INTERNATIONAL LAW CONFRONTS THE GLOBAL ECONOMY: LABOR RIGHTS, HUMAN RIGHTS, AND DEMOCRACY IN DISTRESS

*Timothy A. Canova**

What role does law play in a modern national economy? The answer, of course, is many roles. The range of law's reach is immense. Well-functioning markets require rules, from contract law and commercial codes to banking and financial regulations. Statutes and regulations often provide minimum standards for labor, health and safety, environmental and consumer protection. Law protects private property, intellectual property, and sometimes communal property. The common law plays its part as well. Tort law provides compensation for victims of lawful and unlawful economic activity. And the state, through its taxing and spending powers, provides subsidies, encourages research and development, and invests in social and physical infrastructure.

How much more complex is the relationship of international law to our global economy, where law must deal with challenges posed by geography, language, and cultural tradition, as well as competing sovereignties and diverse political and social systems? While economics provides a useful lens for analyzing international law,[1] there is no easily definable discipline of international economic law.[2] It has been suggested that the closest we can come to defining international economic law are

*Professor of Law and Director, The Center for Global Trade & Development, Chapman University School of Law. I would like to thank Dean Parham Williams, Chapman University's President James Doti and former Provost Hamid Shirvani, and my Chapman colleagues for their support of this inaugural conference. In addition, special thanks to my colleague John Eastman, the editors of the Chapman Law Review, particularly Nikole Kingston, the editor-in-chief, and of course, our symposium participants, for all of their hard work to ensure the success of this conference.

1 Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999).

2 According to Jeffery Atik, the few published definitions of international economic law "are catalogues of stray topics." Jeffery Atik, *Interfaces: From International Trade to International Economic Law*, AM. U. INT'L L. REV. 1231, 1235 (2000) (suggesting that the difficulty in defining the field suggests a "simple failure of a discipline to form").

several interrelated, but distinct fields of law, all impacting the global economy.[3]

As the pace of globalization has intensified, lawyers and scholars continue to develop an appreciation for the many ways their own areas of expertise and practice relate to the global economy.[4] This symposium issue of the Chapman Law Review, featuring papers presented at the inaugural conference of Chapman University's Center for Global Trade & Development, reflects the dynamic and evolving relationship between international law and the global economy, and the profound impacts of each on the course of democracy and human rights in the world today.

LAW'S CONFRONTATION

Each of our panelists and speakers were asked to consider the various ways that international law confronts the global economy for the purpose of protecting labor rights, human rights, and substantive and procedural norms of democracy itself.[5] The term "confrontation" suggests an encounter of two expanses, international law and international economics, each worthy of study in its own right, and each suddenly filled with great uncertain potentials to alter and shape the other. Confrontation implies opposition, conflict, and perhaps cooperation. Moreover, it presumes the possibility that the course of events can be shaped by human agency and will — the hope of any democracy.

The Center for Global Trade & Development provided an ideal venue to discuss these confrontations. Multi-disciplinary by design and inter-disciplinary in approach, the Global Center, like the Chapman University School of Law, is committed to genuine ideological diversity and the free exchange of ideas. In this spirit of inquiry, our symposium heard from speakers and panelists on a wide range of international legal confrontations, including global efforts to protect the environment, address future energy demands, and promote sustainable development; the many consequences of China's emergence in world trade; human rights litigation in U.S. and foreign forums; the role of international

3 *Id.* (arguing that international trade law provides the core of international economic law, complemented by a variety of other areas of law, including international monetary law, competition/antitrust law, intellectual property and law and development).

4 *Id.* at 1235-36 (describing the field of international economic law as an accommodation, "a big tent, embracing multiple subdisciplines, methodologies and approaches")

5 See the Appendix to this Introduction for full descriptions of the symposium panels, *infra* p. 22. The two-day symposium is also available by WebCast at http://www.chapman.edu/law/students/lawReview/symposiumWebCast.asp (last visited May 1, 2005).

financial institutions in addressing labor standards and human rights in developing countries; the protection of indigenous rights and culture; the legal and extra-legal treatment of immigrant workers; and the development of socially responsible investment policies and codes of conduct for the protection of labor and human rights.

Given the wide range of these concerns, it is not surprising that many of the confrontations between international law and the global economy are inherently political, though not necessarily in any partisan sense. In fact, as played out in both the academy and the streets, the so-called "globalization debates" of the 1990s were extremely contentious. In 1992, Francis Fukuyama declared the end of history.[6] According to his thesis, liberal democracy and free market capitalism were the ideological winners of the Cold War.[7] This conclusion was compatible with a central premise of the prevailing consensus on globalization, namely that private and corporate-led globalization was better than any and every possible alternative.[8]

Yet, the actual course of events of globalized trade and finance soon produced its own stresses. Transition economies faltered, failed states degenerated into anarchy, and collapsing currencies swept the globe in a contagion that brought severe economic hardship to millions. Perhaps history had not ended after all.[9] While policy was safely dominated by an orthodox consensus, ideological debate was still alive.[10]

Globalization means very different things to different people.[11] To many, globalization has been synonymous with

6 FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

7 *Id.*

8 The consensus was often referred to as the Wall Street-Washington consensus, and by its critics, as The Neoliberal Model. *See* Timothy A. Canova, *The Disorders of Unrestricted Capital Mobility and the Limits of the Orthodox Imagination: A Critique of Robert Solomon, Money on the Move: The Revolution in International Finance Since 1980*, 9 MINN. J. GLOBAL TRADE 219, 228 n.43 (2000) (contesting the artificial limits on alternative paths of globalization).

9 BENJAMIM R. BARBER, *JIHAD V. MCWORLD*: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD (1995); SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1998).

10 The strength of the Wall Street-Washington consensus was made apparent when Joseph Stiglitz was purged as Chief Economist at the World Bank for his repeated public criticisms of the orthodox model, and particularly the International Monetary Fund, the World Bank's sister institution. But the ideological debate only intensified, and can be seen to have peaked in 2001 with news that Stiglitz had been awarded a Nobel prize in Economics. *See* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

11 Frank J. Garcia, *The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51, 56-57 (1999) (recognizing the multiplicity of meanings, while articulating objective definitions of various kinds of globalization, including economic, transactional, regulatory, and market globalization).

global progress. International trade expands the benefits of free market capitalism. Consumers get cheaper foreign imports, workers get more efficient, and shareholders get higher returns on their investments.[12] Commerce and trade creates new wealth, restrains the welfare state, and disperses ideas and technology around the globe.[13] To others, globalization has described a process by which multinational corporations ruthlessly exploit the factors of production by chasing after ever-cheaper labor and ever laxer environmental regulations.[14] The result, according to these critics, is often a race to the bottom which undermines wages and living standards, while eroding the sovereign capabilities of the modern welfare state.[15]

This wide divergence of views is reflected in the globalization debates, particularly beginning in the 1990's when the pace, as well as the increasingly private character of the globalization phenomenon, intensified. As serious academic inquiry sought to explain what was happening in the global economy and in the shifting legal relationships between and within the nation state, scholars often provided a useful legitimizing cover for a process that was arguably based more on market and political power than on consent.

Public choice theory has offered a legitimating explanation of globalization, one premised on the view of national regulation as an illegitimate exercise of the state's coercive power. Regulation provides regulators and regulated alike, often acting in concert, with ample opportunities to transfer wealth (or "extract rents," in the words of some public choice scholars) from the unorganized and geographically diffuse.[16] According to this view, free trade undermines rent-extraction: technological change and easy exit to foreign jurisdictions make it more difficult for regulators to regulate, while the previously protected and privileged become subject to the market forces of intensified foreign competition.[17]

---

12 William A. Niskanen, *A Personal Overview of U.S. Trade Policy*, *in* FUTURE VISIONS FOR U.S. TRADE POLICY, 38 (Bruce Stokes ed., 1998), *available at* http://www.cfr.org/pub177/bruce_stokes/future_visions_for_us_trade_policy.php#memo2.

13 According to John O. McGinnis, "[f]ree trade and global markets restrain the government's ability to redistribute wealth and hamper enterprise." John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 914 (1996).

14 *See, e.g.,* Jim Chen, *Fugitives and Agrarians in a World Without Frontiers*, 18 CARDOZO L. REV. 1031 (1996).

15 Jim Chen argues that the effects of economic globalization "are far from wealth-neutral" and "they aggravate existing inequalities within and between nations." Jim Chen, *supra* note 14, at 1050. He argues that the rising tide of economic growth "will not raise all boats." *Id.*

16 *See, e.g.,* McGinnis, *supra* note 13, at 911.

17 *Id.* at 933. Proponents of free trade often celebrated the downward harmonization of regulatory standards resulting from the processes of globalization. Niskanen, *supra*

Globalization, therefore, becomes a progressive force that is justified by utilitarian calculations of the greatest good for the greatest numbers.

