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NOTES

CITIZEN JUDGES IN JAPAN: A REPORT CARD FOR THE INITIAL THREE YEARS

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I. INTRODUCTION

Previous literature is critical of the European features of the Japanese jury system, including the joint deliberation by judges and citizens on juries, majority voting, non-waiver of jury trial by the defense, as well as juror confidentiality requirements. This Article presents contrary arguments that the Japanese should maintain the current features of their system and expand the jury system to cover even more criminal offenses, to eventually covering civil cases. The offered recommendations include eliminating prosecutor appeals to maintain legitimacy of the jury system and promulgating procedural rules requiring that lay jurors deliberate and vote separately from the professional judges.

During the past twelve years as an Orange County Judge in Orlando, Florida, I had the privilege of presiding over many criminal jury trials. I prosecuted state crimes early in my legal career. Recently, I observed the public's reaction to one of the highly publicized jury trials to take place inside the courthouse where I presided. In the case of *Florida v. Case Anthony,*[1] the extensive international media coverage furthered the public's interest in our local state jury system. When the verdict was published, groups and individuals expressed their adamant pleasure or displeasure with the verdict. As it typically occurs with intense media coverage of trials, citizens begin to take a closer look at the role of juries. Those who agreed with the verdict praised the modern US jury system. Those who disagreed with the verdict discredited the jury.

During my years of judicial service, I also had unique opportunities to meet with foreign judges from Brazil and South Korea. Foreign judges generally schedule visits to US courts when their respective countries are considering changes to their court system.[2] During one such visit, I

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1. State v. Anthony, No. 48-2008-CF-15606-O, 2011 WL 7463889 (Fla. Cir. Ct. Mar. 18, 2011). The defendant was charged with first degree murder of her young daughter. The jury rendered a verdict of not guilty of the first degree murder charges and the defendant was convicted of several misdemeanors. The defendant appealed the judgment and sentence of the court on the misdemeanor offenses, and two of misdemeanor charges were reversed on appeal.

2. Japan, China, South Korea, Spain, Russia, and the Republic of Georgia have

questioned a South Korean Judge about his country's interest in expanding the role of juries. The judge explained that some judicial rulings were unpopular and that the public would better receive lay citizen verdicts and have more confidence in jury decisions.[3] Ironically, unpopular judge verdicts led to a public interest in a Korean all lay jury system.

When I visited Tokyo and Kyoto, I could not help but notice the extremely low concern for crimes. To the casual observer, Japanese citizens expressed no concern for crimes of any nature. I was surprised to see women leaving their purses and businessmen leaving their laptops unattended at lunch tables while they briefly stepped away.

In 2012, Japan marked the completion of the initial three year period of its new lay adjudication court system.[4] The three year report was anticipated in 2012 and should be forthcoming in 2013. Many scholars have criticized certain aspects of Japan's unique *saiban-in* jury system.

In 2009, in its first post-war effort to reintroduce a citizen jury system, Japan implemented a mixed tribunal using citizen participation.[5] The mixed tribunal, or quasi-jury, system adopts some features of a traditional common law jury system similar to that which exists in the United States.[6] The *saiban-in* system further adopts some features from the continental European influenced mixed jury systems.[7] Lastly, Japan has

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introduced or reintroduced the use of juries in criminal trials. Few countries outside the United States, Canada, and Great Britain use juries for civil cases, and then only in limited cases. Therefore, this Article will not address civil cases. However, Professor Matthew J. Wilson proposes that Japan expand the use of juries into civil cases. *See* Matthew J. Wilson, *Prime Time for Japan to Take another Step Forward in Lay Participation: Exploring Expansion to Civil Trials,* 46 AKRON L. REV. (forthcoming 2013).

3. South Korea introduced an all lay jury system in 2008. *See* Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes?*, 12 ASIAN-PAC. L. & POL'Y J. 58 (2010).

4. On May 21, 2004, the Diet enacted Saiban'in no sanka suru keiji saiban ni kansuru hōritsu [Act Concerning Participation of Lay Judges in Criminal Trials] Law No. 63 of 2004 (Japan), *translated in* Kent Anderson & Emma Saint, *Japan's Quasi-Jury* (Saiban-in) *Law: An Annotated Translation of the Act Concerning Participation of Law Assessors in Criminal Trials*, 6(1) ASIAN-PAC. L. & POL'Y J. 233 (2005) [hereinafter Lay Assessor Act].

5. Japan adopted the *Saiban-in* system, which is referred to by many names. Throughout this Article, the Japanese reformed system shall be referred to as "*Saiban-in*" or "lay assessor" jury system.

6. The lay juror members are selected at random from a list of eligible voters. Similar to the United States common law jury system, lay jurors decide issues of fact, and not law, and serve for one case only. Lay Assessor Act, *supra* note 4, at 234, 241-43.

7. German criminal courts utilize mixed courts where lay jurors sit side by side with professional judges. Throughout this Article, a "lay juror" shall mean a non-lawyer citizen member of the public who is not formally trained nor educated about the law or courts and who is summoned by a court to serve on a jury. A "professional judge" shall mean an individual elected or appointed to serve as a judge in a full time paid position. In Germany, for example, lay jurors serve for a length of time and render service on multiple cases until discharged.

introduced some very unique aspects to its jury system.[8]

The Japanese mixed tribunal generally consists of three professional judges and six lay members of the public who sit and deliberate together as a jury.[9] The quasi-jury presides over criminal cases where the sentence can be death or life imprisonment, as well as offenses involving the death of a victim from an intentional act. The jurors decide both the guilt of an accused[10] and an appropriate sentence upon conviction.[11] The jurors' verdict is derived from a combined majority vote,[12] including at least one vote of a judge.[13]

The *saiban-in* system incorporates many continental European-style mixed court features.[14] Just like modern US jurors, Japanese jurors may question witnesses[15] and victims who provide a statement in court.[16] Either party may appeal a verdict, and due to the ability of a prosecutor to appeal an acquittal, many cases are retried.[17] Japanese jurors face severe penalties for disclosing information about the trial and jury deliberations.[18]

This Article includes both a comparative and historical evaluation of the reformed Japanese criminal jury system. The Article first reviews the

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8. Historically, Japanese law has evolved from early Chinese influences, followed by French and German impact, and then US style views incorporated into the Japanese Constitution during the World War II occupation. Luke Nottage, et al., *Japan Final Report for United Nations Development Programme, Viet Nam* (July 30, 2010) *in* RESEARCH STUDIES ON THE ORGANISATION AND FUNCTIONING OF THE JUSTICE SYSTEM IN FIVE SELECTED COUNTRIES (CHINA, INDONESIA, JAPAN, REPUBLIC OF KOREA AND RUSSIAN FEDERATION) [hereinafter UN REPORT].

9. Lay Assessor Act, *supra* note 4, at 233, 237. Cases involving undisputed facts, especially where the Defendant has confessed, are generally tried before a small court consisting of one professional judge and four lay jurors. *Id.* at 233.

10. In US court opinions and legal scholarship, a person accused of a crime, regardless of the stage of the prosecution, is frequently referred to as a defendant, suspect, arrestee, or an accused. In this Article, for the sake of consistency and clarity, a person accused of a crime shall be referred to as the "accused" or the "defendant." As used in this Article, the accused (singular and plural) or the defendant may be a person or persons investigated, detained, arrested, charged by the prosecution, or convicted of a crime.

11. Lay Assessor Act, *supra* note 4, at 233.

12. *Id.* at 273.

13. *Id.*

14. *See generally* Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in* Taxquet v. Belgium, 86 CHI.-KENT L. REV. 613, 618 (2011) (Mixed jury courts have some favorable features including the ability to address questions of fact and law and the ability to provide reasoned verdicts by professional judges.).

15. Lay Assessor Act, *supra* note 4, at 267.

16. *Id.* at 268.

17. *See* Arne F. Soldwedel, *Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants,* 41 VAND. J. TRANSNAT'L L. 1417, 1444-45 (2008).

18. Lay Assessor Act, *supra* note 4, at 277-278.

history of the jury system in pre-war Japan.[19] It then explores the political and economic climate influencing the many Japanese judicial reforms. The Article identifies key issues concerning courts, police conduct, prosecution, legal education, and the legal profession as a whole.[20] The Article addresses the initial skepticism and competing interests of the public, government, courts, and defense attorneys.

The Article details and evaluates the initial three-year period of Japan's new lay adjudication court system. In a sense, this Article serves as a report card of this start up period. It attempts to evaluate the advantages and disadvantages of the current lay jury system; describes the opinions offered by former lay jurors, members of the public, and legal scholars; and identifies competing interests and challenges expressed by Japanese attorneys.[21]

American scholars criticize the European features of the Japanese jury system including: the combination of judges and citizens on juries, majority voting, non-waiver of jury trial by the defense, and juror confidentiality requirements. The Article recommends that not only should these current features be maintained in the Japanese system, but the jury system should be expanded to address even more criminal offenses, and eventually civil cases. These recommendations do, however, include eliminating prosecutor appeals to maintain legitimacy of the jury system, and promulgating court rules to require lay assessors to deliberate separately from the judges with their votes being combined to determine a majority vote.

II. HISTORY OF JURIES

For centuries, England maintained a jury system for both criminal and civil cases.[22] When the English empire expanded, the common law jury system was incorporated into the English colonies in the United States, Africa, and Asia.[23] In the United Kingdom (England and Wales), jury trials

19. Jury trials existed in Japan before World War II. *See* Anna Dobovolskaia, *Japan's Past Experiences with the Institution of Jury Service,* 12 ASIAN-PAC. L. & POL'Y J. 1, 11-17 (2010).

20. The reforms addressed improvement to civil court cases by creation of the Intellectual Property Courts and development of graduate level law schools. *See* JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (2001), *available at* http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html [hereinafter JSRC INTERIM REPORT] (Jun 12, 2001).

21. The Japan Federation of Bar Associations ("JFBA") represents the interests of the Japanese attorneys. *See* Japan Fed'n of Bar Associations, *What is the JFBA?*, http://www.nichibenren.or.jp/en/about/us/profile.html (last visited July 1, 2013).

22. Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury in* WORLD JURY SYSTEMS 1, 7 (Neil Vidmar ed., 2000).

23. *Id.* at 2.

are now very rare and almost non-existent in civil cases.[24] Jury trials still exist in England in a small number of serious criminal cases.[25] Interestingly, the civil jury remains in only the United States and parts of Canada.[26]

In America, juries are still widely used in both criminal and civil cases. Some scholars express concern that the use of jury trials is steadily declining in the United States and the United Kingdom.[27] One author cautioned that if the decline continues, the jury system could become just a "symbol of democracy."[28] The modern US jury system is one of the few that provides jury trials for criminal cases. In the State of Florida, juries hear misdemeanor criminal cases.[29] The lay jury were instituted for the following three main roles: (1) to operate as a check and balance against judicial and governmental overreaching; (2) to allow for meaningful citizen participation in the democratic process; and (3) to act as an essential figure in the administration of justice.[30]

The early US juries were seen as an institution furthering citizen participation in government. The jury was perceived as an educational tool. Alexis de Tocqueville described the US jury as "a gratuitous public school."[31] Today, juries continue to educate the public about the court system. They educate the public about citizen governance and further promote democracy as a result. Juries inject the public values from within their local communities and increase the legitimacy of the judicial branch.

Americans envisioned that the jury system would encourage citizens to affect judicial decision-making thereby creating a balance between government and citizens.[32] During the early Colonial period of the United States, juries were seen as a check against British tyranny and the power of judges.[33] For example, the American founders used the jury system to shield the colonists from the oppressive prosecution of the British.[34] However, the same jury power has been used by jurors in the Southern part

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24. *Id.* at 7.

25. *Id.*

26. *Id.*

27. *See* Valerie P. Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective,* 40 CORNELL INT'L L.J. 303, 305 (SPECIAL ISSUE) (2007).

28. *Id.*

29. In Florida, misdemeanor offenses are punishable by less than one year in jail. FLA. STAT. ANN. § 775.082 (WEST 2011).

30. Jon P. McClanahan, *Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States,* 37 N.C.J. INT'L L. & COM. REG. 725, 727 (2012).

31. *Id.* at 736; *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 337 (Henry Reeves trans., Schoken Books 1961) (1835).

32. McClanahan, *supra* note 30, at 737.

33. *American Juries,* IIP DIGITAL US EMBASSY (July 1, 2009), http://iipdigital.usembassy.gov/st/english/publication/2009/07/20090706173035ebyessedo0.8885418.html#axzz2sa2sk2kj.

34. *Id.*

of the US to exonerate white criminal defendants accused of committing crimes against black victims.[35] As a consequence, judges now instruct juries that they shall follow the law even if they do not agree with the law and criminal defense lawyers are prohibited from requesting that a jury disregard the law and acquit a defendant.[36] In reality, modern US criminal juries render general verdicts, which do not contain findings of fact or reasoning for their verdicts. This means that when a criminal jury verdict is rendered, the public and court participants remain without knowledge of the jury thought process.

A. Waiver of Jury Trial and Juror Sentencing

In early England, the accused did not have the right to waive a jury trial.[37] If the accused did not consent to a jury trial, he was tortured until he consented. Later, the accused who did not consent to a jury trial was treated as if he pled guilty.[38] In early Colonial America, most states and federal courts did not allow the accused to waive jury trial. In 1931, the US Supreme Court ruled contrary in *Patton v. United States* and held that an accused could, in fact, waive jury trial.[39] In *Singer v. United States,* the US Supreme Court clarified that the right to waive jury trial was not absolute and could be contingent upon the prosecutor or court approval.[40] Currently, most US courts permit the accused to waive the jury trial.

The reformed Japanese jury system does not provide for the accused to waive the right to jury trial[41]. Many US scholars have criticized this provision.[42] However this Japanese court feature is very similar to the longstanding non-waiver provision in continental European jury systems as well as early US court features.

In the reformed Japanese court system, the jury determines the guilt of an accused and an appropriate sentence. In early US colonial cases, jurors actually impacted sentencing by refusing to convict in death penalty cases. Some would refer to this as a "jury nullity." When the jurors simply believed that the mandatory death penalty was too harsh for the criminal offense charged, they rendered a general verdict of acquittal even when the accused had committed the offense. Therefore, the jury did in fact play a

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35. *See generally* Vidmar, *supra* note 22, at 10.

36. *E.g.,* FLORIDA SUPREME COURT, *Special Jury Instructions*, http://www.floridasupremecourt.org/jury_instructions/instructions.shtml (last visited July 1, 2013).

37. Mclanahan, *supra* note 30, at 743.

38. *Id.*

39. *Patton v. United States,* 281 U.S. 276, 312 (1930).

40. *Singer v. United States,* 380 U.S. 24, 37 (1965).

41. David T. Johnson, *Early Returns from Japan's New Criminal Trials*, 36 ASIA-PAC. J 3 (2009), *available at* http://japanfocus.org/-david_t_-johnson/3212#.

42. *Id.*

role in sentencing.

In early America, many states provided for juror sentencing. In the nineteenth century, half of the US states permitted juror sentencing in non-capital cases.[43] Many other states allowed for jury sentencing recommendations in non-capital offenses.[44] Today, only the following five states still provide for jury sentencing: Arkansas,[45] Missouri,[46] Oklahoma,[47] Texas,[48] and Virginia.[49]

B. Mixed Courts

Mixed court systems originated in continental Europe and are currently used in many various forms throughout Europe. Mixed courts were used in Russia commencing in 1864 until abolition by the Bolsheviks in 1917.[50] These mixed juries became more commonly used in Germany.[51] Today, many European countries have adopted their own unique version of the mixed court system.

Mixed courts use juries composed of both professional judges and non-lawyer lay citizens ("lay assessors"). The professional judges and lay assessors sit side by side as a joint jury, deliberate together, and render their jury verdict answering questions of fact, law, and sentencing. Mixed jury criminal court systems vary regarding the types of offenses covered, size of the jury, ratio of judges to lay assessors, vote required to convict or acquit, length of service, waiver provisions, appeals, and type of verdict.

First, unlike the United States, most European mixed courts are available for only the most serious criminal offenses. In Italy, France, and Germany, for example, mixed juries generally preside over criminal offenses where defendants are subject to life imprisonment or the death penalty.[52] Each country varies in the number of professional judges and the number of lay assessors empaneled on the jury.[53] A vote of guilty could be

43. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 964 (2003).

44. *Id.*

45. *See* ARK. CODE ANN. § 5-4-103 (West 2011).

46. *See* MO. ANN. STAT. § 557.036 (West 2011).

47. *See* OKLA. STAT. ANN. tit. 22, § 926.1 (2012).

48. *See* TEX. CODE CRIM. PROC. ANN art. 37.07 (West 2011).

49. *See* VA. CODE ANN. § 19.2-295 (West 2007).

50. Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia, in* WORLD JURY SYSTEMS 323 (Neil Vidmar ed., 2000) (An all lay jury system was introduced in Russia in 1993. *Id.* at 233.

51. *See infra* note 52 & 55.

52. Daniel Senger, *The Japanese Quasi-Jury and the American Jury: A Comparative Assessment of Juror Question and Sentencing Procedures and Cultural Elements in Lay Judicial Participation*, 2011 U. ILL. L. REV. 741, 748 (2011).

53. Ethan J. Leib, *A Comparison of Criminal Jury Decisions Rules in Democratic Countries*, 5 OHIO ST. J. CRIM L. 629, 633 & 640-41 (2008).

determined by a majority, super majority, or unanimous vote, as required by law.[54] Lay assessors can be utilized for one case only or for multiple cases, as exists in Germany.[55] In many countries, including common law countries such as Canada and Australia, and in Russia, prosecutors may appeal acquittal verdicts.[56]

In Japan, jurors play an important role by injecting community values and common sense into the proceedings. Some argue that professional judges in mixed court deliberations dominate over the lay jurors.[57] In Russia's prior mixed court system, lay jurors were referred to as "nodders," accused of deferring to, or nodding in agreement with, the professional judges.[58] In Germany, the lay members have been called puppets.[59] In Japan, most cases have uncontested facts. With juror sentencing, however, lay jurors may be more likely to have some impact on the outcome.

C. Expansion of All Lay Juries

Notwithstanding the popularity of mixed juries, several European and Asian countries have implemented jury systems with juries consisting of all lay assessors with one professional judge presiding over the proceeding. All lay assessor juries have traditionally been incorporated into common law court systems in the United States, Canada, Australia, Hong Kong and the United Kingdom.

More recently, countries without a common law or English heritage have embraced an all lay assessor system with variations. Spain and Russia have incorporated all lay assessor courts.[60] These juries render special verdicts where they are asked to answer specific questions in their findings, rather than the general verdict of "guilty" or "not guilty" used in US criminal courts. The Spanish and Russian "question list" is not unlike the interrogatory verdicts used in US civil case verdicts.

Korea introduced an all lay assessor jury system in 2008.[61] The Korean all lay assessor jury renders a general verdict. However, the verdict is not binding on the professional judge presiding over the proceeding, as

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54. MARTIN F. KAPLAN & ANA M. MARTIN, UNDERSTANDING WORLD JURY SYSTEMS THOUGH SOCIAL PSYCHOLOGICAL RESEARCH 114 (2006).

55. *Id.* at 113.

56. Vidmar, *supra* note 22, at 45-46.

57. Douglas G. Levin, *Saibin-in seido: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay Assessor System May Determine its Fate*, 10 ASIAN-PAC. L. & POL'Y J. 207 (2008).

58. Stephan C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L.J. 355, 357 (2007).

59. Stefan Machura, *Interaction between Lay Assessors and Professional Judges in Germany Mixed Courts*, 72 INT'L REV. PENAL. L 451 (2001).

60. Thaman, *supra* note 50.

61. Jae-Hyup Lee, *supra* note 3.

the jury verdict is advisory in nature.[62] The reformed Korean system will proceed with a five-year introductory period and is subject to review in 2013.[63] The all lay jury retires to deliberate in secrecy attempting to reach a unanimous verdict on guilt.[64] If the jurors are unsuccessful in reaching unanimity, then the professional judge states an opinion on guilt.[65] The jury then retires again to deliberate in secrecy and reach a majority verdict on guilt. If a verdict of guilt is rendered, the jury discusses sentencing with the professional judge.[66]

In 2010, the Republic of Georgia enacted legislation to institute an all lay assessor jury system.[67] Georgia has implemented a US style jury system. This system became effective throughout the Republic of Georgia on July 1, 2012.[68] The juries consist of 12 lay assessors and two substitutes (alternate jurors).[69] The jury must deliberate with an attempt to reach a unanimous verdict for at least three hours.[70] If unable to reach unanimity, the jury then retires to reach a super majority vote of 10 to 2 to convict.[71]

HISTORY OF JURIES IN PRE-WAR JAPAN

A. Meiji Period Sanza *System in 1870s*

Japan attempted to maintain a jury system during two different pre-war eras. The first was in the 1870s during the Meiji Period with the *sanza* system.[72] The *sanza* jury panel was implemented for a sole trial involving a high profile dispute.[73] The panel was created for the first trial involving both the Counselor and Governor of the Kyoto Prefecture.[74] A second unique panel was formed and convened two years later for a single trial involving the assassination of the Counselor of State.[75] For each of the two trials, specific *sanza* rules were created and utilized.[76] In the first trial, the jury performed a fact-finding function similar to that of the modern US

62. *Id.* at 58, n.3.
63. *Id.*
64. *Id.* at 64.
65. *Id.*
66. *Id.*
67. Peter Roudik, *Georgia: Courts with Jurors Established Nationwide*, THE LIBRARY OF CONG (Nov. 9, 2011), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402877_text.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. McClanahan, *supra* note 30, at 746. *See* Dobrovolskaia, *supra* note 19, at 6-7.
73. McClanahan, *supra* note 30, at 746.
74. *Id.* at 747.
75. *Id.*
76. *Id.*

common law jury and rendered a verdict.[77] In the second trial, the jury's role was expanded. The *sanza* jury in the second trial entered a verdict of guilty.[78] However, the *sanza* jury was also charged with the duties of evaluating the quality of pre-trial investigations and commenting on the Court's actions.[79]

It is unclear why Japan utilized juries in these rare and isolated instances. Several assumptions exist. Japan demonstrated an interest in the use of a jury following colonial America's successful expansion of its own jury system. The Japanese perhaps believed that it was important to use the jury in high profile cases involving government figures to add creditability to the process. Using a jury in high profile cases may have also offered political insulation to key decision making figures.

B. Influence of French Civil System

The French inquisitorial system was established in Japan by enactment of the 1880 Code of Criminal Instruction.[80] The 1889 Japanese Constitution also provided the defendant with the right to counsel in a criminal proceeding.[81] Under the Code of Criminal Instruction, the judge questioned suspects and gathered evidence.[82] The prosecutors played a dominant role and the main goal of the legal professionals (judges and prosecutors) was to discover the truth.[83] Japan's justice system is a civil law system based on the legal codes of France and Germany.[84] The Japanese Civil Code was enacted in 1898.[85] Japan's Criminal Code of 1907 was based partly on German law[86] where legislation remains the source of law.[87]

C. Showa Period Jury System: 1928-1943

In 1923, the Japanese Diet (national legislature) enacted *Baishin Ho* [Jury Act], thereby creating a jury system.[88] The jury system operated in

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77. *Id.*

78. *Id.*

79. *Id.*

80. Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice,* 4 E. ASIA L. REV. 125, 130 (2009).

81. *Id.*

82. *Id.*

83. *Id.* at 131.

84. Senger, *supra* note 52, at 744; *see* KENNETH L. PORT & GERALD PAUL MCALINN, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 32-33 (2d ed. 2003).

85. Senger, *supra* note 52, at 744.

86. *Id.*

87. Weber, supra note 80, at 131 &138.

88. McClanahan, *supra* note 30, at 748. *See* Baishin Ho [The Jury Act], Law No. 50 of 1923 (Japan).

Japan between 1928 and 1943 during the early *Showa* period.[89] *The Jury Guidebook,* published in 1931 by the Japan Jury Association [*Dai Nippon Baishin Kyokai*], sheds light on the successes and shortcomings of this jury system.[90]

Serving as a juror was a high honor and duty.[91] The Japan Jury Association ("Association") stressed that the judiciary was the only branch of government that did not include public participation.[92] In *The Jury guidebook,* the Association stated that the spirit of the jury system was to increase public trust in the justice system through citizen participation and that improved public knowledge and understanding would lead to smoother court operations.[93]

This twelve person US style jury system was Japan's most significant pre-war experience with juries.[94] This Japanese jury system included many features similar to the US jury system. However, significant distinctions existed, which many scholars attribute for its demise. First, the Japanese courts used magistrates to determine whether sufficient grounds of guilt existed before sending a case to a jury trial.[95] If insufficient grounds existed, the magistrate would simply dismiss the case.[96] Second, the Japanese courts held pre-trial conferences to review trial preparation procedures *(kohan junbi tetsuzuki).*[97] If the suspect confessed, then the case would proceed under standard court procedures before a professional judge.[98] If the suspect did not confess, then the case would proceed to a jury trial if the charge otherwise warranted a jury trial.[99] Third, defendants could waive a jury trial in the most serious cases or were required to assert a demand in the less serious cases.[100]

Two categories of criminal cases were eligible for a jury trial.[101] The first category is crimes designated by law *(hotei baishin jiken).*[102] These crimes were generally punishable by the death penalty or life imprisonment;[103] the accused could waive the right to a jury trial.[104] The

89. Senger, *supra* note 52, at 745.

90. Anna Dobrovolskaia, *The Jury System in Pre-War Japan: An Annotated Translation of "The Jury Guidebook"* (Baishin Tebiki), 9 ASIAN-PAC. L. & POL'Y J. 232, 237 (2008).

91. *Id.* at 248.

92. *Id.* at 250.

93. *Id.*

94. *Id.* at 232.

95. *Id.* at 253.

96. Dobrovolskaia, *supra* note 90, at 253-54.

97. *Id.* at 254.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Dobrovolskaia, *supra* note 90, at 254.

103. *Id.*

second category of cases allowed for jury trials upon the accused's request *(seikyu baishin jiken).*[105] These cases included crimes such as larceny, fraud, embezzlement, and forgery that are punishable by more than three years of incarceration.[106] As a result of the sentencing parameters, jury trials were not authorized for many minor offenses, such as simple theft, embezzlement, and gambling.[107] Requests for jury trial were required to be submitted within ten days of receiving the summons and the accused could submit a "withdrawal of jury trial request."[108]

Last, these pre-war Japanese juries did not render general verdicts.[109] Rather, these pre-war Japanese criminal juries answered specific interrogatories regarding the facts *(toshin)* of the alleged crime.[110] Following the jury instructions, the Judge delivered a question sheet *(monsho)* containing questions of fact to the lay jury.[111] The juries were tasked with answering main questions *(shumon),* supplementary questions *(homon),* and other questions *(betsumon).*[112]

The main questions required the jurors to deliberate on the existence or absence of facts supporting the elements of the offense.[113] These were the most important questions and were sometimes followed by supplementary questions involving factual determinations other than the elements of the crime.[114] Answers were sought in a "yes" or "no" format and the verdicts, or interrogatory answers, only required a majority vote of the twelve jurors.[115] The jury foreperson asked each juror for his or her opinion followed by the foreperson providing an opinion.[116] The deliberations were confidential and the jurors played no role in sentencing.[117]

Of significance, criminal cases were re-tried repeatedly following a "not guilty" verdict.[118] If the judges accepted the decision, a *koso* appeal of the facts was prohibited.[119] Rather, if the judges rejected the jury's verdict, they would simply dismiss the jury and submit the case to a new jury to try

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104. *Id.*

105. *Id.*

106. *Id.*

107. Lester W. Kiss, *Reviving the Criminal Jury in Japan,* 62(2) LAW & CONTEMP. PROBS. 261, 267 n.57.

108. Dobrovolskaia, *supra* note 90, at 255-56.

109. Kiss, *supra* note 107, at 267 n. 57.

110. *Id.* at 267. Spain and Russia, along with five other European countries, have introduced jury systems where the juries answer interrogatory style question lists in their verdicts. *See* Thaman, *supra* note 14, at 619.

111. Dobrovolskaia, *supra* note 90, at 269.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 270.

116. *Id.*

117. *Id.* at 248, 271.

118. *Id.* at 272.

119. *Id.*

the case *de novo*.[120] In practice, this system permitted unlimited re-trials,[121] which would continue until the decision of the jury and the decision of the judges matched ("the revision of the jury").[122] This is contrary to the US jury system where an accused cannot be retried after an acquittal.[123] In *The Jury Guidebook,* the Association explained this distinction as a "defect of foreign jury systems" and proudly described Japan's unique goal to preserve strict fairness.[124]

However, appeals on matters of law *(jokoku)* were permitted by either party.[125] For example, a party could appeal procedural errors of the trial court; such as the judge inserting an opinion in the jury instruction or that a juror was ineligible by law to serve.[126] If the verdict was reversed by the appellate court, the Great Court of Judicature would decide whether a new trial would be granted by the same trial court judges or by another court.[127]

Jurors were encouraged to question the accused and witnesses "without any feelings of embarrassment and without reservation"[128] with the judge's approval. Initially, jurors were observed to pose relevant questions missed by the attorneys.[129] In subsequent years, the jurors seemed to lack enthusiasm in questioning.[130]

Jurors were prohibited from disclosing details of the deliberations, including the other jurors' opinions, and the voting distribution.[131] Jurors leaking the confidential information would face a fine up to 1,000 Japanese yen.[132] If the information was published in the newspaper or other print material, the author could be fined up to the amount of 2,000 Japanese yen.[133]

Initially, the jury system was accepted and used.[134] In 1929, 143 cases were tried.[135] However, in 1930, only sixty-six cases were tried.[136] In 1942, only two cases were tried.[137] The Jury Act was suspended in 1943.[138] The

120. Kiss, *supra* note 107, at 268. *See* Baishinho [Jury Act], Law No. 50 of 1923, art. 91.
121. Dobrovolskaia, *supra* note 90, at 272.
122. *Id.*
123. U.S. CONST. amend. V (the theory of Double Jeopardy prohibits an accused from being tried for the same offenses twice).
124. Dobrovolskaia, *supra* note 90, at 272.
125. *Id*
126. *Id.*
127. *Id.*
128. *Id.* at 267.
129. Dobrovolskaia, *supra* note 90, at 267.
130. *Id.*
131. *Id.* at 271, 274.
132. *Id.* at 274.
133. *Id.*
134. McClanahan, *supra* note 30, at 750.
135. *Id.*
136. *Id.*
137. *Id.*

jury tried only 611 cases in the fifteen years of the jury system.[139]

Legal scholars have debated the reasons for the demise of the pre-war jury system.[140]

First, the numerous re-trials rendered the Japanese jury verdicts meaningless, as the verdicts became mere recommendations or suggestions.[141] Second, the juries were used in only a limited cases, as the accused frequently waived the right to a jury trial or did not "opt in" or demand the right to a jury trial in the lesser cases.[142] This pre-war jury system hardly furthered public participation or education nor did it build public trust in the courts.

Another reason for the failure of this jury system can be attributed to the then changing political and social climate in Japan.[143] In 1923, at the time the Jury Act was instituted, Japanese citizens were moving toward democracy.[144] By 1928 when the jury trial system actually commenced, the country was experiencing rising militarism and was moving toward fascism.[145] Criminal defendants were encouraged to waive the right to jury trial out of fear that their decision would work against them at trial.[146] As a result, juries were rarely used and the jury system was suspended.[147]

IV. CLIMATE FOR REFORM

In May 2004, the Japanese Diet passed the Lay Assessor Act, thereby creating the lay assessor system or *saiban-in seido,* which became effective in 2009.[148] At the time, Japan was the only Group of Eight (G8) country without some form of lay jury system.[149]

In the late 1980s and 1990s, Japanese judicial reform was sought from several groups: (1) the Ministry of Justice; (2) the Secretariat of the Supreme Court; (3) the Japanese Federation of Bar Association (JFBA); (4) the Federation Association of Corporative Executives; and (5) political parties like the Liberal Democratic Party (LDP) and the New Clean

138. *Id. See Baishin Ho no Teishi Ni Kansuru Horitsu* [An Act to Suspend the Jury Act], Law No. 88 of 1943 (Japan).

139. Kiss, *supra* note 107, at 267.

140. *Id.*

141. *See id.* at 268; Dobrovolskaia, *supra* note 90, at 272.

142. Kiss, *supra* note 107, at 268-69.

143. *Id.* at 268.

144. *Id.* at 267-68.

145. *Id.* at 268.

146. *Id.*

147. *Id.* at 266.

148. Dobrovolskaia, *supra* note 90, at 231-32.

149. Matthew J. Wilson, *Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time,* 33 FORDHAM INT'L L.J. 487, 488 (2010). *See Lay Judge System Starts in Japan amid Lingering Concerns,* ASSOCIATED PRESS, May 20, 2009, *available at* http://www.pddnet.com/news/2009/05/lead-lay-judge-system-starts-japan-amid-lingering-concerns?qt-recent_blogs=0.

Government Party.[150] The Japanese Supreme Court and the Ministry of Justice held common ground in increasing the number of judges and prosecutors.[151] To further this objective, they sought to increase the number of people passing the national exam.[152] The JFBA opposed this plan.[153] In 1982, the Research Group on Jury Trial (RGJT), comprised of prominent figures from within the Japanese legal community, became the first civic group to recommend re-introducing a jury system in post-war Japan.[154] The group supported an all citizen jury system[155] and opposed a mixed jury system.[156]

In 1989, Japan saw a burst of its financial bubble and the country faced a long economic recession.[157] The government initiated reforms to address its economic crisis.[158] Various government changes were developed to improve public trust, decentralize government, increase transparency, and improve democratic ideals.[159] Reforms were introduced to improve judicial supervision of elections and protect corporate shareholder rights.[160] New laws improved governmental transparency by addressing freedom of information.[161] Lastly, wide ranging reforms began in the civil and criminal courts to promote deliberative democracy.[162]

Business groups sought improvements in civil litigation.[163] Business leaders proposed the recruitment of new judges from among lawyers holding business experience.[164] Efforts were made to speed up civil trials.[165] Further, new courts were created to handle matters involving intellectual property[166] and small claims cases.[167]

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150. Hiroshi Fukurai, *Peoples Panels vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan,* 12 ASIAN-PAC. L. & POL'Y J. 95, 104, (2010).

151. *Id.* at 105.

152. *Id.*

153. *Id.*

154. Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participating Experience in Japan and the U.S.,* 40 CORNELL INT'L L.J. 315, 317 (2007).

155. *Id.* at 318.

156. *Id.* at 320.

157. Weber, *supra* note 80, at 149.

158. *Id.*

159. *Id.* at 150.

160. *Id.*

161. *Id.*

162. *See generally Id.*

163. Fukurai, *supra* note 150, at 106.

164. *Id.*

165. *Id.* at 105.

166. INTELLECTUAL PROPERTY HIGH COURT, http://www.ip.courts.go.jp/eng/aboutus/history/index.html (last visited July 1, 2013).

167. *See generally* THE JAPANESE JUDICIAL SYSTEM, http://www.kantei.go.jp/foreign/

Criminal courts faced criticism over both procedural and substantive concerns.[168] First, criminal cases were taking too long to get to trial and the trials were not held on consecutive days.[169] Second, prosecutors maintained a 99.9% conviction rate.[170] Third, law enforcement interrogation tactics raised skepticism as a result of the high emphasis on confessions obtained during custodial interrogation.[171] Lastly, public attention has been focused on four death penalty cases involving wrongful convictions.[172] In the 1970's and 1980's, four Japanese men were sentenced to death row following their respective murder convictions (Menda, Zaidagawa, Matsuyame, and Shimada cases).[173] After decades of imprisonment, their convictions were reversed on appeal when higher appellate courts reviewed concerns involving the police interrogation and confessions.[174] The men were acquitted after they served a combination of 130 years in prison.[175] The trial court judges were criticized for poor fact finding.[176] The liberal media criticized the criminal courts for allowing the admissibility of confessions obtained during custodial police interrogations.[177] In Japan, confessions were obtained in more than 90% of cases.[178] Critics have alleged that the confessions were obtained under improper police interrogation techniques.[179]

Many more liberal groups have maintained a persistent interest in reintroducing the lay jury system back into Japanese criminal courts. Koichi Yaguchi, The Chief Justice of the Japanese Supreme Court, commissioned a study to review the implementation of a new jury system.[180] The members of this committee reviewed modern US criminal trial courts as well as continental European courts.[181]

Likewise, in the early 1990's, the Japan Federation of Bar Associations (JFBA) engaged in jury system reform by organizing national

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judiciary/0620system.html (last visited July 1, 2013).

168. Fukurai, *supra* note 150, at 106.

169. Hiroshi Fukurai, *Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy,* 86 CHI.-KENT L. REV. 789, 823 (2011); Wilson, *supra* note 149, at 515.

170. Fukurai, *supra* note 150, at 106 n. 41.

171. Soldwedel, *supra* note 17, at 1430.

172. Weber, *supra* note 80, at 149, n. 127.

173. INT'L BAR ASS'N, INTERROGATION OF CRIMINAL SUSPECTS IN JAPAN-THE INTRODUCTION OF ELECTRONIC RECORDING 41 (2003), *available at* http:/www.ibanet.org/Document/Default.aspx?DocumentUid=340486E4-A77A-4205-A73C-F422C3714CBB ("IBA Report"); Fukurai, *supra* note 169, at 803.

174. Weber, *supra* note 80, at 149.

175. Fukurai, *supra* note 169, at 803.

176. *Id.*

177. *Id.*

178. Weber, *supra* note 80, at 146.

179. Soldwedel, *supra* note 17, at 1432-33.

180. Fukarai, *supra* note 169, at 803.

181. Fukurai, *supra* note 154, at n. 98.

symposiums.[182] The JFBA suggested that new judges be obtained from practicing attorneys.[183] The JFBA further promoted the implementation of an all lay jury system.[184] The JFBA sought checks and balances against the judiciary and prosecutors.[185]

In 1997 and 1998, the LDP and its Special Investigation Council [*Seio tokubetsu chosakai*] held meetings and published reports detailing their proposed reforms for the judiciary and the legal profession.[186] The group sought many judicial and legal professional reforms, including public participation juries.[187]

A. Justice System Reform Council

In 1999, the late Prime Minister Keizo Obuchi responded to growing concerns for judicial reform by creating the Justice System Reform Council (JSRC); the Diet enacted legislation confirming the group's creation.[188] The JSRC was comprised of the three branches of the legal profession- judges, prosecutors, and private practicing attorneys.[189] Other members included law professors and members of the business and labor communities.[190]

The JSRC was charged with the following objectives: (1) clarify the role of the judiciary; (2) investigate easier public use; (3) examine popular jury participation; (4) strengthen and clarify the roles of the three legal profession branches; and (5) explore other policies to reform the operation and foundation of the justice system.[191] The JSRC sought to eliminate lengthy criminal trials, increase public access, and include live witness testimony. The group began its challenge to design and implement a criminal jury system to build public trust and increase citizen participation in a more democratic and adversarial process.[192]

B. Review of the Modern American Jury

After carefully reviewing the US jury system, the JSRC rejected the

182. Weber, *supra* note 80, at 149.
183. *Id.* at 175.
184. Fukarai, *supra* note 150, at 106.
185. *Id.*
186. *Id.* at 105.
187. *Id.* at 107.
188. *See generally* Weber, *supra* note 80, at 151; *See* Shiho seido kaikaku shingikai secchiho [Law Establishing the Justice System Reform Council], Law No. 68 of 1999, art. 2 (Japan).
189. *See generally* Weber, *supra* note 80, at 151.
190. *Id.*
191. *Id. See also* Shiho *seido kaikaku shingikari secchiho* [Law Establishing the Justice System Reform Council], Law No. 68 of 1999, art. 2 (Japan).
192. *See generally* Weber, *supra* note 80, at 151.

same. The JSRC analyzed the liberal and democratic values associated with the US jury and rationalized that the all lay jury was more appropriate in America's multi-ethnic society but not in Japan.[193]

Japanese legal professionals held divergent opinions on the US style lay jury system. Some scholars saw only inconsistent and unpredictable US jury verdicts. Japanese Supreme Court judges indicated that US juries produced a high number of erroneous verdicts.[194] Many conservatives correctly asserted that all lay assessor juries rendered more "not guilty" verdicts than professional judges.[195] Not surprisingly, both conservative and liberal Japanese groups held vested interests in the make- up of the juries and promoted different types of jury systems.[196] Furthermore, the Japanese watched several widely broadcast US jury trials, which could have also affected their views of the US style lay jury system.[197] Specifically, The trial of O.J. Simpson made an impact upon the Japanese public.[198]

Japanese scholars offered explanations for rejecting the US style jury system. Koichiro Fujikura, scholar of US Law, indicated that the pure jury system worked well in US society.[199] He implied that the pure all lay jury system merely legitimized the US courts, as Americans held confidence in a system where the diverse public participated in the courts.[200] Others argued that Americans were better equipped to serve on an all citizen jury.[201]

C. Competing Interests

Various groups would be impacted by revisions to the Japanese justice system and the JSRC obtained input from all players. Conservative groups, such as prosecutors, victim advocates, judges, and the Ministry of Justice, sought to maintain judicial control of the proceedings.[202] More liberal groups, including the JFBA, criminal defense attorneys, and the media, sought change by emphasizing the participation of lay citizens on the jury.[203] Not surprisingly, the Japanese Supreme Court and the Ministry of Justice maintained the view that judges should remain the adjudicators, stressing the importance of professional judges providing consistent, fair,

193. Takuya Katsuta, *Japan's Rejection of the American Criminal Jury,* 58 AM. J. COMP. L. 497, 499 (2010).
194. McClanahan, *supra* note 30, at 762.
195. *Id.* at 763.
196. *Id.*
197. *Id.*
198. *Id.*
199. Katsuta, *supra* note 193, at 510.
200. *Id.*
201. McClanahan, *supra* note 30, at 763.
202. *See Id.* at 765.
203. *Id.*

and predictable decisions and furthering the goal of discovering the truth.[204] The Japanese Supreme Court sought to limit the actual role of lay citizens in the jury and proposed a system that would include citizen involvement, but disallow citizen voting power.[205]

The role of Japanese professional judges continued to face criticism. Japanese judges, prosecutors, and private attorneys completed their education through a highly competitive national exam.[206] The Supreme Court selected, trained, promoted, assigned and rotated all judges.[207] The selected judges receive additional legal training and education through the Supreme Court's Legal Training and Research Institute (LTRI).[208] Japanese judges rise through the judicial ranks for maintaining decisions that were consistent with the opinions of higher judges.[209] The judges came from similar educational backgrounds; the judiciary lacked diversity.[210] The judges were criticized for being isolated and out of touch with public opinions.[211] They work long hours and rotate to different parts of the country.[212] As such, they had little opportunity to integrate within their local communities. Some critics alleged that the professional judges were insulated from public opinion.[213] Other critics have indicated that the Japanese judges did not demonstrate warmth towards crime victims.[214] Ironically, judges in Western countries continue to face similar criticism from time to time when they render an unpopular decision.

The various Japanese civic and legal groups proposed different jury system models. At one point, the Liberal Democratic Party (LDP) supported a conservative model similar to that proposed by the Supreme Court and Ministry of Justice.[215] This model consisted of three professional judges and four lay members.[216] The Democrats supported a more liberal model consisting of one professional judge and ten lay members.[217] One group proposed a moderate model consisting of two judges and seven

204. Weber, *supra* note 80, at 153.
205. *Id.* at 155.
206. *Id.* at 139.
207. *Id.*
208. *Id.*
209. Weber, *supra* note 80, at 140.
210. *Id.* at 152.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. Kent Anderson & Leah Ambler, *The Slow Birth of Japan's Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement,* 21 J. JAPAN. L. 55, 61 (2006).
216. *Id.*
217. *Id.*

citizens.[218]

D. Reform Compromise

Tokyo Law Professor Masahito Inouye proposed a "middle ground" continental European style mixed court system combining lay citizen jurists and professional judges.[219] On June 12, 2001, the JSRC adopted Professor Inouye's proposal and recommended a compromise that would address the concerns of all of the groups in its Interim Report.[220] The JSRC indicated that the fundamental task for reform was to clearly define what must be done to "transform both the spirit of the law and the rule of law into the flesh and blood" of Japan.[221] The JSRC recognized respect for individuals pursuant to Article 13 of the Japanese Constitution and popular sovereignty under Article 1.[222] The JSRC detailed the fundamental philosophy to realize a system that would be easy to utilize and would incorporate citizen participation in the justice system with direction for reform of the justice system for the twentieth-first century.[223] In its Interim Report, the group described the role of the justice system, legal profession, and the people.[224] The JSRC outlined the shape of the justice system by addressing: (1) the construction of a justice system responding to public expectations (coordination of the Institutional Base); (2) how the legal profession supporting the justice system should be (expansion of the Human Base); and (3) establishment of the Popular Base.[225]

The JSRC proposed substantial reforms to both the civil justice system and the criminal justice system, including speeding up civil cases.[226] It proposed that the parties confer to outline a proceeding plan and that the process to collect evidence be expanded.[227] The JSRC strengthened the courts for intellectual property rights and labor rights cases;[228] recommended improvements to family courts and summary courts;[229] called for reinforcing the legal aid system and the alternative dispute resolution

218. *Id.*

219. Fukarai, *supra* note 150, at 108; *See* Sosho tetsuzuki eno ratana sanka seido kokushi an [A New Mixed Court System in Criminal Procedure: A Suggestion for the Framework], Mar. 13, 2001, (Japan) *available at* http://www.kantei.go.jp/jp/sihouseido/dai51/51bessi1.html.

220. *See generally* JSRC INTERIM REPORT *supra* note 20.

221. *Id.* at ch. I.

222. *Id.*

223. *Id.* at ch. I.

224. *Id.* at ch. I, pt. 2, para. 1.

225. *Id.* at ch. I, pt. 3, para. 2 (1) – (3).

226. JSRC INTERIM REPORT *supra* note 20, at ch. II, pt. 1, para. 1.

227. *Id.*

228. *Id.* at ch. II, pt. 1, paras. 3 & 4.

229. *Id.* at ch. II, pt. 1, para. 5.

process.[230] Many of these recommendations reflect successful aspects of the US state and federal courts.

The JSRC recommended significant reform to the legal training system and increasing the number of Japanese attorneys.[231] The group recommended US style graduate level law schools.[232] It addressed accreditation of the law schools, the future vision of undergraduate legal education,[233] a new national bar exam, apprenticeship training and continuing legal education.[234] The group stressed the need for a "larger stock of legal professionals" with a "wide range of activities in various fields."[235] The JSRC set a goal of 1,500 individuals passing the national bar exam in 2004 and 3,000 people passing the national bar exam in 2010.[236] It recommended improving legal ethics and making lawyer discipline clearer and more effective[237] and improving the consciousness of prosecutors.[238]

In its Interim Report, the JSRC indicated that the people "must participate in the administration of justice autonomously and meaningfully" and must maintain "rich communication with the legal profession."[239] The JSRC recognized the need for broad popular support and understanding. It reasoned that the judicial branch must strive for accountability to the people while maintaining judicial independence.[240] Proceedings should be "easily seen, understood, and worthy of reliance by the people."[241] In essence, the legal profession and the courts would need to win over the public trust. The system would need to respond to "public expectations."[242]

The JSRC outlined three basic policies necessary for justice reform, which would contribute to maintaining a free and fair society.[243] The policies were described, as follows:

> 1. First, in order to achieve "a justice system that meets public expectations," the justice system should be made easier to use, easier to understand, and more reliable[;]
> 2. Second, by reforming 'the legal profession supporting the justice system,' a legal profession that as a

230. *Id.* at ch. II, pt. 1, paras. 7(2) & 8.
231. *Id.* at ch. III, pt. 1, para. 1.
232. JSRC INTERIM REPORT *supra* note 20, at ch. III, pt. 2, para. 2.
233. *Id.* at ch. III, pt. 2, para. 2(5)
234. *Id.* at ch. III, pts. 2, 3, 4 & 5.
235. *Id.* at ch. I, pt. 2, para. 2.
236. *Id.* at ch. I, pt. 3, para. 2(2).
237. *Id.*
238. JSRC INTERIM REPORT *supra* note 20, at ch. I, pt. 3, para. 2(2).
239. *Id.* at ch. I, pt. 2, para. 3.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* at ch. I, pt. 3, para.1.

profession is rich both in quality and quantity shall be secured [; and]

3. Third, for 'establishment of the popular base,' public trust in the justice system [should] be enhanced by introducing a system in which the people participate in legal proceedings and through other measures.[244]

The JSRC proposed expanding the people's access to the justice system to improve public's expectations. It stressed insuring "fairer, more proper and more prompt proceedings."[245] In its Interim Report, the JSRC indicated that the justice system of the 21st century must resolve disputes with "predictable, highly clear and fair rules." [246] People should have a "proper and prompt remedy" when their rights or freedoms have been infringed.[247]

In the Interim Report, the JSRC recommended changes to the recruitment and selection of judges by diversifying the applicant sources.[248] The JSRC sought the appointment of lawyers as judges and recommended that assistant judges gain diverse legal experience.[249] Moreover, the JSRC sought the establishment of a system where groups reflecting public views participated in the selection of judges.[250]

The JSRC recommended the adoption of a mixed jury system, but did not specify the number of lay judges or professional judges.[251] It proposed a new preparatory pre-trial proceeding with expanded disclosure of evidence by the prosecution and indicated that jury trials should be held on consecutive days.[252] To secure fairness and the protection of an accused's rights, the JSRC recommended the creation of a public defender system.[253] To address the concerns raised about coerced police interrogation, the JSRC proposed requiring written records of the conditions of questioning.[254]

The JSRC recommended that the jury preside over criminal cases regardless of whether the accused admitted or denied guilt and, unlike most US jurisdictions and Japan's own unsuccessful pre-war jury system, the accused could not waive the right to a jury trial.[255] Mixed juries would decide the guilt or innocence of an accused and impose a sentence upon

244. JSRC INTERIM REPORT *supra* note 20, at ch. I, pt. 3, para.1.
245. *Id.* at ch. I, pt. 3, para. 2(1).
246. *Id.* at ch. I, pt. 2, para.1.
247. *Id.*
248. *Id.* at ch. I, pt. 3, para. 2(2).
249. *Id.*
250. JSRC INTERIM REPORT *supra* note 20, at ch.I, pt. 3, para. 2(2).
251. *Id.*
252. *Id.* at ch. IV, pt. 1, para. 1(4)a.
253. *Id.* at ch II, pt. 2, para. 2.
254. *Id.* at ch. I, pt. 3, para. 2(1).
255. *See supra* note 41.

conviction. The JSRC emphasized that the mixed jury system would afford the professional judges and laypersons with the opportunity to share their knowledge and experience through effective communications.[256] In the new jury system, professional judges would educate the lay members and maintain consistency, while lay members would add a fresh perspective. This hybrid system would inject public sentiment and common sense, eliminate judicial bias, and improve civic education.[257] The JSRC considered a future expansion of the jury system to apply to civil cases, and Japan has not yet addressed this topic.

Resurrection of the lay jury system had been sporadically raised since the suspension of the Japanese jury system in 1943 and many were surprised when a jury system was included in the JSRC's Interim Report in 1999.[258] The Interim Report did not specify the detailed composition of the mixed or quasi-jury; interested parties lobby for their respective positions from 2001 to 2004. The Japanese Federation of Bar Associations (JFBA) represented the private attorneys, including criminal defense attorneys. This group held the most liberal view and proposed a system consisting of one professional judge and nine lay citizens.[259] The Japanese Supreme Court proposed the most conservative position proposing a non-binding advisory mixed-court panel. Subsequently, the Supreme Court proposed a mixed panel consisting of three professional judges and three lay citizen jurors.[260] The Ministry of Justice and the prosecutors supported Professor Inoue's middle ground position calling for a panel consisting of three professional judges and four to six lay jurors.[261]

V. IMPLEMENTATION OF THE NEW JURY SYSTEM

On May 28, 2004, the Japanese Diet enacted an Act Concerning Participation of Lay Assessors in Criminal Trials ("Lay Assessor Act").[262] In Article 1, the Lay Assessor Act indicates that its purpose is to "contribute to the promotion of the public's understanding of the judicial system and thereby raise their confidence in it."[263] It defines a criminal justice system promoting the joint participation of lay assessors with professional judges. The lay participants are to be selected from "among the people."[264]

256. Weber, *supra* note 80, at 156.

257. Anderson & Ambler, *supra* note 215, at 56.

258. *Id.* at 58.

259. *Id.* at 59.

260. *Id.*

261. *Id.*; *See* INVESTIGATION COMM., *Saiban-in seido nit suite [*Concerning the Lay Assessor System] (March 11, 2003), *available at* http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai13/13siryou1-2.pdf.

262. Lay Assessor Act, *supra* note 4, at 233.

263. *Id.* at 236.

264. *Id.*

The Lay Assessor Act contains a five-year preparatory time period (2004-2009).[265] The Japanese Supreme Court was tasked with drafting procedural trial and deliberation rules. The government and the Supreme Court were required to spend the preparatory time educating the public and encouraging citizen participation.[266]

The Lay Assessor Act indicates that the citizen lay assessors will adjudicate criminal offenses falling within the following two categories:

> 1. Cases involving crimes punishable by death or imprisonment for an indefinite period or by imprisonment with hard labor; and
> 2. Cases involving crimes in which the victim has died from an intentional criminal act . . . .[267]

After years of debate, the Lay Assessor Act prescribed the composition of the jury panel. For contested cases, three professional judges and six lay assessors will serve with one of the three professional judges acting as the chief judge.[268] When an accused admits guilt and there are no disputed issues of facts at trial, a smaller size jury shall consist of one professional judge and four lay assessors.[269]

Notwithstanding the prosecutor charging serious crimes covered by a mixed jury trial, the judge may determine that certain cases proceed to an all professional judge panel, as follows:

> 1. When there are conditions that make it difficult to guarantee lay assessor candidates' appearance;
> 2. When it is difficult to appoint substitute lay assessors;
> 3. When the duties cannot be performed due to the lay assessors' fear of significant violation to their peaceful existence; or
> 4. When the jurors' fear of added injury to themselves or their family's assets or lives.[270]

The mixed panel of lay assessors and professional judges are empanelled to make court decisions. These decisions include determinations of sentencing judgment, determinations of sentence exoneration, determinations of innocence, and determinations on transfers

265. *Id.* at 280.
266. *Id.* at 280-81
267. *Id.* at 237.
268. Lay Assessor Act, *supra* note 4, at 237.
269. *Id.*
270. *Id.* at 238.

to the Family Court under Juvenile Act.[271] The professional judges interpret laws and ordinances and render decisions concerning litigation procedure.[272] When a smaller size jury is appropriate for an uncontested case, the decisions typically made by empanelled judges are then made by the sole judge.[273]

Lay jurors (assessors) must carry out their duties with honesty and fairness in accordance with the law.[274] They shall not disclose deliberation secrets nor take any action that might diminish the public trust in the trial's fairness or affect the dignity of the trial.[275] The Lay Assessor Act provides for utilization of reserve lay assessors, referred to as "juror alternates" in US courts.[276] Lay assessors and reserve lay assessors are compensated for travel, per diem, and hotel expenses, pursuant to the Rules of the Supreme Court.[277]

Jurors are subject to disqualification in a few instances. First, jurors must have completed a ninth grade education.[278] Second, they must have not been subject to imprisonment for a crime.[279] Third, those unable to perform juror duties due to significant burden to physical or mental incapacities are disqualified.[280]

People falling under any of the following career titles are prohibited from serving as a lay juror:

1. Members of the National Diet;
2. Ministers of the State;
3. Certain higher ranking employees of national administrative institutions;
4. Current or former judges;
5. Current or former prosecutors;
6. Current or former attorneys;
7. Patent attorneys;
8. Judicial clerks;
9. Notaries;
10. Judicial police officers;
11. Court personnel;

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271. *Id.* at 240; Shonen ho [Juvenile Ace], Law No. 168 of 1948, art 55 ("Transfers to Family Court") (Japan).

272. Lay Assessor Act, *supra* note 4, at 241.

273. *Id.*

274. *Id.* at 242.

275. *Id.*

276. *Id.*

277. *Id.*

278. Lay Assessor Act, *supra* note 4, at 243, n. 24.

279. *Id.* at 244.

280. *Id.*

12. Ministry of Justice personnel;
13. Police;
14. Persons qualified to be a judge, assistant judge, prosecutor, or lawyer;
15. Professors of law;
16. Legal apprentices;
17. Prefectural governors and mayors;
18. Self Defense Force Officers;
19. Persons with pending criminal charges; and
20. Persons under arrest or detention.[281]

The following citizens are eligible to decline jury service:

1. Persons over age 70;
2. Members of local councils;
3. Students;
4. Person who served as a juror in the past 5 years;
5. Candidates called for service in the past year;
6. Persons who have served on the Prosecutorial Review Commission within the past 5 years;[282]
7. Persons who by unavoidable reason face difficulty in serving on the particular date scheduled, as follows:
   A. Where it is difficult to appear in court due to a serious illness or injury;
   B. Where it is necessary to provide childcare or nursing care to household members;
   C. Where there is fear of significant damage to a business interest; and
   D. Where it is necessary to attend a parent's funeral or other social obligation that cannot be rescheduled.[283]

Jurors with a relationship to a particular case being heard shall be disqualified. Those individuals include:

1. The Accused, the victim, and their relatives, guardians, representatives, family members, attorneys and employees;
2. Witnesses in the case;
3. Prosecutors or law enforcement officers in the case;

281. *Id.* at 244-46.
282. *Id.* at 246-47.
283. *Id.* at 247.

