, *supra* note 98.

177. Wittner, *supra* note 52, at 620.

178. 8 U.S.C. § 1204(d)(2).

States. These changes, however, were not effective until the INS and the Department of State published implementing regulations in the *Federal Register*; in the meantime, the standard adoption procedures under section 101(b)(1)(E) and (F) governed intercountry adoptions.[179]

After the IAA is implemented and the Hague Convention is part of national law, a country may decide to establish penalties for non-compliance, which, if used properly, could lead to greater accountability.[180] For example, violation of the IAA has a civil penalty of up to $50,000 for the first violation and for each succeeding violation, a penalty not to exceed $100,000.[181] A fine not to exceed $250,000, imprisonment for not more than five years, or both, is imposed for criminal penalties.[182]

d. The Long Road to Implementation

Once a law such as the IAA has been passed, it cannot be modified without subsequent legislative measures; however, changes *can* occur within the regulations before they are finalized.[183] As such, on September 15, 2003, the Department of State published two proposed regulations in the *Federal Register*: (1) a proposed rule on the accreditation and approval of agencies and (2) a proposed rule on approval of persons.[184] Then, on October 28, 2003, the Department of State held a meeting to answer questions and concerns regarding the proposed regulations.[185] These proposed rules were open for a ninety-day public comment period that concluded December 15, 2003.[186] During September 2005, the Department of State finished its review of the public comments and submitted the regulations to the Office of Management &

179. *See infra* Part IV(d). While the Department of State published the final rules on "'Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000' (IAA) (22 CFR Part 96) and 'Intercountry Adoption-Preservation of Convention Records' (22 CFR Part 98)" in the *Federal Register* on February 15, 2006, the separate rules to establish intercountry adoption procedures under the Convention and the IAA's amendments to the Immigration and Nationality Act (INA) are still under preparation. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, *supra* note 154, 71 Fed. Reg. at 31,8065.

180. *See* Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 404, 114 Stat. 825 (2000).

181. *Id.*

182. *Id.*

183. *See generally* FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE (2d ed. 2001).

184. Joint Council on International Children's Services, Hague Adoption, http://www.jcics.org/Hague.htm (last modified Feb. 15, 2006) [hereinafter Joint Council on International Children's Services]; Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, *supra* note 154, 71 Fed. Reg. at 31,8065.

185. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, *supra* note 154, 71 Fed. Reg. at 31,8065.

186. Joint Council on International Children's Services, *supra* note 184.

Budget (OMB) for final review and approval.[187] The OMB had up to ninety days to review the regulations, after which it had the option of publishing the regulations as final in the *Federal Register* or issuing another proposed version for a second public comment period and effectively repeating the process.[188]

On February 15, 2006, the Department of State published in the *Federal Register* the final rules on "Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000" and "Intercountry Adoption-Preservation of Convention Records" in accordance with the Hague Convention.[189] As is consistent with U.S. policy on ratification of treaties, the United States will not be able to officially ratify the Hague Convention until its obligations under the Hague Convention are carried out.[190] As such, while this Final Rule is "effective in [thirty] days, except as otherwise indicated in the text of the rule, the [Hague] Convention will not enter into force immediately upon passage of the [thirty] days."[191]

Overall, the Hague Convention and the IAA require that agencies and individuals receive accreditation to provide services for adoption when both parties involved come from countries that are signatories to the Hague Convention.[192] Further, the IAA requires that the Department of State designate one or more qualified accrediting entities to accredit and approve agencies and persons involved with intercountry adoptions.[193] The United States must have accredited and approved these providers before depositing its instrument of ratification and bringing the Hague Convention into action for the United States.[194]

For their own benefit and protection, while the public comments were being reviewed and preparations for publication in the *Federal Register* were taking place, the Department of State simultaneously was negotiating with potential accrediting entities that would accredit or approve adoption service

187. *Id.*; *see also* U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, DEPARTMENT OF STATE SELECTION OF ACCREDITING ENTITIES UNDER THE INTERCOUNTRY ADOPTION ACT OF 2000 (Mar. 1, 2005), *available at* http://travel.state.gov/family/adoption/implementation/implementation_2151.html (last visited Dec. 21, 2006) [hereinafter DEP'T OF STATE: IMPLEMENTATION STRATEGIES]. "Before completing the Final Rule on accreditation and approval of adoption service providers, the Department [of State] held public meetings, conducted extensive research, and reviewed and considered of 1,500 public comments on the Proposed Rule." DEP'T OF STATE: OFFICE OF THE SPOKESMAN, *supra* note 59.

188. Joint Council on International Children's Services, *supra* note 184.

189. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, *supra* note 154, 71 Fed. Reg. at 31,8064.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. U.S. OFFICE OF THE SPOKESMAN, U.S. DEP'T OF STATE, Hague Convention on Intercountry Adoption: Accreditation/Approval Regulations Published in the Federal Register (Feb. 15, 2006), http://www.state.gov/r/pa/prs/ps/2006/61272.htm [hereinafter Dep't of State: Accreditation/Approval Regulations Published].

providers electing to provide services in cases covered by the Hague Convention.[195] Now that these final standards have been published in the *Federal Register*, the Department of State hopes to complete its discussions with these potential accrediting entities so that it can deposit its instrument of ratification and finalize the implementation of the Hague Convention.[196]

The final framework for the Department of State's "oversight of accrediting entities, agencies and persons"[197] places the Department of State as the lead federal agency for implementation of the IAA.[198] The IAA required the Department of State to enter into agreements with one or more qualified entities under which these entities will be required to perform the task of accrediting or approving agencies and persons.[199] This requirement informed the public that the Department of State would be attempting to reach agreements with those qualified accrediting agencies so that they could become IAA accredited agencies.[200] Additional standards will be published in the *Federal Register* to set forth how the accrediting entities should perform their functions under the IAA.[201]

The Department of State, pursuant to section 202(a) of the IAA, was required to enter into at least one agreement to designate an accrediting entity.[202] Such accrediting entities could be: "(1) Non-profit private entities with expertise in developing and administering standards for entities providing child welfare services; or (2) State adoption licensing bodies that have expertise in developing and administering standards for entities providing child welfare services and that accredit only agencies located in that State."[203]

The Department of State chose two entities that will have the duty to accredit U.S. agencies and individuals, and in turn these accredited agencies and individuals will be able to arrange for adoptions from Hague Convention countries.[204] The two entities are the Colorado Department of Human Services

---

195. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, IMPLEMENTATION OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION AND THE INTERCOUNTRY ADOPTION ACT OF 2000 (Nov. 30, 2005), http://travel.state.gov/family/adoption/implementation/implementation_2641.html [hereinafter DEP'T OF STATE: REGULATIONS STILL UNDER REVIEW].

196. *Id.*; *see also* Dep't of State: Accreditation/Approval Regulations Published, *supra* note 194.

197. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, *supra* note 154, 71 Fed. Reg. at 31,8064.

198. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, DEPARTMENT OF STATE SELECTION OF ACCREDITING ENTITIES UNDER THE INTERCOUNTRY ADOPTION ACT OF 2000 (Mar. 1, 2005), *available at* http://travel.state.gov/family/adoption/implementation/implementation_2151.html (last visited Dec. 21, 2006) [hereinafter DEP'T OF STATE: IMPLEMENTATION STRATEGIES].

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. Bernstein, *supra* note 95.

and the Council on Accreditation.[205] It is imperative that the United States has these accredited and approved providers firmly in place before the United States can deposit its instrument of ratification and finally bring the Hague Convention into force in the United States.[206]

The Department of State has set forth the manner in which these two accrediting entities will be required to finance their functions under the IAA and how the Department of State will have the responsibility of overseeing their performance of such functions.[207] These financial agreements conclude: "to become accredited under the Hague regulations, adoption agencies will have to pay an additional fee of about $7,000 to $13,000 every four years, and will also need to pay staff to compile documentation for the accreditation process and to make sure they are compliant with Hague regulations."[208] The goal was to approve and sign most of the agreements between the adoption agencies and these accrediting entities in 2006.[209]

V. THE TREATY BETWEEN THE UNITED STATES AND VIETNAM: A MORE EFFICIENT SOLUTION OR JUST A QUICK FIX THAT FOSTERS THE PROBLEMS OF THE HAGUE CONVENTION, THEREBY ADDING TO THE EVER GROWING EXPLOITATION OF CHILDREN?

The recent bilateral treaty between the United States and Vietnam has triggered discussion over intercountry adoptions and has drawn attention to what the Hague Convention and its provisions really accomplish. Although the Hague Convention was designed to satisfy the need for a formal process, the drafters recognized that differences in culture and society between countries made it difficult to streamline the criteria for legal standards; the drafters provided only minimum standards of uniformity.[210] As a result, there has been little cooperation between major sending and receiving countries, which in turn makes it less likely that the Hague Convention will meet its lofty goals for safeguarding intercountry adoptions.[211]

For example, the Hague Convention has failed to take into account the fact that there are hefty burdens of compliance on sending countries compared to those of receiving countries, both in the urgency to draft and implement the

---

205. Bernstein, *supra* note 95. The Council on Accreditation is a New York-based non-profit company. *Id.* The Council on Accreditation has already accredited many agencies in preparation for the final implementation. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

206. DEP'T OF STATE: REGULATIONS STILL UNDER REVIEW, *supra* note 195.

207. *Id.*; *see also* Bernstein, *supra* note 95.

208. *See id.*; *see also* Bernstein, *supra* note 95.

209. DEP'T OF STATE: OFFICE OF THE SPOKESMAN, *supra* note 59. "No one knows exactly how many adoption providers there are in the U.S. but experts estimate there are about 400, with as many as half expected to apply for accreditation." Bernstein, *supra* note 95.

210. *See* Lippold, *supra* note 27, at 498.

211. *See* Kimball, *supra* note 38, at 583.

regulations and in the financial demands connected with funding compliance.[212] More detailed and realistic measures need to be drafted in order for there to be any incentive for each country to comply with the proposed standards and further the ultimate goal of stopping the exploitation of children.[213] Thus, it remains for nations to develop more effective methods of intercountry adoption through treaties or other arrangements. The bilateral treaty between the United States and Vietnam could be the way to accomplish this goal.

a. Children Waiting for a Permanent Home: The History of Adoption in Vietnam

"In Vietnam, a poverty-stricken mother sheds bitter tears as she hands her daughter to the Canadian woman who will be her new mom."[214] This has been a familiar story in Vietnam, a country that has become a major source of babies for North Americans.[215]

Vietnam's history goes back to a time when the Chinese Empire reigned; however, Vietnam became an independent kingdom in the early 10th century, and eventually gained autonomy in the 11th century.[216] France invaded Vietnam in the middle of the 19th century and then Japan invaded in the 20th century.[217] While Vietnam did regain its sovereignty in 1954, a civil war began that split the nation for a period of time.[218] During this time, the citizens of Vietnam experienced political and economic turmoil that resulted in dreadful living conditions, which in turn led to many families turning to adoption with the hope that their children would have a better life.[219] One month before the South Vietnamese government fell to North Vietnamese forces, the United States attempted to mitigate the effect of the turmoil. As a result, "Operation Babylift" was approved by President Gerald Ford, which involved airlifting 2,700 orphans out of Vietnam in order to be adopted by predominately white U.S. families.[220]

Today, the United States continues to closely scrutinize baby trafficking

---

212. *Id.*

213. *See* Thompson, *A Call for More Protection*, *supra* note 5, at 455.

214. Jim Rankin, *Wanted: Babies; For Lawyers It Is Good Business*, TORONTO STAR, Sept. 29, 2001.

215. *Id.* Since 2001, there has been a moratorium placed on Vietnam, and hopefully Vietnam will once again become a major source of babies for the United States. MARY M. STICKERT, THE INTERNATIONAL ADOPTION GUIDEBOOK, *available at* http://vietnam.adoption.com/foreign/vietnam-adoption-background.html (last visited Dec. 21, 2006).

216. STICKERT, *supra* note 215.

217. *Id.*

218. *Id.*

219. C.N. LE, *Asian-Nation: The Landscape of Asian Americans*, *available at* http://www.asian-nation.org/adopted.shtml (last modified Aug. 2006).

220. *Id.*

in Vietnam.[221] With Vietnam's rapidly growing population and per capita income of about $200 a year,[222] allegations of baby buying operations have repeatedly surfaced in Vietnam over recent years.[223] One reason for this is that Vietnam is a war-torn and poverty-stricken country that has a weaker adoption infrastructure; therefore, it is more susceptible to corruption.[224] Consequently, countries like Vietnam lack adequate laws to protect the parties involved and therefore have no way to prevent or criminalize child trafficking.[225]

With neighboring China's strict and well-established adoption rules, adoptive parents have been turning to Vietnam, where the rules are much more lenient.[226] Vietnam has a more "elastic definition than the United States of what constitutes an 'orphaned' or 'abandoned' child."[227] For example, two healthy parents who claim they are not economically stable can hand over their child to an orphanage without ever legally relinquishing their rights as parents. As such, the child does not meet the U.S. definition of an orphan under U.S. immigration law.[228] Another issue involves the ineligibility of children receiving an immigrant visa under U.S. immigration law, where a child is adopted directly from the natural parents instead of through an agency.[229]

As a result of the ongoing problems in Vietnam, on July 10, 2002, the Vietnamese government promulgated a new Marriage and Family Law pertaining to intercountry adoptions that took effect on January 2, 2003.[230] The decree announced a number of new requirements for intercountry adoptions, including the requirement that there be a bilateral agreement between Vietnam and other countries before intercountry adoptions can take place.[231] This was

---

221. *See generally* U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, INTERCOUNTRY ADOPTION: VIETNAM (2006), http://www.travel.state.gov/family/adoption/country/country_349.html (last visited Dec. 21, 2006) [hereinafter DEP'T OF STATE: VIETNAM].

222. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, 1995: INTERNATIONAL ADOPTION—VIETNAM, *available at* http://dosfan.lib.uic.edu/ERC/population/children/adoptions/Vietnam.html [hereinafter 1995 VIETNAM].

223. Rankin, *supra* note 214.

224. Wittner, *supra* note 52, at 599.

225. *Id.*

226. *See* Rankin, *supra* note 214.

227. 1995: VIETNAM, *supra* note 222. Vietnamese courts do not apply U.S. legal standards when classifying a child as an orphan or abandoned, and therefore, many children in orphanages in Vietnam may not meet the U.S. eligibility requirements. *Id.*

228. *See id.*

229. *Id.*

230. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, EXPECTED DELAYS IN ADOPTIONS IN VIETNAM (Jan. 27, 2003), http://travel.state.gov/family/adoption/notices/notices_1994.html.

231. *Id.* The Vietnamese Marriage and Family Law has three main provisions:

> (1) A Memorandum of Understanding on international adoption must be formulated and signed by the governments of the U.S. and Vietnam in order for adoptions to continue; (2) Foreign adoption agencies must be licensed in their own country and in Vietnam, and these adoption agencies must maintain offices

unfortunate because in 2002, the last year adoptions were allowed between Vietnam and the United States, Americans completed approximately 766 adoptions of children born in Vietnam.[232] Today, Vietnam has a population of more than eighty million people.[233] Due to the ongoing corruption of intercountry adoptions involving Vietnamese children, however, there has been a hold on all intercountry adoptions with Vietnam until new Vietnamese regulations regarding intercountry adoption are drafted and implemented.[234]

On June 21, 2005, in an attempt to renew their relationship, the United States and Vietnam signed the "Agreement Between the United States of America and The Socialist Republic of Vietnam Regarding Cooperation on the Adoption of Children" (Bilateral Treaty), which is expected to pave the way for American parents to once again adopt Vietnamese children.[235] The Bilateral Treaty reflects both countries' "commitment to the welfare and well-being of children and parents, as well as to a transparent and effective adoption system between the two countries."[236] According to the agreement, Vietnam and the United States must "agree" to the Hague Convention before the adoption measures can resume and adoptions by can once again be processed by the United States and Vietnam.[237]

b. The Infeasibility of Implementing the Hague Convention in Developing Countries

The Hague Convention has yet to be proven as a very successful way of accomplishing the noble goal of preventing adoption abuses and will never be able to reach that goal unless it is signed and ratified by a majority of sending countries.[238] The cost and the organization entailed to implement and conform to the Hague Convention exemplify two reasons why most countries, including Vietnam and the United States, continue to avoid the Hague Convention completely or have a difficult time drafting compliant legislation.[239]

---

in Vietnam supporting humanitarian projects; and (3) All international adoptions in Vietnam will be processed through a new Central Authority at the Ministry of Justice.

STICKERT, *supra* note 215.

232. STICKERT, *supra* note 215.

233. *Id.*

234. *Id.*

235. *See generally* Vietnam Bilateral Treaty, *supra* note 40.

236. Children's Hope International, Children's Hope International Latest News (scroll down to Vietnam Program Update) (June 22, 2005), http://www.childrenshopeint.org/hotline.htm.

237. *See generally* Vietnam Bilateral Treaty, *supra* note 40. The United States and Vietnam do not have to implement the Hague Convention before adoptions will take place. The Bilateral Treaty covered the Hague requirements. Further, Vietnam is currently sending out referrals to U.S. couples, and adoptions are beginning without either Vietnam or the United States having implemented the Hague Convention. Rainbow Kids, *Vietnam Adoption Re-Opens!* (July 1, 2005), http://www.rainbowkids.com/ArticleDetails.aspx?id=151.

238. *See* Wittner, *supra* note 52, at 595.

239. Jeff D. Opdyke, *Changes in Global Rules Toughen Process*, WALL ST. J., Oct. 14,

First, the Hague Convention does nothing to remedy the situation that young, under-developed countries face in implementing the necessary measures to ensure that intercountry adoptions will truly benefit the children of their country.[240] In general, the Hague Convention requires contracting countries to implement an extensive system of laws pertaining to intercountry adoption; however, the governments in under-developed countries, such as Vietnam, are reluctant or unable to undertake these responsibilities.[241] Implementation and start-up costs would be extraordinarily high and would be almost impossible to attain in under-developed countries without continued foreign aid.[242] Moreover, very little incentive exists for countries like Vietnam to substantially change a system that currently brings in millions of dollars a year.[243]

Most sending countries like Vietnam culturally oppose dependence on intercountry adoption to raise their children, yet they continue to engage in the practice out of necessity.[244] If Vietnam had the resources, it would likely devote that money to caring for its orphans in order to end the shameful practice of baby trafficking rather than expending those resources in implementing the Hague Convention.[245] Unfortunately, Vietnam does not have the financial resources needed to do either of these things. Instead, it has decided to take the passive approach of putting off compliance for an extended period of time; realistically, it may never finalize compliance, thereby undermining the goals of the Hague Convention.[246] Detrimentally, these countries are the ones with the highest number of orphans that are desperate for a solution.

Even the United States, one of the wealthiest and most organized receiving countries in the world of intercountry adoption, has put off *full* compliance since 1993.[247] Most of the delay in the United States'

2003, *available at* http://www.adoptachild.org/Messageboard/forum_posts.asp?TID=89&TPN=1&KW=opdyke&dlimit=0#1005.

240. Kimberly A. Chadwick, Comment, *The Politics and Economics of Intercountry Adoption in Eastern Europe*, 5 J. INT'L LEGAL STUD. 113, 140 (1999) (citing ELIEZER D. JAFFE, INTERCOUNTRY ADOPTIONS: LAWS AND PERSPECTIVES OF "SENDING" COUNTRIES 227 (1995)). The Hague Convention favors compliance of receiving countries, which tend to be wealthier and more able to bear the economic burdens posed by compliance than comparatively poor sending countries. *Id.*

241. *See generally* Chris Decherd, *Official: U.S. Aid at Risk if Cambodia Doesn't Fight Human Trafficking*, ASSOC. PRESS, Jan. 24, 2003.

242. *Id.*

243. *Id.*

244. *See* Kimball, *supra* note 38, at 582; *see* Wittner, *supra* note 52, at 621.

245. *See* Kimball, *supra* note 38, at 582. For example, when Korea's economy was growing in the 1990s, the Korean government contemplated ending intercountry adoption altogether, feeling that the nation should move toward full dependency on domestic adoption. *Id.*

246. Chadwick, *supra* note 240, at 140 (citing ELIEZER D. JAFFE, INTERCOUNTRY ADOPTIONS: LAWS AND PERSPECTIVES OF "SENDING" COUNTRIES 227 (1995)); Kimball, *supra* note 38, at 572; Thompson, *A Call for More Protection*, *supra* note 5, at 459.

247. *See* Kimball, *supra* note 38, at 581.

implementation of the IAA has been due to business and financial issues concerning cost of implementation, which has been estimated to cost $4 million per year to create and continue to operate the U.S. Central Authority and the large adoption case-tracking database.[248]

Second, not only do sending countries potentially face these same financial issues, they also face the more serious problem of organizing legislation in the face of societal and cultural objections to intercountry adoption of their children.[249]

More and more, countries have committed themselves to compliance with the internationally agreed upon norms with the goal of protecting children and their families. Nevertheless, these same countries do not have established governmental structures to support the requirement of such an intense Central Authority.[250] While the goal is to streamline the process through a Central Authority, countries that do not have a strong infrastructure may be inefficient, ineffective, or face increased time delays, thus defeating the original goal of the Hague Convention.[251] This organization is not easy for any country, especially for under-developed countries like Vietnam.[252] Therefore, without strong domestic enforcement, the Hague Convention will fail.[253]

The success of the Hague Convention weighs heavily on the shoulders of the individual countries because countries that choose to ratify the Hague Convention are required to incorporate the specific terms and provisions into their domestic and international laws.[254] In fact, regulations at the international level, such as the Hague Convention, merely serve to impose burdensome responsibilities on sending countries without doing anything to help these countries implement the regulations on a domestic level.[255] Although the international conventions have the potential to encourage cooperation among countries, they can have the effect of increasing the burden on poorer sending countries that have difficulty formulating and implementing guidelines for adoption.[256]

c. The Potential Impact on Other Countries If the United States Implements the IAA

The United States' implementation of the IAA, and thus a subsequent ratification of the Hague Convention, could provide a good avenue to assure Vietnam and the rest of the world that American adoptions are in the best

248. *See id.*
249. *Id.* at 582; *see also* Chadwick, *supra* note 240, at 140.
250. Thompson, *A Call for More Protection*, *supra* note 5, at 459.
251. Katz, *supra* note 44, at 326.
252. *See generally id.*
253. *Id.*
254. Kimball, *supra* note 38, at 572.
255. *See* Chadwick, *supra* note 240.
256. *See id.*

interest of the child. The United States could also benefit from implementation through access to adoptions in countries that have previously banned adoptions with the United States.[257]

On the other hand, even if the United States implements the IAA, problems between the United States and countries like Vietnam might continue to exist if these countries have not finalized *their* implementation of the Hague Convention.[258] For example, since Vietnam is not a contracting nation under the Hague Convention, the non-uniform definition of an "orphan" could still cause immigration problems between the respective parties.[259] This type of non-uniformity in poorer countries, where the Hague Convention is too costly to implement, is likely to result in fraudulent labeling of children as orphans to facilitate their adoption.[260]

A solution could be to adhere to the stricter definition under the INA, which states that "only children who are orphaned with no living parents or abandoned are eligible for adoption and immigration to the United States," and therefore, a child voluntarily given up by his or her parents would be ineligible for adoption under the INA.[261] This would force countries to implement a system in compliance with the INA abandonment proceedings if they wanted to continue finding homes in the United States for their orphans.[262] A result of this also could be a backlash of adoptions with the United States.

If the IAA is not implemented by the United States, however, it might also be difficult for the Hague Convention to be successful.[263] For example, member countries will limit their intercountry adoptions to other member countries, which will result in a greater number of suspended adoptions until the United States completes ratification.[264] In addition, if the United States chooses not to participate, there could be an increase in non-Hague adoptions, or worse, a total withdrawal of member countries from the Hague

---

257. *See* Opdyke, *supra* note 239. "Some countries that are party to the treaty but that send relatively few children to the U.S. for adoption-such as Brazil and Mexico-might allow more American adoptions once the U.S. implements the new guidelines, experts say." Bernstein, *supra* note 95.

258. *See* Wittner, *supra* note 52, at 621.

> Once the U.S. ratifies the Hague treaty, the convention's regulations will govern all adoptions in countries that are party to it. It will be against the law for Americans to adopt children from countries that have ratified its treaty but are in violation of its laws. Yet Americans will still be able to adopt children from non-convention countries; Hague rules and safeguards will not technically apply to those adoptions.

Bernstein, *supra* note 95.

259. *See* Wittner, *supra* note 52, at 621.

260. *See id.*

261. *Id.*

262. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

263. *See* Croft, *supra* note 37, at 644.

264. *See id.*

Convention.[265] As a result of the uncertain future of the United States' final implementation of the IAA, current member countries could be discouraged from complying with the Hague Convention guidelines.[266] In sum, with many nations delaying their next move regarding the Hague Convention (not regarding intercountry adoption in general) until the United States adopts or rejects the IAA, the United States' decision could eventually result in another failed attempt at global regulation of intercountry adoption standards.[267]

d. Analysis of the Bilateral Treaty: Is the Treaty Between the United States and Vietnam a More Efficient Way to Fulfill the Goals of the Hague Convention?

In general, the Bilateral Treaty with Vietnam has almost identical language to the Hague Convention, which means it fosters many of the same problems.[268] Articles 1 and 2 lay out the general goals of trying to obtain common understanding and mutual cooperation in the adoption of children between the two countries, as well as the applicable law.[269] Article 3 provides the scope of the treaty, which applies to children "who are eligible for adoption under the applicable domestic laws of that Party."[270] Article 4 sets out the principles of the treaty, using language such as "voluntary," "humanitarian grounds," and "in accordance with the laws of the Parties," which continues to leave wide discretion to each country to set their own adoption laws and could result in a return to a path destined to defeat the purpose of the Hague Convention.[271]

Article 6 establishes the "competent authorities," which is similar to the "Central Authority" requirement in the Hague Convention; where Vietnam has the Ministry of Justice as its competent authority, while the United States has the Department of State.[272] The language of Article 8 also continues to leave wide discretion to the respective country to implement "necessary measures to penalize such practices under applicable law for inappropriate activities that take place within their own country," which again fails to provide mechanisms for accountability.[273] Article 9 is a key provision that distinguishes itself from the language in the Hague Convention, reading: "the decision to make a child available for adoption will be made by the competent authorities of the Country

265. *Id.* at 644-45.

266. See Rhonda McMillion, *'Save the Children' More Urgent: U.S. Delays in Ratifying Accord Could Jeopardize Adoptions by American Citizens*, 86 A.B.A. J. 94, 94 (2000).

267. *See id.*

268. *See* Hague Convention, *supra* note 36; *see generally* Vietnam Bilateral Treaty, *supra* note 40.

269. Vietnam Bilateral Treaty, *supra* note 40, arts. 1-2.

270. *Id.* art. 3.

271. *Id.* art. 4.

272. *Id.* art. 6.

273. *Id.* art. 8.

of Origin," and it further provides:

> For purposes of this Agreement and in accordance with the U.S. Immigration and Nationality Act previously cited, a child shall be determined to be an orphan if the child is under the age of 16 at the time of the adoption and: (a) The child has no parents because of the death or disappearance of, abandonment or desertion by, or separation from or loss of both parents, as clearly evidenced through documentation certified by the competent Vietnamese authorities; or (b) The sole or surviving parent is incapable of providing proper care and has, in writing, irrevocably released the child for emigration and adoption. In such instances, the U.S. competent authorities may require evidence through DNA testing and/or an interview with the child's birth parent. DNA testing and interview expenses shall be borne by the prospective adoptive parent(s).[274]

This language in Article 9 establishes the use of the U.S. definition as the controlling standard to which the countries must adhere.[275] This cooperation will potentially eliminate all problems of unpredictability that were previously associated with immigration into the United States after a child has been adopted from Vietnam. After taking this step forward by laying a concrete uniform foundation on which Vietnam and the United States can more efficiently cooperate with immigration laws, Article 11 takes a step back; it includes the same loophole that is found in Article 24 of the Hague Convention.[276] Article 11 provides that a "decision of the competent authorities of one Party on the adoption of a child in accordance with its applicable law is recognized in the other Party's country *unless contrary to its public policy*, taking into account the best interests of the child."[277] This provision does nothing more than provide a way out if one party decides not to go through with the adoption, which could be the case for a number of reasons.[278]

Articles 13 through 18 lay out the responsibilities of the competent authorities of the receiving country, much like the Central Authority under the Hague Convention; however, there are no burdensome or costly provisions that Vietnam or the United States must implement.[279] Finally, Article 25 sets out the effective date and date of termination; the agreement will be effective "on the first day of the second month, after the Parties notify each other through the

274. *Id.* art. 9.
275. *Id.*
276. *See id.* art. 11; Hague Convention, *supra* note 36.
277. Vietnam Bilateral Treaty, *supra* note 40, art. 11. (emphasis added).
278. *See id.*
279. *Id.* arts. 13-18; *see supra* Part V(b).

diplomatic channels confirming that each Party has completed the necessary legal procedures for entry into force."[280] This agreement will automatically terminate "should the Hague Adoption Convention enter into force for *both* the Socialist Republic of Vietnam and the United States of America."[281]

With much of the same vague language as the Hague Convention, the Bilateral Treaty is susceptible to similar criticisms given earlier in this Note regarding the Hague Convention.[282] The success of the Bilateral Treaty is dependent on the capacity of Vietnam to withstand pressures and on the integrity of each professional involved to make ethical decisions.[283] Another potential pitfall would be if Vietnam or the United States enacts the Bilateral Treaty but fails to completely modify their policies and procedures, or does not adjust the structure of their services, thereby weakening the effectiveness of the Bilateral Treaty.[284] With many of the provisions that allow key standards and enforcement mechanisms to fall within the wide discretion of the respective parties, there will continue to be a great deal of room for the parties to distort these articles through mistranslations that alter the intended meaning of provisions and that lead to conclusions unintended by the Bilateral Treaty.[285]

Although there are many criticisms, this type of treaty is a step in the right direction to allow communication and intercountry adoption to begin again between the United States and Vietnam. The United States' delayed implementation of the Hague Convention coupled with a Bilateral Treaty that allows Vietnam to get around implementing the Hague Convention does, however, potentially send a message to the rest of the world: there may be an artificial way of side-stepping the costly implementation of the Hague Convention, while still allowing for adoptions with the United States.[286] If the wealthiest country is not compelled to follow the international rules, then why should other sending countries feel any particular need to take on the economic burdens that come with the implementation of the Hague Convention?[287]

V. CONCLUSION: SHOULD THE HAGUE CONVENTION HAVE BEEN A DECLARATION THAT COUNTRIES IMPLEMENT BILATERAL TREATIES?

> "When one has a stronger sense of confidence in what another nation will do with respect to a child who leaves its country of origin, the more faith one has in the credit of the country who

280. *Id.* art. 25, § 1.
281. *Id.* art. 25, § 3 (emphasis added).
282. *See supra* Part IV.
283. *See generally* Sargent, *supra* note 16.
284. *Id.*
285. *Id.*
286. *See generally* Kimball, *supra* note 38.
287. *Id.*

will assume the responsibility of that child."[288]

In the past, the international community has responded to allegations of baby trafficking by drafting treaties designed to streamline the adoption process among countries and to eliminate the monetary motivations currently involved in the intercountry adoption process. While the Hague Convention has attempted to provide solutions to the corruption in intercountry adoptions, it has only skimmed the surface of addressing deeply rooted issues that go well beyond intercountry baby trafficking. The diversity and country specific aspects of intercountry adoption do not lend themselves to overly vague solutions. By taking the focus off improving the system from the ground up, the Hague Convention has once again failed to reach the end goal of more uniform intercountry adoption standards.

The substantial financial and organizational burdens imposed on sending countries, as well as the voluntary and humanitarian nature of the treaties, tend to make them ineffective solutions to Vietnamese adoption abuses. Vietnam cannot afford to implement the provisions required by the Hague Convention and is unlikely to voluntarily change its lucrative adoption process without the help of larger sending and receiving countries like China and the United States. Intercountry adoptions will only be free from fraud and abuse when policies and initiatives exist that more fairly and intelligently delegate the burdens of a transparent intercountry adoption process.

Consequently, agreements like the Bilateral Treaty have provided a way to sidestep implementation of the Hague Convention. The Bilateral Treaty, although seemingly a viable solution for under-developed countries that cannot finance the implementation of the Hague Convention, contains similar language as the Hague Convention; therefore, it tends to discredit the importance of implementing the Hague Convention.

The Bilateral Treaty is subject to the same criticisms as the Hague Convention and fails to offer an effective solution to address the core issue or fulfill the primary goal involved in intercountry adoption: *an agreed upon uniform standard that is in the best interest of the child.* If countries focused on the core interest involved in the adoption process, *what is in the best interests of the children,* when implementing adoption policy, each country might be more successful in formulating a workable solution that may involve private support for each country. With countries working together to support one another financially, each is more likely to carry out adoption regulations that have been imposed upon them. Only then will the best interests of children be served.

288. Pierce, *supra* note 128, at 535.

CHINA'S LATEST 'THREAT' TO THE UNITED STATES: THE FAILED CNOOC-UNOCAL MERGER AND ITS IMPLICATIONS FOR EXON-FLORIO AND CFIUS

Joshua W. Casselman*

INTRODUCTION

The United States has long encouraged an open investment policy, with nearly every U.S. president since Herbert Hoover taking such a stance.[1] Yet with an increasingly interdependent and connected world came the need to place limitations on a purely open-door investment policy.[2] President Reagan exemplifies this necessity in his statement describing the general policy on foreign direct investment in the United States:

> The United States seeks to . . . foster a domestic economic climate in the United States which is conducive to investment, ensure that foreign investors receive fair and equitable treatment under our statutes and regulations, and maintain only those safeguards on foreign investment which are necessary to protect our security and related interests.[3]

The Exon-Florio provision of the Defense Production Act of 1950 currently embodies this important limitation to the United States' free trade and investment stance.[4] Exon-Florio authorizes the President or his designee to investigate a proposed or completed foreign acquisition and the President to prohibit such an acquisition if he determines that it poses a threat to national security.[5]

Since its implementation, Exon-Florio has been the source of considerable criticism, and numerous proposals for amendment have been suggested.[6] Recently, proposals for change in Exon-Florio have been spurred

---

* J.D. candidate, May 2007. B.A. Albion College 2004. The author would like to express his appreciation to Prof. Antony Page for his assistance with this Note.

1. Jacqueline J. Ferber, Comment, *The U.S. Foreign Direct Investment Policy: The Quest for Uniformity*, 76 MARQ. L. REV. 805, 810 (1993).

2. *See generally id.* (discussing U.S. Foreign Investment Policy in the 1990s especially with regard to increased Japanese investment in the United States).

3. Statement of the President Transmitting International Investment Policy, 19 WKLY. COMP. PRES. DOC. 1214, 1216-17 (Sept. 9, 1983).

4. 50 U.S.C. § 2170 (2005).

5. *Id.*

6. See ON THE IMPLEMENTATION OF THE EXON-FLORIO AMENDMENT AND THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: BEFORE THE SENATE COMMITTEE ON BANKING,

by China National Offshore Oil Corporation's (CNOOC) high-profile bid for American-based Unocal Corporation, a producer of oil and natural gas.[7] As will be discussed below, Congress used national security arguments and anti-China rhetoric to justify close scrutiny of the deal, which resulted in the passage of several resolutions and bills.[8] Congress successfully politicized CNOOC's offer to buy Unocal by turning the bid into a showdown between the United States and China for economic and military power, with any gains by China viewed as losses to the United States.[9] Ultimately, Congress exerted sufficient pressure on CNOOC that it withdrew its bid.[10]

In the wake of CNOOC's failed bid, the United States' policy on foreign direct investment is unclear. Protectionist-minded members of Congress are raising concerns that Exon-Florio and the Committee on Foreign Investment in the United States (CFIUS), which was delegated the authority to carry out Exon-Florio's requirements, are not adequately protecting national security and should be strengthened.[11] Proposed changes have called for increased congressional authority to regulate foreign investment and for significant procedural and substantive alterations to be made in Exon-Florio and CFIUS.[12] Whether these proposals are actually warranted or merely the product of an increasing anti-China trend are important issues, as any change in current foreign investment policy could have significant economic implications in the United States.[13]

This Note examines current proposals for amending Exon-Florio and altering the structure of CFIUS. It argues that some minor changes to Exon-Florio are warranted, but that it is currently unnecessary to drastically alter its statutory framework or the structure of CFIUS. Part I of this Note provides an overview of Exon-Florio itself and discusses how the statute has been applied to foreign acquisitions. Part II provides an overview of the failed CNOOC-Unocal merger and argues that congressional outcry over CNOOC's bid was unwarranted and unwise. Part III examines the Government Accountability Office's (GAO) recent report on the effectiveness of Exon-Florio, its recommendations for change, and the response by some CFIUS agencies to the

---

HOUSING AND URBAN AFFAIRS, 109th Cong. (2005) (statement of David Marchick, Partner, Covington & Burling), for a discussion of the potentially negative impacts of implementing recent proposals to amend Exon-Florio.

7. Christopher Corr, *Pressures to Stiffen Exon-Florio: The Chinese Bid for Unocal Sparks a Firefight Over Inbound Deals*, MERGERS & ACQUISITIONS, Jan. 1, 2006, at 34-38.

8. James A. Dorn, *Policy Analysis: U.S.-China Relations in the Wake of CNOOC*, POL'Y ANALYSIS, Nov. 2, 2005, at 6.

9. *Id.*

10. David Barboza & Andrew Ross Sorkin, *Chinese Company Drops Bid to Buy U.S. Oil Concern*, N.Y. TIMES, Aug. 3, 2005, at A1.

11. Corr, *supra* note 7.

12. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW'S EFFECTIVENESS (2005) [hereinafter GAO]; *see also* S. 1797, 109th Cong (2005).

13. See Marchick, *supra* note 6, at 3-4, for a brief discussion of the importance of foreign investment to the U.S. economy.

report. It also introduces the most recent legislative proposals to amend Exon-Florio and alter CFIUS. Part IV provides a critical review of the GAO report recommendations and current legislative proposals and offers suggestions to improve Exon-Florio based in part upon lessons learned from the failed CNOOC-Unocal transaction and other general considerations.

I. THE EXON-FLORIO ACT

A. Purpose, Requirements, and Structure

Prior to the adoption of the Exon-Florio provision, many in Congress believed that foreign acquisition of U.S. firms could be stopped only if the President declared a national emergency.[14] The President hesitated to take such a drastic measure because doing so was essentially "a declaration of hostilities against the government of the acquirer company," an action considered politically dangerous.[15] Particularly concerned with Japanese acquisitions of certain types of U.S. firms and believing it was powerless to take any action, Congress approved the Exon-Florio provision of the Defense Production Act in 1988.[16]

Exon-Florio authorizes the President to take "appropriate" action "to suspend or prohibit foreign acquisitions, mergers, or takeovers of U.S. businesses" determined to threaten the national security of the United States.[17] The meaning of "national security," however, is not defined in the Exon-Florio provision, with Congress intentionally leaving the term undefined so that it could be "interpreted broadly without limitation to a particular industry."[18] Exon-Florio limits the President's authority to prohibit or suspend foreign acquisitions by requiring that he first find "credible evidence" that the foreign acquisition will impair national security and that no other provisions of law are adequate or appropriate to protect national security.[19]

By Executive Order 12,661, the President delegated his authority under

---

14. JAMES K. JACKSON, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 2 (2005).

15. Christopher R. Fenton, Note, *U.S. Policy Towards Foreign Direct Investment Post-September 11: Exon-Florio in the Age of Transnational Security*, 41 COLUM. J. TRANSNAT'L L. 195, 203 (2002).

16. JACKSON, *supra* note 14, at 2.

17. *Id. See also* 50 U.S.C. app. § 2170 (2005).