Ricardian notions of comparative advantage also supported the easily observable: liberalized trade coincided with increased economies of scale, diversification, and economic growth. Critics of globalization, unable to dispute the reality of growing trade and wealth, pointed to the unequal distribution of growth and to those left behind by the liberalization of trade.[18] While trade might bring a larger economic pie, some groups in society invariably lost out. Therefore, as foreign competition replaces jobs in domestic industries, there is a greater need for government regulation and redistribution to compensate the "losers" of the global competition.[19]

Noticeably absent from the public choice explanation of globalization was any critical assessment of the role of the multinational corporation, the primary institutional vehicle of globalization. Corporations internalize benefits and externalize costs onto society.[20] Profitability is determined by how efficiently both objectives are achieved simultaneously. But if the corporation is seen as the predominant mechanism for private collusion with public officials to extract rents from the unorganized, then tax and regulatory policies may be seen as the progressive forces necessary to require corporations to internalize more of their costs.[21]

---

note 12, at 45 (arguing that globalization undermines "those fiscal and regulatory policies that increase the relative cost of American firms in the global market").

18 *See* Jeff Faux, *Fast Track's Problem: Not the Marketing, the Product*, *in* FUTURE VISIONS FOR U.S. TRADE POLICY 38 (Bruce Stokes ed., 1998), *available at* http://www.cfr.org/pub177/bruce_stokes/future_visions_for_us_trade_policy.php#memo2.

19 *Id.* (calling for a minimum annual budget for retraining and worker adjustment assistance of "about $8 billion – or about $20,000 per worker"); *cf.* RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW 992-1005 (1998) (reporting budget cuts and low level of assistance under the Trade Adjustment Assistance program). While many free trade advocates accept the need for trade adjustment assistance in theory, it remains a relatively low priority on the free trade agenda. See Niskanen, *supra* note 12, at 45 ("The major problem presented by both globalization and new technology is their impact on the earnings of low-skilled workers; this should lead us to address the performance of our public school system, the school-to-work transition, and the opportunities for vocational training on the job – rather than close off the opportunities presented by globalization and technology.").

20 The classic example of externalized costs would be pollution that is generated from corporate activity. Public choice theory would suggest that corporations, like any interest group, may influence legislatures and regulators to gain favorable regulatory treatment, such as legal sanction to externalize costs. *Cf.* Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 50 n.28 (1988) (suggesting dilution of environmental protection as result of lobbying by corporate polluters).

21 Likewise, if the corporation is seen as a vehicle for rent-extraction (from the public to management elites and shareholders), then legislation and regulation that protects

Critics of globalization, often without engaging in the discourse of public choice, implicitly identify this problem of externalized costs when they call for harmonized standards for labor and environmental protection. They argue that as the market expands across borders, so must the regulatory authority of the nation state. Our conceptions of sovereignty must expand along with the market.

These were some of the general contours of the globalization debates that animated academic discourse and contributed to an increasingly worldwide anti-globalization movement by the end of the 1990s. For many of us, the mass street protests against the World Trade Organization's Millennium Round Ministerial meeting in Seattle in the late fall of 1999 confirmed that there were serious cracks in the orthodox consensus. Suddenly concerns about democratic deficits were not so esoteric or theoretical; ideological debate was both more urgent and more political.[22]

Until Seattle, discussions about globalization asked whether free trade would deliver on its utilitarian promise of greater economic growth and prosperity, questions that implicitly assumed our capability of measuring the costs and benefits traceable to trade liberalization. Seattle seemed to change the questions themselves in ways that undermined people's faith in our ability to scientifically and objectively analyze the myriad of consequences resulting from globalization. The questions were no longer limited to economic growth and financial stability, but now included concerns about social justice, social stability, and security.[23]

Over a two year period, the street demonstrations grew in size and frequency—resembling a global stalking movement that appeared wherever there was a major meeting of the world's leading multilateral institutions.[24] The protests indicated how

workers (including minimum wage and maximum hour laws, and protection of union organizing and collective bargaining) can be seen as correctives that reward merit and hard work by spreading benefits beyond the management elite, CEOs and passive investors.

22 In late November 1999, some 50,000 protesters descended on Seattle, thereby disrupting the World Trade Organization's ministerial meeting. The demonstrations were recognized as decisive in bringing together organized labor with environmentalists and human rights activists. Marc Cooper, *Teamsters and Turtles: They're Together at Last*, L.A. TIMES, Dec. 2, 1999, at B11 (predicting, correctly, that the next WTO meeting would have to be held "in some place like Singapore or Jakarta" where mass demonstrations would be more difficult").

23 In February 2000, the International Law Group of the American Society of International Law, at ASIL's annual conference, posed this question to its symposium: "Will the new world economic order we describe lead to greater peace, stability, fairness, and justice?" *See* Jeffery Atik, *supra* note 2, at 1246.

24 After Seattle, there were mass protests directed at the following forums: the

politically contentious the orthodox model of corporate-led globalization had become.[25] Protesters were often met with force or fenced off, far away from trade delegates and government officials.[26] Some trade summits were held in locations less accessible to protesters,[27] while others were forced to cancel or end early because of the size of the mass demonstrations.[28]

The demonstrations reached a peak during the so-called "summer of resistance" in July 2001, with an estimated quarter of a million protesters surrounding the Group of Eight Summit in Genoa, Italy.[29] One protester was shot to death and approximately two hundred were injured.[30] Following Genoa, the

World Economic Forum in Davos and Zurich in February 2000; the April 2000 annual meetings of the International Monetary Fund (IMF) and World Bank in Washington, D.C.; the Democratic and Republican National Conventions in Los Angeles and Philadelphia in the summer of 2000; a World Economic Forum conference in Melbourne, Australia in September 2000; the September 2000 meetings of the IMF and World Bank in Prague; a European Union summit in Nice, France in December 2000; the Summit of the Americas in Quebec City in April 2001; a World Bank conference in Barcelona in June 2001; a European Union summit in Goteborg, Sweden in June 2001; and a G-8 Summit in Genoa, Italy in July 2001. Romesh Ratnesar, *Chaos Incorporated*, TIME, July 23, 2001, at 32.

25 There were many factors that no doubt contributed to this deepening disquiet about globalization: the Jubilee 2000 call for third-world debt relief which combined communities of religious faith with popular culture; apocalyptic fears of the new millennium; and organized labor's sense of urgency at the prospect of Communist China's entry into the World Trade Organization. Just weeks after the Seattle protests, Al Gore, then Vice President, did a complete flip-flop on trade with China in the course of only twenty-four hours. *Compare* Katharine Q. Seelye, *Cozying Up to Labor, Gore Vows to Shift China Trade Policy*, N.Y. TIMES, Feb. 18, 2000, at A27 (reporting Gore's private pledge to labor leaders to negotiate a tougher trade agreement with China that would include labor and environmental protections), *with* David E. Sanger & Katharine Q. Seelye, *Gore Back In Step With White House Over China Trade*, N.Y. TIMES, Feb. 19, 2000, at A1 (reporting that "just a day after reassuring union leaders . . . Gore felt obliged to write a letter today to reiterate his support for the trade agreement that President Clinton is trying to push through Congress").

26 Protesters were fenced off at both the Democratic and Republican National Conventions in the summer of 2000, the Summit of the Americas in Quebec City in April 2001, and the Group of Eight Summit in Genoa, Italy in July 2001. *See Investigation Into Police Charge in Barcelona Demanded by 350 Organizations*, EL PAIS, June 26, 2001, at 24 (reporting the Spanish bar council's call for an investigation into possible police infiltration and provocation).

27 A new tactic was also employed to deter mass demonstrations: meetings were held in relatively inaccessible locations, where protest would be difficult. Elizabeth Olson, *W.T.O. Picks Qatar Capital as Meeting Site*, N.Y. TIMES, Jan. 31, 2001, at W1 (reporting criticism of Doha as site for WTO ministerial meeting because of "authoritarian Qatar's human rights record and the difficulty of organizing protests there on anything like the scale of those in Seattle"). Likewise, the Group of Eight Summit was brought to the Kananaskis, a remote spot in the Canadian Rockies in the fall of 2001. *See* David E. Sanger, *Bush and Putin Tie Antimissile Talks to Big Arms Cuts*, N.Y. TIMES, July 23, 2001, at A1.

28 *See World Bank Cancels Session*, WASH. POST, May 22, 2001, at E2; Ben Fenton, *Protesters 'Beat' World Bank*, DAILY TELEGRAPH, May 22, 2001, at 15 (reporting on other meetings that had been ended early).

29 Mike Bygrave, *The Globalization Debate*, THE OBSERVER (London), July 14, 2001 (referring to the "Siege of Genoa" as the "peak of the anti-globalization movement").

30 Alessandra Stanley & David E. Sanger, *Italian Protester is Killed by Police at*

U.S. braced for the prospect of massive street demonstrations for the annual IMF and World Bank meetings and the Group of Seven Summit, all to take place in the nation's capitol in late September.[31] However, these mass demonstrations were all but cancelled following the September 11th terrorist attacks.[32]

As suddenly as the mass anti-globalization protests appeared, they disappeared. World Terror replaced World Trade in the fears and imaginations of many. For good or ill, September 11th brought an abrupt end to the strategy of mass civil disobedience.[33] This closing off of political activity seems to have erased any hope for grand alternatives to the corporate-led globalization model. And yet, the confrontation continues. It may not be as loud, but the stakes are even higher and the role of law, and lawyers, more important than ever before.