4. Prosecutorial Review Commission members in the case; and
5. Persons participating in the original trial, in the event of a remand and re-trial.[284]

The judge maintains discretion to disqualify a potential lay assessor when the judge believes that the individual is unable to act fairly.[285] The judge may submit juror questionnaires to prospective jurors in advance of jury selection.[286] The questions can be designed to determine whether the jurors will conduct the trial fairly.[287] Jury selection shall take place in the presence of the judges, prosecutor, defense counsel, and court clerks.[288] The judge may permit the accused to be present when necessary.[289] Jury selection shall not be open to the public.[290] The chief judge presides over jury selection.[291]

Similar to the US court's challenges for cause, the prosecutor, accused, and the accused's attorney, may request that the judge not appoint or seat a prospective juror based upon any grounds relating to the juror's legal qualifications or disqualification matters.[292] The judge may also raise the issue *sua sponte*.[293] If the judge decides not to appoint a prospective juror, the judge shall state a reason[294] and any party may appeal the court's decision.[295] Similar to the peremptory strikes in the US, the Japanese prosecutor and the defense may each request the non-appointment of four additional jurors without providing any reasons.[296]

Under the Lay Assessor Act, cases are scheduled for pre-trial proceedings.[297] The judge reviews expert testimony during the pre-trial proceedings.[298] Judges, prosecutors, and defense counsel shall strive to make jury trials quick and easy for the jurors to understand.[299] Jurors and reserve jurors shall appear at any pre-trial proceedings when the judge

284. Lay Assessor Act, *supra* note 4, at 248-49.
285. *Id.* at 249.
286. *Id.* at 254.
287. *Id.* at 255.
288. *Id.* at 256.
289. *Id.*
290. Lay Assessor Act, *supra* note 4, at 256.
291. *Id.*
292. *Id.* at 257.
293. *Id.*
294. *Id.*
295. Lay Assessor Act, *supra* note 4, at 258.
296. *Id.*
297. *Id.* at 265.
298. *Id.*
299. *Id.* at 266.

questions and inspects witnesses.[300]

The jury trial proceeds with the prosecutor and defense attorney providing opening statements.[301] Lay jurors may question the witnesses.[302] During the trial, victims (or a representative upon victim death) may state their opinions and are then subject to juror questioning.[303] If the defendant provides a voluntary statement, then the jurors may, upon informing the chief judge, request a statement from the defendant.[304] Jurors shall be present in court when the verdict and judgment are rendered.[305] However, the failure of a juror to appear in court does not affect the validity of the jury's verdict or the court's judgment.[306]

Professional judges and jurors ("lay assessors") shall deliberate together.[307] Lay assessors shall state their opinions during the deliberations.[308] The judges shall deliberate on matters of law and trial procedure. The judges may allow the lay jurors to listen to the judges' deliberations on law and may choose to ask for the lay jurors' opinions.[309] During deliberations, the chief judge shall, at a minimum, state their judicial opinions on matters of law and trial procedure[310] and lay assessors shall follow the judges' legal opinions.[311] During deliberations, the chief judge shall insure that lay assessors are able to perform their duties. The chief judge shall explain the laws, make deliberations easily understandable, and provide opportunity for the lay assessors to state opinions.[312] Reserve lay assessors participate in deliberations by listening to all deliberations by the professional judges and joint deliberations by expressing their opinions.[313]

The verdict of the jury is rendered by a majority vote, including the vote of at least one professional judge.[314] Upon a conviction, the jury also

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300. *Id.*
301. Lay Assessor Act, *supra* note 4, at 267.
302. *Id.*
303. *Id.* at 268.
304. *Id.*
305. *Id.* at 269.
306. *Id.*
307. Lay Assessor Act, *supra* note 4, at 273.
308. *Id.*
309. *Id.* at 274.
310. *Id.* at 273.
311. *Id.*
312. *Id.*
313. Lay Assessor Act, *supra* note 4, at 274.
314. *Id.* at 273. The Act specifies that all majority opinions shall include at least one vote of a professional judge and one vote of a lay juror. By virtue of the size of the panel, lay juror votes will always be contained in a majority vote. The Act does not specify what verdict would be rendered if a majority vote failed to include a professional judge vote. A reasonable interpretation of the Act would imply that a majority vote to acquit without a professional judge vote would result in an acquittal verdict. However, a majority vote to

determines an appropriate sentence in accordance with the law and by a majority vote of the jury including a vote of at least one professional judge and one lay assessor vote.[315] When there is no initial agreement, the number of votes for the defendant's most unfavorable sentence is combined with the number of votes for the next sentence favorable to the defendant until a majority vote, including both a judge and lay juror, is reached.[316]

Deliberations of the professional judges alone, as well as joint deliberations, shall never be revealed.[317] The opinions and votes of the professional judges and lay assessors shall also remain confidential.[318] The names, addresses, and personal particular information of the jurors, prospective jurors and reserve jurors must never be made public.[319] However, the individual jurors may elect to disclose their own identity.[320]

No one may contact a lay assessor or reserve lay assessor about the defendant's case or for the purpose of learning trial secrets.[321] Violation of this law carries a fine of up to 200,000 Japanese yen.[322] If a lay assessor or reserve lay assessor leaks a deliberation secret, they are subject to a fine up to 500,000 Japanese yen and/or a term of imprisonment not to exceed six months.[323] The lay assessors are further prohibited from stating what they thought the weight of a sentence should have been or the facts they thought should have been found, regardless of whether they agreed or disagreed.[324] Prosecutors, defense counsel and defendants are prohibited from revealing the name of lay assessors and their answers to juror questionnaires in jury selection.[325] Violation of this law carries a fine of up to 500,000 Japanese yen and/or imprisonment for up to one year.[326]

During the five year preparatory period, the government and the Japanese Supreme Court were required to develop educational opportunities for the public, explaining the lay assessors' duties in deliberations and during the trial, jury selection, and the importance of citizen participation as lay assessors in jury trials.[327] The government and other groups underwent an extensive public education campaign. The Supreme Court, the Ministry of Justice, and the Japanese Federation of Bar Associations each

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convict without a professional judge vote would result in an acquittal verdict. *Id.* at 273, n. 49.

315. *Id.* at 273-74.
316. *Id.* at 274.
317. *Id.* at 275.
318. *Id.*
319. Lay Assessor Act, *supra* note 4, at 275.
320. *Id.*
321. *Id.*
322. *Id.* at 277
323. *Id.*
324. *Id.* at 278.
325. Lay Assessor Act, *supra* note 4, at 278.
326. *Id.*
327. *Id.* at 280-81.

disseminated information through their respective websites.[328]

The Japanese government spent hundreds of millions of US dollars on the new justice system.[329] The Japanese Supreme Court estimated annual expenses of 2 billion Japanese yen ($20 US million) for lay judge compensation and 1.2 billions Japanese yen ($12 US million) for lay judge travel related expenses.[330] In the first three years since the enactment of the Lay Assessor Act, the Supreme Court spent 3.6 billion Japanese yen ($47 US Million) on advertising. The Ministry of Justice spent 970 million Japanese yen ($12.6 US million) on advertising.[331] Further, the Japanese government expended more than 28.6 billion yen ($350 US million) remodeling court facilities around the country to accommodate jury panels.[332]

The three groups created the Lay Assessor Promotions Office [*Saiban-in seido koho suishin kyogo-kai*], which developed public relations efforts to promote the new system.[333] The Promotions Office filmed a television drama, conducted mock trials throughout the country and published posters, newsletters, and flyers.[334]

The Promotions Office conducted public opinion surveys.[335] Surprisingly, in a 2005 poll, 70% of people survey stated that they did not want to serve on a jury panel.[336] Those surveyed expressed their apprehension of judging people and finding guilt.[337] In a separate poll, citizens indicated the following reasons for not wishing to serve as a lay juror: "'the responsibility to decide another's fate is too great' (75%); 'lay people cannot try a case without legal knowledge' (64%); and 'lay people cannot deliberate as equals with experienced and professional judges' (55%)."'[338] A Japanese Supreme Court survey disclosed that those caring for children or the elderly did not wish to serve as jurors.[339]

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328. Anderson & Ambler, *supra* note 215, at 71. *See* SUPREME COURT OF JAPAN, *Saiban-in Seido* [The Lay Assessor System],http://www.saibanin.courts.go.jp (last visited July 1, 2013) (Japan); MINISTRY OF JUSTICE, *Anata mo Saiban-in!!* [You too will be a lay assessor!!], http:www.moj.go.jp/SAIBANIN/ (last visited July 1, 2013) (Japan); JAPAN FED'N OF BAR ASSOCIATIONS, *Saiban-in Seido* [The Lay Assessor System], http://www.nichibenren.or.jp/ja/citizen_judge/index.html (last visited July 1, 2013) (Japan).

329. Mclanahan, *supra* note 30, at 770-71.

330. Wilson, *supra* note 149, at 494-95.

331. Mclanahan, *supra* note 30, at 770-71.

332. *Id.* at 771, n. 297.

333. Anderson & Ambler, *supra* note 215, at 68.

334. *Id.*

335. *Id.* at 69.

336. *Id.*

337. *70% Don't Want to Serve on Juries in New System*, THE JAPAN TIMES (Apr. 17, 2005), http://www.japantimes.co.jp/news/2005/04/17/national/70-dont-want-to-serve-on-juries-in-new-system/#.UXBIBsrNuSo.

338. Mclanahan, *supra* note 30, at 770, n. 293.

339. Anderson & Ambler, *supra* note 215, at 69. See *Caregivers Reluctant to Be Lay*

Areas of public criticism included fears of mistake, bias, and ignorance. The public expressed some anxiety over hearing murder cases and imposing the death penalty. Members of the public held some concern regarding appeals, sentencing guidelines, adverse treatment of jurors by employers, and penalties for leaking secret information.[340]

In subsequent polls conducted just prior to the commencement of the new jury trial system in 2009, citizens started to respond more favorably to jury service. Results reflected that 71.5% of respondents were "willing" to serve as a juror.[341] Only 13.6% of the respondents stated that they would participate "regardless of [their] legal obligation" to serve.[342] A majority of the respondents (57.9%) indicated that the felt legally obligated to serve.[343]

VI. EARLY CRITICISM

Prior to the effective date of implementation in 2009, many experts expressed their apprehension regarding the new criminal jury system. Scholars suggested three areas warranting court rules.[344] First, judges maintained discretion to assign cases to the larger panel, smaller jury panel (consisting of one professional judge and four lay jurors when the accused confesses and there are no issues of fact to be resolved by a jury), and to an all professional judge panel.[345] The Japanese Supreme Court should promulgate rules providing guidance on judicial discretion in designating the types of appropriate trial panels.

Second, similar to US and other foreign courts, the participants have great interest in jury selection, as the jury make-up may affect the outcome of the cases.[346] Jury composition can be greatly affected by the manner in which *voir dire* (jury selection) is conducted by the judge; experts recommend that the Japanese Supreme Court promulgate rules regarding jury selection.

Third, the deliberations between professional judges and lay citizens create many concerns. Professional judges could very well dominate discussions due to their expert knowledge and legal stature.[347] Professional judges must deliberate on both issues of law and court procedure. Some scholars have suggested that the Japanese Supreme Court provide guidance on the deliberation dynamics.[348] For example, the scholars recommend rules

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Judges, THE DAILY YOMIURI (Mar. 23, 2006), http://www.accessmylibrary.com/article-1G1-143562874/caregivers-reluctant-lay-judges.html.

340. Anderson & Ambler, *supra* note 215, at 70.

341. *70% Don't Want to Serve on Juries in New System*, *supra* note 337.

342. Mclanahan, *supra* note 30, at 771.

343. *Id.*

344. Anderson & Ambler, *supra* note 215, at 67.

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* at 67-68.

that specify the role and participation of the lay jurors when the professional judges determine issues of law.[349] They further recommend rules to regulate the role of the professional judge when the panel is expressing opinions during deliberations.[350]

A. Deliberation Secrecy and Voting

Other legal scholars have stressed great criticism over the statutory provisions mandating juror confidentiality of deliberations. One author argues that Japan should "lift the overly strict duty of lifetime secrecy" placed on lay jurors.[351] Others argue that the jurors would be unable to address their own post-trial stress in pursuing professional help or communicating with friends and family.[352]

Interestingly, many foreign courts have similar confidentiality provisions. In England, Northern Ireland, and Canada, jurors are prohibited from disclosing deliberation information.[353] In Russia and Spain, juror deliberations are completely confidential.[354] In Australia, jurors may disclose information, but not for remuneration.[355] The media cannot contact Australian jurors.[356] New Zealand does not impose restrictions on juror disclosures; however, court opinions have sanctioned media for contacting jurors.[357] Violations are enforced through contempt of court proceedings.[358]

Under the juror confidentiality provisions, Japanese lay jurors would be precluded from sharing their positive experiences and educating the general public around them about the reformed criminal justice system. In US courts, jurors generally have a positive experience from their participation on a jury. At a minimum, they return home and share their new perspective of the courts with household members, family and co-workers. This communication arguably improves democracy and increase transparency and legitimacy of the US judicial branch. US jurors are also free to write their own "tell all" books for substantial profits and disclose the communications and votes of the other jurors provided during

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349. *Id.*

350. Anderson & Ambler, *supra* note 215, at 67-68.

351. Wilson, *supra* note 149, at 498.

352. *See generally* James E. Kelley, *Addressing Juror Stress: A Trial Judge's Perspective*, 43 DRAKE L. REV. 97, 108 (1994).

353. Neil Vidmar, *Review of Jury Systems Abroad Can Provide Helpful Insights Into American Practices*, 73 N.Y. ST. B.J. 23 (June 2001).

354. Thaman, *supra* note 50.

355. Michael Chesterman, *Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy*, 62 LAW & CONTEMP. PROBS. 69, 101 (1999).

356. *Id.* at 100-01.

357. Neil Cameron, Susan Potter & Warren Young, *The New Zealand Jury*, 62(2) LAW & CONTEMP. PROBS. 103,129-31 (1999).

358. *Id.*

deliberations.

Ironically, several parts of the US court system do, in fact, embrace confidentiality provisions. Court ordered mediations in civil cases are completely confidential. The US grand jury system holds a longstanding tradition of complete confidentiality at every stage. Further, US jurors cannot be compelled to disclose deliberation communications. US attorneys in many jurisdictions are subject to ethical rules restricting them from initiating communications about any subject with jurors.

Japanese jurors are precluded from sharing their deliberation experiences, including the votes and opinions of themselves and the other jurors and judges.[359] However, they may still communicate their positive experiences and newly gained court education. In fact, many jurors have joined groups, created blogs, and become self-appointed spokespersons championing court reforms and jury service.[360]

Unlike the majority of modern US courts, which require a unanimous verdict, Japanese verdicts require only a simple majority vote with one professional judge in the vote.[361] This vote is more characteristic of the continental European style mixed jury systems. All lay juries in Russia and Spain are required to obtain more of a super-majority vote.[362] The lay jury in Spain must obtain a guilty verdict with seven out of nine lay jurors voting.[363] The Spanish jury may acquit with five out of nine jurors voting.[364] Russian all lay juries may convict with a vote of seven out of twelve jurors in agreement.[365] A vote of six out of twelve is required to acquit.[366] However, Russian jurors must attempt to obtain a unanimous verdict during their first three hours of deliberation.[367]

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359. Mark Levin &Virginia Tice, *Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform*, THE ASIA-PAC. J.: JAPAN FOCUS, www.japanfocus.org/-Mark-Levin/3141 (last visited July 1, 2013).

360. Setsuko Kamiya, *Lay Judge Duty Sparks New Passion,* JAPAN TIMES ONLINE (June 21, 2012), www.japantimes.co.jp/text/nn20120621f1.html.

361. In Canada, New Zealand, US federal courts and almost all US state courts, unanimous verdicts are required. The US states of Oregon and Louisiana permit all majority verdicts. Majority verdicts are allowed in US state civil trials. Vidmar, *supra* note 22, at 31.

362. "Russian jurors must strive for unanimity during the first three hours of deliberation, whereafter they may seek to reach a majority decision." Stephen Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, 62 LAW & CONTEMP. PROBS. 233, n. 114 (1999) [hereinafter Thaman, *Spain and Russia*]. "In Spain, seven of nine votes are required to prove any propositions unfavorable to the defendant, whereas only five votes are needed to prove any proposition favorable to the accused." *Id.* at 254.

363. Thaman, *supra* note 14, at 629.

364. Thaman, *Spain and Russia*, *supra* note 368, at 254.

365. *Id.* at n. 113.

366. *Id.*

367. *Id.* at n. 114.

B. Prosecutor Appeals

Japan has adopted the continental European mixed jury system that allows for prosecutorial appeals of acquittals.[368] Scholars have expressed great concern over allowing prosecution appeals of defense acquittals. Under the Lay Assessor Act, prosecutors maintain their rights to appeal acquittals and they are not bound by the acquittal.[369] The prosecution may appeal the acquittal based upon issues of law and procedural error and seek a re-trial upon reversal.[370]

In contrast, US court participants are bound by acquittals pursuant to the Fifth Amendment to the US Constitution, which prohibits Double Jeopardy.[371] However, in US jurisdictions, individuals can face accusations even following an acquittal on criminal charges.[372] Japan has a longstanding tradition of allowing prosecutorial appeals under its pre-war jury systems and under its post-war justice system. Ironically, however, Article 39 of the post-war Japanese Constitution [KENPO] provides, in part that "No person shall be held criminally liable for an act . . . of which he has been acquitted, nor shall he be placed in double jeopardy."[373]

C. Confessions and Police Interrogations

Traditionally, obtaining a confession has been "at the heart" of the Japanese criminal justice system.[374] Concerns have been raised regarding the voluntariness and reliability of confessions. Specific criticism involves custodial interrogation techniques and the emphasis placed upon confessions in criminal cases, along with the use and accuracy of prepared "confession statements."[375]

Following an arrest in Japan, the accused can be held for up to twenty-three days without bail or any provision for release.[376] Under the

368. Levin & Tice, *supra* note 365.

369. *Id.*

370. *Id.*

371. U.S. CONST. amend. V. ("Due Process Clause").

372. Following an acquittal in a criminal state court case, the US government may indict an individual on federal criminal charges for the same conduct that resulted in the state court acquittal. Further, following an acquittal in a criminal case, those seeking monetary damage awards may initiate a civil cause of action for money damages. O.J. Simpson was acquitted of his criminal charges in the state court of the State of California. The family of the decedents filed a civil cause of action and obtained a civil judgment awarding money damages to the Plaintiffs.

373. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 39 (Japan), *available at* http://history.hanover.edu/texts/1947con.html.

374. Daniel Foote, *From Japan's Death Row to Freedom,* 1 PAC. RIM L. & POL'Y J. 11, 86 (1992).

375. *Id.* at 96-97.

376. *Id.* at 86. UN Report, *supra* note 8 (Confessions are known as the "king of

Code of Criminal Procedure (amended in 1948) [Keisoho], police can hold a subject for up to seventy-two hours.[377] Following an arrest, police have forty-eight hours to turn the criminal case over to the prosecutor, who then has up to twenty-four hours to obtain a detention warrant from a judge.[378] The judge typically issues the detention warrant to hold the accused in custody for a period up to ten days.[379] The prosecutor may then seek a judicial warrant extending the detention time for an additional ten day period before the accused is either indicted or released.[380]

Under the Japanese Constitution [Kenpo] and the Code of Criminal Procedure enacted in 1948 [Keisoho], confessions shall not be admitted into evidence if obtained after "prolonged detention."[381] In past years, police have used the theory of "voluntary accompaniment" and "arrest on other charges" when an arrest or detention is not made.[382]

An accused is required to appear before the police or prosecution for questioning when under arrest or under detention.[383] However, when police do not make an arrest for lack of probable cause or other reasons, officers may request an individual to voluntarily accompany them to a police station for questioning.[384] While not required under law to appear for questioning, the accused is voluntarily submitting to interrogation.[385] Following interrogation, the individual departs the police station to return home. In other instances, the accused's statements during interrogation may result in probable cause for an arrest on the subject case or an arrest on other unrelated charges.[386]

Japanese courts have rendered different opinions when confronted

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evidence" in Japanese courts. "Experienced detectives are expected to extract statements from suspects concerning their personal background, life history, the motive of the crime, the crime was committed and a statement of apology. For this task, most interrogators hope to form a good relationship with the suspect, known as constructing "rapport". Over ninety per cent of suspects confess in this way.").

377. KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 205, para. 1-2 (Japan), *available at* http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf.

378. *Id.* at art. 204 & 205.

379. *Id* at art. 208, para. 1.

380. *Id.* at art. 208, para. 2.

381. KENPO [Constitution] art. 38(2) ("Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence") NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION](Japan), *available at* http://history.hanover.edu/texts/1947con.html.; *See also* KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 319(1)(Japan) ("Confession made under compulsion, torture or threat, or after prolonged arrest or detention, or which is suspected not have been made voluntarily shall not be admitted in evidence"), *available at* http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf

382. Foote, *supra* note 380, at 87.

383. *Id.*; *See* KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 198, para. 1 (Japan), *available at* http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf.

384. KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 198, para. 1 (Japan), *available at* http://www.oecd.org/site/adboecdanti-corruptioninitiative/46814489.pdf.

385. *Id.*

386. *Id.* at art.199, para. 1.

with contested issues involving alleged aggressive use of "voluntary accompaniment" techniques. Some courts have reviewed these challenges and denied the same ruling that while improper techniques were used, the confessions remained voluntary.[387] Other courts continue to review the challenges of police impropriety in determining whether the confessions are reliable.[388]

Also, some criminal cases involve interrogation during an arrest on other unrelated minor charges. For example, an accused may be arrested or detained on prior minor offenses.[389] During the arrest or detention on the minor, unrelated offense(s), police may interrogate the accused on the subject case.[390] Japanese courts have considered and rejected this argument in many criminal cases.

Following arrest and during this pre-indictment stage, the arrestees are typically held in substitute prisons in police station holding cells called the "Daiyo Kangoku System."[391] Prosecutors may conduct interrogation inside the police holding cell.[392] However, the accused may be transported to the prosecutor's office for questioning during the day and then returned to the police station holding cell.[393] In 2009, the average daily number of persons detained in such facilities was 11, 235.[394]

Defense attorneys argue that the accused remains too readily accessible for lengthy or repetitive interrogation and that this location hinders the attorneys' access to their clients.[395] Police and prosecutors argue that detention centers (jails) have insufficient beds to house all of the accused held in these "substitute prisons" and that building additional bed space in detention centers is too costly.[396] Prosecutors argue that the existing detention centers are located too far from their offices.[397] The government responds that these pre-indictment arrestees are actually afforded more privacy and comfort, as they are permitted to use their own personal clothing and bedding.[398] One major inherent problem with substitute prisons involves the police maintaining the dual role of

387. Foote, *supra* note 380, at 88.

388. *Id.*

389. *Id.* at 89.

390. *Id.*

391. IBA Report, *supra* note 173, at 18.

392. *Id.*

393. *Id.* at 19.

394. MINISTRY OF JUSTICE, *White Paper on Crime* (2010), *available at* http://hakusyo1.moj.go.jp/en/59/nfm/mokuji.html.

395. *Japan's "Substitute Prison" Shocks the World*, JAPAN FED'N OF BAR ASSOCIATIONS, 9 (Sept. 2008), http://www.nichibenren.or.jp/library/en/document/data/daiyo_kangoku.pdf.

396. IBA Report, *supra* note 173.

397. *Id.* at 110.

398. IBA Report, *supra* note 173.

supervision over both the custody and the questioning of the accused.[399]

Another challenge raised in courts involves lengthy questioning during interrogation. While in custody, the accused is subject to unlimited interrogation. They can be questioned for multiple days and, in some reported instances, for over ten to twelve hours per day and into the evening.[400] Some critics have recommended that police document the duration and frequency of questioning.[401]

Japanese accused have the right to counsel under the Japanese Constitution.[402] However, defendants have not been afforded access to counsel during custodial interrogation and are not typically provided US style *Miranda* warnings advising them of their right to counsel.[403] If an accused invokes the right to counsel, the interrogation does not halt.

Court appointed counsel is not made available to pre-indictment arrestees held in Daiyo Kangoku.[404] Counsel is not available during interrogation or during detention hearings.[405] Accused may retain an attorney at his or her own expense prior to indictment and at every stage.[406] In 2003, the International Bar Association (IBA) compiled a thorough investigative study. It indicated its support of the electronic recording of Japanese police and prosecutor interrogation to accomplish the following goals:

1. The creation of an objective and complete record of proceedings that is more reliable than other means of reporting and that remains available for later examination and application as required;
2. The protection of suspects from the fabrication of false confessions;
3. The reduction of the likelihood of ill-treatment of suspects by police;

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399. *Id. See also* HUMAN RIGHTS WATCH/ASIA & HUMAN RIGHTS WATCH PRISON PROJECT, PRISON CONDITIONS IN JAPAN 1 (Human Rights Watch 1995), *available at* http://www.hrw.org/sites/default/files/reports/JAPAN953.PDF

400. IBA Report, *supra* note 173, at 41; *See also Japan's "Substitute Prison" Shocks the World*, JAPAN FED'N OF BAR ASSOCIATIONS, 10 (Sept. 2008), http://www.nichibenren.or.jp/library/en/document/data/daiyo_kangoku.pdf.

401. IBA Report, *supra* note 173, at 51. *See also* JSRC INTERIM REPORT, *supra* note 20, at ch. II pt. 2, para. 4(2).

402. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 34 (Japan), *available at* http://history.hanover.edu/texts/1947con.html.

403. IBA Report, *supra* note 173, at 21.

404. *Id.* at 62.

405. *See Japan's "Substitute Prison" Shocks the World*, JAPAN FED'N OF BAR ASSOCIATIONS, 10-11 (Sept. 2008), http://www.nichibenren.or.jp/library/en/document/data/daiyo_kangoku.pdf.

406. IBA Report, *supra* note 173, at 109.

4. Fewer allegations of impropriety by officials, resulting in improvements in morale and public standing; and
5. Less time and expense on the interrogation process and on police.[407]

The JFBA has opined that custodial confessions should be videotaped in full.[408] Many argue that complete videotaping of the entire interrogation will insure transparency and objectivity.[409] They argue that videotaping will eliminate concerns of torture, coerced confessions, and false confessions.[410] They go so far as to lobby that the admissibility of confessions should be examined by the lay jurors as a question of fact, rather than a judge determination of a question of law.[411]

Law enforcement and prosecutors remain adamantly opposed to audiotaping and videotaping interrogations.[412] They argue that taping will impede their ability to connect with the accused and obtain confessions, considered the "King of Evidence."[413] Many other countries, like the United States, do not generally require the electronic recording of interrogations, except in a few US jurisdictions.

In the past, some accused have alleged that during interrogation, they were abused, tortured and forced to confess.[414] The interrogation process has played "an integral role in the investigative process" by truth searching.[415] Similar to US courts, confessions are generally admissible in court. However, in US jurisdictions, custodial confessions obtained without properly advising the accused's of his rights are suppressed by Courts and never heard by juries.

The Japanese Constitution [KENPO] developed at the end of World War II in 1947 contains many rights afforded to a criminal accused. Accused have the constitutional right to the presumption of innocence, the right to silence, and the right to counsel.[416] Confessions must be voluntary, reliable, and consistent to the constitution. Article 38 of the Japanese Constitution provides, in part, that "no person shall be compelled to testify

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407. *Id.* at 7.
408. *Id.* at 75.
409. *Id.* at 77.
410. *Id.*
411. *Id.* at 79.
412. *Id.* at 14. *See also* Wilson, *supra* note 149, at 551.
413. *Id.*; Mariko Oi, *Japan Crime: Why Do Innocent People Confess?*, BBC NEWS (Jan. 2, 2013), http://www.bbc.co.uk/news/magazine-20810572.
414. Wilson, *supra* note 149, at 503. *See* Jeff Vize, *Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System*, 20 UCLA PAC. BASIN L.J. 329, 360-63 (2003).
415. Wilson, *supra* note 149, at 503.
416. NIHONKOKU KENPÔ [KENPÔ] [CONSTITUTION], art. 34 (Japan), *available at* http://history.hanover.edu/texts/1947con.html.

against himself" and confessions made under compulsion, torture, threat, or prolonged detention hall not be admitted in evidence.[417] No person "shall be convicted or punished in cases where the only proof against him is his own confession."[418]

Some expressed concern over the use of "statement by word processor."[419] This involves a process whereby the interrogation process involves oral questions and answers back and forth over a period of time.[420] The interrogator then prepares the accused's statement on a word processor in a typewritten form. The statement is allegedly read to the accused, who then signs the typewritten statement prepared by in the interrogator.[421] Others express concerns over foreign language translation where accuracy issues can arise during the oral question and answer phase.[422]

D. Death Penalty

Members of the public and the JFBA have held very vocal long-term criticism over the use of the death penalty in general. [423] Critics further seek the requirement of a unanimous sentencing vote before imposition of the death penalty. Under the current reformed Japanese jury trial system, an accused can be convicted of a crime by a majority vote and then be subject to the death penalty by a simple majority vote.[424]

Other concerns mirror those human rights issues raised by groups in US jurisdictions, as well as other foreign jurisdictions.[425] Death penalty concerns vary with the political changes and beliefs under Japanese leadership. Similar to US jurisdictions, following a death penalty sentence recommended by a jury and ordered by a judge, a government official must specifically order the imposition of the death penalty on each individual.[426]

The JFBA has taken an aggressive stance and again demanded a

417. *Id.* at art. 38.

418. *Id.*

419. IBA Report, *supra* note 173, at 42.

420. *Id.*

421. *Id.* at 93.

422. *Id.*

423. *JFBA Recommends to Put Capital Punishment Moratorium into Law*, JAPAN FED'N OF BAR ASSOCIATIONS, http://www.nichibenren.or.jp/en/meetings/year/2002/20021129.html (last visited July 6, 2013).

424. Keiji Hirano, *Lay Judge Death Sentences Must Be Unanimous: JFBA*, THE JAPAN TIMES (Mar. 25, 2012), http://www.japantimes.co.jp/news/2012/03/25/national/lay-judge-death-sentences-must-be-unanimous-jfba/#.UVYgu6KG2So.

425. US groups have frequently attacked the use of the death penalty on several fronts. Some groups cite to religious beliefs. Other US groups contend that the death penalty is imposed disproportionately against black men and cite to long term racial imbalances in the United States.

426. AMNESTY INTERNATIONAL, "*WILL THIS DAY BE MY LAST?*" THE DEATH PENALTY IN JAPAN 5 (2006), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI4Japan92.pdf.

national debate on abolishing the death penalty and suspension of executions.[427] The JFBA responded to the government carrying out four executions in a two month period. Two executions took place on August 3, 2012, and two additional executions during September, 2012.[428]

In a letter from Kenji Yamagishi, President of the JFBA, to the Ministry of Justice, Mr. Yamagishi warns that "the Japanese government has been repeatedly warned from United Nations-related institutions that it should suspend executions."[429] He expressed concerns that the Minister of Justice, Toshio Ogawa, on March 29, 2012, gave the go ahead to execute three death row inmates after a period of twenty months without executions.[430] Ogawa's predecessors, Hideo Hiraoka and Satsuki Eda, were reluctant to issue death warrants for executions.[431] Mr. Yamagishi requested a nationwide debate and the suspension of executions.[432]

Justice Minister Ogawa, who had just assumed his position in January 2012, issued three death warrants, thereby approving the executions by hanging.[433] One of the inmates was Yasuaki Uwabe, 48, who was convicted of killing five victims and injuring ten others in the 1999 train station rampage in Yamaguchi Prefecture.[434] Justice Minister Ogawa stated, "the death penalty has been supported in lay judge trials."[435] In the initial eight months of the reformed system, juries recommended death sentences in more than ten cases.

E. Preparation of Judgment

Some critics have expressed concern over the preparation of the judgment document. Following the deliberations and imposition of sentence upon a finding of guilt, the professional judge prepares the written judgment.[436] The judgment shall contain a written description of the jury's judgment, the sentence and the reasoning for the same.[437] The verdict shall

427. Kenji Yamagishi, *Statement Protesting the Resumption of Executions, and Requesting Once More the Launch of a Nationwide Debate on the Abolition of the Death Penalty and Suspension of Executions*, JAPAN FED'N OF BAR ASSOCIATIONS (Sep. 27, 2012), *available at* http://www.nichibenren.or.jp/en/document/statements/year/2012/120927.html.

428. *Id.*

429. *Id.*

430. *Id.*

431. Kyodo, *Ogawa Has No Qualms About Executions*, THE JAPAN TIMES (Apr. 6, 2012), http://www.japantimes.co.jp/news/2012/04/06/national/ogawa-has-no-qualms-about-executions/#.UVYxZ6KG2So.

432. Yamagishi, *supra* note 433.

433. Kyodo, *supra* note 437.

434. *Id.*

435. *Id.*

436. Makoto Ibusuki, *"Quo Vadis?": First Year Inspection to Japanese Mixed Jury Trial* 24, 33 (2010), *available at* http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ_12.1_ibusuki.pdf.

437. *Id.*

contain the views reflected in the panel's majority voted opinion. The JFBA has demanded that the courts make public all such judgment documents.[438]

Under the voting scheme, one professional judge is required to join the vote of guilt.[439] The proposed legislation does not mandate that the professional judge who voted with the majority draft the group's verdict. Further, all three professional judges could vote to convict, but the panel's majority vote could end in an acquittal.[440] In such a scenario, the professional judge drafting the opinion would again be drafting a verdict that was contrary to the judge's own opinion. Some scholars have discussed the risk of the drafter "sabotaging" the verdict by drafting the verdict in such a way as to cause an appellate court to reverse the decision.[441] Others express concern that the views of the dissenters would be ignored by a majority vote and not included at all.

VII. THREE YEARS IN REVIEW

In 2012, the reformed Japanese criminal justice system completed its initial three year period, and pursuant to the Lay Assessor Act, its review should be conducted.[442] The Ministry of Justice is leading the review and formed a group tasked with analyzing the court reforms.[443] The group's members are lawyers and members of civic groups and media organizations. The review group has reviewed court records and interviewed former lay jurors, professional judges, and non lawyer court personnel.

Some believe that the new Japanese jury system is functioning well and expect no changes.[444] Others anticipate some minor court revisions addressing the types of criminal charges covered.[445] Some critics argue that the jurors should not address criminal sex cases due to concerns about the victim's privacy and nature of charges.[446] Others express concern that juries have increased acquittal verdicts in drug cases.[447] Some scholars anticipate revisions to juror confidentiality mandates. They further expect jurors and defense attorney to gain increased access to information obtained during

438. *Id.*

439. Hirano, *supra* note 430.

440. Levin & Tice, *supra* note 365 ("Acquittal is by majority vote but convictions must also obtain the concurrence of at least one professional judge.").

441. Ibusuki, *supra* note 442, at 34.

442. Lay Assessor Act, *supra* note 4.

443. *Lay Judge System Reviewed After Auspicious Start*, THE JAPAN TIMES (May 30, 2012), http://www.japantimes.co.jp/text/nn20120530f2.html.

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

pre-trial investigations.[448]

The JFBA has issued its own report and recommendations for change. The JFBA has traditionally advocated for the repeal of the death penalty, which is unlikely at this time. Therefore, the JFBA has proposed that death penalty sentencing decisions be rendered by a unanimous jury decision, rather than the currently required majority vote.[449] It further recommended that jury confidentiality laws be relaxed so that juror violators are only punished if acting maliciously.[450]

A. Public Opinion

Public opinion has increasingly improved and former lay assessors have had positive experiences. In the Japanese Supreme Court's annual surveys for each of the three years of operation of the new juror system, 96.7% of citizen jurors regarded their experience as positive.[451] During the initial year of operation, 57% of lay jurors surveyed indicated that their experience was "extremely positive" and 39.7% indicated it was a "positive" experience.[452] The jurors surveyed expressed that they were also satisfied with the deliberations.[453] The great majority of jurors have expressed that they understood the trial proceedings, discussions, evidence and testimony and that the judges and prosecutors were easy to follow. Only about half of the jurors were able to understand the defense arguments.[454]

Former lay jurors have spoken publicly about their experience with great enthusiasm. Notwithstanding their duty of confidentiality, many citizen jurors have offered their own suggestions for improvements. One juror indicated that his jury service has "sparked his new engagement with society."[455] He recommends that jurors be afforded tours of correctional facilities prior to commencing the trial.[456] The former juror participates with a group that visits juvenile detention facilities and speaks to youths.[457] His

448. Setsuko Kamiya, *Lay judges Present Ideas to Make System Better,* THE JAPAN TIMES (Jan. 21, 2012), http://www.japantimes.co.jp/text/nn20120121f2.html.

449. *Lay Judge System Reviewed After Auspicious Start*, THE JAPAN TIMES (May 30, 2012), http://www.japantimes.co.jp/text/nn20120530f2.html.

450. *Id.*

451. Ibusuki, *supra* note 442, at 44.

452. *Id.*; *See* Supreme Court Office, *Saiban-In To Keikensha Ni Taisuru Anketo Chousa Houkokusho [Report of Questionnaire Survey of Former Lay Judges]*, Mar. 2010, *available at* http://www.moj.go.jp/content/000050865.pdf.

453. Ibusuki, *supra* note 442, at 44.

454. *Id.*at 47.

455. Setsuko Kamiya, *Lay Judge Duty Sparks New Passion,* THE JAPAN TIMES (June 21, 2012), http://www.japantimes.co.jp/text/nn20120621f1.html.

456. *Id.*

457. *Id.*

group requests that the government disclose more information regarding death penalty cases.[458]

Some lay jurors did express some negative feedback in the first year of reform. When surveyed, 21% of the lay jurors indicated that the professional judges tried to influence their decisions.[459] Six percent of the 210 people who responded to the survey indicated that the judges tried to influence them.[460] The 210 respondents were part of the more than 5,200 lay citizens who had served on the panels consisting of three professional judges and six lay members.[461] These citizens sentenced 903 of the 904 people convicted in 858 cases.[462] Fifteen percent indicated that the professional judges tried "somewhat" to influence them for a total equating to 21%.[463] However, 73% of those who responded to the survey indicated that they did not believe that the professional judges directed them during deliberations.[464]

B. Case Management

In the first three years of reform, almost 21,000 lay citizens have served as jurors in almost 5,000 cases.[465] During the first year of operating the reformed Japanese criminal justice system, the number of cases which proceeded to trial and were completed were far lower than expected.[466] The new system commenced in May 2009 and the first actual lay trial took place in August 2009.[467] From its inception on May 21, 2009, until May 20, 2010, the trial courts handled 1,881 criminal cases, of which 530 resulted in a guilty verdicts and no acquittals were entered.[468] Scholars have offered explanations for the lower number of completed jury trials.[469]

The number of offenses warranting a jury trial filed monthly by the prosecutors was about half as much as officials had expected, based upon a

458. *Id.*

459. *21% of Lay Judges Felt Decisions Guided By Pros,* THE JAPAN TIMES (August 2, 2010), http://www.japantimes.co.jp/text/nn20100802a1.html.

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. Anna Watanabe, *Japan's 'Lay Judge' System To Be Revised,* ASIAN CORRESPONDENT (June 3, 2012), *available at* http://asiancorrespondentcom/83631/japans-lay-judge-system-to-be-revised/.

466. Ibusuki, *supra* note 442, at 39 (The actual number of jury trials was 40% lower than expected and the number of completed jury trials was only a little more than 18%).

467. Setsuko Kamiya, *Lay Judges Present Ideas to Make System Better,* THE JAPAN TIMES (Jan. 21, 2012), http://www.japantimes.co.jp/text/nn20120121f2.html.

468. Ibusuki, *supra* note 442, at 36.

469. *Id.* at 37-38.

review of the prior five year period.[470] In the first year of operation of the jury trial system, the Ministry of Justice expected 3,600 lay trials, equating to roughly 300 cases per month.[471] However, prosecutors filed approximately 138 indictments per month during the first year.[472]

One expert has characterized prosecutors as commencing with an "extra measure of caution"[473] and offered three explanations for this prosecutor caution, as follows: avoid uncertainties, allocate resources efficiently, and maintain a high conviction rate.[474] Prosecutors could avoid the uncertainty of a jury trial by simply reducing the number of charges and types of offenses they choose to file. Japanese prosecutors have the power to serve as the gatekeepers to jury trials by selectively filing cases.

Another explanation for the lower than expected numbers of completed jury trials during the first year maybe due to the delay in the pre-trial phase.[475] More emphasis is now placed on pre-trial proceedings.[476] Prosecutors have broader discovery requirements. Previously, prosecutors were only required to disclose evidence that they sought to introduce at trial.[477] Prosecutors must now disclose more of their collected evidence, even if it shows weaknesses in their case.[478] By utilizing pre-trial conferences, judges and litigants should narrow the issues and clarify the charges and applicable laws. Judges should review evidence and discovery issues and schedule all hearings and trials.

A typical period from indictment to judgment was six months.[479] Jury trials took only three or four days on average to complete and the period was not significantly different from the time required for a trial before professional judges.[480] Further, the pre-trial period was not significantly longer with jury trials.

The first year statistics must also take into account the initial pre-trial delay or "lag time" in bringing the first cases under the new jury system to conclusion. For example, the new system commenced in May 2009 and the first trial did not commence until August 2009.[481] If the average pre-trial period was six months, the full trial caseload did not commence until November 2009 (six months following the May inception). Further, the 2008 report issued by the Court Office reflects that prior to the new system,

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470. Johnson, *supra* note 41.
471. *Id.*
472. *Id.*
473. *Id.*
474. *Id.*
475. Fukurai, *supra,* note 169, at 822.
476. *Id.*
477. *Id.*
478. *Id.*
479. Ibusuki, *supra* note 442, at 38.
480. *Id.*
481. *Id.*

contested cases averaged 10.5 months to complete.[482] Therefore, once the initial lag time and start-up inefficiencies are fully appreciated, it becomes difficult to criticize the low number of completed trials in the first twelve months of operation.

In 2006, District Courts disposed of their 75,370 contested and uncontested cases on average in 3.1 months.[483] This means that from the onset of prosecution (indictment) to disposition (sentencing), cases were concluded in just over three months.[484] In 2010, District Courts resolved their 62,840 contested and uncontested cases in just 2.9 months following commencement of prosecution.[485] However, the 2010 caseload includes cases tried under the new lay jury system.

Of the 1,506 individuals who concluded their cases following a lay jury trial in 2010, 971 confessed and 535 individuals denied the charges.[486] Of those individuals who confessed, the average case was resolved in 7.4 months.[487] Of those who denied their charges, the average case was resolved in 9.8 months.[488] Therefore the average case was resolved in 8.3 months.[489] Of those cases tried by jury, the median case was resolved in three to four days of trial in 2010.[490] Of the 1,506 cases, 73% were tried in five days or less.[491] Ninety four percent of the cases were tried in ten days or less.[492] It is apparent that the Japanese trials are being run fairly efficiently, as they are taking just a few days to complete. Also, the jury's sentencing function is being concluded during this same time frame.

In light of the significant reforms, participants should remain patient with the perceived delay from onset of the cases until conclusion. Presiding judges and attorneys must gain comfort with the jury system and defense attorneys must improve pre-trial investigatory skills. Lawyers for both sides must develop new litigation and advocacy skills with their new lay audiences. Presiding and professional judges must develop different organizational skills in operating trial courtrooms.

Upon review of the judicial criminal court case statistics, it must be

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482. *Id.*

483. *White Paper on Crime 2007*, MINISTRY OF JUSTICE, http://hakusyo1.moj.go.jp/en/56/nfm/mokuji.html (last visited July 1, 2013).

484. Ibusuki, *supra* note 442, at 38.

485. STATISTICS BUREAU, *Ch 25. Justice & Police: tbl. 25-13,* http://www.stat.go.jp/english/data/nenkan/1431-25.htm (last visited July 1, 2013).

486. *White Paper on Attorneys 2011,* JAPAN FED'N OF BAR ASSOCIATIONS, 47, http://www.nichibenren.or.jp/library/en/about/data/WhitePaper2011.pdf (last visited July 1, 2013)[hereinafter *White Paper on Attorneys*].

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.*

492. *White Paper on Attorneys*, *supra* note 486.

noted that Japanese courts have a near 100% clearance rates. US courts review monthly and annual caseload reports to determine judicial efficiency. The number of newly assigned cases is compared against the number of cases concluded or closed (generally, by conviction, acquittal or sentence). The resulting comparison number is considered the clearance rate. In Japan, criminal judicial cases reported for 1995, 2000, 2005, 2009 and 2010 reflect nearly equivalent numbers for "accepted" and "settled" cases. Therefore, the criminal justice system as a whole, which includes all offenses whether or not subject to the new jury trial system, operates at a near 100% clearance rate.[493]

A total of 3,173 people have been tried by Japanese juries since the reform inception through December 2011.[494] However, the Japanese government reports an overall reduction in criminal court cases in the last decade. In 2000, Japanese courts accepted roughly 1,638,000 cases. In 2010, Japanese courts accepted 1,158,000 cases.[495] These statistics reflect a 30% overall reduction in filed criminal cases over a 10-year time span. However, it should be noted that these overall criminal case numbers include traffic related cases, which could dramatically skew the perceived overall decrease in prosecuted crimes.

C. Verdicts

During the initial first year period, few Japanese jury trials ended with acquittals. The almost 100% conviction rate continued even after the reforms. Of course, it should be noted that Japan does not have arraignments where defendants may plead guilty. Further, unlike US courts where defendants admit guilt and "plea bargain" for a negotiated lesser charge or lower sentence, uncontested cases where Japanese defendants admit guilt are still tried before the small mixed jury panel expecting, of

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493. This clearance rate for court cases should not be confused with police and prosecutor reported clearance rates. In 2009, the clearance rate for all reported crimes to police was 51%. *See White Paper on Crime 2010, Part 1/Chapter 1/Section 1*, MINISTRY OF JUSTICE, http://hakusyo1.moj.go.jp/en/59/nfm/n_59_2_1_1_1_0.html#fig_1_1_1_1 (last visited July 1, 2013). Between 2004-2008, the clearance rate for reported homicides remained between 95% and 97% in Japan and Germany. The homicide crime rate is significantly lower in Japan than the US. The homicide clearance rate in the US for the same time period ranged from 61% - 64%. *See White Paper on Crime 2010, Part 1/Chapter4/Section 2*, MINISTRY OF JUSTICE, http://hakusyo1.moj.go.jp/en/59/image/image/h001004002001h.jpg (last visited July 1, 2013). In 2008, police clearance rates for reported major offenses were 32% in Japan and 21% in the US. *See, White Paper on Crime 2010/ Part 1/Chapter 4/Section 1*, MINISTRY OF JUSTICE, http://hakusyo1.moj.go.jp/en/59/image/image/h001004001001h.jpg (last visited July 1, 2013).

494. STATISTICS BUREAU, *Handbook, Ch, 17: Government System,* http://www.stat.go.jp/english/data/handbook/c17cont.htm (last visited July 1, 2013).

495. STATISTICS BUREAU, *Ch 25. Justice & Police: tbl. 25-12,* http://www.stat.go.jp/english/data/nenkan/1431-25.htm (last visited July 1, 2013).

course, that the defendant will be found guilty.

The first jury trial ending in an acquittal occurred on June 22, 2010, in the Chiba District Court involving a drug trade offense.[496] The second acquittal verdict was rendered six months later in December 2010.[497] In this case, an acquittal was entered for the first time where the prosecutor was seeking the death penalty. From 2003-2007, not guilty verdicts ranged from 2-3%.[498] Not guilty verdicts actually decreased slightly. Until May 2010, not guilty pleas were entered in 26% of the 554 indicted cases.[499] From 2003-2007, not guilty pleas were entered in roughly 30% of serious offense cases.[500]

In 2010, after the first full calendar of operation, a total of 1,835 cases were prosecuted for offenses subject to the new lay jury criminal system.[501] Robbery Causing Injury offenses accounted for 25% of the cases (460 cases).[502] Homicide cases (353 cases) amounted to 19% of the prosecuted offenses and the 180 Arson of Inhabited Buildings offenses constituted 10% of the cases.[503] Injury Causing Death and Violations of the Stimulants Control Act each accounted for 8% of the cases.[504]

During 2010, the cases of 1,530 individuals tried before lay jurors were finalized.[505] Of those cases finalized, 1,503 individuals were convicted, two were acquitted, one was partly acquitted, and twenty-four other individuals had their cases dismissed or transferred.[506] These first full year results indicate a 98% jury conviction rate.[507]

D. Attorneys

As part of the justice system reform, many changes were made to the practice of law and the role of the attorney [bengoshi]. Sweeping changes were made to legal education, including the opening of several graduate level law schools, an increase in the number of attorneys passing the bar

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496. Ibusuki, *supra* note 442, at 40. *First Full Acquittal in Lay Judge Trial,* THE JAPAN TIMES (June 23, 2010), http://search.japantimes.co.jp/cgi-bin/nn20100623a4.html.

497. *See* Fukurai, *supra* note 169, at 819. *Gallows Averted in a First as Lay Judges Acquit,* THE JAPAN TIMES (Dec. 11, 2010), http://search.japantimes.co.jp/cgi-bin/nn20101211a1.html.

498. Ibusuki, *supra* note 442, at 40. SUP. CT. OF JAPAN, *Table 4. Annual Comparison of Number and Rate of the Accused Found Not Guilty* (2008), http://www.courts.go.jp/english/proceedings/pdf/criminal_justice/table4.pdf.

499. *Id.* at 40.

500. *Id.*

501. *White Paper on Attorneys, supra* note 492, at 45.

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.* at 46.

506. *Id.*

507. *White Paper on Attorneys, supra* note 492, at 46.

exam and practicing law, and the implementation of the publicly funded criminal defense attorney system.

From 2000 to 2011, the Japanese Bar experienced a 44% increase in practicing lawyers. In 2011, Japan maintained 30,485 attorneys, 17% of which were women.[508] The highest number of male and female attorneys were in their 30s. Almost half of the attorneys practiced in Tokyo, where the ratio of people per attorney was the lowest.[509]

The increase in the number of Japanese attorneys is decreasing the number of citizens per lawyer. From 2005 to 2011, Japan experienced a 17% decrease in the number of people per attorney.[510] Other major foreign countries did not have any significant changes during the same time period. In 2011, Japan had 4,196 people per attorney.[511] In comparison, France had 1,244 people per attorney in 2011; Germany had 525 people per attorney; The United Kingdom had 435 people per attorney; and the United States had 273 people per attorney.[512]

Japan has reduced the number or people per judge from 2005 to 2011 by 13%.[513] In 2005, Japan maintained 51,905 people per judge.[514] In 2011, the number of people per judge declined to 44,932.[515] In comparison, the United Kingdom had 15,074 people per judges; France had 10,964 people per judge; the United States had 9,553 per judge (federal and state judges combined); and Germany had the highest number of judges with 4,070 people per judge.[516]

Japan increased its number of prosecutors. From 2005 to 2011, Japan experienced a 13% decrease in the number of people per prosecutor.[517] In 2011, Japan maintained 71,500 people per prosecutor.[518] In comparison, France maintained 32,677 people per prosecutor; the United Kingdom (England and Wales) had 17,929 people per prosecutor; and Germany consisted of 15,971 people per prosecutor.[519] From 2005 to 2011, the United States saw an 11% "increase" in the number of people per prosecutor with 9,455 people per prosecutor.[520]

The Japanese criminal justice system experienced significant improvements by increasing the number of arrestees represented by counsel

508. *Id.* at 13.
509. *Id.* at 15.
510. *Id.* at 17
511. *Id.*
512. *Id.*
513. *White Paper on Attorneys, supra* note 492, at 18.
514. *Id.*
515. *Id.*
516. *Id.*
517. *Id* at 19.
518. *Id.*
519. *White Paper on Attorneys, supra* note 492, at 19.
520. *Id.*

prior to indictment by the prosecution. From 2007 to 2010, the percentage of pre-indictment arrestees in the District Courts with an attorney increased from 23% to 64%.[521] In 2010, 40,329 arrestees out of 62,840 arrestees retained an attorney before they were formally charged with a crime by the prosecutor.[522] Of those accused represented by counsel, 18% retained private counsel and 84% were furnished with court-appointed counsel.[523]

In Summary Courts where less serious offenses are heard,[524] the percentage of individuals represented at the pre-indictment stage increased significantly from 2007 to 2010.[525] In 2007, roughly 9% of arrestees were represented by counsel.[526] In stark contrast in 2010, 64% of arrestees were represented.[527] Interestingly, court-appointed counsel represented 95% of the arrestees and 5% of the individuals hired private counsel.[528]

The new court-appointed attorney system has been rolled out in two stages. The first stage was implemented in October 2006 and court-appointed counsels were furnished to arrestees prior to indictment in serious cases.[529] These cases included crimes punishable by the death penalty, indefinite incarceration or a minimum of one year incarceration, such as murder, rape and robbery.[530] In May 2009, stage two commenced and court-appointed counsel were additionally provided to pre-indictment arrestees facing less serious charges carrying maximum sentences of up to three years incarceration.[531] In 2008, court-appointed counsels were appointed in 7,415 pre-indictment cases.[532] In 2009, court-appointed counsels were appointed in 61,857 pre-indictment cases.[533] In 2010, 70,917 cases received attorneys.[534]

In post-indictment District Court cases, almost all individuals were

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521. *Id.* at 36.

522. *Id.*

523. *Id.*

524. *Outline of Criminal Justice in Japan,* SUP. CT. OF JAPAN, http://www.courts.go.jp/english/judicial_sys/criminal_justice_index/ (last accessed Apr. 7, 2013). (District courts are the principal courts of general jurisdiction and summary courts have limited jurisdiction over "offenses punishable by fines or lighter punishments and other minor offenses, such as theft and embezzlement").

525. *White Paper on Attorneys, supra* note 492, at 37.

526. *Id.*

527. *Id.*

528. *Id.* (95% arrived at by dividing the number of defendants with court appointed counsel (6,025) by the total number of defendants with defense counsel from pre-indictment stages in 2010 (6,345) to arrive at 94.96%).

529. *Id.* at 39.

530. *Id.*

531. *White Paper on Attorneys, supra* note 492, at 39.

532. *Id.*

533. *Id.*

534. *Id.*

represented by counsel. In 2000, 97% of individuals were represented.[535] In 2005, individuals retained counsel in 98% of the cases.[536] In 2010, indicted individuals were represented more than 99% of the time.[537]

However, the number of individuals receiving court-appointed counsel rose. In 2005, District Courts appointed counsel to 76% of individuals following indictment.[538] In 2010, court-appointed counsel represented 84% of indicted individuals in District Court cases.[539]

In Summary Court cases, post-indictment individuals retain counsel nearly 100% of the time.[540] However, from 2005 to 2010, the percentage of individuals receiving court-appointed counsel rose from 89% to 94%.[541] Interestingly, the number of cases pending in Summary Courts decreased significantly from 14,549 cases in 2005 to 9,876 in 2010.[542]

In appeals pending in the High Courts, 95% of individuals retained counsel in 2010.[543] This percentage rose slightly from 2005, when 93% of individuals were represented by counsel for their appeals.[544] The percentage of individuals represented by court-appointed, as opposed to privately retained counsel, rose slightly. In 2005, 70% of individuals received court-appointed counsel.[545] In 2010, individuals with appeals pending in the High Courts were represented by court-appointed counsel in 74% of the cases.[546]

The reformed system has addressed and modified many significant aspects of the judicial system. To be effective, a thorough preparation and educational period was utilized. However, court participants cannot be expected to fully appreciate and adjust to the reformations until actual implementation. During the initial years, participants and observers must be patient with the progress. Modern US courts with long traditions of jury trial systems continue to struggle with these same concerns of efficiency, trial length, and length of pre-trial periods.

E. Appeals and Sentencing

In reviewing the cases tried in 2010 before lay judges, many cases were tried multiple times. *Koso* appeals ("First Instance") are filed to the

535. *Id.* at 36.
536. *Id.*
537. *White Paper on Attorneys, supra* note 492, at 36.
538. *Id.*
539. *Id.*
540. *Id.* at 37.
541. *Id.*
542. *Id.*
543. *White Paper on Attorneys, supra* note 492, at 38.
544. *Id.*
545. *Id.*
546. *Id.*

High Courts from the District Courts.[547] Either the defense or the prosecution may appeal.[548] The High Court may reverse and order a new trial.[549] A party may appeal a jury's verdict and judgment of the court based upon the following grounds: (1) error in trial procedure; (2) error of law; (3) inappropriate Sentence; and (4) error of Fact Finding.[550] The average case involving a confession was tried 3.5 times.[551] The average case involving a denial of the criminal charge resulted in being tried 4.4 times.[552]

In 2009, 75,128 cases were heard in District Courts and the death penalty was imposed in nine cases.[553] Four of the cases involved robbery offenses and five cases involved homicide.[554] Life sentences were imposed in sixty-eight cases.[555] Life sentences were handed down in fifty robbery cases and eighteen homicide cases.[556]

F. Jurors

From May 2009 until May 2010, more than 50,000 citizens were identified as potential lay jurors.[557] Juror summons were sent to almost 38,000 people.[558] Exemptions or excusals were awarded to roughly 13,000.[559] More than 21,000 citizens appeared at court for jury selection.[560] More than 4,600 citizens were selected to serve as either jurors or alternate jurors.[561]

By December 2009, 5,000 citizens were summonsed to appear for trial and almost 80 percent appeared for jury selection.[562] The Japanese Supreme Court surveyed the group about their demographics. The majority of the jurors were male, middle-aged (30s to 50s), and full time workers.[563] Almost 17% of the jurors were primarily responsible for the care of a child

547. *Outline of Criminal Justice in Japan,* SUP. CT. OF JAPAN, http://www.courts.go.jp/english/judicial_sys/criminal_justice_index/ (last visited July 1, 2013).

548. *Id.*

549. *Id.*

550. *Id.*

551. *White Paper on Attorneys, supra* note 492, at 47.

552. *Id.*

553. MINISTRY OF JUSTICE, WHITE PAPER ON CRIME app. 2-4 (2010), *available at* http://hakusyo1.moj.go.jp/en/59/image/image/h008002004-1h.jpg.

554. *Id.*

555. *Id.*

556. *Id.*

557. Fukurai, *supra* note 169, at 815.

558. *Id.*

559. *Id.* at 815

560. *Id.* at 816

561. *Id.*

562. Fukurai, *supra* note 169, at 816.

563. *Id.*

or elderly person.[564]

In July 2010, the Japanese Supreme Court conducted its second report. From January to April 2010, more than 11,000 appeared for jury selection.[565] The majority of the jurors were male, middle-aged and full-time workers.[566] Nearly 20% maintained the primary responsibility for the care of a child or elderly person.[567] Of the jurors selected to sit on a jury as a juror or as an alternate, the demographic make-up of the juror remained the same. Of the jurors selected to serve, 18%-20% of the jurors maintained the primary care responsibility for a child or elderly person.[568] Full-time homemakers comprised approximately 10% of the jurors.[569] Individuals without employment, including retired persons, made up 5% to 7% of the jurors in both the 2009 and 2010 surveys.[570]

VIII. RECOMMENDATIONS

The initial three year period of the Japanese jury system has proven to be a huge success. After decades of an under utilized pre-war jury system, Japan bravely implemented sweeping judicial reform to almost all aspects of the court system and the legal profession. Certain continental European court features will always cause concern for US scholars, but mixed courts have been widely accepted across Europe. Japan should expand the use of its jury trials to additional serious criminal offenses; maintain juror confidentiality; further study death penalty issues; further study police interrogations and reduce emphasis on confessions; stabilize professional law schools and bar passage rates; eliminate prosecutor appeals; and develop court rules for separate lay juror deliberations. Japan should eventually expand coverage to civil cases.

A. Expand Jury System to Additional Serious Offenses

The Japanese jury system commenced by covering the more serious cases involving capital offenses and those offenses involving victim death by intentional act. These categories of cases were an excellent starting point. Many foreign jury systems similarly cover only the most serious cases.

The Japanese government and other groups developed an extensive public education campaign leading up to the commencement of the reforms.

564. *Id.*
565. *Id.* at 817.
566. *Id.*
567. *Id.*
568. Fukurai, *supra* note 169, at 817.
569. *Id.*
570. *Id.*

Further, the media covered many Japanese jury trials. Many lay jurors have spoken publicly about their positive trial experiences. Without doubt, Japanese citizens have embraced their reformed and unique jury system. Similar to US jurors, Japanese lay jurors generally enjoy their service. These positive jury experiences and media coverage have furthered the court reform goals of enhancing citizen participation in government, advancing democracy, and improving legitimacy of the court system.

The Japanese courts successfully implemented the jury system to the intended criminal offenses. After three years of smooth operation, Japanese courts are now well prepared to expand jury trials to cover additional criminal offenses. Some critics have proposed excluding drugs and sexual related offenses. Critics express concern over jury acquittals in drug cases. They further cite to victim privacy concerns in sex offenses. I propose maintaining jury trials for both drug offenses and sex crimes. If needed, measures may be easily implemented to protect victims of sex crimes. Further, prosecutors and members of the public should not fear any perceived jury acquittals in drug cases.

Rather, the court system will remain a strong institution if the number of jury trials increases. Learning from Japan's past experience with its pre-war jury system, which was suspended due to nonuse, utilization is key. The goal of public participation and education will be furthered with an increased number of lay jury trials. The Japanese courts are well prepared to tackle an expansion of the jury system to additional categories of criminal offenses. For example, jury trials could be implemented in serious cases involving victim violence, such as robberies, kidnapping, batteries and rapes, even when death does not result. Once the court system adjusts to the increase in volume, the jury system should continue to expand to cover more serious offenses involving property and drug offenses.