> [T]he President may take such action for such time as the President considers appropriate to suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States proposed or pending . . . by or with foreign persons so that such control will not threaten to impair the national security.

Id.

18. JACKSON, *supra* note 14, at 2.

19. *Id.*

Exon-Florio to CFIUS.[20] CFIUS is housed in and chaired by the Department of the Treasury and consists of twelve members.[21] The twelve-member panel includes:

> the Secretaries of State, Treasury, Defense, Homeland Security, and Commerce; the United States Trade Representative; the Chairman of the Council of Economic Advisors; the Attorney General; the Director of the Office of Management and Budget; the Director of the Office of Science and Technology Policy; the Assistant to the President for National Security Affairs; and the Assistant to the President for Economic Policy.[22]

The CFIUS panel is overseen by the Senate Banking, Housing and Urban Affairs Committee, which is currently chaired by Alabama Senator Richard Shelby, one of the strongest proponents of reform in Exon-Florio and CFIUS.[23]

Exon-Florio lists a number of factors that CFIUS may consider in determining what constitutes a threat to "national security." These factors include: "domestic production needed for projected national defense requirements"; whether domestic industries have the capability and capacity to meet national defense requirements, which include such things as human resources, technology, and materials; "the potential effects of the transactions on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical or biological weapons"; and "the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security."[24]

After receiving written notification of a proposed merger, acquisition, or takeover, CFIUS has thirty days to review potential national security threats of a transaction and determine if a full investigation is warranted.[25] If CFIUS chooses to further investigate after this thirty-day period, it then has an additional forty-five days to complete its full investigation and provide a recommendation to the President.[26] Ultimate authority to decide whether a

---

20. *Id.* at 3.

21. *Id.*

22. *Id.*

23. *See* Stephanie Kirchgaessner, *Senate Unease at Vetting Procedure*, FIN. TIMES, Oct. 7, 2005 (statement of Sen. Richard Shelby) ("The Treasury Department may believe that the process is sufficiently transparent . . . . This is the United States Senate committee with jurisdiction over the process question, and we most certainly do not agree.").

24. JACKSON, *supra* note 14, at 3. See 50 U.S.C. app. § 2170(f) (2005), for a full list of factors that may be considered.

25. *See* 50 U.S.C. app. § 2170(a) (2005) ("[An] investigation shall commence not later than 30 days after receipt by the President or the President's designee of written notification of the proposed or pending merger, acquisition, or takeover . . . .").

26. *See* 50 U.S.C. app. § 2170 (2005) ("Such investigation . . . shall be completed not later than 45 days after its commencement.").

proposed foreign acquisition should be prohibited is given to the President, who is required to make his final decision within fifteen days after the CFIUS investigation is complete.[27] The President must send a written report of his decision to Congress, which includes an explanation of his findings and the factors listed under the Exon-Florio provision that were considered in reaching his decision.[28] In total, CFIUS's review process cannot exceed ninety days.[29]

Foreign parties are not required to voluntarily submit notification of a proposed acquisition to CFIUS.[30] However, they have an incentive to do so because Exon-Florio authorizes the President to order companies to divest completed acquisitions that threaten the national security where they fail to notify CFIUS of the acquisition.[31] In addition, where parties fail to voluntarily notify CFIUS of a transaction, any CFIUS agency can authorize a review of a transaction of which it becomes aware.[32] Foreign companies that have filed with CFIUS can request to withdraw their notification at any time during CFIUS's review process, as long as withdrawal occurs before the President announces his decision on the matter.[33] Withdrawing companies can then refile at a later date where it is considered a new, voluntary notice to CFIUS and the thirty day review process begins again.[34]

The U.S. Department of Treasury states that the Exon-Florio provision is implemented within the context of the traditional U.S. open investment policy.[35] This policy is said to welcome foreign direct investment and afford "foreign investors fair, equitable, and nondiscriminatory treatment with exceptions" made only to protect national security.[36]

B. Applying Exon-Florio

"CFIUS has received more than 1500 notifications" since the enactment of Exon-Florio and has chosen to proceed past the thirty day review period in approximately twenty-five cases.[37] Of these twenty-five cases that were to proceed to the full investigation stage, thirteen were withdrawn by the foreign acquirer upon notice that CFIUS would conduct a full investigation, while the

---

27. *Id.*

28. *Id.*

29. U.S. Dep't Treasury, *Committee on Foreign Investments in the United States (CFIUS)*, http://www.treas.gov/offices/international-affairs/exon-florio/ (last visited Dec. 12, 2006).

30. GAO, *supra* note 12, at 8.

31. *Id.* at 9.

32. Letter from Linda L. Robertson, Assistant Secretary of the Dep't of Treasury, to John Warner, Chairman of the Comm. on Armed Serv. (Jul. 23, 1999) (on file with author).

33. GAO, *supra* note 12, at 10.

34. *Id.*

35. U.S. Dep't. Treasury, *supra* note 29.

36. *Id.*

37. JACKSON, *supra* note 14, at 4.

remaining twelve transactions were sent to the President for his decision.[38] More specifically, in 2004 CFIUS received notification of forty-five transactions that underwent a thirty day review period, but initiated only one full investigation that required a report and recommendation for the President's decision.[39] Since the enactment of Exon-Florio, the President has blocked only one of the twelve transactions in which CFIUS has conducted a full seventy-five day investigation.[40]

The small number of full forty-five day investigations undertaken by CFIUS has been the source of considerable criticism.[41] Some have argued that CFIUS's reluctance to initiate investigations results from "the negative connotations of an investigation and the need for a presidential decision."[42] For example, public knowledge of an investigation may have the effect of reducing investor confidence, which in turn could cause the company's stock prices to fall.[43] The Treasury Department has stated that CFIUS's decision whether to initiate an investigation demands careful deliberation because a forty-five day investigation potentially requires the President to make a decision about the foreign acquisition.[44] The Treasury Department believes CFIUS investigates the appropriate number of cases, stating that Congress intentionally "limited Exon-Florio to situations where other tools were not adequate or appropriate to deal with a national security threat."[45]

As demonstrated by the figures above, the practical effect of Exon-Florio is that foreign entities have voluntarily withdrawn bids to avoid a full CFIUS investigation much more frequently than they have been prohibited from acquiring U.S. companies. But the existence of CFIUS plays a role beyond the occasional deterrent effect of its investigation process; it can also persuade

---

38. *Id.*

39. DEP'T OF TREASURY, PART II – ANNUAL PERFORMANCE REPORT: FY 2004 PERFORMANCE AND ACCOUNTABILITY REPORT 47 (2004), *available at* http://www.treas.gov/offices/management/dcfo/accountability-reports/2004reports/part2.pdf.

40. JACKSON, *supra* note 14, at 4. The prohibited transaction took place in 1990 when China Aero-Technology Import and Export Corporation (CATIC) sought to acquire U.S.-based Mamco Manufacturing Company, an aerospace parts manufacturer. *Id.* The People's Republic of China owns CATIC and was acting as purchasing agent for the Chinese Ministry of Defense in the deal. *Id.* Using his power under Exon-Florio, President Reagan ordered CATIC to divest itself of Mamco, citing concerns that CATIC would gain access to technology that could otherwise have been acquired only through an export license. *Id.*

41. See GAO, *supra* note 12, for a critical analysis of CFIUS.

42. *Id.* at 13.

43. *Id.* at 14. A CFIUS investigation could adversely affect stock prices because the prospect of an investigation makes a merger less likely.

44. *Id.* at 31.

45. *Id.* at 28. More specific laws that protect the national security include those that restrict foreign ownership of U.S. air carriers, restrict the export of sensitive technology, and restrict access to sensitive information. *Id.* In addition, even if the Unocal board had approved the CNOOC bid, it would have been "subject to regulatory review for possible anticompetitive effects." Laura D'Andrea Tyson, *What CNOOC Leaves Behind; Existing Mechanisms Can Assess Risks to U.S. National Security*, BUS. WK., Aug. 15, 2005, at 101.

foreign entities to restructure the terms of the acquisition in ways that address CFIUS's security concerns.[46] As an example, in 2000 CFIUS allowed the Japanese Nippon Telephone & Telegraph Company to acquire the U.S.-based Internet service provider Verio after the Japanese government agreed to a strict ban on any involvement in the firm.[47] In addition, an otherwise highly critical GAO report found that CFIUS has recently made substantial improvements in obtaining and enforcing mitigation measures under Exon-Florio.[48]

The Department of Homeland Security has taken the lead role in monitoring compliance for these agreements, and such agreements have recently included more specific time frames for compliance and stronger language concerning noncompliance with contractual terms.[49] Likewise, as will be discussed more fully, CNOOC's apparent willingness to fully cooperate with the CFIUS review process and its assurances to sell Unocal's domestic assets exclusively to the United States may provide further indications of the benefits of CFIUS's deal-restructuring role.

II. CNOOC'S BID FOR UNOCAL

A. Explaining What Happened

To fuel its booming economy,[50] China has developed a voracious appetite for new and improved energy supplies. In fact, according to the U.S. Department of Energy, China surpassed Japan in 2003 to become the world's second largest oil consumer after the United States.[51] Given China's relative infancy in the world oil market, however, it lacks the established historical oil supply links necessary to meet its demands.[52] This has led China into ventures, such as that of CNOOC's offer to purchase Unocal, which seek to establish supply arrangements for new oil reserves to China.[53]

What has been described as "one of the of the most politically charged merger battles in U.S. history"[54] began on June 23, 2005, when CNOOC made

---

46. James A. Lewis, *New Objectives for CFIUS: Foreign Ownership, Critical Infrastructure, and Communications Interception*, 57 FED. COMM. L.J. 457, 465 (2005).

47. JACKSON, *supra* note 14, at 5.

48. GAO, *supra* note 12, at 18.

49. *Id.* at 18-19.

50. Wayne M. Morrison, CHINA'S ECONOMIC CONDITIONS, CRS Issue Brief for Congress, at 2 (2005), http://www.fas.org/sgp/crs/row/IB98014.pdf. China's real gross domestic product (GDP) has grown an average annual rate of 9.3% from 1979 to 2004. *Id.* In the first quarter of 2005, real GDP grew by approximately 9.4%. *Id.*

51. DICK K. NANTO ET AL., CHINA AND THE CNOOC BID FOR UNOCAL: ISSUES FOR CONGRESS 3 (2005).

52. *Id.* As noted later, China has a preference for captive supply sources, *infra* note 105.

53. *Id.*

54. Christopher Palmeri, *Unocal Goes Out With a Bang*, BUS. WK. ONLINE, Aug. 11, 2005, http://www.businessweek.com/bwdaily/dnflash/aug2005/nf20050811_8247_db017.htm.

an unsolicited $18.5 billion cash offer to purchase the California-based energy company Unocal.[55] The bid sparked great controversy in Washington, D.C., for a number of reasons. To begin, CNOOC is no ordinary energy company. It is China's third largest oil group, its largest offshore oil and gas producer,[56] and, most importantly, it is 70% owned by a state-controlled company.[57] The merger with Unocal would have more than doubled CNOOC's oil and gas production and increased its reserves by nearly 80%.[58] In addition, CNOOC's offer was to be heavily subsidized by state-owned companies and banks.[59] CNOOC's parent company, China National Offshore Oil, agreed to subsidize $7 billion of the offer, $2.5 billion of which was interest free and the rest a thirty-year loan at 3% interest.[60] A state-owned bank agreed to loan CNOOC another $6 billion.[61] These generous loans led many in Washington to view CNOOC's offer as an effort by the Chinese government to overtake a private American oil company, rather than a pure commercial transaction.[62] Fueling the controversy was the fact that CNOOC's bid came only two months after Chevron Corporation, the United States' fourth-largest oil company, had agreed to acquire Unocal for $16.4 billion in cash and stock.[63]

In an effort to ease U.S. concerns over the offer, CNOOC provided a number of terms favorable to U.S. interests in its proposal. CNOOC expressed its willingness "to continue Unocal's practice of selling and marketing all or substantially all of the oil and gas produced from Unocal's U.S. properties in U.S. markets."[64] CNOOC further promised to retain substantially all Unocal employees, including those in the United States.[65] This position stood in contrast to the existing Chevron proposal, in which Chevron had "announced plans to extract hundreds of millions of dollars of cost savings from the merger annually," which likely would have included employee layoffs.[66] Further, CNOOC's offer provided that it would attempt "to persuade members of

---

55. NANTO ET AL., *supra* note 51, at 1.

56. Asia Times Online, *CNOOC Bids US$67 Per Share for Unocal*, June 24, 2005, http://atimes.com/atimes/China/GF24Ad01.html.

57. NANTO ET AL., *supra* note 51, at 7.

58. Press Release, CNOOC Ltd., CNOOC Limited Proposes Merger with Unocal Offering US$67 Per Unocal Share in Cash (June 23, 2005) [hereinafter Press Release], http://www.cnoocltd.com/press/channel/press1612.asp.

59. *National Security Dimensions of the Possible Acquisition of Unocal by CNOOC and the Role of CFIUS: Before the House Committee on Armed Services* (July 13, 2005) (statement of Hon. C. Richard D'Amato, Chairman, U.S.-China Economic and Security Review Commission), *available at* http://www.uscc.gov/testimonies_speeches/testimonies/2005/05_07_13_testi_damato.htm.

60. *Id.*

61. *Id.*

62. *Id.*

63. Cathy Landry, *Congress Lashes Out on Cnooc Bid For Unocal; Chevron Stands By Its Competing $16.4-Bil Offer*, PLATTS OILGRAM PRICE REPORT, June 24, 2005, at 1.

64. Press Release, *supra* note 58.

65. *Id.*

66. *Id.*

Unocal's executive and operational management to join the management team of the combined company."[67] Lastly, CNOOC voluntarily filed notification to CFIUS of the proposed transaction, claiming that it was willing to fully discuss its proposal and participate in the CFIUS review process to demonstrate that its motives behind the transaction were purely commercial.[68]

Even with CNOOC's assurances, the offer was greeted by a wave of criticism in Washington, D.C.[69] Just one week after CNOOC's bid was announced, Congress made clear its reservations about the proposed merger through legislation intended to thwart or, at least, delay the transaction. On June 30, 2005, the House of Representatives overwhelmingly passed House Resolution 344, proposed by Representative Richard Pombo of California, by a vote of 398 to 15.[70] The resolution expressed the House's belief that CNOOC, through its control of Unocal, could take action that would impair the national security of the United States and called for the President to initiate an immediate review of the proposed acquisition if Unocal entered into the agreement.[71] That same day, the House cut off funding to CFIUS by passing House Amendment 431, which prohibited the Treasury Department from spending any money to approve the sale of Unocal to CNOOC.[72]

On July 15, 2005, Senator Byron Dorgan proposed a joint resolution to prohibit the acquisition of Unocal by CNOOC.[73] This proposal was based in part on several of the general concerns noted above: oil and natural gas are strategic assets critical to national security; the Chinese government owns 70% of CNOOC's parent company; a significant portion of the acquisition would be financed by banks owned by the Chinese government; the strategic assets of Unocal would be preferentially allocated to China by the Chinese government; and, under Chinese law, the U.S. Government and U.S. investors would not be allowed to acquire a controlling interest in a Chinese energy company.[74]

On August 8, 2005, House Resolution 6/P.L. 109-58 energy bill was signed into law.[75] The bill included a provision requiring a four-month long study by the Secretaries of Defense and Homeland Security on China's energy needs and the political, strategic, economic, and national security implications of China's growing energy requirements before the CNOOC bid could be approved.[76] A legislator responsible for the proposal admitted that the measure

67. *Id.*

68. Wang Ying, *CNOOC Volunteers for Acquisition Review*, CHINA DAILY, July 4, 2005, *available at* http://www.chinadaily.com.cn/english/doc/2005-07/04/content_456838.htm.

69. NANTO ET AL., *supra* note 51, at 1.

70. H.R. Con. Res. 344, 109th Cong. (2005) (enacted).

71. *Id.*

72. H.R. Con. amend. 431, 109th Cong. (2005) (enacted).

73. S. 1412, 109th Cong. (2005).

74. *Id.*

75. NANTO ET AL., *supra* note 51, at 15.

76. *Id.*

was specifically intended to stall the CNOOC-Unocal merger.[77]

While congressional outcry over CNOOC's bid created public awareness of the potential implications of the acquisition and put political pressure on CNOOC to withdraw its offer, President George W. Bush remained virtually silent on the proposed bid.[78] The following statement made on July 17, 2005 by President Bush fairly states his position throughout the CNOOC-Unocal ordeal: "There is a process that our government uses to analyze such purchases or intent to purchase. And it's best that I allow that process to move forward without comment."[79]

On August 2, 2005, exactly one month after it filed notice with CFIUS, CNOOC withdrew its bid, citing mounting opposition in Washington, D.C.[80] A spokesperson for CNOOC stated that the political environment had made it very difficult for the company to assess its chance of success, which created "a level of uncertainty that presented an unacceptable risk to" its ability to secure the transaction.[81] Shortly after CNOOC's withdrawal, over 77% of Unocal's shareholders approved the sale of the company to Chevron, who had previously increased its bid to $17 billion.[82] Ironically, due to unprecedented congressional opposition to the bid, CFIUS—the committee actually delegated the authority to investigate the national security risks of foreign acquisition—never got the chance to fully perform its responsibilities.

B. Was Congress' Reaction to CNOOC's Bid Warranted?

CNOOC's attempted acquisition of Unocal appears to have lit or at least rekindled a protectionist-fueled fire in many lawmakers. As will be discussed below, the failed merger has led to the proposal of amendments that would alter the definition of "national security" under Exon-Florio, increase congressional authority to prohibit certain types of foreign investment, and alter the structure of CFIUS. Therefore, it is useful to examine whether congressional outcry over CNOOC's bid was justified in the first place. The answer to this question may provide insight as to whether it is truly in our nation's best interest to have Congress increase its discretion and control over foreign investment and may provide indications as to whether CFIUS and Exon-Florio need to be overhauled.

The bulk of Unocal's assets consist of oil and gas operations in eight

---

77. Jad Mouawad, *Congress Calls for a Review of the Chinese Bid for Unocal*, N.Y. TIMES, July 27, 2005, at 3.

78. NANTO ET AL., *supra* note 51, at 14.

79. Todd Bullock & Katie Xiao, *Bush Administration Says Review of Chinese Unocal Bid Premature* (July 19, 2005), http://usinfo.state.gov/eap/Archive/2005/Jul/19-919521.html.

80. NANTO ET AL., *supra* note 51, at 14.

81. *Id.*

82. *Unocal Shareholders Approve Chevron Offer*, USA TODAY, Aug. 25, 2005, http://www.usatoday.com/money/industries/energy/2005-08-10-unocal-chevron-approval_x.htm.

countries outside North America, including: Thailand, Indonesia, Bangladesh, Myanmar, the Netherlands, Azerbaijan, Congo, and Brazil.[83] Its North American operations primarily take place in the Gulf of Mexico, Canada, and Alaska.[84] Even with its expansive operations, Unocal is only the United States' ninth-largest oil company[85] and does not rank among the top forty global oil or gas firms.[86] Its 2004 gross revenue figures of $8.2 billion are comparable to that of large independent energy producers and pale in comparison to the gross revenues of major multinational oil companies.[87] In addition, 70% of Unocal's proved oil and gas reserves are in Asia and the Caspian Region,[88] and it does not import crude oil into the United States because it owns no refineries.[89] Further, Unocal's domestic oil production of 58,000 barrels per day translates into less than 1% of total domestic production.[90]

In short, Unocal is a relatively minor player on the world's oil and gas scene,[91] which draws into question whether Unocal can fairly be deemed a "strategic asset" of the United States. Had the CNOOC-Unocal merger been completed, "combined CNOOC-Unocal's natural gas production would have amounted to about 1% of U.S. consumption, and combined oil production would have been equivalent to about 0.3% of domestic U.S. consumption."[92]

Admittedly, these facts focus on this specific transaction only and do not take into account the aggregate effects that multiple transactions involving Unocal-size companies might have on national security.[93] The potential aggregate affect was a concern of some politicians, including Representative Tom Tancredo, who stated: "By itself, this takeover may seem small, but a few more deals like this one and America could find itself held hostage not just to the energy brokers in the Middle East but to China as well."[94] Nevertheless, CFIUS is arguably "well equipped to make national security assessments of Chinese investment in the United States on a case-by-case basis," which should

---

83. NANTO ET AL., *supra* note 51, at 10.

84. *Id.*

85. *ChevronTexaco's Plan to Buy Unocal Reverses Driller's Outlook*, ALEXANDER'S GAS & OIL CONNECTIONS; COMPANY NEWS: N. AM., Apr. 20, 2005, *available at* www.gasandoil.com/goc/company/cnn51636.htm.

86. *The Dragon Tucks In*, ECONOMIST, June 30, 2005, *available at* http://www.economist.com/business/globalexecutive/dialogue/displayStory.cfm?Story_id=4127399.

87. NANTO ET AL., *supra* note 51, at 9.

88. Press Release, *supra* note 58.

89. NANTO ET AL., *supra* note 51, at 11.

90. Jerry Taylor, *CNOOC Bid for Unocal No Threat to Energy Security*, FREE TRADE BULL., July 19, 2005, *available at* www.freetrade.org/pubs/FTBs/FTB-019.pdf.

91. *The Dragon Tucks In*, *supra* note 86.

92. NANTO ET AL., *supra* note 51, at 11.

93. *Cf.* Mark E. Rosen, *Restrictions on Foreign Direct Investment in U.S. Defense and High Technology Firms: Who's Minding the Store?*, 4 U.S.A.F. ACAD. J. LEGAL STUD. 75, 81 (1993).

94. Dorn, *supra* note 8, at 5.

alleviate most of these cumulative effect concerns.[95]

In addition to Unocal's valuable oil assets, concerns were raised that Unocal also possessed dual-use technology that would find its way into the hands of the Chinese government if the bid was consummated.[96] Specifically, some believed Unocal possessed sensitive technology used for its deep sea exploration and drilling that could prove to benefit the Chinese military.[97] Still others believed that Unocal did not possess any technology in its oil sector that was not available to China through contractors or private vendors.[98] Regardless which of these positions is accurate, CFIUS would almost certainly have considered Unocal's possession of dual-use technology under a factor of Exon-Florio, which allows CFIUS to consider the effects of a transaction on United States technological leadership in areas affecting national security, in evaluating potential threats to national security.[99] Of course, because of congressional reaction to CNOOC's bid, CFIUS was never afforded that opportunity.

Some members of Congress believed that CNOOC's all cash bid, which trumped that of Chevron's cash and stock offer, was the result of CNOOC's unfair market advantage.[100] Since CNOOC is 70% state-owned and its offer was heavily subsidized by state-owned banks and companies, some in Washington scoffed at CNOOC's claim that its offer was mere normal commercial activity.[101] Still, contrary to what some in Washington believed, CNOOC may have actually overbid for Unocal rather than unfairly circumvented the market. As Gary Becker, a professor of economics at the University of Chicago explained:

> [M]ost large state-owned enterprises in China are inefficiently run, and they can only receive loans from state banks because banks are politically forced to make these loans. As a result, bank loans to state enterprises amounting to hundreds of billions of dollars are in trouble, and many are considered worthless. So it is very likely that CNOOC overbid for the assets of Unocal, which would have meant a transfer of dollars to stockholders of Unocal from the Chinese government.[102]

In addition, U.S. oil companies have also benefited from government assistance and thereby gained an advantage over other foreign countries by way

95. Marchick, *supra* note 6, at 7.
96. D'Amato, *supra* note 59.
97. *Id.*
98. Dorn, *supra* note 8, at 5.
99. *See* 50 U.S.C.S. app. § 2170 (2005).
100. Landry, *supra* note 63, at 1.
101. D'Amato, *supra* note 59.
102. Posting of Gary Becker to The Becker-Posner Blog, *Chinese Ownership of American Companies: A Problem?*, http://www.becker-posner-blog.com/archives/2005/08/chinese_ownersh_2.html (Aug. 7, 2005).

of an energy bill that provides them with tax breaks.[103] Regardless, CNOOC's advantages from low-interest loans should not be overstated; Chevron also may have been able to obtain financing internationally at favorable market rates that are low in relation to historic standards.[104] CNOOC's willingness to pay a premium for Unocal may have had much more to do with its preference for captive supply sources than the desire to gain unfair economic advantage by avoiding the purely private market.[105]

Some members of Congress viewed CNOOC's offer as a threat to the United States' ability to obtain oil and gas for its own economy, citing concerns that China could lock up energy supplies around the world for its own use.[106] Given the fungible nature of oil, however, most oil experts are not concerned about such a problem.[107] Experts point to the vast and fluid nature of oil markets and note that tankers full of crude oil are readily swapped between traders to balance excess demand or supply in areas throughout the globe.[108] Put simply, CNOOC's purchase of Unocal's oil assets would have offset purchases it would have had to make elsewhere, which in turn would have made that oil available for purchase by the United States.[109] Further, oil experts say that China's increased ownership of oil reserves would not change the price of oil because the hoarding of oil for its own use would have come at the cost of missing out on the opportunity to sell that oil on the open market at a higher price.[110] Gary Becker explains oil as a fungible commodity in this way:

> The US already imports about 2/3 of its oil needs, and pays world prices for both imported oil and indirectly for its domestic oil. If CNOOC took over Unocal and only sold its output to China . . . that would replace other oil or gas that China would have bought on the world market at world determined prices . . . . So the oil and gas that would have been purchased by China would become available for American use at effectively the same prices Americans now pay when Unocal is an American company.[111]

---

103. Jeff French, *A Concocted China Syndrome; Cnooc Failure Illustrates Need for China Inc. to Alter Its Approach*, INVESTOR DEALERS DIG., Aug. 8, 2005, at 1.

104. Edward M. Graham, Op-Ed., *No Reason to Block the Deal*, FAR E. ECON. REV., July 2005, *available at* http://www.iie.com/publications/opeds/oped.cfm?ResearchID=535.

105. *Is CNOOC's Bid for Unocal a Threat to America?*, Nov. 21, 2005, http://knowledge.wharton.upenn.edu/article/1240.cfm.

106. Paul Blustein, *Many Oil Experts Unconcerned Over China Unocal Bid*, WASH. POST, July 1, 2005, at D1.

107. *Id.*

108. *Id.*

109. James V. Feinerman, *Seven Questions: China and Unocal*, FOREIGN POL'Y, July 2005, http://www.foreignpolicy.com/story/cms.php?story_id=3121.

110. Blustein, *supra* note 106.

111. Becker, *supra* note 102.

China has only recently begun to decentralize its economy in its move away from completely state-owned businesses, and thus, does not yet fully advocate the free trade stance taken by the United States.[112] Instead, it restricts U.S. investments in sectors like energy by requiring that foreign firms form joint ventures with Chinese companies and be limited to a minority share of equity ownership.[113] Put simply, a U.S. corporation or the U.S. government would be forbidden from purchasing CNOOC under Chinese law.[114] Some members of Congress perceive this situation as an unfair "one-way street" in which China can shield foreign countries from its own strategic industries while simultaneously tapping into those of other countries.[115] Thus, members of Congress cited lack of legal reciprocity as a reason to block the CNOOC takeover on both equitable and national security grounds.[116]

Although Chinese law limits foreign investment in China in some circumstances, it is not completely foreclosed.[117] "Over the past two decades, China's economy has been relatively open to many types of foreign investment, and it continues to improve its investment climate" due in part to commitments it made when joining the World Trade Organization.[118] The United States is the second largest investor in China, behind Hong Kong, accounting for 8.5% of foreign direct investment in the country.[119] In 2004, American companies invested $60 billion into China compared to only $2 billion of direct investment by China into the United States.[120] Both General Motors and Ford have major operations on China's mainland, Anheuser-Busch was allowed to purchase the large Chinese beermaker Harbin Brewery, and Bank of America was able to purchase a 10% stake in China's largest mortgage lender.[121] Although it is undisputed that China does not yet advocate the open-door investment approach of the United States, it seems inaccurate to describe the economic relationship between China and the United States as a "one-way street," at least in relation

112. Morrison, *supra* note 50, at 2. Interestingly, the United States limits or prohibits foreign direct investment in such industries as maritime, banking, power, and aircraft. Jackson, *supra* note 14, at 5. For example, federal law "limits foreign investment in U.S. airlines to 25% of the voting stock and limits foreign investors' ability to elect members of boards of directors and other key officers." Hon. David M. Walker, Comptroller General, Keynote Address at the International Aviation Club of Washington, State of the U.S. Commercial Airline Industry and Possible Issues for Congressional Consideration (Nov. 28, 2001), *available at* http://www.gao.gov/cghome/iac1128.htm.

113. D'Amato, *supra* note 59.

114. *Id.*

115. *Implementation of the Exon-Florio Amendment and the Committee on Foreign Investment in the United States: Before the Senate, Banking, Housing and Urban Affairs Committee*, 109th Cong. (2005) (paraphrasing statement of Sen. Chuck Schumer).

116. *Id.*

117. *Id.*

118. NANTO ET AL., *supra* note 51, at 8.

119. Morrison, *supra* note 50, at 4.

120. Tyson, *supra* note 45.

121. Editorial, *Unocal Won't Be the Last, So Set the Rules Now*, BUS. WK. ONLINE, July 11, 2005, http://www.businessweek.com/magazine/content/05_28/b3942130.htm.

to investment as a whole.

Members of Congress may have missed an important opportunity to pressure China to adopt a more open-door stance with respect to its oil policies by instead focusing on non-existent national security concerns of the merger.[122] Congress could have taken the approach of welcoming the CNOOC offer and used the bid as leverage to press China for assurances of future U.S. investment opportunities in that country.[123] Instead, Washington's effective blockade of the merger may have had the opposite effect: causing the United States to lose leverage in its effort to achieve greater openness with China and potentially hindering an attempted takeover of a Chinese firm by an American firm in the future.[124]

The Exon-Florio provision was passed in large part because of concerns about expansive purchases by Japanese firms of U.S. businesses in the 1980s.[125] During that decade, Japanese firms purchased, or at least attempted to purchase, several large American businesses, including well-known New York buildings, Hollywood movie studios, and a large U.S. semi-conductor business.[126] Critics accused Japan of financing the purchase of real estate in the United States, allowing Japanese firms to pay prices that exceeded what U.S. companies could afford to pay.[127] Dire predictions of the fate of the United States were made in part because Japan had a large trade surplus with the United States and chose to invest their significant foreign currency reserve in the United States.[128] Concerned American politicians used rhetoric to create an irrational fear among the American public that Japan would slowly take over the United States through acquisition of its assets.[129] In the end, Japanese businessmen lost a great deal of money by paying inflated prices for American real estate,[130] and U.S. companies were able to buy back many of the assets at a fraction of the price.[131]

Due to a series of bids by Chinese businesses to acquire major U.S. companies, such as IBM, Maytag, and Unocal, comparisons have been drawn between China's current corporate shopping spree and that of Japan in the 1980s.[132] In fact, just days before CNOOC announced its bid to purchase

---

122. James McGregor, *Advantage, China in This Match, They Play Us Better Than We Play Them*, WASH. POST, July 31, 2005, *available at* http://www.harrywalker.com/articles/archive/McGregor_WashPost_ChinaOpPiece.pdf.

123. *Id.*

124. Graham, *supra* note 104.

125. Jackson, *supra* 14, at 2.

126. Sebastian Mallaby, *China's Latest 'Threat,'* WASH. POST, June 27, 2005, at A15.

127. Maurice Greenberg, *American Posturing on China Is Short-Sighted*, FIN. TIMES, July 18, 2005, at 15.

128. Marchick, *supra* note 6, at 10.

129. Ferber, *supra* note 1, at 810.

130. Mallaby, *supra* note 126.

131. Greenberg, *supra* note 127.

132. *Unocal Bid Hits Sore Spots in U.S.*, INDEP., June 26, 2005, http://www.independent-bangladesh.com/news/jun/27/27062005bs.htm#A15.

Unocal, former Federal Reserve Chairman Alan Greenspan and Treasury Secretary John Snow appeared before a Senate committee to discuss free trade policy with China and compared China's recent U.S. investment with that of Japan's in the 1980s.[133]

Many, however, believe that the Chinese takeover movement generally and CNOOC's offer to purchase Unocal more specifically cannot fairly be compared to Japanese acquisitions in the 1980s.[134] Some have argued that CNOOC's bid is more favorable to protectionist reaction because China, unlike Japan, is not a major competitor of valuable resources like oil; because CNOOC is a state-run company, whereas Japan is a democratic country; because Japan was a military ally and China is not; and because oil, unlike real estate, is a strategic asset that has much greater implications for national security.[135] Still, others believe these arguments are merely weak attempts to mask the fact that paranoia and distrust of China fueled congressional reaction to the CNOOC bid much more than any realistic national security concerns.[136]

III. PROPOSALS FOR REFORMING EXON-FLORIO AND CFIUS

A. The GAO Report

CNOOC's bid for Unocal raised widespread concerns among members of Congress that the current state of Exon-Florio did not adequately protect the United States from foreign acquisition of sensitive U.S. assets.[137] At the request of Indiana Senator Evan Bayh, Oklahoma Senator Richard Shelby, and Maryland Senator Paul Sarbanes,[138] the GAO conducted a study of the effectiveness of CFIUS's review process and released the report in September of 2005.[139]

The GAO report found that CFIUS's implementation of Exon-Florio limits its effectiveness in two primary ways. First, the Treasury, as Chair, too narrowly defines what constitutes a threat to national security.[140] Secondly, CFIUS is reluctant to initiate a forty-five day investigation because of potential

---

133. Diane M. Grassi, *China's Bid for Unocal: More Than Meets the Eye*, AM. CHRON., July 19, 2005, http://www.americanchronicle.com/articles/viewArticle.asp?articleID=1237.

134. *See* Irwin M. Stelzer, *China and Unocal: Remember When the Japanese Bought Rockefeller Center?*, WKLY. STANDARD, June 27, 2005.

135. *Id.*

136. *See* Dorn, *supra* note 8.

137. Corr, *supra* note 7.

138. Press Release, U.S. Senator Evan Bayh, Bayh Calls for Increased Oversight of Foreign Takeovers With National Security Concerns, (Oct. 6, 2005), http://bayh.senate.gov/releases/2005/10/06OCT05PR.htm. The report was initially requested in 2003 after CFIUS approved the takeover by a Chinese company of an Indiana company that made 85% of the magnets used to guide U.S. smart bombs. *Id.*

139. GAO, *supra* note 12.

140. *Id.* at 11.

negative impacts on foreign investment and its conflict with U.S. open investment policy.[141]

With regard to the first issue, the GAO report found that the Treasury did not adequately take into account the broad range of factors listed in Exon-Florio, but instead limited the definition of national security to "export-controlled technologies or items, classified contracts, and critical technology; or specific derogatory intelligence on the foreign company."[142] The report stated that this definition "is not sufficiently flexible to provide for safeguards in areas such as protection of critical infrastructure, security of defense supply, and preservation of technological superiority in the defense arena."[143] By contrast, the study concluded that the Departments of Justice, Defense, and Homeland Security take a broader view of national security, including viewing the transaction "in terms of the potential vulnerabilities posed by the acquisition."[144] These additional factors included foreign control of critical infrastructure and control of critical inputs to defense systems.[145]

The GAO report concluded that CFIUS limits the effectiveness of Exon-Florio by being far too reluctant to initiate forty-five day investigations in an effort not to chill foreign investment in the United States.[146] It pointed to the fact that from 1997 through 2004, CFIUS received 470 notifications but initiated only eight investigations during that period.[147] The report stated that, consistent with its desire to avoid investigations, the Treasury Department applies the strict criterion that there must be "credible evidence that the foreign controlling interest may take action to threaten the national security" before an investigation is undertaken.[148] Additionally, the Treasury Department must determine that "no other laws are appropriate or adequate to protect national security."[149]

These criteria are the same as those provided in the Exon-Florio statute as a basis for the President's decision to suspend or prohibit a foreign acquisition. But, according to the GAO report, it may not be the appropriate criteria in determining whether to initiate an investigation.[150] Presently, the only guidance that Exon-Florio provides for CFIUS in determining whether to initiate an investigation is the broad language that it "may make an investigation to determine the effects on national security."[151]

The GAO study expressed concern that the initial thirty day review

141. *Id.*
142. *Id.* at 3.
143. *Id.*
144. *Id.* at 12.
145. *Id.*
146. *Id.* at 13.
147. *Id.* at 14-15.
148. *Id.* at 14.
149. *Id.*
150. *Id.* at 15.
151. *Id.* (quoting 50 U.S.C. app. § 2170(a)).

period, following notification, in which CFIUS's members must decide whether a full investigation is warranted, is not sufficiently long to gather all necessary information or to negotiate an agreement to mitigate national security concerns.[152] Instead, according to the report, to give itself additional time to make a determination, CFIUS must sometimes ask the company to withdraw their notification under threat of investigation.[153] After withdrawal, problems in CFIUS's monitoring may occur when the acquisition has already been concluded because the foreign company then has less of an incentive to resolve security issues and refile in a timely manner.[154]

The GAO report offered a number of recommendations consistent with its findings for change in Exon-Florio. After determining that the Treasury's narrow definition of national security failed to adequately consider factors that were currently embodied in Exon-Florio and that there existed differing views within CFIUS about the extent of authority under Exon-Florio, it recommended that Congress amend Exon-Florio "by more clearly emphasizing the factors that should be considered in determining potential harm to national security."[155] The report also concluded that time constraints and CFIUS's reluctance to initiate investigations allows companies to withdraw their notifications and, subsequently, CFIUS may lose track of the transaction when companies do not refile.[156]

Thus, the GAO report recommended that Congress require the Secretary of the Treasury to "establish interim protections where specific concerns have been raised," to allot specific time frames for refiling, and to create "a process for tracking any actions being taken during the withdrawal period."[157] The report also suggested easing time constraints by eliminating the distinction between a review period and an investigation, thereby making the entire seventy-five day period available for review.[158] Lastly, the report suggested that Congress require CFIUS to make periodic reports "to provide more transparency and facilitate congressional oversight."[159]

The Treasury Department disputes a number of the GAO's conclusions in its September 2005 report and insists that the current structure and policies of CFIUS have implemented Exon-Florio in a manner effective to protect national security.[160] The Treasury Department stated that any agency could bring forward national security concerns for CFIUS to review and that, contrary to what the GAO study indicated, no agency "defines" national security for

152. *Id.*
153. *Id.*
154. *Id.* at 16.
155. *Id.* at 21.
156. *Id.* at 20.
157. *Id.* at 21.
158. *Id.*
159. *Id.*
160. *Id.* at 27.