CONFRONTATION FOR A PURPOSE: RIGHTING WRONGS

We refer to human rights as fundamental rights because the desire for individual liberty and autonomy is innate within all human beings.[34] From the time of its founding, the history of American democracy reflects this perennial struggle—from the American Revolution to the Civil War, from the New Deal's broader definitions of liberty and economic freedoms, to more recent movements for civil rights, environmental justice, and

Genoa Meeting, N.Y. TIMES, July 21, 2001, at A1.

31 *See* Arthur Santana & Paul Blustein, *IMF Trims D.C. Session to 2 Days; Police to Seek $38 Million in Federal Aid for Security*, WASH. POST, Aug. 11, 2001, at A1; James Toedtman, *DC Police Brace For World Bank Protests*, NEWSDAY, Aug. 21, 2001, at A42 (reporting that police were expecting 100,000 demonstrators on one side of barricades and 17,000 World Bank and IMF delegates and at least 17 heads of state on the other); Alan Beattie, *Legal Battle Looms Over Protests in Washington*, FINANCIAL TIMES (London), Sept. 5, 2001, at 6 (reporting on lawsuit filed by coalition of anti-IMF activists to prevent the Washington, D.C. police from erecting a 9-foot, 2.5 mile fence around the White House and IMF/WB headquarters).

It appeared that organized labor was also preparing for a larger role in these protests. *See* Larry Witham, *Labor Takes Cause to Nation's Pulpits*, WASH. TIMES, Sept. 3, 2001, at A6 (reporting that AFL-CIO president John J. Sweeney urged united protests to protect worker rights to coincide with IMF and World Bank meetings in Washington scheduled for late September 2001).

32 *See Bridal Bash*, FINANCIAL TIMES (London), Oct. 8, 2001, at 19 (reporting that there had been just three protesters, standing rather forlornly on the corner of 14th Street and Pennsylvania Avenue); Elizabeth Becker, *Marchers Oppose Waging War Against Terrorists*, N.Y. TIMES, Oct. 1, 2001, at B7 (reporting that instead of mass demonstrations against the IMF, there were several thousand protesters against any military response to the September 11th terrorist attacks).

33 *See* Bygrave, *supra* note 29 (reporting "that the era of big street protests was over"); Alan Beattie, *Anti-Globalisation Warriors Shift Their Ground: The Appetite for Mass Confrontations at International Conferences has Diminished*, FINANCIAL TIMES (London), Nov. 9, 2001, at 10.

34 DAVID HACKETT FISCHER, LIBERTY AND FREEDOM: A VISUAL HISTORY OF AMERICA'S FOUNDING IDEAS (2004) (arguing that the ideas of liberty and freedom are intertwined through the core of American life).

human rights. While the human struggle for freedom is perennial, the forms of conflict and cooperation to secure fundamental rights have changed over the past two centuries. The evolution of state power, the rise of multilateral institutions, and the development of corporate power have shaped the forms of international law and its varied confrontations today.[35] While what follows is by no means a complete synopsis of the various topics addressed by the articles in this symposium issue, it is intended to highlight some of the main areas of confrontation discussed and debated over the two-day symposium.

Jon Van Dyke, in his keynote address and article, argues that victims of human rights abuse have a fundamental right under customary international law to an effective legal remedy consisting of the distinct elements of an investigation and accounting, an apology, compensation, and prosecution of wrongdoers.[36] He spans the globe to inventory the many legal forums giving content to these elements, including criminal prosecutions in national courts and international criminal tribunals, and civil judgments in U.S. and foreign courts.

While Van Dyke reminds us that what's at stake is nothing short of justice and the rule of law,[37] he concludes with the disturbing cases of human rights violations by Americans at Abu Ghraib and other military prisons in Iraq, Afghanistan, and Guantanamo Bay. While it seems unlikely that any high-ranking U.S. official will be held legally responsible anytime soon for overseeing the use of torture against detainees, Van Dyke's discussion of several long-running cases, including the case against the former Chilean dictator Pinochet, suggests that justice delayed need not always be justice denied.

Legal redress for foreign human rights violations has been sought in U.S. courts perhaps most aggressively under a provision of the Judiciary Act of 1789 known as the Alien Tort Claims Act,[38] which permits federal jurisdiction to foreign

35 The corporation did not even exist in its present form at the time of the American founding. Today it is arguably the primary institutional vehicle for economic globalization, and it therefore remains the focus of much legal confrontation to secure human liberty and economic freedoms.

36 Jon M. Van Dyke, *Promoting Accountability for Human Rights Abuses*, 8 CHAP. L. REV. 148 (2005).

37 Van Dyke's work on behalf of victims and their families demonstrates the importance of legal skill and argument in redressing human rights violations. When confronted with official and societal indifference to such heinous crimes, lawyers and scholars find meaning through engagement in the struggles of our day. ALBERT CAMUS, RESISTANCE, REBELLION AND DEATH 249 (1960).

38 Donald Kochan refers to the act as the Alien Tort Statute. More than a semantic difference, this reflects a view of the act as conferring jurisdiction rather than creating any new causes of action. Donald J. Kochan, *No Longer Little Known But Now a Door*

plaintiffs for torts "committed in violation of the law of nations."[39] Since there is no legislative history, what Congress intended by this provision remains uncertain. As Van Dyke suggests, this dispute is not just over statutory interpretation, but is part of a larger debate about sovereignty and the use of international and foreign law in U.S. constitutional decision-making.

Donald Kochan employs, in part, a public choice approach to argue that the increased use of this 1789 statute is not based on sound jurisprudence, but has been heavily influenced by the plaintiffs bar and international law advocates.[40] Based on concerns of judicial competence, federalism, and the rule of law, Kochan offers a spirited and comprehensive critique of grafting ever-expanding twenty-first century claims onto a limited eighteenth century statute. His is a strict constructionist approach that would apparently freeze the plain meaning of "law of nations" to that which existed in 1789. As exhibited in his article, this approach finds considerable support in the dissents of Justice Scalia warning against an activist unelected judiciary creating new causes of action through an amorphous federal common law.[41]

Kochan's description is accurate: the Alien Tort Claims Act was largely dormant for nearly two centuries, until its relatively recent revival to recover for wrongs committed overseas by not just official state actors, but also private individuals acting in concert with corrupt foreign government and military officials. Armin Rosencranz and David Louk recount the case of *Doe v. Unocal*, in which Unocal was sued under the Alien Tort Claims Act and California constitutional and statutory provisions for aiding and abetting in human rights atrocities committed by the Burmese government and military.[42] While Unocal settled out of court for an undisclosed amount, federal and state court rulings on various pre-motions suggest that future plaintiffs may be able to hold U.S. corporations liable for their overseas complicity in

Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence, 8 CHAP. L. REV. 100 (2005).

39 Kochan was part of a panel on "Litigating Human Rights and Labor Standards in Domestic and Foreign Forums: From Courtrooms and Arbitral Tribunals to Multilateral Trade Dispute Panels" that included Dr. Armin Rosencranz, Professor Michael D. Ramsey, and Paul L. Hoffman, Esq., of Schonbrun DeSimone Seplow Harris & Hoffman LLP (counsel for plaintiffs in the Unocal litigation).

40 Kochan, *supra* note 38, at 103, 107-08.

41 *Id*.

42 Armin Rosencranz & David Louk, Doe v. Unocal: *Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 130 (2005). Rosencranz and Louk also report that foreign and diverse sources of law were used in *Doe v. Unocal*. *Id*. at 141 (reporting that decisions by the U.S. Military Tribunals after World War II were used as precedent to argue the standards for imputing Unocal's knowledge and approval of slave labor practices).

human rights abuses.[43]

Kochan criticizes this trend to use the Alien Tort Claims Act as bad policy as well bad law. He warns that by imposing liability on U.S. corporations for their foreign operations, such suits may discourage foreign investment, thereby impeding economic development in those poverty-stricken lands in need of U.S. capital.[44] Others may argue that corporations should pay the costs of their externalities, including harms to innocent people in foreign lands, if proven in a civil courtroom.[45]

How effective such claims will be against multinational corporations in the future remains uncertain. For now, the Supreme Court has articulated a sufficiently flexible approach to interpreting the "law of nations" that will keep lawyers and scholars arguing about what should constitute "a norm of international character accepted by the civilized world" and whether any such international consensus wrongly intrudes upon U.S. sovereignty.[46]

Issues of sovereignty were also paramount in our panel on "International Trade, Multilateralism, and Sustainable Development" that brought together three leading scholars to consider national and multilateral attempts to safeguard our environment, protect our natural resources and animal life, and plan for a sustainable future. Howard Chang discusses the jurisprudence of the World Trade Organization (WTO) and General Agreement on Tariffs and Trade (GATT) in the context of U.S. efforts to protect marine mammals and endangered species through trade restrictions.[47] Known as the *Tuna-Dolphin* and *Shrimp-Turtle* cases, these were among the more highly visible and symbolic cases subjecting the WTO to sharp criticism. Chang shows how WTO jurisprudence has developed, no doubt in response to criticism of earlier panel and Appellate Body

43 *Id*. Dozens of suits have been filed, and are pending in U.S. courts, against multinational corporations for their overseas activities resulting in human rights violations. Kochan, *supra* note 38.