B. Maintain Juror Confidentiality

Juror confidentiality has worked well in the reformed Japanese criminal jury system. Many foreign scholars have expressed their concern over punishing jurors for "leaking" information about juror deliberations. First, the critics cite to their concerns for jurors who need to discuss their own stress from the court experience. Second, authors have proposed that restricting juror speech could prevent a juror from disclosing juror misconduct. Third, scholars cite to the ideals of freedom of speech that exist under the First Amendment to the US Constitution. Last, critics have asserted that imposing juror confidentiality actually defeats the goals of democracy, as jurors cannot share their court experiences with others.

Jurors experiencing stress after a jury trial may seek professional assistance. They are permitted to make limited disclosures so that they may benefit from counseling services. Therefore, it seems that the jurors are not facing any harm by the required confidentiality.

The mixed jury system encompasses professional judges and lay assessors. The professional judges deliberate side-by-side with citizen jurors. If juror misconduct exists, the professional judges have complete access to the lay jurors. The parties could remain unaware of the misconduct affecting the outcome of a case in certain instances. However, in light of the direct participation of the professional judges, the risk of unaddressed lay assessor misconduct is rare.

Juror confidentiality exists in many forms. United States grand juries have long maintained strict confidentiality requirements. The Japanese new grand jury (Kensatsu Shinsakai or Prosecutorial Review Commission (PRC)) also requires strict juror confidentiality. In the United States, jurors are free to maintain confidentiality, if they choose, and in most jurisdictions, jurors cannot be forced to disclose communications from deliberations. US lawyers are subject to professionalism rules, which prohibit them from contacting jurors and initiating communications about the trial. In the United States, jurors are also free to disclose deliberation communications and votes. The US jurors are free to publish their "tell all" books at a profit and disclose the communications of a fellow juror, even when that juror chooses to maintain privacy. The freedom to disclose the communications of the other jurors provides a potential chilling effect upon juror deliberations.

Following the conclusion of the Japanese trials, lay jurors have spoken out about their experiences. Without divulging specific jury communications, the former jurors have completed polls and surveys. The media has interviewed jurors, who have expressed and described their feelings about the courts. Some jurors have taken steps to offer their recommendations to improve the court system. Other jurors have educated the public and enhanced democracy by sharing their positive experiences and feelings.

C. Further Study Death Penalty Concerns and Jury Voting

Citizens and governments in many countries have held long term debates over the use of the death penalty and the United States is no stranger to such heated debates. Many groups hold strong divergent views of the death penalty due to religious, moral, and human rights views. Some Americans, for example, believe that the death penalty is disproportionately imposed upon African Americans. Proponents of the US death penalty argue that this ultimate sanction deters criminal behavior.

The death penalty existed in Japan long before the jury system and court reforms were implemented. Japanese death penalty opponents seek the complete abolition of the death penalty. However, sensing the political climate supporting the death penalty, some groups have advocated for a less controversial change. Some critics have recommended that a death penalty sentencing vote be unanimous, rather than a majority vote. In this theory, in

a contested case, all three professional judges and all six lay jurors would be required to unanimously vote for a death penalty sentence.

Issues involving the death penalty should be addressed independently from issues involving jury and court reform. Changing a death penalty sentencing vote from a majority vote to a unanimous vote should indeed warrant consideration. However, this sentencing vote is really a small piece of a very large pie. The Ministry of Justice should commission a study to review all aspects of the death penalty. The commission should analyze cases reversed due to a wrongful conviction, police investigation and interrogation, confessions, prosecutorial discretion in seeking the death penalty, and sentencing statistics. The Japanese society should not address this large political issue in piecemeal decision making. Death penalty views vary in US jurisdictions from state to state. The Japanese courts have the benefit of having one unified court system. Therefore, one review group should review death penalty issues from across Japan.

D. Further Study Police Interrogation And Reduce Emphasis On Confessions

Scholars and groups have expressed much criticism over Japanese police interrogations. Critics have studied the use of "substitute prisons," pre-trial detention, access to counsel, and the manner of obtaining confessions. However, the one consistent thread to all of these concerns involves the undue emphasis placed upon obtaining confessions and the near perfect conviction rates.

This culture of seeking confessions in every case is the real driving force behind these police, prosecutor and court concerns. If law enforcement agencies were trained to shift their focus away from obtaining confessions, they would develop other investigatory strategies. Therefore, police agencies and prosecutors should broaden their investigatory focus and develop other forensic techniques.

Concerns over Japanese police tactics include allegations of lengthy interrogations. With the implementation of the public defender system, many accused receive the services of court-appointed counsel. Further, attorneys are more frequently appointed to an accused during pre-indictment detention. Concerns relating to confessions should be studied by a specially appointed independent panel. This panel should carefully review police interrogation tactics involving the duration, location, and recording of interrogations. Special consideration must be focused upon the ability of the accused to terminate questioning once arrested. The accused should be afforded notice of the right to remain silent and right to counsel and the interrogation process should terminate upon the demand of the accused. The independent panel should study these recommended changes and finally address the many concerns surrounding police interrogation.

E. Stabilize Law School Enrollment And Bar Passage Rates

In 1999, Japan implemented sweeping reforms to its legal education system. The JSRC recommended changes to Japanese legal education.[571] In response, Japan adopted "American-style" professional graduate level law schools [houka daigakuin] modeled after the 202 US law schools accredited by the American Bar Association.[572] The JSRC further recommended increasing the bar passage rate from 3% to over 70%.[573]

Prior to the legal education reform, Japanese legal education consisted of undergraduate law [hougakubu] and graduate law [hougakuin].[574] Roughly 45,000 students were educated through this legal study each year.[575] Legal education was not required to sit for the national legal examination.[576] Students would sit for the national exam after attending expensive "cram schools" for several years.[577] Only two to five percent of the students passed the competitive national legal examination.[578] Those who passed the exam were then educated by the Japanese Supreme Court's Legal Training and Research Institute ("LTRI") [Shiho Kenshujo].[579]

The Japanese legal education reforms have faced a rocky start. Seventy-four graduate level law schools opened.[580] Graduation from one of these law schools became a requirement to sit for the exam.[581] The government planned to gradually increase the number of new attorneys. Law school enrollment was predicted to reach 4,000, however, enrollment came in much higher at 5,800.[582] To prevent the number of licensed attorneys from growing too quickly, Japan reduced the expected bar passage rate. In 2009, the bar exam passage rate was 27.6%.[583] As a result, the number of law school applicants dropped.[584] Japan should stabilize its legal education system by regulating the number of law schools student enrollment, maintaining high quality standards in legal education, and

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571. Matthew J. Wilson, *U.S. Legal Education Methods and Ideals: Application to the Japanese and Korean Systems* 18 CARDOZO J. INT'L & COMP. L. 295, 314 (2010); *See* JSRC INTERIM REPORT, *supra* note 20, at ch.I, pt.3, para. 2(2).

572. *ABA-Approved Law Schools,* AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited July 1, 2013).

573. JSRC INTERIM REPORT, *supra* note 20, at ch. III, pt. 2, para.2(2)(d).

574. Wilson, *supra* note 577, at 315.

575. *Id.*

576. *Id.*

577. *Id.* at 315-16.

578. *Id.* at 317.

579. *Id.* at 316.

580. Wilson, *supra* note 577, at 319.

581. *Id.*

582. *Id.* at 326.

583. *Id.* at 327.

584. *Id.*

developing a consistently high bar exam passage rate to 75%.

F. Eliminate Prosecutor Appeals

Under the current system, prosecutors may appeal jury acquittals. Upon appellate court review, a new trial can be ordered and criminal defendants are re-tried several times. By allowing these retrials until a defendant is ultimately convicted, the goal of citizen participation in government is defeated. Citizens may suspect that their involvement in the courts is mere "window dressing" for legitimacy of the courts. Citizens may feel that they are wasting their time and effort if their decisions have no real teeth. With prosecutorial appeals, the jury's job is diminished as juries, in effect, are rendering advisory opinions and not binding verdicts. As Japan's court reform goals are to promote deliberative democracy and enhance legitimacy of the courts, prosecutor appeals should end.

G. Maintain Prohibition of Waiving Jury Trial

The reformed Japanese jury system has faced criticism for not allowing criminal defendants to waive the right to jury trial. If the accused confesses and no facts are in dispute, the case proceeds to the smaller size jury panel consisting of one professional judge and four lay assessors. However, the jury hears all the evidence, including the victim statement. The jury panel further maintains its sentencing function, if a verdict of guilt is determined. Modern US courts permit individuals to waive their right to a jury trial and proceed to a "bench trial" before a professional judge.[585] The judge serves as the fact finder and renders a verdict of guilty or not guilty. However, in practice, criminal "bench trials" are uncommon.

It is more common for American defendants to "plea bargain." A typical "plea bargain" includes an agreement whereby the defendant waives the right to trial and admits guilt. The defendant proceeds directly to sentencing without a trial or any findings of fact. The prosecutor generally agrees to recommend a lighter sentence to be imposed by the judge. As a result, US justice systems face concerns over a diminished number of criminal jury trials.

H. Define Rules for Separate Deliberations

One inherent problem with mixed courts and the Japanese *saiban-in* that make US judges cringe is the likelihood of professional judges dominating the jury deliberations. When discussing mixed courts with my fellow American judges, their first responses are, as expected, that the lay

585. In some US jurisdictions, the prosecutor and/or the judge must consent to the accused's waiver of the right to a jury trial.

assessors will merely defer to the views expressed by the professional judges. These thoughts are similar to those expressed by critics of the previous Russian mixed courts where the lay assessors were referred to as simply "nodders" or "puppets" in German mixed courts. These mixed courts are a foreign concept for US judges, lawyers and scholars, while the mixed courts have a longstanding tradition in continental Europe.

Lay assessors should deliberate separately from the professional judges. The lay assessors should deliberate on questions of fact and vote privately. The professional judges would be limited to offer only opinions and views on questions of law. The professional judges should, likewise, deliberate separately and vote on questions of fact outside the presence of the lay assessors. The separate votes on guilt would be combined with a total majority vote dictating the verdict.

As such, the professional judges would retain their powerful veto power, as one professional judge vote is required for a conviction. By voting privately while not sitting next to the professional judges, the lay assessors might feel more comfortable exercising their independent votes. If five of the six lay assessors vote unanimously to acquit, their vote would be final and the professional judges would not have an opportunity to convince them to convict. However, the five person acquittal vote is actually lower than the unanimous six person jury vote required for an acquittal by US juries, who are already criticized by some Japanese for having high acquittal rates.

I. Expand to Civil Cases

For a homogenous country that does not embrace change, let alone quick change, Japan should be commended for its huge success in making such widespread changes to the entire justice system. In a reasonable period of time, Japan researched, designed, and implemented a "heads to toe" justice reform package encompassing an entirely new and accepted unique jury system, as well as legal education reform and court improvements addressing intellectual property courts, public defender system, and legal aid system. Some concerns remain incompletely addressed, such as judge selection and improper police interrogation and confessions. However, these issues are so embedded in Japanese culture and politics that slow and reinforced social changes are needed to fully address all issues. Other hotly contested issues regarding the death penalty cannot be changed overnight and, as in other countries, will remain a political issue that will change along with government leadership and public views.

The next step is to modify the current deliberation system using court rules for separate deliberations, expand the system to cover additional serious criminal offenses, and eliminate prosecutor appeals. Ultimately, Japan should embrace the expansion of the jury system to civil cases.

DEFYING GRAVITY: THE DEVELOPMENT OF STANDARDS IN THE INTERNATIONAL PROSECUTION OF INTERNATIONAL ATROCITY CRIMES

Matthew H. Charity*

INTRODUCTION

The International Criminal Court ("ICC") is now entering its second decade of existence.[1] As a young institution, the ICC is still in the process of setting norms as to its own scope and jurisdiction. Thus far, one of the key jurisdictional questions that has defied resolution is the place of complementarity in deciding whether certain criminal issues of international concern should be tried before the ICC or national tribunals.[2] Although the Rome Statute crystallizes definitions of core international crimes that may be tried before the ICC, the process of determining whether to leave jurisdiction with the nation or allow jurisdiction to lie with the ICC continues to lack structure and appropriate guidance.

In the midst of this norm-creating and norm-setting moment in the codification of international criminal law, the ICC has, at times, set an overly high bar for the hearing of international criminal law cases. In doing so, the ICC may not only be forgoing the opportunity to prosecute alleged

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1. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002) [hereinafter Rome Statute], *available at* http://untreaty.un.org/cod/icc/statute/english/rome_statute%28e%29.pdf.

2. The drafters of the ICC made the requirement that the ICC complement states' domestic jurisdictions a central component of its authority. *See* Rome Statute, *supra* note 1, pmbl. ¶ 10 ("Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.") & art. 1 ("It shall be a permanent institution and . . . shall be complementary to national criminal jurisdictions."). Pmbl ¶ 6 of the Rome Statute also recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." *See also* JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 4 (2008) (noting that the ICC "is supposed to function as a permanent reserve court, which steps in when effective national suppression of ICC crimes is absent" (internal quotes omitted)).

war criminals, but is also setting an example for States Parties[3] to avoid domestic prosecutions. This is not a new phenomenon; the question of what standard for prosecution should be set by the international community has arisen repeatedly over the past century and again in recent years, and it is a fly in the ointment of international criminal justice.

Different and conflicting approaches have already been voiced,[4] lending urgency to the project of clarifying complementarity during this norm-setting phase in the work of the ICC. This Article recommends a new normative complementary framework for application of core crimes in national jurisdictions—a necessary step in order to strengthen the ICC's ability to act as an effective body in punishing war criminals, improving accountability of governments complicit in atrocity crimes, and deterring future atrocities.

Emblematic of this problem is the case of Bosco Ntaganda, a third-in-command of the Congolese rebel group Forces Patriotiques pour la Libération du Congo (FPLC).[5] The Office of the Prosecutor for the ICC[6] had alleged that Ntaganda engaged in the war crime of conscription of child soldiers, in addition to crimes against humanity and other crimes.[7] The Pre-

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3. For a list of current States Parties, those sovereign States that have ratified or acceded to the Rome Statute, see *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited May 12, 2013).

4. *See generally* William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 538 (2010) (discussing limitations on ICC jurisdiction as a reserve court).

5. *See infra* Part I.C.

6. *See* Rome Statute, *supra* note 1, art. 42(1) (establishing the Office of the Prosecutor and its mandate to "act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court").

7. Situation in the Democratic Republic of Congo, Decision on the Prosecutor's Application for Warrants of Arrest, Case No. ICC-01/04-01/07, ¶¶ 25, 34, 40 (Feb. 10, 2006), *available at* http://www.icc-cpi.int/iccdocs/doc/doc530350.pdf [hereinafter PTC I Warrants Decision] (noting that domestic courts were to some extent dealing with other allegations with regard to Ntaganda). It should be noted that Ntaganda was twice offered a role within the Congolese Army – first in January 2005 (*see D.R. Congo: Army Should Not Appoint War Criminals*, HUMAN RIGHTS WATCH (Jan. 14, 2005), http://www.hrw.org/news/2005/01/13/dr-congo-army-should-not-appoint-war-criminals), and then again in 2009 (*see* HUMAN RIGHTS WATCH, "YOU WILL BE PUNISHED": ATTACKS ON CIVILIANS IN EASTERN CONGO 129 (2009), *available at* http://www.hrw.org/sites/default/files/reports/drc1209webwcover2.pdf). Ntaganda again left the army in April 2012 (*see D.R. Congo: Bosco Ntaganda Recruits Children by Force*, HUMAN RIGHTS WATCH (May 16, 2012), http://www.hrw.org/news/2012/05/15/dr-congo-bosco-ntaganda-recruits-children-force), and has for some months been absent from public scrutiny (*see* David Smith, *Hunting the Terminator: Congo Continues Search for Bosco Ntaganda*, THE GUARDIAN (Nov. 28, 2012), http://www.guardian.co.uk/world/2012/nov/28/terminator-search-bosco-ntaganda-congo).

Trial Chamber of the ICC recognized that the Democratic Republic of Congo was unwilling or unable to prosecute Ntaganda for the alleged war crimes,[8] leaving criminal accountability for those crimes to the mechanisms of international criminal justice. However, the ICC Pre-Trial Chamber—a chamber within the ICC with the responsibility for threshold jurisdictional questions—acting without sufficient guidance, opined that the ICC was simply not the appropriate venue to try individuals such as Ntaganda.[9] Had the Pre-Trial Chamber's opinion stood, it would have legitimized the impunity of Ntaganda and cemented the precedent of a narrow jurisdiction at the ICC, and that would enable the impunity of others like Ntaganda.[10] Had that occurred, it would have indicated a lost opportunity for the ICC, nations interested in prosecuting war crimes, and the international community as a whole. This Article seeks, in part, to enable discourse on how to broaden ICC's jurisdiction through means at both the domestic and international levels.[11]

Part I analyzes the problem of the current trajectory of the ICC with regard to its jurisdictional scope. Looking at the development of transnational and international responses to atrocity crimes, including its burst of development in the last twenty-five years, this article recognizes that the Rome Statute was drafted with the intention of covering a broader range of cases than the ICC is currently handling. The intended scope includes the prosecution of alleged war criminals who were at senior, mid-level, and lower levels of authority in committing grave crimes. However, the potential scope of the ICC to reach such actors has been progressively narrowed since the inception of the Rome Statute due to prosecutorial discretion and resource constraints at the international level. This problem is exemplified by the 2006 Pre-Trial Chamber decision not to issue a warrant of arrest for Bosco Ntaganda, a high-ranking alleged war criminal in the Democratic Republic of Congo; this is rectified, in part, by the ICC Appeal Chamber's review of that decision. Part I also addresses how national courts have failed to live up to their international obligations in not defining gravity[12] broadly so as to encourage the ICC to find that the

8. PTC I Warrants Decision, *supra* note 7, ¶ 40.

9. *Id.* ¶ 89.

10. See infra notes 65-70 for the Appeals' response.

11. The matter of Bosco Ntaganda's case at the ICC is discussed in more detail *infra* in Part I.C.

12. While the terms "grave" and "gravity" were used often throughout the twentieth century in the context of describing the harms that the international community sought to prevent, the terms did not require precision until their use created a jurisdictional trigger for the International Criminal Tribunals. *See* Margaret M. deGuzman, *How Serious Are International Crimes? The Gravity Problem in International Criminal Law*, 51 COLUM. J. TRANSNAT'L L. 18, 21-22 (2012) (arguing that although there is common understanding that a gravity standard has been met in cases of mass atrocities such as those in Rwanda and the former Yugoslavia, the definition of gravity has not yet been properly established).

prosecution of Ntaganda and others who are similarly situated are within its jurisdiction.

Part II considers the historical context of international criminal justice in two respects. First, it reviews efforts at establishing extra-national criminal justice mechanisms and notes that, historically, effective development of transnational legal processes has depended on nations engaging in norm-setting dialogue that has strengthened and underpinned international criminal justice mechanisms by giving meaning to the definitions used by international tribunals and the scope of those tribunals' work. Second, it argues that the jurisdictional narrowing currently occurring at the ICC is not a new phenomenon, but instead, it reflects a historical pattern of the international community attempting to define the jurisdiction of international criminal processes broadly, only to see those processes narrowed and limited over time. As such, the current narrowing of jurisdiction puts the ICC at the brink of lost opportunity to make permanent an institution that can be truly effective in prosecuting and deterring atrocity crimes.

Part III analyzes the slow process and the confusion in the development of the law divided by the roles of the Office of the Prosecutor, the Pre-Trial Chamber, and the Appeals Chamber. The Article suggests further development at the domestic level in order to set broader jurisdictional norms for the ICC, which the ICC would then be permitted under the Rome Statute to consider.[13]

This Article concludes by suggesting a new normative framework to ensure that the ICC can defy historical patterns and live up to its potential. In particular, this Article recommends that States Parties to the Rome Statute engage further in transnational legal processes with regard to the question of complementarity. By engaging in interaction, debate, and discourse, States Parties can enable a broader understanding of what constitutes gravity within national courts, thereby engaging in positive norm-setting that resonates with the ICC as it continues to build the architecture for its own determinations of jurisdiction. Such a process would support efforts to allow for an interpretation of those crimes that would give guidance to victim groups, world leaders, and the world community such that binding internalization of norms would work toward the ultimate goal of protecting vulnerable populations.

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13. *See* Rome Statute, *supra* note 1, art. 21(1)(c) (requiring that the I.C.C. consider "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards," but only where the Statute, treaties, and principles and rules of international law are not clearly applicable).

I. THE NARROWING SCOPE OF ICC'S JURISDICTION

The ICC is still in the early phases of its development. As such, its norms with regard to questions of jurisdiction are still malleable and open to interpretation. Yet the current trends suggest that the ICC's jurisdiction has narrowed significantly from what was envisioned by the Rome Statute. National courts are not picking up the slack and prosecuting atrocity crimes. As a result of these two trends, the ICC is now at risk of falling far short of what the framers of and signatories to the Rome Statute intended.

A. The Rome Statute and Complementarity

In recent years, a number of cases relating to international criminal law have focused on genocide, crimes against humanity, and war crimes (together referred to as "atrocity crimes").[14] The cases vary depending on the situation: some cases and situations are before the ICC, a permanent institution with broad prospective jurisdiction over atrocity crimes.[15] At the same time, a number of ad hoc international institutions have been created to deal with specific post-conflict situations such as the International Criminal Tribunals for Yugoslavia and Rwanda,[16] the Extraordinary Chambers of the Court of Cambodia,[17] and the Special Court for Sierra Leone.[18] Additionally, national trials in Guatemala,[19] Peru,[20] and other

14. *See, e.g.*, David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. U. J. INT'L HUM. RTS. 30, 2 (2009).

15. *See* Rome Statute, *supra* note 1, pmbl. (recognizing that the State Parties to the Rome Statute are "[d]etermined to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole] and thus to contribute to the prevention of such crimes . . .").

16. The International Criminal Tribunal for Yugoslavia (ICTY) was established in 1993 to create a mechanism for accountability over the war crimes and atrocities that occurred in the early 1990s in the various conflicts occurring in the former Yugoslavia. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). Likewise, the International Criminal Tribunal for Rwanda (ICTR) was established in 1994 to seek accountability for the Rwandan Genocide and other grave breaches of international law. *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). Both the ICTY and ICTR are considered groundbreaking as the first post-Nuremberg international criminal tribunals, and the first to be set up through a Security Council resolution under Chapter VII of the Charter of the United Nations. *See* Erik Mose, *Main Achievements of the ICTR*, 3 J. INT'L CRIM. JUST. 920, 927 (2005).

17. See G.A. Res. 57/228, U.N. Doc. A/RES/57/228 (May 27, 2003) (The Extraordinary Chambers of the Court of Cambodia is most accurately characterized as a hybrid tribunal since it is a national court that was created in a coordinated effort with the United Nations. It is staffed by national and international judges and applies international laws. Its mandate includes trying former Khmer Rouge members for war crimes and atrocities committed in Cambodia during the 1970s.).

18. *See* S.C. Res 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (The Special Court for Sierra Leone was established by the United Nations and Sierra Leone as a hybrid entity – a national court that was created in a coordinated effort with the United Nations, is staffed by

places engage in domestic interpretations of international law and the nature of atrocity crimes.[21]

The most basic common thread among all of these aforementioned courts is their goal of seeking accountability for the worst crimes offending ethnic and national societies as well as the international community. The work of these courts should be considered as national and international in nature,[22] since they address crimes and actions that both the international and national communities would like to punish and deter in the future. In order to be effective at this work and to maintain legitimacy at both levels, courts must rely on both national and international mechanisms of prevention.[23] The aspiration of this multi-level system is that those who committed atrocity crimes – whether as senior leaders of a group, mid-level authorities or lower level operatives – can be prosecuted and held accountable for their actions.[24]

The difficulty arises in that international and national mechanisms have different strengths, limits, and, to a certain extent, deontological purposes. The Rome Statute[25] creates the ICC as a body independent from

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national and international judges, and applies international laws. Its purpose is to try those accused of atrocity crimes and war crimes committed during the internal conflicts in Sierra Leone that began in 1996.).

19. *See World Report 2012: Guatemala*, HUMAN RIGHTS WATCH, http://www.hrw.org/world-report-2012/guatemala (last visited May 12, 2013) (Since 2009, sporadic trials for war crimes occurring during Guatemala's decades-long civil war have been ongoing. They represent a small measure of accountability for the number of atrocity crimes that occurred during the conflict.).

20. *See* Simon Romero, *Peru's Ex-President Convicted of Rights Abuses*, N.Y. TIMES, Apr. 7, 2009, *available at* http://www.nytimes.com/2009/04/08/world/americas/08fujimori.html?_r=0 (In 2009, Peruvian courts applied national and international law to convict former Peruvian president Alberto Fujimori of, among other charges, crimes against humanity in the killings of twenty-five people by military death squad in the 1990s.).

21. The obligation of national courts to function on two levels – both domestic and international – is discussed in Part I.C. *See* infra pp.14-18.

22. See, e.g., Rome Statute, *supra* note 1, pmbl. (recognizing that the States Parties to the Rome Statute are "[d]etermined to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole] and thus to contribute to the prevention of such crimes.").

23. See, e.g., Rome Statute, *supra* note 1, pmbl ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation . . ."); *see also* Markus Benzing, The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity, *in* 7 MAX PLANCK Y.B. OF UNITED NATIONS L. 591, 597 (2003) (suggesting the ICC could be used to protect against victor's justice by the state).

24. *See generally* C. H. Beck et al., Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Otto Triffterer 2d ed. 2008) [hereinafter Commentary].

25. By a vote of 120 to 7 (with twenty-one states abstaining), the international community put forth the Rome Statute, allowing for a complementary supranational court to

and not directly controlled by the States Parties to the treaty of the court or the United Nations, but in relationship with the United Nations system.[26] While a state, in dealing with harms occurring within that state's jurisdiction, may take measures at a national level through legislation, administrative mandate, or judicial action, in any case, it would continue to act as the state. As such, the state may be placing the interest of the state ahead of "justice," which is sometimes amorphous and uneasily defined.[27] In those circumstances, the potential exists for interference in the judicial processes of the state by parts of the state apparatus seeking to prevent prosecution of crimes for political reasons or otherwise.[28]

The Rome Statute attempts to account for that concern with its provisions on complementarity and admissibility by striking a balance and allowing the States Parties to take the lead on prosecuting atrocity crimes by making the following inadmissible to the ICC: (1) the state that has jurisdiction over the case is investigating or prosecuting the crime; (2) the investigating or prosecuting state is unwilling or unable to genuinely carry out the investigation or prosecution; or (3) after an investigation, the state with jurisdiction has decided not to prosecute, but the decision resulted from the unwillingness or inability of the state to genuinely prosecute; and (4) the case does not have sufficient gravity to justify further action by the Court.[29] Under this standard, States Parties to the Rome Statute would have the first opportunity to engage in a good faith investigation into the alleged crimes.[30]

The complementary nature of the ICC has raised many questions about the demarcation of responsibility between the national courts and the

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try alleged perpetrators of some of the crimes of primary interest to the international community. M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 32 (1998) [hereinafter DOCUMENTARY HISTORY] (For more information on the Rome Statute, see generally COMMENTARY, *supra* note 24).

26. *See generally* COMMENTARY, *supra* note 24.

27. KLEFFNER, *supra* note 2, at 322 (highlighting the distorting effects of domestic political pressures).

28. Such interference occurred in conjunction with the lack of domestic prosecution of high-ranking officials with regard to the situation in Darfur, Sudan, alleging genocide, war crimes, and crimes against humanity. *See generally* Matthew H. Charity, The Criminalized State: The International Criminal Court, the Responsibility to Protect, and Darfur, the Republic of Sudan, 37 OHIO N.U. L. REV. 67 (2011). The refusal to arrest Omar al-Bashir by government officials in Kenya stands as an example of that interference challenged by internal judicial processes, as the Kenyan Supreme Court in November 2011 found that al-Bashir's arrest must go into effect should he visit Kenya in the future. *See* James Macharia, *Kenyan Court Issues Arrest Order for Sudan's Bashir*, REUTERS (Nov. 28, 2011, 1:50 PM EST), http://www.reuters.com/article/2011/11/28/us-kenya-bashir-icc-idUSTRE7AR0YA20111128. Likewise, such interference has occurred with regard to the ongoing situation in the Democratic Republic of Congo. *See infra* Part I.C. (discussing the case of Bosco Ntaganda).

29. See Rome Statute, supra note 1, art. 17.

30. *See* Rome Statute, *supra* note 1, pmbl. (stating that the ICC "shall be complementary to national criminal jurisdictions . . ."). *Id.* art. 1.

ICC. Much of the scholarship relating to the complementary nature of the ICC's jurisdiction relates to antagonistic complementarity[31] – the ability of the ICC to intervene by taking jurisdiction where the state with primary jurisdiction fails to genuinely investigate or prosecute credible allegations of crimes falling within the ICC's jurisdiction.[32] Other scholars focus on the obligation of national courts to prosecute atrocity crimes, noting the possible obligation to implement the laws against international crimes "subject to the ICC's jurisdiction in their national laws and furthermore to establish extra-territorial, universal jurisdiction which enables their national criminal courts to adjudicate these crimes even if they have been committed abroad by a foreign national."[33]

Even states that do not recognize an obligation on the part of States Parties to incorporate those criminal provisions into their internal law have frequently adopted the language of the Rome Statute to increase the state's ability to cooperate with the ICC, both in support of the Rome Statute and, potentially, to enforce decisions taken by the Security Council.[34]

If the ICC fails to use this norm-setting moment in the codification of

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31. By antagonistic complementarity, I reference the theory that the ICC will serve to shame and blame states that fail to properly prove willingness and ability to prosecute crimes. *See, e.g.*, KLEFFNER, *supra* note 2, at 320 (citing A. CASSESE, INTERNATIONAL CRIMINAL LAW 353 (OUP, Oxford 2003), stating as one of complementarity's chief merits "the indirect but powerful incentive to [national courts] becoming more operational and effective, inherent in the power of the ICC to substitute for national judges, whenever they are not in a position to dispense justice or they deliberately fail to do so [. . .] ."); *see also* Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1, 51 (2009) ("The primary role that the ICC was expected to play in post-conflict states parties was to spur domestic prosecution of known perpetrators to avoid the perceived loss of face and sovereignty costs of having the ICC pursue those prosecutions internationally."). This is distinct from the concept of (1) negative complementarity, which does not of necessity seek compliance through a shaming mechanism, but only empowers the ICC to act where there is a lack of action by national courts, and (2) positive complementarity, which looks to the ICC to engage with states that otherwise would have jurisdiction to further enable those states to prosecute alleged crimes.

32. See e.g., Jann K. Kleffner, The Impact of Complementarity on National Implementation of Substantive International Criminal Law, 1 J. INT'L CRIM. J. 86, 87 (2003) [hereinafter Kleffner, The Impact of Complementarity].

33. *Id.* at n. 18 (quoting the Memorie van Toelichting Wet Internationale Misdrijven, Dutch Explanatory Memorandum on Substantive Implementing Legislation Kamerstukken II 2001/02, 28 337, nr. 3 (MvT) pp. 2 & 18).

34. *See, e.g., id.* at n. 13 (citing Spanish Progress Report on ratification and implementation of the Rome Statute to the Council of Europe, *available at* http://www.coe.int/t/dlapil/cahdi/Source/ICC/4th%20Consult%20ICC%20%282006%29%2008%20E%20Spain.pdf); *see also* Scheffer, *supra* note 14, at 3 ("Paradoxically, even as a non-party to the Rome Statute of the ICC (the 'Rome Statute'), the United States today essentially stands more exposed to its jurisdiction than do American allies that have modernized their criminal codes.").

international criminal law[35] to expand on protections to those subject to atrocity crimes, States Parties seeking to avoid the time, expense, and political repercussions of their own prosecutions would have a strong argument that domestic prosecutions would engage in overreach. The expansion of international criminal law represented by the creation of the ICC would, in effect, make way at this early stage for the contraction of international criminal justice.

B. The Gravity Standard Since the Inception of the International Criminal Court

In negotiating the Rome Treaty during the 1990s, drafters drew much of the language defining the particular underlying crimes over which the ICC would have jurisdiction from recent precedent: the Convention on the Prevention and Punishment of the Crime of Genocide;[36] the Statutes for the International Criminal Tribunals for the Former Yugoslavia[37] and Rwanda;[38] and the Draft Code of Crimes against the Peace and Security of Mankind.[39]

The interaction and transnational dialogue that was prevalent after the U.S. Civil War, the Franco-Prussian War, and the World Wars[40] at all times demanded an interpretation of protection from atrocities, and the extent of punishment for wrongdoing was lacking in the context of the development of the ICC. For the majority of the pre-Rome Statute period, there existed little interest in the creation of a fairly powerful permanent institution with components of criminal law authority. Because the emphasis of pre-Rome Statute criminal justice efforts was largely retrospective and specific

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35. See generally, Lisa J. LaPlante, The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence, 43 J. MARSHALL L. REV. 635, 639-42 (2010); see generally Schabas, supra note 4.

36. *See generally* Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277, *available at* http://www1.umn.edu/humanrts/instree/x1cppcg.htm (defining genocide in legal terms for use in the international community).

37. See generally U.N. Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808*, ¶ 12, U.N. Doc. S/25704 (May 3, 1993) (statute establishing jurisdiction and parameters for the ICTY); S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993) (deciding that an international tribunal was necessary to try atrocity crimes in the former Yugoslavia).

38. See generally S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the ICTR and annexing its statute).

39. *See generally* Draft Code of Crimes against the Peace and Security of Mankind, Int'l Law Comm'n, U.N. Doc. A/CN.4/L.532; GAOR, 48th Sess., Supp. No. 10 (1996) (reporting to the U.N. General Assembly with a code that derives from the Articles of the Nuremberg Charter, which also derive description of criminal acts from the World War I Commission).

40. The transnational legal process engaged in after each of these conflicts is discussed in detail in Part II infra.

(responding to previous problems of which we have become aware from recent experience) as opposed to developing best responses for the problems that we have today or are likely to face prospectively, much of the discussion has focused on the application of general principles of criminal law regarding rights of the accused, the application of lex lata[41] at a time of legal development, and interpretation of treaty provisions in a strict sense such that the defendant benefits from any confusion in the law of the ICC.[42]

While this incrementalism and limited scope may give comfort to States Parties signing the Rome Statute that smaller steps will prevent surprise and allow for the Office of the Prosecutor to develop clear and cogent theories of a fairly narrow reading of the case, this very behavior undermines some of the purpose of the ICC.[43] Further, based on the observed difficulty of prosecution by an international tribunal, criminal trials undertaken by individual states may suffer from every structural and procedural weakness of the ICC, but without the perceived autonomy or international legitimacy (in many cases) that the ICC has.[44]

C. The Case of Bosco Ntaganda and the ICC's Problematically Narrow Jurisdiction

The difficulties are best seen in considering norm development within the ICC's structure. Article 58 of the Rome Statute requires that the Pre-Trial Chamber[45] issue a warrant of arrest if after examining the application and the evidence submitted by the Prosecutor it determines that "[t]here are reasonable grounds to believe that the person has committed a crime within

41. Indeed, questions of whether the ICC would focus only on settled law (*lex lata*) and not deal with more poorly defined law in development (*lex ferenda*) influenced the selection of these cognizable international crimes and forestalled the implementation of a defined crime of aggression.

42. *See* Rome Statute, supra note 1, art. 24 (Non-retroactivity ratione personae).

43. See, e.g., Uwe Ewald, *'Predictably Irrational' – International Sentencing and Its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices*, 10 INT'L CRIM. L. REV. 365, 383 (2010) (noting that "acceptance of penalties is directly related to an understanding of usefulness of criminal punishment"); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 780-81 (2006) (challenging the notion that International Criminal Tribunals actually serve to deter crimes).

44. The resistance received by certain states that were more likely to allow for trials of higher ranking officials under a theory of universal jurisdiction evidences this problem: the financial incentives to allow for greater trade and to continue involvement in regional organizations may influence states such as Afghanistan, Belgium, and Spain to create laws that will limit rather than further enhance jurisdiction.

45. See generally Rome Statute, *supra* note 1, art. 34(b) (establishing a Pre-Trial Chamber of the ICC to deal with, among other duties, admissibility of cases to the Trial Chamber of the ICC).

the jurisdiction of the Court."[46] Due to complementarity concerns and the ICC's reserve status, the ICC only has jurisdiction where the case is of sufficient gravity for the higher level of international consideration.[47]

On February 10, 2006, Pre-Trial Chamber I of the ICC refused to grant a warrant for the arrest of Bosco Ntaganda, the third-in-command of the Forces Patriotiques pour la Libération du *Congo* (FPLC), the military arm of the *Union des Patriotes Congolais* (UPC).[48] The Pre-Trial Chamber recognized that Ntaganda conscripted, trained, and forced children under the age of fifteen to participate in hostilities.[49] Ntaganda was subject to an arrest warrant in Bunia, Democratic Republic of Congo, on charges of joint criminal enterprise, arbitrary arrest, torture, and complicity of assassination.[50] Although the arrest warrant was issued, the Democratic Republic of Congo did not seek Ntaganda for the conscription of child soldiers, which would be considered an atrocity crime.[51]

In reviewing the case against Ntaganda, the Pre-Trial Chamber decided to look at whether a claim would be admissible to the ICC[52] prior to making a determination of whether to issue a warrant for Ntaganda's

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46. Rome Statute, *supra* note 1, art. 58(1)(a).

47. While not probative of the proper interpretation, the travaux préparatoires may be considered to confirm an understanding of a treaty, under a customary law application of the Vienna Convention of the Law of Treaties, art. 32(a), May 23, 1969, 1155 U.N.T.S. 351. One can, therefore, look to The Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, G.A. 51st Sess., Supp. No. 22, A/51/22 (1996) to confirm Article 17's limit on the scope of jurisdiction: "There was general agreement concerning the importance of limiting the jurisdiction of the Court to the most serious crimes of concern to the international community as a whole, as indicated in the ... preamble, to avoid trivializing the role and functions of the Court and interfering with the jurisdiction of national courts." DOCUMENTARY HISTORY, *supra* note 25, at 394.

48. The Forces Patriotiques pour la Libération du Congo (FPLC) was the military wing of the Union des Patriotes Congolais, a Congolese political and militia group formed in the early 2000s. *See Justice in the Democratic Republic of Congo: A Background*, HAGUE JUSTICE PORTAL (Dec. 17, 2009), http://www.haguejusticeportal.net/index.php?id=11284. The FPLC was suspected of engaging in numerous war crimes, including the conscription of child soldiers and the killing of civilians and U.N. peacekeepers. *Situation in the Democratic Republic of Congo*, HAGUE JUSTICE PORTAL, http://www.haguejusticeportal.net/index.php?id=6174 (last visited May 12, 2013).

49. See *Justice in the Democratic Republic of Congo: A Background*, HAGUE JUSTICE PORTAL (Dec. 17, 2009) http://www.haguejusticeportal.net/index.php?id=11284; *see also DR Congo: Arrest Bosco Ntaganda for ICC Trial*, HUMAN RIGHTS WATCH (Apr. 13, 2012), http://www.hrw.org/news/2012/04/13/dr-congo-arrest-bosco-ntaganda-icc-trial (detailing allegations of the various war crimes in which Ntaganda was involved, including ethnic cleansing, rape, torture and the conscription and training of child soldiers).

50. PTC I Warrants Decision, *supra* note 7, ¶¶ 25, 34, 40 (acknowledging that domestic courts were adequately dealing with these allegations with regard to Ntaganda).

51. PTC I Warrants Decision, *supra* note 7, ¶¶ 25, 34, 40 (discussing the failure of domestic courts to address the conscription issue).

52. See Rome Statute, *supra* note 1, arts. 17, 19, 53, 58.

arrest.[53] The Pre-Trial Chamber then set a standard that matched the Prosecution's own prioritization of cases using a gravity standard,[54] "that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes."[55]

Therefore, the Pre-Trial Chamber set up a definition of a gravity threshold for admissibility based on the language of the Rome Statute that asked three questions, all of which had to be answered affirmatively for the case to be considered admissible.[56] First, the Pre-Trial Chamber asked whether the conduct alleged was "systematic" or occurred on a "large scale."[57] The next question was whether the potential defendant can be considered a "senior leader" in committing the alleged war crimes.[58] The final element was consideration of whether the role played by the potential defendant warranted admissibility to the ICC.[59]

The Pre-Trial Chamber recognized that the alleged policy/practice of

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53. PTC I Warrants Decision, *supra* note 7, ¶¶ 17- 20.

54. Rome Statute, *supra* note 1, art. 17(1)(d), ("[T]he Court shall determine that a case is inadmissible where . . . [t]he case is not of sufficient gravity to justify further action by the Court."

55. PTC I Warrants Decision, *supra* note 7, ¶ 62 (quoting *Paper on Some Policy Issues Before the Office of the Prosecutor*, 7 (2003), http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf.)

56. PTC I Warrants Decision, *supra* note 7, ¶ 64. The Pre-Trial Chamber defined the gravity standard as follows:

> any case arising from an investigation before the Court will meet the gravity threshold provided for in article 17(l)(d) of the Statute if the following three questions can be answered affirmatively:
>
> > i) Is the conduct which is the object of a case systematic or large scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct)?; ii) Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and iii) Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large-scale crime within the jurisdiction of the Court; and (2) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?

Id.

57. *Id.*

58. Id.

59. Id. See also *Paper on Some Policy Issues Before the Office of the Prosecutor,* 6 (2003), http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf.

enlisting and conscripting children under the age of fifteen into the FPLC, and causing them to participate in active hostilities, caused social alarm; the Pre-Trial Chamber looked at the scale of the conduct and found it to be regional instead of national and, therefore, not widespread.[60] The Pre-Trial Chamber then concluded that Ntaganda's role in the organization as third in command of the military wing meant that he had little control over the political wing of the organization and that his responsibilities were more limited than the most senior leaders of the organization.[61] Finally, the Pre-Trial Chamber considered Ntaganda's inability to sign agreements binding the political organization[62] and the lack of social alarm at his acts[63] showed that his arrest would not serve as a deterrent to other leaders. Because of these findings, the Pre-Trial Chamber denied the requested warrant of arrest and concluded that the prosecutor should focus its efforts on others who were the most senior leaders.[64]

The Appeals Chamber[65] pointed out numerous flaws in the Pre-Trial Chamber's analysis. First, it noted that Ntaganda was deeply involved with the recruiting of child soldiers, that the war crime with which he was charged did not require it be widespread, and that there was nothing in the Rome Statute that would allow for the subjective "social alarm test" that the Pre-Trial Chamber applied.[66] Second, the Appeals Chamber concluded that failing to arrest Ntaganda would put a large number of alleged criminals on notice that they need not fear arrest, even for serious crimes.[67] Under the Rome Statute, this deterrent effect is one of the purposes of maintaining a broad scope for admissibility of cases similar to that of Ntaganda.[68] Third, even if Ntaganda was not the most senior leader in this conflict, lower and mid-level operatives sometimes are (and should be) arrested to help build a case against the most senior leaders.[69] The Pre-Trial Chamber failed to

60. PTC I Warrants Decision, *supra* note 7, ¶¶ 72, 84 (UPC/FPLC was merely a regional group operating only in the Ituri region.).

61. *Id.* ¶¶ 79, 82, 85, 89.

62. *Id.* ¶¶ 86, 87.

63. The question of social alarm was not fully explained by the Pre-Trial Chamber, an issue raised in the review of the decision by the Appeals Chamber.

64. PTC I Warrants Decision, *supra* note 7, ¶¶ 86, 87.

65. See generally Rome Statute, *supra* note 1, art. 34(b) (establishing an Appeals Chamber for the ICC with jurisdiction to review decisions of the Pre-Trial Chamber and the Trial Chamber).

66. Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," Case No. ICC-01/04-169, ¶¶ 69-72 (July 13, 2006), *available at* http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf [hereinafter Appeal of Pre-trial Chamber I].

67. Appeal of Pre-trial Chamber I, *supra* note 66, ¶¶ 73-77.

68. *Id.* ¶¶ 77-78.

69. *Id.* ¶ 77.

acknowledge or apply these purposes of the Rome Statute.[70]

The potential effect of the initial failure to prosecute in the Ntaganda case may be profound. First, there was a ripple effect on other situations being considered for admissibility to the ICC. The decision not to prosecute Ntaganda led to the expansion of a loophole created by an agreement with the government of Uganda in 2003 in another case.[71] Second, from a norm-setting perspective, the Pre-Trial Chamber's decision not to prosecute gave rise to the practice of the ICC not prosecuting perpetrators other than those few most responsible. Indeed, in issuing a decision for the warrant of arrest of Omar al-Bashir,[72] ICC Pre-Trial Chamber I noted in 2009 that the flawed test offered in the Ntaganda case was still the only standard for consideration by the ICC, presuming the ICC considered it appropriate to determine the admissibility of a case on gravity grounds.[73]

D. Domestic Courts and International Legal Obligations

The failure of the ICC to act in cases like that of Ntaganda is exacerbated by the lack of top-down pressure on domestic courts to prosecute, the failure of domestic courts to fulfill their international obligations, and the failure of State Parties to engage in transnational interaction and discussion regarding harms in violation of international principles and the adoption by states of mechanisms for the vindication of human rights. Adding to these shortcomings, the purported sanctioning tools of negative complementarity failed to provide a remedy to at risk populations.

1. Lack of Top-Down Pressure

Unfortunately, the same standards that lead to compliance pull may evidence the limits on complementarity's applicability. An ability to comply with the letter of the law – here, the terms of the Rome Statute – may undermine some purposes of international criminal law. Prosecutorial

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70. *See* Appeal of Pre-trial Chamber I, *supra* note 66.

71. See Emmanuel Mulondo & Gerald Walulya, Uganda: 'No Amnesty for Rebel Leaders,' ALLAFRICA (Apr. 19 2006), http://www.allafrica.com/stories/200604180779.html; KLEFFNER, *supra* note 2, at 325 ("[T]he prosecutorial policy of limiting the action of the Office of the Prosecutor to a certain category of individuals found reflection in the amendment of the Amnesty Act, thus equally limiting the scope of potential national investigations and prosecutions to these persons.").

72. *See* Charity, *supra* note 28, at 72-77 (explaining the background of the situation in the Darfur region of Sudan, as well as allegations made against Omar al-Bashir).

73. Situation in Darfur, Sudan, In the Case of the Prosecutor v. Omar Hassan Ahmad al-Bashir (Omar al-Bashir), Case Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09, n. 51 (Mar. 04, 2009), *available at* http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf.

discretion allows States Parties wide latitude to refuse to try cases, and states are not under significant pressure to reach beyond the highest level offenders in their prosecutorial decisions.

In determining whether States Parties have complied with their international obligations to prosecute, the ICC first looks to the terms of the Rome Statute,[74] the Elements of Crimes,[75] and the Rules of Procedure and Evidence.[76] Second, the ICC looks to applicable treaties other than the Rome Statute, and principles and rules of international law including established principles of the Law of Armed Conflict.[77] Lastly, only absent general principles of international law, the ICC considers principles derived from national laws of legal systems of the world, where those laws are not inconsistent with the Rome Statute, or with international law and internationally recognized norms and standards.[78] Notwithstanding and separate from these recognized sources of law, the ICC may apply interpretations of principles and rules of law from its own previous decisions, which one might presume would not conflict with the Rome Statute or other international standards of international criminal law.[79] None of these mechanisms put a significant amount of pressure on domestic courts to fulfill their international obligations.

2. Transnational Legal Processes

Were national courts more actively describing their own understanding of the core crimes, similar to the analyses that must be made in considering potential prosecutions by the ICC, there would be greater interaction among parties trying to achieve the goal of ending impunity, and helping to determine a causal law that might prevent harm to populations

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74. Rome Statute, *supra* note 1, art. 21(1)(a) (lex specialis relating to statutory interpretation of ICC-instituted International Criminal Law).

75. *See generally* INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES (2011), *available at* http://www.unhcr.org/refworld/docid/4ff5dd7d2.html.

76. *See generally* INTERNATIONAL CRIMINAL COURT, RULES OF PROCEDURE AND EVIDENCE (Sept. 9, 2002), *available at* http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.ENG.08Feb1200.pdf.

77. Rome Statute, *supra* note 1, art. 21(1)(b).

78. *Id.* art. 21(1)(c). The drafters compromised further by stating that "general principles of law derived by the Court from national laws of legal systems of the world include[s], as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime . . . ." *Id.* Although such a reading might prevent harm to the accused under the nulla poena sine lege standard, in that the accused might have greater awareness of the illegality of an act under, for example, national or territorial jurisdiction of a particular state, the Conference of the ICC Statute "rejected the view of some delegations that the phrase 'including, as appropriate' should be replaced with 'especially'." COMMENTARY, *supra* note 24, at 703. Thus, the laws of the state that would normally exercise jurisdiction have no presumptive authority greater than other national laws of legal systems of the world.

79. Rome Statute, *supra* note 1, art. 21(2).

caused by atrocity crimes.

Taking a transnational legal process approach,[80] national representatives have in previous contexts adopted or recognized existing principles under international law norms,[81] met in groups to discuss implementation of international law standards,[82] and have pushed for the internalization of those standards within a transnational, supranational, or international structure.[83]

The concern over restrictive standards undermining the object and purpose of the Rome Statute, and the principles of law the Statute supports, could be raised in the selection and prosecution of a number of cases and

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80. Harold Hongju Koh describes the transnational legal process as having three phases: One or more transnational actors provoke an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party's internal normative system. The aim is to 'bind' that other party to obey the interpretation as part of its internal value set. Such a transnational legal process is normative, dynamic, and constitutive. The transaction generates a legal rule, which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process. Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law? The New Sovereignty: Compliance with International Regulatory Agreements by Abram Chayes and Antonia Handler Chayes*, 106 YALE L. J. 2599, 2646 (1997) (emphasis added); see also Leila Nadya Sadat, The Nuremberg Paradox, 58 AM. J. COMP. L. 151, 162 (2010) (describing "the existence of transnational legal processes that lead courts, especially, to adopt international norms," in the context of French adoption of the Nuremberg principles in prosecutions of crimes against humanity).

81. *See, e.g.*, MANUAL OF THE LAWS OF WAR ON LAND (Oxford, Sept. 9, 1880), *available at* http://www.icrc.org/ihl/INTRO/140?OpenDocument (noting that the Institute of International Law "believes it is fulfilling a duty in offering to the governments a 'Manual' suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies . . . [and, in not trying to add new law, the Institute] contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable." *Id.* at Preface (describing this facet of transnational legal process as interacting from a positivist (or objective law) perspective)).

82. See Robert O. Keohane, Jr., *Institutional Theory and Realist Challenge after the Cold War*, in NEOREALISM & NEOLIBERALISM 269 (David A. Baldwin ed., 1993) (describing this facet of transnational legal process as interpreting the standards in specific contexts through commissions or other institutions). This is an institutionalized perspective that eventually looks to the International Law Commission or its committees for guidelines as to the development of the ICC.

83. This could be described as a constructivist approach – determining the constitution of rules related to the identified norms, and allowing for the further implementation of norms through that construct. See John Gerard Ruggie, What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge, 52(4) INT'L ORG. 855, 871 (1988) (noting that "Constitutive rules define the set of practices that make up a particular class of consciously organized social activity—that is to say, they specify what counts as that activity.").

for many reasons. One important area in which the conflict in rule-setting with regard to the definition of crimes has clearly arisen is the consideration of gravity as an indicator of admissibility on both qualitative and quantitative grounds.[84]

Considering the usurpation of authority a potential indicator of overall governmental incapacity or specific complicity with the alleged crime suggests an incentive for state governments to make every effort to retain authority over adjudication.[85] In doing so, however, the state tribunals need not behave as though exercising powers delegated to the States by the ICC, and therefore limited to the interpretation of those powers by the ICC. Rather, to the extent the articulation of specific crimes by the ICC reflects jus cogens forbidding atrocity crimes,[86] the adoption and implementation by states of the ICC statute creates an opportunity for states to define the jurisprudence of international criminal law in conjunction with the ICC statute.

3. The Decoupling of State Actors' Roles and Redoubling of a State Actors' Efforts

The lack of transnational legal process is not the only obstacle to positive norm-setting on the national level. In addition, States Parties are failing to live up to their own obligation to act on two levels and with two purposes: on the national and international level; and with the dual purposes of 1) enforcing domestic norms and 2) informing and enriching international norms in the process.

The concept of jus cogens or "compelling law" that allows no derogation is a kindred spirit to the notion of le droit des gens, or "the law of people" described by French law professor and original member of the UN International Law Commission Georges Scelle.[87] In Scelle's Précis du droit des gens, he cites to Montesquieu's definition that "Laws are

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84. *See, e.g.*, Ewald, *supra* note 43, at 371; *see generally* Schabas, *supra* note 4.

85. KLEFFNER, supra note 2, at 317-18 ("Complementarity bestows upon national proceedings the pedigree of 'willingness' and 'ability' when the Court determines that a case is inadmissible in accordance with Article 17(1)(a) to (c) of the Statute."); *id.* at 320 (discussing the "largely antagonist premise on which the regime of complementarity is based . . . [where States] want to avoid the embarrassment that a declaration of admissibility would entail.").

86. In agreeing to the particular crimes included in the Rome Statute, some states noted that this would not create additional laws. *See* RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES §103 (1965), cmt. K, Reporter's Notes 6; *id.* § 702 (listing state violations of peremptory norms).

87. *See, e.g.*, Hubert Thierry, The Thought of Georges Scelle, 1 EUR. J. INT'L L. 193, 198 n.10 (1990) (using the "law of people" as opposed to the more typical translation "Law of Nations" clarifies the role of the individual as "the only genuine subject [] of international law.").

necessary relationships which derive from the nature of things," to lead to the concept of a law of integration and progress leading to "objective law."[88] Because this objective law conforms to social necessities, positive law that derogates from objective law – that fails to conform to those social necessities – becomes anti-legal, and may be rejected.[89] Binding positive law gains its validity from the bundle of conditions necessary for the existence of a social fact, without which the social fact could neither come about nor persist.[90] These purported causal laws that support social functioning are not necessarily enunciated as positive law, but are the basis around which legislators might construe and assess positive law.[91]

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88. Id. at 199 (citing GEORGES SCELLE, PRECIS DU DROIT DES GENS, 37 (Vol. I. 2008), for the concept that objective law develops from social reality). See also, Georges Scelle, *Règles Générales du Droit de la Paix*, *in* 46 RECUEIL DES COURS DE L'ACADEMIE DE LA HAYE 327 (1933) [hereinafter Scelle]:

> Le droit objectif est l'ensemble des lois causales qui déterminent l'apparition, la permanence et le développement du fait social . . . . La traduction normative de ces lois causales immanentes s'appelle le droit positif. Le droit positif n'est donc, par définition, que la transposition sur le plan normatif des lois causales d'une société. Cette transposition peut être d'ordre coutumier ou instinctive ; d'ordre législatif, réglementaire ; d'ordre autocratique ou conventiennel . . . . Il se peut, il est même fréquent, que le droit positif diffère et s'écarte du droit objectif, que la norme sociale diffère de la loi causale, soit parce que l'infirmité de l'agent coutumier ou législatif empêche le droit objectif d'être totalement perçu, soit parce que les insuffisances techniques de l'organisation sociale empêchent une totale juxtaposition du système de lois et du système de normes. Cependant, par une hypothèse nécessaire, il faut considérer comme acquis, jusqu'à preuve contraire, qu'il y a coïncidence exacte entre l'un et l'autre, car sans cela le droit positif ne pourrait pas avoir de valeur obligatoire. La validité (geltung) du droit positif réside, en effet, dans sa concordance avec le droit objectif. ("Objective law is the conglomeration of causal laws which determine the appearance, permanence, and development of social facts . . . . The normative translation of these self-made causal laws is positive law. Positive law, then, is only, by definition, the transposition of a society's causal laws onto a normative plane. This transposition can be either through custom or instinct; through a legislative or regulatory means; from a despotic or conventional society . . . . It can happen, it's even frequent, that positive law differs and separates from objective law, that the social norm differs from the causal law, either because a weakness in the customary or legislative agent prevents the law from being totally perceived, or because insufficient technique in the social organization prevents a total juxtaposition of the system of norms and the system of laws. However, as a necessary hypothesis, one must take for given, until the opposite is proven, that the two exactly coincide, because otherwise positive law could have no obligatory value. The validity of positive law rests, in effect, in its agreement with objective law.").

Id. at 348-50.

89. Thierry, *supra* note 87, at 199.

90. Id. (A rule not necessary toward the existence of a social fact would therefore not be "objective law.").

91. *Id.* at 198.

In the context of international, supranational, and extra-national relations, actions taken by state actors "are by nature international, since their goal, and result, is to realize this phenomenon of [legal monist] solidarity or international relations, and they are, and can only be, accomplished in conformity to international norms."[92] While the state actors could, therefore, act from a national or international perspective, and where there exist no specifically international leaders or agents, the state leaders and agents that stand in for the specifically international leaders/agents take on a "double role."[93] They are national agents and leaders when they function in the state juridical order; they are international agents and leaders when they act in the international juridical order.[94] Scelle describes this – dédoublement fonctionnel – as the *fundamental law of the uncoupling of functions*, but most describe it as "role splitting."[95]

In the context of complementarity before the ICC, some have posited that instead of having to uncouple a national and international function, the national court and the international court exist in a relation of role concurrence – in the first instance, the national court may take jurisdiction over the trial of an alleged perpetrator of an atrocity crime, but the international court will exercise its role in prosecuting the perpetrator when the national court's failure to prosecute activates the international court's concurrent jurisdiction. [96] Because they both may take responsibility for the

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92. Scelle, *supra* note 88, at 358 ("[I]l reste que ces fonctions sont par nature internationales, puisqu'elles ont pour but et pour résultat de donner satisfaction à un phénomène de solidarité ou à des rapports internationaux et qu'elles sont et ne peuvent être accomplies que conformément aux normes internationales.").

93. *See* Antonio Cassese, Remarks on Scelle's Theory of "Role Splitting" (*Dédoublement Fonctionnel*) in International Law, 1 EUR. J. INT'L L. 210, 212 (1990).

94. *Id.*

95. *Id.* at 214.

96. Some have referenced such an obligation as "role concurrence," or the simultaneous protection of important legal values of the international community and the national legal order. KLEFFNER, *supra* note 2, at 32 (citing Otto Triffterer, Preliminary Remarks: The Permanent International Criminal Court—Ideal and Reality, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT—OBSERVERS' NOTES, ARTICLE BY ARTICLE 26-28 (Otto Triffterer ed., 1999). While the concept of role concurrence is, indeed, a departure from Scelle's construct, it would appear less a departure in translating dedoublement as uncoupling – that is, each state that acts in the international community necessarily acts through its organs in both domestic and international spheres. Where law exists in the international sphere and international courts do not exist or are otherwise unable to implement that law, the courts of the state act to fulfill the obligations of the state. Because such courts are applying binding international standards on behalf of the state, the courts must uncouple the two roles – that of state court with that of international court. The court doing otherwise would be anti-legal, undermining an international rule of law. See, e.g., Scelle, supra note 88, at 657:

> If the connection of juridical situations puts into play the competence of government actors of other states, or actors with concurrent responsibility, the role of government actors careful to procure the realization of law in a

prosecution, the international and national courts would share the role of preventing and punishing atrocity crimes.[97]

The potential for shared jurisdiction may deviate from the notion of a concurrent role as opposed to a shared role. To the extent that national courts have a responsibility to vindicate supranational or meta-national[98] harms arising from atrocity crimes, the role is certainly not dissimilar from that exercised by the ICC – both the ICC and national courts are prosecuting alleged perpetrators of atrocity crimes. Realistically, however, crimes vindicated by the ICC must be limited qualitatively and quantitatively by virtue of limited jurisdiction and resources, as well as concerns for sovereign control over criminal justice matters.[99] As such, the national courts have an opportunity to revisit the goal of what Scelle would refer to as the underlying "objective law," to determine which cases can and should be prosecuted by the national courts, even where the ICC would elect not to prosecute or would find the case inadmissible for lack of

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> recognized interstate milieu will consist of a coercive act exercised on their governmental actor colleagues to obtain from them the regular utilization of their competences.