CFIUS.[161] The Treasury claimed that CFIUS considers an extremely broad range of factors in determining what constitutes a threat to national security and refuted the GAO claim that any one narrow definition was used.[162] It further stated that while CFIUS is chaired by the Secretary of Treasury, it is an interagency committee and thus "[a]ll CFIUS decisions are reached only by a consensus among the CFIUS member agencies."[163] It explained that disagreement between differing agencies on what constitutes a threat to national security is the product of vigorous debate when CFIUS considers a foreign acquisition and is not a fundamental defect in the committee's review process.[164]

With respect to its allegedly overly restrictive standard for initiating an investigation, the Treasury noted that its guidelines provide that a forty-five day investigation is undertaken if *any* agency has national security concerns regarding the transaction.[165] The Treasury also stated its belief that the thirty day review period, although "tight," results in "foreign investments being structured to avoid national security problems" and provides incentives for those foreign companies to undergo extensive preparation before they even file notification with the Committee.[166] It refuted the GAO's assertion that it encouraged companies to withdraw their notifications, noting that CFIUS guidelines give parties, and not CFIUS agencies, authority to request a withdrawal for legitimate reasons only.[167]

The Treasury stated its position that nearly all the concluding recommendations in the GAO report were unnecessary or counterproductive. It found no need to more clearly emphasize the factors in considering a potential threat to national security, insisting that the current framework provided by Exon-Florio gives CFIUS "the broadest possible latitude" in determining whether a foreign acquisition poses national security concerns.[168] It also insisted that CFIUS has and will continue to consider as a factor "transactions involving critical infrastructure, including the 'control of or access to information traveling on networks'" in determining national security threats.[169] Furthermore, it disfavored the GAO's suggestion to eliminate distinctions between review and investigation periods, stating that "CFIUS completes the vast majority of its reviews within the initial thirty day review."[170] Thus, for most transactions, extending the review period to seventy-five days would unnecessarily delay the closing of the acquisition, thereby negatively affecting

161. *Id.*
162. *Id.* at 30.
163. *Id.* at 27.
164. *Id.*
165. *Id.* at 31.
166. *Id.*
167. *Id.* at 34.
168. *Id.* at 35-36.
169. *Id.* at 36 (quoting September 2002 GAO Report #02-736).
170. *Id.*

foreign investment in the United States and deterring CFIUS filings in the first place.[171]

With regard to the suggestion that the Treasury increase its reporting procedures to Congress, the Treasury stressed the importance of Exon-Florio's confidentiality provision.[172] The Treasury insisted that protecting the proprietary information of foreign investors from being made public is essential to encourage notification and full disclosure by foreign investors to the committee and to prevent reductions of foreign investment in the United States.[173] Although the Treasury stated that closed session oral briefings to duly authorized committees of Congress was the most appropriate mechanism for reporting, it agreed to work with Congress on developing periodic reporting schedules for completed reviews to some members of Congress.[174] Lastly, the Treasury stated that any measure imposing interim requirements after withdrawal "would be difficult to negotiate and would detract from efforts to complete the CFIUS review."[175]

B. Legislative Proposals

Following the release of the September 2005 GAO report, hearings of the Senate Committee on Banking, Housing and Urban Affairs were held to discuss possible changes to CFIUS.[176] Led by Senator Shelby, Chairman, and Senator James M. Inhofe, several legislative proposals have been introduced and are currently under consideration.[177] Senator Shelby proposed an amendment to a defense bill that would give Congress the power to reject a foreign acquisition for national security reasons, even in cases where the President had not suspended or prohibited the deal.[178] Other proposals include "[p]roviding Congress with power to veto CFIUS clearance on any proposed deal"; "[b]roadening the definition of "national security" to include critical infrastructure, economic security, and energy needs"; "[r]equiring CFIUS to report to Congress on each deal for which notification is provided"; extending the period of time for the CFIUS review process; "[l]imiting the ability of companies to avoid investigations by withdrawing notifications that are to be subsequently re-filed"; and switching the chair of CFIUS to the Department of Defense, Homeland Security, or Commerce.[179] Other less drastic suggestions include requiring companies to report deals to CFIUS and giving U.S. allies

171. *Id.*
172. *Id.* at 37.
173. *Id.*
174. *Id.*
175. *Id.*
176. *See* SEN. RICHARD SHELBY, FOREIGN INVESTMENT AND NATIONAL SECURITY ACT OF 2006, S. Rep. No. 109-264, at 3 (2d Sess. 2006).
177. Corr, *supra* note 7.
178. Kirchgaessner, *supra* note 23.
179. Corr, *supra* note 7.

preferential treatment as compared to more hostile countries.[180]

In September 2005, Senator Inhofe introduced Bill 1797, which called for a number of specific changes in Exon-Florio.[181] The proposed bill would add to the list of factors in determining threats to national security U.S. requirements for sources of energy and economic security; authorize Congress to pass a joint resolution prohibiting an acquisition within ten days after the President informs Congress of his decision not to suspend or prohibit the acquisition; increase CFIUS's review period from thirty to sixty days; require that the findings and recommendations of an investigation be sent to Congress as well as the President; allow a member of the Committee on Banking, Housing and Urban Affairs to require CFIUS to undertake an investigation; and require that the Secretary of the Treasury submit quarterly submissions to the Committee on Banking, Housing and Urban Affairs containing a detailed summary of each merger, acquisition, or takeover that was reviewed or will be reviewed in the next quarter.[182]

The Bush Administration opposed Senator Inhofe's proposal or any other proposed changes in Exon-Florio, stating that the review process works well as currently implemented.[183] In addition, eleven major U.S. business organizations voiced their support for the Bush administration's position at recent congressional hearings.[184]

Little became of legislation proposing to amend Exon-Florio in the months following the withdrawal of CNOOC's bid to acquire Unocal.[185] Recently, however, arguments in support of reform have been revitalized by Dubai Port World's (DP World) attempt to acquire management control of six major U.S. seaports.[186] DP World is a company owned by the government of Dubai in the United Arab Emirates.[187] In February 2006, DP World won the bidding war for the British firm Peninsular and Oriental Stream Navigation Company (P&O), which controlled the right to manage U.S. seaports in New York, New Jersey, Philadelphia, Baltimore, Miami, and New Orleans.[188] DP World had previously submitted a voluntary notification of its plans to acquire P&O to CFIUS and, after a thirty-day review period, CFIUS approved the

---

180. Kirchgaessner, *supra* note 23.

181. *See* S. 1797, 109th Cong. (2005). This bill was referred to the Committee on Banking, Housing and Urban Affairs for consideration. *Id.*

182. *Id.*

183. Richard S. Dunham, *Keeping America Safe - - From Foreign Buyouts*, BUS.WK. ONLINE, Oct. 24, 2005, http://www.businessweek.com/magazine/content/05_43/c3956074.htm.

184. *Id.*

185. See Ronald D. Lee & Nancy L. Perkins, *Securing U.S. Strategic Assets: Does the Exon-Florio Statute Do Its Job?*, CHINA TRADE L. REP. (Apr. 2006), noting the failed efforts of Senators Inhofe and Shelby to have their proposals for reform included in the National Defense Authorization Act of Fiscal Year 2006.

186. *Id.*

187. *Key Questions About the Dubai Port Deal*, CNN.COM, Mar. 6, 2006, http://www.cnn.com/2006/POLITICS/03/06/dubai.ports.qa/index.html.

188. *Id.*

acquisition in January 2006.[189] As part of the approval, DP World made concessions to CFIUS by agreeing to open its books and keep the current U.S. ports management intact.[190]

In February 2006, the Dubai Port deal became highly politicized when critics of the takeover raised national security concerns.[191] Critics noted that two of the September 11 hijackers came from the United Arab Emigrates and the hijackers drew funds from bank accounts in Dubai.[192] A bipartisan group of lawmakers, including Senate Majority Leader Bill Frist, threatened to introduce legislation designed to delay or block the transaction.[193] President Bush responded to this criticism by adamantly defending the deal, stating he would veto any bill designed to hold up the agreement.[194] Facing fervent opposition from lawmakers, DP World agreed to delay the acquisition and submit to a forty-five day investigation by CFIUS in an effort to alleviate congressional concern that the takeover posed a national security threat.[195]

DP World's willingness to undergo a full CFIUS investigation did not, however, discourage members of Congress from taking measures to prevent the deal in the interim. On March 8, 2006, the House Appropriations Committee voted sixty-two to two to block the agreement to allow DP World to operate U.S. seaports.[196] One day later, House and Senate GOP leaders bluntly informed President Bush that Congress would prevent the agreement from being implemented.[197] DP World ultimately succumbed to the political pressure and announced that it would sell its U.S. operations to an American company.[198]

In the wake of the Dubai Port deal controversy, lawmakers have a renewed desire to reform the investment review process and are once again proposing legislation designed to accomplish this goal.[199] On March 7, 2006, Senator Dodd introduced legislation that would add the director of National Intelligence and the CIA Director to CFIUS; create an intelligence subcommittee to review all potential deals; require congressional notification at every step of the CFIUS process; and make notification to the President or CFIUS mandatory.[200] Senators Inhofe and Shelby have also renewed their

---

189. *Id.*

190. *Id.*

191. *Bush, Congress Clash over Port Sale,* CNN.COM, Feb. 22, 2006, http://www.cnn.com/2006/POLITICS/02/21/port.security/.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Ports Buyer Requests 45-Day Review of Deal,* CNN.COM, Feb. 26, 2006, http://www.cnn.com/2006/POLITICS/02/26/ports.dubai/.

196. *Congress Declares War on Ports Deal,* CNN.COM, Mar. 8, 2006, http://www.cnn.com/2006/POLITICS/03/08/port.security/index.html.

197. *Dubai Firm to Sell U.S. Port Operations,* WASH. POST, Mar. 10, 2006, at A01.

198. *Id.*

199. Lee & Perkins, *supra* note 185.

200. S. 2380 109th Cong. (2006).

efforts to pass legislation reforming CFIUS.[201]

IV. A CRITICAL REVIEW OF PROPOSALS FOR REFORM IN EXON-FLORIO AND CFIUS

A. Defining and Expanding the Definition of "National Security"

Recent suggestions to expand the definition of "national security" to include domestic economic concerns are not novel proposals; they have been suggested frequently since Exon-Florio was adopted.[202] Just as past suggestions for expansion of the definition have not been implemented, it is currently unwise and unnecessary to do so. Criticisms leveled against Exon-Florio have often involved what many consider its vague definition of "national security."[203] It has been argued that a failure to create clear standards for what constitutes a threat to national security creates uncertainty among foreign investors when structuring acquisitions of U.S. companies and in turn decreases foreign direct investment in the United States.[204] In addition, this vagueness may create unnecessary transactional delays, since foreign firms that would not be considered a national security threat feel pressure to report their investments to CFIUS.[205]

Concerns of this type have led to suggestions, which were ultimately rejected, that CFIUS should annunciate a list of products and services it considers essential to national security or create a list of industries exempt from Exon-Florio.[206] Given these concerns, one can expect that implementing a statutory requirement that CFIUS consider potential threats to "economic security" in determining a threat would only add to the confusion.[207] The term "economic security" is an extraordinarily vague one, creating a level of uncertainty that could potentially hinder foreign investment in the United States and a means for protectionist-minded politicians to argue for the prohibition of beneficial corporate transactions.[208]

---

201. Press Release, Senator Inhofe, Recent Port Deal Further Reveals Need for CFIUS Reform (Feb. 21, 2006), *available at* http:Inhofe.senate.gov/pressapp/record.cfm?id=253411. *See*, Senator Shelby, *supra* note 176; *see also*, S. 3549 109th Cong. (2006).

202. Marchick, *supra* note 6, at 8.

203. *See* W. Robert Shearer, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, 30 HOUS. L. REV. 1729, 1768 (1993) (arguing that the vague meaning of "national security" gives the President and CFIUS too much discretion to control foreign investment in the United States, creates uncertainty among foreign investors, and allows for threatening foreign acquisitions to escape CFIUS's attention). *Id.*

204. *Id.*

205. Ferber, *supra* note 1, at 827.

206. Shearer, *supra* note 203, at 1741.

207. Marchick, *supra* note 6, at 8.

208. *See id.* (quoting the statement of former Commerce Secretary Malcolm Baldridge,

By contrast, others have argued that the only way to prevent protectionist abuse and maximize beneficial foreign investment is to limit the definition of a threat to national security to "only those transactions that closely bear on national defense."[209] Prior to September 11, 2001, CFIUS took this more narrow approach, focusing "primarily on the protection of the U.S. defense industrial base, the integrity of Department of Justice investigations, and the export of controlled technologies."[210]

In the wake of the terror attacks on the United States and the subsequent war on terrorism, however, the Departments of Justice and Defense, as agency members of CFIUS, now take a broader view of what might constitute a threat to national security by considering vulnerabilities that may result from foreign control of critical infrastructure.[211] Despite the fact that the Treasury Department may continue to take a narrower, more traditional view of what constitutes a threat to national security, the fact that all decisions by CFIUS are based on the consensus vote of all agencies should alleviate concerns that one overly narrow or overly broad definition is used.[212] Thus, keeping "national security" undefined will ensure that national security is adequately protected without increasing the present ambiguity in the meaning of the term.

B. Expanding Congressional Authority

Congressional reaction to CNOOC's bid demonstrates "[t]he increasingly confrontational approach Congress is taking toward China."[213] As discussed above, the relatively trivial assets of Unocal, the fungible nature of oil, and CNOOC's contractual concessions reveal that Congress' reaction to the bid was both irrational and unsupported by the facts.[214] It is precisely because of the strong potential that members of Congress will enact harmful protectionist measures based on anti-China perspectives that proposals to allow Congress to prohibit foreign acquisitions after the President has approved them should not be implemented. As both the CNOOC and Dubai Port transactions demonstrate, through politicization Congress already has the ability to intimidate foreign investors, thereby raising the cost of transactions or effectively preventing them from occurring.[215] Statutory authority to prohibit a deal would encourage protectionist measures to be enacted whenever a Chinese company seeks to purchase an American one, which in turn would create a

---

"you are trying to kill a gnat with a blunderbuss," to support the proposition that an "economic security" test would serve as a vehicle for domestic industries to block foreign competition). *Id.*

209. Robert N. Cappucci, *Amending the Treatment of Defense Production Enterprises Under the U.S. Exon-Florio Provision: A Move Toward Protectionism or Globalism?*, 16 FORDHAM INT'L L.J. 652, 680 (1993).

210. Marchick, *supra* note 6, at 4.

211. GAO, *supra* note 12, at 12.

212. *Id.* at 30.

213. Dorn, *supra* note 8, at 1.

214. *See also id.* (arguing that any threat to U.S. national security posed by the CNOOC-Unocal case was remote at best).

215. *Id.* at 6.

number of direct and indirect problems.

To begin with, allowing Congress to prohibit acquisitions previously approved by the President would create a great deal of uncertainty among foreign investors regarding "the prospect of congressional involvement in the review process."[216] This could lead to decreased foreign investment in the United States.[217] After all, if currently proposed legislation is enacted, a foreign acquirer could potentially be forced to wait the full seventy-five days for CFIUS to complete its review and investigation, gain presidential approval, and then see the deal quashed by a joint resolution of Congress. Congress' role should be limited to ensuring that Exon-Florio is properly implemented, but it should not itself act as a regulatory agency.[218] Considering the animosity toward China and congressional ignorance about energy markets, as demonstrated by CNOOC's bid, this is essential to ensure that beneficial foreign investment in the United States is not discouraged.[219]

Secondly, if U.S. politicians continue to politicize bids by Chinese companies, it is likely that the Chinese government may retaliate by using spurious reasons to block attempts by U.S. firms to acquire Chinese companies.[220] At the very least, congressional involvement in these corporate transactions could only harm the United States' effort to achieve greater openness to invest in the Chinese market; a market that has become increasingly open to foreign investment over recent years.[221] This is especially the case given that other non-Chinese foreign companies, such as British Petroleum and Royal Dutch Petroleum, are free to invest in U.S. energy assets.[222] This inequitable treatment is unlikely to be perceived kindly by the Chinese government and could lead to a decline in permissible U.S. investment in China.

It is entirely plausible that the ability of Congress to thwart the CNOOC bid may have actually decreased the security of the United States. This can be seen when one considers where China has turned to obtain the necessary oil to fuel its economy. Recently, China has secured oil acreage in countries like Iran, Sudan, and Venezuela.[223] In fact, China recently became Iran's biggest oil and gas customer, signing long-term contracts worth around $200 billion.[224] China's need to increase its dealings with countries like Iran in order to fulfill its energy needs has the potential to undermine the United States' efforts to isolate these countries and may aggravate tension between the United States

---

216. Marchick, *supra* note 6, at 8.
217. *Id.*
218. *Id.*
219. Dorn, *supra* note 8, at 7.
220. Graham, *supra* note 104.
221. *Id.*
222. Dorn, *supra* note 8, at 4.
223. Amy Myers Jaffe, *Wasted Energy*, N.Y. TIMES, Jul. 27, 2005, at A23.
224. Antoaneta Bezlova, *Seeking Oil In Troubled Waters,* IPS-INTER PRESS SERVICE, Sept. 19, 2005, *available at* http://www.speroforum.com/site/print.asp?idarticle=1921.

and China.[225] This is yet another reason why increased congressional involvement and subsequent politicization of foreign corporate transactions is unwise.

The Dubai Port deal further demonstrates that politics surrounding a transaction can strongly influence how it is structured and whether or not it is ultimately completed.[226] Amendments that propose to allow Congress to block transactions to which CFIUS does not object or veto CFIUS's clearance to review a proposed deal will only further inject politics into commercial transactions and discourage beneficial foreign investment.[227]

Thus, lessons from the failed CNOOC-Unocal merger and the Dubai Port deal weigh strongly against enacting proposals that increase congressional authority over the regulation of foreign investments.

C. Extending the CFIUS Review Process

Proposals have been suggested that would extend CFIUS's review period from thirty to sixty days or even eliminate the distinction between a review and an investigation completely, making the entire seventy-five days a reviewable period.[228] Some have argued that extending the time frame for a CFIUS review is unnecessary because most companies file only after engaging in informal conversations with CFIUS.[229] These informal consultations give CFIUS "additional time to assess national security risks and design mitigation strategies" and sometimes result in security agreements being completed before parties even file.[230] In addition, in a majority of cases, the thirty day review period is sufficiently long for CFIUS agencies to adequately access whether they should undertake an investigation.[231]

But, good reasons exist for extending the CFIUS review process, at least under some conditions. In response to the September 2005 GAO report, the U.S. Department of Justice, an agency of CFIUS, said:

> The Department shares the concern expressed in the draft report with respect to time constraints imposed by the time limits of the current process. In particular, gathering timely and fully-vetted input from the intelligence community is

225. Jaffe, *supra* note 223.

226. Lee & Perkins, *supra* note 185.

227. *Id.*

228. *See* S. 1797, 109th Cong. (2005); *see also* GAO, *supra* note 12, at 21 (suggesting eliminating the distinction between a review and an investigation and making the entire seventy-five day period available for review to address the Treasury's concern with the impact of investigations on U.S. open investment policy and to address member agencies' concerns about needing more time during initial reviews).

229. Marchick, *supra* note 6, at 9.

230. *Id.*

231. GAO, *supra* note 12, at 31.

> critical to a thorough and comprehensive national security assessment. Any potential extension of the time available to the participants for the collection and analysis of that information would be helpful.[232]

Likewise, even though the Treasury Department believes that for most transactions extending the review by forty-five days would be unnecessary and detrimental, it concedes that "for certain transactions an extension of time available for the collection and analysis of information would ease the burden on the government."[233] The GAO report also claims that in some cases where agencies need more time to gather information, the Committee suggests that companies withdraw their notification and refile at a later time.[234] In some instances, companies have delayed refiling or have not done so at all after their withdrawal.[235]

The solution to this issue appears to lie in determining the length of time in which the agencies of CFIUS can complete a thorough review without unreasonably delaying the closing of an acquisition and deterring CFIUS filings in the first place. One solution might be for Congress to amend Exon-Florio in a manner that would continue to use the thirty day review period, but provide CFIUS with an option to extend the review period by fifteen, or even thirty days at its discretion. This would prevent unnecessary delays in the vast majority of cases where CFIUS can complete a comprehensive review within thirty days, but would allow agencies the additional time they need to complete a thorough review in rare circumstances.

D. Switching the Chair of CFIUS

Over the years there have been a number of proposals that would switch the chairmanship of CFIUS from the Treasury Department to another agency, such as the Department of Defense or the Department of Commerce.[236] Such proposals stem from criticism that the Treasury's primary goal of reducing the deficit, which is furthered by allowing foreign investment, is inconsistent with Exon-Florio's primary goal of protecting national security through monitoring and regulating foreign investment.[237] Thus, it is argued that the Treasury's main focus creates a bias against CFIUS activity.[238] The GAO report supports this criticism, by citing examples of transactions where the narrower definition of national security prevailed when agencies differed about whether the case

232. *Id.* at 48.
233. *Id.* at 36.
234. *Id.* at 15.
235. *Id.* at 15-16.
236. Marchick, *supra* note 6, at 9.
237. *See* Cappucci, *supra* note 209, at 678.
238. *Id.*

constituted a national security threat.[239] The Treasury Department countered by claiming that only "CFIUS, as a Committee, decides whether there are threats to the national security."[240]

Since all CFIUS decisions are made on a consensus basis, it is unlikely that the Treasury Department's allegedly narrow definition of what constitutes a threat to national security predominates.[241] This is especially the case given that CFIUS Guidelines state that "[i]f *any* agency has national security concerns regarding . . . [a] transaction," a forty-five day investigation is undertaken.[242] Thus, where CFIUS chooses not to undertake a forty-five day investigation of a transaction, it is only because no CFIUS agency, not just the Treasury Department, deemed it necessary to do so.

Further, even if those critical of the Treasury Department's chairmanship are correct in claiming it too narrowly defines national security and that this position often prevails in CFIUS's decisions as a whole, the Treasury should continue to chair CFIUS. The reason is simple. As the failed CNOOC-Unocal merger and Dubai Port deal illustrate, if CFIUS is in fact too lenient in regulating foreign investment, congressional politicization of high-profile mergers more than makes up for this deficiency. Thus, in order to maintain a proper balance between free trade and protectionism, CFIUS should continue to be chaired by an agency that advocates an open investment policy. In addition, maintaining chairmanship in the Treasury sends a positive message to potential foreign investors that the United States presumptively welcomes foreign investment; a message that is less clear if CFIUS were chaired by a department with a focus on national defense.[243]

Others have suggested that CFIUS be reorganized as a more independent agency.[244] Under this system, new members would "function independently of other federal agencies and departments," perhaps preventing the disruptive effects of conflicting positions on issues of foreign investment that prevent CFIUS from adopting a clear national security policy.[245] But while a clear definition of national security from a single independent agency may be seen as a benefit to some, it could also be seen as a weakness to others. CFIUS's multiple-agency structure arguably provides benefits by requiring compromise on what constitutes a threat to "national security" between numerous branches whose priorities and goals conflict.[246] This in turn could be said to prevent any one overly narrow or exceedingly broad definition from being used.[247]

---

239. GAO, *supra* note 12, at 12-13.

240. *Id.* at 30.

241. *Id.* at 4-5.

242. *Id.* at 31 (emphasis added).

243. Marchick, *supra* note 6, at 9.

244. Cecelia M. Waldeck, Note, *Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment*, 42 HASTINGS L.J. 1175, 1252 (1991).

245. *Id.* at 1252-53.

246. GAO, *supra* note 12, at 30.

247. *Id.*

E. Increasing CFIUS Reporting Requirements

Few would dispute that Congress has a legitimate role in ensuring that CFIUS correctly implements Exon-Florio. Naturally, this requires some amount of reporting to Congress, but the appropriate amount of such reporting remains in dispute. Currently, Exon-Florio requires that the President send a written report to Congress whenever he makes a decision about whether a transaction should be prohibited.[248] It also requires that agencies of CFIUS "with equities in any particular transaction, provide briefings to duly authorized committees of Congress whenever requested, following completion of action under the statute."[249]

There are a number of reasons why an expansion of congressional oversight over CFIUS's review process is warranted. First, implementing more expansive reporting procedures will help to ensure that CFIUS is held accountable for its role in implementing Exon-Florio. Congress would then have information regarding the nature of certain transactions, the potential national security concerns posed by different agencies of CFIUS, and the ways in which those concerns were mitigated.[250] Perhaps most importantly, by requiring CFIUS to be more accountable to Congress, proposals to amend Exon-Florio to authorize Congress to reject a foreign acquisition for national security reasons, even in cases where the President had not suspended or prohibited the deal, would be less likely to be implemented. The fact that only two cases have been reported to Congress since 1997 contributes to the opaque perception of CFIUS's review process and adds to the feeling among some members of Congress that CFIUS does not adequately protect domestic security.[251] Expanding congressional oversight would eliminate many of these concerns without the need for Congress to step beyond its proper role as a supervisory, as opposed to a regulatory body, in the realm of foreign investment.

It is also important to note that CFIUS agencies do not appear to object to increased congressional oversight. The Treasury Department has stated that it is "happy to work with Congress on developing a reasonable periodic reporting schedule for completed reviews to give interested Members information about transactions."[252] Likewise, the U.S. Department of Justice is not opposed to

248. GAO, *supra* note 12, at 20. Exon-Florio initially required the President to report to Congress only in the case of a negative decision regarding a transaction. *Id.* "To improve congressional oversight, the Byrd Amendment expanded required reporting to include the circumstances surrounding all presidential decisions." *Id.*

249. *Id.* at 37.

250. *Id.* at 21.

251. *Id.* at 20.

252. *Id.* at 37.

making CFIUS's review process more transparent to Congress and more susceptible to its scrutiny so long as confidential proprietary information of filing companies is protected.[253] Keeping such information confidential is arguably necessary to prevent diminution in the number of applications CFIUS receives and to afford foreign investors the confidence to provide CFIUS with the full disclosure necessary to undertake a thorough review.[254]

The current Exon-Florio provision provides that no information or documentary material filed with CFIUS may be made public, but continues on to state that this should not "be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittees of the Congress."[255] Therefore, the statute appears to be sufficiently broad to allow for increased congressional scrutiny without amending Exon-Florio in this regard.

F. Modifying the Rules Regarding Withdrawal

To ensure that national security is protected during the period that foreign investors withdraw their notification to CFIUS and subsequently complete their transactions with U.S.-based companies, the GAO report suggested that the Treasury "establish interim protections where specific concerns have been raised, specific time frames for refiling, and a process for tracking any actions being taken during the withdrawal period."[256] The Treasury Department responded by stating that "[i]nterim measures are difficult to negotiate and would detract from efforts to complete the CFIUS review," where the emphasis should stay.[257]

The GAO report cited eighteen acquisitions since 1997 in which companies withdrew their notification.[258] In sixteen of those cases, the acquisition had not yet been concluded and the companies refiled within four months.[259] In the other two, "the companies had already concluded the acquisition, and nine months and one year, respectively, passed before the companies refiled."[260] In yet two other cases, companies that had concluded their transaction withdrew their notifications and never refiled.[261]

The problem with the GAO's position is that notification is not mandatory in the first place. Thus, should CFIUS impose mandatory conditions for withdrawal where the transactions have been or will be completed during the withdrawal period, foreign investors may be inhibited or

253. *Id.* at 48.
254. *Id.*
255. 50 U.S.C. app. § 2170(c) (2005).
256. GAO, *supra* note 12, at 21.
257. *Id.* at 37.
258. *Id.* at 16.
259. *Id.*
260. *Id.*
261. *Id.*

discouraged from making initial filings.[262] This is especially the case if the GAO report is accurate in concluding that the thirty day review period is sometimes an inadequate amount of time for CFIUS to complete a review and that CFIUS subsequently has occasionally encouraged withdrawals. A voluntary notification system accompanied by mandatory conditions where such voluntary notification is withdrawn seems wholly inconsistent.

A potential solution to this inconsistency would be to make all notifications to CFIUS mandatory.[263] Past proposals have called on Congress to require all U.S. companies involved in national security-related business that plan a merger or acquisition with a foreign entity to notify CFIUS of the transaction.[264] The strongest argument in favor of mandatory filings is that review of a transaction after it has been completed may mean "that national security has already been compromised."[265] Any CFIUS committee member is permitted to submit notice of a proposed or completed transaction for review when it becomes aware of a transaction and a foreign entity has failed to file with CFIUS.[266] No member agency has ever done so, however, and instead, member agencies have chosen to notify the Treasury of the acquisition so that the Treasury can contact the company and encourage it to notify.[267] In addition, there have been some instances where CFIUS was completely unaware of a transaction for a substantial period of time after the acquisition was complete, prompting concerns about whether national security was compromised over this period.[268]

There are, however, good reasons for opposing a mandatory filing system.[269] First, it is highly uncommon for CFIUS to be unaware of a proposed or pending transaction that threatens national security because it receives a great deal of information about such transactions from government agencies that are not members of CFIUS.[270] The infrequency in which CFIUS is unaware of potentially threatening foreign acquisitions must be kept in mind when weighing the potentially significant damage to the U.S.'s investment environment that a mandatory filing requirement may have.[271] Such a requirement undermines the government's goal of promoting open investment,

---

262. *Id.* at 48.

263. BUREAU OF EXP. ADMIN., U.S. DEP'T OF COMMERCE, IMPROVEMENTS ARE NEEDED IN PROGRAMS DESIGNED TO PROTECT AGAINST THE TRANSFER OF SENSITIVE TECHNOLOGIES TO COUNTRIES OF CONCERN 54 (2000), *available at* http://www.oig.doc.gov/oig/reports/2000/BIS-IPE-12454-03-2000.pdf.

264. *Id.* at 55.

265. *Id.* at 54.

266. GAO, *supra* note 12, at 8-9.

267. *Id.* at 9.

268. *See* BUREAU OF EXP. ADMIN., *supra* note 263, at 54-55 (describing the times in which foreign entities who purchased sensitive technology did not file for an extended period of time and CFIUS's monitoring system did not discover the transaction).

269. *See* Robertson, *supra* note 32.

270. *Id.*

271. *Id.*

a policy that helps to ensure economic growth and a higher standard of living in the United States.[272] Second, mandatory filings would lead to a sharp increase in the number of filings, potentially overwhelming governmental resources and resulting in less thorough reviews.[273] Lastly, the President retains the right to void any transaction that was not reviewed by CFIUS, which provides an additional incentive for foreign entities to file in the first place.[274] In the end, a cost-benefit analysis of implementing mandatory filings weighs in favor of the status quo.

CONCLUSION

As discussed previously, the failed CNOOC-Unocal merger reinvigorated a protectionist fervor that has led to a number of proposals to amend CFIUS and alter the structure and procedures of CFIUS. While relatively minor procedural changes to Exon-Florio, such as an optional review extension and making CFIUS's review process more transparent to Congress, are supported by logical and beneficial justifications, most of the other proposals are not so fortunate.

Proposals to expand the definition of national security, authorize Congress to override a presidential decision, switch the chairmanship of CFIUS, and require mandatory filings and interim protections are all proposals that would alter the substantive framework of Exon-Florio and CFIUS. This would likely decrease foreign investment in the United States—investment that benefits the United States by raising labor productivity, income, and employment.[275] Whether members of Congress like it or not, the United States' economic security is intertwined with China and depends upon free market policies.[276] As former Federal Reserve Chairman Alan Greenspan stated, "[I]t is in our interest and that of the global economy that China continue to progress toward becoming a more market-based, productive, and dynamic economy.... For our part, it is essential that we not put that outcome, or our future, at risk with a step back into protectionism."[277]

---

272. *Id.*

273. BUREAU OF EXP. ADMIN., *supra* note 263, at 56.

274. Robertson, *supra* note 32.

275. Mack Ott, *Foreign Investment in the United States*, CONCISE ENCYCLOPEDIA OF ECON., http://www.econlib.org/LIBRARY/Enc/ForeignInvestmentintheUnitedStates.html (last visited Dec. 12, 2006).

276. Dorn, *supra* note 8, at 1.

277. *Id.* at 8.

A MODERN DAY EXODUS: INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW IMPLICATIONS OF ISRAEL'S WITHDRAWAL FROM THE GAZA STRIP

Marc S. Kaliser*

INTRODUCTION

Israel's withdrawal from the Gaza Strip in September 2005 ended thirty-eight years of disputed Israeli control of and presence in the territory.[1] Moreover, the withdrawal represented an important change in the geopolitical stability of the Middle East.[2] Israel's exit affected both Israeli citizens, many of who lived in settlements in the Gaza Strip, and Palestinians, who primarily inhabit the territory.[3]

Various alleged human rights law and humanitarian law violations, mainly against Israel, arose at the same time as Israel's withdrawal plan commenced. Since it relinquished its power and control over the Gaza Strip and is subsequently no longer the governmental authority in the territory, Israel contends that it owes no legal obligations to the Palestinians in Gaza.[4] Palestinians and various non-governmental organizations contend that Israel still owes certain duties and obligations under international law despite its withdrawal.[5]

Historical and religious struggles between Jews and Zionists, on one hand, and Palestinians and Arabs, on the other, date back for centuries.[6] This

---

* J.D. candidate, May 2007. B.A., Univ. of Richmond, 2003. Recipient, Indiana International & Comparative Law Review Award, 2006. The author thanks Prof. George E. Edwards, Carl M. Gray Prof. of Law, Indiana Univ. School of Law at Indianapolis; Dr. Frank E. Eakin Jr., Univ. of Richmond; and Mr. Brian Onufrychuk, B.A., Univ. of Richmond, 2004, for their assistance with this Note.

1. State of Isr., *Exit of IDF Forces from the Gaza Strip Completed* (Sept. 12, 2005), http://www.mfa.gov.il/MFA/Government/Communiques/2005/ (follow "Exit of IDF Forces from the Gaza Strip completed" hyperlink) [hereinafter *Exit of IDF*].

2. *See* Assoc. Press, *Gazans Celebrate, Take over Former Settlements* (Sept. 12, 2005), http://www.msnbc.msn.com/id/9279728/page/2/ [hereinafter *Gazans Celebrate*].

3. *See generally* MINISTRY OF FOREIGN AFFAIRS, STATE OF ISR., ISRAEL'S DISENGAGEMENT PLAN RENEWING THE PEACE PROCESS (2005), *available at* http://www.mfa.gov.il/NR/rdonlyres/23EFC707-AEBA-4195-BB90-B6BA8AB616FF/0/disengagement2.pdf [hereinafter DISENGAGEMENT PLAN].

4. DARRYL LI & YEHEZKEL LEIN, B'TSELEM, ACT OF VENGEANCE ISRAEL'S BOMBING OF THE GAZA POWER PLANT AND ITS EFFECTS 30 (2006) [hereinafter ACT OF VENGEANCE]; *see* DISENGAGEMENT PLAN, *supra* note 3, at 24.

5. *See* ACT OF VENGEANCE, *supra* note 4, at 30-32.

6. The Israeli-Palestinian conflict can be traced to the Zionist movement, a Jewish nationalist ideology, of the late nineteenth and early twentieth century. THOMAS FRIEDMAN, FROM BEIRUT TO JERUSALEM 13-14 (1989). Jews from all over the world amassed in Palestine,

Note, however, focuses exclusively on the Israeli-Palestinian conflict—the ongoing conflict between Israelis and Palestinians over the land of Palestine—since the creation and independence of Israel.[7] It seeks objectivity and accuracy rather than advocacy and opinion regarding the sensitive issues surrounding the Israeli-Palestinian conflict and international law in the Gaza Strip.

This Note seeks to raise awareness of the various alleged human rights violations that have occurred or are occurring in connection with Israel's withdrawal from the Gaza Strip. Various legal instruments and principles exist to protect those involved in the Gaza situation and to remedy violations of international law. Conversely, this Note also serves to remind states of their international legal obligations, as well as the United Nations, the preeminent international organization, of its purpose and role in the international community.

Part One of this Note focuses on the Gaza Strip and provides a brief history of the Israeli-Palestinian conflict since the creation of Israel. Knowledge of this history provides context for the importance of the Gaza Strip to the Israelis, Palestinians, and the region. Part One then describes the birth of Israel and various wars involving the Gaza Strip.

Part Two explains the history of Israeli legal authority in the Gaza Strip. This includes how the Gaza Strip came under Israeli control, the framework for Israeli legal authority, and the transition of power to the Palestinians.

Part Three begins with an overview of the various sources of international law. It continues by identifying and exploring the various sources and forms of international human rights law and international humanitarian law applicable to the situation in the Gaza Strip. Part Three examines six major international legal instruments: the United Nations Charter; the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Guiding Principles on Internal Displacement; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

Part Four surveys the various international human rights law and international humanitarian law claims arising from the withdrawal of Israeli control and presence in the Gaza Strip. This part also examines the forced evacuation and displacement of Israeli citizens from the Gaza Strip. Non-governmental organizations and the media reported most of these human rights claims. Part Four examines these claims in the context of Israeli and Palestinian international law obligations, paying particular attention to their respective international law obligations and any potential violations of these obligations.

Part Five concludes with recommendations for the present situation in Gaza. Ultimately, both Israel and the Palestinian Authority are bound by international law to ensure that human rights are recognized and protected for

---

their believed Biblical homeland, and pushed for the creation of a Jewish state. *Id.*

7. May 14, 1948, marked the creation of the State of Israel and its independence. MARK TESSLER, A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT 269 (1994).

all peoples in the Gaza Strip.

PART ONE: A BRIEF HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT SINCE 1948 AS RELATED TO THE GAZA STRIP

The modern day Israeli-Palestinian conflict does not represent a "struggle between good and evil," but instead embodies "a confrontation between two peoples who deserve recognition and respect, neither of whom has a monopoly on behavior that is either praiseworthy or condemnable."[8] Under this approach, the modern day Israeli-Palestinian conflict is not a continuation of some "ancient blood feud."[9] Rather, the clash includes legitimate and legally-relevant competing interests between Israel and the Palestinian Authority. The most notable interests include Palestinian statelessness and lack of international recognition[10] versus Israeli state security and sovereignty in the hostile Middle East.[11]

A. The Creation of the State of Israel

Israel declared its independence on May 14, 1948.[12] The United States immediately recognized Israel's statehood,[13] as did the larger international community through the United Nations,[14] but others expressed discontent. The day after Israel's independence, Egypt, Jordan, Iraq, and Syria attacked Israel.[15] The primary reason for the attack stemmed from international law: leaders of

---

8. *Id.* at xii.

9. *Id.* at 1.

10. The international community does not recognize Palestine as a state. Adrien Katherine Wing, *The Legal Foundations of Peace and Prosperity in the Middle East: The Palestinian Basic Law: Embryonic Constitutionalism*, 31 CASE W. RES. J. INT'L L. 383, 411 (1999); Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27, 79 (1997). The Palestinian Authority does not meet all the qualifications for statehood, especially the defined territory requirement. International law mandates the following requirements for statehood: "*a*) a permanent population; *b*) a defined territory; *c*) government; and *d*) capacity to enter into relations with the other states." Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (*entered into force* Dec. 26, 1934) [hereinafter Montevideo Convention]. Tribunals have also held that no state of Palestine exists. *See, e.g.*, Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2d Cir. 1991) (holding that the Palestine Liberation Organization does not satisfy the requirements for statehood).

11. TESSLER, *supra* note 7, at xiv.

12. State of Israel Proclamation of Independence, May 14, 1948, *available in* THE ISRAEL-ARAB READER A DOCUMENTARY HISTORY OF THE MIDDLE EAST CONFLICT 125-28 (Walter Laqueur ed., 3d ed. 1976).

13. President Truman immediately recognized Israel's statehood and independence. TESSLER, *supra* note 7, at 263. This recognition contravened the recommendations of Truman's advisors, who "urged him to wait." *Id.*

14. *See id.*

15. *Id.* This war "[was] unmistakably launched by the decision of Arab governments." BERNARD LEWIS, THE MIDDLE EAST A BRIEF HISTORY OF THE LAST 2,000 YEARS 364 (1995).

surrounding states were unwilling to recognize Israel's new existence as a state in the international community.[16] The creation of Israel resulted in a mass exodus of Palestinians; Egypt, Jordan, Iraq, and Syria sought to reclaim the land for the Palestinians.[17]

Originally, the 1947 United Nations partition plan for Palestine[18] intended the Gaza Strip to be a Palestinian-Arab state coexisting with Israel;[19] however, during the ensuing war after Israel's independence, Egypt seized the Gaza Strip and the land fell under Egyptian military control.[20] Other smaller battles followed, such as the "Ten Days War," but the fighting eventually stopped.[21] By 1949, Israel signed armistice agreements with Egypt, Lebanon, Jordan, Iraq, and Syria.[22] At the time of these agreements, and as a result of the fighting, Israel controlled a territory much larger than envisioned under the Partition Plan.[23] The newly-acquired territory, which excluded the Gaza Strip,[24] became the official boundaries of Israel by authority of the armistice agreements.[25]

B. The 1967 War

Also known as the Six Day War[26] or the June War,[27] the 1967 War[28] represents another watermark in the history of the Gaza Strip. Growing regional tensions prompted the war, illustrated by minor military exchanges[29] and "mutual defense pacts" signed by some of Israel's enemies.[30] Scholars disagree on the issue of who started the war,[31] but strong arguments exist that Israel was not the aggressor.[32] Regardless, the 1967 War again pitted Egypt,

---

16. TESSLER, *supra* note 7, at 263. See Montevideo Convention, *supra* note 10, art. 1, for requirements of statehood.

17. *See* TESSLER, *supra* note 7, at 263.