44 Kochan, *supra* note 38, at 126-29.

45 According to this view, it is the globalization of U.S. corporate activities that now breathes new life into a once dormant statute. To maintain a strict constructionist approach to interpreting the "law of nations" would be like freezing in time "the right to bear arms" to include only the muskets that existed at the time the Second Amendment was adopted.

46 The Court held that claims under the Alien Tort Claims Act, in addition to enjoying wide international acceptance, must be "defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2762 (2004). The torts contemplated at the time of the 1789 statute as violating the law of nations included offenses against diplomats, violations of safe conduct, and piracy. Van Dyke, *supra* note 36, at 159.

47 Howard F. Chang, *Environmental Trade Measures, the Shrimp-Turtle Rulings, and the Ordinary Meaning of the Text of the GATT*, 8 CHAP. L. REV. 25 (2005).

decisions, to a stricter interpretive approach. By confining its analysis to the "ordinary meaning" of GATT provisions in the *Shrimp-Turtle* case, the Appellate Body took a step forward in recognizing the authority of sovereign states to use trade measures to promote environmental interests.[48]

There is a certain irony and potential cost, however, from upholding such environmental trade measures. Earlier U.S. attempts to restrict imports of tuna which were caught with high incidental dolphin kills were struck down by the WTO for, among other reasons, the U.S. unilateral approach. But as a result, the U.S. was encouraged to successfully negotiate multilateral conventions and conservation programs, a harmonization approach that included at least some modicum of inspection and enforcement to protect the dolphin. This contrasts with the environmental "victory" in the *Shrimp-Turtle* outcome that ultimately upheld the U.S. environmental trade restrictions without providing any incentives to negotiate multilateral protections of ancient sea turtles.[49]

Lakshman Guruswamy argues that the nature of our most pressing energy and environmental problems demands multilateral coordination and initiatives.[50] The most visible effort in this regard was the 1997 Kyoto Protocol to the United Nations Convention on Climate Change, which set limits on carbon dioxide emissions from industrialized countries. While the Bush administration has been subject to tremendous criticism around the world for withdrawing from the Kyoto negotiations, Guruswamy argues convincingly that the Kyoto Protocols fell short of what is needed to seriously address the world's looming energy shortages by failing to identify and offer any plan to develop new sources of energy.[51]

---

48 *Id*.

49 *But see* Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 809 (2001) (arguing that a "jurisprudence of compulsory multilateralism is especially unfortunate because it hobbles the very multilateral negotiations it purports to promote").

50 Lakshman D. Guruswamy, *Energy, Environment & Sustainable Development*, 8 CHAP. L. REV. 74 (2005).

51 *Id*. Less than one week before our conference, leading U.S. scientists from the Scripps Institution of Oceanography in California, working for several years with the Lawrence Livermore National Laboratory to analyze the effects of global warming on oceans, reported "the most compelling evidence yet" that human activities are responsible for global warming." Clive Cookson, *US Scientists Say Man Has Caused Global Warming and Warn Over the Gulf Stream*, FINANCIAL TIMES (London), Feb. 19, 2005, at 1. "They used computer modeling combined with millions of temperature and salinity readings, taken around the world at different depths over five decades. . . . Tim Barnett, the Scripps project leader, said . . . 'The debate over whether there is a global warming signal is over now, at least for rational people.'" *Id.* Although the report appeared as a headline on Page 1 of London's *Financial Times*, it was hardly reported in the U.S.

The search for solutions to the world's energy deficits requires an inventory of resources, new and emerging technologies, and institutional capabilities.[52] The Energy & Environmental Security Initiative ("The Initiative"), which Guruswamy directs at the University of Colorado, is an ambitious project to move us forward on that long and urgent road. The Initiative contemplates a wide range of national and international efforts and legal instruments that include trade and investment agreements, as well as future multilateral conventions and protocols.

Ved Nanda provides a historical summary of the existing range of multilateral conventions, protocols, and resolutions concerning trade and sustainable development adopted over the past three decades.[53] He reminds us that a primary purpose of international law and the multilateral system should be that of sustainable development: a development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[54] As Nanda argues, it is one thing for the nations of the world to agree to the substantive objective of sustainable development, but quite another to find the political will to "operationalize the concept."[55]

While Guruswamy advocates for a range of targeted and functional international legal instruments for alternative energy development, it may be that our present multilateral system would be more effective in imposing such an instrument on poor and dependent countries than on those wealthier countries in need of discipline in energy conservation and encouragement in the development of alternative resources.[56] This is not to suggest that a multilateral approach is not worth pursuing—Guruswamy demonstrates that there is no other choice. It suggests only that efforts to address the complex challenges of energy and

52 Kevin Morrison & Javier Blas, *Call for World to Turn Away from Oil*, FINANCIAL TIMES (London), March 13, 2005, at 1 (reporting International Energy Agency warning that the rapid rise in global oil demand must lead to greater energy conservation and promotion of alternatives to oil).

53 Ved P. Nanda, *Sustainable Development, International Trade and the Doha Agenda for Development*, 8 CHAP. L. REV. 52, 52 (2005).

54 *Id*. at 54 (quoting OUR COMMON FUTURE: THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT 43 (Gro Brundtland ed., 1987)).

55 *Id*. at 54, 72.

56 Our panel on "International Financial Institutions and Social Ordering: Law, Human Rights, and Labor Flexibility in the Global Economy" suggested the significant power of the International Monetary Fund and World Bank to encourage major policy conditions on countries in need of their financial assistance. Panelists included Professor Sabine Schlemmer-Schulte (former World Bank Senior Counsel), Dr. David Ellerman (former Economic Advisor to the Chief Economist of the World Bank), and Elizabeth Drake (International Policy Analyst in the Public Policy Department of the American Federation of Labor-Congress of Industrial Organizations).

sustainable development will require bold, persistent experimentation, as well as reconceptualizing the role of multilateral institutions in tying trade, finance and development assistance to objectives that are presently considered as illegitimately outside the narrow confines of trade and finance.[57]

Likewise, there has been much discussion about tying trade to labor protections. Our panel on "The World Trade Organization and the Lifting of Quotas for Garment Imports from China: Will the Race to China Become the Long-Awaited Race to the Bottom?" considered the relationship between labor rights and trade liberalization. The panel discussion was led by our keynote speaker, the Honorable C. Donald Johnson, who negotiated the U.S.-Cambodia Textile Agreement, a landmark agreement which for the first time linked trade benefits to labor protections, including inspections by the International Labour Organization.[58] Ambassador Johnson articulated the case for extending such linkages to other bilateral and multilateral trade relationships, an idea that has surfaced more recently during congressional debates about the Bush administration's proposed Central American Free Trade Agreement (CAFTA).[59]

Ellen Rosen endorses the linkage approach and concludes that "Cambodia's garment industry truly blossomed and its workers saw positive changes in the ways they were treated"[60] as a result of Ambassador Johnson's achievement. But Rosen warns that the end of the Multi-Fiber Agreement's system of quotas for the global textile market means profound dislocations and job losses in developing countries, as well as in the U.S.[61] Moreover, Rosen provides a scathing indictment of the role of U.S.

57 Sabine Schlemmer-Schulte, *The World Bank and Human Rights*, 4 AUSTRIAN REV. INT'L & EURO. L. 230 (1999) (articulating the World Bank's adjustment to the changing needs of its borrowing members). *But see* Garcia, *supra* note 11, at 97 (concluding that the international trade system, as presently constructed, leads to decisions "which are fundamentally skewed in favor of trade over other values" such as human rights).

58 Ambassador Johnson served as President Bill Clinton's chief textile negotiator and principal advisor to both the President and the U.S. Trade Representative on all textile and apparel trade matters. His keynote address is available by WebCast. *See infra* note 5.

59 Christopher Swann & Edward Alden, *New Democrats Deal Blow to CAFTA Approval*, FINANCIAL TIMES (London), May 5, 2005, at 4 (reporting criticisms by the House New Democrat Coalition that CAFTA "reduces our ability to enforce labour standards"); Elizabeth Becker, *Free Trade Pact Faces Trouble in Congress*, N.Y. TIMES, May 10, 2005, at C1 (reporting that U.S. labor unions criticize CAFTA for demanding "better enforcement of existing labor laws in Central America without imposing real sanctions").

60 Ellen Israel Rosen, *The Wal-Mart Effect: The World Trade Organization and the Race to the Bottom*, 8 CHAP. L. REV. 253, 258 (2005).