See also id. at 667:

> We are preoccupied with intervention only in international relations. But we know as well that there's no divider between an internal juridical order and the international juridical order: the extent of the latter determines the structure of the former, and when the competence of subjects of law, including nationals in interstate commerce, are covered by an international norm, the application of this norm stems from international law, even in relations between the governing and the governed, immediate subjects of the law of people.

97. This shared responsibility echoes the logic of the Responsibility to Protect, in that the state would have primacy over the international community, but the international community may need to act to put an end to crimes against humanity (including the crime of persecution through ethnic cleansing), genocide, or war crimes. *See* 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1 (Sept. 15, 2005) (United Nations General Assembly reaffirming World Summit Outcome on Responsibility to Protect, *available at* http://www.globalr2p.org/media/files/wsod_2005.pdf [hereinafter 2005 World Summit Outcome]; see also Gareth Evans, Crimes Against Humanity and Responsibility to Protect, *in* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 2 (Leila Nadya Sadat, ed. 2011); see generally Charity, *supra* note 28.

98. "Meta-national" refers to the community of peoples, and the joint interest of the nation of nations, as opposed to any smaller group that may have bilateral or other smaller group commonalities at a level hierarchically superior to the nation (supranational). See KLEFFNER, supra note 2, at 316 (claiming state promotion of matter from a national to the international realm ensures and protects "meta-national values, such as peace, human dignity and the needs of all mankind," in describing gradual development toward a "universal" law of the world community).

99. Schabas, supra note 4, at 542, 544 (noting that there are simply not enough resources for international criminal tribunals to aspire to prosecute all international crimes within their jurisdiction, and that the Office of the Prosecutor of the International Criminal Court explains the choice of situations selected by referencing the "gravity" of the situation).

gravity.[100] The role of the national court is, in the first instance, a greater role, because it may act without the strictures and limitations of the Rome Statute to prosecute perpetrators in a manner that effectively protects its populations prior to the ICC considering admissibility under a complementarity regime.

None of this suggests that national courts should elect to use substantially different national standards over international standards; rather, because of the deontological differences in the international and domestic tribunals and the fact that international standards require different duties of international courts than of national courts, the use of international standards in the investigation and punishment of crimes against humanity by courts should and must be done differently in domestic tribunals than in international tribunals.[101] Even in approaching the same end, the complementarity regime and the history of the development of the atrocity crimes demand a different approach of national courts.

4. Why Negative Complementarity Fails to Offer Sufficient Incentives to Ensure Enforcement

Many commentators have considered the utility of the ICC from the perspective of negative complementarity.[102] In considering the object and purpose of the Rome Statute, negative complementarity is the ability of the ICC to initiate an investigation only after the state that would otherwise have jurisdiction has failed to do so.[103] It is imperative to look at the goal of the international community and the roles of the state and the ICC in that process. The goal of the international community is the protection of human lives from the harms of aggressive war, genocide, crimes against humanity, and war crimes. However, these goals are not achieved when the ICC and the national courts and governments working complementary to each other, are on somewhat independent spheres under a negative complementarity framework.

One theory supporting the framework of negative complementarity focuses on the principle of domestic interest in several ways: first, in promoting a positive world perception of the state's judiciary and its

100. One might reference this as a "redoublement fonctionnel," or a functional redoubling of the state actor's efforts – exercising a metanational responsibility that the state could have chosen to opt out of, for the purpose of vindicating a core international responsibility.

101. Cassese, supra note 93, at 213.

102. *See, e.g.*, Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107 (2009); William A. Schabas, Complementarity *in Practice: Some Uncomplimentary Thoughts*, 19 CRIM. L.F. 5 (2008); Kevin Jon Heller, *The Shadow Side of* Complementarity*: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255 (2006).

103. Rome Statute, *supra* note 1, art. 17.

general capacity and support for the rule of law over anti-legal government acts or actors;[104] second, the state's interest in maintaining its sovereignty over matters arguably within its domestic sphere, as opposed to yielding sovereignty over certain criminal matters to an extra-national court; and third, the application of the underlying laws for which the extra-national court complements the state apparatus.

These justifications for relying on a negative complementarity framework are predicated on the state's negative reaction to public censure or to an extra-national sense that an act by the state breaches an international obligation. Negative complementarity presumes that the state might take action to avoid its control over a situation being undermined, and that the state's reaching an agreement with the international community on the extent of the underlying laws – whether ultimately under state or international jurisdiction – will somehow undercut state interests. Negative complementarity at its heart suggests that the state will do all in its power to prevent the assertion of authority by the complementing body[105] and, therefore, assumes that prosecution of many levels of alleged war criminals will take place at the state level in order to prevent extra-national control and influence.

On the international level, negative complementarity also assumes that the ICC will do all in its power to prosecute an alleged atrocity crime perpetrator if the state will not. However, as previously discussed, from the perspective of limited resources, prosecutorial discretion, and a lack of norm-setting guidance toward a scope broad enough to encompass such crime, the ICC has not thus far lived up to its potential in this regard.

More importantly, and not considered fully in the negative complementarity discourse, the role of the national tribunal can and should be broader than that of the international tribunal, where the state is willing and able to pursue a case against an alleged perpetrator. History shows that the development of the laws on atrocity crimes has been most successful when leaders were communicating with each other and, unfortunately, when their populations were impacted by the atrocities.[106] While the

104. *See, e.g.*, KLEFFNER, *supra* note 2, at 317 ("There is no need for international adjudicative fora if, and when, national courts can adequately achieve effective adjudication . . . ." *Id.* (citing to the requirement in the U.N. Secretary-General, Rep. of the Secretary Gen. on the Establishment of a Special Ct. for Sierra Leone, U.N. Doc. S/2000/915 [10] (Oct. 4 2000), that local courts in Sierra Leone acquire additional capacity prior to the determination of the international community's referring matters back to the state by limiting the longevity of the Special Court, implicitly recognizing a lack of capacity at the state level)).

105. KLEFFNER, *supra* note 2, at 320 ("for the first time in the history of international criminal law, State Parties have agreed ex ante that this failure [to adequately investigate and prosecute core crimes within its jurisdiction] will entail a concrete legal consequence: States forfeiting the claim to exercise jurisdiction, including over their own nationals and officials.").

106. *See* deGuzman, *supra* note 12, at 20-22 (arguing that the development of laws

international court and the national court may have the same ultimate goal of responding to an objective law relating to the prevention of atrocity crimes, the roles of the courts differ. One failure of the international tribunal is the institutionalization of its voice and the impact of its interpretation. The example of the prosecution of Bosco Ntaganda illustrates the point.

II. DEVELOPMENT OF INTERNATIONAL LAWS CAPABLE OF DEALING WITH ATROCITY CRIMES

To understand the development of international criminal law's focus on atrocity crimes through a transnational legal process lens, we must start where the nations focusing on atrocities are interacting. By looking at responses to wars, starting in the mid-nineteenth century, we can see the slow, but continuing, process of interaction, interpretation, and internalization of the social mitigation of war crimes, aggression, and crimes against humanity.[107]

This series of negotiations, accords, and conventions reveals two important lessons for current efforts at supporting a broad jurisdiction for international criminal justice mechanisms. First, the transnational discourse has been and can be an effective means of building state-level consensus as to norm-setting. From a transnational legal process perspective, these post-conflict interactions among states with regard to the rights and obligations of occupying powers in late nineteenth century and twentieth century Europe offer important parallels to our contemporary questions as to how state-level discourse can act as a norm-setting mechanism vis-à-vis the rights and obligations of international tribunals.

Second, the history reveals a striking pattern that persists today of an initial post-conflict push toward international criminal norms that would allow for broad prosecution of war crimes, only to have state-level insecurities lead to the narrowing of the scope of the international legal standards, a smaller number of prosecutions, and the resulting diminution of the initially sought-after accountability and deterrent effect.

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addressing atrocity crimes stemmed from atrocities suffered during World War II, and that subsequent development occurred after the mass atrocities occurring in Rwanda and the former Yugoslavia).

107. *See generally* DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS (Martinus Nijhoff, Dordrecht, eds. 1988); *see generally International Humanitarian Law - Treaties & Documents - Methods and Means of Warfare*, ICRC.ORG, http://www.icrc.org/ihl (last visited May 12, 2013) (reflecting much of the interactions between the states).

A. The 1874 Brussels Conference[108]

Following the Franco-Prussian War, fifteen European states gathered to discuss the laws of war, some of which had been violated during the course of the relatively brief, but bloody, conflict.[109] In considering a transnational legal process approach, the interaction of the states most affected by the war raised questions as to the proper approach to the treatment of war crimes. For example, the states had to address whether an occupying power such as Prussia had the right to defend itself against guerilla warfare by the militia-like francs-tireurs,[110] and the mass conscription of French citizens who were not regular soldiers, or whether these French citizens who acted in defense of their country deserved prisoner-of-war status.

The fifteen states utilized the code developed during the United States Civil War by Francis Lieber[111] in an attempt to develop an "International Declaration concerning the Laws and Customs of War." By building on the Lieber Code, which in turn relied on a number of seventeenth and eighteenth century European laws of armed conflict theorists, the leaders hoped to set stricter guidelines for warfare and post-conflict accountability mechanisms, as Lieber's code purported to be "strictly guided by the principles of justice, honor, and humanity."[112]

The Lieber Code required that soldiers show more discipline during war than civilians. Soldiers violating the Lieber Code might face the punishment of death, "or such other severe punishment as may seem adequate for the gravity of the offense."[113] The penal codes applicable to soldiers during combat would "not only punish [soldiers] as at home, but in

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108. See Yves Sandoz, The History of the Grave Breaches Regime, 7 J. INT'L CRIM. JUST. 657, 663-64 (2009). The article gives an excellent description of the development of grave breaches of the laws of war. For more on the resolutions undertaken by the states parties to the 1874 Brussels Conference on August 27, 1874, *see International Humanitarian Law - Project of an International Declaration Concerning the Laws and Customs of War. Brussels, 27 August 1874, available at* http://www.icrc.org/ihl.nsf/INTRO/135?OpenDocument.

109. For a cogent analysis of the conflict, see GEOFFREY WAWRO, THE FRANCO PRUSSIAN WAR (Cambridge 2003).

110. Francs-tireurs, literally, "free shooters," were men living in eastern France who trained with high quality rifles and were sometimes affiliated with the French army. When franc-tireurs were captured, Prussians did not wish to treat them as captured enemy soldiers because the free-shooters did not dress in uniform or fight with an organized group.

111. The code was entitled, "Instructions for the Government of Armies of the United States in the Field" but is generally referred to as the Lieber Code. *See* Ernest Nys, *Francis Lieber—His Life and His Work: Part I*, 5 AM. J. INT'L L. 84, 86 (1911) (describing the contributions of Lieber to the internationalization of the laws of war).

112. Sandoz, supra note 108, at 660; *See also* Francis Lieber, *Instructions for the Government of the Armies of the United States in the Field*, art. 4 (Apr. 24, 1863), *available at* http://www.icrc.org/ihl/INTRO/110 [hereinafter Lieber Code].

113. Sandoz, *supra* note 108, at 661-62; *see also* Lieber Code, *supra* note 112, art. 44.

all cases in which death is not inflicted, the severe punishment shall be preferred."[114] The interactive response of several nations to the perceived violation of rights in the Franco-Prussian War allowed the parties to develop a shared standard and joint interpretation of the Lieber Code and of the laws and customs of war more generally. The transnational nature of this enterprise marked a significant advance in the international discussion of the prosecution of war crimes.

The parties adopted the International Declaration concerning the Laws and Customs of War but did not create a binding convention. Thus, they did not bind themselves through positive law. Notwithstanding the failure to create a convention, one delegate suggested that states coordinate their internal legislation to ensure equal punishment for those violating the rules of war.[115] Perhaps due to a reluctance to cede a significant responsibility with regard to criminal justice to a larger decision-making body,[116] this suggestion was not acted upon, leaving the parties' interpretation on the table at the end of the Brussels Conference.

Regardless of the reason, these countries had come together following a conflict to consider parameters to behaviors of belligerents during time of war, seeking to prevent the negative consequences of other states' overstepping those parameters. In so doing, the states came much closer to holding themselves accountable and created a framework from which to work in the future to define limits of warfare.

B. The Oxford Manual of 1880

Notwithstanding the failure of the Brussels Declaration to be made into a convention, the Lieber Code was not without impact. In 1880, the Institute of International Law[117] adopted its "Manual of the Laws of War on Land."[118] Drawing principles from the Lieber Code and the 1874 Brussels Conference, the Manual stated that where the violation of the laws of war

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114. Sandoz, *supra* note 108, at 662; *see also* Lieber Code, *supra* note 112, art. 47.

115. Sandoz, *supra* note 108, at 663.

116. *Id.*

117. The Institute of International Law (or *Institut de Droit International*) is a non-governmental body formed in 1873 to develop the standards of international law and promote human rights. *See History*, INSTITUTE OF INTERNATIONAL LAW, http://www.idi-iil.org/idiE/navig_history.html (last visited May 16, 2013). For its influential work on developing international law, it was awarded the 1904 Nobel Peace Prize.

118. *The Laws of War on Land. Oxford, 9 September 1880*, (Sept. 9, 1880), *available at* http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/140?OpenDocument&redirect=0. The preface to the Manual notes that it does not seek an international treaty laying out the laws of war, which the authors acknowledge "might perhaps be premature or at least very difficult to obtain," but that the Manual "strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity." *Id.* at Preface.

are at the same time offenses against the general criminal law, the perpetrator should be tried and punished by the courts of the injured adversary: "the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are ... [with the] offenders against the laws of war [being] liable to the punishments specified in the penal or criminal law," when the person of the offender could be secured.[119] The articulation of this standard in 1880, which would be repeated in a second Oxford Manual of 1913,[120] would have a strong effect on the rules agreed to by the victorious powers that would be able to claim almost thirty years of recognition of the standard prior to seeking to apply it. As states sought consensus on the legal rights of states to prosecute war criminals, even those concerned with *ex post facto* laws recognized the right of the injured belligerent to prosecute the captured enemy under its own laws, the standard articulated by the International Law Institute's 1880 and 1913 Oxford Manuals.[121]

C. The Hague Conference of 1899

Twenty-five years after the Brussels Conference, Europe and other states again gathered to reach a consensus in regards to the regulation of the laws and customs of war.[122] In June 1899, the Hague Diplomatic Conference revisited topics covered in the Brussels Declaration, including the legality of acts between occupying powers and citizens of the occupied state.

Belgium, a smaller nation only recognized in 1830, was concerned that its sovereignty might be overrun by transnational norms created by more powerful states. It was particularly concerned that rights recognized in the Brussels Declaration granted too great a power to an occupying force and forbade the recognition of civilians as lawful combatants when fighting

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119. James W. Garner, Punishment of Offenders Against the Laws and Customs of War, 14 AM. J. INT'L L. 70, 71 (1920) (citing ANNUAIRE DE L'INSTITUT [DE DROIT INTERNATIONAL], 174 (1881-1882)).

120. *See Manual of the Laws of Naval War* (Aug. 9, 1913), *available at* http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/265?OpenDocument&redirect=0 (noting the comparable application of laws of land warfare (Article 79), but also noting that prisoners of war are "subject to the laws, regulations, and orders in force in the navy of the State in whose power they are." (Art. 73)).

121. *See, e.g.*, the acceptance of national tribunals to try combatants following World War I factoring in both the Commission Report (*see infra* note 135, at 121), and the Reservations of the United States (14 AM. J. INT'L. L. 95, 129 (1920)).

122. Czar Nicholas II called the conference with the intention of "seeking the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and, above all, of limiting the progressive development of existing armaments." *See Final Act of the International Peace Conference*, The Hague, July 29, 1899, *available at* http://www.icrc.org/ihl.nsf/INTRO/145?OpenDocument.

an occupying force.[123] As opposed to codifying such a standard, the Belgian delegate argued, "In my opinion, there are certain points which cannot be made the object of a convention, and which would be better to leave as they stand today, under the rule of the tacit and common law which results from principles of the law of nations."[124]

In interpreting the language of the Brussels Declaration, the Belgian delegate recognized that the agents of the various states were interpreting and, potentially, codifying a standard that the representatives of smaller states could not support, because of the power recognized in states more likely through military strength (and in recent past experience) to occupy those smaller states.[125] The Belgian delegate reframed the question so that the Conference would not decide the legality or illegality of a particular act during war; rather, the Conference would determine whether new law would be needed as part of the Hague Convention Respecting the Laws and Customs of War on Land (later known as the Hague Conventions), limiting harms that could be perpetrated by either party.[126]

Fyodor Fyodorovich Martens served as a delegate from Russia, one of the Great Powers, which supported the principles recognizing rights in occupying powers. When the parties had reached an impasse as to the balance of power between international and domestic control of war crimes issues, Martens provided the following clause (later known as the Martens Clause) for adoption:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. They declare that it is in this sense especially that Articles 1 and

123. For a discussion of the power dynamics between the delegations during the 1899 Hague Conference, *see* Cassese, infra n. 124.

124. Cassese, The Martens Clause: Half a Loaf or Simply Pie in the Sky?, 11 EUR. J. INT'L L. 187, n.11 (2000) (citing Conférence Internationale de la Paix, La Haye 18 Mai-29 Juillet 1899, Troisième Partie (1899) at 111 ("A mon avis, il y a certains points, qui ne peuvent faire l'objet d'une convention et qu'il vaudrait mieux laisser comme aujourd'hui, sous l'empire de cette loi tacite et commune qui résulte des principes du droit des gens.")).

125. *Id.* at 193-98.

126. *Id.*

2 of the Regulations must be understood.[127]

The Belgian delegation supported this limiting language as a major check on potential occupying powers: "[t]omorrow, as today, the rights of the conqueror, far from being unlimited, will be restrained by the laws of public conscience (conscience universelle) and not one country, not one general would dare to transgress them, since that would submit oneself to banishment from the civilized nations."[128] Notwithstanding arguments over the accuracy of this characterization, the Conference sidestepped the specific dispute and reached agreement on a broader point. The States Parties to the Hague Convention of 1899 internalized not the right to engage in patriotic resistance to an occupying force, nor a standard for the applicable legal authority held by an occupying power, but the legal norm recognizing the place of laws of humanity and dictates of public conscience alongside the (non-conflicting) terms of the treaty.[129] By shifting the interaction – the question of what law the parties sought to reach agreement on – the interpretation and internalization of the norm became much broader, focusing on the process for legal interpretation rather than the primary law that would directly recognize authority in occupiers.[130]

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127. *Id.* at n.1. This component of the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land, known as the Martens clause after the Russian diplomat who recommended it, may do no more than to extend to those engaging in combat as francs-tireurs the protections recognized for other lawful combatants, if it goes even that far. *See, e.g., id.* at 187-216 (arguing that custom did not permit attacks on the occupying force and would not have protected francs-tireurs, but Martens used the somewhat vague language of the clause to appease smaller countries while not affecting the responsibilities of the great Powers). Nevertheless, the reasoning allowed for under the Martens clause calls for the application of recognizable but not fully enunciated rules over a variety of circumstances not yet fully developed. Again, it may be of interest that the smaller states, such as Belgium, are looking to the protection of individuals (under the droit des gens) as opposed to the rights of states.

128. *Id.* at n.29 (citing Conférence Internationale de la Paix La Haye 18 Mai-29 Juillet 1899, Troisième Partie (1899) at 153) ("Demain comme aujourd'hui les droits du vainqueur, loin d'être illimités, seront restreints par les lois de la conscience universelle et pas un pays, pas un général n'oserait les enfreindre, puisque ce serait se mettre au ban des nations civilisées.").

129. Indeed, Cassese references the speech made by Martens after Martens tabled his proposal of the clause: "Il . . . faut se rappeler que ces dispositions [on lawful combatants and mass conscription (lévée en masse)] n'ont pas pour objet de codifier tous les cas qui pourraient se présenter." ("We must recall that the object of these clauses is not to codify every eventuality that could present itself."). *Id.* at n.18. Despite Cassese's (and Martens') view that the clause was meant to deal only with these two aspects of guerilla warfare, the defense of the limitations on the clause make the very point raised by the Belgian delegate – the smaller states could continue to look to custom and general principles in response to the overwhelming force of an occupying power.

130. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 375, 408, (dissenting opinion) (arguing that "the basic function of the Clause was to

Although the 1899 Hague Convention called only for state liability for compensation and not for criminal sanctions, the normative effect of the Martens Clause's adoption allowed for a second iteration in the 1907 Hague Convention Respecting the Laws and Customs of War on Land, and the adoption of language at that point reflected a belief in the legality of reliance as legally cognizable the public conscience and laws of humanity moving forward in interpreting lawful conduct in times of armed conflict between states.[131]

D. The 1919 Treaty of Versailles

Following World War I, the most powerful nations in Europe convened again to continue their discussions on how to resolve the issue of concurrent powers and the allocation of prosecutorial power to the international level. The transnational legal process that led to the recognition of liability for violations of the laws of war in the Hague Conventions of 1899 and 1907 were coupled with questions of individual culpability that came to the forefront during the Peace Conference of 1919.

The Commission of Responsibility of Authors for the War (the Commission of Responsibilities, or the Commission) was tasked by the Peace Conference to deal with questions of war crimes and international accountability.[132] The Commission investigated the causes of war and evaluated the ability of the several Allied powers to create a tribunal appropriate to try offenders against the laws and customs of war.[133] It distinguished this responsibility from that of the development of an

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put beyond challenge the existence of principles of international law which residually served, with current effect, to govern military conduct by reference to the 'principles of humanity and ... the dictates of public conscience.'") One should also note Martens' own investment in, and his reminder to his colleagues regarding, the Conference's successfully codifying some of the standards the Brussels Declaration had failed to codify. Czar Alexander II had convened the 1874 Brussels Conference, and Czar Nicholas II convened the 1899 Hague Conference, such that Martens reminded his colleagues that the failure of the diplomatic community to agree on specific treaty rules for a second time would show the military that diplomats could not fashion rules regarding the laws and customs of war, leaving the military free to interpret the laws of warfare as they pleased. See Cassese, supra note 124, at 195.

131. Although Cassese argues that Martens' references in the clause may have been a political expedient to appease the Belgians, Martens' belief in a limited natural law depiction of human rights foreshadows the "objective law" view of Scelle: "These [human] rights flow from the nature and from the conditions of humanity and so cannot be created by legislation. They exist in themselves." [Ces droits [de l'homme] découlent de la nature et des conditions de l'humanité et ne peuvent donc pas être créés par la législation. Ils existent par eux-mêmes.] Cassese, supra note 124, n. 45 (citing Martens, Traité de droit international, vol. I, at 14 (1883-87)).

132. *See* Paris Peace Conference, Violations of the Laws and Customs of War: Reports of Majority and Dissenting Reports American and Japanese Members of the Commission of Responsibilities, 1-2 (1919). Foreign Relations of the United States, vol. III, 203-05 (1919).

133. *Id.*

international tribunal and truth-gathering organization, a job believed to be better left to historians.

As noted previously, the 1907 Hague Convention restated and reiterated the 1899 Martens Clause to call for a broader reading of positive law as expressed through principles and the laws of humanity, beyond the written word articulated in the codification completed during the 1899 and 1907 Conferences. The continued interaction among institutional actors, such as other delegates who accepted the terminology of and purpose behind the Martens Clause, allowed for its repeated use through the 1919 Peace Conference and its internalization by representatives of States Parties.[134] It was of particular import to the Commission that during the 1907 negotiations, the German representative had taken a stance on the importance of international principles as guiding state actions. Rather than focus on formulating specific language for each eventuality, that representative had stated that certain acts would not be taken by the German Navy, not because of the codification undertaken by the Conference, but because such actions would be contrary to the unwritten law of humanity.[135]

That the German Navy used submarine mines during World War I—the very act that the German representative had stated need not be specifically forbidden by treaty[136]—was not lost to the participants in the 1919 Peace Conference. The Commission appeared to take particular offense that "those Powers . . . a short time before had on two occasions at The Hague protested their reverence for right and their respect for the principles of humanity," had fully reversed position and committed those very acts only a decade later.[137]

The understanding that, on some level, nations had accepted the idea of a transnational unwritten law of humanity allowed the commission to decide that "the public conscience insists upon a sanction which will put clearly in the light that it is not permitted cynically to profess a disdain for the most sacred laws and the most formal undertakings."[138] However strong the desire was for an international sanction against Germany's war crime,

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134. *Id.*

135. *See* Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference* (Mar. 29, 1919), 14 AM. J. INT'L. L. 95, 117-18 (1920) [hereinafter Commission Report]; *see also id.* n. 65 (citing the declaration of Baron Marschall von Bieberstein to the Hague Conference of 1907: "Military operations are not governed solely by stipulations of international law. There are other factors. Conscience, good sense, and the sense of duty imposed by the principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German Navy, I loudly proclaim it, will always fulfill in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization.").

136. *See id.*

137. *Id.* at 117-118.

138. *Id.* at 118.

the Commission was frustrated by the fact that the Hague Conventions had not set up a mechanism for the investigation and prosecution of a premeditated war of aggression.[139] Instead, the Commission was only able to recommend, based on the gravity of the outrages upon the principles of the law of nations and upon international good faith, that certain acts "be the subject of a formal condemnation by the Conference," and that "for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law."[140]

Due to past interactions and the development of standards over the course of the previous half-century, the Commission's treatment of laws and customs of war and the laws of humanity could be, and was, much broader than its treatment of aggressive war. The Commission concluded that "[a]ll persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."[141] This marked a remarkable shift since a decade ago, there was reluctance in putting into place international tribunals to prosecute war crimes.

The Commission went even further, not limiting its recommendations with regard to international criminal prosecution to only those actually committing war crimes. In addition to the parties culpable for breaches of the laws of humanity, the Commission report added responsibility for those who failed to prevent violations of the laws or customs of war, which included some of the highest ranking military leaders and officials of the German government.[142]

During the course of the war, politicians and lawyers had called for the punishment of not just the immediate perpetrators but also of those with some degree of command responsibility.[143] However, at the war's end, all

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139. Id. (stating that a suddenly declared war under false pretexts

> is conduct which the public conscience reproves and which history will condemn, but by reason of the purely optional character of the institutions at The Hague for the maintenance of peace (International Commission of Inquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorized to consider under its terms of reference.).

140. Id. at 120. Again, the Commission considers the gravity of the outrages on the principles of international law or the law of nations as creating sufficient reason for future penal action.

141. Id. at 117.

142. Id. at 121.

143. See Garner, supra note 119, at 88-89 (citing 39 REVUE PÉNITENTIAIRE 457 (1915) (according to Professor Weiss of the Law Faculty of the University of Paris, "I think . . . that not only the direct immediate offenders should be held responsible, but that we must go to the top; we must pass over the heads of the primary offenders, to the chiefs, to those of whom the soldiers and officers have been only the servants and valets.")).

parties were waiting to see whether the international community would maintain the will to actually prosecute that broad range of individuals.[144] Some noted that Kaiser William II had instigated the war and believed his stepping down and trial would be good for international justice and morality, and would also benefit the German people in terms of having an international reckoning for a key player in starting the war.[145] The Commission held firm in its recommendation for a broad reach of potential war crimes culpability, encouraging its application for the first time to political leaders as well.[146]

Despite the strength of the Commission report, there were some doubts as to the wisdom of allowing international prosecution of war criminals. Even among the Allies in favor of the Commission report, some nationals questioned the logic of this submissive sovereignty – an international court may be prone to engage in overreach in making those decisions relating to imprisonment that were typically within the purview of the sovereign.[147] Respected scholars were incredulous at the idea a sovereign would allow international tribunals of third states or enemy states to judge deeds typically left to the national courts.[148]

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144. See, e.g., James F. Willis, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 51 (Greenwood Press 1982)(citing France's statement to Germany of October 4, 1918: "Conduct which is equally contrary to international law and the fundamental principles of all human civilization will not go unpunished . . . . The authors and directors of these crimes will be held responsible morally, judicially, and financially. They will seek in vain to escape the inexorable expiation which awaits them.").

145. *See, e.g., id.* at 38 (noting former U.S. President Howard Taft stating, "William was behind it all the time," and former U.S. Ambassador to Great Britain Joseph Hodges Choate hoping the war would "put an end to this Imperial Dynasty and give the people of Germany a chance.").

146. *See* Commission Report, *supra* note 135, at 116-17.

147. See HARRY D. GOULD, THE LEGACY OF PUNISHMENT IN INTERNATIONAL LAW 16 (Palgrave MacMillan ed. 2010) (discussing sovereignty as the contrapositive to punishment in defining sovereignty as that which exists above punishment).

148. See Garner, *supra* note 119, at 71, n.2, (quoting a speech from Professor Louis Renault, 1907 Nobel Peace Laureate and participant for France in the 1899 and 1907 Hague Peace Conferences, in which Renault was asked about the enforceability of a provision in a treaty of peace requiring delivery of principal offenders against the laws of war to triers outside of the defendants' nations:

> I do not see how a government, even if conquered, could consent to such a clause; it would be the abdication of all its dignity; moreover, almost always, it is upon superior order that infractions on the law of nations have been committed. I have found the proposal excessive, though I understand the sentiment that inspired it. I cite it because it shows well to what point men, animated by justice and shocked by what has taken place, desire that the monstrosities of which French and Belgians have been victims should not go unpunished.

Despite these concerns, the Commission suggested two mechanisms of prosecution. First, each belligerent would have the power to set up, or use from its current system, an appropriate domestic trial venue that would enforce international norms.[149] Second, the Peace Conference could create a high tribunal to try special cases, including (1) defendants belonging to enemy countries that have committed outrages against civilians and soldiers of several Allied nations; (2) persons in authority whose orders affected the conduct of operations against several of the Allied armies; (3) all civil or military authorities of enemy countries, regardless of rank, who ordered or failed to prevent violations of the laws or customs of war;[150] and (4) such other persons who were most appropriately tried before an international tribunal.[151] Of note, the high tribunal would also have preference over national courts for the same offence, have the ability to transfer cases to national courts for inquiry or for trial and judgment, and would allow for prosecutorial discretion in case selection.[152]

The Commission stated that the tribunal would apply "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience."[153] This language drawn from the Martens Clause would set sufficient parameters to allow for the trial of war criminals. The tribunal would "have the power to sentence [the guilty party] to such punishment or

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25 REV. GEN. DE DROIT INT. PUB. 25). *See also* Carlos S. Nino, The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina, 100 YALE L. J. 2619, 2638-39 (1991):

> Violations of human rights belong with crimes such as terrorism, narcotics-trafficking, and destabilizing democratic governments, in a category of deeds which may, because of their magnitude, exceed the capacity of national courts to handle internally. ... But if the establishment of international courts seems impossible, intermediate solutions could be implemented, such as the internationalization of jurisdiction, and the refusal of foreign courts to recognize amnesties, pardons, or special statutes of limitations for these kinds of crimes.

149. Commission Report, *supra* note 135, at 121 (stating that each belligerent had the right to form "an appropriate tribunal, military or civil, for the trial of such cases ... [which] would be able to try the incriminated persons according to their own procedure, and much complication and consequent delay would be avoided which would arise if all such cases were to be brought before a single tribunal"). Again, this follows the recommendation and model law of the 1880 Manual of the Laws of War on Land, *supra* note 81.

150. Commission Report, *supra* note 135, at 121 (authorizing trial of "all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war).

151. *Id.* at 121-22.

152. *Id.* at 122. For example, the Commission plan states "the duty of selecting the cases for trial before the tribunal and of directing and conducting prosecutions before it shall be imposed upon a Prosecuting Commission of five members . . . ."

153. *Id.*

punishments as may be imposed for such an offence or offences by any court in any country represented on the tribunal or in the country of the convicted person."[154] Looking at the list of crimes reported by the Commission, the crimes are neither divided between war crimes and crimes against humanity, nor are they systematically compiled.[155] Instead, the list is illustrative of "diverse" and "painful" crimes, with additions "daily and continually being made."[156] None of the European powers serving on the Commission sought to challenge this fairly expansive power. The Martens Clause had matured into settled law for the states that had participated in the conferences leading to the Hague Conventions of 1899 and 1907.[157]

E. Challenges to the 1919 Commission Report

In its challenges to the Commission Report, the US delegates raised a number of issues deriving from a claimed distinction between legal and moral obligations: the United States noted that "[t]he laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations," while the "laws and principles of humanity vary with the individual," preventing them from being considered in a court of justice, particularly in the administration of criminal law.[158] Rather than vindicating

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154. *Id.*

155. Sandoz, *supra* note 108, at 668-69 (arguing that the list, while "somewhat interesting historically, . . . cannot be viewed as the result of a serious and systematic work of scholarship carried out to show established doctrine or state practice.").

156. Commission Report, *supra* note 135, at 113-115.

157. Although only ten of the fifteen signatories to the 1907 Hague Convention served on the Commission on Responsibilities, eight of the ten – all but the United States and Japan— recognized the Commission's Majority Report without reservation.

158. Commission Report, *supra* note 135, at 134 (the United States representatives here distinguish between responsibilities of a legal nature and those of a moral nature). *See also id.* at 128. *But see id.* at 136 (arguing to the political question of sovereignty and head of state immunity); *id* at 139-140 (distinguishing to the submission of a non-binding commission of inquiry for aggressive war, to the extent anybody can investigate and distinguish between an aggressive and defensive posture, and to note that such a body would be responding to a moral and not legal question); *cf. id.* at 146 (noting that tribunals to hear war crimes must consider only war crimes over which the individual states already have jurisdiction, as there was "no international statute or convention making a violation of the laws and customs of war—not to speak of the laws or principles of humanity—an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence"); *cf. id.* at 147 (noting the United States was "averse to the creation of a new tribunal, of a new law, of a new penalty, which would be ex post facto in nature, and thus contrary to the Constitution of the United States and in conflict with the law and practice of civilized communities"); *cf. id.* at 148 (noting that heads of state who violate the laws and customs of war "are, as agents of the people, in whom the sovereignty of the state resides, responsible to the people for the illegal acts which they may have committed, and that they are not and that they should not be made responsible to any other sovereignty"); *cf. id.* at 129, 149 (stating that a head of state is morally, but not legally,

rights that exist according to the laws or principles of humanity-- a term negotiated, adopted, and utilized within a European context-- the United States looked to apply the written laws of the parties regarding their own courts applying penal laws to enemy belligerents.[159]

The Japanese delegates similarly questioned whether international law recognized a penal law for a belligerent presumed guilty of a crime against the laws and customs of war, but appeared to challenge only the inclusion of heads of state in those to be charged under high tribunal, and the punishment for failure to "abstain[] from preventing or taking measures to prevent, put[] an end to, or repress[] acts in violation of the laws and customs of war."[160] Thus, while the European members of the Commission on Responsibility looked to interpretations of law developed through and internalized following the Brussels Declaration and Hague Conventions, the United States and Japan did not recognize the developments as having achieved the standard of law in a strict sense.

Eventually, following the first World War, the Allied governments decided to limit their requests, "only want[ing] to make an example. To try very large numbers would be to create great difficulties for the German Government," which some states viewed as easier to work with than a potential Bolshevist or Militarist Government.[161] State leaders shifted the membership of the Inter-Allied Mixed Commission[162] from legal experts to those who would assist in the political expedient of selecting a number of cases for Germany to conduct, "to uphold moral principles and treaty rights."[163]

While maintaining the commission structure, this signified the move toward a political solution over a legal one, moving away from legal concepts such as deterrence of, retribution against, and reparations from individual perpetrators toward recognition of culpability and reparations by the state. Thus, while states recognized the harm done by the parties

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responsible to mankind, such that the authority of the Commission was circumscribed by its mandate: to report on "facts as to the violations of the laws and customs of war committed by the forces of the German Empire and its allies . . .").

159. Commission Report, *supra* note 135, at 135.

160. M. Adatci & S. Tachi, Reservations by the Japanese Delegation *(Apr. 4, 1919)*, 14 AM. J. INT'L L. 70, 152 (1920).

161. Willis, supra note 144, at 117 (referencing the English view that the Allies should seek the surrender of "the most important and notorious offenders and let the rest go," and the French view to commence with "a few symbolic persons."). While even a shortened list of Germans sought by the Allies for trial had 1,580 alleged offenders on it, compromise among the Allies brought the list down to 890. Eventually, the Allies allowed Germany to try an almost negligible number of alleged war criminals.

162. The Inter-Allied Mixed Commission was formed to "collect, publish and communicate to Germany details of the accusations made against each of the responsible persons" for war crimes during World War I. *See Allied Note to President of German Delegation Respecting War Criminals, May 7, 1920*, in 16 (4) Supp. AM. J. INT'L L. 195, 196 (1922).

163. Willis, supra note 144, at 124.

defeated during the war and could specify the criminal nature of that harm such that a majority of those states could agree to the propriety of criminal sanctions, political and economic expediency allowed the states to, in large part, step away from criminal process in response to war crimes and crimes against humanity.

F. The Nuremberg Charter of the International Military Tribunal

Thus far, we have seen that Europe and increasingly, other world powers develop penalties for crimes engaged in during a conflict use war and legal issues raised through the conflict to crystallize legal questions regarding rights and responsibilities of parties to the conflict. Following the first World War, most of the great Powers of Europe had recognized a legal standard, but were unwilling or unable to enforce that standard.

The twentieth-century saw the rise of a voluntary-positivist view of international law – law as an expression of the will of the state, based in a specific, legally cognizable source on which the state representative might rely.[164] In applying international law, the international community had to decide what weight to give arguments stating that a law reached customary status, or reflected a general principle.[165] This happens whether the international community can interpret international law through a designated international body, or allows for interpretation of the law to

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164. While we certainly saw as much in the United States response to crimes against humanity in the Commission report following World War I, we also see the International Court of Justice struggle with sources of law. *See, e.g.,* Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 5 (Mar. 3, 1950) (dissenting opinion of ICJ Judge Alvarez):

> The common view that international law must be created solely by States is, therefore, not valid to-day-nor indeed has it ever been.... [New International Law's] point of departure is that, to-day, States are increasingly interdependent: and that consequently they do not form a simple community, as formerly, but rather a veritable international and organized society. This society in nowise abolishes the independence and the sovereignty of the States, nor their legal equality (Article 2 paragraph 1, of the Charter); but it limits this sovereignty, and the rights which flow therefrom, in view of the general interests of this society.
>
> In accordance with the Preamble to the Charter, the new organization- and consequently, the new law which flows therefrom- must have the following ends in view: to maintain peace, to consider the general interest, to safeguard fundamental human rights, to promote co-operation between States, to bring their interests into harmony, to promote economic, social, intellectual and humanitarian progress. The old individualistic law had none of these purposes; it took account only of the interests of the individual [state] considered in isolation.

Id. at 13-14.

165. *Id.*

devolve back to the states.

The bases of international law were recognized and formalized by the international community in the Charter of the Permanent Court of International Justice, to be later restated in the Statute of the International Court of Justice.[166] Independent sources of international law include treaty law, customary international law, and general principles of law, with decisions of jurists and writings of scholars take on a supportive role in understanding the law.[167] These sources are a minimum – that is, courts may look to these sources and give them weight, notwithstanding arguments made by a party before the court that a particular source is not properly law.[168] The dynamics underpinning all of these sources of law were hotly debated at the end of World War II,[169] when the question of what international criminal justice mechanisms were desirable, available, and enforceable loomed large.

The victorious states, as the United Nations,[170] prepared for the prosecution of Nazi war criminals at the end of World War II. The US delegate to the United Nations War Crimes Commission, Herbert Pell, sought retribution for atrocities committed against people on racial or religious grounds based on the application of the "laws of humanity" and suggested crimes committed against persons based on their race or religion constituted "crimes against humanity."[171]

British prosecutor Hartley Shawcross noted that crimes against humanity were different in kind from the crime against peace and the ordinary war crime. To a certain extent, the crime was carried out as part of the Nazi Party's total war policy, thereby raising international issues of

166. U.N. Charter, Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993 (1945) [hereinafter U.N. Charter].

167. *Id.* art. 38(1).

168. *See, e.g.*, Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 1994 I.C.J. 112 (July 1994) (where the International Court of Justice finds the existence of a treaty notwithstanding denial of intent to treat meeting minutes as binding by party seeking to challenge I.C.J. jurisdiction.).

169. *Formulation of the Nürnberg Principles*, 2 YB. Int'l. L. Comm'n. 181,182-88 (1950). Indeed, at a meeting of the International Law Commission in 1949, member Georges Scelle proposed that the International Law Commission "also formulate the general principles of international law underlying the Charter and the judgment [of the Nürnberg Court]," but the proposal was rejected. *Id.* at 189.

170. The term "United Nations" in its current context was first used in a document describing twenty-six nations united "in the struggle for victory over Hitlerism." *See* United Nations, *Declaration by United Nations* (Jan. 1, 1942), http://untreaty.un.org/cod/avl/ha/cun/photo06.html; *see also* United Nations, *History of the United Nations*, http://www.un.org/en/aboutun/history/ (last visited May 17, 2013) (describing the United Nations' history).

171. Michael R. Marrus, The Nuremberg War Crimes Trial 1945-46: A Documentary History 186 (Bedford Books 1997).

crimes against peace.[172] However, in addition to its impact on the international community, its criminalization derived from "matters which the criminal law of all countries would normally stigmatize as crimes—murder, extermination, enslavement, persecution on political, racial or economic grounds."[173] Shawcross noted that the nations adhering to the Nuremberg Charter "felt it proper and necessary and in the interest of civilization to say that these things . . . were, when committed with the intention of affecting the international community . . . not mere matters of domestic concern but crimes against the law of nations . . . ."[174]

Again, we see the effects of a transnational legal process, albeit one in which the victorious powers following a conflict also acted with power in the domestic sphere as occupying forces. Notwithstanding that, there was the *interaction* of states and peoples – both allies and enemies – during a time of war and soon thereafter, trying to clarify the scope and nature of international criminal justice. As a supranational or international community, the rules that should have protected populations needed to be *interpreted* in a way that was acceptable within a legal framework, both by the prosecuting states and the citizens of states subject to trial; in doing so, the states and international community *internalized* the notion that these crimes were cognizable in the international sphere. By setting parameters for punishment following a specific conflict, the United Nations recognized an applicable international criminal system, and set about attempting to codify it, internalizing it for the victorious states as well as for those defeated during the war.

G. Development of Atrocity Crime Regulation Since Nuremberg

In the years since Nuremberg, the scope of the jurisdiction of international tribunals has expanded in some contexts and faltered in others. This splintered approach reflects political pressures, financial constraints, decisions made based on prosecutorial discretion, and a persistent ambivalence toward international jurisdiction over atrocity crimes. Notwithstanding the inconsistencies in the approach of the United Nations bodies and member states responding to international criminal law issues, the trend of non-governmental organizations, the UN system, and states has been toward the development of standards and processes to enable the prosecution of international crimes.

One of the initial agenda items of the nascent United Nations organization was the codification of the Nuremberg Principles, undertaken

172. *Id.* at 188.

173. *Id.* at 188-89 (citing Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, 42 vols. 19:470-72 (Nuremberg International Military Tribunal, 1947)).

174. *Id.*

by the International Law Commission in a Draft Code of Offences against the Peace and Security of Mankind.[175] The International Committee for the Red Cross prepared a draft of re-articulated international humanitarian law, which after diplomatic Conferences in Geneva became the 1949 Geneva Conventions; some aspects of the Geneva Conventions clarified the need for states to prosecute grave breaches of the Laws of Armed Conflict.[176]

The early 1950s saw an advance toward the ICC, and a move toward the end of impunity for war crimes and crimes against humanity (including genocide) was progressing well. The international community came to accept that "[i]nternational law now protects individual citizens against abuses of power by their governments [and] imposes individual liability on government officials who commit grave war crimes, genocide, and crimes against humanity."[177] The General Assembly unanimously affirmed the principles of the Nuremberg Charter, which many courts, international and municipal, have understood as an authoritative declaration of customary international law.[178]

During the Cold War, distrust and power imbalances prevented the on-going codification and development of international criminal law, with some exceptions, prior to the development of the *ad hoc* tribunals.[179] Despite this period where the growth of international criminal law slowed, development of international criminal law has increased greatly with ad hoc tribunals, the creation of the ICC, and the development of international

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175. Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, G.A./Res./177(II) (Nov. 21, 1947), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/038/84/IMG/NR003884.pdf?OpenElement:

> [T]o entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly, and directs the Commission to (a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and (b) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded on the principles mentioned in sub-paragraph (a) above.

Id.

176. Sandoz, supra note 108, at 673-75.

177. Anne-Marie Slaughter & William Burke-White, An International Constitutional Moment, 43 HARV. INT'L L. J. 2, 13 (2002).

178. Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L. J. 449, 455 (2010).

179. *See generally* BRUCE BROOMHALL, INTERNATIONAL CRIMINAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT (Oxford 2003) (arguing that the Cold War period represented a time during which nations emphasized geopolitical concerns over the prosecution of war crimes); Frédéric Mégret, *The Politics of International Criminal Justice*, 13(5) EUR. J. INT'L L.1261 (2002).

criminal law claims in national jurisdictions.

The first half of the twentieth century had raised the possibility of greater accountability for atrocities. Despite a lack of prosecutions, the arguments raised in the recommendation of the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties[180] advanced legal standards. Twenty-two perpetrators prosecuted at the IMT Nuremberg trial, as opposed to the trials of over 1,000 alleged perpetrators of war crimes and crimes against humanity pursued under Control Council Law No. 10 by military tribunals in occupied Germany and in liberated or Allied nations,[181] already reflected a growth in the possibility of prosecutions of international crimes at international and domestic levels, even where the domestic courts were under the authority of occupying powers. The ICC and the ad hoc tribunals for the former Yugoslavia and for Rwanda allowed for a greater number of trials to occur, both in the courts themselves and outside the international court context both in the completion strategies' recognition of domestic courts and the expansion of complementarity.[182]

The question of the ICC's jurisdictional scope persists, with continued confusion regarding complementarity and the question of whether the ICC or national courts ought to try war crimes, atrocity crimes, and crimes against humanity. The reliance on the national courts makes structural sense, to the extent that the ICC recognizes the primacy of the national courts[183] and is a reserve court, intended to take cases only when the national courts are unwilling or unable to prosecute the case,

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180. Again, but for the four areas of exceptional cases recommended for an international or mixed tribunal, the Commission recognized the right of each belligerent to try "incriminated persons" in the belligerent's custody in an appropriate military or civil tribunal existing under, or set up pursuant to, national legislation, and according to the belligerent's own procedure. Commission Report, supra note 135, at 121. Presumably the vast number of trials would have taken place within a national jurisdiction.

181. Scharf, supra note 178, at 454; KLEFFNER, supra note 2, at 34 (for the claim of over 17,000 prosecutions in East Germany for crimes during the Second World War, with 1,800 for capital offenses, citing C.F. Rüter, Door Nederland Gezochte Oorlogsmisdadigers Allang Berecht Door de DDR—Prof. Rüter Krijgt Toegang Tot Stasi-achieven, 49 FOLIA 1-2, 8-11 (1996)).

182. Indeed, the completion strategies for the ICTY, *List of ICTY Completion Strategy Reports*, http://www.icty.org/sid/10016 (last visited May 17, 2013), and the ICTR, *International Criminal Tribunal for Rwanda, ICTR Complete Strategies*, http://www.unictr.org/AboutICTR/ICTRCompletionStrategy/tabid/118/Default.aspx (last visited May 17, 2013), called for their prosecutors to transfer cases of mid-level and lower-level perpetrators to national courts to allow the international courts to focus on the most responsible senior leaders. This dual track calls for the expanded use of national courts to deal with admittedly international issues.

183. See Rome Statute, *supra* note 1, arts. 1, 17, 53, 58 (referencing complementarity, admissibility, and the issuance of a warrant of arrest when a case is within the jurisdiction of the Court).

notwithstanding the national court's obligation to prosecute.[184] Nevertheless, the Nuremberg Tribunal noted that individuals who commit a crime under international law can be punished for violations of international law.[185] The differential posture of the Nuremberg Tribunal and the Rome Statute serve to highlight the tension in this area of concurrent powers between the international and national levels. Yet this tension is not new.

The International Law Commission clarified as early as 1950 that the duties imposed on individuals by international law require no interposition of internal law, and reiterated the principle in the 1954 Draft Code of Offences against the Peace and Security of Mankind.[186] The responsibility for compliance lies with the people, and the remedy for a breach should be immediately available, without further action taken by their leaders or government agents prior to the enforceability of the peoples' rights. Thus, the United Nations and its members recognized a right existing in individual persons, and prosecutable against individual perpetrators.

However, it may be difficult to vindicate a right that individuals cannot pin down. In revisiting the language of the crimes against humanity provision of the Nuremberg Charter, interaction and interpretation led to fragmentation of an understanding of the crime's definition. For example, the 1954 Draft Code of Offences against the Peace and Security of Mankind specifically referenced (a non-exhaustive list of) crimes against humanity in the context of whether such crimes must be in the context of a war.[187] The 1991 Draft Code of Crimes Against the Peace and Security of Mankind referenced the same material, but expanded it into "Systematic or Mass Violations of Human Rights," and to conform to the principle of nullum crimen sine lege, purported to make the list exhaustive.[188]

Because the violation of human rights would need to be of an extremely serious character, only systematic violation such as a constant practice or a methodical plan or mass scale (based on the number of people or the size of the entity affected) violations would fall within the 1991 Code.[189] The party violating the human right could be a public official, or "private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systemic or mass violations of human rights covered by the article . . . ."[190] This response to systemic/mass scale

184. See *id.* pmbl. ¶¶ 4, 6, & art. 1; Kleffner, *The Impact of Complementarity*, *supra* note 32, at 93-94.

185. Nazi Conspiracy and Aggression: Opinion and Judgment, 1 Int'l Mil. Trib. 52 (1947); Draft Code of Crimes Against the Peace and Security of Mankind, 2 Y.B. Int'l L. Comm'n 18 (1996) [hereinafter *Draft Code*] (emphasis added).

186. 2 Y.B. Int'l L. Comm'n 150 (1954).

187. Id.

188. See 2 Y.B. Int'l L.Comm'n 103-04 (1991).

189. *Id.* at 103.

190. *Id.* At 103-04.

human rights abuse was framed quite differently from the crime against humanity claims brought before the Nuremberg Tribunal.[191]

The 1993 and 1994 International Criminal Tribunals for the Former Yugoslavia (hereinafter, the "ICTY") and for Rwanda (hereinafter, the "ICTR"), respectively, split the difference in terms of their treatment of crimes against humanity for jurisdictional purposes. The ICTY Statute required that the perpetrator commit the crime against humanity during an armed conflict, but expanded the definition of the crime to include "other inhumane acts," such that the list no longer purports to be exhaustive.[192] The ICTR Statute, on the other hand, did not require that crimes against humanity occur during armed conflict, but that the perpetrator must "commit [the crime] as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds . . . ."[193]

The International Law Commission continued to develop and codify the laws allowing for the prosecution of these international crimes, with additional changes. The 1996 Draft Code of Crimes Against the Peace and Security of Mankind requires that a crime against humanity be "committed in a systematic manner or on a large scale and [be] instigated or directed by a Government or by any organization or group."[194] The International Law Commission commentary to the Draft Code claims to apply "the Charter of the Nürnberg Tribunal, as interpreted and applied by the Nürnberg Tribunal, taking into account subsequent developments in international law since Nürnberg."[195]

Instead of relying on the standard requiring a massive human rights violation to qualify as a crime against humanity, as indicated in the 1991 Code, the 1996 Code points out that the Nazi policy of terror was "certainly carried out on a vast scale," in order to suggest that, if the crime is not systemic, but is widespread, it can still qualify as a crime against humanity.[196] This mirrors the type of standard and language used since the

191. *But see* Schabas, supra note 4, at 536 (noting that, with the end of the Cold War and fall of the Berlin Wall, proposals for an international criminal court were strengthened by the growing emphasis of the human rights movement on accountability for atrocity crimes).

192. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Updated Statute of the International Criminal Tribunal For The Former Yugoslavia* http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (last visited May 17, 2013).

193. United Nations, *International Criminal Tribunal for Rwanda (ICTR): Statute of the International Criminal Tribunal for Rwanda*, 61, http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf (last visited May 17, 2013).

194. *Draft Code, supra* note 185, at 47.

195. *Id.*

196. *Id.*

time of the Lieber Code.[197] The requirement of group instigation or direction of the 1996 Code was new, and was intended "to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own plan . . . [particularly as] it would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18 [the Crimes Against Humanity provision]."[198] These variances in treatment by the Draft Codes of 1991 and 1996 serve to illustrate the ongoing tension in defining what acts are grave enough to qualify as crimes against humanity and, therefore, should qualify for admissibility before the ICC.

The Rome Statute defines Crimes Against Humanity as "any of the following acts [listing acts virtually identical to the 1996 Draft Code] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[199] Not surprisingly, when U.S. Senators Durbin, Leahy, and Feingold introduced the Crimes Against Humanity Act of 2009, the Act tracked the language of the Rome Statute.[200]

The baseline for a crime against humanity, specifically its attack requirement, appears to be higher than the standard set in the 1996 Draft Code, and different than the standard for crimes against humanity in the ICTY and ICTR Statutes. Thus, the standard appears to be narrower from the International Law Commission recommendation, notwithstanding the recognition by a majority of UN member states that the ICC has jurisdiction, that the United Nations through the Security Council may refer matters to the ICC under Security Council authority to maintain international peace and security,[201] and that the right to protection from these harms belongs to individuals under international law, not to citizens

197. *Id.*

198. Id.

199. Rome Statute, *supra* note 1, art.7.

200. See Scheffer, *supra* note 14, at 25-28. Ambassador Scheffer noted that the Act required the attack be systematic and widespread, while the Rome Statute allows for the attack on a civilian population to be systematic or widespread – but, given that the Rome Statute definition describes an "attack directed against any civilian population" to mean "a course of conduct involving the multiple commission of acts referred to in [the listing of crimes against humanity] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack . . . ," the crime must be widespread (multiple commission) and systematic (pursuant to a policy), as formulated by the Rome Statute Elements of Crimes. *Id.* at 27. Thus, while the wording of the crime appears to be stricter than wording found anywhere else protecting against crimes against humanity, the distinction made no difference.

201. *See* U.N. Charter, *supra* note 166, arts. 39, 41, 42. The authority of the Security Council has been the basis for referrals to the ICC in the situations in Darfur, Sudan, and in Libya, both non-parties to the Rome Statute at the time of referral (for a description of situations before the ICC, see http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx).

of states through their state governments.

Assuming that the state has an obligation in the international sphere to enforce the international understanding of crimes against humanity and a responsibility to protect individuals within its borders from international crimes, it is unclear in this fragmented model which definition would apply. It could be the Draft Code as custom derived from state practice by the International Law Commission, or the Rome Statute as Treaty and the customary law adopted by over 120 states, or even the international tribunals created by the Security Council that have been in existence for nearly twenty years.

III. MOVING FORWARD: THE ROLE AND OBLIGATION OF NATIONAL COURTS

Previous parts of this Article outlined some of the failures of the ICC to live up to its potential and have traced the historical patterns that suggest that the ICC will continue to narrow its jurisdictional scope. This part offers potential solutions by considering how the current quandary surrounding ICC complementarity and definitions of gravity can motivate national courts to prosecute war crimes and engage in essential norm-setting behavior that will resonate on both the national and international level.

The fact that ICC jurisdictional standards are still malleable creates the opportunity for national leaders and agents, judges, and non-governmental organizations to demand a decrease in barriers when seeking a remedy, a greater number of trials, and the implementation of laws of the ICC as the law of the state by seeking the adoption of terms broader than that of the ICC statute as legislation within the state. While the perceived lack of legitimacy of national courts may indeed be an issue, the national courts' implementation of a lower threshold to entry than that of the ICC may be the only manner to effect both the underlying purpose of the Court, and to create a body of law from which other international criminal cases can begin the process of interaction anew.

In addition, the international community has evolved in not only recognizing a duty under international law to prosecute international crimes as defined by international law, but also a responsibility to protect our populations from the very harms caused by atrocity crimes.[202] In addition to the obligation to give effect to criminal law recognized in the Rome Statute, the United Nations has recognized that primary protection falls to the state with secondary responsibility exercisable by the international community through the UN Security Council.[203] This secondary right in the

202. *See* Charity, *supra* note 28, at 90-109 (detailing the development and standards under the Responsibility to Protect).

203. 2005 World Summit Outcome, *supra* note 97, ¶¶ 138-39.

international community to invest in state security even against national will is also exercisable through the Security Council, which can refer matters to the ICC, and delay the matter's consideration in the interest of international peace and security.[204]

In the meantime, the progressive narrowing of the ICC jurisdiction has the potential to wreak immediate and problematic effects. For example, while the conflicts in the Great Lakes region of Africa may continue for years to come,[205] actions surrounding the ICC have also given some evidence of compliance pull in the application of amnesty laws in Uganda.[206] In communications with the ICC, Uganda was able to pass an amnesty law for the largest portion of those involved in regional conflict, while retaining the ICC as a reserve court.[207] If that decision does not work to Uganda's benefit, the compliance pull for such an act will decrease, and the Court will not establish a norm in support of similar negotiations.[208] In

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204. Rome Statute, *supra* note 1, arts. 14 & 16.

205. *See, e.g.*, Jon Lunn, *The African Great Lakes Region: An End to Conflict?*, HOUSE OF COMMONS (Research Paper 06/51), at 4 (2006), *available at* http://www.stabilisationunit.gov.uk/stabilisation-and-conflict-resources/geographic/doc_details/328-the-african-great-lakes-region-an-end-to-conflict.html:

> The conflicts of the last decade across the African Great Lakes region must be understood in the context of longer-term dynamics of ethnic conflict and state formation. In doing so, it is particularly important to study patterns of intervention in each other's affairs by the states of the region and the role of natural resources in fuelling conflict. Three factors have been identified by analysts as key contributors to conflict in the region: ethnicity, state failure and greed. Peace-building strategies have increasingly sought to address both political and economic issues and to incorporate regional and international dimensions.

Even as political solutions move forward, it remains imperative to support the legal legitimacy of those solutions, as noted recently by Raphael Wakenge, Coordinator of the Congolese Initiative for Justice and Peace (ICJP):

> We need a new approach, a peace process based on the principles of justice. Past peace deals have often closed their eyes toward impunity, allowing war criminals to be integrated into the army, police and security services. This has undermined the legitimacy of the peace process and the reputation of the security services, including the judiciary.

quoted in Richard Lee, *Southern Africa: DRC Peace Deal Is Just the Start*, OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA (Feb. 26, 2013), http://allafrica.com/stories/201302260686.html.

206. That is, there appears to be some quality in the law that may induce, but not necessarily compel, adherence (compliance) without necessarily reflecting obedience or recognition of a legal requirement in and of itself. For a more in depth discussion of theories of legitimacy and compliance pull, see Kal Raustiala and Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 538 (2002).

207. *See Uganda: Amnesty Act Without Amnesty*, ALLAFRICA (June 3, 2012), http://allafrica.com/stories/201206040501.html.

208. See KLEFFNER, *supra* note 2, at 325 (noting that in addition to support for norm creation through a transnational/supranational dialogue, the negotiations recognize different

short, the crimes against humanity that may be occurring in the course of this conflict will go unpunished, and the lack of criminal liability will only embolden future perpetrators of atrocity crimes.