18. G.A. Res. 181 (II), U.N. GAOR, 2d Sess. (Nov. 29, 1947) [hereinafter Partition Plan].

19. AN HISTORICAL ENCYCLOPEDIA OF THE ARAB-ISRAELI CONFLICT 182 (Bernard Reich et al. eds., 1996).

20. *Id.*

21. TESSLER, *supra* note 7, at 264.

22. *Id.*

23. *Id.*

24. Gaza remained under Egyptian control. *Id.* at 264-65.

25. *Id.*

26. BENNY MORRIS, RIGHTEOUS VICTIMS A HISTORY OF THE ZIONIST-ARAB CONFLICT, 1881-2001, at 313 (2001). In dramatic fashion, Israel handed crushing defeats to Egypt, Jordan, Syria, and Iraq in "six days." LEWIS, *supra* note 15, at 365.

27. TESSLER, *supra* note 7, at 378.

28. For more history and information on the 1967 War, see generally ProCon.org, 1967 War, http://www.israelipalestinianprocon.org (follow 1967 War hyperlink) (last visited Jan. 30, 2007).

29. TESSLER, *supra* note 7, at 378.

30. *Id.* at 378-79.

31. LEWIS, *supra* note 15, at 364.

32. ALAN DERSHOWITZ, THE CASE FOR ISRAEL 91-92 (2003). "Although Israel fired the first shots . . . Egypt, Syria, and Jordan started the war." *Id.* at 91.

Syria, Jordan, and Iraq against Israel.[33]

The acquisition of the Gaza Strip by Israel proved to be the most important result of the 1967 War. During the course of the war, Israel captured the Gaza Strip, among other territories, from Egypt.[34] Israel's acquisitions changed the geopolitical stability of the region.[35] The 1967 War resulted in Israeli control of all the land originally allocated for the Palestinians under the 1947 Partition Plan.[36] The war also led to the establishment of Israeli settlements in the "occupied territory" of the Gaza Strip.[37]

C. Intifada *of 1987-1993*

In the twenty years after the 1967 War, the Gaza Strip grew more volatile.[38] Spontaneous and uncoordinated resistance by the Palestinians quickly transformed into a rebellion—the *intifada*.[39] Literally translated as "shaking off,"[40] the *intifada* began on December 8-9, 1987, two decades after Yasser Arafat called for a Palestinian revolt.[41] Instead of an armed rebellion, the *intifada* materialized into a "persistent campaign of civil resistance, with strikes and commercial shutdowns, accompanied by violent (though unarmed) demonstrations against the [Israeli] occupying forces."[42]

The goals of the *intifada* were "to wage a holy war against the Zionist enemy, to oppose any peace efforts, and to convert the Arab states to the way of Islam and to draw them into the conflict."[43] The *intifada* represented the Palestinians' perceived "war for independence from Israel."[44] Palestinian nationalist aspirations for the creation of a Palestinian state drove the *intifada*.[45] The Palestinians' frustration grew from alleged human rights abuses[46] by Israel

---

33. *Id.*

34. TESSLER, *supra* note 7, at 399.

35. *See id.*

36. *Id.* at 401-02; see Partition Plan, *supra* note 18, for details on the territory originally intended for the Palestinians.

37. COMM. ON THE EXERCISE OF THE INALIENABLE RIGHTS OF THE PALESTINIAN PEOPLE, UNITED NATIONS, ISRAELI SETTLEMENTS IN GAZA AND THE WEST BANK (INCLUDING JERUSALEM) THEIR NATURE AND PURPOSE 1 (1982) [hereinafter ISRAELI SETTLEMENTS].

38. Emile A. Nakhleh, a Palestinian-American scholar, described the Gaza Strip as "a pressure-cooker ready to explode." TESSLER, *supra* note 7, at 683.

39. *Id.* at 677.

40. *Id.*

41. MORRIS, *supra* note 26, at 561. Actually, an accident involving an Israeli tank, not a deliberate act, may have ignited the *intifada*. TESSLER, *supra* note 7, at 677.

42. MORRIS, *supra* note 26, at 561. "The stone and, occasionally, the Molotov cocktail and knife were [the *intifada's*] symbols and weapons, not guns and bombs." *Id.*

43. *Id.* at 577.

44. ARYEH SHALEV, THE INTIFADA, CAUSES AND EFFECTS 16 (1990).

45. MORRIS, *supra* note 26, at 562.

46. Some of the alleged human rights abuses resulting from Israeli government policy included deportations, press censorship, denial of access to education, forced curfews, and the demolition of homes. TESSLER, *supra* note 7, at 677.

and deplorable living conditions in the Gaza Strip.[47]

A marked change in Palestinian attitude emerged during the *intifada*. Previously adhering to a passive resistance mentality, Palestinians now followed the concept of *sumud*, or steadfastness.[48] From *sumud* emerged a new assertiveness among the Palestinians that produced a more determined, militant, and desperate Palestinian people.[49] New pro-Palestinian organizations, notably the Unified National Leadership Uprising (UNLU)[50] and Hamas,[51] cast influence over Gaza.[52] Coexistent with *sumud*, Palestinians now perceived themselves as alone in the world and only able to rely on themselves.[53] Thus, the *intifada* "change[ed] the relationship of Palestinians with each other and with the world outside in the occupied territories,"[54] promulgating a Palestinian perception of worldwide abandonment.[55]

PART TWO: THE GAZA STRIP—ADMINISTRATION, AUTHORITY, AND LAW IN THE OCCUPIED TERRITORY

After Israel officially assumed control of the Gaza Strip,[56] authoritative power in the land vested primarily in the occupying Israeli military government.[57] Gaza, as a municipality,[58] was the only such kind of government in the Strip.[59] Theoretically, the municipal government derived its authority

---

47. Such conditions included poverty, hatred, violence, oppression, poor sanitation, drugs, and crime. *Id.* at 683.

48. *Id.* at 684.

49. *Id.* at 685.

50. The UNLU emerged as an underground organization with the purpose of "guiding the evolution of the intifada." *Id.* at 689. The UNLU communicated by distributing leaflets, called *bayanat*, that were printed in secrecy at night. *Id.*

51. *Harakat al-Muqawama al-Islamiyya* (Hamas), the Islamic Resistance Movement, worked to sustain and amplify the *intifada*. *Id.* at 694. Hamas, meaning "zeal" or "ardor" in Arabic, was led in part by Dr. Abd al-Aziz al-Rantisi, a professor at Islamic University in Gaza. *Id.* Embedded in Hamas's ideology is the notion that Palestine is an Islamic land. *Id.* at 695. The main goal of Hamas is the destruction of Israel. MORRIS, *supra* note 26, at 578. Hamas is listed on the U.S. Department of State List of Designated Foreign Terrorist Organizations (FTOs). Bureau of Public Affairs, U.S. Department of State (Oct. 11, 2005), *available at* http://www.state.gov/s/ct/rls/fs/37191.htm. Hamas recently won a large majority of seats in the Palestinian parliamentary elections and became the controlling party. Sarah el Deeb, Associated Press, *Hamas Win Unsettles Peace Process*, (Jan. 26, 2006), *available at* http://www.breitbart.com/news/2006/01/26/D8FCCU705.html.

52. TESSLER, *supra* note 7, at 694-95.

53. *Id.* at 684. "'Reliance on outside help has proven futile,'" commented one Palestinian. *Id.*

54. ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 433 (1991).

55. TESSLER, *supra* note 7, at 684.

56. *Id.* at 399.

57. EMILE A. NAKHLEH, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, THE WEST BANK AND GAZA TOWARD THE MAKING OF A PALESTINIAN STATE 15 (1979).

58. A municipality is the "highest level of indigenous political institution[ ] in the occupied areas." *Id.* at 1.

59. *Id.* at 15.

from an old British municipal law: the Palestine (British) municipal law of 1934.[60] In reality, however, the Israeli military ruled the territory and law came in the form of military directives.[61] Control often manifested itself in the form of military orders directed from Israeli military headquarters.[62] A military commander, military-appointed mayor, or governor implemented the orders.[63]

The Israeli municipal framework had two levels of administration: civil and military.[64] The civil administration ran agencies necessary to ensure the stability of the social infrastructure, such as departments of health, education, and transportation.[65] Israeli military influence still reached the civil administration, however, because Israeli officers, who were attached to the military, often ran these civil departments.[66] All policies devised and actions taken by the civil administration required military approval.[67] Thus, the civil administration served as an extension of Israeli military authority and had no real power or executive authority independent of the military.

The municipal government received much criticism. Extreme poverty in Gaza ran rampant.[68] The municipal government also experienced sharp fiscal restrictions that hindered both fiscal planning and problem solving.[69] These problems affected other areas, such as urban development, industrial development, and educational planning.[70]

Gaza's chronic troubles can be attributed to three main conditions: (1) constraints, such as political, psychological, and economic constraints; (2) outdated laws, such as the British municipal law of 1934; and (3) vague sources of legal authority.[71] Nevertheless, Gaza's problems seemed to emanate primarily from the military's control over the other branches of the municipality:[72] a questionable form of legal authority.[73]

Israeli military control in Gaza presented many legal problems. For instance, municipal officials frequently complained that Israeli military

---

60. *Id.* at 7.
61. *Id.* at 17.
62. *Id.* at 15.
63. *Id.*
64. *Id.* at 9.
65. *Id.*
66. *Id.* The civil officers were still "subject to the rules, regulations, and policies of the military occupation." *Id.*
67. *Id.* at 2.
68. *Id.* at 18.
69. For instance, the civil administration could not levy taxes without military approval. *Id.* Such restraints rendered the government ineffective without the needed military approval. *See id.* at 18.
70. *Id.* at 18.
71. *Id.* at 23.
72. Most officials agreed that the military control was the source of Gaza's problems. *Id.* at 18. *But see* DERSHOWITZ, *supra* note 32, at 158-62.
73. NAKHLEH, *supra* note 59, at 18. Israeli government control in Gaza was "based on a mysterious combination of . . . [British] mandate law, military orders, and the personal temperament of local or regional military governors." *Id.* at 23.

interference undermined their legal authority.[74] This interference blurred the line between legitimate legal authority and "whim and temperament" control by the military.[75] Also, the military often interpreted the law.[76] This resulted in the military determining legal issues—quite a dangerous prospect.[77]

PART THREE: INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO ISRAEL AND THE PALESTINIAN AUTHORITY REGARDING THE CHANGE OF POWER IN THE GAZA STRIP

Before examining the conditions and allegations that arose from Israel's withdrawal from the Gaza Strip, the relevant international law must be understood. Both international human rights law and international humanitarian law are applicable to the situation in Gaza. Various instruments and principles in these bodies of law are identified and examined below.

A. International Law

Public international law "governs relationships principally between and among sovereign states as international actors."[78] The modern day definition of international law includes other international actors, such as intergovernmental organizations and individuals, as objects and subjects of international law.[79] International human rights law and international humanitarian law are subsets of public international law.[80]

There are three traditional sources of international law: (1) treaties, (2)

---

74. *Id.* at 18.

75. *Id.*

76. The military would provide the "correct" interpretation of legal questions, often not serving the local government's interests. *Id.*

77. *See id.*

78. George E. Edwards, Expert Witness Affidavit of Professor George E. Edwards on International Human Rights Law, International Humanitarian Law, and International Criminal Law, United States of America v. David M. Hicks, U.S. Military Commissions, Guantanamo Bay, Cuba, para. 1.1 (Nov. 14, 2005) (unpublished affidavit, on file with the Indiana University School of Law at Indianapolis Program in International Human Rights Law Library) [hereinafter Edwards Affidavit]. Public international law is also commonly referred to as "the law of nations" and "international law." *Id.* Private international law, on the other hand, is defined as "[t]he intellectual discipline concerning the international interface of municipal legal systems." MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 767 (3d ed. 2006). Private international law involves regulating private disputes with the legal system of a particular state, usually entailing a conflict of laws component. *See id.* Private international law is outside the scope of this Note.

79. Mark W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61, 61, 73 (1984); JANIS & NOYES, *supra* note 78, at 368. "[M]ore modernly, [international law], embrac[es] not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes)." BLACK'S LAW DICTIONARY 835 (8th ed. 2004).

80. Edwards Affidavit, *supra* note 80, para. 1.4.

customary international law, and (3) general principles of law.[81] Additionally, equity serves as a non-traditional source of international law that tribunals often synthesize with traditional sources in settling disputes.

1. Treaties

The Vienna Convention on the Law of Treaties,[82] as the foremost authority on treaty law,[83] defines "treaty" as "an international agreement concluded between States in written form and governed by international law."[84] While it is possible for non-state actors to enter into treaties,[85] the Vienna Convention only applies to treaties between state actors.[86] Treaties legally bind states parties under international law.[87] Treaties are akin to contracts under *pacta sunt servanda*,[88] where states parties are legally obligated to abide by the terms of the treaty.[89]

A state's express consent to be legally bound to a treaty activates the binding effect of this source of international law.[90] A state becomes bound when it complies with one of the acceptable methods recognized in the Vienna Convention:[91] (1) signature;[92] (2) exchange of instruments;[93] (3) ratification, acceptance, or approval;[94] and (4) accession.[95] Once a state becomes bound to a treaty, it becomes a "state party" to that treaty.[96] If a state signs but does not ratify, accept, or approve a treaty, the state is not legally bound to it and the

---

81. *Id.* para. 6. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, recognizes these sources as the three traditional sources of international law. Statute of the International Court of Justice art. 93, § 1, June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter ICJ Statute]. The ICJ also considers "[j]udicial decisions and the teachings of the most highly qualified publicists of the various nations[] as subsidiary means for the determination of rules of law." *Id.* art. 93, § 1(d).

82. Vienna Convention on the Law of Treaties, May, 23, 1967, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980) [hereinafter Vienna Convention]. Treaties are also know as "international agreements," "conventions," "covenants," "protocols," "charters," or "pacts." Edwards Affidavit, *supra* note 80, para. 14.3.

83. DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS LAW, POLICY, AND PROCESS 19 (3d ed. 2001).

84. Vienna Convention, *supra* note 84, art. 2, § 1(a).

85. *See id.* art. 3.

86. *Id.* art. 1.

87. *See id.*

88. The Latin translation of *pacta sunt servanda* is "agreements must be kept." BLACK'S LAW DICTIONARY 1140 (8th ed. 2004). The legal definition is "[t]he rule that agreements and stipulations, esp. those contained in treaties, must be observed." *Id.*

89. Vienna Convention, *supra* note 84, art. 26. "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." *Id.*

90. *See id.* art. 2, § 1

91. *Id.* art. 11.

92. *Id.* art. 12.

93. *Id.* art. 13.

94. *Id.* art. 14.

95. *Id.* art. 15.

96. *Id.* art. 1(g).

state's legal obligations are not as stringent;[97] the state merely must "refrain from acts which would defeat the object and purpose of [the] treaty."[98]

2. *Customary International Law*

Customary international law, a second source of international law,[99] includes unwritten rules or principles of law that exist in the international legal arena.[100] These rules and principles become law through their widespread international acceptance as law.[101] A customary international law norm binds all states unless a state has "expressly and persistently objected" to it.[102] While treaty-based law binds states parties based on express consent, customary international law binds states based on implicit consent.[103] This is an important distinction because, while treaties bind only parties, customary international law binds any international actor.[104] Thus, customary international law projects a wider scope than treaty-based international law.

Two elements must exist for a rule or norm to rise to the level of customary international law: state practice and opinio juris.[105] In other words, a state must practice the norm and follow it from a sense of legal obligation.[106] Satisfaction of the state practice prong must, at the very least, show: (a) the duration of the state practice, (b) the uniform and consistent application of the practice, (c) the generality and empirical extent of the practice, and (d) the conformity of state practice to international standards.[107] Courts look to the widespread acceptance of international law instruments and various judicial decisions as evidence of state practice.[108]

Opinio juris[109] is a "psychological element that requires an examination of a state's motives in engaging in a particular act or practice."[110] To satisfy this prong, a state must show that it is practicing the norm out of a sense of legal obligation, not merely convenience or coincidence.[111] To satisfy opinio juris, the state must show: (a) that there is a legal nature to the rule protecting

---

97. *See* Edwards Affidavit, *supra* note 80, para. 14.5.

98. Vienna Convention, *supra* note 84, art. 18(a).

99. ICJ Statute, *supra* note 81, art. 38, § 1(b).

100. Edwards Affidavit, *supra* note 80, para. 15.2.

101. WEISSBRODT ET AL., *supra* note 85, at 22.

102. *Id.*

103. JANIS & NOYES, *supra* note 78, at 92.

104. The binding effect of customary international law is contingent upon the "persistent objector" rule. *Supra* note 102 and accompanying text.

105. WEISSBRODT ET AL., *supra* note 85, at 22.

106. *Id.*

107. Edwards Affidavit, *supra* note 80, para. 15.3.

108. *See* WEISSBRODT ET AL., *supra* note 85, at 22; Edwards Affidavit, *supra* note 80, at 26 n.21.

109. The full phrase *opinio juris sive necessitatis* literally means "opinion that an act is necessary by rule of law." BLACK'S LAW DICTIONARY 1125 (8th ed. 2004).

110. Edwards Affidavit, *supra* note 80, para. 15.4.

111. *See* JANIS & NOYES, *supra* note 78, at 101.

the right, (b) that the right is international in context, and (c) that the state is aware of the right.[112]

It is possible for the rules and norms in a treaty to also exist independently in the field of customary international law.[113] For instance, many of the rules and norms contained within the Vienna Convention on the Law of Treaties have risen to the level of customary international law.[114] In this regard, parts of the Vienna Convention actually represent a codification of customary international law.[115] This has no effect on the treaty itself; customary international law exists parallel to treaty law.[116] For example, a state party to the Vienna Convention would be bound to follow the express treaty norms and the parallel customary international law norms, while a non-state party would be bound to follow only the customary international law norms.[117]

A special type of customary international law, jus cogens,[118] elevates a customary international law norm to a higher status.[119] A jus cogens norm is non-derogable and can only be replaced by a subsequent jus cogens norm.[120] Thus, a jus cogens norm can trump a contrary norm contained in a treaty *contra bonos mores*.[121] From this, it follows that jus cogens sits atop the hierarchy of international law.[122] Examples of jus cogens norms include the prohibition of torture or other cruel, inhuman, or degrading treatment or punishment,[123] the prohibition of slavery,[124] and, more recently, the prohibition of the execution of

---

112. Edwards Affidavit, *supra* note 78, at 26 n.22.

113. *Id.* para. 15.6.

114. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. LEXIS 2, 64 (Sept. 25, 1997); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Part 3 – International Agreements (1987).

115. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. LEXIS 2, 130 (Sept. 25, 1997); Edwards Affidavit, *supra* note 80, para. 14.7.

116. Edwards Affidavit, *supra* note 78, para. 15.6.

117. *Id.* para. 14.7.

118. Jus cogens literally means "compelling law." BLACK'S LAW DICTIONARY 876 (8th ed. 2004). Jus cogens is also known as a "peremptory norm" or "peremptory rule of international law." WEISSBRODT ET AL., *supra* note 85, at 23. The Vienna Convention recognizes jus cogens and defines it as "a peremptory norm of general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, *supra* note 84, art. 53. Jus cogens stemmed from the natural law. JANIS & NOYES, *supra* note 78, at 138.

119. Edwards Affidavit, *supra* note 80, para. 15.8.

120. *See* WEISSBRODT ET AL., *supra* note 85, at 23; Edwards Affidavit, *supra* note 80, para. 15.8.

121. Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 572 (1937). *Contra bonos mores* literally means "against good morals." BLACK'S LAW DICTIONARY 341 (8th ed. 2004).

122. Prosecutor v. Furundzija, Case IT-95-17/1, Appeals Chamber Ruling (2002).

123. WEISSBRODT ET AL., *supra* note 85, at 23; Edwards Affidavit, *supra* note 80, para. 15.8.

124. WEISSBRODT ET AL., *supra* note 85, at 23; Edwards Affidavit, *supra* note 80, para. 15.8.

minors.[125]

3. *General Principles of Law*

General principles of law serve as the last traditional source of international law.[126] This source has been defined as a "non-treaty, non-customary, and non-consensual source of international law."[127] When examining international law issues, treaties and customary international law will be consulted first, and then, if gaps still need filling, general principles of law are consulted.[128] The rationale behind general principles of law is that "some legal principles are so general or fundamental that they are to be found in all or nearly all legal systems."[129] If so, these principles should be used to fill in the gaps of international law.[130]

A general principle of law can also derive from "unperfected" treaties (e.g. one never entered into force) or "unperfected" customary international law (e.g. where the state practice element is not met).[131] Most general principles of law deal with procedural issues.[132] Examples include the right to a fair trial and the right of assistance of counsel.[133]

4. *Equity*

Although a non-traditional source of international law, international tribunals have used equitable principles as a basis in determining issues of international law.[134] The Statute of the International Court of Justice recognizes equity as a legitimate source to decide cases.[135] But, all parties to a particular case must agree to allow the International Court of Justice (ICJ) to apply equitable principles to a particular case.[136] In the more than eighty combined years that the ICJ and the Permanent Court of International Justice (PCIJ) have

---

125. Michael Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 para. 85 (2003).

126. ICJ Statute, *supra* note 83, art. 38, § 1(c).

127. Edwards Affidavit, *supra* note 80, para. 16.2. For an in-depth look at general principles of law, see M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law,"* 11 MICH. J. INT'L L. 768 (1990).

128. *See* Edwards Affidavit, *supra* note 80, para. 16.2.

129. JANIS & NOYES, *supra* note 78, at 137.

130. *See* Case 155/79, AM & S Eur. Ltd. v. Comm'n of the Eur. Cmtys., 1982 E.C.R. 1575.

131. Edwards Affidavit, *supra* note 80, para. 16.2.

132. *See id.* paras. 16.3-16.4.

133. *Id.* para. 16.4.

134. JANIS & NOYES, *supra* note 78, at 154.

135. ICJ Statute, *supra* note 83, art. 38, § 2. "[Article Thirty-Eight] shall not prejudice the power of the Court to decide a case *ex aequo et bono* if the parties agree thereto." *Id. Ex aequo et bono* translates as "[a]ccording to what is equitable and good." BLACK'S LAW DICTIONARY 600 (8th ed. 2004).

136. ICJ Statute, *supra* note 83, art. 38, § 2.

existed,[137] no case has produced such an agreement by the parties.[138] Nevertheless, international tribunals have incorporated equitable principles into adjudication without the express consent of the parties.[139]

B. International Human Rights Law—Applicable Sources and Instruments

The notion of universal human rights materialized in the international community around the same time as the creation of Israel.[140] The brutality of the Nazi regime during World War II and the horrors of the Holocaust—where the Nazis exterminated an estimated six million Jews and six million other politically unpopular European peoples—outraged and shocked the international community.[141] The Japanese military also committed inhumane acts during World War II.[142] During and after World War II, world leaders spoke out against these and other horrors.[143] For instance, President Franklin D. Roosevelt remarked on the importance of promoting "peace and protection of human rights" for the future.[144] Hence, international human rights law was born.

International human rights law, a subset of public international law, consists of multi-lateral treaties, customary international law, and general principles of law.[145] Initially, international human rights law included only those rights recognized in the International Bill of Rights.[146] International human rights law has expanded; it now includes all "norms in place to protect individuals and groups from breaches of basic dignity, respect, and humanity

---

137. The Permanent Court of International Justice (PCIJ) preceded the ICJ. JANIS & NOYES, *supra* note 78, at 28. The PCIJ is now defunct. *See* WEISSBRODT ET AL., *supra* note 83, at 11.

138. JANIS & NOYES, *supra* note 78, at 28-29.

139. *See id.* at 29. The ICJ (and the PCIJ before it) has adjudicated cases using equitable principles without the agreement of all the parties. *See, e.g.*, North Sea Continental Shelf (F.R.G. v. Neth.), 1969 I.C.J. 3, 48 (Feb. 20); Diversion of Water from Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 76-77 (June 28) (individual opinion of Judge Hudson).

140. "The modern human rights movement began during World War II." WEISSBRODT ET AL., *supra* note 85, at 6. "Modern day international human rights law was born in the era immediately following World War II, when pre-existing human rights norms were incorporated into positive international instruments and heralded as inviolable by the international community of nations." Edwards Affidavit, *supra* note 80, para. 22.3.

141. WEISSBRODT ET AL., *supra* note 85, at 6.

142. One of the worst atrocities, the "Rape of Nanking," occurred in 1937, where the Japanese army killed at least 43,000 civilians and raped thousands of women. *Id.*

143. President Franklin D. Roosevelt, in his 1941 State of the Union address, outlined his "four essential human freedoms" vision of a future where human rights are ensured. *Id.* Winston Churchill also supported a future of human rights through the Atlantic Charter. *Id.* at 6-7.

144. *Id.* at 6.

145. Edwards Affidavit, *supra* note 80, para. 22.1.

146. WEISSBRODT ET AL., *supra* note 85, at 28. See *infra* note 173 and accompanying text for a description of the International Bill of Rights.

. . . [that are] afforded to all persons without regard for the identity of the victims or abuse perpetrators."[147] International human rights law protects all persons; it "must be abided by at all times in all places by all" international actors.[148]

1. United Nations Charter

The United Nations replaced the League of Nations as the preeminent intergovernmental world organization.[149] The Charter is the constitution of the United Nations and "is both the most prominent treaty and contains seminal human rights provisions."[150] Initially, the United Nations Charter codified existing human rights norms and elevated them to the international level.[151] The Charter expressly recognizes human rights[152] and the importance of protecting such rights among all peoples.[153] The Charter, and the rights it seeks to uphold, centers around innate human dignity.[154] Thus, the United Nations and its member states strive to promote and protect human rights.[155]

Article Fifty-Five obliges member states to promote "higher standards of living, full employment, and conditions of economic and social progress and development."[156] Article Fifty-Six reiterates that it is an obligation of membership for states to work jointly and separately to achieve the purposes set out in Article Fifty-Five.[157]

Any "peace-loving" state may apply for United Nations membership by submitting an application pursuant to Article Four of the Charter.[158] Next, the Security Council must recommend the applicant for admission and the General Assembly must vote to admit the state.[159] The applicant-state must then accept

---

147. Edwards Affidavit, *supra* note 80, para. 22.1.

148. *Id.*

149. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 207 (4th ed. 2003). Preliminary negotiations among the United States, Great Britain, the Soviet Union, and later with China, occurred in 1944 at Dumbarton Oaks in Washington, D.C. WEISSBRODT ET AL., *supra* note 83, at 7. The United Nations was officially created in San Francisco in 1945. *Id.* at 8. For more information on the founding of the United Nations, see Richard Edis, *A Job Well Done: The Founding of the United Nations Revisited*, 6 CAMBRIDGE REV. INT'L AFF. 29 (1992).

150. WEISSBRODT ET AL., *supra* note 85, at 17.

151. *See generally* U.N. Charter (including provisions for many human rights norms).

152. "WE THE PEOPLES OF THE UNITED NATIONS DETERMINED . . . to reaffirm faith in fundamental human rights . . . ." *Id.* pmbl.

153. *Id.*; WEISSBRODT ET AL., *supra* note 85, at 8-9.

154. U.N. Charter pmbl.

155. "The Purposes of the United Nations are: . . . To achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms . . . ." *Id.* art. 1, para. 3. "[T]he United Nations shall promote: . . . universal respect for, and observance of, human rights and fundamental freedoms for all . . . ." *Id.* art. 55.

156. *Id.* art. 55(c).

157. *Id.* art. 56.

158. *Id.* art. 4, para. 1.

159. *Id.* art. 4, para. 2.

the obligations contained in the Charter.[160] Since the Charter is a treaty,[161] the applicant-state must become bound to it.[162] The Charter requires ratification as the means of becoming bound.[163] In exceptional circumstances, a state may "continue" or "succeed" another state's membership without having to submit an application and undergo the application process.[164]

Membership in the United Nations[165] obligates Israel to adhere to and promote the provisions of the Charter. Only states can become members of the United Nations;[166] the Palestinian Authority cannot become a member unless it obtains statehood.[167] Even if the Palestinian Authority obtains statehood, it would then need to be "peace-loving," submit an application, receive the recommendation of the Security Council and an affirmative vote by the General Assembly, and bind itself to the Charter.[168] Only then could Palestine become a United Nations member and be legally bound to uphold and promote the obligations of membership contained within the Charter.

2. *Universal Declaration of Human Rights*

In 1948, the United Nations General Assembly adopted the foundation of modern international human rights law: the Universal Declaration of Human Rights (UDHR).[169] Although not a treaty, the UDHR represented a monumental human rights law achievement and served as a precursor to subsequent human rights law treaties, declarations, and other international law instruments.[170] The norms contained in the UDHR have, however, risen to the level of customary international law and are therefore binding on all international actors.[171] Municipal law, such as United States case law, has recognized the norms in the UDHR as implicitly binding.[172] The UDHR also

---

160. *Id.* art. 4, para. 1.

161. *Supra* note 150.

162. See *supra* notes 83-89 and accompanying text for information regarding activating the binding effect of treaties.

163. U.N. Charter art. 110, para. 1.

164. See generally Michael A. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29 (1994), for an in-depth look at the continuity and state succession theories of United Nations membership. For instance, India and Russia obtained United Nations membership this way. *Id.*

165. Israel joined the United Nations on May 11, 1949. United Nations, *List of Member States*, http://www.un.org/Overview/unmember.html (last visited Jan. 30, 2007).

166. U.N. Charter art. 4, para. 1. "Membership in the United Nations is open to . . . states. . . ." *Id.*

167. Palestine is not a state. *Supra* note 10 and accompanying text.

168. U.N. Charter art. 4.

169. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR].

170. WEISSBRODT ET AL., *supra* note 85, at 9.

171. Edwards Affidavit, *supra* note 80, para. 15.6.

172. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 882-83 (2d Cir. 1980). "[T]he [United Nations] Charter precepts embodied in this Universal Declaration 'constitute basic principles of

marks the first of three fundamental documents that comprise The International Bill of Human Rights[173]—"the most authoritative and comprehensive prescription of human rights obligations that governments undertake in joining the [United Nations]."[174]

Many articles of the UDHR pertain to the situation in the Gaza Strip and the related human rights implications. Article One of the UDHR establishes a normative, yet hopeful framework.[175] Article Two addresses the UDHR's applicability to all peoples,[176] while Articles Six and Seven extend legal recognition[177] and equal protection[178] to all. Article Twenty-One provides for equal access to public services.[179]

Article Three announces the most fundamental assurance of human rights,[180] while Article Seventeen follows up with property rights assurances.[181] Article Twelve addresses privacy and family rights,[182] and Article Sixteen explicates on the meaning of protection of the family.[183] Article Thirteen recognizes freedom of movement.[184]

The UDHR also includes provisions for economic, social, and cultural rights. Article Twenty-Two recognizes these rights generally along with the

---

international law.' " *Id.* (quoting G.A. Res. 2625 (XXV), at 124, U.N. Doc. A/8082 (Oct. 24, 1970)).

173. DAVID WEISSBRODT ET AL., SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW INSTRUMENTS XI (3d ed. 2001) [hereinafter SELECTED INSTRUMENTS]. The International Bill of Human Rights contains the UDHR; the International Covenant on Economic, Social and Cultural Rights, *infra* note 202; and the International Covenant on Civil and Political Rights, *infra* note 242. WEISSBRODT ET AL., *supra* note 85, at 9. Also considered part of the International Bill of Human Rights are the Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302 (*entered into force* Mar. 23, 1976); and the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 1642 U.N.T.S. 414 (*entered into force* July 11, 1991). WEISSBRODT ET AL., *supra* note 85, at 18.

174. WEISSBRODT ET AL., *supra* note 85, at 9.

175. UDHR, *supra* note 171, art. 1. "All human beings are born free and equal in dignity and rights. . . . and should act towards one another in a spirit of brotherhood." *Id.*

176. *Id.* art. 2. "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.*

177. *Id.* art. 6. "Everyone has the right to recognition everywhere as a person before the law." *Id.*

178. *Id.* art. 7. "All are equal before the law and are entitled without any discrimination to equal protection of the law." *Id.*

179. *Id.* art. 21, para. 2. "Everyone has the right to equal access to public service in his country." *Id.*

180. *Id.* art. 3. "Everyone has the right to life, liberty and the security of person." *Id.*

181. *Id.* art. 17. "Everyone has the right to own property . . . ." *Id.* art. 17, para. 1. "No one shall be arbitrarily deprived of his property." *Id.* art. 17, para. 2.

182. *Id.* art. 12. "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence . . . ." *Id.*

183. *Id.* art. 16, para. 3. "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." *Id.*

184. *Id.* art. 13, para. 1. "Everyone has the right to freedom of movement and residence within the borders of each State." *Id.*

more specific right to social security.[185] Article Twenty-Three provides the right to work, choice of employment, and favorable working conditions.[186] Article Twenty-Five considers standard of living, health, food, clothing, medical care, social security, and welfare.[187] Article Twenty-Six includes a provision for education,[188] while Article Twenty-Seven regards cultural life.[189]

The UDHR is not a treaty; it is a resolution.[190] A resolution does not legally bind a state.[191] It does, however, still affect all member states of the United Nations.[192] Because the United Nations Charter spawned the UDHR and the General Assembly adopted it, Israel, by virtue of being a United Nations member state,[193] should follow the UDHR. Even so, the norms recognized within the UDHR that have risen to the level of customary international law bind Israel.[194]

Conversely, the Palestinian Authority would not be obliged to comply with the UDHR in the same manner as Israel because Palestine is not a United Nations member.[195] But, because the norms contained within the UDHR have risen to the level of customary international law,[196] these norms would still bind the Palestinian Authority as an international actor.[197]

The UDHR served as the impetus of two key international human rights law treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).[198]

---

185. *Id.* art. 22. "Everyone . . . has the right to social security and is entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." *Id.*

186. *Id.* art. 23, para. 1. "Everyone has the right to work, to free choice of employment, [and] to just and favourable conditions of work . . . ." *Id.*

187. *Id.* art. 25, para. 1. "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." *Id.*

188. *Id.* art. 26, para. 1. "Everyone has the right to education." *Id.*

189. *Id.* art. 27, para. 1. "Everyone has the right freely to participate in the cultural life of the community . . . ." *Id.*

190. *Supra* note 170 and accompanying text. Resolutions are not recognized by the ICJ Statute as a source of international law. *Supra* note 83. The U.N. Charter identifies resolutions as "recommendations" only. U.N. Charter art. 10.

191. *See* U.N. Charter art. 10.

192. Texaco Overseas Petroleum Co. v. Libya, paras. 83, 86, 17 I.L.M. 1 (1978). Resolutions have value in that they can help determine and shape international law. *Id.*

193. *Supra* note 165.

194. *Supra* notes 102-104 and accompanying text.

195. *Supra* notes 167-68.

196. Edwards Affidavit, *supra* note 80, para. 15.6.

197. *Supra* notes 102-104 and accompanying text.

198. Originally, the ICESCR and the ICCPR were to be one document, covering all the rights enunciated in the UDHR. WEISSBRODT ET AL., *supra* note 85, at 88. The inherent differences between civil and political rights and economic, social, and cultural rights, as well as

3. *International Covenant on Economic, Social and Cultural Rights*

Both the United Nations Charter[199] and the UDHR[200] refer to economic, social, and cultural rights broadly. Thus, a United Nations member is already obliged to promote such rights.[201] Further, the ICESCR[202] legally binds states parties to a multitude of additional and specifically-defined rights.[203] The norms contained within the ICESCR have likely risen to the level of customary international law.[204] Therefore, those norms would be binding on all states regardless of whether a particular state is a party to the ICESCR.[205] The ICESCR serves as the principal source of international economic, social, and cultural rights obligations.[206] The ICESCR embodies the "second generation" of human rights, or *egalite*.[207] Article One, however, recognizes the right of self-determination[208]—a "third generation" right, or *fraternite*.[209] Article One implies that first,[210] second, and third generation rights must coexist to reach the

---

various governments' hesitations, may have been reasons to create separate instruments. *See id.*

199. "[T]he United Nations shall promote: higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational co-operation. . . ." U.N. Charter art. 55.

200. "Everyone . . . has the right to social security and is entitled to realization . . . of the economic, social and cultural rights . . . ." UDHR, *supra* note 171, art. 22.

201. As a United Nations member, a state has the duty to promote and encourage human rights. *Supra* note 155 and accompanying text. The rights recognized within the UDHR have risen to customary international law; United Nations members, by being international actors, are implicitly bound to ensure those rights. *See supra* note 171 and accompanying text 171.

202. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR].

203. *See generally id.*

204. Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?*, 34 IND. L. REV. 1457, 1464 (2001). *But see* U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights Israel*, ¶ 13, U.N. Doc. E/C.12/1/Add.69 (Aug. 31, 2001) (where the Committee determined that basic economic, cultural, and social rights have risen to the level of customary international law).

205. *See supra* notes 102-104 and accompanying text.

206. WEISSBRODT ET AL., *supra* note 85, at 88.

207. *See* BURNS H. WESTON, *Human Rights*, *in* HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 18-19 (Richard Pierre Claude & Burns H. Weston eds., 1992).

208. "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." ICESCR, *supra* note 204, art. 1, para. 1.

209. WESTON, *supra* note 209. Third generation rights tend to be categorized as collective rights or solidarity rights. *Id.* at 19-20. "[T]he majority of these solidarity rights tend to be more aspirational than justiciable in character, enjoying as yet an ambiguous jural status as international human rights norms." *Id.* at 20. The UDHR even alludes to these rights: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in [the UDHR] can be fully realized." UDHR, *supra* note 171, art. 28.

210. See *infra* note 255 and accompanying text for a description of first generation rights.

ultimate goal—ensuring the penumbra of human rights.[211]

Some controversy has surrounded the ICESCR with regard to issues of justiciability.[212] But, real legal obligations exist for a state party.[213] A state party must "undertake to take steps[214] . . . to the maximum of its available resources,[215] with a view to achieving progressively[216] the full realization of rights recognized in the [ICESCR] by all appropriate means,[217] including particularly the adoption of legislative measures."[218] The Office of the High Commissioner for Human Rights (OHCHR)[219] assured skeptics that, despite the somewhat loose language of Article Two, a state party must take steps "within a reasonably short time" after the ICESCR enters into force.[220] Therefore, the burden rests on the state party to prove it is "taking steps" to implement the ICESCR and is making progress.[221]

The ICESCR expressly recognizes the UDHR and seeks to adhere to its

---

211. *See* ICESCR, *supra* note 204, art. 1, para. 1.

212. Some believe that civil and political rights are immediately and readily justiciable, while economic, social, and cultural rights are not. WEISSBRODT ET AL., *supra* note 85, at 88-89. See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, *Draft General Comment No. 9: The Domestic Application of the Covenant*, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998), for a response to justiciability concerns.

213. ICESCR, *supra* note 204, art. 2, para. 1. "Obligations of conduct" (specific action or omission required of a state party) and "obligations of result" (the state party chooses the action or omission in order to achieve a result) are implicit within the obligations of the ICESCR. *See* WEISSBRODT ET AL., *supra* note 85, at 89-90.

214. ICESCR, *supra* note 204, art. 2, para. 1. "[T]o take steps" may be interpreted as a general rule of international law, meaning states parties must "comply in implementing the provisions" of the ICESCR. WEISSBRODT ET AL., *supra* note 85, at 90. But, conjoined with the later phrase "to achieve progressively," the effect may be to delay obligations. *Id.*

215. This phrase provides a state party "flexibility and discretion" in expending resources, but the Committee on Economic, Social and Cultural Rights examines a state party's true resources. WEISSBRODT ET AL., *supra* note 85, at 92.