61 *Id*. *See also* Ginger Thompson, *Fraying of a Latin Textile Industry*, N.Y. TIMES, March 25, 2005, at C1 (reporting that the end of quotas has resulted in factories shutting down and thousands of lost jobs in El Salvador).

multinational companies, using Wal-Mart as a case study, in undermining labor standards by promoting a race to the bottom "where the lowest production price wins, regardless of human cost."[62]

According to Rosen, Wal-Mart is now the largest single buyer of goods from the People's Republic of China, and today more than seventy percent of merchandise sold in Wal-Mart stores is made in China.[63] There are several reasons for this "race" to China, including China's complete lack of political freedom and/or workers rights, which result in lower wages, longer hours, and unsafe working conditions.[64] Rosen concludes with a discussion of the efficacy of Wal-Mart's Code of Conduct to improve working conditions at its suppliers in China and elsewhere. As she points out, there is ample evidence that the Codes are routinely evaded.[65]

In response to Rosen's critique of Wal-Mart's business model, some might say that the only thing worse than being exploited is not being exploited at all—that Chinese workers are fortunate to have the jobs they have, harsh conditions and all. This view offers a false dichotomy by suggesting that there are no alternatives between sweatshop labor conditions and unemployment, and it ignores the wide range of possibilities, including harmonized minimum standards supplemented by vastly increased levels of foreign aid and public investment in education and infrastructure.[66]

Indigenous populations certainly top the list of those that

62 Rosen, *supra* note 60, at 256. *See also* ELLEN ISRAEL ROSEN, MAKING SWEATSHOPS: THE GLOBALIZATION OF THE U.S. APPAREL INDUSTRY (2002) (arguing that trade liberalization benefits corporations and shareholders, rather than consumers or workers).

63 Rosen, *supra* note 60, at 263.

64 Rosen also mentions China's other advantages over some of its competitors, including China's "impressively modern ports, highways and power supply," its ability to adopt export processing and attract foreign direct investment, and the fact that it was not encumbered with structural adjustment programs imposed by the International Monetary Fund. *Id.* at 263. The latter factor was the result of conscious decisions to reject capital account liberalization of portfolio investment. *See also* DAVID ELLERMAN, HELPING PEOPLE HELP THEMSELVES: FROM THE WORLD BANK TO AN ALTERNATIVE PHILOSOPHY OF DEVELOPMENT ASSISTANCE (2005) (praising China's incrementalist transition in comparison to Russia's embrace of the one-size-fits-all "shock-therapy" model pushed by the IMF).

65 Rosen, *supra* note 60, at 268-271. Our symposium also included a Roundtable Discussion on "The New University Activism: Socially Responsible Investing and Codes of Conduct for Labor and Human Rights Standards in the Licensing of Apparel" that included Dr. David Ellerman, Dr. John A. Hall, and myself (speaking about the University of New Mexico's history in adopting a progressive Code of Conduct and Socially Responsible Investment policy).

66 Canova, *supra* note 8, at 228.

have been ignored and marginalized by global capital.[67] Our panel on "Perspectives on Sovereignty, the State and Multilateral Institutions in International Human Rights" brought together scholars from various disciplines to discuss the particular challenges to human rights posed by changing conceptions of sovereignty.[68] Unfortunately, the rights of indigenous people are often easily dismissed because the sovereignty of nation-states conflicts with those of tribes within their borders.[69] Likewise, the prosecution of human rights abusers are often impeded by the structures of national sovereignty that supported the atrocities in the first place.

Michael Struett argues that the creation of the International Criminal Court (ICC) was not, as charged by its critics, a radical departure from state sovereignty, but rather built upon developing conceptions of state sovereignty.[70] The history of discord surrounding the creation of the ICC highlights the divide between liberal and statist conceptions of sovereignty in the multilateral system. One view holds that the international legal regime depends on a liberal conception of democracy, rule of law, and human rights for its legitimacy.[71] Restrictions on trade are therefore justified to protect a range of human rights, including the right to be free from various state and corporate oppressions. If taken to extremes, some would dismiss this Kantian conception of legitimacy as one that fosters ethnocentrism, even a

67 One apologist for the International Monetary Fund has wrongly equated my own criticisms of the systematic effects of IMF policy with alleging that the IMF intentionally decides to inflict harm and subjugate peoples of other cultures. John W. Head, *Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund*, 52 KAN. L. REV. 521, 535 n.24 (2004). It is unfortunate that Professor Head confuses cause-and-effect with questions of intent. *Id.* Scott Idleman correctly recognized that my critique did not in fact charge the IMF with any "concretely malicious acts," but rather suggested that any racial or ethnic bias inhered "in the very social structures, from language to legal processes, that constitute the cultural and juridical baselines according to which principles such as equality and fairness are discerned and measured." Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 COL. HUM. RTS. L. REV. 589, 595 n.13 (2004).

68 Thanks to Dr. Wayne Sandholtz, University of California at Irvine, who served as the moderator and discussant of this panel.

69 MacKenzie Batzer describes the competing conceptions of tribal sovereignty that complicate the history of relations between the U.S. and American Indian tribes. MacKenzie T. Batzer, *Trapped in a Tangled Web:* United States v. Lara*: The Trouble with Tribes and the Sovereignty Debacle*, 8 CHAP. L. REV. 275, 299 (2005) (arguing that the federal government, "while insisting that Indian tribes are sovereign nations, continuously appears to disregard their sovereignty").

70 Michael J. Struett, *The Transformation of State Sovereign Rights and Responsibilities Under the Rome Statute for the International Criminal Court*, 8 CHAP. L. REV. 172 (2005).

71 IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 107 (Ted Humphrey trans., 1983) (arguing that a morally legitimate system of international law depends, in part, upon an alliance of separate nations that are united by their moral commitment to individual freedom).

cultural imperialism, by pushing Western political values on illiberal systems.[72] Such critics would argue that the legitimacy of the international trading system should depend on formal equality in relations between sovereign nation states.[73] Accordingly, liberal states cannot exclude or restrict trade with other illiberal states merely because their political systems do not sufficiently respect individual rights.[74] The danger of this statist approach, however, when taken to its extreme, is that of moral relativism.

While the accession of the People's Republic of China to the WTO would suggest that the statist position has prevailed in the global trading system, Struett suggests that the legal concept of sovereignty in international law is evolving from the statist toward a liberal conception of sovereignty. He argues that there is an "emerging preference in the international legal system" for democratic and participatory forms of government.[75] The ICC, according to Struett, is a step in the same direction. It creates "an important institutional incentive for member states to prosecute genocide, war crimes, or crimes against humanity."[76]

Struett dismisses concerns that the ICC will infringe upon the sovereignty of non-party states such as the U.S., while recognizing the benefits for state parties, particularly weak states "that have difficulty maintaining law and order in their own territory."[77] Seen this way, the ICC is an innovative approach to the problem of failed states that enhances the legitimacy of the international legal system.[78]

As implicitly suggested in the work of Marina Hadjioannou, the statist approach brings its own kinds of cultural imperialism

72 John Rawls, *The Law of Peoples*, 20 CRITICAL INQUIRY 36, 66 (1993) (arguing that a liberal conception of international law is not ethnocentric so long as it does not seek to force hierarchical societies to abandon their illiberal institutions and adopt liberal ones).

73 Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1528 (2000) (arguing against Jackson-Vanik and human rights review, and instead for permanent, unconditional normal trade relations for the People's Republic of China as necessary for "compliance with international legal obligations").

74 Rawls, *supra* note 72, at 66-67 (arguing that it would be unjust for liberal states to exclude well-ordered hierarchical societies). Rawls does concede, however, that a liberal international system need not accept tyrannical and dictatorial regimes as members in good standing in the international community. *Id*. at 67.

75 Struett, *supra* note 70, at 179 (citing Gregory H. Fox, *The Right to Political Participation in International Law, in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, 48, 71-86 (Gregory H. Fox & Brad R. Roth eds., 2000)).

76 *Id*. at 180.

77 *Id*. at 184.

78 Struett's view is shared by Van Dyke, who shows how U.S. opposition to the ICC was often based on far-fetched, nightmare hypothetical scenarios. Van Dyke, *supra* note 36, at 165-70. Just weeks after our symposium, in a triumph of pragmatism over narrow ideological concerns, the Bush administration agreed to a United Nations Security Council referral of war crimes in the Darfur region of Sudan to the ICC. *Id*. at 168-69.

by empowering state sovereigns to violate the cultural heritage of indigenous peoples.[79] Hadjioannou points to a host of international conventions, declarations and resolutions that have called for international legal protection of indigenous culture and property rights.[80] Some may despair that these instruments lack legally enforceable mechanisms to protect the interests of indigenous peoples, always it seems a discrete and insular minority that is underrepresented and often unable to achieve protection through the political process. Such is all the more reason for indigenous people to mobilize their own resources and use the tools of international law, however imperfect and unrefined, to force recognition on state sovereigns.