A. Decoupling International and National Mechanisms for the Prevention of Harms

As there is a duality of international and national interest in the protection against atrocity crimes, there cannot be a clear demarcation between responsibilities for the prevention of these international harms, as the protection is one recognized by international law for the benefit of the individual. However, the proposed complementarity requires a demarcation between the opportunity for state jurisdiction and international jurisdiction in the punishment of these crimes. Although both the international and national communities have interests in the outcome and the protection of persons subject to these crimes, the outcome should not be determinative on the mechanisms used.

B. International Purposes vs. National Purposes

Looking at the question of the extent to which national courts served an international purpose, on the eve of the British election in October 1918, Lord Finlay, the Lord Chancellor, said to an Inter-Allied Parliamentary Committee: "Britain had 'two aims in this war. One of them was the punishment of those who could be proved guilty of outrages,' and 'the other was reparation for the wrongs that had been done.' Prosecution of 'offenders would not be mere vengeance; it would be the vindication of international morality.'"[209]

The question of control by the state apparatus of mechanisms to prevent the international crimes described in the Rome Treaty goes to the core of complementarity. As previously discussed, there exist numerous reasons that a local trial under the authority of a state with an interest in the outcome of the case would be preferable to an international trial. Only when the state exercising primary jurisdiction proves unable or unwilling to engage in genuine investigations or trials would the international tribunal

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levels of criminality and gravity in the International Criminal Law sphere, and allow Uganda a voice in managing some of the lower level perpetrators). In addition to support for norm creation through a transnational/supranational dialogue, the negotiations recognize different levels of criminality and gravity in the International Criminal Law sphere, and allows Uganda a voice in managing some of the lower level perpetrators. See also Ewald, *supra* note 43, at 396; Baylis, *supra* note 31, at 44 (arguing that the adoption of the Rome Statute in certain cases in the Democratic Republic of Congo "is not an isolated importation of international law by the domestic system... [but is part of the] multiple, overlapping international-national interactions aimed at the more far-reaching goal of promoting post-conflict justice by rebuilding the national justice system.").

209. See Willis, *supra* note 144, at 53.

consider the admissibility of the case for international adjudication.

In attempting to prevent international harms, the state, as an entity in itself with responsibilities to its constituents, and as a member of the international community with responsibilities to the constituents of that community, may have different resources, limitations, and strengths than those available to an entity such as the ICC. The state-level apparatus will more likely have a clearly differentiated system of a judiciary, legislature, and executive.

All aspects of the state may have an interest in the outcome: some in responding to constituent concerns for vindication (perhaps as indicative of justice – i.e., the justice system will vindicate the rights of various classes of people), some in response to stability (either through prevention of escalation, or through maintenance of power structures that support the status quo within the state, or minimize individual needs or desires of various parties within the state), and some in application of their own authorities within the state (responsive executive desirous of recognition to a problem that a court cannot respond to with adequate alacrity).[210] Some have argued that the international community attempts to replicate the governmental structures such that nothing immunizes the ICC from the concerns raised within a state structure.[211]

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210. The writings of Georges Scelle on the permeability of the *domaine réservé* responds to this. A counterargument to state access to protection for those threatened by atrocities is now, and has always been, the concept of a *domaine réservé* – the space in which the state can distance itself from the encroachment of the international community. When the international community comes together and relinquishes authorities previously within the power of individual states to accomplish an international or transnational aim, the community creates a supranational system. In order for the system to function, there must be an agreement that the participants will follow the rule of law as expressed by the community. The government of a state must often represent the state in its international dealings, creating a dual role: both representing the interests of the constituents of the state, and representing a participant in the joint undertaking in a transnational sphere. Some international undertakings allow for or, indeed, require the actions of entities within a state system. One such example is the complementarity envisioned by the ICC Statute – while the international community responds to issues of concern, it does so because the actions are violative of both the international interest in the shared undertaking, as well as the constituents' individual interests. Scelle argues against states, such as the United States, that has an overbroad reading of the *domaine réservé*. *See* Scelle, *supra* note 88.

211. Scelle, *supra* note 88, at 358 ("Social functions must be fulfilled in international collectives just as in national collectives, or the phenomenon of solidarity would rapidly disaggregate and the social tie would founder." [il faut que les fonctions sociales soient remplies dans les collectivités internationales comme dans les collectivités internes, sans quoi le phénomène de solidarité désagrégerait rapidement et le lien social péricliterait]). Scelle gives examples of the various branches of a state government acting with an international motive.

C. Why National Courts Must Act

National courts were envisioned to be the primary actors in prosecuting international atrocity crimes and enforcing the growing global consensus that human rights norms must be protected and promoted. Although they are not currently fulfilling this role, their importance in establishing a strong framework of international criminal justice should not be understated.

As discussed, the state is well-positioned to take on this role: the preparation for the ICC planned around the concept of a reserve court; the complementarity provisions recognize a much more robust and active international community acting through national courts; and national courts are in at least as good a position to express the will of the States Parties to the ICC Statute as the ICC itself, until such time as the ICC has clarified its interpretation of the interpretive issues surrounding the crimes within its jurisdiction.

This is particularly true where there exists a gap between what the ICC purports to do, and what the Statute requires the member states to do in conjunction with the Court. The application of international criminal law has been, to a certain extent, a gap-filling exercise – allowing for us to recognize the imperfections in our protective processes, and to then better articulate standards and processes to close the gaps. However, there are times where the international community recognizes a gap that fails to protect a class originally considered for protection by legal process.[212] Given the opportunity to protect that group, where parties do not reach an agreement on how to best do so, or whether it is in fact possible to do so, later arguments surrounding application and/or codification may lean towards implementing the gap as part of the law as accepted by states so as not to create new laws on which states have not agreed, or to expand on the laws recognized by states.

The application of the gravity standard by the ICC is paradigmatic; in raising what appears only an issue of complementarity, the ICC takes a risk by allowing state practice to redefine how crimes are prosecuted (or note prosecuted) within the ICC system. As noted in the case of Bosco Ntaganda, the ICC's controlling admissibility by refusing to hear cases involving serious crimes unless the alleged perpetrator is among those most responsible puts the onus on states parties to do the same – a cascading effect of impunity that is precisely the opposite of what the Rome Statute strived toward.

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212. The development of the adoption of the Responsibility to Protect resolutions by the U.N. General Assembly and Security Council is an example of recognition of the international role in filling that gap-filling function. *See generally,* Charity, *supra* note 28, at 94.

If national courts apply International Criminal Law terms broadly, applying the terms as they understand the terms and wish them understood, it will serve to bolster the ICC as an institution and norm-setting body, since the ICC will then be in a better position to rely on the judgments made at various levels of responsibility, and to recognize an international harm, even when the ICC cannot or would not hear the case at an international level.

CONCLUSION

Within the realm of atrocity crimes, no answer will serve as a panacea for all humanity's ills. That does not mean that we should not continue working toward as many remedies as possible. The ICC, by design, requires input from various levels – from States Parties, to individuals seeking investigations by sending communications to the Office of the Prosecutor, to other entities seeking to resolve conflicts.

Where the individual members of the international community rely on the Appellate Chamber to set rules for the gravity of a harm subject to remedy, or allow for decisions to be relayed between the International Law Commission, the Office of the Prosecutor, and the leaders of States, individuals will have no voice in the international planning that would protect so many from systematic or widespread violence. Only by redoubling our efforts – through our legislatures, through our executive, through our courts, and through ourselves – will the international community be able to respond to our needs.

(FLY) ANYWHERE BUT HERE: APPROACHING EU-US DIALOGUE CONCERNING PNR IN THE ERA OF LISBON

Douglas Louks*

I. INTRODUCTION

On September 11, 2001, nineteen terrorists boarded four planes in Newark, Boston, and Washington D.C. all headed to the west coast of the United States.[1] Shortly after takeoff, the terrorists onboard the planes subdued, by use of force, the flight attendants and pilots, thereby commandeering control of the aircraft.[2] On each plane was one terrorist trained to fly commercial aircraft.[3] Once in control, these terrorist-pilots took their aim for an attack at the heart of the American financial, government, and defense centers. Three of the aircraft hit their marks, successfully crashing, full of fuel, into World Trade Center 1 and 2 (The Twin Towers) in New York City and the Pentagon in Washington D.C. while the fourth, presumably aimed at the Capitol Building or the White House in Washington D.C., crashed in a field in Pennsylvania.[4] This single, intricate, and irreprehensible plan of terror carried out by Al Qaeda minions forever changed the landscape of our nation and the world. Specifically, the interplay between the right to privacy and national security, including the War on Terror, came into the crosshairs of the American government which took action thereby foisting US ideas of security upon those with whom it interacted.

A. US Action

Just a few months after the 9/11 attacks, the United States Congress passed the Aviation and Transportation Security Act (ATSA).[5] The ATSA

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1. *See* THE 9/11 COMMISSION REPORT EXECUTIVE SUMMARY 2 (2001) [hereinafter 9/11 COMMISSION REPORT], *available at* http://govinfo.library.unt.edu/911/report/911Report_Exec.pdf.

2. *Id.* at 2

3. *Id.*

4. *Id.* at 1-2.

5. Irfan Tukdi, Note, *Transatlantic Turbulence: The Passenger Name Record Conflict*, 45 HOUS. L. REV. 587, 588 (2008). .

contains a specific provision which requires all foreign and domestic airline carriers flying into or over the United States to provide the Commissioner of Customs with a bevy of passenger and crew information.[6] The ATSA further requires all commercial aircraft arriving in the United States from a foreign country to electronically transmit a passenger arrival manifest, concerning the information of all aboard, to the Customs and Border Protection systems.[7] The information in this manifest includes credit card information, name, date of birth, gender, and more.[8] For those airlines which fail to comply and transmit this information before or soon after departure, a heavy fine, at the very least, could be imposed and, at most, their right to land the plane on American soil could be denied.[9]

B. The European Union's Response

With the great risk of planes being forbidden access to land on US runways, the air carriers of the European Union (EU) were placed in a rather precarious situation. They could either abide by Directive 95/46, the central legislation governing the protection of data and privacy in the EU, or grant the US authorities access to the personal data of their transatlantic passengers.[10] The airlines, in the face of monetary loss, chose the latter. The parties (the EU and the United States) entered into negotiations after enactment of the ATSA to develop conditions for an arrangement dealing with the transmission of the required passenger information.[11] Eventually, the EU and the United States agreed to terms on the Passenger Name Record (PNR) Agreement signed in 2004 by the Commission of the EU and by Tom Ridge, on behalf of the US Department of Homeland Security

6. 49 U.S.C. § 44909(c) (Supp. IV 2004) ("Not later than 60 days after the date of enactment of the Aviation and Transportation Security Act, each air carrier and foreign air carrier operating a passenger flight in foreign air transportation to the United States shall provide to the Commissioner of Customs by electronic transmission a passenger and crew manifest containing the information specified [by the Act].").

7. *Id.*

8. Megan Roos, Note, *Safe on the Ground, Exposed in the Sky: The Battle Between the United States and the European Union over Passenger Name Information*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 1137, 1139-40 (2005).

9. Tukdi, *supra* note 5, at 588-89. *See also* Matthew R. VanWasshnova, Note, *Data Protection Conflicts Between the United States and the European Union in the War on Terror: Lessons Learned From the Existing System of Financial Information Exchange*, 39 CASE W. RES. J. INT'L L. 827, 833 (2007-2008) ("Airlines that did not comply with ATSA could be subject to fines or a revocation of landing rights.").

10. *See generally* Tukdi, *supra* note 5, at 589-90.

11. *See generally* Joint Statement, European Commission/US Customs Talks on PNR Transmission (Feb. 17-18, 2003), *available at* http://ec.europa.eu/transport/air/doc/security_2003_02_17_prn_joint_declaration.pdf.

(DHS).[12]

The European Parliament objected to the PNR Agreement at nearly every point of the process.[13] Just a few months after the PNR Agreement took effect, the European Parliament filed suit against the Council and Commission of the EU challenging the legality of the PNR claiming it was a direct violation of the privacy and data protection rights guaranteed by Directive 95/46/EC.[14] In 2006, the European Court of Justice (ECJ) annulled the PNR of 2004 for lack of legal basis[15] which, in short, was more of a procedural ruling than a substantive one.[16] As such, the Commission, after being given leeway for an interim agreement,[17] simply changed the agreement to give them the appropriate legal basis while leaving everything pertaining to the actual data transference the same and signed this 'new' PNR agreement with the United States in 2007 to run through 2013.[18] The legality of the 2007 PNR Agreement was never been challenged in the ECJ because, being based outside of the first pillar, the European Parliament did not retain the requisite authority to do so.[19]

C. Current Situation

Even though the 2007 PNR Agreement was not slated to end until 2014 at the latest,[20] the EU and the United States were forced to re-enter negotiations on the terms of a new PNR agreement to replace the 2007 PNR

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12. *See* Agreement Between the European Community and the United States of America on the Processing and Transfer of PNR Data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, 2004 O.J. (L 183) 84-85 [hereinafter 2004 PNR Agreement].

13. *See* Tukdi, *supra* note 5, at 590.

14. Joined Cases C-317/04 & C-318/04, Parliament v. Council, Comm'n, 2006 E.C.R. I-4798, 1-4826 [hereinafter 2006 ECJ Decision].

15. *Id.* at I-4831. Prior to the current status of the EU Treaties, the EU had a pillar structure with 3 pillars representing different competences granted to different institutions of the European Communities (Union). The EP only had authority to challenge legislation that was enacted in the first pillar. The Commission then changed the legal basis from the first pillar, which would have fallen under the 95/46 Directive, to another pillar. For a more in-depth explanation of the former pillar structure, see http://news.bbc.co.uk/2/hi/in_depth/europe/euro-glossary/1216944.stm.

16. 2006 ECJ Decision, *supra* note 14, at I-4828-29.

17. *Id.* at I-4832. *See generally* Agreement Between the European Union and the United States of America on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the United States Department of Homeland Security, 2006 O.J (L 298) 29 [hereinafter Interim Agreement].

18. *See* Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement), 2007 O.J. (L 204) 18 [hereinafter 2007 PNR Agreement].

19. *See infra* III.D.

20. S. Res. 174, 112th Cong. (2011) (enacted).

Agreement due to a failure to ratify it prior to the entry into force of the Treaty of Lisbon in 2009.[21] The Treaty of Lisbon granted all international agreements, including the 2007 PNR Agreement, a new legal basis requiring European Parliament's approval in addition to a Council Decision in order to take effect.[22] In their new role, while retaining their disdain for the previous EU-US PNR agreements, the European Parliament refused to approve the 2007 PNR Agreement which forced new negotiations.[23]

Due to the general sentiment in the EU towards openness in government and politics, the draft of the new PNR Agreement was made available for scrutiny prior to its eventual approval.[24] However, there was also a confidential report from the legal advisors of the Commission touting the negotiated PNR Agreement as illegal[25] which was leaked to the media.[26] An agreement was eventually reached between the EU and the United States which was ratified by the European Parliament and Council[27] and entered into force on July 1, 2012.[28] What this report brought to light was that the terms of the proposal, which comprised the terms of the 2012 Agreement, are still at odds with EU law regarding data privacy and protection, perhaps even more so than the 2007 PNR Agreement which was

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21. Hans Graux, *Belgian Passenger Name Record Approval Act Survives Legal Challenge on Procedural Grounds*, TIME.LEX (Apr. 12, 2011), http://www.timelex.eu/en/blog/detail/belgian-passenger-name-record-approval-act-survives-legal-challenge-on-procedural-grounds.

22. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 188 N, Dec. 17, 2007, 2007 O.J. (C 306) 97 [hereinafter Treaty of Lisbon]. *See also* Consolidated Version of the Treaty on the Functioning of the European Union art. 218, Mar. 30, 2010, 2010 O.J. (C 83) 144-45 [hereinafter TFEU] (In the amended version, this article appears as Article 218).

23. Sally McNamara, *European Parliament Should Back EU-US Passenger Name Record Agreement*, THE HERITAGE FOUNDATION (Sept. 6, 2011), http://www.heritage.org/research/reports/2011/09/eu-us-passenger-name-records-and-the-european-parliament.

24. Draft Agreement Between the United States of America and the European Union on the Use and Transfer of Passenger Name Record Data to the United States Department of Homeland Security, May 20, 2011, EU Doc. No. 10453/11 [hereinafter 2011 Proposal], *available at* http://www.statewatch.org/news/2011/may/eu-usa-pnr-agreement-20-5-11-fin.pdf.

25. Note from the European Commission Legal Service to Mr. Stefano Manservisi, Director General, DG Home (May 18, 2011) [hereinafter Legal Service Report] *available at* http://www.statewatch.org/news/2011/jun/eu-usa-pnr-com-ls-opinion-11.pdf.

26. Alan Travis, *Air Passenger Data Plans in US-EU Agreement are Illegal, say Lawyers*, THE GUARDIAN (Jun. 20, 2011, 14:45 EDT), http://www.guardian.co.uk/world/2011/jun/20/air-passenger-data-plans-illegal.

27. Agreement Between the United States of America and the European Union on the Use and Transfer of Passenger Name Records to the United States Department of Homeland Security, Dec. 8, 2011, EU Doc. No. 17434/11 [hereinafter 2012 Agreement].

28. Information Concerning the Date of Entry into Force of the Agreement Between the United States of America and the European Union on the Use and Transfer of Passenger Name Records to the United States Department of Homeland Security, July 4, 2012, 2012 O.J. (L 174) 1.

previously applied.[29] One major reason for the strong conflict is the entry into force of the Treaty of Lisbon which took place in December of 2009.[30] An important attribute of the Treaty of Lisbon is that it gives the Charter of Fundamental Rights of the European Union (CFR) legally binding effect.[31] The legal service for the EU Commission stated in its confidential memo that the terms of the draft agreement violate some of the fundamental rights which the CFR confers upon EU citizens.[32] The terms in the finalized 2012 Agreement are identical to the 2011 Proposed Agreement and thus the Commission Legal Service's memo is still relevant. In addition to this bout with the reality that the new agreement may infringe on fundamental rights, the European Parliament, which has been persistently critical of PNR agreement's with the United States since the inception of negotiations in 2003, now has more authority in these decisions than prior to the Lisbon Treaty.[33]

D. The Scope of This Note

Part II of this Note discusses the history and general sentiment of privacy and data protection in both the EU and the United States. This discussion includes a brief historical analysis of the events leading up to the 9/11 attacks, laws which relate to data protection and privacy in general, and laws developed which are pertinent to the debate concerning PNR. The purpose of this historical segment is to support an analysis of the laws and PNR agreements as well as to aid in making proposals for the resolution of the current PNR dilemma.

Part III provides an in-depth analysis of EU and US law which affect the PNR dialogue. In addition, this part examines both the 2007 PNR Agreement and the 2012 Agreement in light of the changes made to primary EU law by the Treaty of Lisbon, including the binding authority of the CFR.

In Part IV, building off of the analysis of Parts II and III, three possible options are discussed for the future of EU-US PNR agreements whereby one is recommended as the best solution to the current problem.

29. *See* Travis, *supra* note 26.
30. *See* Graux, *supra* note 21.
31. Treaty of Lisbon art. 6.
32. Legal Service Report, *supra* note 25.
33. Treaty of Lisbon art. 188 N.

PART II. THE HISTORY OF PRIVACY AND DATA PROTECTION IN THE EU AND US.

A. US – History and General Sentiment toward Privacy and Data Protection

1. 9/11 and the Reactionary Legislation

"September 11, 2001, was a day of unprecedented shock and suffering in the history of the United States."[34] On that fateful day, nineteen hijackers boarded planes on the eastern seaboard headed for the west coast under the orders and orchestration of Usama Bin Laden and his terrorist group, al-Qaeda.[35] The death toll was astonishing, surpassing that of December 1941, when the Japanese bombed Pearl Harbor.[36] In all, nearly 3,000 people lost their lives that day.[37] Shortly thereafter, in November 2001, then President George W. Bush ordered an extensive investigation into the events of, and those leading up to, the attacks: The 9/11 Commission.[38]

Perhaps most astonishingly, the events that transpired September 11 were seemingly quite preventable. As the 9/11 Commission stated, "The nation was unprepared."[39] The attackers and the plot by a group of extremists exploited major gaps in security and information sharing within the United States. The hijackers were 19 for 19 getting through the security checkpoints at the various airports.[40] The US authorities had ample information and intelligence, but no one could connect the dots. "[N]o analytic work foresaw the lightning that could connect the thundercloud to the ground."[41] As the 9/11 Commission found in their research of the events:

> Operational failures...included[:] not watchlisting future hijackers Hazmi and Mihdhar, not trailing them after they traveled to Bangkok, and not informing the FBI about one future hijacker's U.S. Visa or his companion's travel to the United States;... not discovering false statements on visa applications; not recognizing passports manipulated in a

34. 9/11 COMMISSION REPORT, *supra* note 1, at 1.
35. *Id.* at 3.
36. *Id.* at 2.
37. *Id.* at 2-3 ("More than 2,600 people died at the World Trade Center; 125 died at the Pentagon; 256 died on the four planes.").
38. *See generally id.*
39. *Id.* at 1.
40. *Id.* at 7.
41. *Id.*

> fraudulent manner; not expanding no-fly lists to include names from terrorist watchlists; not searching airline passengers identified by the computer-based CAPPS screening system[.][42]

In addition, part of this attack was comprised of "a cell of expatriate Muslim extremists who had clustered together in Hamburg, Germany."[43] The so-called 'Hamburg Cell' made extensive use of air travel dating from a few years prior to 9/11 up to the time they boarded their final flights.[44]

In order to remedy the vulnerabilities in the system of aviation security and data collection and transfer, the 9/11 Commission made several suggestions including "expanding no-fly lists, searching passengers identities by the CAPPS screening system, deploying federal air marshals domestically, hardening cockpit doors, [and] alerting air crews to a different kind of hijacking possibility than they had been trained to expect."[45] The plan behind these suggestions was to "[t]arget terrorist travel...Develop strategies for neglected parts of our transportation security system...[P]revent arguments about a new computerized profiling system from delaying vital improvements in the "no-fly" and "automatic selectee" lists...Determine...guidelines that integrate safeguards for privacy and other essential liberties."[46]

The legislative response to the inquiry regarding how to amend these vulnerabilities in order to protect the United States and its citizens was the enactment of the Aviation and Transportation Security Act of 2001(ATSA).[47] The ATSA requires that airlines submit the PNR for all flights into, out of, or within the United States to the United States Customs and Border Patrol (USCBP).[48] Essentially, this means pretty much every flight that enters US airspace. PNR data includes such things as "passengers' names, credit card information, and even meal preferences."[49] Failure of the airline to comply with the US requirement could result in rather large fines of up to $5000 per passenger.[50] At most, the United States can refuse to allow the airplane to land on US soil at all and may even revoke the landing privileges of that airline.[51]

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42. *Id.* at 8-9.
43. *Id.* at 5.
44. *Id.*
45. *Id.* at 10.
46. *Id.* at 19.
47. Aviation and Transportation Security Act of 2001, Pub. L. 107-71, §101, 115 Stat. 597, 597-604.
48. *Id.* § 115.
49. Tukdi, *supra* note 5, at 588.
50. 19 C.F.R. § 122.161 (2007).
51. 19 C.F.R. § 122.14(d)(5) (2007).

2. General US Sentiment Toward Privacy

The United States generally has a quite different view and sentiment of privacy than that of other countries, especially those countries which are Member States in the EU. There is the Fourth Amendment of the US Constitution which protects a person from an unwarranted search and seizure.[52] However, as this amendment was written in 1791 and is not incredibly precise, attempting to apply it to the modern day computer-age notion of data and privacy protection can be quite problematic at times. There is also the judicial right to privacy, most notably upheld in the Supreme Court cases Griswold v. Connecticut[53] and Roe v. Wade.[54] But, there is no real 'right' of privacy in the United States, per se, which is to say there is no fundamental right to privacy. This framework, as will be discussed, is quite different than that of the EU.

The United States employs the sectoral approach to privacy. This basically means that the United States protects privacy on a point-by-point basis, picking and choosing when and where to employ privacy protection.[55] For the most part, Americans are generally more willing to barter privacy freedoms for security than are Europeans which is in large part due to the sectoral approach of American privacy laws. As one commentator puts it, "The United States' sectoral approach is more reactive in nature . . . .[T]he United States allows the market to decide how much privacy is needed, and the public generally has limited statutory rights."[56] The words of David Heyman, Assistant Secretary for Policy at the DHS, support this sentiment:

> Passengers have a right to privacy and protections of their civil liberties and personal information, but also have a right to know that their government is doing everything it can to ensure their safety and security when they board an airplane. It is necessary, therefore, to ensure the continued use of proven and effective security measures. PNR is a proven asset in the fight against terrorism and other

52. U.S. CONST. amend. IV.

53. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (combining the First, Third, Fourth, Fifth, and Ninth Amendments to create a new constitutional right, the right to privacy in marital relations).

54. Roe v. Wade, 410 U.S. 113, 152 (1973) (Though the US Constitution does not "explicitly mention any right to privacy...the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

55. VanWasshnova, *supra* note 9, at 830-32.

56. Arthur Rizer, *Dog Fight: Did the International Battle Over Airline Passenger Name Records Enable the Christmas-Day Bomber?*, 60 CATH. U. L. REV. 77, 81-82 (2010).

transnational crimes.[57]

The United States really has only one piece of legislation that has a broad, blanketing effect with regard to data privacy and that is the Privacy Act of 1974.[58] This "single, wide-ranging data privacy law in the United States--the Privacy Act of 1974--restricts the use of personal data held by federal agencies. The Act requires federal agencies to apply 'fair information practices' to all agency policies regarding personal data sharing."[59] Even in this 'broad' legislation, there are some equally broad exceptions which punch holes in its effect. "The Privacy Act, however, does permit the disclosure of personal data for 'routine use' and subsequent interpretations of that provision have significantly weakened the effectiveness of the law."[60] The 'routine use' exception, as time passes and it is construed more broadly, will continue to erode any of the encompassing effect it would have had. As a consequence, the exception may possibly become the rule.

Not even a week after the 9/11 attacks, the willingness of the United States to trade-off privacy and data rights in exchange for national security became quite apparent. Congress, at this time, proposed legislation "to expand the surveillance and investigative powers of federal law enforcement agencies."[61] The result was enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act").[62] The PATRIOT Act greatly increased the ability of federal agencies to gather and transfer massive amounts of personal data.[63] Further, this legislation also restricted both public oversight and the public's power to contest the data collection.[64] Ambiguity in the terms used in the PATRIOT Act expanded the variety of data that could be procured.[65] For example, "[i]n June 2003, U.S. Attorney General John Ashcroft testified in front of the House Judiciary Committee

57. David Heyman, Assistant Sec'y, Office of Policy, Testimony before the House Committee on Homeland Security Subcommittee on Counterterrorism and Intelligence: Intelligence Sharing and Terrorist Travel: How DHS Addresses the Mission of Providing Security, Facilitating Commerce and Protecting Privacy for Passengers Engaged in International Travel (Oct. 5, 2011) [hereinafter Heyman Testimony], *available at* http://www.dhs.gov/ynews/testimony/20111005-heyman-info-sharing-privacy-travelers.shtm.

58. 5 U.S.C. § 552(a) (1974).

59. D. Richard Rasmussen, *Is International Travel Per Se Suspicion of Terrorism? The Dispute Between the United States and European Union over Passenger Name Record Data Transfers*, 26 WIS. INT'L L.J. 551, 564 (2008).

60. *Id.* at 565.

61. *Id.* at 568.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See id.*

that the term 'tangible things' subject to FBI seizure under the USA PATRIOT Act included personal data such as purchase records, computer files, educational records, library records, and genetic information."[66]

Congress did attempt to rein in the expansive collection of personal data to protect individual privacy through the creation of privacy offices.[67] "The new offices, however, have done little of consequence and the push by the executive branch for information sharing has continued with only limited oversight from Congress and the Supreme Court."[68] Given the recent signing of a four-year extension to the PATRIOT Act,[69] it appears that this readiness to barter privacy for security is not in recession nor is it likely to be any time in the near future.

3. EU – History and General Sentiment toward Privacy and Data Protection

European countries and their citizens tend to have a much different view of privacy than do most Americans. "European standards on the protection of the right to privacy are significantly different from American standards, as demonstrated by the fact that the creation of the PNR system was met with much greater resistance in the EU than in the US."[70] From the inception of negotiations between the EU and the United States, the members of European Parliament, as well as many citizens of the EU, were adamantly against the idea.[71] On the contrary, there was very little of this sentiment reciprocated across the pond.

A possible reason for this distinction between the EU and the United States with regard to privacy and data protection are the "historical roots."[72] Nazis were renowned for their use of data collection in order to track and account for Jews which nearly allowed for the mass extermination of an entire race of people in Europe.[73] After the fall of the Third Reich, citizens of Europe were then confronted by the autocratic Communist regimes which, as with the Nazis, relied heavily on data collection in order to squelch the voice of any threatening opposition.[74] Though Western

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66. *Id.*

67. *Id.* at 570.

68. *Id.*

69. Jim Abrams, *Patriot Act Extension Signed by Obama*, THE HUFFINGTON POST (May 27, 2011 1:55 AM), http://www.huffingtonpost.com/2011/05/27/patriot-act-extension-signed-obama-autopen_n_867851.html.

70. Alenka Kuhelj, *The Twilight Zone of Privacy for Passengers on International Flights Between the EU & USA*, 16 U.C. DAVIS J. INT'L L. & POL'Y 383, 408 (2010).

71. Michael Kerr, *USA: Uncle Sam is watching you*, THE TELEGRAPH (July 19, 2003 12:01 AM), http://www.telegraph.co.uk/travel/727918/USA-Uncle-Sam-is-watching-you.html.

72. Kuhelj, *supra* note 70, at 408-09.

73. *Id.* at 409.

74. *Id.*

Europeans were not directly subjected to these same regimes as the citizens of Eastern Europe, this procurement of data and the way in which the data was used was certainly feared by them.[75] Given the recent history, it is fairly easy to empathize with Europe's contra-US perspective concerning personal data as the United States has never been subjected to a similarly fascist dictatorship. As one commentator has advanced: "The atrocities that followed the abuse of personal data in Europe, and the fact that the US has not had similar negative experiences with data protection, makes the different conduct and attitude to the collection, storage, and use of PNR understandable."[76]

Pursuant to the European position on the protection of data and privacy, it is reasonable to understand why, in the EU, privacy and data protection are applied through a very broad, comprehensive, and robust approach. First, both data protection and privacy are covered by encompassing legislation such as that of Directive 95/46.[77] They were also given the status as fundamental rights[78] after the entry into force of the Treaty of Lisbon.[79] Well before the Treaty of Lisbon, several countries in Europe drafted and ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) thereby placing data protection and privacy in the context of human rights throughout Europe.[80] Second, the privacy guaranteed by these laws applies whenever and to or by whomever it is processed, transmitted, or stored.[81] It is not a case-by-case basis as a norm like that in the United States, but rather instilled in almost all contexts.[82]

Another distinction between the EU and United States in this regard is that, in the United States, "privacy interests on a scale [are] counterbalanced by free speech rights," while in the EU, they "analogize privacy rights with

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75. *Id.*

76. *Id.*

77. *See e.g.*, Council Directive 95/46, 1995 O.J. (L 281) 31 (EC) [hereinafter Directive 95/46].

78. Charter of Fundamental Rights of the European Union, art. 7-8, 2000 O.J. (C 364) 1 [hereinafter CFR]. *See also* Kuhelj, *supra* note 70, at 409.

79. Treaty of Lisbon art. 6; *see also* Consolidated Version of the Treaty on European Union art. 6, Mar. 30, 2010, 2010 O.J. (C 83) 19 [hereinafter TEU] (granting the CFR legally binding effect equal to that of the Treaties).

80. *See Convention for the Protection of Human Rights and Fundamental Freedoms: Status,* COUNCIL OF EUROPE (Feb. 5, 2013), http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=05/02/2013&CL=ENG (demonstrating the current countries that have ratified the Convention); *see also Convention for the Protection of Human Rights and Fundamental Freedom* (Nov. 4, 1950), *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf [hereinafter ECHR].

81. *See, e.g.*, Directive 95/46, *supra* note 77.

82. Tukdi, *supra* note 5, at 591.

intellectual property rights."[83] The viewpoint here is that "[i]f government is going to let corporations keep competitors from exploiting brand-names and trademarks, the law certainly should allow a citizen to keep others from trafficking in his credit history, sex life and other personal information."[84] As a result, the laws and legislation of the EU and Member States treat an individual's data as something in line with proprietary information.

It was with the variant sentiments concerning data and privacy in combination with the reactionary post-9/11 US legislation, the EU and the United States entered into negotiations for a PNR scheme that would bring the air carriers flying from the EU to the United States in compliance with the ATSA. The Commission and the United States finally agreed to terms on an agreement in 2004[85] which was later annulled by the ECJ based on the challenge of the European Parliament that it was in direct violation of Directive 95/46.[86] In the end, the ECJ annulled based on a technicality, an incorrect legal basis.[87] The Commission, in response, simply moved the basis from the first to the third pillar which resulted in the European Parliament losing their voice and ability for legal challenge.[88] During the time that the 2007 PNR Agreement was implemented, the primary law in the EU drastically changed with the entry into force of the Treaty of Lisbon.[89] European Parliament's regained voice as a consequence of the Treaty of Lisbon caused a new round of negotiations for an EU-US PNR agreement.[90] The next section analyzes the former and current PNR agreements in light of these treaty changes and Directive 95/46.

III. ANALYSIS OF APPLICABLE EUROPEAN UNION LAW

A. Directive 95/46

Directive 95/46, passed in 1995, is the legislative embodiment of the European sentiment toward the protection of privacy and personal data.[91] The Data Protection Directive also further differentiated the approach of the EU to that of the United States with regard to the protection of data and data

83. Tanya L. Forsheit, et al., *Privacy, Data Security and Outsourcing*, 946 PLI/PAT 11, 18 (2008).

84. *Id.*

85. *See e.g.* 2004 PNR Agreement, *supra* note 12.

86. Tukdi, *supra* note 5, at 590; *see also* ECJ Decision, *supra* note 14, at I-4831.

87. ECJ Decision, *supra* note 14, at I-4831.

88. Elspeth Guild & Evelien Brouwer, *The Political Life of Data: The ECJ Decision on the PNR Agreement Between the EU and the US*, CENTRE FOR EUROPEAN POLICY STUDIES POLICY BRIEF, July 2006, No. 109 at 3.

89. Rizer, *supra* note 56, at 98; *see also* Treaty of Lisbon.

90. Rizer, *supra* note 56, at 99; *see also* 2011 Proposed Agreement, *supra* note 23.

91. Rizer, *supra* note 56, at 83.

privacy.[92] For the EU, finding the US approach of the non-comprehensive protection of privacy to be inadequate, the only effective way to protect data was through a blanket approach.[93] The preamble of Directive 95/46 illustrates this perspective of the EU sentiment by stating:

> [D]ata processing systems are designed to serve man...they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy[.] . . . The fact that the processing of data is carried out by a person established in a third country must not stand in the way of the protection of individuals provided for in this Directive[.][94]

As is the case with all directives, the purpose of Directive 95/46 was to standardize pertinent legislation across all of the Member States.[95] To accomplish this, the Directive "proposes strict requirements on the processing of personal data."[96] The Directive states:

> [A]ny processing of personal data must be lawful and fair to the individuals concerned[.]...[I]n particular, the data must be adequate, relevant and not excessive in relation to the purposes for which they are processed[.]...[S]uch purposes must be explicit and legitimate and must be determined at the time of collection of the data[.][97]

The Directive further provides that "in order to be lawful, the processing of personal data must in addition be carried out with the consent of the data subject or be necessary...for the performance of a task carried out in the public interest[.]"[98] The latter portion of this provision potentially allows for a lot of discretion. So long as the personal data is necessary for the greater public interest, the directive seems to allow its process. However, to curtail the use of such a gap, the directive states that "data...capable... of infringing fundamental freedoms or privacy should not be processed unless the data subject gives his explicit consent[.]...[D]erogations from this prohibition must be explicitly provided for in respect of specific needs[.]"[99] To help determine what this actually means, Article 7 states that other than

92. VanWasshnova, *supra* note 9, at 832.
93. *Id.*
94. Directive 95/46, *supra* note 77, pmbl.
95. Rasmussen, *supra* note 59, at 559.
96. *Id.*
97. Directive 95/46, *supra* note 77, pmbl.
98. *Id.* pmbl., Recital 30.
99. *Id.* Recital 33.

by personal consent of the subject, personal data may be processed in "compliance with a legal obligation."[100] Lastly, the Member States are prohibited from processing of the so called 'sensitive data' which includes "racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life."[101]

Directive 95/46 does permit the transfer to personal data to third countries, but only if that nation "ensures an adequate level of protection."[102] It also mandates that "the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited[.]"[103] The Directive further requires that "the adequacy of the level of protection afforded by a third country must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations[.]"[104] In the event the Commission finds that any country provides inadequate data protection, the Member States are strictly prohibited from transferring any personal data to that country until the Commission, through negotiation, can fix the issues.[105] Interestingly, the United States was found to be one such country which did not provide adequate protection of European data which required the approval of certain safe harbor provisions for commercial transactions.[106]

A major concern for the EU regarding the Directive was oversight to ensure that the directive was being applied correctly and that no circumvention of the law took place which is both evidenced and alleviated by Articles 28 and 29.[107] Article 28 requires that every Member State establish its own independent enforcement body.[108] Article 29 establishes a Working Party on the protection of individuals with regard to the processing of personal data.[109] The Article 29 Working Party is comprised of a representative from each Member State, a representative for the Community, and one from the Commission.[110] This is an independently working group that has an advisory capacity on the nature of data protection.[111] The Working Party may give an opinion on any act or legislation affected by the Directive whether or not they are expressly asked

100. *Id.* art. 7.
101. *Id.* art. 8.1.
102. *Id.* art. 25.
103. *Id.* pmbl. Recital 57.
104. *Id.* pmbl. Recital 56.
105. VanWasshnova, *supra* note 9, at 830.
106. *Id.* at 832.
107. Directive 95/46, *supra* note 77, arts. 28-29.
108. *Id.* art. 28.
109. *Id.* art. 29.
110. *Id.*
111. *Id.*

to do so.[112] The Working Party can only give an opinion to the Commission which is non-binding in nature.[113] However, the Commission must address any opinion given by the Working Party and the reasoning for diverging from that opinion.[114] In addition, both the Working Party's opinions and the Commission's reasoning for diverging from or acting in accordance with such opinions must be made public.[115] Therefore, though the opinions are not binding, making them available to the public in conjunction with the requirement that the Commission answer for its action in public, can act as a check on the Commission's power by exerting political pressure on the Commission.

Even though Directive 95/46 was meant to be a very broad and comprehensive data protection law, there is one very large gap left by the scope of the Directive.

> This Directive shall not apply to the processing of personal data...in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security...and the activities of the State in areas of criminal law[.][116]

This provision grants a wide exemption. Basically, anything that falls outside of Community law, meaning the first pillar (in the former pillar structure), was exempt. With the fall of the pillar structure brought on by the entry into force of the Treaty of Lisbon,[117] the processing of data pursuant to or for the necessity of public security, defense, security, and criminal law remains part of this exemption.[118] However, for other reasons, discussed later, this exemption may not matter in the context of PNR Agreements between the EU and the United States.

B. 2004 PNR and 2006 Annulment

When the United States enacted the ATSA, the laws of two powers on each side of the Atlantic Ocean were placed into immediate conflict with

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112. *Id.* art. 30.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*, art. 3.2.
117. *Treaty of Lisbon: Introduction*, EUROPA, July 14, 2010, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0033_en.htm (last visited May 18, 2013).
118. Directive 95-46, *supra* note 75, pmbl., Recital 13.

one another. Meanwhile, European airlines were stuck in the middle between a figurative 'rock and a hard place' because no matter which path they chose, they would have been subject to a fine.[119] "The airlines that complied with the ATSA by transferring passenger data violated EU privacy laws; however, refusal to transmit the data to U.S. authorities meant facing fines and the possible revocation of landing rights."[120] The airline companies had to transmit or allow the US authorities access to the data either before or shortly after takeoff and the fine for refusal to comply could reach as much as $5,000 per passenger.[121] From a purely financial perspective, the European airlines were left without any real choice in this matter seeing that compliance with EU law would have led to massive losses to the airlines through the stiff monetary penalty and potential loss of landing privileges.[122] The United States did, however, grant a waiver to the European airlines until the EU and United States could work out a permanent deal, but this waiver to penalize noncompliant European airlines ended in March of 2003 and many of these European airlines granted the United States access to their PNR data.[123] On account of this, the EU and United States immediately entered into negotiations for a firm agreement.[124] The parties finally agreed to a deal on May 17, 2004.[125]

However, a major point of contention for the countries was the Commission's decision on the adequacy of US protection of EU citizens' data. The Commission's decision was based almost exclusively on a letter from the USCBP to the Commission detailing what they would undertake in the gathering and processing of PNR data.[126] In June 2003, the Article 29 Working Party gave their opinion which "expressed doubts regarding the level of data protection" guaranteed by the US authorities.[127] The Article 29 Working Party, named so as their function and creation is based on Article 29 of Directive 95/46, was very apprehensive of the 2004 PNR Agreement for a few reasons:

> [T]he European Data Protection Working Party . . . repeatedly raised its doubts on the proportionality of transfer of PNR data and on the level of protection as guaranteed in the undertakings of the US . . . (CBP). Other concerns dealt with the fact that the transfer of data was

119. Guild & Brouwer, *supra* note 88, at 1-2.
120. Rizer, *supra* note 56, at 87.
121. Guild & Brouwer, *supra* note 86, at 1.
122. Tukdi, *supra* note 5, at 589.
123. 2006 ECJ Decision, *supra* note 14, at I-4822.
124. *Id.*
125. *See generally* 2004 PNR Agreement, *supra* note 12.
126. Commission Decision 2004/535, 2004 O.J. (L 235) 12 (EC).
127. 2006 ECJ Decision, *supra* note 14, at I-4823.

based on a 'pull' instead of 'push' system . . . .[128]

The Article 29 Working Party believed that the sheer amount of data that was requested was unnecessary to the function to which it would serve.[129] They were also quite concerned about the USCBP having access to the European airlines' reservation systems and taking the data as opposed to the airlines transmitting the data to the USCBP.[130]

Despite this, the Commission, pursuant to the former Article 300 of the Treaty of the European Community, submitted the agreement with the United States to the European Parliament for a consultation based on their own decision that the USCBP "provid[ed] an adequate level of protection."[131] The European Parliament delayed in giving their opinion on the adequacy of the Agreement despite the Council requesting an urgent opinion.[132] Two weeks after the Commission's submission, the European Parliament adopted a resolution detailing its apprehension to the proposed agreement and asked the Commission to draft a new agreement.[133] As the European Parliament had refused to give their opinion on the adequacy of the Commission's draft decision, the Commission passed its decision on adequacy which the Council adopted on May 17, 2004, as the 2004 PNR Agreement.[134] The European Parliament then challenged this agreement on the basis of the involvement of both the Council and the Commission for their respective roles.[135]

The ECJ annulled the 2004 PNR Agreement on the grounds that it lacked appropriate legal basis.[136] The 2004 PNR Agreement was based in the first pillar transport policy, but the ECJ held that since the agreement was for security and combating terrorism, it should fall under the public security framework, a third pillar provision.[137] Article 3(2) of the Directive states that it "shall not apply to the processing of personal data...in the

128. Guild & Brouwer, *supra* note 88, at 2.

129. Article 29 Data Protection Working Party, *Opinion 6/2004 on the implementation of the Commission decision of 14-V-2004 on the adequate protection of personal data contained in the Passenger Name Records of air passengers transferred to the United States' Bureau of Customs and Border Protection, and of the Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection*, 11221/04/EN, WP 95 (June 22, 2004), *available at* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2004/wp95_en.pdf.

130. *Id.*

131. 2004 PNR Agreement, *supra* note 12, at 84.

132. 2006 ECJ Decision, *supra* note 14, at I-4823.

133. *Id.*

134. *Id.* at I-4823-24.

135. *Id.* at I-4826.

136. *Id.* at I-4831.

137. Guild & Brouwer, *supra* note 88, at 3.

course of an activity which falls outside the scope of Community law," meaning data processing that occurs outside the first pillar.[138] As such, the ECJ held that the Directive did not apply to the 2004 PNR Agreement or the adequacy decision, but that the Commission did not have the appropriate competence in the first pillar.[139]

In essence, this was a purely procedural ruling and, unfortunately, appears to lend little to no substantive quality that could be applied to either the 2007 PNR Agreement or the 2011 Proposal, and thereby the 2012 EU-US PNR Agreement (2012 PNR Agreement), to determine their legality. "The ECJ did not take an explicit position on whether the PNR Agreement disproportionately encroached on the rights of EU citizens, but instead took an easier course and annulled the Council Decision and Commission Decision on formal grounds."[140] However, the ECJ annulment may not totally lack meaning. For instance, the ECJ began its opinion by citing to Article 8 of the ECHR which states the right to individual privacy and also "the circumstances in which a state may intervene with the right."[141] This was the first known instance of the ECJ doing anything of this nature by referring to an international human rights agreement as opposed to EU law, especially given that at that time the EU was not a party to the ECHR.[142] There are a few possible theories as to why the ECJ would reference the ECHR. At the time of this ruling by the ECJ, the Treaty establishing a Constitution for Europe (EU Constitution) was in the ratification period.[143] The EU Constitution would have given the EU legal personality[144] and thus allowed the EU to accede to the ECHR.[145] Therefore, it is possible that the ECJ was trying to be politically influential to push the ratification of the EU Constitution and express its view of accession to the ECHR. In addition, it is a quite reasonable assumption that the ECJ was predicting that in future PNR disputes, the ECHR's personal privacy provisions would play an important role.

C. The Treaty of Lisbon

Quite possibly the most important and influential change in EU law took place on December 1, 2009 when the Treaty of Lisbon entered into

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138. Directive 95/46, *supra* note 77, art. 3(2).

139. Guild & Brouwer, *supra* note 88, at 3.

140. Kuhelj, *supra* note 70, at 400.

141. Guild & Brouwer, *supra* note 88, at 2-3.

142. *Id.* at 3.

143. Carlos Closa, *The Constitution Ratification*, THE EUROPEAN UNION CONSTITUTION, http://www.proyectos.cchs.csic.es/euroconstitution/Treaties/Treaty_Const_Rat.htm (last visited May 18, 2013).

144. Treaty establishing a Constitution for Europe art. I-7, Dec. 16, 2004, 2004 O.J. (C 310) 13.

145. *Id.* art. I-9.

force.[146] The adoption of the Treaty of Lisbon made four extremely significant amendments to the TEU and TFEU that affect the PNR debate. First, it adopted the Charter of Fundamental Rights of the European Union (CFR) as primary law equal to that of the Treaties.[147] Second, through the Treaty of Lisbon, the EU acceded to the ECHR thus bringing the institutions and all Member States within the jurisdiction of the European Court of Human Rights (ECtHR).[148] Third, the Treaty of Lisbon granted far more legislative and political power to the European Parliament by collapsing the three pillars of the EU, thereby eradicating the former pillar structure.[149] Lastly, the European Parliament was further empowered by the Treaty of Lisbon by the change in the legislative process. Prior to the amendments, the Treaty Establishing the European Communities (EC Treaty) Article 251 called for the consultation method of passing legislation.[150] The Treaty of Lisbon changed this to a co-decision method requiring joint decision-making between the Council and the European Parliament.[151] All of these changes to the Treaties will undoubtedly have an immeasurable impact on the future of PNR negotiations and agreements between the EU and the United States

The Commission exclusively negotiated the PNR agreements of 2004, 2006, and 2007; negotiation being a sole function of the Commission.[152] Prior to the Treaty of Lisbon, the European Parliament only had a right to consultation regarding the drafting of such agreements.[153] However, this right of consultation was only available if the action fell within the competence of the European Community, meaning the first pillar.[154] For the 2004 PNR Agreement, the Commission and Council merely granted a token nod to the European Parliament by consulting them on the drafts of the agreements.[155] For the 2006 Interim Agreement and the 2007 PNR Agreement, there was no longer a necessity to involve the European Parliament since each was moved under the third pillar, a Union

146. Graux, *supra* note 21.

147. Treaty of Lisbon art. 6(1).

148. *Id.* arts. 6(2)-6(3).

149. *Structure of the Treaties Governing the EU*, CITIZENS INFORMATION BOARD (Feb. 8, 2010), http://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_law/lisbon_treaty/structure_of_the_treaties_governing_the_eu.html.

150. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 280; Treaty Establishing the European Communities art. 251 [hereinafter EC Treaty] (as in effect until Dec. 1, 2009) (now TFEU art. 294).

151. Treaty of Lisbon art. 251 (amending EC Treaty art. 251, which is now TFEU art. 294).

152. TEU art. 17.

153. EC Treaty art. 251.

154. VanWasshnova, *supra* note 9, at 838.

155. Guild & Brouwer, *supra* note 88, at 3.

competence, effectively circumventing the European Parliament in the process.[156]

Under the amendments of the Treaty of Lisbon, the circumstances surrounding the 2006 and 2007 Agreements would be completely untenable. The amendments made to the Treaties collapsed the pillars into one, the first pillar, which thereby brings all Commission and Council action within the same competence as the European Parliament.[157] In addition, the Treaty of Lisbon also eliminated the consultation procedure of legislative enactment, which resulted in very limited involvement by the European Parliament, and replaced it with the co-decision procedure.[158] Subsequent to the Treaty's enactment, the European Parliament became, and currently is, a resounding voice in the negotiations and the future of the EU-US PNR relationship. Currently,

> Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement after obtaining the consent of the European Parliament in the following cases . . . agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.[159]

In short, the European Parliament, together with the Council, will decide on all actions which do not involve the common defense and security policy, which is more akin to military type action or prevention and does not include PNR, which falls under the Home Affairs Commission.[160]

Another significant amendment to the Treaties made by the Treaty of Lisbon was adopting the CFR originally meant to be part of the EU Constitution, and further giving the CFR the status of primary EU law. "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."[161] The purpose of the CFR is "to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those

156. *Id.*; *see also* VanWasshnova, *supra* note 9, at 838.

157. Treaty of Lisbon arts. 24-25(b).

158. *Id.* art. 9 C.

159. *Id.* art. 188 N.

160. *See generally* EUROPEAN EXTERNAL ACTION SERVICE, http://www.consilium.europa.eu/eeas/security-defence (last visited May 18, 2013). *See also* Legal Service Report, *supra* note 25 (the report is addressed to the Directorate General of the Home Affairs).

161. Treaty of Lisbon art. 1(8).

rights more visible in a Charter."[162] The fundamental rights which are contained within the Charter, as such rights, cannot be infringed upon or violated; they are guaranteed rights, unless their limitation is "necessary and genuinely meet[s] objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others."[163] In addition, the limitation of a right must be proportional to the objective.[164]

Data protection for an individual, after the Treaty of Lisbon, attained the status of a fundamental right pursuant to the CFR. Article 8 of the CFR states:

> Everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.[165]

Even if Directive 95/46, for any reason, does not apply to PNR agreements or is somehow rendered less effective through gaps in the legislation or otherwise, the CFR will still be applicable and protect personal data. Thus, the PNR debate will hinge on whether the data is processed fairly, proportionately, and legitimately by law for the general interest.

Yet another important change made by the Treaty of Lisbon was EU accession to the ECHR.[166] By the EU acceding to the ECHR, yet another layer and set of rights will take effect with regard to the EU itself. In 1950, the countries comprising the Council of Europe[167] met in Rome to draft, and eventually sign, the ECHR.[168] "[T]his declaration aims at securing the universal and effective recognition and observance of the Rights therein declared...[with the purpose of] maintenance and further realization of human rights and fundamental freedoms."[169] Those countries which signed and thereby acceded to the ECHR took on the obligation to secure the freedoms and rights of all of the citizens within their jurisdiction.[170] This convention also created a judicial body known as the European Court of

162. CFR, *supra* note 78, pmbl.
163. *Id.* art. 52(1).
164. *Id.*
165. *Id.* art. 8.
166. Treaty of Lisbon art. 1(8).
167. This is not to be confused with the European Council, which is an EU institution; the Council of Europe has no affiliation with the EU.
168. ECHR, *supra* note 80, pmbl.
169. *Id.*
170. *Id.* art. 1.

Human Rights (ECtHR). [171]

All Member States of the EU were already party to the ECHR prior to the Treaty of Lisbon and therefore the citizens of those Member States could challenge the actions of their own country on the basis of human rights violations in the ECtHR .[172] After the Treaty of Lisbon, the citizens of the EU can challenge the actions of the EU directly, even when that action is to compel Member State action, as a violation of their individual human or fundamental rights.[173] Although the Treaty of Lisbon mandates accession to the ECHR,[174] actual accession by the EU to the ECHR has yet to occur.[175] As a consequence, a citizen can still challenge an EU act, but only to the extent that it is carried out in the national legislature; they cannot directly challenge any EU act in the ECtHR.[176]

Given the current status of the EU's official accession to the ECHR, in order for a citizen to challenge any PNR agreement in the ECtHR, there must be national law in place. This has created a rather difficult situation for the people of the EU because the 2007 PNR Agreement was not ratified prior to the entry into force of the Treaty of Lisbon.[177] With the entry into force of the Treaty of Lisbon, and therefore the subsequent greater legislative powers of the European Parliament, the 2007 Agreement was never ratified by the Parliament.[178] As such, the 2007 Agreement was only provisionally applied pursuant to a 2007 Commission Decision "which rules that the Agreement should be provisionally applied pending its entry into force."[179]

Another issue with the provisional application in the context of the ECHR is that in order to open the gates to the ECtHR, one must exhaust all other judicial remedies: "The Court may only deal with the matter after all domestic remedies have been exhausted[.]"[180] For citizens of the EU, this requires the exhaustion of the national court system as well as in the ECJ. The ultimate result is that the fundamental and human rights of the citizens of the EU were placed in limbo in the context of an ECtHR. However, it does appear that accession of the EU is to come in the near future.[181] Regardless of when this accession does in fact occur, there is no doubt that

171. *Id.* art. 19.

172. *EU Accession to the European Convention on Human Rights*, COUNCIL OF EUROPE, http://www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention (last visited May 18, 2013) [hereinafter COUNCIL OF EUROPE].

173. *Id.*

174. Treaty of Lisbon art. 1(8)(2); *see also* TEU art. 6(2).

175. COUNCIL OF EUROPE, *supra* note 172.

176. *Id.*

177. Rizer, *supra* note 56, at 99.

178. McNamara, *supra* note 23.

179. Graux, *supra* note 21.

180. ECHR, *supra* note 80, art. 35.

181. COUNCIL OF EUROPE, *supra* note 172.

the mandate for accession in the Treaty of Lisbon will have a dramatic effect on the state of PNR.

All of the amendments made to the Treaties by the Treaty of Lisbon will have incredible bearing and weigh very heavily on the state of current and all future PNR negotiations and agreements. As the European Data Protection Supervisor stated in a 2010 opinion, "It is essential that any agreement with third countries takes into account the new data protection requirements as they are being developed in the post-Lisbon institutional framework."[182]

D. 2007 PNR

After the 2004 PNR Agreement was annulled, the ECJ allowed for the Commission to negotiate an interim agreement in 2006 to satisfy the United States and to prevent yet another major dilemma for the European airlines.[183] Just days prior to the expiration of the 2006 Interim Agreement, the United States and EU agreed to terms on a new PNR deal which was signed in Brussels on July 23, 2007 and in Washington on July 26, 2007.[184] The Commission, when drafting the 2007 PNR Agreement, did make some other minor changes from the 2004 Agreement, most notably answering the demand to change from the 'pull' to the 'push' method.[185] But, for the most part, it basically just changed the legal basis from the first pillar of the European Communities competence to the third pillar invoking Articles 26 and 38 of the TEU.[186]

There were a few important issues regarding the change from the first pillar to the third. "For one, in the third pillar the Parliament has even less voice than in the first pillar, so the result would be that the Parliament is effectively cut out of the picture."[187] In the third pillar, the European Parliament did not have the competence to challenge the Commission or the Council as they had in the ECJ in 2006. Second, by this move, Directive 95/46 became wholly inapplicable to the PNR Agreement since the scope of

182. Opinion of the European Data Protection Supervisor on the Communication from the Commission on the Global Approach to Transfers of Passenger Name Record (PNR) Data to Third Countries of 30 Dec. 2010, 2010 O.J. (C 357) 11 [hereinafter EDPS Opinion 2010].

183. *See generally* Interim Agreement, *supra* note 17.

184. 2007 PNR Agreement, *supra* note 18.

185. *Id.* The 2004 Agreement allowed the US to 'pull' data, which means to access the airlines' computer reservation systems (CRS) and thereby gain access to and review the data. *Id.* The 'push' method is simply the opposite where the airlines send the DHS the PNR data. *Id.*

186. *Id.* After the Treaty of Lisbon, former Article 24 became Article 37 in the TEU and former Article 38 has since been repealed (*see* Treaty of Lisbon Annex *Table of Equivalents* 2007 (C306) 202-229).

187. Guild and Brouwer, *supra* note 86, at 3.

the Directive does not include "the processing of personal data in the course of an activity which falls outside the scope of Community law, such as...processing operations concerning public security, defence, States security . . . and the activities of the State in areas of criminal law[.]"[188] The third pillar concerned "matters of policing and criminal law" and thus was not within the grasp of the Directive.[189] Third, the ECJ could also have been effectively excluded from ruling on PNR after the move to the third pillar.[190] ECJ "jurisdiction over third-pillar matters depends on whether each member state has made a declaration permitting its national courts . . . to refer questions to the ECJ on third pillar issues."[191] However, after the Treaty of Lisbon entered into force, these factors became much less relevant, and possibly irrelevant altogether.

Given that the 2007 Agreement was not ratified before the Treaty of Lisbon entered into force, it was only provisionally applied and thus it needed to be ratified by the European Parliament in order to be fully effective, which is to say "formally enforced."[192] This consent was never given by the European Parliament and they declined to ratify the 2007 Agreement as recently as May 2010.[193] Politically, the PNR agreements between the EU and the United States have never been popular with the European Parliament.[194] However, there may also be a sound legal basis for the European Parliament's adamant opposition. In order to fully understand the 2012 Agreement, one must delve into the applicable laws and apply them to the 2007 Agreement in order to fully understand the 2012 Agreement as well as to determine if this new agreement is an improvement and whether it fits within the EU legal framework.

With the Treaty of Lisbon entering into force and thereby collapsing the former pillar structure of EU law, the third pillar basis of the 2007 PNR Agreement was no longer sufficient to circumvent application of Directive 95/46 because it was outside the Directive's scope, at least as it pertains to the pillar competences.[195] The pertinent portions of Directive 95/46 which need to be analyzed in order to determine whether the 2007 PNR Agreement meets the strict requirements of the Directive are Articles 6, 8, 12, 13, and 25.

Article 6 sets out the basic principles dealing with data processing. With regard to PNR, the pertinent sections state:

188. Directive 95/46, *supra* note 77, art. 3(2).
189. Guild & Brouwer, *supra* note 88, at 3.
190. *Id.* at 4.
191. *Id.* at 3.
192. McNamara, *supra* note 23.
193. *Id.*
194. Rizer, *supra* note 56, at 99.
195. Guild & Brouwer, *supra* note 88, at 4.