216. *Supra* note 212.

217. This phrase allows a state party discretion in the actions it undertakes, though the ECS Committee is the final arbiter on what is an appropriate measure. WEISSBRODT ET AL., *supra* note 85, at 90. "Appropriate measures" include, but are not limited to, "administrative, financial, educational and social measures." U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, *Report on the Fifth Sesssion*, ¶ 7, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter General Comment 3].

218. ICESCR, *supra* note 204, art. 2, para. 1.

219. The OHCRH assists the High Commissioner in "implementing U.N. activities by attempting to secure respect for human rights through diplomacy and dialogue." WEISSBRODT ET AL., *supra* note 85, at 456 n.2.

220. General Comment 3, *supra* note 219, ¶ 2. The full quote reads:

> [W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

Id.

221. WEISSBRODT ET AL., *supra* note 85, at 90.

ideals.[222] The ICESCR focuses on the individual's duties to others and the community.[223] Like the UDHR,[224] the rights recognized in the ICESCR apply to all persons.[225] The ICESCR includes certain rights applicable to the Gaza situation. Article Six outlines the right to work,[226] while Article Seven incorporates decent working conditions and fair wages.[227] Article Eleven follows up with the right to an adequate[228] standard of living.[229] Article Ten announces family rights and emphasizes the importance of the family.[230] It also provides special protection for children.[231] Article Nine deals with social security,[232] and Article Twelve sets the bar for health care rights.[233] Article Thirteen provides a lengthy prescription for educational rights,[234] while Article

---

222. ICESCR, *supra* note 204, pmbl. "*Recognizing* that, in accordance with the [UDHR], the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights . . . ." *Id.*

223. *Id.* "*Realizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the [ICESCR] . . . ." *Id.*

224. See UDHR, *supra* note 171, for its language pertaining to application of rights to all.

225. ICESCR, *supra* note 204, art. 2, para. 2. "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.*

226. *Id.* art. 6, para. 1. "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts . . . ." *Id.*

227. *Id.* art. 7. "[J]ust and favourable conditions of work" include "[f]air wages and equal remuneration . . . [a] decent living . . . [s]afe and healthy working conditions; [e]qual opportunity for everyone to be promoted . . . [and] [r]est, leisure and reasonable limitation of working hours . . . ." *Id.*

228. "Adequate shelter means . . . adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost." U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, *General Comment 4, The Right to Adequate Housing*, ¶ 7, U.N. Doc. E/1992/23 (1991) [hereinafter General Comment 4].

229. ICESCR, *supra* note 204, art. 11, para. 1. "[T]he right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." *Id.*

230. *Id.* art. 10, para. 1. "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society . . . ." *Id.*

231. *Id.* art. 10, para. 3. "Special measures of protection and assistance should be taken on behalf of all children and young persons . . . ." *Id.*

232. *Id.* art. 9. "The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance." *Id.*

233. *Id.* art. 12, para. 1. "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." *Id.*

234. *Id.* art. 13, para. 1. "The States Parties to the present Covenant recognize the right of everyone to education." *Id.* This article also defines the scope of the right to education:

> (a) Primary education shall be compulsory and available free to all; (b) Secondary education . . . shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all . . .

Fifteen includes the right to cultural participation.[235]

Israel ratified the ICESCR and is thus a state party.[236] Therefore, Israel is legally bound to undertake the obligations of the ICESCR.[237] General Comment 3 aids in determining what might qualify as a failure of obligations under the ICESCR.[238] Because a state of Palestine does not exist,[239] it is not and presently cannot be a state party. But, the norms within the ICESCR have arguably risen to the level of customary international law.[240] The Palestinian Authority, as an international actor, is implicitly bound to those norms.[241]

4. *International Covenant on Civil and Political Rights*

The ICCPR[242] also furthers the principles in the United Nations Charter.[243] Given that the UDHR recognizes many civil and political rights,[244] the ICCPR advances those norms[245] by enunciating express rights and holding states parties legally bound to its provisions.[246] However, the norms contained

---

> by every appropriate means, and in particular by the progressive introduction of free education . . . .

Id. art. 13, para. 2(a-c).

235. *Id.* art. 15, para. 1(a). "The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life . . . ." *Id.*

236. Israel signed the ICESCR on Dec. 19, 1966, and ratified it Oct. 3, 1991. Office of the U.N. High Comm'r for Human Rights, International Covenant on Economic, Social and Cultural Rights New York, 16 December 1966, http://www.ohchr.org/english/countries/ratification/3.htm (last updated May 8, 2006) (last visited Sept. 23, 2006). It entered into force on Jan. 3, 1992. Office of the U.N. High Comm'r for Human Rights, Status of Ratification of the Principal International Human Rights Treaties, http://www.ohchr.org/english/bodies/docs/ratificationstatus.pdf (June 16, 2006) (last visited Sept. 23, 2006) [hereinafter Ratification Chart].

237. *See* Vienna Convention, *supra* note 84, art. 14.

238. "[A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the [ICESCR]." General Comment 3, *supra* note 219, ¶ 10.

239. *Supra* note 10 and accompanying text.

240. *Supra* note 204 and accompanying text.

241. *Supra* notes 102-104 and accompanying text.

242. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

243. "*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, ..." ICCPR, *supra* note 244, pmbl.

244. *See, e.g.*, UDHR, *supra* note 171, art. 3.

245. ICCPR, *supra* note 244, pmbl.

> *Recognizing* that, in accordance with the [UDHR], the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

Id. Interestingly, the ICCPR not only makes reference to civil and political rights, but also to the complementary necessity of economic, social, and cultural rights. *Id.* This gives more credence to the idea that the ICESCR and ICCPR were to be one document. See *supra* note 198 for more information on this idea.

246. *See* Vienna Convention, *supra* note 84, art. 14.

within the ICCPR have risen to the level of customary international law;[247] these norms bind all international actors.[248] Unlike the ICESCR's flexible implementation plan,[249] the ICCPR requires much more stringent measures of its states parties.[250]

The ICCPR focuses on humankind's inherent dignity and equal and inalienable rights.[251] Like in the UDHR[252] and the ICESCR,[253] the rights enunciated in the ICCPR apply to all without discrimination.[254] The ICCPR embodies "first generation" human rights, or *liberte*.[255] Similar to the ICESCR,[256] the ICCPR incorporates the "third generation" right of self-determination.[257] Article One of the ICCPR, like the ICESCR, intimates that first, second, and third generation rights must be realized and promoted together.[258]

Article Six recognizes one of the most basic human rights, the inherent

---

247. Russell A. Miller, *Post-Conflict Justice: From Malmedy to Halabja*, 13 MICH. ST. J. INT'L L. 107, 136 n.118 (2005); *see* U.N. Human Rights Comm., *General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994); *see also* Harold Hongju Koh, *Agora: Military Commissions: The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 341 n.24 (2002).

248. *Supra* notes 102-104 and accompanying text.

249. *Supra* notes 212-21 and accompanying text.

250. ICCPR, *supra* note 244, art. 2, para. 2.

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Id. See U.N. Human Rights Comm., *General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter *General Comment 31*], for more information on states parties' legal obligations under the ICCPR.

251. "[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." ICCPR, *supra* note 244, pmbl.

252. UDHR, *supra* note 171, art. 2.

253. ICESCR, *supra* note 204, art. 2, para. 2.

254. ICCPR, *supra* note 244, art. 2, para. 1.

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id.

255. *See* WESTON, *supra* note 209, at 18-19.

256. *See supra* note 209 and accompanying text.

257. ICCPR, *supra* note 244, art. 1, para. 1. "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *Id.*

258. *See id.*

right to life,[259] though it does not abolish the death penalty per se.[260] Article Seven, upholding another fundamental human right, abolishes the use of torture and other degrading forms of punishment.[261] Article Nine recognizes the general right to liberty and personal safety.[262] Article Twelve explains the right to freedom of movement,[263] while Article Seventeen prohibits unlawful interferences with privacy and family.[264] Article Twenty-Four discusses enhanced protection of children.[265] Article Twenty-Five explains the right of equal access of public services.[266]

Article Twenty-Eight establishes the Human Rights Committee (HRC).[267] The HRC serves as the chief United Nations body in charge of implementing the ICCPR.[268] HRC members "serv[e] in their individual expert capacity and [are] charged to study reports submitted by the state parties on measures they have adopted that give effect to the rights recognized in the covenant."[269]

Israel is a state party to the ICCPR.[270] Therefore, Israel is legally bound by international law to undertake the obligations of the ICCPR.[271] The

259. *Id.* art. 6, para. 1. "Every human being has the inherent right to life.... No one shall be arbitrarily deprived of his life." *Id.*

260. *See id.* art. 6, paras. 2, 4-6. The ICCPR does encourage states parties to abolish the death penalty, though. *Id.* art. 6, para. 6. The ICCPR does abolish the death penalty for persons under the age of eighteen and pregnant women. *Id.* art. 6, para. 5.

261. *Id.* art. 7. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.*

262. *Id.* art. 9, para. 1. "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." *Id.*

263. *Id.* art. 12, para. 1. "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." *Id.* Restrictions on movement are limited. See *id.* art. 12, para. 3, for a list of restrictions. "No one shall be arbitrarily deprived of the right to enter his own country." *Id.* art. 12, para. 4.

264. *Id.* art. 17, para. 1. "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." *Id.*

265. *Id.* art. 24, para. 1. "Every child shall have, without any discrimination... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." *Id.*

266. *Id.* art. 25. "Every citizen shall have the right and the opportunity... [t]o take part in the conduct of public affairs... [t]o vote and to be elected... [t]o have access, on general terms of equality, to public service in his country." *Id.*

267. *Id.* art. 28.

268. *See* WEISSBRODT ET AL., *supra* note 85, at 17.

269. WESTON, *supra* note 209, at 25.

270. Israel signed the ICCPR on Dec. 16, 1966, and ratified it on Oct. 3, 1991. Office of the U.N. High Comm'r for Human Rights, International Covenant on Civil and Political Rights New York, 16 December 1966, http://www.ohchr.org/english/countries/ratification/4.htm#reservations (last updated Sept. 9, 2006) (last visited Sept. 23, 2006). The ICCPR entered into force for Israel on Jan. 3, 1992. Ratification Chart, *supra* note 238.

271. *See* Vienna Convention, *supra* note 84, art. 14.

Palestinian Authority, a non-state,[272] is not and presently cannot be a state party to the ICCPR; however, the norms contained within the ICCPR have risen to customary international law.[273] Those norms implicitly bind the Palestinian Authority as an international actor.[274]

5. *Guiding Principles on Internal Displacement*

The United Nations first raised awareness of the international crisis of internal displacement.[275] In 1992, the Secretary-General of the United Nations appointed Mr. Francis M. Deng as the representative on internally displaced persons.[276] Mr. Deng studied the causes and consequences of internal displacement and the status of internally displaced persons within an international law context.[277] At the time of his report, Mr. Deng found that internal displacement affected about twenty-five million people worldwide and often involved the gross violation of human rights.[278] Mr. Deng focused his mandate on developing normative and institutional frameworks to assist in the plight of internally displaced persons and to promote a systematic international response.[279]

In 1996, Deng submitted a "Compilation and Analysis of Legal Norms"[280] to the Commission on Human Rights.[281] The Compilation and Analysis examined various areas of international law and concluded that there were "significant areas in which [international law] fails to provide an adequate basis for [an internally displaced person's] protection and assistance."[282] In response, the Commission requested that Deng prepare a more instructional report—the Guiding Principles on Internal Displacement (Guiding

---

272. *Supra* note 10 and accompanying text.

273. *Supra* note 247.

274. *Supra* notes 102-104 and accompanying text.

275. Representative of the Secretary-General, Francis M. Deng, *Report of the Representative of the Secretary-General on the Guiding Principles on Internal Displacement*, ¶ 4, *submitted pursuant to Commission on Human Rights Resolution 1997/39*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles*].

276. *Id.* ¶ 2.

277. *Id.*

278. *Id.* ¶ 1.

279. *Id.* ¶ 3.

280. Representative of the Secretary-General, Francis M. Deng, *Report of the Representative of the Secretary-General on Internally Displaced Persons Compilation and Analysis of Legal Norms, submitted pursuant to Commission on Human Rights Resolution 1995/57*, U.N. Doc. E/CN.4/1996/52/Add.2 (Dec. 5, 1995).

281. The Commission on Human Rights is a key charter-based United Nations body pertaining to the protection of human rights. WEISSBRODT ET AL., *supra* note 85, at 15. The Commission can "initiate studies and fact-finding missions, draft conventions and declarations for approval by higher bodies, discuss specific human rights violations in public or private sessions, and initiate suggestions for improving the U.N.'s human rights procedures." *Id.* The Commission can also establish rapporteurs, consider specific state situations confidentially, and use thematic procedures to review certain alleged human rights violations. *Id.*

282. *Guiding Principles*, *supra* note 277, ¶ 7.

Principles).[283]

The Guiding Principles "address[es] the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection."[284] International human rights law and international humanitarian law serve as the backbone of the Guiding Principles.[285] The Guiding Principles incorporates treaty-based international law and customary international law.[286] Specifically, the Guiding Principles "address[es] gaps identified in the Compilation and Analysis," such as the different phases of displacement, protection against arbitrary displacement, and government and institutional assistance during displacement.[287] In this regard, the Guiding Principles, albeit soft law,[288] is intended to act similarly to general principles of law as a gap-filler.[289]

The Guiding Principles provides guidance to states, internally displaced persons, and other authorities and institutions, such as the United Nations.[290] Deng intended the Guiding Principles to be persuasive authority that aids states in determining the best course of action regarding internally displaced persons and their rights.[291] Additionally, the Guiding Principles was to serve as an educational and consciousness-raising tool.[292] Deng also hoped the Guiding Principles would ultimately help prevent crises of internal displacement.[293]

The Guiding Principles defines "internally displaced persons":

> persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.[294]

---

283. *Id.* ¶ 8.

284. *Id.* ¶ 9.

285. *See id.*

286. *See id.*

287. *Id.*

288. Soft law in the international context is a term of art: "Guidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding." BLACK'S LAW DICTIONARY 1426 (8th ed. 2004).

289. *See supra* notes 128 and accompanying text.

290. *Guiding Principles*, *supra* note 277, ¶ 10.

291. *Id.* ¶ 11.

292. *Id.*

293. *Id.*

294. *Id.* ¶ 2. Another United Nations document defines internally displaced persons as "persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country." Representative of the Secretary-General, Francis M. Deng, *Report of the Representative of the Secretary-General on Internally Displaced Persons, submitted pursuant to Commission on Human Rights*

The First Principle announces that "[i]nternally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country."[295] The Guiding Principles prohibits discrimination against internally displaced persons regarding legal rights and freedoms[296] and discrimination in the application of the Principles.[297] Principle Two instructs that all authorities and persons shall observe the Guiding Principles.[298] Further, Principle Two does not mitigate the responsibilities of international actors to adhere to international human rights law or international humanitarian law treaties or customary international law norms or rules.[299] Principle Three identifies national authorities as the bodies primarily responsible for providing protection and assistance to internally displaced persons.[300]

Principle Five reminds authorities and international actors of their obligations under international law.[301] Principle Six recognizes the right of everyone to be protected against arbitrary displacement from their "home or place of habitual residence."[302] Further, this Principle describes certain circumstances where arbitrary displacement is prohibited.[303] Principle Seven instructs authorities to "ensure that all feasible alternatives are explored in order to avoid displacement altogether" when making decisions.[304]

If displacement must result, the Guiding Principles requires it be done in a manner where proper accommodation can be provided to the displaced persons.[305] The Guiding Principles also seeks to ensure safety, health, and that

---

Resolutions 1993/95 and 1994/68, U.N. Doc. E/CN.4/1995/50 (Feb. 2, 1995).

295. *Guiding Principles*, *supra* note 277, principle 1, para. 1.

296. *Id.* "They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced." *Id. See also id.* principle 22.

297. *Id.* principle 4, ¶ 1. "These Principles shall be applied without discrimination of any kind . . . ." *Id.*

298. *Id.* principle 2, ¶ 1. "These Principles shall be observed by all authorities, groups and persons irrespective of their legal status . . . ." *Id.*

299. *Id.* principle 2, ¶ 2. "These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument . . . ." *Id.*

300. *Id.* principle 3, ¶ 1. "National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction." *Id.*

301. *Id.* principle 5. "All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons." *Id.*

302. *Id.* principle 6, ¶ 1.

303. *Id.* principle 6, ¶ 2. These circumstances include displacement based on "(a) apartheid, 'ethnic cleansing' or similar practices"; (b) "situations of armed conflict"; (c) "cases of large-scale development projects, which are not justified by compelling and overriding public interests"; (d) "cases of disasters, unless the safety and health of those affected requires evacuation"; and (e) "collective punishment." *Id.*

304. *Id.* principle 7, ¶ 1.

305. *Id.* principle 7, ¶ 2. "The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons .

families are kept together "to the greatest practicable extent" when displaced.[306] When displacement does not result from the most compelling stages of armed conflict and natural disasters, certain guarantees apply to the displaced.[307] These guarantees include an undertaking to inform the displaced of the reasons and procedures for their displacement, compensation, if applicable, the right to effective legal remedy, and an undertaking to involve the displaced persons in the decision-making process of the relocation.[308]

Principle Eight recognizes that displacement shall be carried out in a humane manner.[309] Principle Nine informs states that they are under a particular obligation to protect against the displacement of certain classes of peoples.[310] Principle Ten recognizes the inherent right to life and prohibits violence against internally displaced persons.[311] Principles Eleven and Seventeen remind international actors that every human has the right to dignity.[312] Principle Twelve prohibits arbitrary arrest.[313] Principle Thirteen prohibits the involvement of children in hostilities.[314] Principle Fourteen recognizes the freedom of movement of internally displaced persons.[315] Principle Fifteen expounds upon Principle Fourteen by recognizing that internally displaced persons have the right to seek safety or asylum elsewhere and to be protected from "forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk."[316]

Principle Sixteen recognizes the right to information on missing internally displaced persons and asks for the cooperation of relevant international organizations in assisting governmental authorities in providing such information.[317] Principle Seventeen reiterates the right to life, further expanding the definition by including the right of family members to stay together during times of internal displacement.[318] Principle Eighteen informs of the right to an adequate standard of living, including food, water, shelter,

---

. . ." *Id.*

306. *Id.*

307. *Id.* principle 7, ¶ 3.

308. *Id.*

309. *Id.* principle 8. "Displacement shall not be carried out in a manner that violates the rights of life, dignity, liberty and security of those affected." *Id.*

310. *Id.* principle 9. These classes include "indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands." *Id.*

311. *Id.* principle 10. In particular, Principle Ten protects against: "(a) [g]enocide; (b) [m]urder; (c) [s]ummary or arbitrary executions; and (d) [e]nforced disappearances." *Id.* This Principle even protects against threats of the above particulars. *Id.*

312. *Id.* principle 11, ¶ 1; *see id.* principle 17, ¶ 1.

313. *Id.* principle 12, ¶ 1. "No one shall be subjected to arbitrary arrest or detention." *Id.*

314. *Id.* principle 13, ¶ 1. "In no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities." *Id.*

315. *Id.* principle 14. "Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence." *Id.* principle 14, ¶ 1.

316. *Id.* principle 15.

317. *Id.* principle 16.

318. *Id.* principle 17. "[F]amily members who wish to remain together shall be allowed to do so." *Id.* principle 17, ¶ 2.

clothing, and medical services.[319]

Principle Twenty announces that everyone "has the right to recognition everywhere as a person before the law."[320] Accordingly, authorities shall issue identifying documents to internally displaced persons when appropriate.[321] Principle Twenty-One prohibits the arbitrary deprivation of property and possessions.[322] Principle Twenty-Two allows the internally displaced the opportunity to seek work.[323] Principle Twenty-Three recognizes the right to education,[324] although authorities are only obligated to provide compulsory primary education to internally displaced persons.[325] Principles Twenty-Four through Twenty-Seven regard humanitarian assistance.[326] Finally, Principles Twenty-Eight through Thirty contain rights of return and resettlement for the internally displaced in addition to obligations for authorities.[327]

Many of the Principles align with provisions of the UDHR, ICESCR, ICCPR, and the norms recognized in these instruments. These instruments all seek to uphold human dignity.[328] All of these instruments contain provisions prohibiting discrimination[329] and recognize rights associated with the family.[330] The UDHR, ICCPR, and Guiding Principles expressly recognize the inherent right to life.[331] While the ICESCR does not expressly recognize the right to life, it must recognize it implicitly; one cannot enjoy economic, social, and cultural rights without being alive. The UDHR, ICESCR, and Guiding Principles recognize the right to education.[332] These instruments also all recognize the right to work[333] and the right to an adequate standard of living.[334] Finally, the UDHR, ICCPR, and Guiding Principles each include provisions on the freedom of movement.[335]

---

319. *Id.* principle 18.

320. *Id.* principle 20, ¶ 1.

321. *Id.* principle 20, ¶ 2. "[T]he authorities concerned shall issue to [internally displaced persons] all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates." *Id.*

322. *Id.* principle 21.

323. *Id.* principle 22, ¶ 1(b). "The right to seek freely opportunities for employment and to participate in economic activities[.]" *Id.*

324. *Id.* principle 23, ¶ 1.

325. *Id.* principle 23, ¶ 2.

326. *Id.* principles 24-27.

327. *Id.* principles 28-30.

328. *Supra* notes 175, 222, 251, 312, 318 and accompanying text.

329. *Supra* notes 176, 225, 254, 296, 297 and accompanying text.

330. *Supra* notes 183, 230, 264, 317, 318 and accompanying text.

331. *Supra* notes 180, 259, 311 and accompanying text.

332. *Supra* notes 188, 234, 324 and accompanying text. The ICCPR seems to implicitly support the idea of a right to education because it notes that its objectives can only be achieved when coupled with the enjoyment of economic, social, and cultural rights. *Supra* note 245 and accompanying text.

333. *Supra* notes 186, 226, 323 and accompanying text.

334. *Supra* notes 187, 228, 229, 319 and accompanying text.

335. *Supra* notes 184, 263, 315 and accompanying text.

From the numerous connections identified above, it becomes evident that these human rights instruments complement one another in the recognition and guarantee of human rights through international law. At the very least, they provide supplementary support to that idea.

C. *International Humanitarian Law—Applicable Sources and Instruments*

International humanitarian law,[336] another subset of public international law, operates specifically in situations of armed conflict.[337] This body of law applies to state and non-state actors[338] and is based on treaties and customary international law.[339] International humanitarian law "recognizes a sense of humanity in armed conflict," and "places limits on the means and method of conducting war."[340] In this regard, international humanitarian law can be characterized as an "intersection of human rights law with the law of war."[341]

The rules of international humanitarian law protect civilians and persons not involved or no longer involved in combat.[342] Unlike international human rights law, which always applies and protects all human beings no matter the situation,[343] international humanitarian law applies only during armed conflict[344] and protects only those involved in armed conflict.[345] International humanitarian law is situation- and context-specific in its applicability.[346] Therefore, the scope and applicability of international humanitarian law is necessarily narrower than that of international human rights law.

1. *The Geneva Conventions*

The Geneva Conventions serve as the principal instruments governing international humanitarian law.[347] Specifically, the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War[348] pertains to the

---

336. International humanitarian law is also known as "IHL" or the "law of armed conflict" or "LOAC" or the "law of war." Edwards Affidavit, *supra* note 80, para. 36.

337. WEISSBRODT ET AL., *supra* note 85, at 29.

338. *Id.*

339. Edwards Affidavit, *supra* note 80, para. 36. International human rights law evolved from treaties and customary international law adopted at The Hague Peace Conferences of 1899 and 1907. WEISSBRODT ET AL., *supra* note 85, at 29.

340. Edwards Affidavit, *supra* note 80, para. 36.

341. WEISSBRODT ET AL., *supra* note 85, at 29.

342. Edwards Affidavit, *supra* note 80, para. 36. Examples of non-civilians include prisoners of war and *hors de combat* ("out of the fight"). *Id.*

343. *Supra* note 148 and accompanying text.

344. WEISSBRODT ET AL., *supra* note 83, at 29.

345. *Supra* note 337 and accompanying text.

346. *See supra* notes 342-45 and accompanying text.

347. WEISSBRODT ET AL., *supra* note 83, at 21.

348. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter

situation in the Gaza Strip because the territory has been, and still may be,[349] an "occupied territory."[350] The Fourth Geneva Convention is an international treaty;[351] however, many of the rules and norms contained within the Fourth Geneva Convention are widely accepted as customary international law.[352] Therefore, all international actors are implicitly bound to follow those rules and norms during armed conflict or occupation.[353]

Many articles in the Fourth Geneva Convention are relevant to the situation in the Gaza Strip. Article Four defines the category of persons protected as "those who, at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[354] Article Twenty-Five provides for information to be forwarded regarding the status of family members,[355] while Article Twenty-Six includes the right to reunite with dispersed family members.[356] Article Thirty-Three prohibits using "measures of intimidation or of terrorism."[357] Article Thirty-Four prohibits taking of hostages without distinguishing between civilian and combatant hostages.[358] Article Forty-Nine prohibits deportations or forcible transfers of protected persons.[359]

Humanitarian law applies to internally displaced persons when such persons are in a state where armed conflict or occupation is occurring.[360] In such a case, internally displaced persons are considered "civilians" under

---

Fourth Geneva Convention]. See generally Society of Professional Journalists, Reference Guide to the Geneva Conventions, http://www.genevaconventions.org/ (last visited Oct. 14, 2006), for a helpful guide to the Geneva Conventions.

349. This topic is discussed in Part Four.A of this note, *infra*.

350. Fourth Geneva Convention, *supra* note 350, art. 2. "The [Fourth Geneva Convention] shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." *Id.*

351. INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW ANSWERS TO YOUR QUESTIONS 10-12 (2d ed. 2004) [hereinafter ICRC ANSWERS].

352. WEISSBRODT ET AL., *supra* note 85, at 22, (citing SALLY MALLISON & WILLIAM MALLISON, ARMED CONFLICT IN LEBANON 1982: HUMANITARIAN LAW IN A REAL WORLD SETTING 67-68 (1983) and Symposium, *The Hague Peace Conferences*, 94 AM. J. INT'L L. 1 (2000)); *see also* ICRC ANSWERS, *supra* note 353, at 12.

353. *Supra* notes 102-104 and accompanying text.

354. Fourth Geneva Convention, *supra* note 350, art. 4.

355. *Id.* art. 25. "All persons . . . shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them . . . speedily and without undue delay." *Id.*

356. *Id.* art. 26. "Each Party to the conflict shall facilitate enquiries . . . with the object of renewing contact with [family members] and of meeting, if possible." *Id.*

357. *Id.* art. 33.

358. *Id.* art. 34.

359. *Id.* art. 49. "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country . . . are prohibited . . . ." *Id.*

360. ICRC ANSWERS, *supra* note 353, at 28; *see* Fourth Geneva Convention, *supra* note 348, art. 2.

humanitarian law and the Fourth Geneva Convention.[361]

Israel is a state party to the Fourth Geneva Convention.[362] The Palestinian Authority, a non-state, is not and presently cannot be a state party.[363] But, since international humanitarian law and the Fourth Geneva Convention exist as customary international law, the Palestinian Authority is implicitly bound to follow and respect such rules and norms during armed conflict or occupation.[364]

2. *First Additional Protocol to the Geneva Conventions*

The First Additional Protocol to the Geneva Conventions (First Protocol)[365] provides additional protection to victims of international armed conflicts.[366] Articles Forty-Eight through Fifty-Six deal specifically with protection of civilians and civilian objects.[367] Article Forty-Eight provides basic rules for protection of civilian populations and objects.[368] Article Forty-Nine defines "attacks" as "acts of violence against the adversary, whether in offence or in defence."[369] Article Fifty defines "civilians" and "civilian population."[370] This article provides latitude on who qualifies as a civilian.[371]

Article Fifty-One sets the rules of protection for civilians.[372] Specifically, civilians "shall not be the object of attack."[373] But, if a civilian "take[s] a direct part in hostilities," then the protection is forfeited.[374] Further, Article Fifty-One prohibits indiscriminate attacks.[375] Article Fifty-Two grants protection of

---

361. ICRC ANSWERS, *supra* note 351, at 28.

362. ISRAELI SETTLEMENTS, *supra* note 37, at 7. Israel ratified the Fourth Geneva Convention on April 10, 1951. *Id.*

363. *Supra* note 10 and accompanying text.

364. *Supra* notes 102-104 and accompanying text.

365. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 3 (*entered into force* Dec. 7, 1979) [hereinafter First Protocol].

366. *See generally id.*

367. *Id.* arts. 48-56.

368. *Id.* art. 48. "[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." *Id.*

369. *Id.* art. 49, para. 1.

370. *Id.* art. 50. "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol." *Id.* art. 50, para. 1. "The civilian population comprises all persons who are civilians." *Id.* art. 50, para. 2.

371. *Id.* art. 50, para. 1. "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." *Id.*

372. *Id.* art. 51.

373. *Id.* art. 51, para. 2.

374. *Id.* art. 51, para. 3.

375. *Id.* art. 51, para. 4. This article defines "indiscriminate attacks":

> Indiscriminate attacks are: (*a*) those which are not directed at a specific military objective; (*b*) those which employ a method or means of combat which cannot be

civilian objects.[376] Article Fifty-Four designates certain categories of objects as "indispensable to the survival of civilian populations" and provides protection.[377] Protection does not apply when the objects are used "as sustenance solely for the members of [adverse] armed forces"[378] or "in direct support of military action."[379] Article Fifty-Eight admonishes states parties to locate military objectives away from the civilian population and civilian objects.[380]

Israel is not a state party to the First Protocol.[381] The Palestinian Authority, a nonparty to the Geneva Conventions, de facto cannot be a state party to the First Protocol.[382] Therefore, Israel and the Palestinian Authority would only be required to follow the norms recognized within the First Protocol that have risen to customary international law. The norm of distinguishing between military and civilian objects during attacks, evident in Articles Forty-Eight and Fifty-Two of the First Protocol, exists as customary international law.[383]

---

directed at a specific military objective; or (*c*) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Id.

376. *Id.* art. 52. "Civilian objects are all objects which are not military objectives as defined in paragraph 2 [of Article Fifty-Two]." *Id.* art. 52, para. 1.

377. *Id.* art. 54. This article prohibits the destruction of certain categories of objects:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party. . . .

Id. art. 54, para. 2.

378. *Id.* art. 54, para. 3(a).

379. *Id.* art. 54, para. 3(b).

380. *Id.* art. 58.

The Parties to the conflict shall, to the maximum extent feasible: (*a*) . . . endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (*b*) avoid locating military objectives within or near densely populated areas; (*c*) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Id.

381. ACT OF VENGEANCE, *supra* note 4, at 23 n.30.

382. *Supra* notes 10 and 363 and accompanying text.

383. ACT OF VENGEANCE, *supra* note 4, at 23. J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 181 (2005); Thomas Michael McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 93 (2002).

PART FOUR: ALLEGED INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW VIOLATIONS RELATED TO ISRAEL'S WITHDRAWAL FROM THE GAZA STRIP

Israel officially commenced its withdrawal from the Gaza Strip on August 15, 2005.[384] Israeli Prime Minister Ariel Sharon initially introduced the plan in December 2003.[385] Sharon's cabinet accepted it June 2004[386] and the *Knesset*[387] adopted it on October 25, 2004.[388]

The withdrawal plan aimed for peace,[389] while the disengagement as a whole had two main purposes: "[to] enhance[e] Israel's security by reducing terrorism and [to] boost[] Israel's economy by improving the quality of life."[390] Sharon fully supported a self-governed, democratic Palestinian state in the Gaza Strip.[391] Sharon hoped that Israel's withdrawal from the Gaza Strip could help facilitate the development of a peaceful Palestinian state.[392]

The withdrawal centered around Israel's Disengagement Plan Implementation Law,[393] which provided for the systematic removal of all permanent Israeli military and government presence in the Gaza Strip.[394] On August 15, 2005, the Israeli Defense Force (IDF) mobilized in the Gaza strip to begin administering the evacuation of Israeli citizens from their homes.[395] Two days later the IDF began forcing noncompliant Israeli citizens from their homes.[396] By August 21, 2005, the IDF had evacuated the majority of Israeli settlements in the Gaza Strip.[397] The IDF demolished the remaining residential buildings.[398] In total, the IDF destroyed approximately 2000 homes.[399]

---

384. Assoc. Press, *Timeline: Israel's Gaza Settlements*, Aug. 14, 2005, http://www.foxnews.com/printer_friendly_story/0,3566,165694,00.html.

385. DISENGAGEMENT PLAN, *supra* note 3, at 7.

386. *Id.*

387. The *Knesset* is Israel's parliamentary body. *Id.* at 5.

388. *Id.* at 7.

389. *See id.*

390. *Id.* at 8.

391. *See id.*

392. *See id.*

393. State of Isr., *The Cabinet Resolution Regarding the Disengagement Plan* (June 6, 2004), *available at* http://www.mfa.gov.il (scroll over "Peace Process" and follow "Reference Documents" hyperlink; then follow "Revised Disengagement Plan Main Principles" hyperlink).

394. *See* DISENGAGEMENT PLAN, *supra* note 3, at 5.

395. State of Isr., *Disengagement Plan Is Under Way* (Aug. 15, 2004), http://www.mfa.gov.il (scroll over "Government" then "Communiques" and follow "2005" hyperlink; then follow "Disengagement Plan is under way" hyperlink).

396. State of Isr., *Gaza Strip Evacuation* (Aug. 17, 2005), http://www.mfa.gov.il (scroll over "Government" then "Communiques" and follow "2005" hyperlink; then follow "Gaza Strip evacuation").

397. State of Isr., *Majority of Communities in the Gaza Strip Evacuated* (Aug. 21, 2005), http://www.mfa.gov.il (scroll over "Government" then "Communiques" and follow "2005" hyperlink; then follow "Majority of communities in the Gaza Strip evacuated" hyperlink).

398. Harvey Morris, *Israeli Bulldozers Destroy Settler Homes in Gaza* (Aug. 21, 2005), http://www.ft.com/cms/s/62039b54-1235-11da-8cc3-00000e2511c8,ft_acl=.html.

The following day, the IDF completed the evacuation pursuant to the disengagement plan.[400] This marked the culmination of official Israeli military control in the Gaza Strip, ending thirty-eight years of Israeli military presence.[401] Overall, Israel forced out about 8000 of its citizens at a cost of approximately $1.8 billion.[402]

The Israeli government and the IDF encountered protest and resistance by Israeli settlers who were subsequently removed.[403] The IDF also reported attacks by Palestinians during the withdrawal.[404] As a whole, the disengagement plan proceeded relatively peacefully;[405] however, post-withdrawal violence has occurred in the Gaza Strip between Israel and the Palestinians.[406] Also, the relocated Israelis have faced inferior housing, difficulty in finding comparable employment, and fractured communities.[407]

Israel claims it is free of any legal obligation pertaining to the Gaza Strip or the Palestinians living or located there.[408] In contrast, the Palestinian Authority and Human Rights Watch, a non-governmental human rights organization, among others, assert that Israel's international legal obligations did not extinguish upon its withdrawal.[409] Thus, various international human rights law and international humanitarian law claims have arisen since Israel's withdrawal from the Gaza Strip.

A. *Denial of Access to Education, Freedom of Movement, and Family Rights*

Mohamed Anwar Qawash, a twenty year-old Palestinian, was studying medicine in Egypt prior to Israel's withdrawal from the Gaza Strip.[410] In June 2005, Mohamed visited his family in the Gaza Strip and planned to return to school in September 2005.[411] As a result of Israel's withdrawal, however,

---

399. *Id.*

400. State of Isr., *Evacuation of Israeli Civilians from the Gaza Strip Completed* (Aug. 22, 2005), http://www.mfa.gov.il (scroll over "Government" then "Communiques" and follow "2005" hyperlink; then follow "Evacuation of Israeli civilians from the Gaza Strip completed" hyperlink) [hereinafter *Evacuation Completed*].

401. *Exit of IDF*, *supra* note 1.

402. *Yes, but*, ECONOMIST, May 27, 2006, at 43.

403. *Evacuation Completed*, *supra* note 402.

404. *Id.*

405. *See id.*

406. Microsoft, *Israel Continues Gaza Air Offensive* (Sept. 26, 2005), http://www.msnbc.msn.com/id/9453473/; Microsoft, *Israel Fires on Gaza Strip After Rocket Attack* (Dec. 28, 2005), http://www.msnbc.msn.com/id/10627205/.

407. *Yes, but*, *supra* note 404, at 43.

408. *See Exit of IDF*, *supra* note 1.

409. HUMAN RIGHTS WATCH, GAZA: ISRAELI OFFENSIVE MUST LIMIT HARM TO CIVILIANS (2006), http://hrw.org/english/docs/2006/06/29/isrlpa13662.htm [hereinafter ISRAELI OFFENSIVE]; *see generally* Palestinian Ctr. for Human Rights, http://www.pchrgaza.org/ (last visited Sept. 24, 2006).

410. PALESTINIAN CTR. FOR HUMAN RIGHTS, STUDENTS STILL DEPRIVED OF RIGHT TO EDUCATION (2005), http://www.pchrgaza.org/files/campaigns/english/gaza/stud.htm.

411. *See id.*

Mohamed was prevented from returning to school; Israel had closed Rafah International Crossing Point, a crossing between the Gaza Strip and Egypt.[412] It is unknown whether Mohamed has returned to his medical school and, if so, how much schooling he missed or what effect this delay caused.

Bilal Abu al-Amrain, a sixteen year-old living and attending high school in Qatar, visited the Gaza Strip with his family on holiday in May 2005.[413] After the Israeli disengagement plan commenced, the IDF permitted Bilal's family to return home, but the IDF required Bilal to stay.[414] The reason for the distinction is unknown. Bilal remained with a brother in the Gaza Strip, but apart from the rest of his family, friends, home, and school in Qatar.[415] It is unknown whether Bilal has been allowed to return to Qatar.

The Palestinian Centre for Human Rights (PCHR) argues that Mohamed and Bilal's cases represent a deprivation of the right to continue education.[416] In addition, they are potentially deprivations of the right to freedom of movement, family rights, and, specifically to Bilal, a violation of special children's rights. Other restrictions on movement have been reported by PCHR.[417] Assuming the stories of Mohamed and Bilal are true, Israel may be in breach of Articles Ten and Thirteen of the ICESCR[418] and Articles Twelve, Seventeen, and Twenty-Four of the ICCPR.[419] Israel may also have violated the customary international law norms recognized within Articles Twelve, Sixteen, and Twenty-Six of the UDHR.

PCHR argues that, despite the withdrawal of Israel, the Gaza Strip is still "occupied"; therefore, international humanitarian law should still apply.[420] Presupposing that the Gaza Strip still constitutes an occupied territory, Israel may have also breached Article Twenty-Six of the Fourth Geneva Convention.[421] According to PCHR, Israel continues to reject the applicability of the ICESCR, ICCPR, and Fourth Geneva Convention to the situation in the Gaza Strip and to those Palestinians affected.[422] Israel, as a state party to the ICESCR, ICCPR, and Fourth Geneva Convention, has an international legal duty to follow the provisions of these treaties and not to take steps that

412. *See id.*
413. *Id.*
414. *Id.*
415. *Id.*
416. *Id.*
417. PALESTINIAN CTR. FOR HUMAN RIGHTS, SUFFERING CONTINUES FOR RESIDENTS OF AL-SAYAFA SEA; ED ENCLAVE (2005), http://www.pchrgaza.org/files/campaigns/english/gaza/siafa.htm.
418. *See* ICESCR, *supra* note 202, arts. 10, 13.
419. *See* ICCPR, *supra* note 242, arts. 12, 17, 24.
420. PALESTINIAN CTR. FOR HUMAN RIGHTS, SHARON'S GAZA REDEPLOYMENT PLAN: A DENIAL OF HUMAN RIGHTS, NOT AN END TO OCCUPATION 11 (2004), *available at* http://www.pchrgaza.org/files/Reports/English/Sharons.pdf [hereinafter PCHR RESPONSE]; *see also* ISRAELI OFFENSIVE, *supra* note 411.
421. *See* Fourth Geneva Convention, *supra* note 348, art. 26.
422. *Id.* at 15.

undermine the respective rights recognized therein.[423] Israel owes this duty to all persons within Israel's borders, as well as persons that are directly affected by Israel's actions.