Hadjioannou's discussion of the Maya Atlas Project in Southern Belize shows how vital is the role of indigenous people themselves in gathering evidence, documenting their use of land and mapping their traditional land boundaries.[81] Working with lawyers, the Maya have argued for recognition of their property rights under customary international law and charters for regional institutions such as the Organization of American States. For the Maya, the outcome thus far has been a favorable ruling by the Inter-American Commission on Human Rights that affirms the obligation of Belize to protect their rights. It also suggests the value of self-help, mobilizing resources, and inspired lawyering during times when political action is largely stalled or even foreclosed.

Arthur Manuel and Nicole Schabus recount the difficulties facing Canada's Aboriginal Peoples, beginning with the Canadian government's disregard for its own constitutional law and Supreme Court rulings recognizing Aboriginal title, reminiscent of Andrew Jackson's infamous defiance of U.S. Supreme Court rulings relatively early in American history.[82] Manuel and Schabus argue that, as a result, large integrated wood-processing corporations have expropriated the land and physical resources

79 Marina Hadjioannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law*, 8 CHAP. L. REV. 193 (2005).

80 *See, e.g.,* Alan Riding, *A Global Culture War Pits Protectionists Against Free Traders*, N.Y. TIMES, Feb. 5, 2005, at A19 (reporting on the drafting of the provisional Convention on the Protection of the Diversity of Cultural Contents and Artistic Expression).

81 Hadjioannou, *supra* note 79, at 213-16. The work of the Maya Atlas Project to document their land use is reminiscent of the work of the Peruvian economist Hernando de Soto to record land titles and grant legal property protection to those who live on and work the land. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

82 Arthur Manuel & Nicole Schabus, *Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law*, 8 CHAP. L. REV. 222, 225 (2005).

of Aboriginal peoples by the Canadian government's granting of long-term non-competitive licenses to log on Aboriginal lands.[83]

In 1996, Canada's Royal Commission of Aboriginal Peoples concluded that current levels of poverty and underdevelopment among indigenous peoples are directly linked to their dispossession from their lands, which has undermined the legitimacy of their institutions and capabilities to govern themselves.[84] Such dire consequences should not come as a surprise. Orthodox economics teaches that respect of property rights is a fundamental incentive for economic activity.[85] Manuel and Schabus, the chairperson and a legal advisor for the Indigenous Network on Economics and Trade (INET) in British Columbia, describe the evolution of their legal strategy, from failed attempts to secure indigenous land rights under Canadian law, to the symbolic use of international human rights law and the more effective use of international trade law, which typically has the advantages of sanctions and enforceability.

They also point to the experience of some Native American Tribes in the U.S., especially in the Pacific Northwest, that "have gained control over forestry on their lands and have developed sustainable forest management practices."[86] Indigenous people on both sides of the border have a stake in seeing that the Canadian government begins respecting Aboriginal land title. American Indians in the Pacific Northwest are unable to compete with cheap Canadian lumber imports harvested from corporations that are able to avoid the costs of environmentally sustainable practices. And of course, Canada's indigenous peoples would benefit from gaining control over their land and natural resources.

Politics makes strange bedfellows, and INET's legal strategy was able to attract the support of the U.S. lumber industry and environmentalists in arguing that Canada's licensing system that ignored the internationally-recognized property rights of its indigenous peoples constitutes an unfair and illegal trade subsidy to Canadian timber companies under WTO law and the

83 *Id*. at 246-47. (contrasting the ability of multinational companies to sue for the expropriation of future profits, while also expropriating the land and resources of indigenous peoples).

84 *Id*. at 225.

85 DE SOTO, *supra* note 81.

86 Manuel & Schabus, *supra* note 82, at 239 n.93. One Mexican ejido recently auctioned a hunting permit to kill one endangered bighorn ram on ejido lands. It uses the proceeds from such auctions to protect the ram's habitat and grow the herd, while providing jobs and income for members of the ejido. *See* Daniel Duane, *Sacrificial Ram*, MOTHER JONES, March/April 2005, at 67 (reporting that since 1996, the ejido has raised $200,000 a year through such auctions, "funding a drinking water project, a school, a health clinic, and conservation programs").

North American Free Trade Agreement (NAFTA).[87] This may point the way for environmentalists, indigenous people, labor unions and workers to make similar arguments in the future.[88] The goal, we are reminded, is not protectionism, but to provide incentives for sovereign nations to respect property rights, worker rights, and human rights for their own citizens.

The strategy of INET also shows how international law can confront powerful economic institutions, such as the corporation and the organs of the state beholden to the corporation, to secure the fundamental rights of Aboriginal peoples. We are also reminded that law's confrontation need not always be one solely based on conflict, but includes cooperation, compromise, and building of coalitions across borders. As Galit Sarfaty suggests, there is room for progress in our multilateral institutions, like the World Bank in its efforts to internalize indigenous rights norms into the domestic laws of client states through binding loan agreements, an effort that is supported through alliances between local civil society activists and advocates within the Bank.[89]

Finally, our symposium included two panel discussions not reflected in this volume: a Roundtable Discussion on "The New University Activism: Socially Responsible Investing and Codes of Conduct for Labor and Human Rights Standards in the Licensing of Apparel," and a Practitioner's Panel on "The Third World Within the First World: Legal Protections for Immigrant Labor in the United States."[90] Both of these panels, along with the rest of our symposium, can be viewed by WebCast.[91]

GLOBAL CHALLENGES AND GLOBAL PERSPECTIVES

The Center for Global Trade & Development at Chapman University, in conjunction with the Chapman Law Review, was privileged to host this inaugural symposium and we are grateful to the many fine, distinguished and thoughtful participants for sharing their work with us.

87 Manuel & Schabus, *supra* note 82, at 235-50.

88 For instance, one can imagine U.S. workers complaining that China's failure to respect internationally-recognized labor rights of its citizens in a specific industry or company should constitute an illegal trade subsidy under WTO law. According to Ron Gettelfinger, president of the United Automobile Workers, "China's repression of its own workers and its manipulation of its own currency are unfair trade practices which must no longer be tolerated by the U.S. government." Keith Bradsher, *China Looms as the World's Next Leading Auto Exporter*, N.Y. TIMES, April 22, 2005, at C1.

89 Galit A. Sarfaty, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 YALE L. J. 1791 (2005).

90 For descriptions of these panels, see Appendix *infra* p. 22.

91 *See infra* note 5.

We live in a time when the local and the global are increasingly interrelated, even if the relationship between the two is often invisible or hard to quantify. Trade, commerce, and cultural exchange are booming, even while division and hatreds deepen. We are confronted by the same "common enemies of man" that were faced a generation ago: "tyranny, poverty, disease, and war itself."[92] The challenge and the work of human rights are therefore as important today as ever before.

The pages that follow in this volume demonstrate the diversity and richness of perspectives and concern about human rights in this era of globalization. As business and finance has gone global, so too have the legal consciousness and conscience. International law will continue to play a vital and instrumental role in confronting the institutions of our global economy to protect our rights, do justice, and secure our freedoms. Lawyers will continue to test the boundaries of the possible with new theories, bold ideas, and innovative arguments at the forefront of this global struggle for justice and human rights.

92 John F. Kennedy, Inaugural Address (Jan. 20, 1961), *in* PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: JOHN F. KENNEDY 1961 2 (1962).

APPENDIX

PANEL DESCRIPTIONS

The World Trade Organization and the Lifting of Quotas for Garment Imports from China: Will the Race to China Become the Long-Awaited Race to the Bottom?

Members of the World Trade Organization agreed a decade ago to abolish all trade quotas on apparel and textile imports, effective January 1, 2005, to permit the free flow of goods around the world. The end of quota protections is likely to result in the rapid and unchecked growth of the Chinese garment and textile sector, posing a profound threat for many developing countries, as well as garment manufacturing in the United States. This panel will examine the impact of the end of quotas on the developing world, with case studies of the implications for labor rights and economic development in Cambodia, India and the Philippines, as well as an analysis of the potential political, labor and social instability resulting from the anticipated shift of apparel and textile manufacturing to China.

International Financial Institutions and Social Ordering: Law, Human Rights, and Labor Flexibility in the Global Economy

With financial assistance programs in nearly a hundred countries, the International Monetary Fund and World Bank play an increasingly important role in the international trading and financial system and in the lives of millions of people around the world. Panelists will consider the impact of International Monetary Fund and World Bank policies on labor and human rights, as well as contemporary debates concerning the interpretation of legal mandates of these international financial institutions to promote implementation and compliance with international human rights and worker rights, and to improve labor conditions and living standards.

Litigating Human Rights and Labor Standards in Domestic and Foreign Forums: From Courtrooms and Arbitral Tribunals to Multilateral Trade Dispute Panels

An increasing array of plaintiffs, activists, and non-governmental organizations are taking their grievances over labor and human rights abuses in foreign nations to the judicial system in the

United States, as well as other venues like arbitral panels and multilateral trade dispute panels. The main vehicle allowing the application of international law in U.S. courts has been the Alien Tort Statute. This panel will examine this growing trend of using civil litigation, private arbitration, and trade dispute panels as means for employing, enforcing and developing international law. The panel will address these issues from a variety of perspectives, including its implications for law, policy, national security, business, labor and human rights.