> [T]hat personal data must be . . . adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed . . . accurate . . . [and] kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.[196]

The first part of this is a matter of proportionality, which is a key component of the EU legal system. The information collected and processed must be proportional to the purpose for its collection, which is for security and to prevent terrorism and other types of organized crime.[197] This has been a major point of contention for privacy advocates who are opposed to the agreements as well as the European Parliament and the Article 29 Working Party.[198] Both the European Parliament and the Article 29 Working Party have found that the amount of data available in the 2007 PNR was excessive in relation to purpose for its transfer.[199]

The data that was collected and included in PNR was very extensive. In all, there were nineteen types of PNR data collected and required for transfer to US authorities.[200] This number, though a reduction from the amount of elements collected, processed, and transferred in the 2004 Agreement, "is a mere subterfuge as the [2007] Agreement groups all but one of the thirty-four elements into one of the nineteen new data sets."[201] Despite this reduction, the 2007 "Agreement retains broad categories such as 'general remarks' and 'all historical changes to the PNR.'"[202] Therefore, it can be inferred that the reduction in categories was by no means an actual reduction in the PNR data that is collected and transferred. The European Parliament, specifically referring to the array of data and the relation to

196. Directive 95/46, *supra* note 77, art. 6.

197. 2007 PNR Agreement, *supra* note 18, at 18.

198. Guild & Brouwer, *supra* note 88, at 2; *See also* Tukdi, *supra* note 5, at 610.

199. European Parliament Resolution on SWIFT, the PNR Agreement and the Transatlantic Dialogue on These Issues, 2007 O.J. (C 287 E) 349, 351 [hereinafter European Parliament Resolution 2007]; *See also* Article 29 Data Protection Working Party, *Opinion 7/2010 on European Commission's Communication on the Global Approach to Transfers of Passenger Name Record (PNR) data to third countries*, 622/10/EN, WP 178, at 3 (Nov. 12, 2010) [hereinafter Article 29 Working Party 2010 Opinion], *available at* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp178_en.pdf.

200. Letter from Michael Chertoff, U.S. Secretary of Homeland Security, to Luis Amado, President of the Council of the European Union, 2007 O.J. (L 204) 21-22 [hereinafter DHS Letter]. *See also* 2007 PNR Agreement, *supra* note 18, at 19 (the DHS letter is more or less part of the 2007 Agreement incorporated in the first recital of the agreement as a basis for reliance on the part of the European Union and follows sequentially in the Official Journal.)

201. VanWasshnova, *supra* note 9, at 839.

202. Rasmussen, *supra* note 59, at 586-587.

their legitimate use, stated:

> [I]t would seem that in practice, for law enforcement and security purposes, Advance Passenger Information System (APIS) data are more than sufficient; these data are already collected in Europe in accordance with Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerized reservation systems (2), and may therefore be exchanged with the US under a comparable regime; behaviour data in the PNR seem to be of limited use, as they cannot be identified if not linked to APIS; the justification for the general transfer of PNR data is therefore not satisfactory[.][203]

The Article 29 Working Party further stated that, though "personal data can be valuable under certain circumstances," it still may not be enough to guarantee air travel security and that less intrusive measures should also be employed with regard to innocent passengers.[204] Given the excessive amount of data that were collected through the 2007 Agreement, it is possible that the volume did not fit within the framework of Article 6 of the Directive.

Article 8 provides that certain personal data, called sensitive data, cannot be processed except with the consent of the subject.[205] Such data includes "racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life."[206] The 2007 Agreement provided that the United States would automatically delete any such sensitive data that is included in any of the PNR data transferred to the DHS.[207] However, the United States still retained the ability to access that data "in exceptional case[s]"[208] or if it may threaten US interests.[209] Additionally, "the deletion of sensitive data applies only in principle, and in prac[t]ice [sic] the US itself w[ould] decide what constitutes grounds for deletion."[210] This exception for the collection of sensitive data, even if only in extremely exceptional cases, was what the European Data Protection Supervisor (EDPS) stated was utterly deplorable.[211] "He consider[ed] that the

203. European Parliament Resolution 2007, *supra* note 199, at 351.
204. Article 29 Working Party 2010 Opinion, *supra* note 199, at 3.
205. Directive 95/46, *supra* note 77, art. 8.
206. *Id.*
207. DHS Letter, *supra* note 200, at 22.
208. *Id.*
209. Kuhelj, *supra* note 70, at 405.
210. *Id.* at 404-405.
211. EDPS Opinion 2010, *supra* note 182, at 10.

conditions of the exception are too broad and do not bring any guarantees[.]"[212]

In addition to the other articles, Article 12 directly correlated to the 2007 PNR Agreement. This article provides that the subject must have a right of access to the data collected concerning them and also that they have the right to rectify any error in that data which hearkens back to the requirement for the accuracy of data being processed in Article 8 of the Directive.[213] The obvious purpose for this provision was so that any and all data subjects could ensure and also be assured that the data being transferred which is identifiable to them is indeed correct.

The 2007 PNR Agreement did grant some access, stating, "Consistent with U.S. law, DHS also maintains a system accessible by individuals, regardless of their nationality or country of residence, for providing redress to persons seeking information about or correction of PNR."[214] This information, when requested, was to be "disclosed to the individual in accordance with the Privacy Act and the US Freedom of Information Act (FOIA)."[215]

Even though the agreement provided for this right of access, US compliance with this provision may be lacking. In February of 2010, the DHS promulgated a final rule exempting the Automated Targeting System (ATS), the system where PNR data is stored, from the requirement for disclosure of the Privacy Act, even though this is a "flagrant violation of the DHS 'undertakings' and the DHS-EU 'agreement'."[216] On account of this, "non-US persons are not being afforded the greater access rights provided by the Privacy Act."[217] Even when explicitly requested on the basis of the Privacy Act, the information, if divulged at all, has only been done so in accordance with the FOIA, meaning only data that is required to be released by the FOIA is released.[218] According to a study by the Identity Project, none of the requests for PNR data have been performed by the DHS in accordance with the Privacy Act, only in accordance with the FOIA.[219] Additionally, "All DHS responses . . . have been incomplete."[220] Without US compliance, the 2007 Agreement appeared to clearly be in violation of Article 13 of the Directive.

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212. *Id.*

213. Directive 95/46, *supra* note 77, art. 12.

214. DHS Letter, *supra* note 200, at 23.

215. *Id.*

216. The Identity Project, *DHS "Update" Still Misstates Compliance with EU Agreement on PNR Data*, PAPERS, PLEASE! BLOG ARCHIVE (Apr. 18, 2010 1:31 PM), http://www.papersplease.org/wp/2010/04/18/dhs-update-still-misstates-compliance-with-eu-agreement-on-pnr-data/.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

The noncompliance of the United States with regard to the right of access brings to light an imperative notion. Most of the 2007 Agreement, that is the promises or "assurances", were given by the United States in the form of a letter from Michael Chertoff, US Secretary of the DHS, to Luis Amado, President of the Council (DHS Letter).[221] Many of the specific provisions of the 2007 Agreement are contained in the DHS Letter, not the actual body of the Agreement itself.[222] However, the DHS Letter, which holds so many specifications, was not legally binding in nature.[223] As one scholar stated, "[I]t is significant that the processing, collection, use, and storage of personal data are not regulated by a bilateral agreement (or on international law), but only on the transient 'assurances' in the US Letter, which may change at any time."[224] The 2007 Agreement was anchored only "[o]n the basis of the assurances" which was rather problematic for the EU, or should have been seen as such.[225] This is further supported by a 2007 Resolution of the European Parliament which stated that the assurances "must become an integral part of the agreement and must be legally binding."[226]

In addition to the aforementioned articles, Article 25 was a central point of contention as it allowed the transfer of data from the Member States to a third country, provided that the third country in question provided "an adequate level of protection."[227] The criteria used in determining the adequacy of data protection of a third country included, most importantly, but not limited to, "the nature of the data, the purpose and duration of the proposed processing operation or operations . . . the rules of law, both general and sectoral, in force in the third country in question . . . and security measures which are complied with in that country."[228] A couple of issues arose in the context of this Article when discussing the duration of data retention as well as the rule of law in the United States.

The DHS Letter stated that the United States had the authority to hold the PNR data of an individual for up to fifteen years; seven years in active status and eight years in dormant status.[229] Some scholars have been quite critical of the length of this retention period as it is nearly five times the length of retention provided for in the 2004 Agreement.[230] It is possible that

221. *See generally* DHS Letter, *supra* note 200.
222. *Id.*
223. *Id.*
224. Kuhelj, *supra* note 70, at 404.
225. 2007 PNR Agreement, *supra* note 18, at 19.
226. European Parliament Resolution 2007, *supra* note 199, at 352.
227. Directive 95/46, *supra* note 77, art. 25.
228. *Id.*
229. DHS Letter, *supra* note 200, at 23.
230. VanWasshnova, *supra* note 9, at 839 ("[T]he Revised Agreement[] extends the retention period from three and one-half years to fifteen years, with the possibility of it being extended further.").

such an extensive retention period could be in violation of Article 6 of the Directive which states that data should be "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which" the data were collected.[231] In contrast, the EU draft agreement with Australia only has a retention period of five and one-half years (three years active and two and one-half years dormant statuses) and a recent proposal for an EU PNR Directive only contained a retention period of a little over five years (thirty days active and five years dormant statuses).[232] Given that the 2007 Agreement was still almost three times the length as another EU PNR agreement and the proposed directive, it does appear it was unnecessary for the purpose served.

The 2007 Agreement applied the US Privacy Act protections to the data subjects involved in the PNR transfers.[233] However, "the Agreement does not afford full Privacy Act protections to the PNR data collected by DHS, other than the disclosure of data to individuals; thus, DHS will be permitted to share the data with other federal, state, and local law enforcement agencies."[234] In a sense, this means that the United States could do what they please with the data once they had received it. Further degrading the adequacy of protection, "[t]he US Privacy Act only protects its own citizens against abuse and incorrect use of personal data[.]"[235] It seems apparent that if an EU citizen has no legal rights to recourse on the basis of US law then their data would not be adequately protected by the United States.

In light of this information, it does not seem likely that the 2007 Agreement was in line with the provisions of Directive 95/46 mainly in regard to the lack of adequate protection of data in the United States. However, Articles 3 and 13 granted wide exemptions for data processing and use when its collection was a matter of security or defense.[236] Therefore, even though the Treaty of Lisbon, by collapsing the pillar structure, may have brought all PNR agreements within the first pillar and thus subject to the Directive, this may not be enough to protect the data subjects.[237] Given that the ECJ in their 2006 Decision held that the 2004 Agreement was for public security, it is very possible that they would have ruled similarly with regard to the 2007 Agreement, which would have exempted it from subjectivity to the Directive.[238] However, it must be noted that the Article 29 Working Party adamantly holds their ground that any

231. Directive 95/46, *supra* note 77, art. 6(1)(e) (emphasis added).
232. Legal Service Report, *supra* note 25.
233. DHS Letter, *supra* note 200, at 23.
234. Rasmussen, *supra* note 59, at 587.
235. Kuhelj, *supra* note 70, at 413-414.
236. Directive 95/46, *supra* note 77, arts. 3 and 13.
237. Guild & Brouwer, *supra* note 88, at 4.
238. ECJ Decision, *supra* note 14, at I-4828.

and all PNR agreements must comply with Directive 95/46.[239]

Despite the possibility that the 2007 Agreement and future PNR agreements would fall outside the scope of Directive 95/46, after the Treaty of Lisbon these agreements must abide by rules for protection of fundamental rights established in the CFR and also be added to the TFEU.[240] As the European Commission Legal Service wrote in their letter to the Director General of the Home Affairs Commission:

> [A]n international agreement to be concluded by the Union must, like any other act of secondary law, [] comply with primary law, including fundamental rights...this requires in particular the respect of the right to the protection of personal data enshrined in Article 16 TFEU and Article 8 of the Charter of Fundamental Rights.[241]

In particular, "this means that any restriction of that fundamental right must be limited to what is necessary and proportional."[242]

The CFR is quite explicit in its protection of privacy and data. Article 7 grants, "Everyone has the right to respect for his or her private and family life, home and communications."[243] In addition, Article 8 provides for protection of personal data, that all "data must be processed fairly for specified purposes and on the basis of consent of the person concerned or some other legitimate basis laid down by law."[244] Given their very nature as fundamental rights as well as their addition to Treaties pursuant to the Treaty of Lisbon granting the CFR the same legal effect of primary EU law, there is no doubt that these rights are directly applicable to PNR.[245]

As the Legal Service Report states, since the right to privacy and data protection are fundamental, any limitation of those rights must be proportional and necessary. Article 52 of the CFR specifically states:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to

239. Article 29 Working Party 2010 Opinion, *supra* note 199.
240. *See generally* CFR, *supra* note 78; *See also* TFEU art. 16.
241. Legal Service Report, *supra* note 25.
242. *Id.*
243. CFR, *supra* note 78, art. 7.
244. *Id.* art. 8.
245. TEU art. 6; *see also* Treaty of Lisbon art. 1.

protect the rights and freedoms of others.[246]

As has been demonstrated, security, which is the ECJ's stated purpose of PNR, could reasonably be considered to be 'general interest'.[247] In addition, as a stated purpose is public security and because terrorism can potentially be a serious threat to human lives, PNR could be said to be a 'need to protect the rights and freedoms of others', specifically the Article 2 right to life[248] and the Article 6 right to security of person.[249] Therefore, the 2007 Agreement, as well as future PNR agreements, may lawfully limit the fundamental rights to privacy and data protection if proportional and necessary. The Article 29 Working Party has already deemed the fight against terrorism and serious transnational crime necessary.[250] The Working Party "has always supported the fight against international terrorism and serious transnational crime" and "considers this fight necessary and legitimate."[251] This seems to be both a reasonable and agreeable view. Thus the issue of PNR agreements limiting fundamental rights of subjects comes down to proportionality.

The two main proportionality issues concerning the 2007 Agreement are retention period and the extent of the data. As stated previously, the retention period of the 2007 Agreement was an increase of nearly five times that of the 2004 Agreement, and three times that of the draft EU-Australian PNR Agreement.[252] The European Parliament refused to ratify this agreement partly on account of such a lengthy retention period.[253] Additionally, in the EU's own proposal for PNR for internal EU travel, the retention period was only five years.[254] The Article 29 Working Party stated that "retention periods should not be longer than necessary for the performance of the defined purpose."[255] Specifically, the Working Party finds that "[r]etention of data of non-suspected individuals raises the question of their necessity and might conflict with constitutional principles in some Member States."[256] It believes that unless the data of a passenger has triggered some sort of an investigation, it should be discarded immediately after analysis.[257] This short of a retention period may in actuality be too short and could possibly lower the working efficiency of

246. CFR, *supra* note 78, art. 52.
247. ECJ Decision, *supra* note 14, at I-4828.
248. CFR, *supra* note 78, art. 2.
249. *Id.* art. 6.
250. Article 29 Working Party 2010 Opinion, *supra* note 199, at 3.
251. *Id.*
252. *See* VanWasshnova, *supra* note 9, at 839.
253. Legal Service Report, *supra* note 25.
254. Travis, *supra* note 26.
255. Article 29 Working Party 2010 Opinion, *supra* note 199, at 6.
256. *Id.*
257. *Id.*

PNR systems in general. The Council Legal Service seems to believe that a retention period of two years is adequate for the purposes for which the data is held, but questioned the necessity of retention beyond that period.[258] Although there are varying opinions among different EU and independent bodies about what is the maximum retention period to remain proportional, as the Commission Legal Service stated, "[I]t appears highly doubtful that a period of 15 years can be regarded as proportional."[259]

The shear breadth and amount of data that was collected and processed pursuant to the 2007 Agreement also raises the issue of proportionality. There were nineteen categories of data that were or could have been collected by the DHS through the 2007 Agreement.[260] However, some of these categories were very broad such as "General Remarks" which allowed more data to be collected under the guise of just one category.[261] In addition, the 2007 Agreement still allowed the collection of the so-called 'sensitive data' which included data revealing religious beliefs, racial origin, ethnic origins, or political opinions.[262]

The issue is determining just how much information is needed to effectuate the purpose of PNR agreements to stop terrorism. The European Parliament has stated on at least two occasions that Advance Passenger Information (API) data is more than sufficient for the purpose served.[263] Also, the API data collection would be much less invasive on the personal privacy of data subjects than was the data collection in the 2007 PNR scheme.[264]

Lastly, it is the opinion of both the EDPS and the Article 29 Working Party that sensitive data should not be transferred to the DHS at all.[265] The EDPS specifically calls for a reduction of categories, including the broad categories like 'general remarks' as well as the 17th category named in the DHS Letter,[266] to eliminate the transmission of sensitive data.[267] The PNR data is needed to combat terrorism and serious international crime through

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258. Legal Service Report, *supra* note 25.

259. *Id.*

260. DHS Letter, *supra* note 200, at 21-22.

261. Rasmussen, *supra* note 59, at 586-587.

262. *Id.* at 587.

263. European Parliament Resolution 2007, *supra* note 199, at 351; *see also* European Parliament Resolution of 5 May 2010 on the Launch of Negotiations for Passenger Name Record (PNR) Agreements with the United States, Australia and Canada. 2011 O.J (C 81) E/73 [hereinafter European Parliament Resolution 2010].

264. European Parliament Resolution 2010, *supra* note 263, at E/73.

265. EDPS Opinion, *supra* note 180, at 10; Article 29 Working Party 2010 Opinion, *supra* note 199, at 6.

266. DHS Letter, *supra* note 200, at 22 ("General remarks including OSI [Optional Services Instruction], SSI [Special Services Instruction] and SSR [Special Service Request] information").

267. EDPS Opinion, *supra* note 180, at 10.

tracing of recent travel, credit card transactions, other financial information, and contact information.[268] However, sensitive data can be used in one way only which is to profile individual passengers.[269] The Article 29 Working Party does not believe that this is the most effective manner to alleviate the problem and certainly not the least invasive.[270] The Working Party specifically noted:

> The usefulness of large-scale profiling on the basis of passenger data must be questioned thoroughly, based on both scientific elements and recent studies. Up to now the Working Party has not seen any information confirming the usefulness of such profiling. On the contrary, recent studies tend to establish the counter-productive character of such screening, especially in relation to the fight against terrorism.[271]

Therefore, since the amount of PNR data that is transferred to the DHS may neither be the least invasive nor necessarily the most effective means of accomplishing the purpose, it seems the logical progression that the amount of PNR data transferred pursuant to the 2007 Agreement was not proportional.

E. 2011 PNR Proposal and 2012 Agreement

When the Treaty of Lisbon entered into effect, the 2007 Agreement had not yet been ratified, and therefore was not fully effective. Consequently, with their newly granted legislative powers, the European Parliament refused to ratify the 2007 Agreement and asked the DHS to enter negotiations for a new PNR agreement; the DHS obliged.[272] The negotiations between the European Commission and the DHS commenced in December of 2010 and an agreement on a text, the 2011 Proposal, was reached in May of 2011.[273] The resulting proposal was met with the similar rebuke as the 2004 and 2007 Agreements.[274] In contrast to the 2007 Agreement, the harshest admonition came from the Commission's own Legal Service which, in their opinion, seriously doubted the legality of the 2011 Proposal.[275] In particular, the Commission Legal Service had "grave

268. *Id.*
269. *Id.*
270. Article 29 Working Party 2010 Opinion, *supra* note 199, at 3.
271. *Id.* at 4.
272. Heyman Testimony, *supra* note 57.
273. *Id.*
274. *See generally* Travis, *supra* note 26.
275. Legal Services Report, *supra* note 25.

doubts as to [the proposal's] compatibility with the fundamental rights to data protection."[276] The 2011 Proposal was amended slightly culminating in the European Parliament's approval to become the 2012 EU-US PNR Agreement (2012 Agreement).[277] However, this did not include amendment of any of the provisions which the Commission Legal Service found problematic. Therefore, the service's report and the other criticisms of the 2011 Proposal are equally applicable to the 2012 Agreement.

The 2011 Proposal did address some of the issues that plagued the 2007 Agreement. As opposed to the EU basing almost an entire agreement with the United States on a legally non-binding letter of assurance, the integral provisions of the 2012 Agreement are rightfully set out in what would become a legally binding agreement.[278] For example, access for individuals, contained in the DHS Letter in the 2007 Agreement, is Article 11 in the 2011 Proposal.[279] In addition, the 2011 Proposal incorporates the 'push' method for data transfers, which was also previously covered by the DHS Letter.[280] These provisions, as with nearly all of the terms of the 2011 Proposal, were copied into the 2012 Agreement.[281]

Despite incorporating much of the DHS Letter into the legal framework of an agreement, the 2011 Proposal, and thereby 2012 Agreement, still fall below the legal standard required under EU law. For instance, although the 2012 Agreement does require the push method, there is still a wide exception that allows the DHS to acquire access to the carriers' systems "in order to respond to a specific, urgent, and serious threat[.]"[282] Additionally, the redress incorporated into Article 13, as with the 2007 Agreement, still "guarantees basically no judicial redress to data subjects, since all judicial redress is made subject to US law . . . [and] are administrative only and thus at the discretion of the DHS."[283] As with the 2007 Agreement, the oversight is not guaranteed to be independent which is required by Directive 95/46 Article 28.[284] Lastly, the 2012 Agreement also still allows the retention of sensitive data just as the 2007 Agreement.[285]

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276. *Id.*

277. *See generally* 2012 Agreement, *supra* note 26.

278. *See generally* 2011 Proposal, *supra* note 24.

279. *Id.* art. 11.

280. *Id.* art. 15; *compare* DHS Letter, *supra* note 200, at 23 (Carriers had to comply with DHS requirements for 'push' method data transmission. For those who did not, the DHS still held the right to 'pull' data from their CRS directly until they could meet DHS requirements.)

281. 2012 Agreement, *supra* note 26, arts. 11 and 15.

282. 2012 Agreement, *supra* note 26, art. 15(5).

283. Legal Service Report, *supra* note 25; *compare* DHS Letter, *supra* note 200, at 23. (The one major difference is that the 2012 Agreement does not offer the US Privacy Act as protection to EU citizens as in the 2007 Agreement, only offering applicability of the FOIA).

284. Legal Service Report, *supra* note 25; *See also* Directive 95/46, *supra* note 77, art 28.

285. Travis, *supra* note 26. *See also* 2012 Agreement, *supra* note 26, art. 6.

The 2012 Agreement also makes some critical changes from the 2007 Agreement which may have caused it to violate the principles of proportionality and necessity even more than the 2007 Agreement. The 2011 Proposal attempted to expand the circumstances in which US authorities can process PNR data by replacing "transnational crime" with the much broader category of "[o]ther serious crimes, which shall mean extraditable offences as defined in Article 4 of the Agreement on Extradition between the United States and the European Union . . . that are transnational in nature."[286] Based on the extradition agreement, a serious crime is one which is punishable by more than one year.[287] With such a low maximum penalty as well as the transnational requirement being met by simply occurring in or affecting more than one nation,[288] which will inevitably "include a very large number of crimes which cannot be regarded as serious[,]" the proportionality of the agreement is put into question.[289] Another major sticking point of the 2012 Agreement provision is that applying the extradition agreement definition of serious crimes seems repugnant as those individuals are already suspected or convicted of the crime whereas PNR relates to "a priori innocent individuals."[290] The 2012 Agreement changes this provision for the proposal slightly to include only "[o]ther crimes that are punishable by a sentence of imprisonment of three years or more and that are transnational in nature."[291] This is still a low enough penalty to raise the same issues mentioned in the Legal Service Report bringing proportionality into question.

The Legal Service also finds that the third clause of Article 4, which would allow PNR to be used in identifying persons that would be further questioned and scrutinized at the borders of the United States also "raises serious questions of proportionality."[292] This is simply a means of extending the USCBP's capabilities to police immigration offenses, possibly very minor offenses, not a means of preventing terrorism or serious transnational crime.[293]

Within that same Article, yet another provision drew the ire of the Commission's Legal Service. Subsection 2 of Article 4 would allow the DHS to use and process PNR "if ordered by a court."[294] The Legal Service finds that this cannot possibly be a meaningful limitation as it would allow the use of PNR for any purpose provided that the user could persuade a US

286. 2011 Proposal, *supra* note 24, art. 4(b).
287. Legal Service Report, *supra* note 25.
288. 2011 Proposal, *supra* note 24, art. 4(b).
289. Legal Service Report, *supra* note 25.
290. *Id.*
291. 2012 Agreement, *supra* note 26, art. 4(1)(b).
292. Legal Service Report, *supra* note 25.
293. *Id.*
294. 2012 Agreement, *supra* note 26, art. 4(2).

judge to allow it.[295] This is a direct violation of Article 52 of the CFR which provides that a "limitation on the exercise of rights and freedoms . . . must be provided for by law[.]"[296] The Legal Service does not consider such a provision to meet the requirement of foreseeability which the ECJ has held is needed to uphold the principle of a measure's being provided for by law.[297]

One consistency between the 2012 Agreement and the 2007 Agreement is the retention period, which remains fifteen years.[298] However, the active period would be shortened to five years with a dormant period of ten years.[299] The proposal also provides that after six months, "PNR shall be depersonalized and masked[.]"[300] This is, quite simply, a hollow, empty promise of protection considering that the data could be 'demasked' by US authorities, albeit by "a limited number of specifically authorized officials."[301] The ending result is the same in that the data can be 'repersonalized' and utilized after it is masked if the United States desires it to be so. The Legal Service does not find such a reduction of the active status period to be enough to scotch the same proportionality concerns as the 2007 Agreement's retention period as it "represents almost no improvement compared to the [2007] EU-US agreement, which the Parliament refused to approve . . . ."[302] Despite a shorter active period and access being more restricted in the dormant period, the data can still be accessed by US authorities.[303] The bottom line is that fifteen years of retention is quite incongruous with the requirement of proportionality.

On account of these major conflicts with fundamental rights and data protection laws in the EU, the Legal Service came "to the conclusion that despite certain presentational improvements, the draft agreement does not constitute a sufficiently substantial improvement of the agreement currently applied on a provisional basis, the conclusion of which was refused on data protection grounds by the European Parliament."[304] As a matter of fact, the Legal Service viewed the 2011 Proposal as "a setback from the point of view of data protection."[305] For these reasons, there is no doubt, at least in the eyes of the Legal Service, that the 2011 Proposal violates the fundamental rights guaranteed to EU citizens by the CFR.[306] Given that the

295. Legal Service Report, *supra* note 25.
296. CFR, *supra* note 78, art. 52(1).
297. Legal Service Report, *supra* note 25.
298. 2012 Agreement, *supra* note 26, art. 8.
299. *Id.*
300. *Id.*
301. *Id.*
302. Legal Service Report, *supra* note 25.
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*

2012 Agreement incorporated almost the exact same provisions of the 2011 Proposal the Commission's Legal Service found to violate the CFR, it stands to reason that the 2012 Agreement also likely violates the same fundamental rights of EU citizens.

IV. RECOMMENDATION

Given the information available, there appear to be three options that the EU can authorize, two of which have already been shown to be untenable with regard to fundamental rights. First, the EU, through the actions of the European Parliament as well as the other bodies, could annul the 2012 Agreement and then ratify the 2007 Agreement. The second option for the EU is to accept the new status quo held in the terms 2012 Agreement. Given that the 2007 Agreement has many of the same proportionality issues as the 2011 Proposal and thus the 2012 Agreement, which the Commission Legal Service deemed to violate fundamental rights, it seems logical that the 2007 Agreement also violates fundamental rights. As such, neither of these two options should be entertained by the EU. The final and recommended option is for the European Parliament to annul the 2012 Agreement and then for the European Commission to negotiate a new bilateral agreement with the United States. This new bilateral agreement should be consistent with the basic principles of EU law and the fundamental rights guaranteed by the CFR which was incorporated into primary EU law by the Treaty of Lisbon.

Instead of the broad, sweeping categories and breadth of PNR data that is transferred pursuant to the 2007 Agreement, the new agreement should use the much less invasive API data. In addition to being less invasive to privacy, the EU already has the appropriate legal framework in place concerning API data and it would be fairly easy to apply when sending it to the United States while, more than likely still providing an adequate amount of security to counter terrorism efforts and transnational crime.[307] As the European Parliament has already stated:

> [I]t would seem that in practice, for law enforcement and security purposes, Advance Passenger Information System (APIS) data are more than sufficient; these data are already collected in Europe in accordance with Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerized reservation systems, and may therefore be exchanged with the US under a comparable regime; behaviour data in the PNR seem to be of limited use, as

307. European Parliament Resolution 2007, *supra* note 199, at 351; *see also* Council Regulation (EEC) No. 2299/89 of 24 July 1989, 1989 O.J. (L 220) 1, 1.

> they cannot be identified if not linked to APIS; the justification for the general transfer of PNR data is therefore not satisfactory[.][308]

Regardless of whether the same API data is acceptable to the United States, any new agreement must eliminate any transfer of sensitive data to the United States, which would require the actual reduction of the categories of PNR data that is transferred. Further, on the basis of proportionality, any new agreement must also reduce the retention period. There is a wide variance in opinion as to what would be proportional, but it certainly must be less than fifteen years.[309] The best outcome would likely be a retention period of between five and six years which would bring the new agreement in line with the 2004 Agreement with the United States as well as the current draft agreement with Australia.[310]

Additionally, the new agreement must eliminate the criticisms of all other EU-US PNR agreements. The method of transfer should be exclusively push thereby eliminating the any ability of the United States to pull data from European airlines.[311]

It is also vitally important that EU citizens have knowledge of their data being transferred as well as access to their records in order to ensure their adequacy and accuracy.[312] "PNR data is unverified information, mostly provided by the passengers themselves or their tour operators or travel agencies and collected for business purposes, not law enforcement purposes. As there is no (easy) way to objectively verify these data, PNR data cannot be considered as exact information."[313] Based on this assessment, a subject's access to his or her records and data are necessary not just on account of this being a fundamental right,[314] but also for the effectiveness of data use. This is a point which US authorities ought to willingly agree being that any effective use of such data is contingent on the data being correct. If the people do not have access to the data or the ability to ramify any errors, the data becomes useless. US denial of concession to this point would be illogical.

The negotiation of a new EU-US PNR agreement based on these suggestions is not without problems. The biggest issues are the US Senate Resolution and the general administrative sentiment that any new agreement must not degrade the operational effectiveness of the 2007

308. European Parliament Resolution 2007, *supra* note 199, at 351.
309. Legal Service Report, *supra* note 25.
310. *Id.*
311. European Parliament Resolution 2007, *supra* note 199, at 352.
312. *Id.* at 351.
313. Article 29 Working Party 2010 Opinion, *supra* note 199, at 5.
314. CFR, *supra* note 78, art. 8.

Agreement.[315] It seems likely that any reduction to any of the terms stated in the 2007 Agreement would be considered by the United States to "degrade the usefulness of the PNR data for identifying terrorists and other dangerous criminals" and thereby compel DHS rejection of the agreement.[316]

The other major obstacle is that the entirety of all EU-US PNR relations has been dominated by the United States who has basically disregarded any notion of actual negotiation to conform to EU demands or to comply with EU laws.[317] Tony Bunyan of Statewatch, a group which keeps track of civil liberties across all of Europe, stated:

> Secret minutes of EU-US meetings since 2001 show that they have always been a one-way channel, with the US setting the agenda by making demands on the EU[.] When the EU does make rare requests, like on data protection, because US law only offers protection and redress to US citizens, they are bluntly told that the US is not going to change its data protection system – as they were at the EU-US JHA ministerial meeting in Washington on 8-9 December 2010.[318]

Yet another obstacle is that the United States entered into several bilateral agreements with different EU Member States which condition admission into the US Visa Waiver Program on those Member States providing the United States with PNR data.[319] Being that these PNR transfers are based on the 2007 Agreement's provisions, any degradation in the new agreement would seriously threaten these bilateral agreements.[320] The last and perhaps most problematic obstacle is that, both logistically and politically, it would be wildly unpopular and almost unthinkable that the EU would rescind an agreement which so recently entered into force and which was the culmination of nearly two years of negotiations.

However, the EU needs to stand their ground against the United States. The EU is really the "only legal check on the actions of the United States" being that they have the political clout and affluence necessary to control the United States in the international arena.[321]

What is more important than the EU asserting their position in the international political sphere, is the EU's need to limit the inevitable fallout

315. S. Res. 174, *supra* note 20; *see also* Heyman Testimony, *supra* note 57.
316. S. Res. 174, *supra* note 20.
317. Travis, *supra* note 26.
318. *Id.* (citing Bunyan during an interview for the article).
319. McNamara, *supra* note 23.
320. *Id.*
321. Rasmussen, *supra* note 59, at 589.

that will occur by enactment of an agreement that violates fundamental rights guaranteed by the CFR and the ECHR, to which all Member States have acceded.[322] "A solution within the EU . . . is highly desirabl[e] as the alternative is the potentially very damaging possibility of a judgment from the [ECtHR] striking down the EU-US agreement on human rights grounds."[323]

After the European Parliament and the Council approved the PNR agreement, the national legislations will now have to implement it into their own legal framework.[324] Once in the national legislation and thereby legally binding, the people of that nation will have access to their courts to challenge the agreement on the grounds that it violates their fundamental rights to privacy and data protection.[325] Because of the gravity and consequence, there are two possible outcomes, but the likely result is that the national court will refer the case to the ECJ for a preliminary ruling on the matter.[326] The ECJ could then either do what is easiest and annul any agreement that violated fundamental rights, such as the 2007 Agreement or the 2012 Agreement, or they could rule in favor of the Member State. Since all Member States have acceded to the ECHR, if, and only if, the ECJ hears the case and denies remedy for the individual can that person then apply to have the case heard by the ECtHR.[327] Once in the ECtHR, the case could prove very troublesome to the EU as "[i]t is to be doubted whether the transmission of the extensive list of personal data to US authorities and the uncertainty about the future use of this information will pass the test of the criteria which have been developed by the [ECtHR] on the basis of Article 8 ECHR."[328]

The ECtHR, which is wholly independent from the EU or its institutions, does not, nor has it ever, had any qualms with ruling Member State law as a violation of human rights, even when that means an inevitable imposition on US law as was seen in Soering v. United Kingdom.[329] The outcome of that case was that Soering's extradition from

322. CFR, *supra* note 78, arts. 7-8; ECHR, *supra* note 80, art. 8.

323. Guild & Brouwer, *supra* note 88, at 6.

324. TFEU art. 291.

325. *Id.* art. 291; *see generally* Graux, *supra* note 21.

326. TFEU art. 267. Even if the national court ruled in favor of the agreement, the matter could still be appealed up through national court systems to the ECJ. If the ECJ denied hearing the case, the sole option would be for the individual to apply to hear the case in the ECtHR.

327. ECHR, *supra* note 80, art. 35 ("The Court [ECtHR] may only deal with the matter after all domestic remedies have been exhausted").

328. Guild & Brouwer, *supra* note 88, at 4.

329. *See generally* Soering v United Kingdom, 11 Eur. Ct. H.R. (ser. A) (1989) (holding that Soering, a German national who was accused of committing capital murder in the State of Virginia and the fleeing to the United Kingdom, and who petitioned the ECtHR on the grounds that extradition to a place where he faced the death penalty violated his fundamental

the UK was deemed to violate his human rights on account of the State of Virginia seeking the death penalty, and the US State ultimately had to change its prosecution to seeking a life sentence in order to get extradition from the UK.[330] Since an individual has to exhaust all domestic remedies before he or she can seek remedy in the ECtHR,[331] it could mean that several years would have passed with the agreement in place before the ECtHR rules and if, as in the Soering case, they rule against the Member State, the EU would then be forced to negotiate an agreement that abided by fundamental rights immediately, not to mention the political fallout of the decision to annul an agreement as a violation of human rights. The risk of such a ruling is too high for the EU to gamble by not structuring a new agreement that does not comport with the fundamental rights of its people.

It is in consequence of all of this information that the only option for the EU regarding EU-US PNR agreements is to repeal the 2012 Agreement and then to negotiate a wholly new agreement which addresses all of the issues that have been brought to light, such as proper oversight of US data protection, judicial redress for EU citizens, and adherence to fundamental principles of EU law regarding necessity and proportionality. This has been further emphasized by a recent opinion of the European Data Protection Supervisor.[332] In this opinion, the EDPS stated that although the 2011 Proposal and thereby the 2012 Agreement "includes adequate safeguards on data security and oversight, none of the main concerns expressed...nor the conditions required by the European Parliament to provide its consent appear to have been met."[333] As such, neither the 2012 Agreement nor the 2007 Agreement fit within the legal framework of the EU as they either do not meet the requirements of Directive 95/46, the EU Founding Treaties as amended by the Treaty of Lisbon, or they come in conflict with certain fundamental rights guaranteed to EU citizens by the ECHR.

V. CONCLUSION

There is little argument to contest that the aftermath of events which transpired on September 11, 2001 have had a profound effect on law and privacy in the United States. With the proposed purpose of increased security, the immense transportation laws which were passed by the US Congress required other countries to negotiate bilateral agreements with the

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human rights under Article 3 ECHR. The ECtHR ruled that UK extradition, despite their extradition agreement with the US, did violate Soering's human rights in light of the death penalty prosecution).

330. *Id.*

331. ECHR, *supra* note 80, art. 35.

332. Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security of 9 Dec. 2011, 2012 O.J. (C 35) 16.

333. *Id.* at 18.

United States. The fallout from this was that, through the EU-US PNR agreements, the fundamental rights to privacy and data protection of citizens of the EU were put at risk. The entry into force of the Treaty of Lisbon further strained the EU-US PNR dialogue by reinforcing and enhancing the rights of the EU citizenry. The ultimate result is that, since none of the agreements or proposed agreements fit within the EU legal framework and since the United States is unwilling to budge, meaning negotiate, or compromise, a stalemate between the United States and the European Parliament looms.

From the inception of the ATSA and thereby the EU-PNR dialogue, the United States has dominated the negotiations while the European Commission has more or less simply accepted the terms presented.[334] The EU, arguably, is the last political and legal check on the United States and its seemingly global-reaching domestic policies.[335] If the EU is not willing to stand their ground and instead buckles to US pressure, the landscape of global privacy and data policy will most certainly tilt almost wholly to the US perspective. At the risk of destroying this last line of defense against a US policy regime, the EU must make the United States meet EU terms and fit a new PNR agreement within the laws of the EU. Additionally, recent changes in the primary foundational law of the EU through the Treaty of Lisbon have made it impossible for the EU to maintain the status quo approach to EU-US PNR agreements. An agreement which does not fall within the legal framework of the EU risks annulment by the ECJ or, perhaps even more detrimentally, the ECtHR striking down the agreement on human rights grounds.[336] In this period of change and flux, one thing is certain, the EU cannot meet all of the US demands for terms of a PNR agreement and at the same time abide by their own domestic law meaning that there must be some compromise by the United States.

The post-9/11 US transportation policy, in the context of PNR, is for the security of air travel within, to, or from the United States, but structuring an agreement that fits within EU standards does not mean that the United States downgrades its security. Some critics argue that the EU has no right to push their privacy and data protection standards on the United States.[337] However, is the United States not doing just that by forcing their domestic law and policy regarding PNR on the EU? What the United States is actually doing is pushing off the expenses and resources of border security onto other nations.[338] The United States can still gain an appropriate and ample amount of PNR from the EU and meet the other EU standards all without risking national security if it simply increased other

334. Travis, *supra* note 26.
335. Rasmussen, *supra* note 59, at 589.
336. Guild & Brouwer, *supra* note 88, at 4.
337. McNamara, *supra* note 23.
338. Rasmussen, *supra* note 59, at 590.

mechanisms of border control such as increased visa requirements or requiring data disclosure at its borders.[339] Whatever the outcome of the current EU-US PNR situation, the result will undoubtedly have an extensive influence and bearing on the transmission of data, its protection, and the privacy of individuals throughout the world.

339. *Id.*

CUSTOMARY INTERNATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW: A PROPOSAL FOR THE EXPANSION OF THE ALIEN TORT STATUTE

Anne Lowe

I. INTRODUCTION

Human rights, by definition, belong to all people equally, inalienably, and universally.[1] A being is either human or not human, and if it is human, it possesses the same rights as all other humans.[2] Furthermore, once a being is human, it cannot cease being human.[3] Therefore, human rights cannot be taken away from any person.[4]

Even so, these rights, despite their universality and inalienability, are sometimes violated by the conduct of governments, corporations, and private individuals. Various international laws and conventions have been developed to address and prevent human rights violations.[5] Members of the international community—States themselves—must, and do, play an important role in both developing and enforcing international human rights laws.[6]

In the United States, an important vehicle used to adjudicate international human rights claims is the Alien Tort Statute (ATS), also known as the Alien Tort Claims Act.[7] The ATS is a statute that allows US federal courts to hear cases brought by foreign plaintiffs alleging various torts committed outside of the United States.[8] Today, most of the cases brought under the statute involve alleged human rights violations.[9]

This Note begins with a brief history of the Alien Tort Statute and an examination of its purpose, jurisdictional requirements, and scope. The Note then examines the subject of customary international law (CIL). The Note explores the ways courts determine whether a practice violates customary international law in the context of ATS cases and the relationship between human rights norms and customary international law.

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1. *See* MARK GOODALE, THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 7 (Mark Goodale & Sally Engle Merry eds., 2007).

2. *See id.*

3. *See id.*

4. *See id.*

5. *See* MARGOT E. SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS 16 (Oxford University Press, 2007).

6. *See id.* at 17.

7. 28 U.S.C. § 1350 (2011).

8. *See id.*

9. *See* THE ALIEN TORT STATUTE, available at http://www.cja.org/article.php?id=435 (last visited Aug. 13, 2013).

Next, the Note briefly considers the subject of international human rights, the nature of human rights, States' obligations to protect and enforce international human rights, and the challenges encountered in enforcing such rights.

Finally, this Note proposes a broader approach to the application of customary international law as a basis for ATS liability. This Note will argue that the proposed solution will allow the United States to more readily fulfill its obligation to protect and enforce human rights.

II. AN OVERVIEW OF THE ALIEN TORT STATUTE

The Alien Tort Statute was enacted under the Judiciary Act of 1789.[10] The actual text of the law is very simple: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[11]

While the legislative history of the Judiciary Act fails to provide concrete evidence regarding Congress's purpose in enacting the ATS,[12] other historical evidence indicates that the statute was intended to protect the young country in a volatile international community.[13] The Framers likely sought to "avoid embroiling the nation in conflicts with foreign states arising from U.S. mistreatment of foreign citizens."[14] To avoid offending another nation by denying justice to one of its citizens, Congress enacted the ATS, providing a federal forum for aliens to bring tort claims.[15] Congress was likely interested in ensuring that claims involving foreign citizens or foreign states were tried in federal courts rather than state courts, because "state judges were less likely to be sensitive to national concerns than their federal counterparts."[16]

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10. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712-13 (2004):
> The first Congress passed [the ATS] as part of the Judiciary Act of 1789, in providing that the new federal district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

(quoting Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77).

11. 28 U.S.C. § 1350 (2011).

12. *See* CHARLES ALLAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3661.1 (3d ed. 2011).

13. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 464 (1989).

14. *Id.* at 465.

15. *Id.*

16. *Id.*

A. History of the ATS

Judge Friendly, of the Second Circuit, once called the ATS a "legal Lohengrin" because "no one seems to know whence it came."[17] The statute provided jurisdiction for only one case in the 170 years following its enactment.[18]

Then, in 1980, the Second Circuit "launched the modern ATS litigation revolution"[19] when it decided *Filartia v. Pena-Irala*.[20] In *Filartiga*, plaintiffs who were citizens of the Republic of Paraguay brought an action against another citizen of Paraguay, alleging that the defendant had violated the law of nations by torturing the plaintiffs' son to death.[21] The Second Circuit found that the ATS provided jurisdiction for the suit because deliberate torture, under color of authority, does in fact violate the law of nations.[22]

The Second Circuit also concluded that the "law of nations" referenced in the text of the ATS is equivalent to modern customary international law.[23] Furthermore, the Second Circuit found that there is "an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens."[24] This case marks the first time that foreigners had the ability to sue for alleged human rights violations in US courts.[25] The Second Circuit's findings provided the groundwork for the ATS to serve as a modern tool for courts to use to address human rights violations abroad.

Using the guidelines provided by the Second Circuit in *Filartiga*, US federal courts began to hear ATS cases alleging violations of customary international law more regularly.[26] Slowly but surely, court decisions have continued to delineate the permissible reach and scope of the ATS.[27] For

17. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

18. *See id.*:

> [A]lthough it has been with us since the first Judiciary Act, no one seems to know whence it came. We dealt with it some years ago in Khedivial Line, S. A. E. v. Seafarers' Union. At that time we could find only one case where jurisdiction under it had been sustained, in that instance violation of a treaty, Bolchos v. Darrell, [a 1795 case].

(internal citations omitted).

19. Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U.L. REV. 1117, 1127 (2011).

20. 630 F.2d 876 (2d Cir. 1980).

21. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

22. *See id.* at 880.

23. *Id.* at 880-81.

24. *Id.* at 884.

25. *See* Knowles, *supra* note 20, at 1127.

26. *See id.* at 1127.

27. *See id.* at 1127-28.

example, in *Hilao v. Estate of Marcos*,[28] Philippine citizens brought a human rights violations class action against the former president of the Philippines, alleging that he committed human rights abuses against the plaintiffs themselves, as well as the plaintiffs' descendants.[29] The Ninth Circuit found that the defendant could be held liable under the ATS for the human rights violations his military committed, since he had knowledge of the violations and did not prevent them.[30] The court also held that ATS jurisdiction applies even where the alleged tort is committed abroad rather than on US soil.[31]

In *Kadic v. Karadzic*,[32] Bosnian nationals sued the chief of Serbian forces for alleged human rights violations, including torture, rape, and execution.[33] The Second Circuit found that the ATS did provide jurisdiction for the plaintiffs' suit and that *private* liability did exist for the violations.[34] The defendants' conduct, the court declared, breached the law of nations "whether undertaken by those acting under the auspices of a state or only as private individuals."[35] The court specified, however, that the only conduct that should lead to individual liability under the ATS is that "committed in pursuit of genocide or war crimes."[36]

In *Flores v. Southern Peru Copper Corp.*,[37] Peruvian citizens sued a corporate defendant, alleging that the corporation had violated the law of nations by causing environmental damage that led to the plaintiffs' illnesses.[38] The Second Circuit held that no jurisdiction existed under the ATS because the plaintiffs did not show that the defendant's conduct constituted a violation of customary international law.[39] However, by failing to hold that the plaintiff's allegations should be dismissed on the grounds that the defendant was a corporation rather than a government official or private individual, the court implied that a corporation may indeed be held liable under the ATS for sufficiently universal and specific human rights violations.[40]

28. 103 F.3d 767 (9th Cir. 1996).
29. *See id.* at 771.
30. *See id.* at 776.
31. *See id.* at 772.
32. 70 F.3d 232 (2d Cir. 1995).
33. *See id.* at 236-37.
34. *See id.* at 239.
35. *Id.* at 239.
36. *Id.* at 244.
37. 414 F.3d 233 (2d Cir. 2003).
38. See *id.* at 236-37.
39. See *id.* at 255.
40. *See generally id.*

B. Jurisdictional Requirements

Federal subject matter jurisdiction over an ATS claim depends on the satisfaction of three independent criteria. First, a foreigner must sue.[41] Second, the suit must allege that a tort has been committed.[42] Third, the tort must have been committed either in violation of the "law of nations,"[43] of a treaty that has been ratified by the United States, or of a binding legislative, judicial, or executive rule.[44]

If a plaintiff brings a claim that fails to allege conduct that violates either a treaty ratified by the United States or a binding decision or act,[45] the court must undertake the sometimes difficult task of determining whether the conduct violates the law of nations. When conducting this analysis, the court must determine whether the claim implicates an international legal norm that is "specific, universal, and obligatory,"[46] and whether the United States accepts that norm. When a claim meets these criteria, the court then decides whether the plaintiff states a claim that sufficiently alleges a violation of the norm.[47]

C. The Permissible Scope of the ATS

Prior to 2004, American courts were split on the issue of the ATS's jurisdictional scope. The majority of courts ruled that the ATS provides plaintiffs with a substantive right of action for law of nations violations.[48] Under this approach, once the court identified an international legal norm, the plaintiff had a right of action under the ATS and traditional standing principles against alleged violations of that norm.[49] A minority of courts, on the other hand, viewed the ATS as a statute that provides only jurisdiction for claims brought by plaintiffs, but no substantive cause of action.[50] Under this approach, the statute provides nothing but a forum for the action.[51] The

41. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir.1980) ("[T]his action is properly brought in federal court. This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations.").

42. *See id.*

43. *Id.* For further discussion of customary international legal norms, see *infra* Part II.E.

44. *See id.* at 880.

45. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) ("[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . .").

46. In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (C.A.9 1994).

47. *See* Joel Slawotsky, *Doing Business Around the World: Corporate Liability Under the Alien Tort Claims Act*, 2005 MICH. ST. L. REV. 1065, 1087 (2005).

48. *See* Patrick D. Curran, *Universalism, Relativism, and Private Enforcement of Customary International Law*, 5 CHI. J. INT'L L. 311, 313 (2004).

49. *See id.*

50. *See id.* at 313-14.

51. *See id.* at 314.

substantive right of action was to be provided by self-executing treaties, statutes, and customary international law, not by the ATS itself.[52]

Then, in 2004, the United States Supreme Court decided *Sosa v. Alvarez-Machain*[53] and resolved the debate. In *Sosa,* the Court held that the ATS is a jurisdictional statute only and creates no cause of action.[54] This decision greatly limited the scope of tort claims permitted under the ATS. The Court found that the more narrow approach corresponded better with the intent of the ATS drafters.[55] According to the Court, the ATS's drafters intended that common law, rather than the ATS standing alone, would supply a cause of action for only a "modest number of international law violations."[56] Justice Souter pointed out that, at the time of its adoption, the ATS allowed federal courts to hear claims only "in a very limited category defined by the law of nations and recognized at common law."[57] In other words, at the time of its ratification, ATS jurisdiction depended on the existence of an established cause of action under either common law or the law of nations. [58]

The *Sosa* Court specified three "law of nations" offenses addressed by the ATS at the time of its ratification: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[59] The Supreme Court did not restrict modern ATS jurisdiction to these three offenses, but instead held that federal courts have ATS jurisdiction according to "present-day law of nations."[60] ATS claims, the Court declared, must derive from

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52. *See id.*
53. 542 U.S. 692 (2004).
54. *See id.* at 724.
55. *Id.*
56. *Id.*
57. *Id.* at 712.
58. *See id.*
59. *Id.* at 715.
60. *Id.* at 724-25. The Court explained:

> [W]e have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala* has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.

(internal citations omitted).

"norm[s] of international character accepted by the civilized world and defined with a specificity" similar to "the features of the 18th-century paradigms" recognized by the Court.[61] In other words, the Supreme Court held that, in order to be recognized, ATS claims must be similar in specificity and universality to the historical ATS claims Congress anticipated when it enacted the ATS.[62]

D. Corporate/Individual Liability

Plaintiffs often bring ATS claims for corporations' human rights violations.[63] Corporations can be appealing defendants because their business practices abroad sometimes lead to serious human rights violations, and they possess ample assets from which to pay settlements or judgments to plaintiffs.[64]

The international community recognizes that corporations' practices should be monitored for human rights violations.[65] However, neither members of the international community nor US courts have been able to agree regarding whether law of nations liability reaches corporations.[66] The Supreme Court has not yet resolved the issue.[67]

E. Customary International Law as Federal Common Law

The boundaries of the law of nations have shifted a great deal during

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61. *Id.*

62. *See* Curtis A. Bradley et. al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 904 (2007).

63. *See* Mara Theophila, *"Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After Kiobel v. Royal Dutch Petroleum Co.*, 79 FORDHAM L. REV. 2859, 2876 (2011).

64. *See id.*

65. *See id.* at 2880.

66. *See id. See also* Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010) (holding that corporations are not subject to ATS jurisdiction for violations of customary international law); Doe I. v. Unocal, 395 F.3d 932 (9th Cir. 2002) (holding that private parties, including corporations, may be sued under the ATS for aiding and abetting in customary international law violations without a showing of state action); Romero v. Drummond Co., Inc., 552 F.3d 1303, 1316 (11th Cir. 2008) ("[S]tate actors are the main objects of the law of nations, but individuals may be liable, under the law of nations, for some conduct, such as war crimes, regardless of whether they acted under color of law of a foreign nation.").

67. *See* Theophila, *supra* note 64, at 2873:

> The Supreme Court has never ruled on what categories of defendants can be held liable for a violation of the law of nations, nor has the Court indicated which body of law--domestic or international--should control this inquiry. Particularly with the infusion of corporate defendants into ATS litigation, courts have only recently begun to analyze the question.

the two centuries following the ATS's enactment.[68] In the eighteenth century, the law of nations included only maritime law, the conflict of laws, the law of merchant, and laws that applied in disputes between states.[69] Over time, other private-law principles of the law of nations became integrated into common law, and the law of nations began to include human rights principles and norms.[70] Eventually, the law of nations "came to rest on the positive authority of custom."[71] Today, to determine the scope of customary international law, courts look at "the customs and usages of civilized nations,"[72] which help denote "the general assent of civilized nations."[73]

Early courts hearing ATS law of nations claims interpreted Article III, Section II of the US Constitution to allow jurisdiction for these claims under the theory that the law of nations was incorporated into US federal common law.[74] However, the Supreme Court in its 1938 decision, *Erie Railroad v. Tompkins,*[75] held that federal courts must apply state law in diversity cases.[76] It followed from the decision that no federal common law exists.[77] This presented a problem for courts hearing ATS cases because ATS jurisdiction depends on the claim falling under federal common law.

The Supreme Court addressed this problem when it heard *Sosa v. Alvarez-Machain.*[78] In *Sosa*, the Court held that courts could hear a very limited range of claims—only those for violations of international legal norms—under federal common law.[79] The effect of the Court's decision in *Sosa*, then, was to create "a new class of federal common law claims based

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68. *See* William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 21 (2007).

69. *See id.* at 21-22.

70. *See id.* at 22.

71. *Id.* at 23.

72. *Id.* (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

73. *Id.* (quoting The Paquete Habana, 175 U.S. 677, 694 (1900)).

74. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980). The court said,

> [A]s part of an articulated scheme of federal control over external affairs, Congress provided, in the first Judiciary Act, for federal jurisdiction over suits by aliens where principles of international law are in issue. The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.

Id. (internal citation omitted).

75. 304 U.S. 64 (1938).

76. *See id.* at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

77. *See id.* ("There is no federal general common law.").

78. 542 U.S. 692 (2004).

79. *See id.* at 731-32 ("[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.").

on a narrow subset of international law norms."[80]

The Court gave three reasons for its decision. First, it reasoned that Congress, when enacting the ATS in 1789, had concluded that "torts in violation of the law of nations would have been recognized within the common law of the time."[81] The Court recognized that, since the enactment of the ATS, the evolution of the *Erie* doctrine had significantly altered the function of federal common law, but determined that it should safeguard the drafters' intention that common law would provide causes of actions for a limited scope of law of nations violations.[82] The reason: in 1789, Congress could not have anticipated that federal courts would "lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."[83] The Court also noted that, since the ATS's enactment, no legislative or judicial action, including *Erie*, expressly proscribed courts from recognizing claims alleging violations of customary international law.[84]

F. Permissible Sources of International Law

Since, under *Sosa*, the ATS provides no substantive cause of action, but simply provides a forum for plaintiffs to litigate alleged violations of existing international law, the question of where a federal court may find its sources of international law is an important one. In *Paquete Habana*,[85] the United States Supreme Court held that

> where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy

80. Note, *An Objection to Sosa - and to the New Federal Common Law*, 119 HARV. L. REV. 2077, 2088 (2006).

81. *Sosa*, 542 U.S. at 714.

82. *See id.* at 740 ("[Erie v. Tompkins] signaled the end of federal-court elaboration and application of the general common law.").

83. *Id.* at 730.

84. *See id.* at 694 ("[T]he reasonable inference from history and practice is that the ATS was intended to have practical effect the moment it became law, on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time.").

85. The Paquete Habana, 175 U.S. 677 (1900).

evidence of what the law really is.[86]

In *Paquete Habana*, the Supreme Court held that the traditional proscription against wartime seizure of an enemy's fishing ships had become a rule of international law by general agreement among civilized nations.[87] This holding is particularly significant for ATS cases, because it clearly directs courts to construe international law "as it has evolved and exists among the nations of the world today," rather than as it existed in 1789.[88]

The sources of international law outlined in *Paquete Habana* are perpetuated in modern interpretations of customary international law. For example, the Statute of the International Court of Justice (ICJ Statute), in Article 38(1),[89] describes four types of sources on which a court should rely when interpreting international law.[90] First, courts must apply international laws contained in binding international conventions.[91] If no such laws exist, a court may look to customary international law as a source of international legal norms.[92] To determine whether a practice is customary international law, courts must determine whether the practice exists across civilized nations and whether that practice is rendered obligatory by rule of law, or *opinio juris*.[93] Third, courts may also consider general legal principles recognized by civilized nations.[94] Finally, courts may consider judicial decisions and the works of highly-regarded scholars and experts.[95] All of these provide acceptable sources of international law under which US courts may hear ATS cases.[96]

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86. *Id.* at 700.

87. *See generally id.*

88. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

89. *See* Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 [hereinafter ICJ Statute].

90. *See id.* at art. 38(1)(a)-(d).

91. *See id.* at art. 38(1)(a).

92. *See id.* at art. 38(1)(b).

93. *See* Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1068 (C.D. Cal. 2010) (citing The Paquete Habana, 175 U.S. 677, 708 (1900). *See also* Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603, 648 (1990) ("Under traditional theory, opinio juris 'comprehends a conviction on the part of states that their acts are required by, or consistent with, existing international law.' The opinio juris principle has also been described as a state's perception or belief that a particular practice is binding or obligatory. Still others have characterized opinio juris as 'shared community expectations,' 'common popular sentiment,' and the 'spirit of the people.' Despite these varying definitional formulations and theories, two distinct notions emerge as the 'essence' of opinio juris: (1) that the consequence of opinio juris is a binding international obligation, and (2) that the nature of opinio juris is subjective.").

94. *See* Doe v. Nestle, 748 F. Supp. 2d at 1068.

95. *See* ICJ Statute, *supra* note 90, art. 38(1)(d).

96. *See* Doe v. Nestle, 748 F. Supp. 2d at 1068.

III. CUSTOMARY INTERNATIONAL LAW

A. Customary International Law Generally

Much of the uncertainty surrounding jurisdiction in ATS cases involves the question of whether a particular type of conduct constitutes a violation of customary international law. Customary international law is "created by the general customs and practices of nations"[97] and is defined and framed using "myriad decisions made in numerous and varied international and domestic arenas."[98] Since there exists no "single, definitive, readily-identifiable source" of customary international law, determining whether a certain type of conduct violates customary international law can be a complex task, one with which lawyers and judges tend to be inexperienced.[99]

Customary international law is derived from "those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[100] In other words, in order for a standard to become customary international law, it must be one adopted in writing or in practice by most or all civilized nations. States need not, however, be universally effective in implementation of the principle.[101] Also, states must adhere to the practice because they feel there is a legal obligation.[102] Principles that states follow for political or moral reasons, rather than legal reasons, are generally not considered customary international law.[103]

In order to be considered customary international law, the legal standard must be of "mutual," and not merely "several," concern to states.[104] The distinction: areas of "mutual" concern between states involve state conduct that involves or is related to other states. Areas of "several" concern are "matters in which States are separately and independently interested."[105]

B. Customary International Law and the ATS

International legal norms that are "so fundamental and universally recognized that they are binding on nations even if they do not agree to them" are called *jus cogens*.[106] A *jus cogens* violation always satisfies the

97. Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003).
98. *Id.* at 247.
99. *Id.* at 248.
100. *Id.*
101. *See id.*
102. *See id.*
103. *See id.*
104. *Id.* at 249.
105. *Id.*
106. Doe v. Qi, 349 F. Supp. 2d 1258, 1277 (N.D. Cal. 2004).