Additionally, in 2004 the ICJ issued an advisory opinion against Israel regarding restriction of movement.[424] The Israeli Wall case reached the ICJ through the court's advisory jurisdiction. The General Assembly can invoke the ICJ's advisory jurisdiction regarding any legal issue.[425] Conversely, adversary, or contentious, jurisdiction[426] is only available to states parties to the Statute of the ICJ. [427] A state of Palestine does not presently exist.[428] Therefore, an advisory opinion, rather than an adversary decision, was the only feasible way for the issue to reach the ICJ.

The ICJ advised that the construction of a security wall or annexation wall[429] by Israel violated the right of freedom of movement and was an international human rights law and international humanitarian law violation.[430] The ICJ further advised that the construction of the wall went so far as to violate the Palestinians' right to self-determination.[431] The ICJ informed Israel that it is obligated to halt the construction of the wall, demolish portions of the wall already erected, and cease to impede the movement of any persons.[432] According to the ICJ, failure to comply would amount to an internationally wrongful act.[433] The ICJ also included in its advisory opinion that all legislation and regulations associated with the construction of the wall must be repealed.[434]

Further, the ICJ recognized Israel's obligation to make reparations.[435] The ICJ adopted and articulated the customary international law definition of reparation: "[A] reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all

---

423. See Part Three.A(1) of this Note, *supra*, for a discussion on a state's legal obligations as a state party to a treaty.

424. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 43 I.L.M. 1009 (July 9, 2004) [hereinafter Israeli Wall Case]; see Lori Fisler Damrosch & Bernard H. Oxman, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Editors' Introduction*, 99 AM. J. INT'L L. 1 (2005), for a brief review of the case and its importance.

425. Article Ninety-Six of the U.N. Charter permits "[t]he General Assembly or the Security Council [to] request the International Court of Justice to give an advisory opinion on any legal question." U.N. Charter art. 96, para. 1.

426. See WEISSBRODT ET AL., *supra* note 85, at 11, for a brief discussion on the ICJ's advisory and adversary jurisdiction.

427. ICJ Statute, *supra* note 83, art. 34, § 1.

428. *Supra* note 10 and accompanying text.

429. PCHR RESPONSE, *supra* note 422, at 14.

430. Israeli Wall Case, *supra* note 426, at 3-5.

431. *Id.* at 4.

432. *Id.* at 145.

433. *Id.*

434. *Id.* at 146.

435. *Id.* at 146-47.

probability, have existed if that act had not been committed."[436] The ICJ further recognized Israel's restitution obligation and ordered Israel to "return the lands, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall."[437] The ICJ anticipated that if restitution was materially impossible, then Israel owes compensation to persons damaged as a result of the construction of the wall.[438]

PCHR alleges that the construction and operation of the wall violates the rights recognized in Articles Seventeen, Twenty-Three, Twenty-Five, Twenty-Six, and Twenty-Seven of the UDHR.[439] While Israel certainly has the right to self defense under international human rights law[440] and international humanitarian law,[441] it cannot implement defense measures that violate international law.

B. Denial of the Right to Work

PCHR authored a response to the Israeli disengagement plan. In its response, PCHR alleged that Israel was denying Palestinians' access to work by closing the Rafah border[442] and Erez Military Checkpoint.[443] PCHR also alleged that Israel intended to end all access for Palestinian workers by 2008.[444] The Gaza Strip is largely isolated; therefore, Palestinians rely on the right of freedom of movement to find work.[445] PCHR asserts that the Israeli disengagement plan, which includes measures for restriction of access to work, will ultimately result in severe economic loss to the Palestinians.[446]

If Israel does prevent Palestinians from working by way of checkpoint blockages and movement restrictions, then Israel would potentially violate Articles Six, and, by implication, Eleven of the ICESCR.[447] Israel could also be in violation of Article Twelve of the ICCPR[448] and the norms contained in Articles Thirteen and Twenty-Three of the UDHR.[449] While Israel can patrol its borders and implement checkpoints, it cannot implement restrictive measures that curtail human rights; to do so would breach its international legal

436. *Id.* (quoting Factory at Chorzow (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 41).
437. Israeli Wall Case, *supra* note 426, at 147-48.
438. *Id.*
439. PCHR RESPONSE, *supra* note 422, at 15.
440. "Nothing in the [UN Charter] shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . ." U.N. Charter art. 51.
441. Fourth Geneva Convention, *supra* note 350, arts. 4 & 27.
442. *Gazans Celebrate*, *supra* note 2.
443. PCHR RESPONSE, *supra* note 422, at 11.
444. *Id.*
445. *Id.*
446. *Id.* at 11-12.
447. *See* ICESCR, *supra* note 202, arts. 6 & 11.
448. *See* ICCPR, *supra* note 242, art. 12.
449. *See* UDHR, *supra* note 169, arts. 13 & 23.

duties.[450]

C. *Demolition of Housing and the Right to an Adequate Standard of Living*

Part of the Israeli disengagement plan included demolishing the homes of former Israeli settlers in the Gaza Strip.[451] Israel coordinated this decision with the Palestinian Authority.[452] The report does not indicate that Israel destroyed any personal property of the former Israeli settlers, just the former residences.[453]

Israel, as a state party to the ICESCR, has the duty to recognize the right to an adequate standard of living, which includes housing, for all persons.[454] As part of its obligations as a state party, Israel must refrain from doing anything to defeat the object and purpose of Article Eleven or the ICESCR generally.[455] Also, the norms recognized within Article Twenty-Five of the UDHR are included as part of Israel's international legal obligations under customary international law.[456]

Since the norms articulated in the provisions of the ICESCR have arguably risen to customary international law status, the Palestinian Authority also has the duty to recognize the right to an adequate standard of living.[457] Therefore, Israel and the Palestinian Authority's participation in the destruction of housing readily available for Palestinians may be in contravention of this norm.

D. *Forced Removal, Forced Eviction, and Internal Displacement*

The Israeli disengagement plan resulted in the forced removal and relocation of approximately 8000 Israelis living in the Gaza Strip.[458] These "Resettlers" were forcibly relocated, but remained within the territory of Israel rather than "cross[ing] an internationally recognized State border."[459] Accordingly, the Resettlers fit the definition for internally displaced persons under the Guiding Principles. Thus, at first glance the Guiding Principles seems to apply to the Resettlers' rights.

A key question is whether the displacement of the Resettlers is "arbitrary." Principle Six of the Guiding Principles prohibits arbitrary displacement and articulates particular scenarios that are arbitrary.[460] These

---

450. *See* Fourth Geneva Convention, *supra* note 350, arts. 4 & 27.
451. Morris, *supra* note 398.
452. *Id.*
453. *See id.*
454. ICESCR, *supra* note 204, art. 11.
455. *See* Vienna Convention, *supra* note 82, art. 18.
456. *See supra* note 171 and accompanying text.
457. *See supra* note 204 and accompanying text.
458. *Evacuation Completed*, *supra* note 402.
459. *Guiding Principles*, *supra* note 277, at annex, para. 2.
460. *Id.* principle 6, para. 1.

scenarios include displacement based: on apartheid, ethnic cleansing, or similar practices; on situations of armed conflict where security reasons do not dictate displacement; on large-scale development projects that are not justifiably compelling and override public interest; on disasters that do not require evacuation based on public safety and health; and on displacement used as collective punishment.[461] In this instance, none of the proffered scenarios fit the Resettlers' situation. Israel's decision to withdraw from the Gaza Strip, which displaced its citizens, seemed to stem from politics rather than a legal sense[462]—a category not included among arbitrary displacement. Although Principle Six does not include all possible examples of arbitrary displacement, the resultant displacement of the Resettlers does not seem to contravene the prohibition in Principle Six.[463]

Under Principle Seven of the Guiding Principles, Israel must "ensure, to the greatest practicable extent, that proper accommodation is provided to the [Resettlers]."[464] Israel provided the Resettlers with a choice of four compensation plans: (1) Resettlers who lived in the settlements for more than four years are "entitled to a replacement house of similar quality"; (2) Resettlers who lived in the settlements for less than four years or lived elsewhere during that time period are entitled to compensation based on their property value; (3) any Resettler can be relocated in an area chosen by the Israeli government; and (4) any Resettler that chooses to relocate in an area not chosen by the Israeli government is entitled to some compensation on a case-by-case basis.[465]

One troubling aspect of the Resettlers' displacement is the "free and informed consent" guarantee of Principle Seven.[466] Since the displacement did not occur during an emergency, armed conflict, or natural disaster, Principle Seven guarantees that "free and informed consent of those to be displaced shall be sought."[467] While it seems the Resettlers were informed of the displacement many months in advance, it does not appear their consent was sought.

The Guiding Principles is soft law and not binding upon Israel.[468] It does, though, mirror many of the norms of binding international human rights law.[469] Israel, as a United Nations member, carries the obligation to reaffirm and promote human dignity.[470] Therefore, it would behoove the Israeli government to consider the Guiding Principles in the context of the internal displacement of its own citizens. An Israeli high court even ruled in line with the Guiding

461. *Id.* principle 6, para. 2.

462. *See* DISENGAGEMENT PLAN, *supra* note 3, at 7-9.

463. *See Guiding Principles*, *supra* note 275, principle 6.

464. *Id.* principle 7, para. 2.

465. British Broad. Corp., *Settler Reparation Plan Unveiled*, http://news.bbc.co.uk/2/hi/middle_east/3925999.stm (last visited Sept. 24, 2006).

466. *Guiding Principles*, *supra* note 277, principle 7, para. 3(c).

467. *Id.*

468. *See supra* note 288 and note 290 and accompanying text.

469. See Part Four.B(5) of this Note, *supra*.

470. U.N. Charter pmbl.

Principles and against an Israeli military order that would forcibly relocate three individuals from the West Bank to the Gaza Strip.[471]

E. Kidnapping and Hostage-Taking

On June 23, 2006, Palestinian militants kidnapped Israeli corporal Gilad Shalit.[472] Three Palestinian military groups, including the military wing of Hamas,[473] coordinated the kidnapping, which occurred on Israeli soil.[474] Human Rights Watch, a nongovernmental group, believes the Palestinians kidnapped Shalit to secure a bargaining chip in an effort to release various Palestinian prisoners.[475] Regardless of the motive, Israel blamed Hamas for Shalit's fate.[476]

The Palestinian militants breached international legal duties by kidnapping and holding hostage Shalit. Kidnapping Shalit resulted in multiple human rights law violations, including infringement on liberty and security of person[477] and restriction on freedom of movement.[478] It also resulted in a humanitarian law violation.[479] The Palestinian militants, as individuals in the international legal system, are accountable for these violations. Individuals are subjects of international law.[480] Thus, individuals owe duties as international actors and must uphold international legal obligations.[481]

Also, these violations could be imputed to the Palestinian Authority via Hamas. Because Hamas rose to power as the controlling party of the Palestinian Authority, it too, as an international actor, could be attributed to this violation.[482]

---

471. HCJ 7015/02, Ajuri v. IDF Commander in West Bank [2002] IsrLR 1; see Detlev F. Vagts, *International Decisions: Ajuri v. Idf Commander in West Bank*, 97 AM. J. INT'L L. 173 (2003), for a review of this case.

472. *Might Something Good Come out of It This Time?*, ECONOMIST, July 1, 2006, at 41 [hereinafter *Something Good?*].

473. The military wing of Hamas is *Izz ad-Din al-Qassam* Brigades. *Getting Worse and Worse*, ECONOMIST, July 8, 2006, at 39.

474. ISRAELI OFFENSIVE, *supra* note 411.

475. *Id.*

476. *Something Good?*, *supra* note 474, at 41.

477. ICCPR, *supra* note 242, art. 9; UDHR, *supra* note 169, art. 3.

478. ICCPR, *supra* note 242, art. 12; UDHR, *supra* note 169, art. 13.

479. Fourth Geneva Convention, *supra* note 348, art. 34; *see also* ISRAELI OFFENSIVE, *supra* note 411.

480. M.W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61, 73-74 (1984).

481. *See* The Nuremberg Judgment, 6 F.R.D. 69, 110-12 (1946).

482. *See, e.g.*, Diplomatic and Consular Staff (U.S. v. Iran), 1980 I.C.J. 3, 37 (May 24) (recognizing potential imputability of actions of a nongovernmental actor to the state).

F. Destruction of Civilian Objects, Indiscriminate Attacks, and Measures of Intimidation

Israel responded to the kidnapping of Shalit by destroying a power station in the Gaza Strip.[483] A few days later, Palestinian militants fired two Qassam rockets from the Gaza Strip into a nearby Israeli town.[484] These rockets, bearing the name of Hamas's military wing, were unguided and were fired indiscriminately into Israeli civilian populations.[485] Reportedly, Israel then intimidated the Palestinians in Gaza by creating sonic booms with its fighter jets.[486]

If the Gaza power station was not sustaining or directly supporting the Palestinian militants, then its destruction resulted in a humanitarian law violation.[487] Further, a power station probably qualifies as an "object[] indispensable to the survival of the civilian population," and thus added to the severity of the act.[488] Also, creating sonic booms to instill fear in a civilian population is prohibited.[489]

The firing of Qassam rockets into Israeli civilian populations resulted in a humanitarian law violation by the Palestinian militants.[490] The rockets were unguided and clearly aimed at civilian targets, as there were no Israeli military targets in the vicinity.[491] Also, since the Qassam rocket attacks apparently were launched in retaliation, this constitutes another humanitarian law violation.[492]

CONCLUSION AND RECOMMENDATIONS

Ultimately, both Israel and the Palestinian Authority are bound by international law to ensure that human rights are recognized and protected for all persons in the Gaza Strip. Israel is further obligated to ensure the rights of those affected by its withdrawal from the Gaza Strip. Israel, bound by conventional and customary international law, continues to owe duties to the Palestinians in the Gaza Strip and to its own citizens who were internally displaced as a result of the withdrawal.

Failing to recognize international legal obligations to the Palestinians in Gaza would be contrary to the object and purpose of the various international human rights law treaties to which Israel is a state party. Also, Israel should

---

483. *Getting Worse and Worse*, *supra* note 475, at 39.
484. *Id.*
485. *See id.*
486. ISRAELI OFFENSIVE, *supra* note 411.
487. *See* First Protocol, *supra* note 367, art. 54.
488. *Id.*
489. *See* Fourth Geneva Convention, *supra* note 350, art. 33; First Protocol, *supra* note 367, art. 51, para. 2.
490. *See* First Protocol, *supra* note 367, art. 51, para. 4.
491. *See Getting Worse and Worse*, *supra* note 475, at 39.
492. First Protocol, *supra* note 367, art. 51, para. 6.

follow the Guiding Principles pertaining to Israeli citizens that were internally displaced because of the disengagement plan. These Resettlers fit the definition of internally displaced persons under the Guiding Principles. The Guiding Principles follows the spirit of international human rights law; Israel, as a United Nations member, has an obligation to promote this spirit.

The Palestinian Authority, as an international actor, owes duties to the Israelis and Palestinians under customary international law. Failing to recognize its international obligations would be in direct opposition to the widely accepted customary international law norms and principles that exist in the international realm. Furthermore, as the Palestinian Authority is propositioning the world for statehood, recognizing and ensuring its duties under customary international law serves the interest of all Palestinians seeking their own state. By doing so, the Palestinian Authority can demonstrate to the international community that its intentions are good and that it has the capacity to meet state responsibilities—strong support for Palestinian statehood.

Reports of alleged human rights violations in the Gaza Strip warrant further inquiry. While some nongovernmental organizations, such as Human Rights Watch, have undertaken studies and fact-finding missions, the United Nations is best suited to conduct a thorough examination of these allegations. Many options exist, such as the dispatch of a Special Rapporteur or an investigation by the Human Rights Commission or a human rights expert.[493] Alternatively, the General Assembly or Security Council could invoke the ICJ's advisory jurisdiction, like in the Israeli Wall case,[494] to determine the legal obligations of Israel pertaining to its withdrawal from the Gaza Strip. However, this request would most likely need to arise from the General Assembly rather than the Security Council. The United States is a permanent member of the United Nations Security Council,[495] and, as an ally of Israel, would likely veto any such request for ICJ advisory jurisdiction originating in the Security Council.

Issues of enforcing human rights are a perennial concern. If human rights violations have occurred or are still occurring in the Gaza Strip, international legal institutions and mechanisms are in place to provide recourse. Lack of enforcement in the past or a sense that international human rights law is merely aspirational is not a compelling reason to fail to investigate alleged violations, and, if appropriate, enforce international law.

Israel and the Palestinian Authority each have international legal obligations. Both are in a position to work together to ensure international human rights law is upheld, setting a firm foundation for a new beginning in the Gaza Strip and a new age in the Middle East.

---

493. See WEISSBRODT ET AL., *supra* note 83, at 235-48, for more information on U.N. charter-based mechanisms for evaluation of potential human rights violations.

494. *Supra* notes 424-27 and accompanying text.

495. U.N. Charter art. 23, para. 1.

LICENSE TO BLOG: INTERNET REGULATION IN THE PEOPLE'S REPUBLIC OF CHINA

Trina K. Kissel*

INTRODUCTION

In 1998, a study boldly predicted that by 2005, the number of Internet users in China would grow "exponentially" to reach 16 million.[1] The study grossly underestimated the figure: by the end of 2005 the actual number of Internet users in China reached 111 million.[2] A few years ago, there were only "a handful" of weblogs (blogs) in China,[3] but by the end of 2005, the number of blogs had skyrocketed to 36.82 million.[4] Worldwide, one blog is created every second.[5] These statistics demonstrate both the rapidity with which people adopt new uses of technology and also portend the difficulties a government might encounter in regulating emerging technology.

---

* J.D. candidate 2007. The author would like to thank Professor Kenneth Crews for his assistance.

1. Kristina M. Reed, Comment, *From the Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce*, 13 TRANSNAT'L LAW. 451, 460 (2000) (citing *China: A Shift in Focus with a Little Restructuring*, ASIA-PAC. TELECOMM., Oct. 1, 1998).

2. Embassy of the People's Republic of China in the United States of America, *China Has 111 Million Internet Users*, (Jan. 18, 2006), http://www.china-embassy.org/eng/xw/t231597.htm [hereinafter *111 Million*]. The only country to surpass China in Internet usage is the United States, with an online population of about 135 million. Audra Ang, *China Wants Web News 'Civilized'*, DESERET MORNING NEWS, Sept. 26, 2005, at A4, *available at* 2005 WLNR 15133888. This represents 67% of the total U.S. population. China Daily, *Internet Users Reach 103 Million: Survey*, (July 22, 2005), http://www.china.org.cn/english/BAT/135701.htm. In contrast, China's online population represents about 8.5% of its total population. *111 Million*, *supra.* Within six months, China's internet population had vastly expanded again to 123 million. Sumner Lemon, *China's Internet Population Hits 123 Million*, http://www.infoworld.com/article/06/07/19/HNchinainternet_1.html (last visited Dec. 18, 2006).

3. Mat Honan, *Little Red Blogs*, salon.com, June 4, 2004, http://dir.salon.com/story/tech/feature/2004/06/04/china_blogs/index.html. A weblog is defined as "a personal Web site that provides updated headlines and news articles of other sites that are of interest to the user, [which] also may include journal entries, commentaries and recommendations." Dictionary.com, Weblog, http://dictionary.reference.com/search?q=blog (last visited Dec. 18, 2006). Authoring a blog, or "blogging," has occurred since about 1994, although the term "weblog" was not coined until 1997. *See* Clive Thompson, *The Early Years: A Timeline of the History of Blogging*, N.Y. MAG., Feb. 20, 2006, *available at* http://nymag.com/news/media/15971.

4. People's Daily Online, *MSN Spaces Rated the Leading Blog Service Provider in China*, (Dec. 20, 2005), http://english.peopledaily.com.cn/200512/20/eng20051220_229546.html.

5. BBC News, *One Blog Created 'Every Second,'* (Aug. 2, 2005), http://news.bbc.co.uk/1/hi/technology/4737671.stm.

Since the development of the Internet, China's government has welcomed technological advances because of the increased opportunity for economic development and the potential for China to become a global leader in e-commerce.[6] However, Internet access creates important social ramifications with which the Chinese Communist Party (CCP or Party) must contend because the development of the Internet in China occurs in a single-party, communist-controlled country.[7] "The political solidarity of China's [one-party system] depends heavily upon maintaining ideological unanimity, and this, in turn, necessitates close State control of all information flows."[8] Though the CCP wants to utilize the Internet for economic development, the government is also concerned with the citizens' ability to access information that may be antithetical to Party objectives.[9]

The year 2005 completed the first decade of publicly available Internet access in China.[10] The CCP created many regulations during this decade and imposed control of the Internet through a variety of methods. These stringent mechanisms of control have caused China's Internet to be dubbed the "Great Firewall."[11] After the first regulations were imposed in 1996, subsequent regulations were adopted either to strengthen or clarify previous regulations[12] or to deal with an unforeseen problem caused by emerging technology.[13]

Two regulations promulgated in 2005, the Registration Administration Measures for Non-Commercial Internet Information Services (Registration Measures) and the Rules on the Administration of Internet News Information Services (Administration of News), typify the reasons the CCP creates new Internet regulations. These rules strengthen existing Internet laws and add new provisions for emerging uses of technology, which is accomplished through registration requirements for all non-commercial websites and stringent regulation of the posting of news-related content, including political commentary.[14] Media outside of China characterized both regulations as being

---

6. Fuping Gao, *The E-Commerce Legal Environment in China: Status Quo and Issues*, 18 TEMP. INT'L & COMP. L.J. 51, 52 (2004).

7. Richard Cullen & D.W. Choy, *China's Media: The Impact of the Internet*, 6 SAN DIEGO INT'L L.J. 323, 326 (2005). *See also* Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 895 (2004).

8. Cullen & Choy, *supra* note 7, at 326.

9. Reed, *supra* note 1, at 459-60. *See also* Cullen & Choy, *supra* note 7, at 327.

10. Clara Liang, Note, *Red Light, Green Light: Has China Achieved Its Goals Through the 2000 Internet Regulations?*, 34 VAND. J. TRANSNAT'L L. 1417, 1422 (2001).

11. Traci E. Carpenter, *'Great Firewall' How China Is Using American Technology to Censor the Internet—and Why This Hurts U.S. Interests*, NEWSWEEK, July 21, 2005, http://www.msnbc.msn.com/id/ 8662273/site/newsweek/.

12. Cullen & Choy, *supra* note 7, at 329.

13. *Fourteen Departments United to "Purify" the Internet*, NANFANG WEEKEND, Aug. 18, 2005, *translated in* EastSouthWestNorth, Purifying the Chinese Internet, http://www.zonaeuropa.com/20050821_1.htm (last visited Dec. 18, 2006) [hereinafter *Fourteen Departments*].

14. *See* Congressional-Executive Commission on China, Ministry of Information Industry: Web Sites that Fail to Register May Be Shut Down,

adopted in response to the rapidly growing popularity of blogging in China.[15]

This Note will discuss the CCP's legal and technological responses to the rapidly growing availability of Internet access and examine some of the reasons that the CCP finds strict control necessary. Part A of this Note will look at recent Internet regulations, such as the Registration Measures and the Administration of News, in the context of the three methods that the CCP uses for Internet control. The first method imposes civil and criminal liability through Internet content regulation. The second method employs technological mechanisms to restrict website content and enforce the legal regulations. The third method restricts citizens' ability to access the Internet through personal registration requirements and strict regulation of Internet cafes.

Part B will discuss the unique characteristics of the Internet that cause the CCP to regulate the Internet in these three ways. The unique characteristics of the Internet that necessitate strict regulation include the anonymous character of posting and accessing information on the Internet, the ability for all citizens to freely exchange ideas and information, the rapidly changing technology that makes control more difficult, the ability for sophisticated users to bypass technological control, and efforts by Western parties to end Internet censorship in China.

A. METHODS OF REGULATION

Historically, the CCP used the press as a platform for propaganda, utilizing it as a method of "disseminating its goals and values."[16] The Party traditionally controlled the media through "direct government regulation, censorship, and strict enforcement."[17] As technology has advanced, the CCP has reacted with suspicion and created methods to control new developments in technology.[18] The reasons for the Party's suspicion of technology are undoubtedly complex and cannot be traced to one particular factor or historical event; however, certain occurrences, such as the Tiananmen Square tragedy, likely play a role in causing the Party to distrust emerging technology.[19]

In 1989, at Tiananmen Square, student protesters gathered to urge for democracy in China.[20] The military killed and wounded an unknown number

---

http://cecc.gov/pages/virtualAcad/index.phpd?showsingle=13937 (last visited Dec. 18, 2006) [hereinafter MII]; Congressional-Executive Commission on China, *Government Agencies Issue New Regulations Restricting News Reporting on the Internet*, http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=25176 (last visited Oct. 4, 2006) [hereinafter *Government Agencies*].

15. Charles Hadlock, *China Toughens Restrictions on Internet News*, (Sept. 26, 2005), http://www.msnbc.msn.com/id/9489510/.

16. Reed, *supra* note 1, at 460.

17. Liang, *supra* note 10, at 1426.

18. Jill R. Newbold, Note, *Aiding the Enemy: Imposing Liability on U.S. Corporations for Selling China Internet Tools to Restrict Human Rights*, 2003 U. ILL. J.L. TECH. & POL'Y 503, 507 (2003).

19. *Id.*

20. *Id.*

of protestors; estimates range from a few hundred killed to seven thousand killed and as many as thirty thousand wounded.[21] Political protestors used fax machines, which were "cutting edge technology at the time," to release information of the massacre to the outside world.[22]

After Tiananmen Square, the Party eliminated almost thirteen percent of news publications to reduce apparent threats to its authority.[23] The CCP also recognized the role that emerging communications technology played in the incident, and thus "views the Internet, a tool far more powerful than [fax] machines, with a correspondingly greater suspicion."[24] From the CCP's perspective, strict Internet regulation is necessary because certain websites contain material such as "unhealthy news stories that will easily mislead the public,"[25] information content that is considered "feudalistic and superstitious . . . [which] poison[s] people's spirits,"[26] or political commentary that will create "ideological confusion," especially among college students.[27] Thus, the CCP has strictly regulated the Internet since its inception.[28]

Although the CCP attempts to curtail citizens' access to political dissent, it has also found the Internet useful in positively reinforcing Party messages.[29] Government websites are used to publicize information about the CCP's "stance on various controversial issues" and as "a platform to advance its political agenda."[30] The government also employs citizens to anonymously "offer opinions and write blogs in support of the government, either from a nationalistic perspective or in other ways."[31] The writing of opinions favorable to the Party goes beyond the employment of a few individuals; "[n]ational security and propaganda departments [have] . . . trained a network of on-line 'commentators' to manipulate public opinion as expressed in Internet forums, [Bulletin Board Systems], and message groups."[32]

Despite the ability to emphasize positive Party information through the

---

21. *Id.* *See also* Wikipedia.org, Tiananmen Square Protests of 1989, http://en.wikipedia.org/wiki/tiananmen_ square_protests_of_1989 (last visited Dec. 18, 2006).

22. Newbold, *supra* note 18, at 507.

23. Liang, *supra* note 10, at 1426.

24. Newbold, *supra* note 18, at 507.

25. *Government Agencies*, *supra* note 14.

26. MII, *supra* note 14.

27. Congressional-Executive Commission on China, *Two Provinces Force Universities to Implement "Real Name Systems" for Internet Forums*, http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=25569 (last visited Oct. 4, 2006).

28. Charles Li, *Internet Content Control in China*, 8 INT'L J. COMM. L. & POL'Y 1, 6 (2004).

29. Cullen & Choy, *supra* note 7, at 328.

30. *Id.* at 328-29.

31. Chris Gill & David Stanway, *Cloak and Daggers in Cyberspace—Dark Tales from China's Internet*, CHINA BUS. NEWS ON-LINE, Oct. 13, 2005, at 1.

32. Radio Free Asia, *China Tightens Grip on Cyberspace*, (Aug. 17, 2005), http://www.rfa.org/english/news/in_depth/2005/08/17/internet_china/ [hereinafter *China Tightens Grip*].

Internet, the CCP has exerted far more effort in attempting to shield its citizens from information that portrays the Party in a negative light.[33] The CCP does this through a variety of mechanisms.[34] Many Internet regulations impose criminal and civil liability "down the food chain" upon Internet Service Providers (ISPs), Internet Content Providers (ICPs), and citizens who access the Internet.[35] The Party also uses multi-faceted technological controls to prevent access to forbidden information.[36] Finally, the CCP has made it more difficult for citizens to access the Internet, requiring citizens to register for Internet access by providing personal identification information and closely monitoring the Internet cafes that many citizens use to access the Internet.[37]

1. Legal Control

The CCP has regulated the Internet extensively, dating back to 1996.[38] The regulations cover many aspects of Internet governance, such as infrastructure,[39] e-commerce,[40] intellectual property,[41] security,[42] content restriction,[43] and duties imposed upon individual citizens, ISPs, and ICPs.[44] The Party first created Internet regulations to control the physical connection to the Internet.[45] Since then, the focus of the regulations has shifted primarily, though not exclusively, to content control.[46] More than sixty regulations govern the type of content that is permitted or forbidden on the Internet.[47] In addition, the regulations are enforced by local, provincial, and national government bodies whose jurisdictions may overlap;[48] at least twelve government divisions

33. Congressional-Executive Commission on China, 2005 Annual Report, at III(e), http://www.cecc.gov/pages/annualRpt/annualRpt05/2005_3e_expression.php (last visited Sept. 24, 2006) [hereinafter 2005 Annual Report].

34. *See generally* Reporters Without Borders, *Living Dangerously on the Net: Censorship and Surveillance of Internet Forums*, May 12, 2003, http://www.rsf.org/article.php3?id_article=6793 (describing methods of control over information posted on websites) [hereinafter *Living Dangerously*].

35. Cullen & Choy, *supra* note 7, at 329.

36. *See generally* OPENNET INITIATIVE, INTERNET FILTERING IN CHINA IN 2004-2005: A COUNTRY STUDY, (2005), http://www.opennetinitiative.net/studies/china/ONI_China_Country_Study.pdf (describing various methods of technological control) [hereinafter ONI].

37. *See* Reed, *supra* note 1, at 462; Ang, *supra* note 2.

38. Newbold, *supra* note 18, at 507-08.

39. Li, *supra* note 28, at 6.

40. Gao, *supra* note 6, at 60.

41. Alicia Beverly, *Protecting Your IP in China*, MANUFACTURER'S MONTHLY (AUSTL.), Sept. 2006.

42. Li, *supra* note 28, at 6.

43. Newbold, *supra* note 18, at 508.

44. Cullen & Choy, *supra* note 7, at 329.

45. Li, *supra* note 28, at 6.

46. *Id.*

47. *Id.*

48. Cullen & Choy, *supra* note 7, at 327.

regulate different aspects of the Internet.[49] Businesses and individuals find that adherence to the regulations is difficult because the rules are often "vague, confusing, and inconsistent."[50]

A brief overview of some of the significant content regulation demonstrates how the Party's tactics have evolved over time by changing who is liable for illegal content,[51] who is responsible for maintaining control over content,[52] and what type of content is illegal.[53] On February 1, 1996, the State Council promulgated the Interim Provisions Governing Management of Computer Information Networks (Interim Provisions).[54] This was the first strategic effort by the Party to control the Internet.[55]

Article Thirteen of the Interim Provisions provided that "[n]o unit or individual may use the Internet to engage in criminal activities such as harming national security or disclosing state secrets. No unit or individual may use the Internet to retrieve, replicate, create, or transmit information that threatens social stability and promotes sexually suggestive material."[56] The Interim Provisions placed liability upon individuals who post and access content on the Internet.[57] Organizations and citizens were compelled to register with the Ministry of Public Security (MPS) in order to access the Internet.[58] The

---

49. ONI, *supra* note 36, at 54. The departments that regulate some aspect of the Internet include: Central Propaganda Department; Department of Commerce; Department of Telecommunications; General Administration of Press and Publications; Ministry of Culture; Ministry of Information Industry; Ministry of Public Security; Public Security Bureau; State Administration of Radio, Film, and Television State Council; State Council Information Agency; and State Secrets Bureau. *Id.*

50. Li, *supra* note 28, at 5.

51. *See, e.g.*, Measures for the Administration of Internet Information Services, (promulgated by the State Council, Sept. 20, 2000), art. 14, *translated in* China ePulse, Measures for the Administration of Internet Information Services, http://www.chinaepulse.com/html/regulation.html (last visited Dec. 18, 2006) [hereinafter 2000 Measures].

52. Li, *supra* note 28, at 6.

53. *See, e.g.*, 2000 Measures, *supra* note 51, art. 15.

54. Newbold, *supra* note 18, at 507. The State Council is the "highest authority of state administration with the power to enact nationwide law." *Id.* "It is comprised of the General Affairs Office and twenty-eight ministries and commissions." China.org.cn, The Organizational Structure of the State Council, http://www.china.org.cn/english/kuaixun/64784.htm (last visited Dec. 18, 2006) [hereinafter Organizational Structure]. It includes the Ministry of Public Security, *see infra*, note 58, and the Ministry of Information Industry, *see infra*, note 92.

55. Newbold, *supra* note 18, at 508.

56. *Id.*

57. *Id.*

58. Scott E. Feir, Comment, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China's Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM L. & POL'Y J. 361, 370 (1997). The MPS oversees public security and is the "highest leading and commanding organ of the Armed Police." Organizational Structure, *supra* note 54. It functions to create guidelines, policies, rules, and regulations for public security, and it oversees the implementation of regulations at local security posts. *Id.* In addition, it has the authority to "investigate computer crimes, furnish computer security training, and institute computer security regulations." Liang, *supra* note 10, at 1432.

mandatory registration required that people appear at the local police station and provide demographic information,[59] the name of their ISP, their e-mail address, and any newsgroups to which they subscribe.[60]

In 1998, the State Council promulgated the Provisions for the Implementation of the Interim Provisions Governing the Management of Computer Information Networks (Implementation Provisions).[61] The Implementation Provisions make clear that both individual users and ISPs share liability for illegal content posted on the Internet.[62] These regulations were the second key effort made to control the Internet.[63]

The next important effort by the CCP to regulate the Internet occurred in September 2000.[64] The Measures for Managing Internet Information Services (2000 Measures) made several changes in the way the Internet was governed.[65] The 2000 Measures required ISPs to record the dates and times when subscribers accessed the Internet, the subscriber's account number, the addresses of all websites visited, and the telephone number used to access the Internet.[66] The ISPs must keep a record of this information for sixty days and provide it to the authorities upon request.[67]

The 2000 Measures also required all commercial websites to acquire a license from the State Council or other local government office in order to legally offer commercial services online.[68] All licensed commercial websites must display the license number in a prominent place on the home page of the website and must guarantee that the information provided on the site is published in accordance with the law.[69]

The 2000 Measures were the first regulations to impose liability upon ICPs, ISPs, and individuals.[70] ICPs, ISPs, and individuals are restricted from producing or disseminating nine enumerated categories of information; for example, no information may be posted on the Internet that "instigates ethnic hatred or ethnic discrimination or that undermines national unity."[71] The 2000 Measures also prohibit Internet content that "spreads pornography or other salacious materials, promotes gambling, violence, homicide, or terrorism, or instigates crime."[72]

The CCP also promulgated the Provisions for the Administration of

59. Feir, *supra* note 58, at 370.
60. Reed, *supra* note 1, at 462.
61. Newbold, *supra* note 18, at 508.
62. *Id.*
63. *Id.*
64. Cullen & Choy, *supra* note 7, at 329.
65. *Id.*
66. 2000 Measures, *supra* note 51.
67. *Id.*
68. *Id.* art. 7.
69. *Id.* arts. 12-13.
70. *See* Cullen & Choy, *supra* note 7, at 329.
71. 2000 Measures, *supra* note 51, art. 15.
72. *Id.*

Electronic Bulletin Board System Services (BBS Provisions) in 2000.[73] The BBS Provisions impose liability upon BBS providers similar to that of ISPs. BBS providers must monitor the information posted on the bulletin board and keep records of the details of users, the content they post, and the time of posting.[74]

Also in 2000, the State Secrets Protection Regulations for Computer Information Systems on the Internet were promulgated (State Secrets Law).[75] The State Secrets Law makes it a crime to divulge state secrets online.[76] It also imposes a duty upon ISPs, BBS operators, chat room operators, and news group organizers to create a mechanism to ensure that state secrets are not transmitted using their systems.[77] The law does not define what a state secret consists of, and it has been described as being "so broad that it can cover almost everything."[78] Each information-producing government body has the ability to determine whether a piece of information constitutes a state secret, and the courts have no review over that determination.[79] A subsequent interpretation of law by the Supreme People's Court, the highest court in China, provides that if a state secret is disclosed online under serious circumstances, the punishment must be in accordance with Article 111 of the Criminal Law.[80] This law allows for a maximum penalty of death.[81]

Through these increasingly stringent regulations, the CCP has developed a system of law that holds many entities and individuals accountable for accessible content on the Internet.[82] By placing accountability first upon Internet users, then upon ISPs, and finally upon ICPs, the Party has decentralized regulation by shifting the responsibility for content control away from the government.[83] This ensures that content on the Internet is "not double- but triple-checked: at the gateway . . . , at the network responsible for delivering the content, and [at] the receiver itself."[84] Creating levels of control

---

73. Cullen & Choy, *supra* note 7, at 331.

74. *Id.*

75. *Id.* at 331-32.

76. *Id.* at 332. *See also* Provisions on the Administration of the Protection of Secrets on Internationally Networked Computer Information Systems (Jan 1. 2000), art. 10, *translated in* Congressional-Executive Commission on China, PRC Domestic Laws and Regulations: National Security and State Secrets, http://cecc.gov/pages/virtualAcad/exp/explaws.php#secretsonnetworkslaw (last visited Dec. 18, 2006) [hereinafter State Secrets].

77. Cullen & Choy, *supra* note 7, at 332-33. Article 8 of the State Secrets Law declares that the administration of the law must adhere to the principle of "those who go online shall bear responsibility." State Secrets, *supra* note 76.

78. Cullen & Choy, *supra* note 7, at 332.

79. *Id.*

80. *Id.* at 333.

81. *Id.*

82. *Id.* at 329.

83. Li, *supra* note 28, at 6.

84. *Id.* For a discussion of China's Internet gateways, see *infra* notes 196-99 and accompanying text.

in this manner is an effective way "to make Internet participants adhere to those norms beneficial to the [Party's] control."[85]

The types of information that constitute illegal content have also evolved.[86] The 1996 Interim Provisions prohibited four categories of information that would harm national security, disclose state secrets, threaten social stability, or include sexually suggestive materials.[87] By contrast, the 2000 Measures included nine broad categories of forbidden information.[88]

Two sets of regulations promulgated in 2005 naturally evolved from previous Internet regulation in China. Like the preceding regulations, the new laws identify even broader categories of forbidden information,[89] create enhanced accountability,[90] and focus more directly on newer uses of Internet technology like blogging.[91]

a. Registration Administration Measures for Non-Commercial Internet Information Services

On February 8, 2005, the Ministry of Information Industry (MII) promulgated the Registration Administration Measures for Non-Commercial Internet Information Services.[92] The Registration Measures require that all non-commercial websites carry out registration procedures with the Communications Administration Office in the province where the individual or organization resides.[93] Anyone who does not register is prohibited from operating a non-commercial website within China.[94] Commercial websites

85. *Id.*

86. For example, compare the Interim Provisions with the 2000 Measures. *See* Newbold, *supra* note 18, at 507; 2000 Measures, *supra* note 51, art. 15.