International Trade, Multilateralism, and Sustainable Development

The globalization of trade and finance has presented significant challenges to the capabilities of nation states, regional alliances and multilateral institutions to promote economic development while protecting the environment. Panelists will consider the relationship between the multilateral trading regime and environmentally sustainable development including efforts to reach bilateral and multilateral accords on environmentally sustainable energy development, the Kyoto Protocol on Climate Change, and analysis of World Trade Organization Appellate Body decisions concerning environmental trade measures under the General Agreement on Tariffs and Trade.

Perspectives on Sovereignty, the State and Multilateral Institutions in International Human Rights

Globalization has altered the traditional balance of sovereignty between nation states. Free trade accords and liberalized trade rules have often empowered private corporations, many argue, at the cost of individual freedoms, human rights, and the protection of ethnic, racial and religious minorities throughout the world. But the evolving, multilateral patchwork of new forms of sovereignty has also created opportunities for greater legal protection of human rights. Panelists will consider efforts to protect indigenous people's rights to land and natural resources through the World Trade Organization, the North American Free Trade Agreement, and the Inter-American Human Rights System, as well as efforts to enforce human rights norms through the International Criminal Court.

The Third World Within the First World: Legal Protections for Immigrant Labor in the United States (Practitioner's Panel)

A great number of American businesses rely on immigrant labor. Workers from other countries enter the United States, both legally and illegally, in large numbers. Given that immigrant labor underpins a substantial portion of the American economy, it is important for both employers and employees to understand what rights and obligations each has, and what dangers and pitfalls each may fact. This panel is intended to assist businesses, employees and those who counsel them to understand the legal landscape facing foreign workers in the United States. Experts in the fields of immigration, employment, litigation and taxation law will speak about how their areas of the law affect foreign workers and those who employ them, and what can be done to improve the current legal regime.

ENVIRONMENTAL TRADE MEASURES, THE SHRIMP-TURTLE RULINGS, AND THE ORDINARY MEANING OF THE TEXT OF THE GATT

Howard F. Chang[1]

The World Trade Organization (WTO) Appellate Body issued the most important rulings to date on the status of environmental trade measures under the General Agreement on Tariffs and Trade (GATT)[2] in its 1998 report[3] and 2001 report[4] in the "shrimp-turtle" dispute. At issue in this case was section 609 of Public Law 101-162,[5] a U.S. statute that the U.S. Court of International Trade had interpreted as a ban on shrimp imports from countries not certified by the United States as having adopted "a regulatory program governing the incidental taking of . . . sea turtles . . . that is comparable to that of the United States."[6] The United States adopted such a program to promote the conservation of sea turtles, which are endangered species. This program includes a requirement that U.S. trawlers use turtle excluder devices (TEDs) to protect sea turtles from

[1] Professor of Law, University of Pennsylvania Law School. Copyright © 2005 by Howard F. Chang. Parts of this article have appeared previously in a shorter essay by Howard F. Chang, *Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case*, 74 S. CAL. L. REV. 31 (2000). I wish to thank Robert Howse and participants at the Chapman University symposium, at a United Nations Development Programme (UNDP) seminar at Renmin University in Beijing, China, at the Association of American Law Schools (AALS) Conference on Environmental Law in Portland, Oregon, and at a symposium sponsored by the Association for Comparative Studies of Legal Cultures in Tokyo, Japan, for their helpful comments.

[2] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 187 [hereinafter GATT].

[3] Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), 38 I.L.M. 118 (1999) [hereinafter 1998 Appellate Body].

[4] Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products; Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter 2001 Appellate Body].

[5] Sea Turtle Conservation Amendments to the Endangered Species Act, Public Law 101-162, sec. 609, 103 Stat. 988, 1037 (Nov. 21, 1989) (codified at 16 U.S.C. § 1537 note (1984)).

[6] *Id.* sec. 609(b)(2)(A), 103 Stat. at 1038; *see* Earth Island Institute v. Christopher, 942 F. Supp. 597 (Ct. Int'l Trade 1996), *vacated*, Earth Island Inst. v. Albright, 147 F.3d 1352 (Fed. Cir. 1998).

incidental capture and drowning in shrimping nets. India, Malaysia, Pakistan, and Thailand complained that the U.S. ban on shrimp imports violated GATT Article XI,[7] which prohibits quantitative restrictions on imports, and requested that a WTO panel settle their dispute with the United States.

Given the hostile attitude toward environmental trade measures reflected in past panel decisions under the GATT, the WTO Appellate Body's 1998 ruling in the shrimp-turtle case represented a significant step toward more liberal treatment of these measures under the GATT. In stark contrast to the consistent pattern in those past decisions, the Appellate Body upheld the statute in dispute and objected only to very specific aspects of its implementation. The Appellate Body endorsed the general type of case-by-case review that I had proposed in my writings and thereby brought GATT case law much closer to a reasonable balance between environmental and trade interests.[8] The 1998 Appellate Body decision, as I have noted in prior writing about that ruling, suggests that countries can defend unilateral import bans as permissible environmental measures under the GATT as long as they avoid unfair discrimination.[9] The result was a decision much more sensitive to environmental interests than observers had expected.

To comply with the Appellate Body's decision, the U.S. State Department issued new guidelines in 1999 that addressed the problems identified by the Appellate Body in its 1998 report.[10] Malaysia nevertheless complained that the United States had not brought its policies into conformity with the 1998 ruling. Malaysia brought this complaint before the WTO, and in 2001, the Appellate Body held that the United States had complied with the 1998 Appellate Body decision, confirming that the U.S. import ban was consistent with the GATT despite the ban's reliance on environmental standards unilaterally prescribed by the United States.

The Appellate Body's rulings in this dispute, however, have generated some confusion regarding the standard that WTO panels should apply to environmental trade measures in the

7 GATT, *supra* note 2, art. XI, 61 Stat. pt. 5, at A32, 55 U.N.T.S. at 224.

8 *See generally* Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 INT'L REV. L. & ECON. 309 (1997) [hereinafter Chang, *International Externalities*]; Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995) [hereinafter Chang, *Trade Measures*].

9 *See* Chang, *supra* note 1. This article updates and expands upon the analysis that I presented in that essay.

10 *See* Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946, 36,948 (1999).

future. In this article, I will suggest that the 2001 ruling by the Appellate Body confirms an interpretation of the 1998 shrimp-turtle decision that preserves broad leeway for the use of environmental trade measures. I will argue that a more restrictive interpretation of the shrimp-turtle rulings would be inconsistent with the Appellate Body's close attention to the "ordinary meaning" of the text of the GATT in its legal reasoning.

First, in Part I of this article, I will review the Appellate Body's decisions in the shrimp-turtle cases, summarizing the Appellate Body's rulings in both its 1998 and 2001 reports. Unlike prior dispute-settlement reports addressing environmental trade measures under the GATT, the Appellate Body in the shrimp-turtle cases emphasized the "ordinary meaning" of the text of the GATT. This explicit focus on the treaty text implies better legal reasoning and more liberal treatment for environmental trade measures than we have seen in the past. Second, in Part II, I consider three questions of interpretation that have generated disagreements among readers of the Appellate Body reports. With respect to each issue, I argue that fidelity to the "ordinary meaning" of the text of the GATT requires the interpretation of those reports that gives WTO members greater freedom to use environmental trade measures.

I. THE SHRIMP-TURTLE RULINGS

The United States defended its ban on shrimp imports as a measure falling within GATT Article XX, which sets forth general exceptions from the obligations set forth elsewhere in the GATT. In particular, Article XX states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> . . . .
>
> (b) necessary to protect human, animal or plant life or health;
>
> . . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
>
> . . . .[11]

In May 1998, the WTO panel nevertheless ruled against the

11 GATT, *supra* note 2, art. XX, 61 Stat. pt. 5, at A60-61, 55 U.N.T.S. at 262.

United States.[12]

When the United States lost before the WTO panel in the shrimp-turtle case, it was the third time in a row that a dispute-settlement panel had held that the United States had violated the GATT by banning imports harvested in a manner harmful to marine life. Pursuant to the Marine Mammal Protection Act (MMPA),[13] the United States has banned imports of tuna from countries that have not adopted programs to protect dolphins comparable to the U.S. program. In 1991, and again in 1994, dispute-settlement panels held that the MMPA violated the GATT.[14] Both those GATT panels, like the WTO panel in the shrimp-turtle case, ruled against the United States on grounds so general and sweeping that they left little scope for trade measures to protect the global environment. The GATT Council, however, adopted neither of the "tuna-dolphin" panel reports, which therefore never became legally binding.