ATS's "law of nations" requirement,[107] but a norm need not be considered *jus cogens* before it can be considered customary international law and, thus, actionable under the ATS.[108]

To satisfy ATS jurisdictional requirements, a principle of customary international law must be universal, specific, and obligatory.[109] These requirements serve as a filter to allow in only claims arising from the violation of international norms that are truly fundamental. They also ensure that US courts do not "sit in judgment of the valid acts of another state in the absence of agreement on the controlling principles of law."[110] Finally, the requirement of specificity guarantees that those claims brought under the ATS are governed by standards that are judicially manageable.[111]

After *Sosa*, federal courts must perform a two-part analysis to determine whether a practice may be considered a violation of the law of nations. [112] The court must find that the claim is based on a "present-day law of nations" that (1) derives from an international norm that is accepted by civilized nations and (2) is defined with a degree of specificity similar to the actionable eighteenth-century norms of the era during which the ATS was enacted: piracy, infringement of ambassador's rights, and violation of safe conducts.[113]

C. Treaties Versus Other Sources of Law

While binding treaties certainly constitute law of nations, sources other than treaties may be used to determine customary international law. For example, international agreements create law for the states who are parties to the agreements, and can still be considered customary

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107. *See id.*

108. Doe I v. Unocal Corp., 395 F.3d 932, 978 n.15 (9th Cir. 2002). *See also* Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 890 (2007):

> Some litigants and commentators suggested that ATS litigation should be limited to violations of jus cogens norms. A jus cogens norm is a norm "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." In the Ninth Circuit opinion that the Supreme Court reviewed in Sosa, the court rejected such a jus cogens limitation . . .

(quoting Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331).

109. *See* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 495 (1997).

110. *Id.* at 496.

111. *See id.*

112. Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1067 (C.D. Cal. 2010).

113. *Id.*

international law even for those states who are not party to the agreement,[114] when those agreements are intended for general observance and are, in fact, broadly accepted.[115] The agreements, while technically unbinding, serve as sufficient evidence that "a norm has developed the specificity, universality, and obligatory nature required for ATS jurisdiction."[116] For example, in *Abdullahi v. Pfizer*, the Second Circuit noted that the International Covenant on Civil and Political Rights provided sufficient evidence of customary international law, even though it was not self-executing and did not create binding international obligations.[117]

General legal principles that are common amongst civilized nations, even if those principles are not incorporated into express law or agreement, may also be invoked as principles of customary international law.[118]

IV. INTERNATIONAL HUMAN RIGHTS GENERALLY

A. The Nature of Human Rights

The phrase "human rights" applies to "a broad range of rights and freedoms to which every person is entitled."[119] These rights are considered to be inalienable and inherent in all human beings.[120] The very fact that principles of human rights exist necessarily demonstrates that those who hold these rights—all human beings—may also exercise them.[121] Human

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114. *See* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011) ("[C]onventions that not all nations ratify can still be evidence of customary international law. Otherwise every nation (or at least every 'civilized' nation) would have veto power over customary international law.") (citation omitted).

115. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. b (1987). *See also* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 176 (2d Cir. 2009):

> While adoption of a self-executing treaty or the execution of a treaty that is not self-executing may provide the best evidence of a particular country's custom or practice of recognizing a norm the existence of a norm of customary international law is one determined, in part, by reference to the custom or practices of many States, and the broad acceptance of that norm by the international community. Agreements that are not self-executing or that have not been executed by federal legislation, including the ICCPR, are appropriately considered evidence of the current state of customary international law.

(internal citation omitted)).

116. Abdullahi, 562 F.3d at 177.

117. *See id.* at 180.

118. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. c (1987).

119. Helen C. Lucas, *The Adjudication of Violations of International Law Under the Alien Tort Claims Act: Allowing Alien Plaintiffs Their Day in Federal Court*, 36 DEPAUL L. REV. 231, 232 (1987).

120. *See id.* at 233.

121. *See* Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527, 543 (2001).

rights standards are generally accepted by members of the international community, and abuse of these standards is a matter of international concern.[122] Today, states have significant contact with each other and the decisions made by one state often affect other states in the global community.[123] States all "rely on the same global environment for satisfaction" of their economic needs, and this close connection requires their collaboration in enforcing human rights globally.[124] This system also influences the ways human rights are defined and enforced globally. Although states are sovereign entities, there exists a globally-shared responsibility, one which derives from the interdependence between states, to cooperate in protecting and enforcing human rights principles, both domestically and abroad.[125]

B. The Development of International Human Rights Standards

Modern international human rights law looks very different than it did prior to World War II. Traditional international law governed only relations between sovereign states, rather than between private individuals or between states and individuals. Furthermore, international law applied only to states within that specific law's express jurisdiction.[126] The traditional framework treated states as sovereign and largely unaccountable. Individuals who were citizens of these states were only entitled to those human rights which their governments granted to them.[127] However, the international community's perspective on human rights shifted dramatically after World War II due to outrage over the brutalities that occurred during the war.[128]

The formation of international law occurs mostly at the international level through treaties, agreements, and conventions of the United Nations and of other international entities.[129] The United Nations has been largely responsible for the proclamation and definition of human rights through its international human rights conventions and declarations.[130]

One of the most prominent examples of an international human rights convention is the United Nations' Universal Declaration of Human Rights (UDHR). The UDHR declares, "All human beings are born free and equal

122. *See* Lucas, *supra* note 120, at 233.
123. SALOMON, *supra* note 5, at 15.
124. *Id.* at 24.
125. *Id.* at 25.
126. *See* Lucas, *supra* note 120, at 233.
127. *See id.* at 234.
128. *See id.*
129. *See* Elizabeth M. Bruch, *Whose Law Is It Anyway? The Cultural Legitimacy of International Human Rights in the United States*, 73 TENN. L. REV. 669, 674 (2006).
130. *See* Lucas, *supra* note 120, at 234.

in dignity and rights. They are endowed with reason and conscience . . . ."[131] The UDHR is a non-binding convention, so it was later supplemented by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are binding treaties.[132] However, even though the UDHR is not a binding treaty, it is considered to be a source of customary international law, and, therefore, imposes binding international legal obligations.[133]

While international law is generally framed and codified via international bodies, implementation and enforcement of these international human rights laws occurs mostly at the domestic level.[134] State governments are the primary actors in "implementing international human rights law at both the international and national levels."[135]

Human rights principles become universally-accepted norms by way of three different forms of internalization: social, political, and legal.[136] A norm is internalized socially when it "acquires so much public legitimacy that there is widespread general adherence to it."[137] When political figures recognize an international norm and recommend that a government adopt the principle as a matter of policy, the norm is internalized politically.[138] Legal internalization occurs when a principle is incorporated into a State's legal system through judicial interpretation, legislative action, and/or executive action.[139] Thus, one method governments can use to help shape international human rights norms is to provide for their courts both jurisdiction and a framework under which to adjudicate violations of those norms.

Consideration of all three forms of norm internalization proves useful when determining whether a claim of human rights violations is actionable under the ATS. When a norm is socially and politically internalized in the international community, to the degree that it is considered universal, the norm constitutes customary international law and its violation is presumably actionable under the ATS.[140] Then, when a US federal court

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131. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).

132. *See* Melissa Robbins, *Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement*, 35 CAL. W. INT'L L.J. 275, 280 (2005).

133. *See id.* at 280-281.

134. *See* Bruch, *supra* note 130, at 674.

135. *Id.*

136. *Id.* at 472, citing Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 642 (1998).

137. *Id.*, citing Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2657 (1997).

138. *Id.*

139. *Id.*

140. *See generally* The Paquete Habana, 175 U.S. 677 (1900). *See also* ICJ Statute, *supra* note 90, art. 38(1)(a)-(d).

delivers a decision regarding the norm, the judicial decision serves as legal integration of the norm, certainly in the US court system and likely in the international legal community as well.[141]

C. States' Obligations

Modern international human rights law places less emphasis on state sovereignty than did traditional human rights law. The international community has "manifested [its] concern with states' treatment of their own nationals in the numerous international conventions prohibiting conduct that violates human rights."[142] International human rights laws leave enforcement and protection of these rights to individual countries, so each nation shoulders an obligation not only to avoid violating the human rights of its citizens and those of citizens of other states, but also to implement human rights law and to ensure that human rights are protected and enforced globally.[143] This duty becomes even more important given the increasing globalization and interdependence between nations.[144] Many nations, willingly accepting the obligation imposed by international human rights law,[145] assert the right to protest other nations' human rights violations against their own citizens.[146] These protesting nations believe that a "lack of means of enforcement" within the violating state's legal system does not counteract the existence of a human right and a state's obligation to protect it.[147]

D. Global Challenges in Enforcing Human Rights

While members of the international community generally agree that human rights are universally enjoyed by all individuals, regardless of culture, religion, or politics, there still exist unresolved questions related to the most effective way to define, protect, and enforce these rights.[148]

Despite widespread globalization among nations, "local variables have a major impact on success or failure of adaptation" of human rights

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141. *See generally* The Paquete Habana, 175 U.S. 677 (1900). *See also* ICJ Statute, *supra* note 90, art. 38(1)(a)-(d).

142. Lucas, *supra* note 120, at 247.

143. Michael C. Small, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163, 178 (1985).

144. *Id.*

145. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) ("The United Nations Charter makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern." (internal citation omitted)).

146. Lucas, *supra* note 120, at 247.

147. *See id.* at 248.

148. *See* Mahmood Monshipouri, *Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries*, 4 YALE HUM. RTS. & DEV. L.J. 25, 43-44, 60 (2001).

norms.[149] A practice that seemingly constitutes a human rights violation in one nation or culture may be considered acceptable conduct in another nation or culture. United Nations' conventions, though they offer a legal basis for universal human rights, do not always provide "universal agreement as to the precise extent of the 'human rights and fundamental freedoms' guaranteed to all by the Charter . . . ."[150] In other words, even when a convention identifies a universal human right, it may fail to define the scope or the breadth of the right.

V. ANALYSIS

A. A Survey of ATS Decisions

Before discussing a proposal for a new approach in determining jurisdiction under the ATS, it may be helpful to take a broad look at those human rights violations which have been found to satisfy the ATS's jurisdictional requirements and those violations which have not.

Human rights violations that have thus far been determined actionable under the ATS include official torture;[151] war crimes (either by a State or by private individuals);[152] torture and summary execution committed within the context of war crimes or genocide;[153] torture and cruel treatment by private individuals;[154] systematic racial discrimination;[155] crimes against humanity;[156] environmental injury;[157] arbitrary, prolonged detention, kidnapping, forced disappearance; [158] genocide;[159] slavery or forced labor;[160] cruel treatment;[161] and denial of political rights.[162]

Human rights violations determined not actionable thus far under the ATS include cultural genocide;[163] environmental injury;[164] sustainable

149. *Id.*

150. Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (quoting United Nations Charter, 59 Stat. 1033 (1945)).

151. *Id.*

152. Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995).

153. *Id.* at 243.

154. Doe v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998).

155. Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1210 (9th Cir. 2007).

156. *Id.* at 1199.

157. *Id.*

158. *See generally* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995). *See also* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1092-93 (S.D. Fla. 1997).

159. *See generally* Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007). *See also* Kadic v. Karadzic, 70 F.3d 232, 241-42 (2d Cir. 1995).

160. Doe I v. Unocal Corp., 395 F.3d 932, 945-46 (9th Cir. 2002).

161. *See generally* Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001).

162. *See generally id.*

163. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 168 (5th Cir. 1999).

164. Flores v. S. Peru Copper Corp., 414 F.3d 233, 241 (2d Cir. 2003). *See also* Beanal v.

development;[165] child custody disputes;[166] child labor;[167] terrorism;[168] libel and free speech;[169] negligence;[170] and fraud.[171]

The courts deciding these cases have provided a variety of reasons for declaring a human rights claim not actionable under the ATS. Very often, potential ATS suits are struck down because they do not satisfactorily allege all of the ATS jurisdictional requirements.[172]

In *Flomo v. Firestone Nat. Rubber Co., LLC*, a group of Liberian children filed an action under the ATS, claiming that a corporation and its officers violated customary international law against using hazardous child labor on a rubber plantation.[173] The Seventh Circuit dismissed the suit.[174] For sources of customary international law, the court looked to the United Nations Convention on the Rights of the Child,[175] but ultimately decided that the language in the Convention was too indistinct and broad to constitute an international legal norm.[176] Next, the court looked at the International Labour Organization's (ILO) Convention 138: Minimum Age Convention.[177] The court declared the language in this Convention too vague and concluded that the type of labor appropriate for children varies greatly across cultures.[178] Lastly, the court looked at the ILO's Convention 182: The Worst Forms of Child Labour, which was ratified by the United States.[179] This Convention provides that the worst forms of child labor include "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."[180] The

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Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999).

165. *See* Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1200 (9th Cir. 2007).

166. Huynh Thi Anh v. Levi, 586 F.2d 625, 630 (6th Cir. 1978).

167. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1022-23 (7th Cir. 2011).

168. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984).

169. De Wit v. KLM Royal Dutch Airlines, 570 F. Supp. 613, 618 (S.D.N.Y. 1983).

170. Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978).

171. Int'l Inv. Trust v. Vencap, Ltd., 519 F.2d 1001, 1016-18 (2d Cir. 1975), *abrogated by* Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2885 (U.S. 2010).

172. *See* Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1067 (C.D. Cal. 2010).

173. *Flomo*, 643 F.3d at 1015.

174. *Id.* at 1024.

175. *Id.* at 1021-22. ("Article 32(1) of the United Nations' Convention on the Rights of the Child provides that a child has a right not to perform 'any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.'") (citing Convention on the Rights of the Child, G.A. Res 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989)).

176. *Id.* at 1022.

177. *Id.* ("ILO Convention 138 provides that children should not be allowed to do other than 'light work' unless they are at least 14 years old.")

178. *Id.*

179. *Id.*

180. *Id.* (quoting *International Labor Organization Convention 182, Convention Concerning the Prohibition and Immediate Action for the Elimination of The Worst Forms of Child Labour*, Article 3(d), (June 17, 1999), http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm).

court proclaimed that the Convention was still "pretty vague" because "no threshold of actionable harm is specified" and because of "the inherent vagueness of the words 'safety' and 'morals.'"[181]

The court noted that the ILO's Recommendation 190 "adds some stiffening detail" by specifically decrying "work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health," and "work under particularly difficult conditions such as work for long hours."[182] The court remarked, however, that a "Recommendation" is not the same as an enforceable obligation.[183]

The Seventh Circuit ultimately concluded that the three conventions fail to provide a specific and enforceable rule.[184] The court indicated that, because economic conditions vary from state to state, "working conditions of children below the age of 13 that significantly reduce longevity or create a high risk (or actuality) of significant permanent physical or psychological impairment" may not violate customary international law.[185] It also declared that the working conditions on the rubber plantation were "bad" but "not that bad."[186] The court speculated that the children, in helping their fathers fill their daily quotas, enabled their fathers to keep their jobs, and were therefore better off than Liberian children whose parents did not have the benefit of the labor of their children.[187]

In *Guinto v. Marcos*, a group of Philippine citizens brought an action against the former president of the Philippines.[188] The plaintiffs argued that the Philippine government, under the direction of its president, violated

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181. *Id.*

182. *Id.* (quoting *International Labor Organization Convention 182, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,* Recommendation 190, (June 17, 1999) http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm).

183. *See id.* at 1022-23:

> [A]part from bringing the Recommendation before the ... competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director–General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them.

(citing ILO Constitution, Article 19(6)(d), (April 1919) *available at* http://www.ilo.org/ilolex/english/constq.htm).

184. *Id.* at 1023.

185. *Id.*

186. *Id.*

187. *Id.* at 1024.

188. Guinto v. Marcos, 645 F. Supp. 276 (S.D. Cal. 1986).

their right to free speech by seizing a film produced and directed by the plaintiffs.[189] The district court dismissed the action.[190] The judge stated, "[H]owever dearly our country holds First Amendment rights, I must conclude that a violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations.'"[191]

In *Beanal v. Freeport-McMoran, Inc.*, Indonesian citizens filed suit against corporations mining in Indonesia.[192] The plaintiffs alleged environmental abuses, individual human rights violations, and cultural genocide, which are all offenses under the ATS and the Torture Victim Protection Act.[193] The Fifth Circuit dismissed the environmental torts claims and the cultural genocide claims.[194] The court found that the environmental claims were not actionable because the sources of international law the plaintiffs cited "merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts."[195]

Similarly, the Fifth Circuit held that cultural genocide is not recognized globally as a violation of universal international law.[196] The court found that the international declarations, conventions, and agreements to which the plaintiffs referred merely made "pronouncements and proclamations of an amorphous right to 'enjoy culture,' or a right to 'freely pursue' culture, or a right to cultural development" without specifying which conduct actually would amount to an act of cultural genocide under customary international law.[197]

B. A Review of the Current Approach

Under *Sosa*, courts must treat the Alien Tort Statute as a jurisdictional statute only.[198] Thus, the ATS, standing alone, neither provides nor defines a cause of action for foreign plaintiffs. Instead, the statute simply allows US federal courts to serve as a forum in which these plaintiffs may bring a very limited scope of claims.[199]

Plaintiffs' causes of action under the ATS, then, must derive from

189. *Id.* at 277.
190. *Id.* at 280.
191. *Id.*
192. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).
193. *Id.* at 163.
194. *Id.* at 167-68.
195. *Id.* at 167.
196. *Id.* at 168.
197. *Id.*
198. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).
199. *See id.*

substantive treaties, statutes, or universal legal norms known as customary international law.[200] Customary international law, for ATS purposes, is comprised of legal principles featuring the same degree of specificity and universality as the law of nations principles in place at the time the ATS was ratified.[201] Those ancient principles include violations of safe conduct, infringement on ambassadors' rights, and piracy.[202] Today, in order for a customary international law violation to be actionable under the ATS, the principle of customary international law must be both universally adopted by civilized nations and defined with a great deal of specificity.[203]

The *Sosa* approach permits US courts to protect only a relatively limited range of human rights. It also allows courts little freedom to define and enforce many of the human rights that are indeed recognized universally in UN conventions and other international agreements.[204] As a result, courts have found ATS claims to be non-justiciable if the underlying customary international law principles are not sufficiently specifically defined, even if the principles are arguably universally held by civilized nations.[205]

For example, as previously noted, the Seventh Circuit dismissed the *Flomo* plaintiffs' claim that the defendant violated customary international law by using hazardous child labor, holding that the child labor-related language found in the conventions cited by the plaintiffs was too vague, expansive, and culturally-relative to be considered customary international law.[206] The court also noted that the conventions failed to specify the scope of actionable injury.[207]

In *Beanal*, the Fifth Circuit dismissed the plaintiffs' environmental claims, because the relied-upon sources of customary international law failed to denote actual practices that amounted to violations of these norms.[208] In the same case, the Fifth Circuit also held that cultural genocide did not violate customary international law because international conventions that refer to a right to enjoy or pursue culture or cultural development fail to explicitly denote actual practices that amount to cultural genocide.[209]

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200. Curran, *supra* note 49, at 314.

201. *See* Doe v. Nestle, 748 F. Supp. 2d 1057, 1067 (C.D. Cal. 2010).

202. *Id.*

203. *Id.*

204. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

205. Doe v. Nestle, 748 F. Supp. 2d 1057, 1071 (C.D. Cal. 2010).

206. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1022 (7th Cir. 2011).

207. *Id.*

208. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999).

209. *Id.* at 168.

In *Flores v. S. Peru Copper Corp.*, the Second Circuit held that claims alleging violations of a right to life and health, based on principles asserted in the United Nations Universal Declaration of Human Rights as well as other UN conventions, were not actionable because those rights were too ambiguous and abstract to constitute customary international law principles.[210] Rather, the principles lacked specific standards for enforcement.[211]

In *Wiwa v. Royal Dutch Petroleum Co.*, a New York district court held that an alleged violation of the right to peaceful assembly is not actionable under the ATS.[212] To establish the existence of the customary international law norm of right to peaceful assembly, the plaintiffs relied on two UN resolutions[213] and four European Court of Human Rights decisions.[214] The court noted that these sources do help establish a customary international law norm, but ultimately held that the sources do not adequately define the norm, so they do not meet *Sosa's* specificity requirement.[215]

These and other ATS decisions demonstrate the limitations of the current ATS framework under *Sosa*. Even when a human rights principle is supported by an acceptable source of customary international law, and even when that principle is found to be sufficiently universal, if the customary international law sources fail to define the scope of the principle, then the ATS does not grant jurisdiction.[216] This means that US courts must refuse to

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210. Flores v. S. Peru Copper Corp., 414 F.3d 233, 254-55 (2nd Circ. 2003) (quoting Universal Declaration of Human Rights, Art. 25, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.") (also quoting International Covenant on Economic, Social, and Cultural Rights, Art. 12, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 ("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.") (also quoting Rio Declaration on Environment and Development (Rio Declaration), United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 13, 1992, Principle 1, 31 I.L.M. 874 ("Human beings are . . . entitled to a healthy and productive life in harmony with nature.")).

211. *See Flores*, 414 F.3d at 254-55.

212. Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp.2d 377,385-86 (S.D.N.Y 2009).

213. *Id.* at 385 (citing United Nation's *Code of Conduct for Law Enforcement Officials,* annex, 34 U.N. GAOR Supp., No. 46, at 186, U.N. Doc. A/34/46 (1979) and United Nation's *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,* principle 9, U.N. Doc. A/CONF. 144/28/Rev. 1, at 112 (1990).)

214. *Id.*

215. *Id.* at 385-86.

216. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 258 (2d Cir. 2003) ("[T]he American Convention on Human Rights does not assist plaintiffs because, while it notes the broad and indefinite '[r]ight to [l]ife,' it does not refer to the more specific question of environmental pollution, let alone set parameters of acceptable or unacceptable limits." (internal citations omitted)).

enforce many human rights, which members of the international community have agreed are universal, simply because no agreement has already provided specific guidelines for enforcement.

C. Why the Current Approach Should be Broadened

The world is changing rapidly. The international community is no longer comprised of separate nations existing independently from one another. Today, international actors have a great deal of contact with and interdependence on each other.[217] States are "linked by communication, disease, the environment, crime, drugs, terror, and also by the search for prosperity. . . ."[218] The authority and effectiveness of international laws and agreements depend on these connections.[219] The decisions and conduct of one state have a remarkable impact on other states.[220] This is especially true with regard to international legal principles of human rights.[221]

Legal human rights norms should apply universally to all people, regardless of culture, religion, or citizenship,[222] and regardless of whether the precise framework of those rights has been unambiguously defined. Human rights belong to each individual because each individual is human. Since human rights belong to people by virtue of their humanity, these rights "cannot vary from state to state or individual to individual," but instead, all people enjoy these rights equally.[223] It follows, then, that each individual is equally entitled to protection of those rights.[224] As the international community becomes smaller, it is important that members of this community recognize that all individuals enjoy the same human rights. It is also important that the international community understand that those human rights that have been acknowledged in international conventions are worthy of being protected, [225] whether or not an international convention, agreement, or treaty has specifically defined the precise behavior which constitutes a violation of those rights.

The issue of human rights is ultimately an international one, since the values informing notions of human rights are presumably universally held across nations and since all individuals, regardless of citizenship or nationality, hold these rights.[226] Therefore, all members of the international

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217. SALOMON, *supra* note 5, at 15.
218. *Id.* at 24.
219. *See id.*
220. *See id.* at 15.
221. *See* Lucas, *supra* note 120, at 232-34.
222. Robbins, *supra* note 133, at 277-78. *See also* Curran, *supra* note 49, at 316.
223. Robbins, *supra* note 133, at 277.
224. *Id.*
225. *See id.* at 301.
226. *See* Lucas, *supra* note 120, at 232-33. *See also* SALOMON, *supra* note 5, at 24.

community have an obligation to cooperate to ensure that human rights are both recognized and protected.[227]

While formation of international human rights treaties and conventions occurs mostly at the international level, through entities such as the United Nations, execution and enforcement of these rights takes place primarily at the domestic level, through State governments.[228] Therefore, all states have an individual and collective obligation to ensure that human rights are protected and that the means exist to redress human rights violations.

Since states themselves enjoy the economic benefits of an increasingly-globalized international community, they must also accept the responsibility of "determining and enforcing" the boundaries of universal human rights.[229] States must be proactive in ensuring that principles of human rights "catch up with the realities of a world in which the actions and decisions of states have unprecedented impact on the human rights of people in other states."[230] One way states may achieve this objective is to not only enforce human rights, but to help clearly define the rights held by all people and also to define the scope of states' obligations to protect those rights.

D. Proposal for Expanded Application of the Alien Tort Statute

1. An Introduction to the Proposed Approach

The Alien Tort Statute provides a vehicle for the United States, as a nation, to protect the human rights of foreign individuals, but with a broader interpretation of permissible customary international law, ATS claims would allow US courts to more affirmatively implement and enforce human rights principles.

The proposed approach does not suggest that the universality prong of the Alien Tort Statute analysis be abandoned or even altered. Under the proposed approach, as under the current *Sosa* approach, the customary international law underlying the human rights claim must be universally accepted (although not necessarily universally enforced) by civilized nations.[231] Otherwise, US courts would be free to impose human rights principles unique to the United States on foreign defendants, possibly in situations where upholding those principles is neither practical nor appropriate. Furthermore, it is not enough that a US court could find that a

227. *See* SALOMON, *supra* note 5, at 24-25.
228. Bruch, *supra* note 130, at 674-75.
229. *See* SALOMON, *supra* note 5, at 24-25.
230. *Id.* at 24.
231. *See* Doe v. Nestle, 748 F. Supp. 2d 1057, 1067 (C.D. Cal. 2010).

certain *type* of behavior violates customary international law.[232] To justify liability under the proposed ATS approach, the court must find that the international community would reach agreement that the *specific conduct* alleged by the plaintiff embodies a violation of universal customary international law.[233]

The proposed approach does not suggest that sources of customary international law—other than those already accepted—be permitted to establish a cause of action for an ATS claim. Under both the current approach and the proposed approach, acceptable sources of international law include binding international conventions, treaties, legislative and executive acts, judicial decisions, customary international law, and the works of certain scholars and experts.[234]

Instead, the proposed approach simply suggests that US courts be permitted to relax the specificity requirement of the current approach in determining whether conduct violates a principle of customary international law. In other words, courts should be permitted to hear claims of violations of norms that are universal but for which specific guidelines for enforcement do not yet exist.

2. Practical Justifications of the Proposed Approach

Often, a court concludes that a claim is not actionable under the ATS because, while the alleged violation of human rights is arguably a universal customary international law principle, the language in the source of the customary international law is too vague, abstract, or non-specific to render the claim actionable under the ATS.[235] This limits US courts' ability to protect legitimate and universal human rights that are enumerated in sources of customary international law but that have not yet been specifically defined. This limitation is a maltreatment of the opportunity the ATS gives US courts to fulfill its obligation in protecting and enforcing international human rights.

3. How US Courts Should Treat ATS Claims Under the Proposed Approach

If a principle of human rights can be found in an acceptable form of

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232. *See* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1093 (S.D. Fla. 1997).

233. *See id.*

234. *See generally* The Paquete Habana, 175 U.S. 677, 700-01, 707 (1900). *See also* ICJ Statute, *supra* note 90, art. 38(1)(a)-(d).

235. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011) ("[S]ome of the most widely accepted international norms are vague, such as 'genocide' and 'torture.'").

customary international law and the principle is found to be adequately universal, then US courts should hear allegations of its violation under the ATS, regardless of whether there are already specific guidelines for the enforcement of the human rights norm. The court itself can establish specific guidelines or boundaries for defining the customary international law principle. These guidelines can then serve as a framework for other US courts hearing ATS claims and also for members of the international community enforcing or determining human rights.

This approach, while a departure from the approach the Supreme Court directed in *Sosa*, has already been used in the ATS context. For example, in *Eastman Kodak Co. v. Kavlin*, a federal district court heard an ATS claim alleging conspiracy to arbitrarily and inhumanely detain.[236] For evidence of customary international law, the plaintiffs relied on two United Nations conventions prohibiting arbitrary detention of individuals.[237] The court reviewed the conventions and concluded that "international law clearly forbids arbitrary detentions" and that "no reasonable person" would argue that arbitrary detention is permissible.[238] The court also found, however, that the conventions the plaintiff cited failed to show that members of the international community had been able to agree on "what constitutes probable cause to arrest."[239] In other words, the international community had not yet distinguished between arrests constituting arbitrary detention and arrests that are justified by probable cause.[240] The court further noted that the arbitrary detention standards set forth in the conventions cited by the plaintiffs constitute a "general and hortatory norm," rather than one that is specific.[241] Therefore, the customary international law sources proscribing arbitrary detention were, at this point, not sufficiently specific to be actionable under the ATS.[242]

The court spent some time contemplating the appropriate meaning of "arbitrary detention."[243] It considered, for example, whether such detention

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236. Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1090 (S.D. Fla. 1997).

237. *Id.* at 1092. ("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.") (citing Article 9.1 of the International Convention on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(A)(XXI), 6 I.L.M. 383, 999 U.N.T.S. 171 (1967)). ("No one shall be subject to arbitrary arrest or imprisonment." Article 5.2 of the same Convention directs that "All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.") (citing Article 7 of the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (1970)).

238. *Id.*

239. *Id.* at 1092-93.

240. *Id.* at 1092.

241. *Id.* at 1093.

242. *Id.*

243. *Id.* at 1093-95 (discussing whether specific conduct can be included in arbitrary

must also be accompanied by torture, the length of time the person must be detained, and the implications of the word "arbitrary."[244]

Ultimately, the court, using the conventions cited by the plaintiffs, provided its own definition of conduct that constitutes arbitrary detention.[245] It found that "the law of nations does prohibit the state to use its coercive power to detain an individual in inhumane conditions for a substantial period of time solely for the purpose of extorting from him a favorable economic settlement."[246] Having adequately defined the notion of "arbitrary detention," the court then ruled on the plaintiff's claim.[247]

Courts hearing ATS claims alleging violations of human rights, that have not yet been specifically defined, can use the same approach used by the *Eastman Kodak* court. If a plaintiff is able to provide acceptable customary international law sources affirming the existence of the allegedly-violated human right and if the court finds that the human right principle is sufficiently universal, but the customary international law sources fail to provide specific guidelines for enforcing the human right, the court can provide the guidelines, or at least determine whether the conduct at issue violates the human right in question.[248]

For guidance, courts may look to decisions by other courts and international tribunals regarding the same or similar conduct.[249] Courts can also look closely at the language of the convention itself, the precise context of the language in question, and the general context of the agreement as a whole.[250] Courts need not attempt to provide broad, sweeping definitions for a customary international law norm but may simply determine whether the conduct at issue in the case at hand violates the norm. In fact, the United States District Court for the Northern District of California has held that the limits of a norm of international law need only be so defined that the acts on which the plaintiff's claim is based certainly fall within the limits of that norm.[251] Put differently, if a principle of international law is defined sufficiently to assure the fact-finder that the defendant's behavior surely violates that norm, the ATS should provide jurisdiction for the plaintiff's claim.

Judicial decisions related to international human rights become customary international law.[252] Accordingly, US courts' ATS decisions have a significant impact on implementation and enforcement of human

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detention and whether "prolonged" detention is a required element).

244. *Id.* at 1093-94.

245. *See id.* at 1094.

246. *Id.*

247. *Id.*

248. *See generally id.*

249. *See id.* at 1093.

250. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

251. *See* Doe v. Qi, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004).

252. *See generally* The Paquete Habana, 175 U.S. 677 (1900).

rights on an international level. The guidance US courts provide in defining and framing human rights principles will in turn enable other States to protect individuals against human rights violations more effectively.

4. Possible Criticisms of the Proposed Approach

Since the proposed approach embodies a departure from the ATS jurisdictional requirements set forth in *Sosa*, it is subject to numerous potential criticisms. Critics may argue that the proposed approach gives US courts too much discretion in determining international law and imposing liability on citizens of other States.[253] However, this Note argues that US courts in fact have *an obligation* imposed by international human rights law to hear and help enforce human rights claims like those brought under the ATS.[254] This obligation includes the duty to enforce the sometimes-vague principles of human rights set forth in international conventions and agreements, especially since these conventions often call for "*institutionalized reaction*" to violations of those principles.[255] Indeed, the drafters of various international laws setting forth enforceable human rights often assume that the laws will be interpreted and enforced at the domestic level.[256]

Critics may also argue that courts should only be permitted to hear claims for which there exists a judicially manageable standard to adjudicate the claim, and that sources of customary international law that provide no judicially manageable standard cannot provide ATS jurisdiction. However, it is important to note that the very purpose of the Alien Tort Statute is to allow plaintiffs to bring claims alleging violations of *customary international law*, not just violations of existing treaties and conventions.[257] A principle of customary international law—a prohibition against arbitrary detention, for example, as in *Eastman Kodak*[258]—may be a well-accepted human right norm, but there may be no universally-agreed-upon specific definition framing that norm. This approach allows US courts to provide judicially manageable standards for future cases alleging violations of the customary international law norm.

By hearing cases under the ATS, US courts have taken upon themselves the obligation to protect international human rights. A "lack of means of enforcement at the international level" does not cancel out that

253. *See* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1095 (S.D. Fla. 1997).

254. *See* SALOMON, *supra* note 5, at 25.

255. *See id.* at 20.

256. *See id.*

257. Flomo v. Firestone Nat Rubber Co., 643 F.3d 1013, 1022 (7th Cir. 2011) (stating that even a treaty or convention not ratified by the United States could establish principles that could be enforceable in US courts).

258. *Eastman Kodak*, 978 F. Supp, at 1092-93.

obligation.[259] If a norm has been recognized as one that is universal, but no specific enforcement guidelines have been established, US courts should be willing to hear the case and set usable guidelines. In doing so, courts could "greatly increase the quality and quantity of available evidence on substantive law in [ATS] disputes, improving the accuracy and uniformity of judicial outcomes. . . ."[260] After all, as Judge Posner points out, "There is always a first time for litigation to enforce a norm; there has to be."[261] Every time a court decides an ATS case, it clears away some of the ambiguity surrounding international human rights law by providing a framework for other courts to use in similar cases that may arise.

Critics might argue that the proposed approach would, in large part, adopt as law vague notions about human rights found in UN conventions, and UN conventions are not binding international law. However, the fact that a UN convention, or any other non-self-executing agreement or convention, champions a principle of human rights constitutes decisive evidence that the principle is indeed a customary international norm accepted by civilized nations.[262] The process of integrating a principle of human rights into such an agreement shows that the universal status of the principle has been carefully considered and, presumably, agreed upon by a group of civilized nations.[263] Therefore, one could safely suppose that those rights enumerated in UN conventions and other widely-accepted international agreements *are* sufficiently universal to support an ATS cause of action.

A common argument against expanding the jurisdictional scope of the ATS revolves around the notion that US courts should not feel entitled to determine, without the benefit of an existing legal enforcement framework, which human rights truly are sufficiently specific and universal within the international community.[264] However, given increasing globalization of the international community,[265] and the evolving and expanding human rights movement, courts can, without inappropriately overstepping their ATS-granted boundaries, use the ATS as a vehicle to protect human rights that are universal but so far have remained unprotected in the legal sense.

Moreover, given the makeup of the international community, with its diversity of cultural and legal norms and practices, it is no surprise that international human rights law requires further definition and interpretation by those implementing and enforcing it. After all, very few human rights principles are entirely universal and some human rights principles that have

259. Lucas, *supra* note 120, at 248.
260. Curran, *supra* note 49, at 319.
261. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011).
262. Curran, *supra* note 49, at 318.
263. *Id.* at 317-18.
264. *See* Dodge, *supra* note 69, at 26.
265. *See Monshipouri*, *supra* note 149, at 30.

already been found to be actionable under the ATS (like "genocide" and "torture") are indeed very vague.[266]

In order for a principle of human rights to be integrated into international law, someone must first take action to prompt international interactions which produce legal interpretations.[267] These legal interpretations, then, can be adopted as international legal standards in the global community.[268] As such, US courts have an interest in hearing human rights claims brought under the ATS, even if the boundaries of the human rights norms in question have not been specifically determined. In hearing the claims and delivering opinions, US courts have an opportunity to legally integrate human rights principles which have been socially or politically integrated but not yet legally integrated. While a US court decision regarding a human rights norm may not serve as binding international law, it still provides guidance for international groups and communities and for the governments of other States in protecting human rights and, at the very least, furnishes a "normative dialogue with human rights bodies and constitutional courts around the world."[269]

VI. CONCLUSION

It would be illogical to "conceptually divide the idea . . . of human rights from the practice of human rights . . . ."[270] Furthermore, it makes no sense for a member of the international community to concern itself only with the "expression of the idea of human rights" without taking affirmative action to protect the human rights that have already been expressed.[271] In other words, members of the international community have an obligation not only to pay heed to international statements about human rights but to protect those rights in practice.

The ATS can and should be used as "an American response to a decentralized international legal system that calls on the members of the

266. *See Flomo* 643 F.3d at 1016.

267. Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 471 (2008) (citing Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1502 (2003)).

268. *Id.* (citing Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1502 (2003)).

269. Soohoo & Stolz, *supra* note 268, 473-74 (2008):

> Scholars also have suggested that there are institutional and suprapositive concerns that may make it beneficial for courts to consider human rights law and the decisions of other high courts in constitutional adjudication. For example, some scholars suggest there is an empirical benefit to considering international and foreign law because it provides an opportunity for a judge to observe how a proposed rule operates in other systems.

270. GOODALE, *supra* note 1, at 10.

271. *Id.*

world community to supply human rights remedies."[272] The proposed approach would allow US courts to expand and define notions of international human rights within the global community, and it would provide a framework for both the US judiciary and other members of the international community to recognize and enforce universal human rights standards through imposition of civil penalties on those who violate the standards.[273] Therefore, the approach would have the effect of benefitting not only the individual holders of human rights, but also the States themselves.[274]

Article I of the United Nations Universal Declaration of Human Rights proclaims, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[275] In an ever-shrinking global community, States' obligation to defend human rights requires that each State do more than merely wait passively for an acceptable enforcement framework to come along. Rather, states must be active in protecting those human rights already characterized as universal. The ATS, as it stands today, fails to adequately protect even universal human rights. The proposed approach, on the other hand, offers the flexibility and movement required under our duty to recognize and shield the human rights we often take for granted.

272. Small, *supra* note 144, at 177.

273. *See* Curran, *supra* note 48, at 320.

274. *Id.*

275. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).

THE LEGALIZATION OF INDUSTRIAL HEMP AND WHAT IT COULD MEAN FOR INDIANA'S BIOFUEL INDUSTRY

Nicole M. Keller

Over thirty countries around the world have a legal industrial hemp industry; the United States is not one of them.[1] Each of these countries have realized the amazing potential of this one plant as an efficient input source for many industries including, but not limited to, food products, cosmetics, paper, automotive parts, clothing, and biofuel.[2] These industries provide a steady source of income and thousands of jobs for people all over the world.[3] The use of hemp as the primary input makes the processes and resulting products environmentally safe and even beneficial.[4] In the United States, countless studies have shown the benefits of hemp.[5] Many states have conducted their own feasibility studies examining what hemp can do for them.[6] In this time of economic turmoil and budget deficits, states are looking for ways to diversify and expand their current industries. They are also looking for cheaper, smarter, more environmentally friendly ways to produce products in their current industries. Some states are finding that industrial hemp offers an answer.[7] The production of industrial hemp products is a new industry in itself.[8] Additionally, industrial hemp can help replace, and possibly eliminate, the need for limited resource inputs in the

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1. *Countries Growing Hemp*, ARIZ. INDUS. HEMP COUNCIL, http://azhemp.org/Archive/Package/Countries/countries.html (last visited Aug. 17, 2013).

2. *Hemp Information, Hemp Facts*, NORTH AMERICAN INDUSTRIAL HEMP COUNCIL, http://www.naihc.org/hemp-information/286-hemp-facts (last visited Aug. 17, 2013); *see also* JEAN M. RAWSON, CRS REPORT FOR CONGRESS: HEMP AS AN AGRICULTURAL COMMODITY 4 (2005) [hereinafter CRS REPORT], *available at* http://www.fas.org/sgp/crs/RL32725.pdf.

3. Joseph B. Gonsalves, U.N. Conference on Trade and Dev., *An Assessment of the Biofuels Industry in India* at 12, 37 (2006), *available at* http://www.unctad.org/en/docs/ditcted20066_en.pdf.

4. Dr. Eric C. Thompson, et al., *Economic Impact of Industrial Hemp in Kentucky*, CTR. FOR BUS. AND ECON. RESEARCH, UNIV. OF KY. 1 (1998), *available at* http://www.votehemp.com/PDF/hempstudy.pdf.

5. *See, e.g.*, Kimball Christensen & Andrew Smith, *Does the Use of Cannabis Species for the Production of Biodiesel and Ethanol, Result in Higher Yields of Ethanol Than Competing Cellulotic Crops, Including Zea Mays?*, UNIV. OF WASH., DEP'T OF BIOLOGY (2008), *available at* http://www.votehemp.com/PDF/The_Case_for_Hemp_as_a_Biofuel2008.pdf.

6. *Id.*; *see also*, Daryl T. Ehrensing, *Feasibility of Industrial Hemp Production in the United States Pacific Northwest*, EXTENSION SERV. OR. STATE UNIV. (1998), *available at* http://extension.oregonstate.edu/catalog/html/sb/sb681/.

7. Thompson, et al., *supra* note 4, at iii.

8. *See generally id.*

paper and fuel industries.[9] In response to these findings, several states have passed legislation allowing for the growth of industrial hemp under state licensing schemes.[10] However, the states are meeting resistance at the federal level. As a result, despite the benefits of industrial hemp and the states' desire to take advantage of their newly enacted laws, no industrial hemp has yet to be grown.[11]

This Note begins with a discussion of what industrial hemp is and is not. Next, the Note describes in further depth the various uses for industrial hemp and its potential impact on certain industries, with a specific look at hemp as a source of biofuel. Following this section is a discussion of hemp history and laws in the United States and Canada, with a comparison of the two approaches. Next, the Note briefly examines the economic impact of the current US hemp laws on trade and commerce on a national level. The Note then takes a more micro approach by looking at the state laws emerging in favor of legalizing industrial hemp, including an examination of statutory and case law. Then, the Note focuses on Indiana law and its biofuel industry. A comparison is made between environmental conditions in Indiana and surrounding states that have legalized the production of industrial hemp. Next, the Note argues that Indiana's biofuel goals could be better met by growing industrial hemp instead of taking corn out of the food supply to meet biofuel production needs. Finally, the Note argues that, in order for states to take advantage of the benefits of industrial hemp, the United States must change the classification of industrial hemp, and ultimately model its regulations of the industrial hemp industry after the Canadian model.

I. WHAT IS INDUSTRIAL HEMP?

There is a common, and unfortunate, misconception surrounding industrial hemp in American society. The industrial hemp plant, despite its inability to have any psychoactive effects,[12] is often confused with its cousin marijuana. Both plants are members of the species *Cannabis Sativa*; however, each plant represents the opposite spectrum of the plant's capabilities.[13] "*Cannabis* is the only plant genus that contains the unique

9. *Id.* at 36.

10. *U.S. State Industrial Hemp Regulation,* VOTEHEMP.COM, http://www.votehemp.com/legislation.html (last visited Aug. 17, 2013).

11. *NORML Statement on the Cultivation of Industrial Hemp,* NORML.ORG, http://norml.org/marijuana/industrial/item/introduction-5 (last visited Aug. 17, 2013).

12. David P. West, Ph.D., *Hemp and Marijuana: Myths & Realities*, NORTH AMERICAN INDUSTRIAL HEMP COUNCIL (1998), http://naihc.org/hemp_information/content/hemp.mj.html (last visited Mar. 17, 2013).

13. *Id.* at 3.

class of molecular compounds called cannabinoids.[14] Many cannabinoids have been identified, but two preponderate: THC . . . and CBD."[15] The type of *Cannabis* known as marijuana has long been recognized for its medicinal and recreational properties.[16] This is due to its levels of delta-9 tetrahydrocannabinol (THC), the psychoactive component in the plant.[17] Marijuana typically contains relatively high levels of THC, ranging from five to twenty percent,[18] and low levels of CBD, the antipsychoactive cannabinoid.[19] Industrial hemp, on the other hand, "contains less than 1 percent"[20] of THC, with the normal range under .5%,[21] and high levels of CBD.[22] Because industrial hemp has very low levels of THC, "no one could get high from smoking it."[23] In fact, the high levels of CBD in hemp actually block the high associated with smoking marijuana.[24] "Hemp, it turns out, is not only not marijuana; it could be called 'antimarijuana.'"[25]

In addition to the psychoactive differences between the two variations of *Cannabis*, the cultivation characteristics set them apart as well. Granted, the seeds and leaves of marijuana and industrial hemp are strikingly similar in appearance, but they are easy to distinguish from each other when grown for their respective purposes.[26] Marijuana is grown for its flower, which comes from the female plant.[27] The goal is to maximize the plant's flowering potential, so plants are spaced widely to allow room to grow.[28] By contrast, industrial hemp is generally grown for its fibrous stalk.[29] Spacing is extremely close to encourage height and fiber production and

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14. *Id.* at 7.

15. *Id.* at 7-8.

16. *Legal Issues*, ARIZ. INDUS. HEMP COUNCIL, http://azhemp.org/Archive/Package/Legal/legal.html (last visited Aug. 17, 2013).

17. *NORML Statement on the Cultivation of Industrial Hemp*, *supra* note 11.

18. *Hemp Defined*, NORTH AMERICAN INDUSTRIAL HEMP COUNCIL, http://www.naihc.org/hemp-information/289-hemp-defined (last visited Mar. 17, 2013).

19. West, *supra* note 12.

20. U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., INDUSTRIAL HEMP IN THE UNITED STATES: STATUS AND MARKET POTENTIAL, at iii (Jan. 2000), *available at* http://www.ers.usda.gov/publications/ages001E/ages001E.pdf.

21. *Legal Issues*, *supra* note 16.

22. West, *supra* note 12.

23. *Legal Issues*, *supra* note 16.

24. *Id.*

25. *Id.*

26. Valarie L. Vantreese, *Industrial Hemp: Global Markets and Prices* 4 (1997), *available at* http://www.votehemp.com/PDF/hemp97.pdf.

27. *Marijuana Science-Based Information for the Public*, UNIV. OF WASH. ALCOHOL AND DRUG ABUSE INST., http://adai.uw.edu/marijuana/factsheets/potency.htm (last visited Aug. 17, 2013).

28. Vantreese, *supra* note 26, at 4.

29. *Id.*; D. Michelle Domke, *Hemp Case*, 7 TED CASE STUDIES 398 (1997), *available at* http://www1.american.edu/ted/hemp.htm.

discourage leaf production.[30] Furthermore, industrial hemp is harvested much earlier than its cousin marijuana;[31] therefore, it is relatively easy to identify illegal fields past a certain date.[32] In fact, over thirty countries are able to tell the difference between the two plants, and are able to benefit from an industrial hemp industry.[33]

II. THE NEW BILLION DOLLAR CROP[34]

These countries, which have been able to distinguish between hemp and marijuana, are able to take advantage of an enormous renewable resource that boosts their economies and lessens their country's impact on the global environment. Hemp "can be used to produce more than 25,000 products, ranging from dynamite to cellophane."[35] This statement was made in 1938 when *Popular Mechanics* released an article toting the wonders of industrial hemp, claiming it was the new billion dollar crop. The article "further state[d] that increased hemp production 'will displace imports of raw material and manufactured products' and call[ed] hemp the 'standard fiber of the world.'"[36] That was in 1938. With today's advanced technologies, it is highly likely that the number of uses exceeds 25,000 products.[37] In fact, some sources claim that over 50,000 products can be made from this single plant.[38] Among the 50,000 products are "textiles, paper, paints, clothing, plastics, cosmetics, foodstuffs, insulation, animal feed,"[39] biodegradable industrial products such as fiberglass, replacement for wood products, biofuel, and detergents.[40] For a majority of these products, the fibrous stalk of the hemp plant is used. However, the seeds are also an excellent source of oil, varnishes, body care products, detergents, and biofuel. In other words, the entire hemp plant has a use; nothing goes to

30. Vantreese, *supra* note 26, at 4.

31. West, *supra* note 12. *See also NORML Statement on the Cultivation of Industrial Hemp*, *supra* note 11 (industrial hemp's planting cycle); *Hemp Defined*, *supra* note 18 (industrial hemp's planting cycle).

32. *See* Hélèna Katz, *Hemp Legalization Sparks Growth of New Industries*, AMERICAN NEWS SERVICES (June 1, 2000), *available at* http://www.berkshirepublishing.com/ans/HTMView.asp?parItem=S031000480A.

33. *Id.*

34. *New Billion Dollar Crop*, POPULAR MECH. MAGAZINE (Feb. 14, 1938), *available at* http://www.globalhemp.com/1938/02/new-billion-dollar-crop.html.

35. *Id.*

36. *Hemp History*, HEMP-SISTERS.COM, http://www.hemp-sisters.com/Information/history.htm (last visited Aug. 17, 2013).

37. *See* Jeff Meints, *The Hemp Plant, Humankind's Savior - 50,000 Uses and Counting*, (Jan. 23, 2007, 11:32 AM), http://www.voteindustrialhemp.com/.

38. *Id.*

39. *NORML, Statement on the Cultivation of Industrial Hemp*, *supra* note 11.

40. *See A Treasure Plant*, HEMPUSA.ORG, https://www.hempusa.org/index.php/product-articles-category/hemp-information/a-treasure-plant.html (last visited Aug. 17, 2013).

waste.

Many countries now have active industries utilizing industrial hemp to their benefit. For example, China has large hemp paper and textile industries.[41] In 2009 Zhang Jianchun, Director General of China's Hemp Research Centre in Beijing, said,

> Expanded production of hemp . . . offers enormous benefits for China. First, it would provide a major new source of fibre for the textile industry, reduce dependency on cotton and, in the process, free large areas of cotton-growing land for food production. In addition, hemp cultivation would generate extra income for millions of small-scale farmers in some of the country's poorest rural areas.[42]

Three years later, "[China] is the largest exporter of hemp paper and [hemp] textiles."[43] It seems that, at least in China, Popular Mechanics' tout that hemp would become the "standard fiber of the world"[44] is quickly becoming a reality as the Chinese increasingly replace fibers such as cotton with industrial hemp.[45] Additionally, another large producer of hemp products is Canada, which supplies the world with a variety of hemp food products.[46] Canada's hemp food industry is growing, and Canadian farmers are benefiting from the US government's refusal to legalize the crop.[47]

Among the products derivable from the industrial hemp plant, and the product most relevant to this Note, is hemp as a biofuel. In a time of high gas prices, political instability, and increasing concerns over the environmental effects of fossil fuel consumption, it is natural to seek an alternative. Globally, the use of biofuels as an alternative to petroleum products is gaining momentum.[48] The United States alone consumed approximately 11.7 million gallons of ethanol in 2011[49] and over 549

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41. *Countries Growing Hemp*, *supra* note 1.

42. *Fibre Stories: Hemp's Future in Chinese Fabrics*, U.N. FOOD AND AGRICULTURE ORGANIZATION: INT'L YEAR OF NATURAL FIBRES (2009), http://www.naturalfibres2009.org/en/stories/hemp.html.

43. *Countries Growing Hemp*, *supra* note 1.

44. *New Billion Dollar Crop*, *supra* note 34.

45. *Fibre Stories*, *supra* note 42.

46. CAN. HEMP TRADE ALLIANCE, http://www.hemptrade.ca/ (last visited Aug. 17, 2013).

47. Katz, *supra* note 32.

48. *See* Candace Lombardi, *World Biofuel Use Expected to Double by 2015*, CNET (Sept. 30, 2009, 9:31 AM), http://news.cnet.com/8301-11128_3-10364139-54.html.

49. *Monthly U.S. Fuel Ethanol Production/Demand*, RENEWABLE FUELS ASS'N, http://ethanolrfa.org/pages/monthly-fuel-ethanol-production-demand (last visited Aug. 17, 2013).

million gallons of biodiesel in the first 9 months of 2011.[50] In Canada, hemp biofuel research is underway to produce cellulosic ethanol.[51] Cellulosic ethanol is ethanol produced from the non-food parts of feedstock and is a more efficient source of energy.[52] Currently, the majority of feedstock for biofuels comes from corn, soybeans, or wheat.[53] However, in addition to being an inefficient source of fuel, the diversion of these commodities for fuel production is at the expense of the world food supply.[54] The United States has recognized the issue and has "announced a $510 million initiative meant to spur development of a new US bio-fuel industry that utilizes non-food crops[.]"[55] The initiative is meant to examine sources such as algae or wood chips;[56] however, there is a more efficient source: industrial hemp.

"When compared to other plant species of active interest in biofuel production, Hemp derives 100% more cellulose than species under active investigation."[57] Furthermore, "[h]emp is Earth's number one biomass resource; it is capable of producing 10 tons per acre in four months."[58] Hemp biomass fuel products require a minimal amount of specialization and processing and "[t]he hydrocarbons in hemp can be processed into a wide range of biomass energy sources, from fuel pellets to liquid fuels and gas."[59] These facts alone make industrial hemp the ideal source for both ethanol and biodiesel production. Yet, industrial hemp, in addition to its fibrous plant matter, also produces seeds wherein lies a rich source of hemp

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50. Erin Voegele, *Latest EIA Numbers Show Biodiesel Consumption Is on the Rise*, BIODIESEL MAGAZINE (Dec. 29, 2011), http://biodieselmagazine.com/articles/8255/latest-eia-numbers-show-biodiesel-consumption-on-the-rise.

51. Michael Bachara, *Canada: Research for the Production of Cellulosic Ethanol from Sustainable Feedstock Begins*, HEMP NEWS (Feb. 26, 2010 11:23 PM), http://www.hemp.org/news/content/canada-research-cellulosic-ethanol-sustainable-feedstock.

52. *See Ethanol*, TEXAS STATE ENERGY CONSERVATION OFFICE, http://www.seco.cpa.state.tx.us/energy-sources/biomass/ethanol.php#cellulosic (last visited Aug. 17, 2013).

53. *See generally* Kevin Kerr, *Ethanol: The Truth About This 'Alternative' Fuel*, THE DAILY RECKONING, http://dailyreckoning.com/alternative-fuel-the-truth-about-ethanol/ (last visited Aug. 17, 2013).

54. *See id.*; *see also* Holly Jessen, *Hemp Biodiesel: When the Smoke Clears*, BIODIESEL MAGAZINE (Jan. 24, 2007), http://www.biodieselmagazine.com/articles/1434/hemp-biodiesel-when-the-smoke-clears; *Fibre Stories*, *supra* note 44 (saying hemp will provide food security because it will be grown in areas that do not displace food production).

55. Devin Dwyer, *White House Seeks New US Bio-Fuel Industry Not Based on Corn*, ABC NEWS (Aug. 16, 2011), http://abcnews.go.com/blogs/politics/2011/08/white-house-seeks-new-us-bio-fuel-industry-not-based-on-corn/.

56. *Id.*

57. Christensen & Smith, *supra* note 5.

58. *Hemp: Food Fuel Fiber Medicine Industry*, HEMPCAR TRANSAMERICA, http://www.hempcar.org/hempfacts.shtml (last visited Aug. 17, 2013).

59. *Hemp Facts*, ARIZ. INDUS. HEMP COUNCIL, http://azhemp.org/Archive/Package/Facts/facts.html (last visited Aug. 17, 2013).

oil, and this oil can also be used for fuel.[60]

Industrial hemp's fuel capabilities and desirability is further enhanced by the fact that "[i]ndustrial hemp can be grown in most climates and on marginal soils. It requires little or no herbicide and no pesticide[.]"[61] The hemp plant is also known to improve soil conditions for rotational crops,[62] and it is a clean-burning fuel, contributing no greenhouse gases.[63] Yet, industrial hemp is not seriously considered as a feedstock input,[64] largely because industrial hemp is illegal to grow in the United States.

III. INDUSTRIAL HEMP HISTORY IN THE UNITED STATES

Industrial hemp was not always illegal in the United States.[65] In fact, before 1937 it was grown and manufactured into many products.[66] The public sentiment surrounding the plant was social acceptance of a staple in the American household.[67] It was used most often for clothing, paper, rope, and lamp oil.[68] Respected presidents were proponents of industrial hemp: "George Washington and Thomas Jefferson both grew hemp. Ben Franklin owned a mill that made hemp paper. Jefferson drafted the Declaration of Independence on hemp paper[,]"[69] and "Abraham Lincoln use[d] hemp-seed oil to fuel his household lamps."[70] But in 1937, right when mechanical processes that would turn hemp into a truly industrialized commodity were about to explode on the American scene,[71] Congress passed the Marihuana Tax Act of 1937.[72] The Act was aimed at eliminating the use of marijuana as a drug but had the effect of making all industrial hemp varieties illegal as well.[73]

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60. *Biodiesel*, THE CAMPAIGN FOR THE RESTORATION AND REGULATION OF HEMP, http://crrh.org/biodiesel/ (last visited Aug. 17, 2013).

61. Tim Castleman, *Hemp Biomass for Energy*, FUEL AND FIBER CO., (2001), *available at* http://icearth.drupalgardens.com/content/hemp-biomass-energy-tim-castleman-fuel-and-fiber-company.

62. Thompson, et al., *supra* note 4, at 52; *See infra* note 254.

63. *Id.* at 7.

64. *Advanced Ethanol*, RENEWABLE FUELS ASSOC., http://www.ethanolrfa.org/pages/cellulosic-ethanol (last visited Aug. 17, 2013).

65. *See* Seaton Thedinger, *Prohibition in the United States: International and U.S. Regulation and Control of Industrial Hemp*, 17 COLO. J. INT'L ENVTL. L. & POL'Y 419, 425-26 (2006).

66. *Id.*

67. *See generally id.*

68. *See Hemp History*, *supra* note 36.

69. *History*, ARIZ. INDUS. HEMP COUNCIL, http://azhemp.org/Archive/Package/History/history.html (last visited Aug. 17, 2013).

70. *Hemp History*, *supra* note 36.

71. *New Billion Dollar Crop*, *supra* note 34.

72. Thedinger, *supra* note 65, at 426.

73. *History*, *supra* note 69.

The Act placed a $1 tax on anyone who "imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana."[74] Although legislative history shows that industrial hemp was not an intended target of the law, and "Harry J. Anslinger, Commissioner of the Federal Bureau of Narcotics (FBN) (the predecessor to the Drug Enforcement Administration (DEA)), told the Senate Committee that those in the domestic industrial hemp industry 'are not only amply protected under this act, but they can go ahead and raise hemp just as they have always done it[,]'"[75] the wording of the law effectively prohibited industrial hemp cultivation.[76] Specifically, §1(b) of the Act says,

> The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin- but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.[77]

It is clear that Congress tried to exclude industrial hemp from the legislation (i.e. "but shall not include the mature stalks of such plant"[78]), but for practical purposes there is no way for a farmer to produce the "mature stalks of such plant" without growing "the seeds thereof."[79] After the passage of the Act, hemp farmers were confused about the impact the Act would have on their operations.[80] Letters were sent to the Federal Bureau of Narcotics asking what should be done about the hemp that had been harvested but not yet sold.[81] People wanted to know if even having it was a violation of the new law.[82] The letters also urged the Bureau to conduct

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74. Tara Christine Brady, *The Argument for the Legalization of Industrial Hemp*, 13 SAN JOAQUIN AGRIC. L. REV. 85, 89 (2003).