87. Newbold, *supra* note 18, at 507.

88. 2000 Measures, *supra* note 51, art. 15.

89. *See, e.g.*, Provisions on the Administration of Internet News Information Services (promulgated by State Council Information Office & Ministry of Information Industry, Sept. 25, 2005), *translated in* Congressional-Executive Commission on China, Provisions on the Administration of Internet News Information Services, http://cecc.gov/pages/virtualAcad/index.phpd?showsingle=24396 (last visited Dec. 18, 2006) [hereinafter Administration of News].

90. *Government Agencies*, *supra* note 14.

91. Hadlock, *supra* note 15.

92. MII, *supra* note 14. The MII is responsible for the "manufacture of electronic and information products, telecommunication industry and the software industry, promotion of information in the national economy and social services in the country. . . ." Organizational Structure, *supra* note 54.

93. Registration Administration Measures for Non-Commercial Internet Information Services (promulgated by Ministry of Information Industry, Jan. 28, 2005), art. 3, *translated in* Congressional-Executive Commission on China, Registration Administration Measures for Non-Commercial Internet Information Services, http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=12212 (last visited Dec. 18, 2006) [hereinafter Registration Measures].

94. *Id.* art. 5.

were already subject to licensure by the 2000 Measures.[95]

The MII asked local administrators to complete registration of non-commercial websites by June 30, 2005.[96] Local authorities in several Chinese provinces began to register the non-commercial websites in May 2005.[97] On July 2, 2005, Chinese agencies temporarily shut down 100,000 websites that had not registered; the agencies permitted some websites that subsequently registered to re-open.[98] Other websites were refused permission to register because they did not prove they had permission to post certain types of regulated content.[99] Certain other websites were permanently black-listed and will never be permitted to reopen.[100] It is estimated that one quarter of all Chinese websites were temporarily closed for failing to register with the CCP.[101]

One example of a website that was temporarily shut down was that of computer chip-maker Intel.[102] The company had failed to register its Chinese domain name with the authorities,[103] but after registering the domain name on the next day, the site was restored.[104] Individual citizens may not be able to register with the same ease.[105] A blogger found his website inaccessible after his failure to register; he telephoned the MII and was told that it was "not worth bothering" because "there was no chance of an independent blog getting permission to publish."[106] Another website owner expressed that he would not attempt to register his website because it would enable authorities to prosecute him for previously publishing illegal content.[107]

b. Rules on the Administration of Internet News Information Services

On September 25, 2005, the State Council and the MII promulgated the Administration of News regulations.[108] The Administration of News defines "News Information" to include "reporting and commentary relating to politics,

95. 2000 Measures, *supra* note 51, art. 4.

96. MII, *supra* note 14.

97. *Id.*

98. Congressional-Executive Commission on China, Authorities Begin to Sanction, Permanently Shut Down Web Sites that Failed to Register with the Government, http://cecc.gov/pages/virtualAcad/index.phpd?showsingle=17821 (last visited Dec. 18, 2006).

99. *Id.*

100. *Id.*

101. 2005 Annual Report, *supra* note 33, at III(e) n.44.

102. John Liu, *China Closes Unregistered Websites En Masse Before Christmas*, CHINA IT & TELECOM REPORT, Dec. 26, 2005 [hereinafter Liu, *China Closes*].

103. Intel, http://www.intel.com.cn (last visited Dec. 18, 2006).

104. Liu, *China Closes*, *supra* note 102.

105. *Id.*

106. Reporters Without Borders, *Authorities Declare War on Unregistered Websites and Blogs* (June 6, 2005), http://www.rsf.org/article.php3?id_article=14010 [hereinafter *Authorities Declare War*].

107. Liu, *China Closes*, *supra* note 102.

108. Administration of News, *supra* note 89.

economics, military affairs, foreign affairs, and social and public affairs, as well as reporting and commentary relating to fast-breaking social events."[109]

The regulations require the organizations that provide news to perform four functions.[110] First, they must abide by the Chinese Constitution, laws, and regulations.[111] Second, they must be "oriented toward serving the people and serving socialism."[112] Third, they must "correctly guide public opinion."[113] Finally, they must "safeguard the nation's interests and the public interest."[114] The Rules also "encourage" news organizations to "disseminate healthy and civilized News Information that is conducive to raising the quality of the nation, promoting economic development, and spurring social progress."[115]

The Administration of News enumerates eleven categories of news information that may never be posted online.[116] The prohibited subjects are worded vaguely and could encompass a wide variety of information that might be used to challenge the CCP's control.[117] For example, Internet content that would "jeopardize the security of the nation, divulge state secrets, subvert the national regime, or jeopardize the integrity of the nation's unity" is one of the categories of forbidden information.[118] The eleven categories include the original nine categories of content information that were forbidden by the 2000 Measures and two additional categories.[119] The first new category of forbidden information includes "inciting illegal assemblies, associations, marches, demonstrations, or gatherings that disturb social order."[120] The second new category includes "conducting activities in the name of an illegal civil organization."[121]

There are three types of news organizations that may post online news content.[122] The first type includes news organizations established by a government agency that post news that employees of *that* agency gathered and reported.[123] The second type includes news organizations established by government agencies that post news that employees of *another* government agency gathered and reported.[124] The third type is one that is established by a

---

109. *Id.* art. 2.
110. *Id.* art. 3.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* art. 19.
117. Human Rights Watch, *China: End Censorship of Internet*, (Sept. 28, 2005), http://hrw.org/english/docs/2005/09/28/china11798_txt.htm [hereinafter *End Censorship*].
118. Administration of News, *supra* note 89, art. 19.
119. Compare the 2000 Measures and the Administration of News. 2000 Measures, *supra* note 51, art. 19; Administration of News, *supra* note 89, art. 19.
120. Administration of News, *supra* note 89, art. 19.
121. *Id.*
122. *Id.* art. 5.
123. *Id. See also* Government Agencies, *supra* note 14.
124. Administration of News, *supra* note 89, art. 5. *See also* Government Agencies, *supra*

non-government entity.[125]

The second and third types of news organizations may not post online information that they have gathered and edited themselves.[126] The news information reprinted online must reference the source of the information and may not distort the original content.[127] No organization providing Internet news may be operated by a Chinese-Foreign joint venture, cooperative venture, or a wholly foreign-owned venture.[128] Chinese-Foreign ventures that work cooperatively are acceptable but must report to the State Council to complete a security evaluation.[129]

Anyone who posts online news information without authorization or, if authorized, exceeds the scope of their authority will be fined between 5000 and 30,000 yuan, depending on the nature of the violation.[130] If incorrect information is posted online, an organization may be asked to correct or delete it; if the circumstances are severe, access to the online content will be terminated.[131]

Violating the Administration of News regulations could also result in violation of several other laws, subjecting the user to the sanctions imposed by those laws. For example, if a news organization posted information that was considered a state secret in violation of the Administration of News regulations, it is also likely a violation of the State Secrets law. The State Secrets law allows far greater penalties to be imposed, including imprisonment or execution.[132]

The Administration of News implements several significant changes to the manner in which the 2000 Measures regulated Internet sites and activities.[133] Previous regulations did not impose restrictions on BBS, blogs, news alerts sent by e-mail, or Short-Message Systems (SMS) used to send news alerts via cellular telephones.[134] The previous regulations did not differentiate between news organizations; the Administration of News establishes the three categories of news providers and restricts the latter two categories from publishing news unless it has already been published by a government news agency.[135] Finally, the Administration of News sets new restrictions on

---

note 14.

125. Administration of News, *supra* note 89, art. 5. *See also* Government Agencies, *supra* note 14.

126. Administration of News, *supra* note 89, art. 16. *See also* Government Agencies, *supra* note 14.

127. Administration of News, *supra* note 89, art. 16.

128. *Id.* art. 9.

129. *Id.*

130. *Id.* art. 26-29. Five thousand yuan is approximately $620 (USD), and 30,000 yuan is approximately $3700 (USD). Universal Currency Converter, http://www.xe.com/ucc (last visited Dec. 18, 2006).

131. Administration of News, *supra* note 89, arts. 26-28.

132. Cullen & Choy, *supra* note 7, at 332-33.

133. Government Agencies, *supra* note 14.

134. *Id.*

135. *Id.*

Chinese-Foreign ventures that were not previously in effect.[136] Because of the growing popularity of blogging, SMS, and bulletin boards, the Administration of News explicitly encompasses these uses.[137] The previous Internet regulations' applicability to these technologies may have been unclear.[138]

The effects of the Administration of News are expected to be felt more by individuals than existing news organizations,[139] which is why the regulations have been characterized as being created in response to the growing popularity of blogging.[140] "The mainstream press in China already follows official sanctions – they self-censor and get their news filtered and censored before publication."[141] News organizations also regularly meet with government officials to learn what news is acceptable to report.[142] Executives from Internet news providers attend the meetings; representation at the meetings include all of China's Internet "giants" and the Chinese branch of the U.S. corporation Yahoo!.[143] The Administration of News is significant in that its regulations ensure that "only groups that parrot the government's version of events" will be permitted to post or email news information.[144] By forbidding any news or political commentary from being posted by individual users, the Administration of News was designed to intimidate bloggers and those who post messages on BBS forums, causing them to avoid controversial subjects.[145] "The authorities also hope to push the most outspoken online sites to migrate abroad where they will become inaccessible to those inside China because of the Chinese filtering systems."[146]

---

136. *Id.*

137. *Id.*

138. Eugenia Chien, *International News Report: China Takes Aim at its Bloggers*, ATHENS NEWS, Oct. 6, 2005, http://www.athensnews.com/issue/article.php3?story_id=21758.

139. *Id.*

140. Hadlock, *supra* note 15.

141. Chien, *supra* note 138. The *Xinhua News Agency* is China's main outlet for propaganda to China's media. REPORTERS WITHOUT BORDERS, XINHUA: THE WORLD'S BIGGEST PROPAGANDA AGENCY 2 (2005), http://www.rsf.org/IMG/pdf/Report_Xinhua_Eng.pdf. The international department of *Xinhua* publishes news internationally that is actually censored inside of China, giving foreign media the impression that China's media has not censored major events. *Id.* at 6.

142. Stephan Faris, *"Freedom": No Documents Found*, salon.com, Dec. 16, 2005, http://www.salon.com/tech/feature/2005/12/16/censorship/.

143. *Id.* Microsoft, which has been criticized for its participation in Party censorship of the Internet, does not attend the meetings because the news on its site in China is provided by a Party publication, the Beijing Youth Daily. *Id.*

144. *End Censorship*, *supra* note 117. Additionally, the Administration of News sets minimum standards that news organizations must adhere to, which makes compliance difficult, if not impossible, for small organizations. *Id.* They must have registered capital of ten million yuan, and they must have at least ten full-time news editors, five of whom must have at least three years experience in a legal news organization. Administration of News, *supra* note 89, art. 8. Ten million yuan is approximately $1.2 million dollars (USD). Universal Currency Converter, http://www.xe.com/ucc (last visited Dec. 18, 2006).

145. Chien, *supra* note 138.

146. *Authorities Declare War*, *supra* note 106.

Another regulation of news was promulgated on September 10, 2006, entitled Measures for Administering the Release of News and Information in China by Foreign News Agencies (Release of News).[147] The regulations do not explicitly apply to Internet news but could encompass it.[148] The regulations require foreign news agencies to apply to the *Xinhua News Agency* for permission to distribute news information within China.[149]

The Release of News contains ten categories of forbidden information that foreign news agencies may not include in their articles; the categories are similar to the prohibitions contained in the Administration of News.[150] Foreign news agencies are also forbidden from soliciting subscription of their news to users in China.[151] In contrast to the Administration of News, which was characterized as greatly affecting bloggers,[152] commentators criticize the Release of News as having a "large commercial impact on foreign distributors of financial information, such as Reuters and Bloomberg."[153]

c. The Effect of Internet Regulation: Self-censorship

The blocking of particular websites or the imposition of monetary fines, though important to Chinese Internet regulation, does not have as great an impact on citizens' Internet usage habits as the manner in which the law is enforced.[154] Enforcement is designed to cause every user and every business in the country to believe that if an Internet law is violated, the violation will be caught and the punishment will be severe.[155] This causes individuals, ISPs, and ICPs to self-censor. This way, the government does not have to block as much offensive content or locate as many violators because "[t]he best censorship is

147. Measures for Administering the Release of News and Information in China by Foreign News Agencies (promulgated by Xinhua, Sept. 10, 2006), *translated in* Congressional-Executive Commission on China, Measures for Administering the Release of News and Information in China by Foreign News Agencies, http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=69668 (last visited Dec. 18, 2006) [hereinafter Release of News].

148. *See id.* art. 2 ("These Measures shall be applicable to the release of news and information in text, photo, graphics and other forms in China by foreign news agencies.").

149. *Id.* art. 4.

150. *See id.* art. 11.

151. *Id.* art. 4.

152. *See* Hadlock, *supra* note 15.

153. Congressional-Executive Commission on China, New Measures Increase Xinhua Control Over Foreign News Sources, (Oct. 3, 2006), http://cecc.gov/pages/virtualAcad/index.phpd?showsingle=70873. Critics also voiced concern over the ability of foreign news agencies to report on the 2008 Beijing Olympic Games, which Chinese officials had previously promised that reporters would be free to cover. *See* BBC News, *New China Media Curbs Condemned* (Sept. 12, 2006), http://news.bbc.co.uk/2/hi/asia-pacific/5337248.stm.

154. *See generally* 2005 Annual Report, *supra* note 33, at III(e) (describing freedom of expression in China).

155. *Id.*

self-censorship . . . ."[156]

One of the reasons many people choose to self-censor is the fear of imprisonment.[157] A human rights organization found that between 1998 and 2003, seventy-one people had been arrested in China for using the Internet to access or post political or religious material.[158] Reporters Without Borders, an advocate for worldwide freedom of the press, estimates that there are currently eighty-six journalists and cyber-dissidents imprisoned in China.[159] In almost all of the Internet-related imprisonments, the individuals had been charged with subversion, found guilty, and sentenced to between two and twelve years imprisonment.[160] "The manhunts for individual Internet users, which often mobilize dozens of agents from the public security and state security ministries, serve as warnings for the recalcitrants and dissidents who continue to surf the Internet."[161]

Chinese citizens recognize that using the Internet in a way that would violate the law is dangerous due to broad publicity surrounding citizens who are arrested.[162] In 2005, the arrest of Shi Tao was widely reported.[163] Shi Tao is a Chinese citizen who used a Yahoo! email address to correspond with the editor of a democracy-promoting website and periodical.[164] Shi provided the editor, who resides in New York, with information contained in a top-secret government document, which reportedly expressed the Party's concern about the possibility of demonstrations occurring on the fifteenth anniversary of the Tiananmen Square tragedy.[165] At the CCP's request, Yahoo! identified the

---

156. Matthew Forney, *China's Web Watchers*, (Oct. 3, 2005), http://www.time.com/time/magazine/article/0,9171,501051010-1112920,00.html.

157. *See generally* BOBSON WONG, THE TUG-OF-WAR FOR CONTROL OF CHINA'S INTERNET, http://www.hrichina.org/fs/downloadables/pdf/downloadable-resources/a3_Tugofwar.2004.pdf?revision_id=8986 (last visited Dec. 18, 2006) (describing Chinese citizens who were imprisoned for posting information on the Internet) [hereinafter WONG, TUG-OF-WAR].

158. *Id.* at 1.

159. Reporters Without Borders, *Journalist Tried for Posting "Alarmist" Reports on Foreign Websites* (Jan. 20, 2006), http://rsf.org/article.php3?id_article=16221.

160. WONG, TUG-OF-WAR, *supra* note 157, at 1.

161. *Living Dangerously*, *supra* note 34.

162. Tim Johnson, *In China, Sophisticated Filters Keep the Internet Near Sterile*, CHINA DIGITAL TIMES, July 14, 2005, http://chinadigitaltimes.net/2005/07/tim_johnson_in.php; Li, *supra* note 28, at 6.

163. Forney, *supra* note 156; *see also* BBC News, *Yahoo "Helped Jail China Writer"* (Sept. 7, 2005), http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/asia-pacific/4221538.stm; Reporters Without Borders, *Information Supplied by Yahoo! Helped Journalist Shi Tao Get 10 Years in Prison* (June 9, 2005), htpp://www.rsf.org/article.php3?id_article=14884 [hereinafter *Information Supplied*].

164. *Shi Tao Written Judgment* (Hunan Province Changsha Municipality Intermediate People's Court, April 27, 2005) *translated in* Congressional-Executive Commission on China, *Changsha Intermediate People's Court's Written Judgment in the Shi Tao State Secrets Trial*, http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=19648 (last visited Dec. 19, 2006).

165. *Id.*; *Information Supplied*, *supra* note 163.

Internet Protocol (IP) address used to send the message, which allowed the government to locate and arrest Shi.[166] He was found guilty of illegally providing state secrets to foreigners and was sentenced to ten years imprisonment.[167]

Another Internet-related conviction in 2005 captured the attention of Chinese Internet users.[168] Poet and political commentator Zheng Yichun was charged with posting his articles about the "evil" of China's one-party system on a website.[169] Although Chinese Internet users would not have been able to read his articles because the website had been blacklisted by the Party for some time, Zheng was arrested and sentenced to seven years imprisonment for subversion.[170] Another Chinese writer who had posted articles on the same website commented that "Zheng's arrest served as a warning to people like me," and he requested that the website take down any information that he had previously posted.[171]

Internet users have always been in danger of arrest if they chose to post information related to the most sensitive topics, such as the Falun Gong spiritual movement or Tiananmen Square.[172] More recently, however, many citizens have also been detained by the government for posting more general information, such as complaints about Internet cafe restrictions or calls for greater freedom of expression.[173]

Another cause of self-censorship is the vaguely written laws that make it unclear what information the government might deem as subversive, a state secret, or harmful to national interests.[174] "Such obscurity [in the language of the regulations] gives the government wide discretion[] and a stronger basis on which to arrest and punish persons who engage in [controversial] forms of expression."[175] This causes many people to err on the side of caution rather

---

166. *Information Supplied*, *supra* note 163. For an explanation of how an IP address functions, see *infra* note 200.

167. *Information Supplied*, *supra* note 163. Media reports suggest that Yahoo! has provided information to the CCP in other criminal cases as well, leading to the imprisonment of Jiang Lijun, Liu Di, and Li Zhi. *See* Grant Gross, *Group: Yahoo Help Led to Third Dissident's Arrest* (Apr. 19, 2006), http://www.infoworld.com/article/06/04/19/77557_HNyahoodob_1.html.

168. Forney, *supra* note 156.

169. *Id.*

170. *Id.*

171. *Id.*

172. WONG, TUG-OF-WAR, *supra* note 157, at 1-2. *See* Falun Dafa, http://www.falundafa.org/eng/index.htm (last visited Dec. 18, 2006). Falun Gong, or Falun Dafa, is a practice that improves "one's heart and mind through the careful study of universal principles based on truthfulness, benevolence, and forbearance." *Id. See also* Richard C. Morais, *Cracks in the Wall*, FORBES, Feb. 27, 2006, at 94. When the Falun Gong movement spread to seventy million practitioners, the police began to imprison and torture members. *Id.* The movement has now spread worldwide. *Id.*

173. WONG, TUG-OF-WAR, *supra* note 157.

174. Cullen & Choy, *supra* note 7, at 332.

175. Li, *supra* note 28, at 6.

than risk being caught in violation of an Internet regulation.[176] "Broad, vague, and conflicting legislation hangs over Chinese citizens like a fog, obscuring the boundaries of free speech to such a degree that most people are too wary to approach them for fear of over stepping them."[177] Chinese bloggers feel that freedom of expression is greater than one might expect, but it is not completely free.[178] One editor of a Chinese magazine who publishes articles that are critical of the government stated, "We go up to the line—we might even push it. But we never cross it."[179]

Through regulations that hold ISPs, ICPs, and BBS operators liable for content posted on their sites or by using their technology, the Party also induces these entities to self-censor topics that might be deemed illegal.[180] A media analyst explained:

> [T]he Chinese government is currently outsourcing the censorship duties. Finding it impossible to control the opinions of thousands and thousands of bloggers, it is delegating responsibility to a number of favored internet service companies . . . who employ a system of self-censorship and delete posts that might be regarded as offensive or politically sensitive.[181]

Other organizations that provide BBS, message boards, or forums for public opinion also must regularly delete posts or risk being shut down.[182]

After an incident of government violence,[183] one popular bulletin board, Kdnet, was overwhelmed with more than 30,000 messages of "protest and sorrow."[184] The site operator deleted most of the messages but posted an explanation: "Please understand, what other Web sites cannot do, Kdnet also cannot do."[185] This is a common occurrence; forum operators have developed their own systems, as required by the States Secret Law,[186] to catch banned

---

176. Congressional-Executive Commission on China, Prior Restraints in China, http://www.cecc.gov/pages/virtualAcad/exp/exppriorrestraints.php (last visited Dec. 18, 2006).

177. *Id.*

178. Sumner Lemon, *China Finds Freedom Behind Great Firewall* (May 27, 2005), http://www.pcworld.com/article/id,116278-page,1/article.html [hereinafter Lemon, *China Finds Freedom*].

179. 2005 Annual Report, *supra* note 33, at III(e) (citing David Barboza, *Pushing (and Toeing) the Line in China*, N.Y. TIMES, April 18, 2005, at C1). *See also* Lemon, *China Finds Freedom*, *supra* note 178. "Internet users who post content online . . . are generally savvy enough to know what topics test the government's tolerance for free discussion . . . ." *Id.*

180. Philip P. Pan, *Internet Appears to be Weakening China Government's Control of News*, WASH. POST, Dec. 17, 2005, at A1. *See also Living Dangerously*, *supra* note 34.

181. Gill & Stanway, *supra* note 31.

182. *Id.*

183. *See infra* notes 315-16 and accompanying text.

184. Pan, *supra* note 180.

185. *Id.*

186. *See supra* notes 75-81 and accompanying text.

words so that they can review the message before it is posted.[187]

2. Technological Control

The CCP complements the legal regulations with technological measures that are used both to enforce the legal regulations placed upon individuals and to block content that the Party deems as inappropriate.[188]

> In general, China attempts to suppress publication of information related to "subversive" political movements and controversial state actions, including the Tiananmen Square uprising, support for a free Tibet, the Falun Gong spiritual movement, criticism of China's human rights and social justice records, independent news media, and pro-democracy [or] pro-Western commentary.[189]

The CCP has created "the most extensive, technologically sophisticated, and broad-reaching system of Internet filtering in the world"[190] It is difficult to determine exactly how the Party controls the Internet because it changes dynamically over time.[191] Filtering primarily occurs at the "backbone level" of China's network through the construction of a nationwide firewall.[192] In addition, ISPs, Chinese search engines, and blog-hosting services, among others, also filter content.[193] When content is filtered, users sometimes view a "block page," which is a webpage with text identifying that the content may not be accessed.[194] Filtering is often less obvious, however, "appearing to be network errors, redirections, or lengthy timeouts rather than deliberate blocking."[195]

Nine backbone Internet network connections exist in China,[196] and they are required by law to be at least fifty-one percent controlled by State-owned companies.[197] Because there are few backbone levels and they are state-

187. *Living Dangerously*, *supra* note 34. However, moderators at some sites try to "look the other way or drag their feet when they think they can get away with it, because they know that customers are drawn to Web sites with less censorship." Pan, *supra* note 180.

188. *See generally* ONI, *supra* note 36 (describing technological measure of control).

189. *Id.* at 4-5.

190. *Id.* at 4.

191. *Id.* at 3.

192. *Id.* at 3; Liang, *supra* note 10, at 1429. "A firewall is a 'computer or group of computer systems that enforces an access control policy between two networks by blocking traffic or permitting traffic.'" *Id.* at 1430-31 (quoting William Yurcik & Zixiang Tan, *The Great Fire (Wall) of China: Internet Security and Information Policy Issues in the People's Republic of China*, http://www.tprc.org/abstracts/tan.txt).

193. ONI, *supra* note 36, at 3.

194. *Id.* at 20.

195. *Id.*

196. *Id.* at 6.

197. Johnson, *supra* note 162.

controlled, it is simple to add filtering code "at the gateways . . . to meet the [CCP's] special requirement for surveillance."[198] All Internet traffic passes through these backbones.[199] The backbone level of China's network depends on routers made by Cisco, a U.S. corporation.[200] Cisco routers can easily be configured to block information; for example, Cisco routers are commonly utilized in the United States to block viruses.[201] The same technique used to block viruses can also be used to deny access to information that the CCP wishes to remain inaccessible.[202] The version of Cisco routers that was purchased for China's network is capable of handling 750,000 filtering content rules.[203] It is clear that China's network relies on Cisco routers; a Cisco whistleblower further alleged that Cisco customized and developed a type of router or firewall box specifically for China's specialized filtering needs.[204] The router hardware and software that Cisco has provided to China is used both to "filter web traffic" and "conduct surveillance of Chinese Internet users."[205]

One method of filtering content achieved at the backbone level is through blocking the IP addresses of websites that the Party does not want citizens to access.[206] The CCP also filters by domain names or Uniform Resource Locators (URLs).[207] In 1996, the CCP blocked approximately one hundred websites, including access to U.S. newspapers and websites about Taiwan or Hong Kong.[208] The number of blocked websites has grown tremendously since

198. Li, *supra* note 28, at 7.

199. Johnson, *supra* note 162.

200. ONI, *supra* note 36, at 6.

201. Stephanie Ho, *Repressive Governments Use U.S. Technology to Control Internet Access* (Oct. 13, 2005), http://www.voanews.com/english/archive/2005-10/BKG-HO-Internet-Censorship.cfm.

202. ONI, *supra* note 36, at 7.

203. *Id.*

204. *Id.*

205. David Kootnikoff, *The Great Internet Firewall of China U.S. Tech Companies Are Helping to Obstruct Net Freedom*, OHMYNEWS, Nov. 21, 2005, http://english.ohmynews.com/articleview/article_view.asp?menu=c10400&no=259669&rel_no=1.

206. *China's State Control Mechanisms and Methods: Testimony Before the U.S.-China Economic and Security Review Commission*, 109th Cong. (2005) (statement of Kenneth Berman, Director of Information Technology, International Broadcasting Bureau), *available at* http://www.uscc.gov/hearings/2005hearings/written_testimonies/05_04_14wrts/berman_kennet h_wrts.htm (last visited Dec. 18, 2006) [hereinafter Berman].

207. *Id.*; ONI, *supra* note 36, at 3-4. A domain name is a series of letters and numbers separated by periods that is used as an address of a computer network. TechTerms.org, Domain Name Definition, http://www.techterms.org/definition/domainname (last visited Dec. 18, 2006). For example, the search engine Google has the domain name of google.com. An IP address is a set of numbers that identifies devices on a network. TechWeb, IP Address Definition, http://www.techweb.com/encyclopedia/defineterm.jhtml?term=IPaddress (last visited Dec. 18, 2006). A URL is a standardized address name layout that "indicates what kind of resource it is addressing" and the path to the file. *See* TechTerms.org, URL (Uniform Resource Locator) Definition, http://www.techterms.org/definition/url (last visited Dec. 18, 2006). For example, the URL for Google's Image Search is http://www.google.com/images.

208. Liang, *supra* note 10, at 1430.

then.[209] Websites such as Amnesty International, Time Magazine, and news sites by the British Broadcasting Corporation (BBC) are routinely blocked, showing only a message stating "The Page Cannot be Displayed."[210]

Other sites that contain foreign news, however, are often accessible if they appear in a language other than Chinese.[211] If the news is translated in Chinese, then the site is often blocked.[212] The Party has also used domain name system redirection or "hijacking," which takes a user to a website that the Party has chosen rather than the website the user intended.[213]

Filtering of websites has become more refined in the last few years.[214] One study discovered that, in general, websites were actually more accessible in 2005 than in a previous study completed in 2002;[215] however, websites that used the Chinese terms for "Falun Gong" and "Tiananmen Event" were "consistently less accessible in 2005."[216] The researchers concluded that there "appears to be greater specificity and better targeting by China's filtering system" than in previous years.[217] It appears that websites have become more accessible because China has better "tuned its filters" to allow access to some general information on topics relating to forbidden subjects; for example, general information about Tibet may be accessible now, but politically sensitive material about Tibet is still primarily inaccessible.[218] Fewer foreign news sites are blocked than in the past, and it is now "individual bloggers, rather than the New York Times, who are more likely to be blocked."[219]

Initially, the CCP blocked entire domains; however, various domains have been partially unblocked and have some accessible and some inaccessible URLs.[220] For example, the BBC website was initially blocked entirely; now Chinese users can access parts of the website, such as entertainment articles.[221] The CCP will tolerate over-blocking of acceptable content, however, if the domain is likely to have mixed content, where some content is forbidden and some content is acceptable.[222] For example, the entire domains of Angelfire, Blogspot, Tripod, and Geocities were found to be entirely inaccessible in one study; these domains all provide free web-hosting or blogging capabilities.[223]

The CCP has also filtered the results that search engines display to ensure

---

209. *See generally* ONI, *supra* note 36.
210. Johnson, *supra* note 162.
211. Gill & Stanway, *supra* note 31.
212. *Id.*
213. Berman, *supra* note 206.
214. ONI, *supra* note 36, at 4.
215. *Id.* at 36.
216. *Id.* at 35.
217. *Id.*
218. *Id.* at 36.
219. Gill & Stanway, *supra* note 31.
220. ONI, *supra* note 36, at 38.
221. *Id.* at 3; Newbold, *supra* note 18, at 511.
222. ONI, *supra* note 36, at 40.
223. *Id.*

that illegal information is not viewed.[224] In 2002, access to the search engine Google was blocked after the CCP discovered that it could be used to access forbidden material, such as websites about the Falun Gong spiritual movement or Tibetan independence.[225] After a large public outcry, access to Google was later restored, but the caches remained blocked and the results are filtered by the CCP.[226] "Internet searches inevitably yield 'error' messages" when used to look for forbidden information.[227] If users search for prohibited words or phrases, they are "put in a virtual 'penalty box' that temporarily locks up a computer's browser."[228] More than one consecutive illegal search may cause the computer to entirely freeze, requiring it to be rebooted.[229]

In January 2006, Google introduced a new search engine for China,[230] prompting criticism from Western organizations.[231] Previously, Chinese users were accessing the Chinese-language version of Google.com, but now they can access Google.cn.[232] The search engines differ in that Google now cooperates with the Party to block illegal content on Google.cn rather than the Party imposing the censorship.[233] Thus, users will no longer face the lengthy timeouts and error messages they experienced before, but the results will still be censored.[234] When searching for sensitive topics on the new Google site, most results displayed are government sites or those with the Chinese suffix ".cn."[235] Because all ".cn" websites are subject to the Registration Measures,[236] the CCP can ensure that the search engine yields only acceptable information.

Other systems have been implemented by the CCP that do not directly block or filter content but nevertheless ensure that legal regulations are being followed.[237] After the promulgation of the Registration Measures, which

---

224. *See, e.g.*, Newbold, *supra* note 18, at 509.

225. *Id.*

226. Elaine M. Chen, *Legislative Update: Global Internet Freedom: Can Censorship and Freedom Coexist?*, 13 DEPAUL-LCA J. ART & ENT. L. 229, 239 (2003); *Living Dangerously*, *supra* note 34. A cache "stores recently-used information" so that a user can easily access it. TechTerms.org, Cache Definition, http://TechTerms.org/definition/cache (last visited Dec. 19, 2006). The search engine Google "takes a snapshot of each page examined . . . and caches these as a back-up in case the original page is unavailable." Google, Google Help: Search Features, http://www.google.com/help/features.html#cached (last visited Dec. 19, 2006).

227. Johnson, *supra* note 162.

228. *Id.* Penalties last approximately "one hour for the first violation, two hours for the second, and a day for the third." Berman, *supra* note 206.

229. Johnson, *supra* note 162.

230. Christopher Bodeen, *Google Launches Censored China Site* (Jan. 25, 2006), http://abcnews.go.com/Technology/wireStory?id=1542343.

231. Luis Ramirez, *Press Freedom Advocates Blast Google's Decision to Censor Itself in China* (Jan. 25, 2006), http://www.voanews.com/english/archive/2006-01/2006-01-25-voa5.cfm.

232. Bodeen, *supra* note 230.

233. *Id.*

234. *Id.*

235. *Id.*

236. *See supra* note 93 and accompanying text.

237. *See, e.g.*, *Authorities Declare War*, *supra* note 106.

required websites to be registered and the registration number to appear on the site, the MII announced the deployment of a new system that checks the web for unregistered websites.[238] The system, called "Night Crawler," allows the government entity to "locate and block unregistered websites"[239] by "monitor[ing] the sites in real time and search[ing] each Web address for its registration number."[240] To further ensure that forbidden content remains inaccessible and legal regulations are followed, the CCP employs an estimated 30,000 people to personally monitor and censor the Internet.[241] Teams of people have been established within departments of public security to monitor and censor websites.[242]

An innovative method of encouraging citizens to comply with the legal regulations was introduced in January 2006 when the city of Shenzhen introduced two Internet police cartoon characters, Jingjing and Chacha, who appear on all websites and web forums of Shenzhen.[243] The cartoons move interactively with the users as they navigate through web pages.[244] The cartoons function as links to information about Internet regulations and Internet crime cases; they can also connect users to actual Internet police through an Instant Messaging (IM) service for the purpose of answering users' questions about Internet security.[245]

Officials of the Shenzhen Public Security Bureau informed reporters, however, that the "main function" of the cartoons is "to intimidate, not to answer questions. . . ."[246] Local authorities reported that between January and May 2006 the frequency of posting "hazardous information" decreased by sixty percent, and more than 1600 Internet crime allegations were reported through the cartoon police.[247] Within five months of their introduction, the cartoon police were deemed a success and were scheduled to be introduced in eight other cities.[248]

Filtering is also done at levels other than the backbone level and by

---

238. *Id.*

239. *Id.*

240. Assoc. Press, *China Orders All Blogs to Register* (June 7, 2005), *available at* http://www.msnbc.msn.com/id/8131497 [hereinafter *Blogs to Register*].

241. *Living Dangerously*, *supra* note 34.

242. *Id.*

243. Xiao Qiang, *Image of Internet Police: JingJing and Chacha Online – Hong Yan* (Jan. 22, 2006), http://www.chinadigitaltimes.net/2006/01/image_of_internet_police_jingjing_and_chacha_online_hon.php. "Jingcha" is the Chinese word for "police." *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Xinhua, *Cyber Police in Shenzhen to Curb On-Line Crimes* (May 15, 2006), http://news.xinhuanet.com/english/2006-05/15/content_4547731.htm.

248. Michael Zhao, *Online Police to Expand from Shenzhen to 8 Other Cities – An Ling* (May 14, 2006), http://chinadigitaltimes.net/2006/05/online_police_to_expand_from_shenzhen_to_8_other_cities.php.

entities other than the CCP.[249] For example, the MSN Spaces blog-hosting service has received international attention because it prevents bloggers from using politically sensitive language in the names of the blogs or in the titles of blog entries.[250] The blocking is done through the identification of keywords or phrases that are forbidden, such as "Taiwan independence," "human rights," "freedom," or "democracy."[251] When a user has attempted to name a blog or an entry using a banned word, the blogger will receive a message stating: "This message contains a banned expression, please delete this expression."[252]

MSN responds that, as a corporation, it "abides by the laws, regulations[,] and norms of each country in which it operates."[253] A Chinese blogger and technology entrepreneur noted that although official Chinese censorship practices ban speech that is critical of the government, there is no law forbidding the use of words like "freedom"; therefore, MSN is actually going beyond the "laws, regulations[,] and norms" of the country by denying all use of the word.[254] MSN was also severely criticized for acquiescing to Party demands and deleting a blog that was critical of the CCP's removal of a newspaper editor in December 2005.[255] Even a Microsoft employee spoke out against the action by his company, stating: "It's one thing to pull a list of words out of blogs using an algorithm. It's another thing to become an agent of a government and censor an entire blogger's work."[256]

The methods imposed by the CCP and by ISPs or ICPs effectively censor many types of content. Although many Chinese citizens do not support censorship of political information, the majority of citizens are in favor of blocking certain types of content, such as pornography, violence, and unsolicited commercial emails (spam).[257] A Chinese blogger wrote that "the western world is focused on freedom of speech and media in China, but [is] not addressing any problems with imposing socio-cultural standards (with respect to pornography, for example) on everybody else."[258] In general, the CCP has

---

249. *See, e.g.*, Kevin Poulsen, *Chinese Blogger Slams Microsoft* (June 20, 2005), http://www.wired.com/news/technology/1,67957-0.html.

250. *Id.*

251. *Id.*

252. BBC News, *Microsoft Censors Chinese Blogs* (June 14, 2005), http://news.bbc.co.uk/2/hi/technology/4088702.stm.

253. Poulsen, *supra* note 249.

254. *Id.*

255. David Barboza & Tom Zeller Jr., *Microsoft Shuts Blog's Site After Complaints by Beijing*, N.Y. TIMES, Jan. 6, 2006, at C3, *available at* 2006 WLNR 325978.

256. *Id.*

257. Antone Gonsalves, *Chinese Web Users Slow to Buy, Quick to Have Fun* (Nov. 17, 2005), http://informationweek.com/story/showArticle.jhtml?articleID=174400176. *See also* BOBSON WONG, A MATTER OF TRUST: THE INTERNET AND SOCIAL CHANGE IN CHINA 2 (2003), *available at* http://www.hrichina.org/public/contents/10351 (last visited Dec. 18, 2006) [hereinafter WONG, MATTER OF TRUST]. "[C]ensorship is neither as extreme nor as unpopular in China as many Westerners might think." *Id.*

258. Hinano Mizuki, *The Case for Internet Censoring in China, translated in* EastSouthWestNorth (June 22, 2005), http://www.zonaeuropa.com/20050622_1.htm.

effectively censored pornography,[259] and it has also sought to eliminate violent web-based video games, spam, fraud, and gambling.[260] The Party also censors other information that its citizens may not be fully aware of, such as information about Taiwan or Tibet.[261] "[In a country such as China,] sometimes a product gets sold or implemented and [citizens] don't even know what [types of content] they're not getting or why."[262]

Although the technology used to censor content is highly sophisticated and effective, the technological methods of content control are not foolproof, as discussed in Part B. Sophisticated users are able to find ways around the various methods of technological control.[263]

3. Access Control

The third method that the CCP uses to maintain control of the Internet is through creating a system of control that makes it more difficult for citizens to access the Internet.[264] The government regulates access control through two primary methods: mandatory registration of individuals[265] and regulation of the Internet cafes.[266]

"Access control has always been a part of China's Internet filtering system. . . ."[267] Regulation of individuals who use the Internet began in 1996 and has been updated several times.[268] The regulations require citizens to obtain licenses for Internet access and register with the local police, providing their names, the names of their service providers, their e-mail addresses, and any newsgroups to which they subscribe.[269] Through regulations promulgated in 2000, the CCP required ISPs to track their users' account numbers, when their users are online, and the sites their customers visit.[270] Regardless of whether the CCP actually uses this identification information to sanction individuals, the requirements of providing personal information is designed to give citizens the impression that "every bit of [their] activity is tracked."[271]

Local and province officials have also used their authority to require individuals using BBS, chat rooms, and IM services to use their real names

259. ONI, *supra* note 36, at 37; Carpenter, *supra* note 11.

260. Assoc. Press, *China Winning War on Internet Pornography* (Dec. 29, 2005), http://www.chinadaily.com.cn/english/doc/2005-12/29/content_507774.htm.

261. ONI, *supra* note 36, at 4.

262. Carpenter, *supra* note 11.

263. Faris, *supra* note 142.

264. *See, e.g.*, Reed, *supra* note 1, at 462.

265. *Id.*

266. Newbold, *supra* note 18, at 504.

267. ONI, *supra* note 36, at 9.

268. Reed, *supra* note 1, at 462.

269. *Id.*

270. ONI, *supra* note 36, at 11.

271. Johnson, *supra* note 162.

when posting messages or chatting online.[272] Although the real name system is not currently a national law, it has been used in some provinces and in university settings since 2003.[273] In July 2005, the real name system was enforced upon administrators and group founders of QQ, which is China's largest IM service.[274] A notice posted on QQ explained the need for the real name system: "This year, at various Internet chat rooms in our city, there were chat groups, forums, BBS, Internet SMS, and various Internet public information services in which there were illegal assemblies, illegal alliances[,] and obscene behaviors being observed."[275] Requiring registration of all Internet users and implementing real name systems are two more techniques of creating and enforcing user accountability for Internet content control.[276]

The second method the CCP uses to manage Internet access is regulation of Internet cafes.[277] Control of Internet cafes is critical for the CCP because many Chinese citizens are unable to afford a personal computer, and they use Internet cafes as the primary method for gaining Internet access.[278] Regulation of Internet cafes became significantly more stringent after a fire in an Internet cafe killed twenty-five people in 2002.[279] Prior to the fire, Internet cafes had already been subject to regulation; "tens of thousands" of cafes had been shut down in the preceding years.[280] As a result, many cafes were operating without the required licenses, and the owners of the cafe in which the fire occurred had barred the doors at night while customers were inside, due to fear of government inspection.[281] When a fire broke out, some of the customers inside the cafe were unable to escape.[282]

Shortly thereafter, the CCP imposed even stricter regulations for licensing of the cafes, bans on minors using the cafes, and requirements for operators.[283] The operators must install filtering software, post signs warning users not to access illegal information, register users, keep records of the users' activity for sixty days, and provide that information to the CCP upon request.[284] They must also apply for a fire safety permit and demonstrate that they have adequate security personnel.[285] Subsequent to the fire, the Party shut down 150,000

272. *China Tightens Grip*, *supra* note 32.

273. *Id.*

274. *Fourteen Departments*, *supra* note 13. There are 100 million active users of QQ, which includes 8 million users who are classified as founders and administrators. *Id.*

275. *Id.*

276. *See China Tightens Grip*, *supra* note 32.

277. Newbold, *supra* note 18, at 504.

278. Ang, *supra* note 2.

279. *Fourteen Departments*, *supra* note 13.

280. Newbold, *supra* note 18, at 504.

281. *Id.*

282. *Id.*

283. *Id.* at 510.

284. *Id.* The filtering software, known as "Internet Police 110" blocks more than 500,000 banned websites. *Id.*

285. ONI, *supra* note 36, at 12.

unlicensed Internet cafes between June and September 2002.[286] In 2004, the Party shut down 47,000 Internet cafes, sanctioned 21,000, and revoked the licenses of more than 2000 others.[287]

A journalist provided a description of what it was like to use an Internet cafe in Shanghai:

> Each incoming user must give a name and address, then hand over identification to a clerk. Closed-circuit TV cameras monitor from overhead. Every computer terminal is loaded with software to track all activity. If a user heads toward a prohibited Web site, cafe employees know right away . . . [because a] blinking light goes off. . . . The software also alerts authorities at a Shanghai municipal security post across town, and inspectors eventually may drop in to check on the infractions.[288]

Even though Internet cafe use is highly regulated, this does not deter Chinese citizens from using the cafes.[289] One journalist remarked, "[A]t 1 [a.m.] in a Beijing internet cafe there is not an empty seat, as in most of the other 100,000 internet cafes in China."[290] Therefore, despite the strict regulation, Chinese citizens still find the Internet a useful and viable medium, as demonstrated by the skyrocketing number of Chinese citizens who use the Internet.[291]

The Party has fairly effectively controlled the Internet through three forms of control: legal control to create accountability through criminal and civil liability, technological control to prevent access to controversial information, and access control to closely monitor citizens who use the Internet. It is clear that the CCP has created stringent forms of control over the Internet. As technology evolves, the methods of control that the CCP employs will also need to evolve. Although the technology continues to change, there are certain reasons that the CCP controls the Internet which remain the same. The next section of this Note will explore why the Party finds it necessary to regulate in the manner it does.

---

286. Alfred Hermida, *Behind China's Internet Red Firewall* (Sept. 3, 2002), http://news.bbc.co.uk/1/hi/technology/2234154.stm.

287. Petra Räisänen, The Urban Technospace: A Study on Internet Cafes in Shanghai 16 (Spring 2006) (unpublished Master's thesis, Lund University), *available at* theses.lub.lu.se/archive/2006/08/15/1155639224-21264-493/description.scr (last visited Dec. 18, 2006).

288. Johnson, *supra* note 162.

289. Poppy Sebag-Montefiore, *China's Young Escape into the Web* (Nov. 20, 2005), http://observer.guardian.co.uk/international/story/0,6903,1646663,00.html.

290. *Id.*

291. *See 111 Million*, *supra* note 2.

B. CHARACTERISTICS OF THE INTERNET THAT CAUSE THE CCP TO STRICTLY REGULATE IT

The President of China stated what he saw as the principle for Internet development in China: "Develop it positively; Strengthen the management; Hasten the benefits while avoiding the harm; and Make it useful for us."[292] The Party has recognized that Internet development is essential to its economic growth and global political power.[293] Therefore, the government must strike a balance between encouraging the expansion of the Internet while controlling its use.[294]

There are many characteristics of the Internet that cause the CCP to regulate it. Indeed, many countries of the world have some type of legislation that relates to the Internet, although most countries do not regulate the Internet to the extent that China does.[295] The stability of the CCP depends on "maintaining ideological unanimity."[296] This causes the Party to create and enforce strict Internet regulations in order to minimize negative information about the Party, which the Internet is uniquely suited to spread.[297] The characteristics of the Internet that necessitate strict regulation by the Party include the accessible nature of information on the Internet,[298] the anonymous character of posting and accessing information,[299] the rapidly changing technology that makes control more difficult,[300] and efforts by Western parties to assist Chinese users in circumventing the control mechanisms.[301]

1. Nature of the Internet

When the Internet was first introduced in China, many people predicted that because of the open nature and accessibility of information on the Internet, the political structure of China would ultimately have to change.[302] Former U.S. President Bill Clinton commented on the nature of the Internet, stating in 2000: "[T]here's no question China has been trying to crack down on the

---

292. Li, *supra* note 28, at 2.

293. *Id.*

294. *See id.*

295. *Id.* at 3-4.

296. Cullen & Choy, *supra* note 7, at 336.

297. *Id.*

298. Liang, *supra* note 10, at 1427.

299. *See, e.g.*, Honan, *supra* note 3 (describing how the sharing of sensitive information often occurs in chat rooms or on bulletin boards, in part, because of the user's ability to remain anonymous).

300. Gill & Stanway, *supra* note 31.

301. *See, e.g.*, Nart Villenueve, *Technical Ways to Get Around Censorship*, *in* REPORTERS WITHOUT BORDERS, HANDBOOK FOR BLOGGERS AND CYBER-DISSIDENTS 63-78 (2005), *available at* http://www.rsf.org/IMG/pdf/handbook_bloggers_cyberdissidents-GB.pdf [hereinafter HANDBOOK FOR BLOGGERS].

302. David Lee, *Multinationals Making in a Mint from China's Great Firewall*, S. CHINA MORNING POST, Oct. 2, 2002, at 16, *available at* 2002 WL 4489164.

Internet – good luck. That's sort of like trying to nail Jello [sic] to the wall."[303] The Internet presents "a unique challenge" to the Party's ability to strictly control the accessibility of certain information because the Internet is designed to be "decentralized and subject to no singular center of authority."[304]

One of the primary reasons for the popularity of the Internet "is its power to facilitate instantaneous communication without being subject to any significant constraints."[305] Therefore, the nature of the Internet itself is the key reason the Party must exert such stringent control over it.[306] Fundamental conflicts between a one-party political system and the nature of the Internet cause the CCP to be "over-sensitiv[e]" about the political implications of the Internet.[307] The Party has legitimate cause for concern; many organizations use the Internet to try to provide more open communication with Chinese citizens.[308]

In addition to the Party's concern about the accessibility of controversial information, another problem with the nature of the Internet is that it is designed to adapt to faults within the system.[309] "When a link or computer fails, packets adapt and automatically reroute. To access blocked information, a user can just find an alternate route."[310] Furthermore, any system of technological censorship can only be effective "to the extent that human behavior is completely predictable."[311] For example, when Google implemented the Chinese version of its search engine, users could type into the image search function the term "Tiananmen" and find idyllic pictures of Tiananmen Square.[312] If the user misspelled the search term "Tianenmen," however, then the famous picture of a student protester facing down a row of armored tanks is included in the search results.[313] Unless the CCP or Google can predict every potential misspelling of sensitive words, information of this type may often inadvertently be accessible.

Similarly, the CCP must be able to predict the words and phrases that would lead to controversial information. The spread of news of a recent violent

303. Li, *supra* note 28, at 4.

304. Liang, *supra* note 10, at 1427.

305. Cullen & Choy, *supra* note 7, at 326.

306. *Id.*

307. *Id.*

308. *See infra* notes 410-17 and accompanying text.

309. Liang, *supra* note 10, at 1428.

310. *Id.*

311. *Id.*

312. Owen Thomas, *Google's Chinese Censorship Efforts Tank* (Jan. 30, 2006), http://money.cnn.com/2006/01/30/technology/browser0130/?cnn=yes.

313. *Id.* The picture is famous to the Western world. Most Chinese citizens do not speak of Tiananmen Square. *See* Lisa Rose Weaver, *China's Young Ignore Tragic Tiananmen* (June 1, 2001), http://edition.cnn.com/2001/WORLD/asiapcf/east/05/31/tiananmen.luo.daiyou/. Those Chinese citizens who are interested in the Tiananmen tragedy probably have not been able to see the picture because of Internet filtering. *See* Forney, *supra* note 156. Recently a Beijing reporter used a proxy server to view, for the first time, a video of the student protestor. *Id.* He commented, "See that boy facing down a line of tanks? . . . I'd heard about that." *Id.*

occurrence shows how the nature of the Internet makes it difficult for the CCP to predictably and effectively control content.[314] On December 6, 2005, government authorities shot and killed an estimated twenty rural protesters in the town of Dongzhou.[315] The CCP then barred newspapers, broadcasters, and major Internet sites from mentioning the event.[316] The media blackout was fairly effective because most Chinese citizens did not hear about the killings.[317] Some Chinese citizens did learn about it, however, and "[found] ways to spread and discuss the news on the Internet, circumventing state controls with e-mail . . . instant messaging . . . blogs and bulletin board forums."[318] One example of citizens circumventing Party control was through an online discussion about the killing that was disguised as a discussion about another topic; controversial keywords and other filtering mechanisms were completely avoided.[319]

> At first glance, it looked like a spirited online discussion about an essay written 80 years ago by modern China's greatest author. . . . But why did thousands of people read or post notes in an online forum devoted to the essay last week? A close look suggests an answer that China's governing Communist Party might find disturbing: They were using Lu's essay about the 1926 massacre as a pretext to discuss a more current and politically sensitive event – the . . . police shooting of rural protesters in . . . Dongzhou.[320]

A filtering device would not have the subtlety to recognize that the forum topic contained banned information. Mechanisms for censorship are also generally unable to recognize banned words that users have altered by adding dashes, asterisks, or other characters.[321] These are two likely reasons why the CCP has found it necessary to employ an estimated 30,000 individuals to personally check websites.[322]

---

314. *See* Pan, *supra* note 180.

315. *Id. See also* Human Rights Watch, *China: Dongzhou Killings Need Independent Investigation* (Dec. 15, 2005), http://www.hrw.org/english/docs/2005/12/15/china12281.htm [hereinafter *Dongzhou Killings*]. Villagers were protesting inadequate compensation for land that had been expropriated for a power plant. *Id.* Witnesses reported that security forces opened fire without warning. *Id.* The Party initially claimed the violence was initiated by the villagers, but later stated that a government officer mishandled the incident and caused the "mistaken deaths and accidental injuries." *Id.*

316. Pan, *supra* note 180. *See also Dongzhou Killings*, *supra* note 315. It was reported that Dongzhou was subsequently sealed off by roadblocks to keep journalists out. *Id.*

317. Pan, *supra* note 180.

318. *Id.*

319. *Id.*

320. *Id.*

321. *See* ONI, *supra* note 36, at 48.

322. *See Living Dangerously*, *supra* note 34.

2. Anonymity

Another characteristic of the Internet that causes the CCP to strictly regulate it is the anonymity that the Internet provides for its users.[323] From the first efforts to regulate the Internet, in which citizens had to register with the government in order to access the Internet,[324] the Party has repeatedly been striving toward the elimination of Chinese citizens' ability to access and post information anonymously; each successive law has taken another step in eradicating the anonymous character of the Internet.[325]

The ability to remain anonymous while surfing the Internet could cause users to seek out forbidden types of information that the Party does not want them to access; [326] this is another reason for the Party's need to strictly regulate the Internet. Therefore, the CCP requires that ISPs track the sites their customers visit[327] and that Internet cafes install filtering software.[328] The CCP has demonstrated to its citizens, through the arrest and imprisonment of Shi Tao, that even the email that individuals write is not anonymous.[329]

The Party is not only concerned with the ability to access information but also the ability to anonymously post information on the Internet. It has attempted to counteract this by requiring both commercial and non-commercial websites to register.[330] Province officials have even begun to require BBS and IM users to use their real names.[331] From the CCP's perspective, eliminating the anonymity of the Internet is helpful because it quells some of the rebelliousness that users would otherwise voice if they had the ability to remain anonymous.[332] "Dissent more often shows its face in these forums that are harder for the government to monitor and control."[333] Information that the CCP has forbidden is more often distributed in chat rooms and on bulletin boards, which are "places that offer greater levels of anonymity or impermanence."[334]

An Internet blog forum called Bokee uses a list of keywords to catch illegal posts.[335] The operator of the forum stated that ten out of about four

---

323. *See generally* Honan, *supra* note 3 (noting that sites that offer increased "anonymity or impermanence" are often used to post sensitive information).

324. Feir, *supra* note 58, at 370.

325. *See, e.g.*, 2000 Measures, *supra* note 51; Registration Measures, *supra* note 93; Administration of News, *supra* note 89.

326. *See generally Living Dangerously*, *supra* note 34 (describing sensitive topics that are removed from Internet forums).

327. 2000 Measures, *supra* note 51, art. 14.

328. Newbold, *supra* note 18, at 510.

329. *Information Supplied*, *supra* note 163. *See supra* notes 163-67 and accompanying text.

330. 2000 Measures, *supra* note 51, art. 4; Registration Measures, *supra* note 93, art. 3.

331. *China Tightens Grip*, *supra* note 32.

332. Honan, *supra* note 3.

333. *Id.*

334. *Id.*

335. Faris, *supra* note 142.

hundred people are employed at Bokee to search through blogs to find forbidden information that the filters did not catch.[336]

> "[Censoring blogs] is not as serious of a [technical] challenge as people think" . . . . For most of Bokee's blogs, the audience is small and the author can be held accountable, so fewer than one in 500 postings needs to be deleted. On bulletin boards, which are anonymous and reach a larger audience, the number is closer to one in 20.[337]

Creating a system of accountability is thus the Party's most effective way of combating an Internet that is by nature anonymous.

3. Changing Technology

The constant development of new technologies is another characteristic of the Internet that results in the CCP's strict Internet regulation.[338] It is difficult to control a medium that changes so frequently.[339] When citizens adopt new technology for purposes that the Party deems unacceptable, the CCP must always scramble to catch up.[340] China is trying to manage the "media explosion brought about by the Internet . . . by aiming to replicate its controls over traditional media through the use of filters, firewalls[,] and complicated registration procedures;"[341] however, using these old forms of control in a new form of media has created a "considerable challenge" to the authorities.[342]

Blogs are not a new technology per se, but they are a new *use* of Internet technology.[343] Chinese blogs have existed since at least 2002[344] and have become extremely popular.[345] Experts indicate that the sudden growth in popularity of blogs results from more prevalent broadband Internet access and marketing by Chinese Internet providers who promote blogging capability.[346] Early bloggers exercised discretion, emphasizing its use as a system of information management and deemphasizing the potential for blogging to be used as an "engine for free speech."[347] Therefore, blogs were not immediately the source of Party scrutiny even though the CCP already censored or blocked

---

336. *Id.*
337. *Id.*
338. Gill & Stanway, *supra* note 31.
339. Feir, *supra* note 58, at 385.
340. Blogs to Register, *supra* note 240.
341. Gill & Stanway, *supra* note 31.
342. *Id.*
343. *See generally* Thompson, *supra* note 3 (timeline showing history of blogging).
344. Poulsen, *supra* note 249.
345. Howard W. French, *A Party Girl Leads China's Online Revolution*, N.Y. TIMES, Nov. 24, 2005, at A1.
346. *Id.*
347. Honan, *supra* note 3.

personal websites.[348] However, blogging has "exploded in recent months, challenging China's ever vigilant online censors and giving flesh to the kind of free-spoken civil society whose emergence the government has long been determined to prevent or at least tightly control."[349] The government now recognizes that blogs can be a source of government dissent and thus finds this new use of Internet technology necessary to regulate.[350]

Part of the CCP's concern stems from the freedom of expression associated with blogging.[351] An entertainment journalist, Wang Xiaofeng, commented on the nature of blogs: "In blogging I don't need to be concerned about taboos . . . I don't need to borrow a euphemism to express myself. I can do it more directly, using the exact word I want to, so it feels a lot freer."[352]

The Party has demonstrated that it is concerned about blogging; therefore, blogging may not be as free as it seems.[353] One popular blogger, Isaac Mao, writes primarily about education and technology.[354] He stated that although he does not avoid particular subjects, he does "try to avoid sensitive words."[355] Mao crossed the line when he posted a graphic that professed to explain how China's firewall system worked.[356] His blog was blocked by Chinese censors[357] and is no longer accessible worldwide.[358] Because some Internet users have been imprisoned for the content they posted, the advocacy group Reporters Without Borders commented, "You have to be brave to publish political content online. . . . It's not a hobby."[359]

Overall, most of the topics posted on blogs in China are not controversial.[360] Most blog posts are typically politically neutral and often focus on daily life; students also frequently write blogs to practice their English language skills.[361] Blogs that discuss news and politics, however, are not uncommon.[362] Many people "scour foreign Web sites and report on their

348. *Id.*
349. French, *supra* note 345.
350. Hadlock, *supra* note 15.
351. *Authorities Declare War*, *supra* note 106.
352. French, *supra* note 345.
353. *See id.*
354. *Id.*
355. Honan, *supra* note 3.
356. French, *supra* note 345.
357. *Id.*
358. Isaac Mao then created a new blog, in which he wrote:

> It's been 10 months from the last post when my web site was unplugged and then rejected of registraiton [sic] by authority for [sic – four?] times. . . . Seems no other choices [sic], I have to move this site and blogs to oversea's [sic] hosting at last. It's not my personal intention . . . . I want to keep the site in China.

Isaac Mao, *Isaacmao.com Is in Recovering. . .*, (June 21, 2006), http://www.isaacmao.com/meta.
359. Ho, *supra* note 201.
360. Honan, *supra* note 3.
361. *Id.*
362. French, *supra* note 345.

findings, adding their own commentary, in Chinese blogs."[363] The sites that provide news, controversial political topics, or have available public forums are subject to censorship, often within minutes or hours, demonstrating the CCP's fear of the new medium.[364] In March 2004, four of the leading blog providers in China were temporarily shut down.[365] Users complain that this is typical; there are no stable blogging services because the service provider must completely shut down "when the government finds any sensitive information on any of the 100,000 blogging users' pages."[366] The blogs may be restored when the sensitive content has been removed.[367]

The Party must constantly update both the laws and the technological methods of enforcing the laws in order to keep up with the adoption of new technology.[368] Although blogging has become extremely popular in China, "it still takes a backseat to SMS and other means of peer-to-peer communication."[369] In December 2005, the MII announced that it would soon require registration of mobile phones because of the "spread of rumors and false advertising" through SMS.[370] The MII also reported that mobile phone registration would help control "improper political commentary."[371] It takes a certain period of time for an emerging technology to become popular enough for the CCP to become concerned about it, so there is necessarily a delay between popular adoption of a new technology and strict regulation of it.[372]

4. Internet as a Tool for Mobilization

The CCP is not just concerned with the information that is accessible

---

363. *Id.*

364. *See Living Dangerously*, *supra* note 34. *But see* Nicholas D. Kristof, *In China It's ******* vs. Netizens*, N.Y. TIMES, June 20, 2006, at A17. A journalist created two Chinese blogs and "huff[ed] and puff[ed] as outrageously" as he could about various sensitive political topics in attempt to see how long it would take for his sites to be shut down. *Id.* Forbidden words in his posts appeared with asterisks in them, but the sites were not quickly blocked. *Id.* Another journalist reported that the Chinese blogs written by *The New York Times* journalist had been blocked the next morning, demonstrating "how difficult it is for [the CCP's] Internet censors to keep up." David Fickling, *Beating China's Censors at Their Own Game* (June 21, 2006), http://blogs.guardian.co.uk/news/archives/2006/06/21/beating_chinas_censors_at_their_own_game.html.

365. Honan, *supra* note 3. The domains temporarily closed down were Blogbus, BlogCN, Blogdriver, and TypePad. *Id.*

366. *Id.*

367. *Id.*

368. *See generally* 2000 Measures, *supra* note 51; Registration Measures, *supra* note 93; Administration of News, *supra* note 89.

369. Honan, *supra* note 3.

370. *China Wants Mobile Phone Users to Register,* XINHUA FINANCIAL NETWORK NEWS, Dec. 2, 2005.

371. *Id.*

372. *See generally* Honan, *supra* note 3 (explaining that the CCP did not initially recognize the significance of blogs and did not censor them until blogging became popular).

online.[373] The Party has demonstrated that it has recently become concerned with the Internet's ability to be used for coordinating protests.[374] The Administration of News regulations added two forbidden categories of information that were not previously prohibited from being posted on the Internet.[375] Both prohibitions are directed at avoiding civil unrest through prevention of "inciting illegal assemblies, associations, marches, demonstrations, or gatherings that disturb social order" or conducting activities in the name of an "illegal civil organization."[376] The regulations reveal a concern by the CCP that the Internet may be used for those activities. As one commentator stated, "Most foreign analysts get it wrong. . . . Political concern about the Internet [in China] is totally about social organization, not about information. It [is] how you act on the information you have."[377]

In the Spring of 2005, bulletin board postings and SMS messages motivated thousands of youth to participate in anti-Japanese protests, which caught riot police off-guard.[378] The CCP recognized the role technology played in instigating the demonstration, so the Party sent SMS messages of its own, warning residents to "avoid illegal demonstrations and to focus their patriotism on their studies and jobs."[379] Public protests like this are a growing trend.[380] In 2005, "mass gatherings to disturb social order" rose by thirteen percent as compared to 2004.[381] Because the Internet can facilitate these mass gatherings, the CCP must govern it more closely to prevent civil unrest.[382]

5. Sophisticated Users

The CCP also finds it necessary to regulate the Internet because sophisticated users are able to bypass the technological means of control.[383] "Experts say the hackers and the government are in a constant game of cat-and-mouse, with the first constantly finding loopholes and the other moving just as quickly to close them."[384] Technologies are constantly being developed to

373. Melinda Liu, *China: Now Big Brother Is Talking to You*, NEWSWEEK INT'L, Oct. 17, 2005, *available at* http://www.msnbc.msn.com/id/9630976/site/newsweek/print/1/displaymode/1098/ [hereinafter Liu, *Big Brother*].

374. *Id.*

375. *Id.*; Administration of News, *supra* note 89, art. 19.

376. Liu, *Big Brother*, *supra* note 373; Administration of News, *supra* note 89, art. 19.

377. Liu, *Big Brother*, *supra* note 373.

378. *Id.*

379. *Id.*

380. Congressional-Executive Commission on China, Ministry of Public Security Reports Rise in Public Order Disturbances in 2005, http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=37602 (last visited Oct. 4, 2006).

381. *Id.*

382. *See generally* Liu, *Big Brother*, *supra* note 373 (describing the anti-Japanese protests).

383. Feir, *supra* note 58, at 384.

384. *Q&A: China's New Internet Restrictions*, N.Y. TIMES, Sept. 29, 2005, *available at* http://www.nytimes.com/crf/international/slot1_092905.html. *See also* WONG, MATTER OF

allow users to access information that has been blocked.[385] Online activists provide information and services that assist citizens in countries with repressive governments to create blogs that are anonymous or less likely to be blocked.[386] These are some of the reasons that "attempts to physically limit Internet access[] are merely a nuisance to determined users."[387] Therefore, the CCP must constantly update censorship techniques and regulations that prohibit circumventing state control in order to combat users who attempt to access controversial information and the activists that assist them.[388]

Circumvention technologies can route a user's request from inside a country that censors online content through an intermediary machine that is not subject to the same blocking.[389] This intermediary retrieves the content that the user requested and sends the content back to the user.[390] There are several forms of circumvention technologies that vary in complexity.[391] Web-based circumvention is the easiest type of circumvention technology to use.[392] These are public web pages that allow users to type in a URL that they want to visit, and the circumvention site will deliver the content.[393] Most web-based circumvention sites are well-known and easily blocked by the government; if the user cannot access the circumvention site, then the user cannot use the service.[394]

There are also private web-based circumventors, which require the installation of software but are more difficult for the government to discover and block.[395] A private circumventor requires an entity in a non-censored location with sufficient technical expertise and available bandwidth to accommodate the users in the censored location.[396]

Another technique that users can employ to circumvent Party filtering is the use of proxy servers.[397] A proxy server is a server positioned between a client and a server, acting as a buffer between them.[398] "To use a proxy server,

---

TRUST, *supra* note 257, at 2.

385. *See generally* HANDBOOK FOR BLOGGERS, *supra* note 301. However, technologies to prevent circumvention techniques are also constantly developed; the sale of web filtering products reached $433 million in 2004. Red Herring, *The Business of Censorship* (Oct. 31, 2005), http://www.redherring.com/Article.aspx?a=14405&hed=The+Business+of+Censorship#.

386. *See, e.g.*, HANDBOOK FOR BLOGGERS, *supra* note 301, at 54; Electronic Frontier Foundation, *How to Blog Safely*, http://www.eff.org/Privacy/Anonymity/blog-anonymously.php (last visited Dec. 18, 2006).

387. Feir, *supra* note 58, at 384.

388. *See generally* Morais, *supra* note 172 (describing technology designed to circumvent the CCP's filtering techniques).

389. HANDBOOK FOR BLOGGERS, *supra* note 301, at 64.

390. *Id.*

391. *Id.*

392. *Id.* at 67.

393. *Id.*

394. *Id.* at 68.

395. *Id.* at 69.

396. *Id.*

397. *Id.* at 70.

398. *Id.* at 71.

the end-user must configure the settings of their web browser with the IP address or hostname of the proxy server as well as the port number that the proxy server is running on."[399] Users can also find online lists of open IP addresses that can be used as proxies.[400] "After users in the filtered locations configure their browsers to point through the proxy server[,] they can transparently surf the Internet."[401] Software proxy servers are more adaptable for use with websites that require cookies or authentication than web-based proxy servers are.[402] Proxy software is growing in popularity as a method of circumvention in China.[403] "Activists smuggle proxy software into China and pass it hand-to-hand on flash memory devices."[404]

Another example of software designed to assist users in China is called DynaWeb, which was created by Chinese-American engineers in North Carolina.[405] DynaWeb is similar to a proxy server that uses peer-to-peer connections to allow users to circumvent Internet control in China.[406] It can be used by accessing links or through software called Freegate or DynaPass.[407] More than ninety percent of the visitors that use DynaWeb are from China.[408] This and other similar software is consistently used by an estimated 100,000 Chinese citizens to access information that is blocked by the Party.[409]

There are other worldwide organizations that challenge the CCP through technological or political means.[410] The Epoch Times is an organization that

---

399. *Id.*

400. *Id.* at 73.

401. *Id.* at 72.

402. *Id.*

403. James Burke, *"Tuidang" is Chinese for "Withdrawal from the Party"* (Oct. 18, 2005), *available at* http://www.theepochtimes.com/news/5-10-18/33463.html.

404. Forney, *supra* note 156.

405. Chen, *supra* note 226, at 243.

406. Dynamic Internet Technology, http://www.dit-inc.us/dynaweb.php (last visited Dec. 19, 2006). Peer-to-peer, also called P2P, connections are "computer systems which are connected to each other over the Internet. Files can be shared directly between systems on the network without the need of a central server." TechTerms.org, P2P (Peer to Peer) Definition, http://www.techterms.org/definition/p2p (last visited Nov. 9, 2006).

407. Dynamic Internet Technology, *supra* note 406.

408. *Id.*

409. Reporters Without Borders, *Google.com Blocked as Vice Tightens on Chinese Users* (June 6, 2006), http://www.rsf.org/article.php3?id_article=17936. A software engineer reported that in June 2006, jamming of the programs had reached "unprecedented level[s]," which he attributed to the Party "deploying considerable hardware and software resources to achieve." *Id.* Reporters Without Borders noted that the jamming subsided a few days later and speculated that the CCP had "stepped up" online censorship during the days before and after the anniversary of Tiananmen Square. *Id.*

410. *See, e.g.*, Amnesty International, http://www.amnesty.org (last visited Dec. 19, 2006); Electronic Frontier Foundation, http://www.eff.org (last visited Dec. 19, 2006); Human Rights in China, http://hrichina.org (last visited Dec. 19, 2006); OpenNetInitiative, http://www.openneteinitiative.net (last visited Dec. 19, 2006); Radio-Free Asia, http://rfa.org (last visited Dec. 19, 2006); Reporters Without Borders, http://rsf.org (last visited Dec. 19, 2006); Voice of America, http://www.voanews.com (last visited Dec. 19, 2006).

created and published a book entitled, "Nine Commentaries on the Communist Party."[411] "Nine Commentaries" traces the history and tyranny of the CCP for Chinese citizens who are, because of censorship, probably unaware of many of the historical events surrounding the establishment and control of the CCP.[412] The organization distributes the book, emails it as a text file, and makes the information accessible in other media formats.[413] Users are encouraged to copy and disseminate the information.[414] More than fifteen million people have renounced the Party on this organization's website.[415] Most of the Chinese citizens who renounce the CCP achieved this by using DynaWeb to reach The Epoch Time's website.[416]

The United States government has funded organizations such as Voice of America and Radio Free Asia, which are groups that provide news information to China and other countries through radio and satellite broadcasts and websites.[417] In 2003, U.S. Representative Christopher Cox introduced legislation entitled the Global Internet Freedom Act (Act), which would combat censorship tactics in China and other repressive countries.[418] The Act was reintroduced in the House of Representatives in 2005[419] and 2006.[420]

The Act would create an office of Global Internet Freedom, which would operate to "develop and implement a comprehensive global strategy to combat state-sponsored and state-directed Internet jamming by repressive foreign

---

411. The Epoch Times, Denouncing the Chinese Communist Party, http://declaration.epochtimes.com/ (last visited Dec. 19, 2006). *See also* The Epoch Times, Nine Commentaries on the Chinese Communist Party, http://www.ninecommentaries.com (last visited Dec. 19, 2006) [hereinafter Nine Commentaries].

412. *Id.*

413. DYNAMIC INTERNET TECHNOLOGY, REPORT ON CHINESE PEOPLE RENOUNCING THE CHINESE COMMUNIST PARTY VIA INTERNET CIRCUMVENTION TECHNOLOGIES (2005), http://www.dit-inc.us/report/9p200505/9pExecutiveSummary.html [hereinafter REPORT ON CHINESE PEOPLE]. *See also* Morais, *supra* note 172. The book has been promoted with 100 million emails, 12 million traditional mails, 10 million faxes, and 50 million phone calls. *Id.*

414. REPORT ON CHINESE PEOPLE, *supra* note 413.

415. Nine Commentaries, *supra* note 411. It appears that the majority of the withdrawals are from Chinese citizens, but citizens of other countries have signed the declaration as well. Denouncing the Chinese Communist Party, *supra* note 411. In March 2006, there were more than five hundred resignations from the Party on the English-language page of the website, which included signatures from the United States and Canada. *Id.* In contrast, there were more than 23,000 *pages* of names and resignations on the Chinese-language website. The Epoch Times, Renouncing the Chinese Party, http://tuidang.dajiyuan.com (last visited Dec. 19, 2006).

416. REPORT ON CHINESE PEOPLE, *supra* note 413.

417. *See* Chen, *supra* note 226, at 233-34. The broadcasts are regularly "jammed" by the CCP by playing diffuse music or static at the frequencies of known broadcasts. MANOSIJ GUHA, TIBET: MAKING WAVES ATOP THE WORLD 56-57 (n.d.), http://www.passband.com/pdf_files/tibet.pdf.

418. Chen, *supra* note 226, at 229; Global Internet Freedom Act, H.R. 48, 108th Cong. (2003). To see the reactions of a few Chinese bloggers to the Act, see RConversation, GOFA: Reactions from China (Feb. 18, 2006), http://rconversation.blogs.com/rconversation/2006/02/gofa_bloggers_r.html.

419. Global Internet Freedom Act, H.R. 2216, 109th Cong. (2005).

420. Global Internet Freedom Act, H.R. 4741 109th Cong. (2006).

governments . . . ."[421] The Act would allocate funds for anti-jamming technology use and development, and the expertise of the private sector would be utilized to develop and implement the technologies.[422] Although the Act seemed to be slow to gain political attention, U.S. Secretary of State Condoleezza Rice created a Global Internet Freedom Task Force in February 2006.[423] Yahoo!, Google, and other U.S. Internet companies were asked to attend congressional briefings on their respective roles in aiding the CCP in censorship.[424] Due to the actions of these U.S. companies in 2005 and 2006, the Act received much more attention in 2006 than in previous years.[425]

Even as "the rest of the world is doing its best to make sure the Chinese government fails,"[426] the CCP does not sit idly by as organizations and governments develop circumventing technologies.[427] The Party blocks the names of circumventing systems and Internet freedom organizations in order to prevent citizens from learning about their existence or operation.[428] Even though the Party is unable to prevent all Chinese citizens from accessing illegal information, "[i]t's important to remember that success in filtering doesn't require total control; it just requires altering the average online experience of the average user," which the CCP has become quite adept at doing.[429] Due to the regulations, the "casual user" is unlikely to stumble upon controversial information, even though those citizens who are technically sophisticated can find a way around the filters.[430] "[T]he government accepts the leakage as long as it can squelch the loudest voices."[431]

---

421. H.R. 4741 § 4(a).

422. H.R. 2216 § 3(5). However, several private U.S. corporations are complicit in helping the Party censor the Internet. *See supra* notes 166, 200, 231, 250, 255 and accompanying text. For an analysis of the viability of the Global Internet Freedom Act, see Chen, *supra* note 226.

423. U.S. Department of State, *Secretary of State Establishes New Global Internet Freedom Task Force* (Feb. 14, 2006), http://www.state.gov/r/pa/prs/ps/2006/61156.htm.

424. *Id.*

425. *See* Assoc. Press, *Lawmakers Blast Internet Firms over China* (Feb. 1, 2006), http://msnbc.msn.com/id/11134689. *See also* Josette S. Shiner, Remarks on Global Internet Freedom, (Feb. 20, 2006), *available at* http://www.state.gov/e/eb/rls/rm/2006/61182.htm. Legislation was also being drafted in 2006 that would prevent companies such as Google and Yahoo! from providing services in repressive countries such as China. *Id.*

426. Mizuki, *supra* note 258.

427. *See id.*

428. *See id.* The author puts asterisks in the middle of the names of software that allows access to foreign-based web sites such as "Dynapass," "Freegate," and "Ultrasurf," noting that the asterisks "were added after a reader in China wrote to tell me that this post was being blocked at precisely this point." *Id.*

429. Radio Free Asia, *China's Internet Controls Raise Tough Questions* (Sept. 14, 2005), http://www.rfa.org/english/news/politics/2005/09/14/china_internet/.

430. Faris, *supra* note 142.

431. *Id.*

CONCLUSION

Although the CCP is highly concerned with accentuating the positive effects of e-commerce in China and reducing the negative effects of citizens' access to political dissent, studies have shown that the average Internet user in China does not often access the Internet for either of these objectives.[432] The typical Chinese Internet user is less than thirty years old, single, and primarily uses the Internet for accessing entertainment news, playing online games, instant messaging, and downloading music.[433] It is unclear whether these web trends are a result of the strict Internet regulations or if the Chinese culture merely views the Internet in a different manner than Western citizens, who primarily use the Internet for information gathering or for efficiency reasons such as buying tickets or paying bills.[434]

Some commentators believe that "[m]any Chinese Internet users barely notice the restrictions; they're grateful to have expanded sources of information and entertainment. Millions of Web sites exist in Chinese, satisfying the estimated 80 percent of users who stick only to regulated Chinese-language sites and rarely venture into the freewheeling global internet."[435] Others believe that the majority of Chinese citizens are interested in political events but their interest is suppressed because they do not have access to that type of information.[436] Still others believe that the Western media places far too much emphasis on censorship and ignores the expanded freedom of expression that the Internet allows in China.[437]

The Internet is still a relatively new medium, particularly in China where only 8.5% of the population uses the Internet.[438] The CCP has developed stringent and fairly effective mechanisms of content control by regulation through legal methods, technological methods, and access methods. These methods of regulation have proven to be sustainable for the last decade. Although the methods are not infallible, the government has created a level of intimidation that deters many users from accessing controversial information. By continually updating the laws to reflect changes in technology and by implementing new technological measures to enforce the laws, the CCP will continue to control the Internet successfully to the extent that a casual user will not be able to access forbidden information.

However, due to rapid changes in technology, efforts by hackers and activists, and expanding access to the remainder of China's population, it is likely that the methods of control by the CCP will not remain feasible

---

432. Gonsalves, *supra* note 257.

433. *Id.*; Johnson, *supra* note 162; WONG, MATTER OF TRUST, *supra* note 257, at 2.

434. Deborah Fallows, *Pew Internet: Women and Men Online*, http://www.pewinternet.org/PPF/r/171/report_display.asp (last visited Dec. 19, 2006).

435. Johnson, *supra* note 162.

436. *Id.*

437. Lemon, *China Finds Freedom*, *supra* note 178.

438. *111 Million*, *supra* note 2.

indefinitely for users who seek out forbidden information. Circumvention efforts will continue to keep pace with censorship efforts. The number of Chinese-language websites that the Party will need to oversee will also continue to increase dramatically.[439]

Although China may not be transforming into the free democracy that so many people predicted the Internet would create, sustaining such a highly regulated system of control will become increasingly difficult for the Party when the Internet population reaches, for instance, 500 million users. Nevertheless, the CCP will not give up Internet content control easily. As one city's public security bureau monitoring department director stated:

> It is different from what the outside world understands. We have been trying to seek a balance between preserving privacy and protecting order and safety. As far as we are concerned, the Internet is a battleground and the keyboard is the handgun. We are going where no one has gone before.[440]

439. The ".cn" top-level domain name server already receives more than 600 million domain name analysis requests every day. China Tech News, *New Chinese Top Node Put Into Operation* (June 15, 2006) (on file with author).

440. *Fourteen Departments*, *supra* note 13.