75. *Id.*

76. *Id.*

77. Marihuana Tax Act of 1937, Pub. L. No 75-238, §1(b), 50 Stat. 551, 552 (repealed 1970), *available at* http://www.druglibrary.org/schaffer/hemp/taxact/mjtaxact.htm.

78. *Id.*

79. *Id.*

80. *See generally,* JOHN CRAIG LUPIEN, UNRAVELING AN AMERICAN DILEMMA: THE DEMONIZATION OF MARIHUANA, Ch. 4 (1995), *available at* http://www.iahushua.com/T-L-J/DMH-4.html.

81. *Id.*

82. *Id.*

research on the benefits of the hemp plant.[83] Officials, unsure about the exact properties of hemp, gave conflicting answers and enforced the new law inconsistently.[84] Moreover, there was never any formal research to determine if hemp was a viable crop for big industry and if it could be produced without the psychoactive effect found in marijuana.[85] Thus, for some time, the hemp industry mostly died in America.[86]

Several years later in 1942, at the request of the Department of Agriculture, US farmers were enlisted to grow hemp in an effort to support the war.[87]

> Despite the existence of the Marihuana Tax Act of 1937, the result of the "Hemp for Victory" Campaign was that "thousands of farmers grew hundreds of thousands of acres of hemp for wartime needs." However, by the end of WW II, the government's allowance of industrial hemp cultivation also ended and by 1957, "prohibitionists had reasserted a total ban on hemp production."[88]

Time passed, and American culture changed and evolved throughout the 1960's when drug use escalated amidst the country's freedom movement.[89] As a result of the increased use of recreational drugs, in 1970 Congress passed the Controlled Substances Act, which lays out definitions, offenses, and charges related to narcotic drugs in the United States.[90] In it, Cannabis sativa is defined just as it was in the Marihuana Tax Act of 1937, lumping industrial hemp into the category of Schedule I: Hallucinogenic Substances,[91] despite hemp not having high enough THC levels to have any narcotic effect.[92]

Over the past ten years, many states have realized the economic and environmental potential of industrial hemp and have passed legislation legalizing its cultivation.[93] However, because of its narcotic classification a

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83. *Id.*

84. *Id.*

85. *See generally*, LUPIEN, *supra* note 80.

86. *Id.*

87. Brady, *supra* note 74, at 90.

88. *Id.*

89. *See* West, *supra* note 12. *See also generally*, Mortal Journey, *The 1960's Hippie Counter Culture Movement*, Mortal Journey.com (Feb. 13, 2013, 10:05:34 AM), http://www.mortaljourney.com/2011/03/1960-trends/hippie-counter-culture-movement.

90. *See generally,* CONTROLLED SUBSTANCES ACT, 21 U.S.C. §§ 802-889, *available at* http://www.fda.gov/regulatoryinformation/legislation/ucm148726.htm.

91. *Id.* §§ 802(16), 812(c)(Schedule I)(c)(10).

92. West, *supra* note 12.

93. EARTHFIRST.ORG, *Hemp*, http://www.earthfirst.org/hemp.htm (last visited Aug. 16, 2013).

DEA permit is also required.[94] Unfortunately, the DEA has refused to grant any permits,[95] which makes production still illegal at the federal level and effectively voids any efforts the states have taken to legalize industrial hemp.

On February 14, 2013, "[Senator] Rand Paul and Senate Republican Leader Mitch McConnell, both of Kentucky, joined Oregon Democratic [Senators] Jeff Merkley and Ron Wyden in introducing legislation to allow American farmers to cultivate and profit from industrial hemp."[96] The legislation, which is a companion bill to H.R. 525, also known as the "Industrial Hemp Farming Act of 2013" would explicitly exclude industrial hemp from the definition of marijuana in the Controlled Substances Act, thus giving regulation of the crop to the States.[97] Currently the bill is in the first stage of the legislative process.[98] The existence of this bill demonstrates the importance and potential of the industrial hemp industry. It illustrates the people's desire to move away from the draconian enforcement of outdated laws that fail to change and adapt with the demands of society.

IV. INDUSTRIAL HEMP IN CANADA

In order to assess where the United States is on the world scene regarding industrial hemp, a look to other countries is necessary. Specifically, and most relevant to the United States, a comparison to Canadian hemp law is revealing and promises a viable regulation scheme which could be adopted in the United States.

Industrial hemp history in Canada follows a pattern familiar to the United States.[99] Prior to 1938, industrial hemp production was legal and encouraged in Canada.[100] It served much of the same purpose as it did in the United States, primarily serving industries committed to producing rope, textiles, paper, and fuel.[101] Then in 1937, the United States passed the

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94. Brady, *supra* note 75, at 85. *See also NORML Statement on the Cultivation of Industrial Hemp*, *supra* note 11.

95. Brady, *supra* note 75, at 90.

96. *Sens. McConnell and Paul Co-sponsor Industrial Hemp Legislation*, PAUL.SENATE.GOV (Feb. 14, 2013), http://www.paul.senate.gov/?p=press_release&id=707.

97. *Id.*

98. Industrial Hemp Farming Act of 2013, S. 359, 113th Cong. (2013-2014), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s.00359:.

99. *See generally*, GOV'T OF MAN., *Manitoba Agriculture, Food and Rural Initiatives: Background of Industrial Hemp*, http://www.gov.mb.ca/agriculture/crops/hemp/bko02s00.html (last visited Aug. 16, 2013).

100. *Id.*

101. HEALTH CAN., *Frequently Asked Questions - Why Did the Government Change Its Laws*, http://www.hc-sc.gc.ca/hc-ps/substancontrol/hemp-chanvre/about-apropos/faq/index-eng.php#a7 (last visited Aug. 16, 2013) [hereinafter *FAQ*].

Marihuana Tax Act of 1937, and Canada followed suit in 1938 passing The Opium and Narcotics Control Act.[102] The Act, similar to the US Act, was aimed at reducing recreational marijuana use but had the effect of eliminating industrial hemp cultivation.[103]

Sixty years later, however, the US and Canadian laws on industrial hemp diverged and in 1998, "the Canadian government legalized the growth of industrial hemp under license from Health Canada."[104] In coming to this decision, the Canadian government initially authorized research on industrial hemp to see if it would be a viable crop.[105] The results affirmed that industrial hemp could "successfully [be] grown in Canada as a separate entity from cannabis (marijuana)."[106] Armed with this knowledge and aware of the concerns regarding the difficulty of distinguishing between the two varieties of cannabis, Health Canada implemented some very stringent regulatory and licensing requirements to ensure strain autonomy and compliance with other federal laws.[107]

In deciding to legalize and regulate industrial hemp, Canada analyzed the plants' impact and wrestled with how the plant could be assimilated into Canadian society without infringing upon current laws.[108] The result was the Regulatory Impact Analysis Statement (RIAS).[109] The RIAS explains Canada's thought process when faced with the decision on whether or not to legalize industrial hemp.[110] It lays out the regulations and explains why Canada chose to regulate the way it did.[111] Health Canada analyzed three options: 1) strict compliance with drug laws - no legalization; 2) legalization with regulation; or 3) free market legalization - no regulation.[112] Ultimately, option 2 was chosen.[113] In coming to that decision, Health Canada set out mandatory criteria and then measured how well each option fit the criteria.[114] According to the RIAS,

> Each option was assessed using the following criteria:

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102. GOV'T OF MAN, *supra* note 100.

103. *Id.*

104. Katz, *supra* note 32.

105. CRS REPORT, *supra* note 2, at 3.

106. *FAQ*, *supra* note 101.

107. *See* Industrial Hemp Regulations (Controlled Drugs and Substances Act), SOR/98-156 (Can.), *available at* http://laws-lois.justice.gc.ca/eng/regulations/SOR-98-156/.

108. *See generally,* HEALTH CAN. REGULATORY IMPACT ANALYSIS STATEMENT 1, (1998), *available at* http://www.hc-sc.gc.ca/hc-ps/alt_formats/hecs-sesc/pdf/pubs/precurs/rias1089/rias1089-eng.pdf.

109. *Id.*

110. *Id.* at 5-6.

111. *Id.*

112. *Id.* at 6-7.

113. HEALTH CAN., *supra* note 108, at 7.

114. *Id.*

Mandatory criteria

- The option must be in conformity with the authorities contained in the CDSA and comply with Canada's international obligations.
- The option must not facilitate the production of illicit drugs.
- The option must provide an appropriate means of control (compliance).

Screen criteria

- The option must not hinder trade.
- The option must not be an undue burden on government and industry.
- The option must be responsive to future needs.
- The option must not undermine public confidence.[115]

Under option 2 - legalization with regulation - Health Canada amended Canada's Controlled Drugs and Substances Act by adding Industrial Hemp Regulations.[116]

The Canadian regulation method is a three-step process: application, licensing, and cultivation.[117] First, the potential grower must apply for a license issued by Health Canada.[118] The application is an extremely detailed process. A potential license holder must reside in Canada and must submit an application, which includes: name, address, phone number, date of birth, certificate of incorporation (if the applicant is a corporation), the activity hoping to be licensed, import/export/transportation documents (if applicable), the address of the place where the industrial hemp will be stored and sold (and indicating which form of industrial hemp will be at each address), the type of cultivar or variety of industrial hemp to be grown, the number of hectares of hemp grown for seed/grain/fiber, the GPS coordinates of each type of production and an indication on a map of where at each site each type is situated, etc.[119] The requirement list is long, and it is tailored depending on the use for which hemp is grown, be it seed, fiber, or grain.[120]

Once the grower submits an application, Health Canada determines

115. *Id.*
116. *Id.* at 8.
117. Industrial Hemp Regulations, *supra* note 107.
118. *Id.* ("application" link under "licensing and authorization" link).
119. *Id.*
120. *Id.*; Industrial Hemp Regulations, *supra* note 107.

whether to approve and issue a license or not.[121] The requirements for approval are also strict and set up to ensure that each grower is in compliance with the regulations.[122] Once a license is issued, the regulations continue with cultivation.[123] Cultivation is allowed "only in the specified region, using an approved variety, specified on the license. Every person legally cultivating industrial hemp must submit samples of their crop to a licensed and accredited laboratory to ensure that the THC level is at or below 0.3%, according to procedures outlined in the . . . [regulations]."[124] Other restrictions, such as not being able to grow industrial hemp within one kilometer of a school and requirements that all industrial hemp must be in a locked container or facility,[125] illustrate Canada's acknowledgement of the potential risks associated with the legalization of industrial hemp, as well as its commitment to compliance with other Canadian laws.[126]

V. ECONOMIC IMPACT OF US HEMP LAWS

The legalization of industrial hemp in Canada introduced a new industry for Canada's citizens.[127] The hemp industry is growing.[128] In fact, some companies are reporting fifty percent business growth every year since 1998.[129] Canada is quickly becoming a large player on the global hemp products scene.[130] Primary industrial hemp exports from Canada include hemp seed, hemp fiber, and hemp oil, with about 60% of Canadian hemp exports going to the United States in 2010.[131] According to the Hemp Industries Association (HIA), "the retail value of North American hemp food, vitamin and body care products was in the range of $121 to $142 million in 2010. When clothing, auto parts, building materials and other non-food or body care products are included, the HIA estimates that the total retail value of U.S. hemp products is about $419 million."[132]

However, the true value of US hemp consumption is higher. Because

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121. *Id.* ("issuance" link).

122. *Id.*

123. *Id.* ("cultivation" link).

124. ANTHONY CORTILET, MINN. DEP'T. OF AGRIC., INDUSTRIAL HEMP REPORT (2010), *available at* http://www.votehemp.com/PDF/MN-legrpt-hemp.pdf.

125. *Id.*

126. *See* HEALTH CAN., *supra* note 108, at 5-6.

127. GOV'T OF MAN., *supra* note 99.

128. Rita Trichur, *The 'Snicker Factor' Aside, Hemp Is Serious Business,* THE GLOBE AND MAIL (July 10, 2011), http://www.theglobeandmail.com/report-on-business/the-snicker-factor-aside-hemp-is-serious-business/article586400/.

129. *Id.*

130. *Id.*

131. Ray Hansen, *Industrial Hemp Profile*, AGRIC. MKTG. RES. CTR., http://www.agmrc.org/commodities__products/fiber/industrial_hemp_profile.cfm (last updated Aug. 2012).

132. *Id.*

of US hemp laws, American consumers must pay more for the hemp products they demand. Direct import costs and tariffs drive prices up.[133] Additionally, greater delivery distances require more gas, resulting in higher prices.[134] When products are priced too high, certain members of society are unable or unwilling to buy them and, in the case of industrial hemp, benefit from them.[135] Demand is therefore skewed; whereas, if the United States had a legal industrial hemp industry and no longer needed to import the products, price would be down (sans extra import/tariff/fuel costs), and, assuming a normal demand curve, demand would go up.[136] As demand increases, more producers enter the market, further driving price down.[137] The result is lower prices to the American consumer and more Americans benefiting and consuming industrial hemp products from American farmers and businesses.[138] Overall, this combination results in a higher value for industrial hemp products to the American economy. Yet even though the industry as it stands is still in the growth phase,[139] US farmers and businesses are unable to capitalize on this new source of economic growth.

VI. INDUSTRIAL HEMP AND EMERGING STATE LAWS

Many states, however, are trying to capitalize on the new industrial hemp market. Currently, "thirty-one states have introduced pro-hemp legislation and nineteen have passed legislation; nine (Hawaii, Kentucky, Maine, Maryland, Montana, North Dakota, Oregon, Vermont and West Virginia) have removed barriers to its production or research."[140] Despite the growing interest and action taken by the states, federal law preempts all legislation they have passed. Therefore, with the exception of a small test field in Hawaii,[141] no industrial hemp has actually been grown.[142]

Two states are of particular interest to this Note. First is North Dakota, where hemp farmers filed a suit against the DEA in *Monson v. Drug Enforcement Agency*[143] arguing that as hemp farmers under North

133. *See generally* N. GREGORY MANKIW, ESSENTIALS OF ECONOMICS (Alex von Rosenberg, ed., Thomson South-Western) (4th ed. 2007).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *See* Allen St. Pierre, *Hope for Industrial Hemp? Group Of Senators Seeking Legislative Sanity*, NORML BLOG (Aug. 6, 2012), http://blog.norml.org/2012/08/06/hope-for-industrial-hemp-group-of-senators-seeking-legislative-sanity/.

140. *U.S. State Industrial Hemp Regulation*, *supra* note 10.

141. CORTILET, *supra* note 124.

142. *Id.*

143. Monson v. Drug Enforcement Agency, 522 F. Supp. 2d 1188, 1191 (D. N.D. 2007).

Dakota's industrial hemp statute they could not be prosecuted under the federal Controlled Substances Act.[144] The Note will also look at Kentucky's industrial hemp regulations and then review a feasibility study on growing hemp in Kentucky.

A. Monson v. Drug Enforcement Agency

In 2007, David Monson and Wayne Hauge brought suit in North Dakota against the DEA.[145] Monson and Hauge are farmers in North Dakota who had been granted valid licenses in that state under North Dakota's regulatory statute, N.D. Cent.Code §4-41-01, to grow industrial hemp for commercial purposes.[146] Initially, the North Dakota statute required that farmers must obtain a permit from the DEA to grow industrial hemp.[147] However, once it became clear that the DEA was going to treat Monson and Hauge's application as one seeking to grow marijuana, a controlled substance, the North Dakota legislature changed the statute, removing the requirement to seek DEA approval.[148] However, despite this change, the DEA still possessed Monson and Hauge's application and continued to process it.[149] The DEA requested more information from the farmers, but instead of supplying it, the farmers filed suit seeking a declaratory judgment that industrial hemp was not covered by the definition of marijuana as a Schedule 1 controlled substance and therefore not subject to federal regulation.[150]

The North Dakota statute reads,

> Industrial hemp (cannabis sativa l.), having no more than three-tenths of one percent tetrahydrocannabinol, is recognized as an oilseed. Upon meeting the requirements of section 4-41-02, any person in this state may plant, grow, harvest, possess, process, sell, and buy industrial hemp (cannabis sativa l.) having no more than three-tenths of one percent tetrahydrocannabinol.[151]

Monson and Hauge's argument rests on the fact that under the North Dakota statute industrial hemp is defined as Cannabis Sativa L., "having not

144. *Id.* at 1194. *See also generally*, 21 U.S.C. §§ 802-889; N.D. CENT. CODE ANN. §4-41-01 (West 2011).

145. Monson, 522 F. Supp. 2d at 1194.

146. *Id.* at 1195.

147. *Id.* at 1194.

148. *Id.*

149. *Id.*

150. *Id.*

151. N.D. CENT. CODE ANN. §4-41-01 (West 2011).

more than three-tenths of one percent tetrahydrocannabinol."[152] However, the Controlled Substances Act (CSA) defines marijuana as,

> [A]ll parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.[153]

The court in *Monson* pointed out that the CSA makes no mention of THC content in the definition of marijuana; therefore, regardless of how North Dakota defines the plant, industrial hemp fits clearly within the definition set out in the CSA.[154]

The *Monson* case embodies the core problem industrial hemp activists seek to resolve: industrial hemp's inclusion in the definition of marijuana, a Schedule 1 controlled substance under the CSA.[155] Activists argue that Congress did not intend to include industrial hemp in the definition because the definition excludes

> the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.[156]

Because farmers of industrial hemp grow the plant for its mature stalks, fiber, and oil from the seeds,[157] it would appear that indeed Congress did exclude industrial hemp from the definition. Generally in a contract drafting environment, if a drafter seeks to exclude certain items from a general

152. Monson, 522 F. Supp. 2d at 1191.
153. *Id.* at 1198; 21 U.S.C. § 802(16).
154. Monson, 522 F. Supp. 2d at 1191.
155. 21 U.S.C. § 812(c)(Schedule I)(c)(10).
156. Monson, 522 F. Supp. 2d at 1198; 21 U.S.C. § 802(16).
157. *See generally,* RICHARD LAWRENCE MILLER, HEMP AS A CROP FOR MISSOURI FARMERS: MARKETS, ECONOMICS, CULTIVATION, LAW (1991), *available at* www.druglibrary.org/olsen/hemp/crop/hemp-01.html.

definition the drafter would do so with an exception to the rule. Thus, anything falling within the exception is considered excluded from the rule, and the exclusion trumps when it comes to ambiguities. Hemp opponents argue it is impossible to grow the mature stalks of the hemp plant without simultaneously growing "all parts of the plant Cannabis sativa L."[158] While this is true, Congress put the mature stalks, fiber, and oil in an exception to the general definition. Therefore, from a contract drafting perspective, the mature stalks, fiber, and oil were not intended to be part of the definition of marijuana. Nevertheless, federal regulatory authorities and the courts continue to enforce the CSA's definition of marijuana as prohibiting the growth of industrial hemp.[159]

B. Kentucky Law and Feasibility

Kentucky is another state that is trying to pass legislation authorizing the production of industrial hemp.[160] On January 19, 2012, twelve House members signed on to Kentucky's House Bill 286, which promotes industrial hemp production in Kentucky.[161] While legislators admit that federal rules still regulate, and therefore Kentucky would still need a federal permit to begin production, Agriculture Commissioner James Comer says, "passage of a legalization bill would provide an impetus to push for a needed federal permit for Kentucky to be a pilot program."[162]

Kentucky has been the focus of several feasibility studies on industrial hemp viability in the region.[163] This is partly because

> Before hemp cultivation was outlawed, it had been a major crop in Kentucky and grew well in the climate. In the 1800s, Kentucky regularly accounted for one half of the industrial hemp production in the United States (Hopkins, 1951). The climate, soil, and growing season in Kentucky also make the state a superior location for growing certified hemp seed to be planted by farmers raising an industrial hemp crop.[164]

158. 21 U.S.C. § 802(16).

159. Monson, 522 F. Supp. 2d at 1198.

160. Gregory A. Hall, *Industrial Hemp Bill Gains Support; 12 Members of House Sign On,* COURIER-JOURNAL (Jan. 20, 2012), *available at* http://www.courier-journal.com/article/20120119/BUSINESS/301190069/industrial-hemp-legalization.

161. *Id.*

162. *Id.*

163. *See generally* Vantreese, *supra* note 26; Thompson, et al., *supra* note 4, at iii.

164. Thompson, et al., *supra* note 4, at iii.

As Kentucky's tobacco industry continues its decline,[165] the state looks for other sources to replace their primary cash crop and diversify their industries.[166]

In response to the declination of Kentucky's cash crop industry, the Center for Business and Economic Research in Kentucky conducted a study analyzing the market potential and feasibility of industrial hemp growth in Kentucky.[167] The study specifically addresses issues regarding the economic impact an industrial hemp industry would have in Kentucky with regard to prices and profitability for Kentucky farmers, potential markets for sales, costs to grow and turn industrial hemp into viable products, and potential job growth in the state.[168]

First, regarding prices and profitability for Kentucky farmers, the study found that growing industrial hemp could result in varying profit depending on the end product for which the plant was grown.[169] The study found that farmers growing industrial hemp exclusively for the production of straw could earn a profit of approximately $320 per acre; if growing for grain only, farmers could expect a return of $220 per acre; and if growing to produce certified seed for use by other farmers, Kentucky farmers could expect a profit of $600 per acre.[170]

Next, the study showed that there are many markets for Kentucky's hemp products. Specialty niche markets were cited as particularly profitable, specifically animal bedding, paper, food, and oil.[171] Additionally, the study touted a future market feasibility for "automobile parts, replacements for fiberglass, upholstery, and carpets."[172] After going through a detailed analysis of each feasible hemp market, the study concluded that "there may be demand for up to 100,000 tons of industrial hemp fiber each year. This tonnage suggests that there would be a need to cultivate up to 82,000 acres of industrial hemp for straw or straw and grain each year."[173] While the study is a bit dated, these numbers suggest that industrial hemp is definitely a viable crop for Kentucky.

The study goes on to analyze costs associated with cultivation and processing.[174] While the costs associated with cultivating industrial hemp in Kentucky are relatively low because the plant requires little to no pesticides

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165. John I. Gilberbloom, *Preface* to Dr. Eric C. Thompson, et al., *Economic Impact of Industrial Hemp in Kentucky*, CTR. FOR BUS. AND ECON. RESEARCH, UNIV. OF KY., at i (1998).

166. *Id.*

167. *See* Thompson, et al., *supra* note 4 at iii.

168. *Id.* at iii.

169. *Id.* at iv.

170. *Id.*

171. *Id.* at iii.

172. *Id.*

173. Thompson, et al., *supra* note 4 at 46.

174. *Id.* at 47.

or fertilizers,[175] there is some concern about transportation costs because industrial hemp is bulky and heavy.[176] "Short of locating an industrial hemp processing facility in Kentucky, it may be possible to process industrial hemp using modified tobacco processing equipment. However, this might not be as cost-effective as using equipment designed for decorticating industrial hemp."[177] The possibility of using existing processing equipment for hemp processing is a promising idea. Much of the concern regarding industrial hemp production revolves around processing costs and the lack of specialized equipment, specifically a decorticator,[178] to process the hemp.

The last factor the Kentucky study focused on was jobs.[179] In America today jobs are a constant focus and source of concern. One of the points proponents of industrial hemp make is that the legalization of the plant will create jobs.[180] This study examined that assertion and found that if

> Kentucky again becomes the main source for certified industrial hemp seed in the United States [the economic impact] is estimated at 69 full-time equivalent jobs and $1,300,000 in worker earnings. The total economic impact in Kentucky, assuming one industrial hemp processing facility locating in Kentucky and selling certified seed to other growers, would be 303 full-time equivalent jobs and $6,700,000 in worker earnings. If two processing facilities were established in Kentucky, industrial hemp would have an economic impact of 537 fulltime equivalent jobs and $12,100,000 in worker earnings. If one processing facility and one industrial hemp paper-pulp plant were established in Kentucky, industrial hemp would have an economic impact of 771 full-time equivalent jobs and $17,600,000 in worker earnings."[181]

These estimates are based on production in certified seed, fiber, and grain industries only.[182] The study does not include the hemp food industry,[183] nor

175. *Id.* at ii.
176. *Id.* at i.
177. *Id.* at 9.
178. Kevin W. McCarty, *California: Hemp to Potentially Replace Reliance on Fossil Fuels,* DAILY NEXUS (Apr. 18, 2011), http://dailynexus.com/2011-04-18/hemp-potentially-replace-reliance-fossil-fuels/. A decorticator is a machine that strips fiber from plants, separating it from pulp. *Id.*
179. Thompson, et al., *supra* note 4, at iii.
180. *Id.* at iv.
181. *Id.*
182. *Id.* at 50.
183. *Id.* at 52.

the hemp fuel industry[184] in its estimates, but it is revealing that job creation, profitability, market penetration, and cultivation is possible in the Midwest region of the United States.[185]

VII. INDUSTRIAL HEMP IN INDIANA

Despite industrial hemp's potential for success in the Midwest,[186] Indiana is not among the states that have passed legislation allowing for the growth and production of industrial hemp and hemp related products. However, as a result of a policy study on the effects of current marijuana law held in the summer of 2011, Senator Karen Tallian has introduced Senate Bill 347 (SB347).[187] SB347 is primarily a decriminalizing effort related to marijuana criminal offenses.[188] However, Senator Tallian says she plans to propose an amendment to the bill, which would allow the production of industrial hemp.[189] Currently, Indiana's definition of marijuana encompasses industrial hemp in the same way that the Controlled Substances Act does.[190] Indiana Code § 35-48-1-16 states:

> "Marijuana" means any part of the plant genus Cannabis whether growing or not; the seeds thereof; the resin extracted from any part of the plant, including hashish and hash oil; any compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom); or the sterilized seed of the plant which is incapable of germination.[191]

If Indiana decides to pass SB347, then the state would need to amend its Code to first change the definition of marijuana so that it is clear that it only refers to marijuana the drug. Then, Indiana would need to write a new

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184. Thompson, et al., *supra* note 4 at ii.

185. *Id.* at 55.

186. *Id.*

187. Karen Tallian, *Tallian Lays Out Next Steps for Marijuana Policy Legislation,* THE BRIEFING ROOM (Jan. 23, 2012), http://insendems.wordpress.com/2012/01/23/tallian-lays-out-next-steps-for-marjiuana-policy-legislation/.

188. *Id., see also,* 2012 Ind. S.B. 347, 2nd Regular Session, *available at* http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2012&request=getBill&docno=347.

189. Tallian, *supra note* 187.

190. Kentucky Cooperative Extension Service, *Industrial Hemp – Legal Issues*, CROP DIVERSIFICATION BIOFUEL RESEARCH EDUCATION CENTER (2012).

191. IND. CODE ANN. 35-48-1-19 (West 2011).

definition for industrial hemp. It is important to have two separate definitions so that there is no mistaking the two versions of the same plant species. Alternatively, a better option would be to pass legislation specifically and solely aimed at allowing the emergence of an industrial hemp industry in Indiana. The biggest battle industrial hemp activists face is the common confusion between marijuana and industrial hemp.[192] Any mention of hemp immediately conjures an image and association with its psychoactive cousin, but the two are very different.[193] By acknowledging their differences, and passing separate legislation, Indiana can help distinguish the two and demonstrate to society that there is a difference.

With industrial hemp legislation Indiana's industries would explode. Industrial hemp is so versatile, the introduction of it into numerous industries would lower costs in those industries in addition to improving the overall environment.[194] The Indiana automotive industry is already aware of the benefits of hemp as a natural fiber for car materials;[195] this industry could benefit further by introducing hemp fiberglass for other car parts or hemp composites in the same way that "BMW, Chrysler, Ford, GM, Honda, Volkswagen and virtually all European car makers have begun using hemp based composites for panel and linings."[196] Currently Indiana automakers must import the hemp products for use in their applications, but if Indiana were to legalize industrial hemp the revenue and jobs could be kept at home. Additional industries that would benefit from an industrial hemp industry in Indiana are the paper industry, food industry, body care products industry, and clothing industry.[197] All of these industries currently import hemp for inputs into other Indiana-made products.[198]

VIII. BIOFUEL IN INDIANA

While the potential impact of an industrial hemp industry is large for most Indiana industries, the primary reason that Indiana should legalize industrial hemp is because doing so would be extremely beneficial to its economy, specifically in the area of biofuel. Indiana is committed to a thriving biofuel industry.[199] Since its creation in 2005, the Indiana

192. David P. West, *Hemp and Marijuana: Myths and Realities*, NORTH AMERICAN HEMP COUNCIL (1998).

193. *Id.*

194. Thompson, et al., *supra* note 4, at ii.

195. Hansen, *supra* note 131.

196. *Hemp Facts and Uses*, MEDICAL CANNABIS SPAIN, http://www.cannabis-spain.com/cannabis-hemp.htm (last visited Aug. 18, 2013).

197. *Indiana Hemp & Cotton Recycled Products*, ORGANIC CONSUMERS ASSOC., http://www.organicconsumers.org/state/greenbiz.cfm?state=IN&type=hemp (last visited Aug. 18, 2013)

198. *Id.*

199. *Background on Bioenergy and Biofuels*, IND. STATE DEP'T OF AG. (2005), *available*

Department of Agriculture has made agro-energy one of its strategic goals.[200] According to the Indiana Department of Agriculture's website:

> The Midwest really can be the Middle East of biofuels. [Indiana's] numerous new E85 pumps, more than a dozen new ethanol plants, the world's largest soy biodiesel facility, and the establishment of BioTown are evidence that [the state] won't rest until Indiana is the nation's biofuels capital. Beyond the use of traditional grain for ethanol, Indiana will strive to be a leader in cellulosic ethanol. Cellulosic is the future of biofuels and can be maximized by Indiana's research universities like Purdue.[201]

Currently, because Indiana is one of the nation's leading producers of corn,[202] it has naturally followed that corn is the main input for the production of agricultural biofuel in the state.[203] However, funneling corn out of the food supply into the fuel supply has cost Indiana export revenue,[204] and contributed to the increase in global corn prices.[205] Before corn was used as an ethanol feedstock, Indiana exported over fifty percent of the corn produced by Indiana farmers.[206] Now, that "extra" corn is not exported but kept at home to produce biofuel.[207] In response to the decreased exports Indiana argues that, "as U.S. ethanol production expands, higher U.S. and world corn prices would provide incentives for Brazil and Argentina to expand corn production and compete with U.S. corn in world markets."[208] However, the price increases caused by taking corn out of the food chain for fuel production has increased food shortages in areas where the food supply is already at risk for insufficiency.[209] For example, "[b]etween 2002 and 2007, world food prices increased by some 140 percent due to a number of factors including, increased demand for biofuels feedstocks and rising agricultural fuel and fertilizer prices."[210] As a result of

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at http://www.in.gov/isda/biofuels/background.pdf.

200. *Economic Growth from Hoosier Homegrown Energy: Indiana's Strategic Energy Plan*, IND. OFFICE OF ENERGY DEVELOPMENT (2006), *available at* http://www.in.gov/oed/files/Energy_Strategic_Plan_1-2.pdf.

201. *Id.*

202. *Id.*

203. *Id.*

204. Ind. State Dep't Ag., *supra* note 199.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. Gunther Fischer, et al., *Biofuels and Food Security: Implications of an Accelerated Biofuel Production*, INT'L INST. FOR APPLIED SYS. ANALYSIS OFID 18 (Mar. 2009), *available*

these higher prices, "in 2008 . . . a further 100 million [were added] to the world's undernourished [population]."[211] While Indiana's argument that increased competition would put downward pressure on the price of corn is true, and it would relieve some of the effects affecting the world food crisis, it is not necessary to remove corn from the food supply, nor subject our corn industry to the risk of lost market share. The introduction of hemp as a feedstock for biofuel would replace the corn that is currently being removed from the food chain to supply biofuel needs. Replacing the corn with hemp would lessen the pressure on global corn prices as the supply of corn increased,[212] thus helping to alleviate some of the effects third world nations are suffering as a result of the global search for alternative fuel. Furthermore, foregoing export revenue in Indiana is also unnecessary. Indiana has enough farmland[213] that it is fully capable of maintaining its pre-ethanol corn export levels, while supporting its growing biofuel industry with industrial hemp.

IX. HEMP VS. CORN

Furthermore, Indiana should switch to producing industrial hemp as a biofuel feedstock because it is a more efficient resource.[214] There is no question that "corn ethanol is energy efficient."[215] It has "an energy ratio of 1.34 [, which means] for every BTU dedicated to producing ethanol there is a 34 percent energy gain."[216] Unfortunately, corn puts high demands on land and water resources,[217] and producing biofuel from it is energy and resource-intensive.[218] Industrial hemp, by comparison, because of its high cellulose content has an estimated 540 percent energy gain.[219] Through Indiana's own research it knows that biofuel from cellulous is the direction the industry is taking.[220] According to Alan Greenspan, "[c]orn ethanol,

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at http://www.ofid.org/publications/PDF/pamphlet/ofid_pam38_Biofuels.pdf

211. *Id.* at 20.

212. *See generally* MANKIW, *supra* note 133.

213. *Renewable Energy for America*, NAT. RES. DEFENSE COUNCIL, http://www.nrdc.org/energy/renewables/indiana.asp, (last visited Aug. 17, 2013).

214. *Id.*

215. *Background on Bioenergy and Biofuels*, *supra* note 199.

216. *Id.*

217. *See Economic Research Service, Corn: Background,* US DEPT. OF AGRICULTURE, http://www.ers.usda.gov/topics/crops/corn/background.aspx (last visited Aug. 17, 2013) (stating that increased demand for ethanol production has resulted in increased corn acreage taken from soybean farms, pasture land, and cotton crops); *see also* Hamid Farahani and William B. Smith, *Irrigation,* CLEMSEN.EDU, http://www.clemson.edu/extension/rowcrops/corn/guide/irrigation.html (last visited Aug. 17, 2013) (explaining water requirements for corn yields).

218. *Renewable Energy for America*, *supra* note 213.

219. *Bio Fuel Stations, Hemp Bio-Fuel*, PANACEA-BOCAF, http://www.panacea-bocaf.org/biofuelstations.htm (last visited Aug. 18, 2013).

220. *Economic Growth from Hoosier Homegrown Energy*, *supra* note 200.

though valuable, can play only a limited role [in energy independence], because its ability to displace gasoline is modest at best. But cellulosic ethanol, should it fulfill its promise, would help to wean us of our petroleum dependence."[221]

In addition to hemp's high cellulous content, hemp requires little from its growing environment.[222] It can be grown on land unsuitable for other feedstock crops.[223] For example, China purports to grow industrial hemp on land that will not displace food crops, or as a rotational crop with soy and wheat.[224] Furthermore, it can be harvested two or three times per season;[225] it requires nearly no pesticides or herbicides to thrive;[226] and it coincidentally leaves the land in better shape than it was in before planting,[227] thus creating a suitable plot for rotational crops where before there were none.[228] Moreover, industrial hemp would thrive in Indiana farmland because it "tends to grow best on land that produces high yields of corn."[229]

The trend in feedstock crops is now towards cellulous-based ethanol production.[230] Indiana has recognized that cellulose-based crops are the future for biofuel.[231] In its strategic outlook, Indiana has dedicated itself to becoming a leader in this field.[232] With industrial hemp's superiority over other cellulosic plants,[233] Indiana would surely gain dominance in ethanol production in the United States if it were to employ industrial hemp as the main biofuel feedstock.

X. ENERGY SECURITY AND CLIMATE STEWARDSHIP PLATFORM

As evidence of its commitment to sustainable energy, Indiana has adopted the Energy Security and Climate Stewardship Platform.[234] The

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221. Anthony Crooks, *From Grass to Gas,* USDA RURAL DEVELOPMENT, Alan Greenspan, *Testimony before Senate Committee on Foreign Relations*, June 7, 2006, *available at* http://www.setamericafree.org/wordpress/?p=93.

222. *Fibre Stories*, *supra* note 42.

223. *Id.*

224. *Id.*

225. *Hemp Defined*, *supra* note 18.

226. *Id.*

227. Thompson, et al., *supra* note 4, at ii.

228. *Id.*

229. *Hemp Defined*, *supra* note 18.

230. *Id.*; *See also Economic Growth from Hoosier Homegrown Energy*, *supra* note 200.

231. *Economic Growth from Hoosier Homegrown Energy*, *supra* note 200.

232. *Id.*

233. *Christensen and Smith*, *supra* note 5.

234. *Indiana Laws and Incentives for Biodiesel*, U.S. DEP'T OF ENERGY, http://www.afdc.energy.gov/afdc/laws/index.php?p=laws&state=IN&type=tech&catid=3251&print=y (last visited Aug. 18, 2013). *See also* ENERGY SECURITY & CLIMATE STEWARDSHIP PLATFORM, MIDWESTERN GOVERNORS ASS'N 4, *available at* http://www.midwesterngovernors.org/

Platform establishes shared goals for the Midwestern region as they relate to biofuel, environment, and energy independence.[235] The goal of the Platform is to "[m]aximize the energy resources and economic advantages and opportunities of Midwestern states while reducing emissions of atmospheric CO2 and other greenhouse gases."[236] In order to reach its goal, the Platform is committed to meeting various objectives including the implementation of renewable energy technologies, cost-effective energy efficiency, and to "[a]dd economic value and high-paying jobs to the Midwest's energy, agriculture, manufacturing and technology sectors through the development and deployment of lower-carbon energy production and technologies."[237] Some specific strategies to reach the objectives include expanding on the production of biofuels and building a bio-refinery industry.[238] Regarding transportation and biofuel specifically, the Energy Security and Climate Stewardship seeks to

- Develop the Midwest's capacity for production of biofuels and other low-carbon advanced transportation fuels to advance national energy independence, add value for consumers, revitalize rural economies and the region's manufacturing base, and decrease greenhouse gas emissions.

- Accelerate strategies for improving the efficiency of biofuels production and use, reduce fossil fuel inputs, minimize GHG emissions, decrease water use and strengthen the existing biofuels industry.

- Develop, demonstrate and commercialize a variety of biomass-utilizing technologies and other low-carbon advanced fuels covering a portfolio of energy products and biobased products.

- Pursue innovative opportunities to increase the biofuels supply while improving water quality, soil quality and wildlife habitat.

- Build the infrastructure to allow the bioeconomy to expand.[239]

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resolutions/Platform.pdf [*hereinafter* PLATFORM].

235. *Id.*

236. PLATFORM, *supra* note 234, at 4.

237. *Id.*

238. *Id.* at 5.

239. *Id.* at 10-11.

Industrial hemp is the ideal feedstock to help Indiana meet all of these objectives. An analysis of each one is useful.

1. Develop the Midwest's capacity for production of biofuels and other low-carbon advanced transportation fuels to advance national energy independence, add value for consumers, revitalize rural economies and the region's manufacturing base, and decrease greenhouse gas emissions.[240]

Currently Indiana's main feedstock inputs are corn and soybean.[241] These inputs are limited in their capacity because they are both food sources as well. Industrial hemp, on the other hand, contributes to national energy independence by reducing the need for fossil fuel inputs.[242] It adds values for consumers because it lets food crops be used for food, which reduces the price for that food. It revitalizes rural economies by providing low-skilled agriculture jobs for smaller production farmers.[243] And hemp is a miracle when it comes to reducing greenhouses gases and leaving the growing environment in a better condition than that in which it was found.[244]

2. Accelerate strategies for improving the efficiency of biofuels production and use, reduce fossil fuel inputs, minimize GHG emissions, decrease water use and strengthen the existing biofuels industry.[245]

Industrial hemp is an efficient source of biofuel.[246] Both hemp biomass and hemp seed are available to produce fuel,[247] whether it is biodiesel or ethanol.[248] Additionally, hemp's cellulose content far exceeds anything Indiana is currently using as feedstock, managing a 540% energy gain when processed, which makes it a very efficient biofuel input.[249] Furthermore, hemp is known to reduce greenhouse gasses,[250] and requires less water to grow than cotton[251] (however, compared to corn the results are mixed).

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240. *Id.* at 10.
241. *Background on Bioenergy and Biofuels*, *supra* note 161.
242. *Id.*
243. GEORGE BROOK, NATIONAL INDUSTRIAL HEMP STRATEGY 70 (2008).
244. Thompson, et al., *supra* note 4, at ii.
245. PLATFORM, *supra* note 234, at 10.
246. Castleman, *supra* note 61.
247. *Id.*
248. *Id.*
249. *Bio Fuel stations*, *supra* note 219.
250. Angelique van Engelen, *Industrial Hemp's Silver Bullet Potential for Reducing Greenhouse Gas*, GLOBAL WARMING IS REAL: RESOURCES FOR THE CONCERNED CITIZEN, http://globalwarmingisreal.com/2008/05/26/industrial-hemps-silver-bullet-potential-for-reducing-greenhouse-gas/ (last visited Aug. 18, 2013).
251. Castleman, *supra* note 61.

3. Develop, demonstrate and commercialize a variety of biomass-utilizing technologies and other low-carbon advanced fuels covering a portfolio of energy products and biobased products.[252]

The addition of industrial hemp as a biofuel source would help diversify Indiana's biofuels portfolio. Additionally, while hemp biofuel is the focus here, the plant is extremely versatile, capable of producing over 25,000 products,[253] which could fill out Indiana's biobased products portfolio effortlessly.

4. Pursue innovative opportunities to increase the biofuels supply while improving water quality, soil quality and wildlife habitat.[254]

Estimates suggest that industrial hemp is capable of producing 1300 gallons of fuel per acre of biomass.[255] Hemp can be grown in conjunction with corn and soybean feedstock because it is capable of growing on unfarmed land,[256] or in rotation with other crops.[257] Alternatively, industrial hemp can easily replace corn and soybean feedstock on currently farmed land because such land is ideal for maximum output.[258] Any of these growing options would increase the biofuel supply. Furthermore, studies show that growing industrial hemp improves water quality because it requires little to no pesticides,[259] and it improves soil quality, often leaving it in better condition.[260] The improvement in water and soil quality would naturally lead to an improvement in wildlife habitat because the environment would be able to support additional wildlife and plants.

5. Build the infrastructure to allow the bioeconomy to expand.[261]

Legalizing industrial hemp would increase the biofuel supply, increase exports, as well as provide Indiana with new industries, resulting in increased revenue for the State. The extra revenue received could be reinvested in Indiana's bioeconomy.

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252. PLATFORM, *supra* note 234, at 10.

253. *New Billion Dollar Crop*, *supra* note 34.

254. PLATFORM, *supra* note 234, at 11.

255. *All About Hemp*, at 1.7, PROJECT HUMANITY EARTH, *available at* http://www.project-humanity-earth.org/yahoo_site_admin/assets/docs/All-About-Hemp.70130752.pdf (last visited Aug. 18, 2013).

256. Castleman, *supra* note 61.

257. *Id.*

258. *Hemp Defined*, *supra* note 18.

259. Thompson, et al., *supra* note 4, at 53.

260. R.M. Forbes, *Industrial Hemp Can Save America*, DAILY KOS (Sept. 9, 2011), http://www.dailykos.com/story/2011/09/09/1014706/-Industrial-Hemp-can-save-America.

261. PLATFORM, *supra* note 234 at 11.

As for Indiana and many other Midwestern states that have adopted the Energy Security and Climate Stewardship Platform, industrial hemp seems to be an almost perfect answer to their energy needs.

XI. FEDERAL LEGALIZATION

Despite Indiana's potential to become a huge producer of industrial hemp and to take advantage of the opportunities it holds as a biofuel, the State is still limited by the Controlled Substances Act.[262] Federal law preempts when a federal and state law conflict.[263] One of the ways for states like Indiana to capitalize on the hemp industry is for Congress to remove industrial hemp from the definition of marijuana in the Controlled Substances Act. According to the Act itself, several factors are considered in making a determination of whether a drug should be removed from a schedule.[264] Specifically, the Act states:

> In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:
> (1) Its actual or relative potential for abuse.
> (2) Scientific evidence of its pharmacological effect, if known.
> (3) The state of current scientific knowledge regarding the drug or other substance.
> (4) Its history and current pattern of abuse.
> (5) The scope, duration, and significance of abuse.
> (6) What, if any, risk there is to the public health.
> (7) Its psychic or physiological dependence liability.
> (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.[265]

Ideally, during Congressional review of the proposed legislation, S. 359, Congress will submit industrial hemp to an evaluation using the previously mentioned factors. Doing so should result in a finding that industrial hemp

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262. *See* Controlled Substances Act, Pub. L. No. 91-513, Tit. II, Sec. 102(15), 84 Stat. 1242, 1244 (codified as amended at 21 U.S.C. § 802(16)).

263. *See* Altria Group, Inc. v. Good, 555 U.S. 70, 76-77 (2008) ("Article VI, cl. 2, of the Constitution provides that the laws of the United States 'shall be the supreme Law of the Land. . . .' Consistent with that command, we have long recognized that state laws that conflict with federal law are 'without effect.'" (citations omitted)).

264. 21 U.S.C. §811(c).

265. *Id.*

does not belong as a Schedule I controlled substance. Going through the factors finds that:

> (1) Industrial hemp does not have any potential for abuse because it is a commodity, not a drug;[266]
>
> (2) Scientific evidence shows that industrial hemp contains nominal levels of THC, the psychoactive property of marijuana, and cannot cause any narcotic effect;[267]
>
> (3) There is substantial scientific knowledge regarding the absent nature of industrial hemp as a drug;[268]
>
> (4) History shows that Congress did not intend to prohibit farmers from growing industrial hemp,[269] and there is no current pattern of abuse for industrial hemp;
>
> (5) Again, there is no abuse of the crop;
>
> (6) No direct risk to public health exists. In fact, hemp seeds and hemp oil are optimal sources of nutrients for humans.[270] However, there is an argument to be made that some people could confuse industrial hemp with its cousin marijuana,[271] and if so a public health risk may exist, albeit small;
>
> (7) Industrial hemp has not been shown to create any psychic or physiologic dependence;[272] and
>
> (8) Industrial hemp is not a precursor to any drug because it is not a drug itself.[273]

By this analysis, the factors are in favor of removing industrial hemp from the definition of marijuana under the Controlled Substances Act.

Alternatively, the United States could adopt a regulatory scheme similar to Canada's. Instead of passing regulation to the states as Representative Paul's bill proposes, the federal government could carve out an exception to the Controlled Substances Act, allowing the CSA to be the controlling body of law, yet have a subsection specifically defining and regulating industrial hemp. For instance, Canada maintains cannabis as a Schedule II controlled substance,[274] defining it as:

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266. *See* Jay Halfon, *Industrial Hemp Petition*, RESOURCE CONSERVATION ALLIANCE, http://www.woodconsumption.org/alts/petition.html (last visited Aug. 18, 2013).

267. *See id.; see also Hemp Defined*, *supra* note 18; *Hemp Facts*, *supra* note 2.

268. *See Hemp Facts*, *supra* note 2; Halfon, *supra* note 261.

269. *See* RENÉE JOHNSON, HEMP AS AN AGRICULTURAL COMMODITY 11 (2012), *available at* http://www.fas.org/sgp/crs/misc/RL32725.pdf; Halfon, *supra* note 261.

270. *See* Thompson, et al., *supra* note 4, at 7-8; *Hemp Facts*, *supra* note 2; Halfon, *supra* note 261.

271. *See Hemp Facts*, *supra* note 2; Halfon, *supra* note 266.

272. *See* Halfon, *supra* note 266.

273. *Id.*

274. *See* Controlled Drugs and Substances Act, sched. II, S.C. 1996, c. 19 (Can.), *available at* http://laws-lois.justice.gc.ca/eng/acts/C-38.8/

> Cannabis, its preparations, derivatives and similar synthetic preparations, including Cannabis resin, Cannabis (marihuana), cannabidiol, cannabinol, nabilone, pyrahexyl, tetrahydrocannabinol; but not including non-viable Cannabis seed, with the exception of its derivatives, and mature Cannabis stalks that do not include leaves, flowers, seeds or branches; and fiber derived from such stalks[.][275]

While preserving the classification of marijuana, the Controlled Drugs and Substances Act carves out a subsection specifically for industrial hemp[276] and defines it as:

> [T]he plants and plant parts of the genera *Cannabis*, the leaves and flowering heads of which do not contain more than 0.3% THC w/w, and includes the derivatives of such plants and plant parts. It also includes the derivatives of non-viable cannabis seed. It does not include plant parts of the genera *Cannabis* that consist of non-viable cannabis seed, other than its derivatives, or of mature cannabis stalks that do not include leaves, flowers, seeds or branches, or of fibre derived from those stalks.[277]

It is interesting to note that the Canadian definition of industrial hemp is similar to the definition adopted by North Dakota,[278] which includes in the definition the distinction regarding the percent of tetrahydrocannabinol allowable.[279] The federal government, in addition to having Canada as an example for implementation and success of industrial hemp regulations, could also look to the states for various policy rationales behind adoption of the new definition.

When analyzing and creating the new legislation, the United States would be well served by following Canada's method of analysis. The criteria by which Canada evaluated legalization are all important policy considerations for the United States, and are in line with US interests. Specifically, Canada's mandatory criteria that the option chosen: be in conformity with other laws, comply with Canada's international obligations, must not facilitate the production of illicit drugs, and must

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275. *Id.*

276. Industrial Hemp Regulations (Controlled Drugs and Substances Act), sec. 1, SOR/98-156 (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/SOR-98-156.pdf.

277. *Id.*

278. *See* N.D. CENT. CODE ANN. § 4-41-01 (West 2011).

279. *Id.* ("Industrial hemp (cannabis sativa l.), having no more than three-tenths of one percent tetrahydrocannabinol, is recognized as an oilseed.").

provide an appropriate means of control[280] are all concerns of the United States.[281] Furthermore, the screen criteria adopted by Canada that the option must not hinder trade; not be a burden on government and industry; or that it must not undermine public confidence[282] are also concerns for the United States.[283] By following Canada's analysis, the United States has the advantage of comparison, with the ability to determine if Canada's reasoning is applicable to the United States. If so determined, then the United States could simply adopt Canada's regulations without significant change.

Once Congress makes the distinction between marijuana and industrial hemp, the issue of enforcement remains and, in fact, is one of the concerns expressed by law enforcement officials.[284] The concern is that enforcement would burden local law officials because they would have a hard time distinguishing between hemp and marijuana fields, and people would try to covertly grow marijuana in hemp fields.[285] However, many countries have no trouble at all with these two issues because the regulatory scheme ensures that locations of hemp farms are clearly registered and known to law enforcement.[286] Furthermore, covert planting of marijuana in hemp fields would prove disastrous to the marijuana grower because the two strands would cross-pollinate, and the low THC strand, industrial hemp, would win the genetic war causing the marijuana to lose potency.[287]

In Canada, the agency Health Canada furnishes permits and licenses for the growth of industrial hemp; Health Canada also maintains the regulations.[288] Of course, enforcement belongs to the law enforcement agencies,[289] but the regulations are so strict and exact that police know where and what type of hemp grows in each field,[290] which alleviates much of the concern with distinguishing between the two strains of Cannabis. Similar to Health Canada's role, the DEA could still be the controlling

280. Regulatory Impact Analysis Statement, Industrial Hemp Regulations, C. Gaz. 1997 pt. I, 3905, 3910 (Can.).

281. *See* 21 U.S.C. §801a(1)-(2).

282. REGULATORY IMPACT ANALYSIS STATEMENT, C. Gaz. 1997 pt. I, at 3910.

283. *See e.g.* Jonathan Miller, *Inside the Movement to Legalize Hemp*, THE DAILY BEAST (May 14, 2013), http://www.thedailybeast.com/articles/2013/05/14/inside-the-movement-to-legalize-hemp.html.

284. *See* KENTUCKY PRESS NEWS SERVICE, *Beshear Sides with Law Enforcement over Hemp Legalization*, WEKU.FM (Feb. 9, 2013), *available at* http://weku.fm/post/beshear-sides-law-enforcement-over-hemp-legalization.

285. West, *supra* note 12.

286. *Id.*

287. CRS REPORT, *supra* note 2, at 3.

288. *See* Industrial Hemp Regulations (Controlled Drugs and Substances Act), secs. 1, 8, SOR 98-156 (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/SOR-98-156.pdf

289. *See, e.g.*, Controlled Drugs and Substances Act, § 11(1), S.C. 1996, c. 19 (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/C-38.8.pdf.

290. *See* West, *supra* note 12.

agency for the enforcement of industrial hemp regulations, continuing to have the authority to grant permits to states and individuals wishing to cultivate industrial hemp. Yet, contrary to current practice, permits should not be unreasonably withheld. Nor would they need to be because the adopted regulations should be strict, and potential growers should have to abide by them absolutely. This is especially important in the beginning until the various kinks associated with all regulatory change are worked out.

While the US government's biggest concern regarding industrial hemp regulation is how to tell the difference between industrial hemp and marijuana,[291] Canada is not so troubled. Its solution to the uncertainty is to require GPS coordinates of each growing plot, and require within each plot the coordinates of each type of hemp output grown.[292] Therefore, officials know exactly what is planted where. Furthermore, Canada requires a minimum plot of 0.4 hectares of hemp grown for seed or a minimum of four hectares for hemp grown for fiber to help distinguish between fields of industrial hemp and illegal fields of marijuana.[293]

Another very important part of Canada's hemp regulation, and crucial to the distinction between marijuana and industrial hemp, is Canada's seed regulations.[294] Under paragraph 14, a person licensed to grow industrial hemp may grow only seed that is approved to grow in their specific region; the seed must be the seed that is listed on the grower's license; and the seed must be "an approved cultivar referred to in subsection (1) [and] must be of a pedigreed status, as defined in subsection 2(2) of the *Seeds Regulations*."[295] Pedigreed status under the Seeds Regulations "means that the seed is of foundation status, registered status or certified status or the seed is approved by the Association as being breeder seed or select seed."[296] Additionally, Canada has created a list of approved cultivars.[297] The approved cultivars are seeds that are from

> a variety of hemp that is recognized by the Canadian Seed

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291. Tim Johnson & Adam Silverman, *More States Want Federal Government's OK to Grow Hemp*, USA TODAY (Nov. 3, 2011, 1:52 AM), http://www.usatoday.com/news/nation/story/2011-11-06/hemp/51042146/1?csp=34news.

292. *See* JOHNSON, *supra* note 269, at 3.

293. Can. Seed Growers Ass'n, Circular 6: *Canadian Regulations and Procedures for Pedigreed Seed Crop Production* § 11.2.10(a) (2013), *available at* http://www.seedgrowers.ca/pdfs/Circ%206%20March%2013%202013%20Update/Circ6_Complete_Rev01.8-2013_20130123.pdf.

294. Industrial Hemp Regulations, SOR/98-156, §18 (Can.).

295. *Id.* § 14.

296. Seeds Regulations C.R.C., c. 1400 (Can.).

297. Health Canada, Healthy Environments and Consumer Safety Branch, List of Approved Cultivars for the 2012 Growing Season (2012), *available at* http://www.hc-sc.gc.ca/hc-ps/alt_formats/hecs-sesc/pdf/pubs/precurs/list_cultivars-liste2012/list_cultivars-liste2012-eng.pdf.

> Growers' Association, the Canadian Food Inspection Agency or the Organisation for Economic Co-operation and Development; and . . . the Minister has reasonable grounds to believe that the cultivar is likely to produce a plant that will contain 0.3% THC w/w or less in its leaves and flowering heads when it is cultivated in the region of Canada for which it is to be designated.[298]

The seeds on the approved cultivars list may or may not require further testing, depending on the seed.[299] If the seeds do require further testing to determine their THC concentration, then farmers must "have samples of the industrial hemp collected in accordance with the methods set out in the Manual; and . . . have the samples tested at a competent laboratory using analytical procedures set out in the Manual."[300] Canada has taken substantial steps to ensure that the seeds grown by industrial hemp farmers are approved, certified, and contain no more than 0.3% THC content.[301]

The United States already indirectly acknowledges and approves of the Canadian regulations. Evidence of this is the fact that the United States imported nearly $8.6 million dollars of raw hemp products from Canada in 2010.[302] This number includes raw inputs only, and does not include finished products such as hemp food, textiles, or body care products.[303] If Canada did not have such strict regulations regarding THC content, both in their approved cultivars and in the testing of some varieties, the United States would not allow any imports of hemp products into the country.[304] The government simply needs to take one step further and implement licensing and enforcement regulations so that the American economy can fully benefit from an industrial hemp industry.

Another concern for opponents of an industrial hemp industry is that regulation of industrial hemp would be cost prohibitive.[305] Admittedly, at first it will likely be expensive to regulate, but there are always additional

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298. SOR/98-156, §39(1)(a), (b) (Can.).

299. *See* Health Canada, *supra* note 297.

300. Industrial Hemp Regulations, SOR/98-156, §16 (Can.).

301. *See generally, id.*

302. *Canadian Hemp: Nature's Wonder Fibre*, AGRIC. AND AGRI-FOOD CAN. (Aug. 10, 2011), http://www.marquecanadabrand.agr.gc.ca/fact-fiche/pdf/4687-eng.pdf. (The conversion rate on 3/23/12 was 1 Canadian dollar to 1.002 U.S. dollars) *See Canadian Dollars (CAD) to US Dollars (USD) Exchange Rate for March 23, 2012*, EXCHANGE-RATES.ORG, http://www.exchange-rates.org/Rate/CAD/USD/3-23-2012.

303. *Id.*

304. *See generally*, Ray Hansen, *Industrial Hemp Profile*, AGRICULTURAL MARKETING RESOURCE CENTER, http://www.agmrc.org/commodities__products/fiber/industrial-hemp-profile/ (last updated Aug. 2012).

305. *See* West, *supra* note 12.

expenses when implementing a new system. One cannot simply look at the costs associated with change. It is also necessary to examine the beneficial results that the change will bring. Weighing the costs and benefits against each other will undoubtedly show that the benefits of regulating industrial hemp will far outweigh the costs the change will incur. Moreover, after time, efficiency will increase and costs will subsequently decrease, while the benefits of an industrial hemp industry will remain.

XII. CONCLUSION

Ultimately, Indiana's potential to be the leader in the biofuel industry depends largely on the federal government's classification of industrial hemp. Once Congress distinguishes between marijuana and industrial hemp, empowering regulation with the Drug Enforcement Agency under a scheme similar to Canada's, the states would be able to go forward with their own regulations to comply with federal regulations. Indiana would then be able to amend its own definition of Cannabis to separate marijuana from industrial hemp, similar to the actions taken by other states such as North Dakota and Kentucky, which have authorized the cultivation and production of hemp and hemp-based products. Acknowledging that legislators in Indiana have introduced legislation seeking to decriminalize marijuana with the intent to amend it in the future to include industrial hemp, a better option would be to introduce legislation specifically for the regulation of industrial hemp. A separate law would ensure that the public, and government, recognizes the difference between industrial hemp and marijuana.

The growth of industrial hemp would support and enhance Indiana's renewable biofuel industry. Industrial hemp cultivation for biofuel feedstock would have a positive effect on Indiana's export revenue by allowing excess corn, which is no longer being grown for fuel, to be exported as it used to be. These exports, in turn, will relieve some of the pressure on corn prices as more corn enters the market for food, which will result in decreased shortages in the world's food supply. Cultivation would also satisfy Indiana's goals under the Energy Security and Climate Stewardship Platform.[306]

Indiana industry is being jeopardized by the federal government's refusal to acknowledge the many uses and benefits of the industrial hemp plant because they think "commercial cultivation would increase the likelihood of covert production of high-THC marijuana and send the wrong message to the American public concerning the government's position on drugs."[307] If the United States simply adopted a regulatory/licensing scheme

306. *See generally* PLATFORM, *supra* note 234.

307. Johnson & Silverman, *supra* note 291.

similar to Canada's and educated people on the difference between marijuana and industrial hemp, the American public would be informed and understand that industrial hemp can provide so many benefits from food to fuel for our amazing country.