A. The 1998 Appellate Body Ruling

In the shrimp-turtle case, the United States appealed the panel's ruling to the WTO Appellate Body, which in October 1998 also ruled against the United States, but on much narrower grounds than the panel below. In its ruling, the Appellate Body used much better legal reasoning than we have seen in past panel decisions, with much closer attention to the ordinary meaning of the language in GATT Article XX. For example, in the shrimp-turtle case the panel below required that any measure allowed under Article XX must not be "a type of measure" that would "undermine the WTO multilateral trading system" if adopted by others,[15] a requirement that echoes a concern expressed by both the 1991 and 1994 tuna-dolphin panels.[16] In a striking departure from the pattern established by those past decisions, the Appellate Body explicitly rejects this requirement as "a test that finds no basis . . . in the text" of Article XX.[17] The Appellate Body criticized the panel below for failing to examine "the ordinary meaning of the words of Article

12 *See* Report of the Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998), 37 I.L.M. 832 (1998) [hereinafter 1998 Panel].

13 Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421h (1994).

14 *See* Report of the Panel, *United States—Restrictions on Imports of Tuna*, GATT Doc. DS29/R (May 20, 1994), 33 I.L.M. 839 (1994) [hereinafter 1994 Panel]; Report of the Panel, *United States—Restrictions on Imports of Tuna*, GATT Doc. DS21/R (Aug. 16, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter 1991 Panel].

15 1998 Panel, *supra* note 12, para. 7.44.

16 *See* 1994 Panel, *supra* note 14, para. 5.26; 1991 Panel, *supra* note 14, para. 5.27.

17 1998 Appellate Body, *supra* note 3, para. 121.

XX."[18] The Appellate Body stressed that "[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted," looking beyond that text only "[w]here the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired."[19] Thus, as John Knox has observed, the Appellate Body "decided that its starting point would always be the ordinary meaning of the text" and that it would "follow the ordinary meaning of the text before it as far as possible."[20] This emphasis on the "ordinary meaning" of the treaty text is itself significant, because each of the prior panel decisions ruled against the United States based on requirements that the panels invented without any support in the text of Article XX.[21] Critics of those past decisions, including this author, have urged a more literal reading of Article XX, which implies a broader reading of the Article XX exceptions.[22]

Turning to the question of whether section 609 is a measure "relating to" conservation within the meaning of Article XX(g), the Appellate Body in the shrimp-turtle case found the "general design and structure" of section 609 to be "reasonably related" to a "legitimate policy" of conservation.[23] The Appellate Body noted that section 609 "is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species."[24] The requirement that "a country adopt a regulatory program requiring the use of TEDs," according to the Appellate Body, "is . . . directly connected with the policy of conservation of sea turtles."[25] Thus, the Appellate Body concluded that section 609 "is a measure 'relating to' the conservation of an exhaustible natural resource within the meaning of Article XX(g)."[26]

---

18 *Id.* para. 115.

19 *Id.* para. 114.

20 John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 50 (2004).

21 *See* Chang, *Trade Measures*, *supra* note 8, at 2145; Carrie Wofford, Note, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENVTL. L. REV. 563, 573 (2000) ("Through a more literal interpretation of the text of Article XX, the Appellate Body has abandoned several tests . . . that prior panels had imposed . . . that had no basis in the actual language of Article XX.").

22 *See, e.g.*, Chang, *Trade Measures*, *supra* note 8, at 2172-75; Robert Howse, *The Turtles Panel: Another Environmental Disaster in Geneva*, J. WORLD TRADE, Oct. 1998, at 73.

23 1998 Appellate Body, *supra* note 3, para. 141.

24 *Id.*

25 *Id.* para. 140.

26 *Id.* para. 141. Some observers have read the Appellate Body's analysis to suggest a requirement of "proportionality," so that a broader import ban might be "disproportionately wide" and thus fail to qualify as a measure "relating to" conservation

The Appellate Body carefully identified problems *only* in the way in which the executive branch *applied* this law to countries exporting shrimp. In particular, the Appellate Body held that the executive branch applied section 609 "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries," which violates the requirements set forth in the preamble, or "chapeau," of Article XX.[27] Thus, the Appellate Body avoided the use of any general *per se* rules against environmental trade measures like the sweeping rules announced by panels in the past. Instead, the Appellate Body endorsed a case-by-case analysis that relies on the requirements explicit in the chapeau of Article XX to guard against the abuse of the Article XX exceptions,[28] much as critics of past panel decisions, including this author, have proposed.[29] Given its case-specific approach, the opinion is explicit regarding precisely which particular features of the application of the trade measure in question were "a means of arbitrary or unjustifiable discrimination." Furthermore, each objection pertains to a *discriminatory* aspect of the U.S. policy and is thus tied to the actual text of Article XX:[30]

(1) First, although section 609 permits some flexibility in determining whether an exporting country's regulatory program is "comparable" to the U.S. program, in practice U.S. officials

under Article XX(g). *See* Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 503 & n.33 (2002). Others have inferred that the Appellate Body may require a "direct connection" between conservation and the measure in question. *See* Petros C. Mavroidis, *Trade and Environment after the* Shrimp-Turtles *Litigation*, 34 J. WORLD TRADE, Feb. 2000, at 73, 84-85. It would be inappropriate, however, to infer any additional requirements stricter or more demanding than the modest requirement actually set forth in the text of Article XX(g). While the Appellate Body praises certain features of the section 609 import ban, it never states that these features are required by Article XX(g). Given the ordinary meaning of the treaty language, "relating to" conservation, the features praised are certainly sufficient but hardly necessary to show that the measure satisfies that simple requirement. The Appellate Body does not present its analysis as setting forth a new litmus test for measures "relating to" conservation. Instead, the Appellate Body praises these features merely to underscore how easily section 609 qualifies as a measure related to conservation.

27 GATT, *supra* note 2, art. XX, 61 Stat. pt. 5, at A60, 55 U.N.T.S. at 262.

28 *See* 1998 Appellate Body, *supra* note 3, para. 159 (endorsing a balance that "moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ").

29 *See, e.g.*, Chang, *Trade Measures*, *supra* note 8, at 2172-75; Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 513-15 (1993).

30 Although this attention to the text of Article XX represents an improvement over past panel decisions, some critics complain that the Appellate Body distorted the meaning of the term "discrimination." *See, e.g.*, Benjamin Simmons, Note, *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report*, 24 COLUM. J. ENVTL. L. 413, 445 (1999) (arguing that the Appellate Body "expanded the term 'discrimination' . . . to encompass all of its criticisms of the U.S. measure, including criticisms that have no relation to the plain meaning of 'discrimination'").

only looked at whether the country's policies are "essentially the same" as U.S. policies.[31] Officials did not take into account other policies and measures that the country may have adopted, nor did they consider different conditions that may exist in that other country.[32] Because this rigid approach to certification could result in a ban on imports from a country with a different yet comparable program, the Appellate Body held that this inflexibility amounted to "arbitrary discrimination" among countries with comparable programs in violation of the chapeau of Article XX.[33]

(2) Second, the United States failed to engage in "serious" negotiations with *all* affected countries before imposing its import ban.[34] The United States did negotiate with *some* countries to produce the Inter-American Convention for the Protection and Conservation of Sea Turtles, concluded in 1996, but not with other countries.[35] The result was "unjustifiable" discrimination.[36]

---

31 1998 Appellate Body, *supra* note 3, para. 163.

32 *See id.* para. 164.

33 *Id.* para. 177. For a critique of this interpretation of the phrase "arbitrary or unjustifiable discrimination," see Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 784-90 (2001). *See id.* at 784 (arguing that the Appellate Body ruled against the United States "because it *refused to discriminate* in trade treatment between countries where *different* conditions may prevail," which "is the exact converse of the chapeau language"); Simmons, *supra* note 30, at 443 (arguing that "there is no affirmative duty *to discriminate* where conditions between countries are different"). The Appellate Body identified only the *potential* for discrimination among countries with equally effective conservation programs; it did not find such discrimination in actual practice as a matter of fact. Gaines argues that "[a]t the very least, the Appellate Body needed to make a robust finding of fact that the shrimp fishing and sea turtle conditions in South Asian waters were different from those in the Caribbean or western Atlantic in ways that were significant for policies to reduce sea turtle mortality." Gaines, *supra*, at 786. Furthermore, Gaines argues that the United States could justify any discrimination resulting from an inflexible certification approach based on "considerations of administrative capacity," which militate in favor of a "simplified approach." *Id.* at 788.

34 1998 Appellate Body, *supra* note 3, para. 166.

35 *See id.* para. 171.

36 *Id.* para. 172. For a critique of this interpretation of the term "discrimination," see Gaines, *supra* note 33, at 805-07, 817-18. First, Gaines argues that we should read the word "discrimination" in the Article XX chapeau to mean "only discrimination in *trade*." *Id.* at 807. Second, Gaines argues that any discrimination in negotiations caused "absolutely no discrimination in trade," *id.* at 806, because the "negotiations had no effect on trade embargo decisions under Section 609," *id.* at 817. Furthermore, Gaines complains that the Appellate Body's interpretation of the Article XX chapeau implies that "the WTO sits in judgment of the wisdom of a member's particular foreign policy strategy." *Id.* at 815. Lakshman Guruswamy argues that the Appellate Body's holding violates "the principle of state sovereignty by attempting to second-guess the manner in which the United States should have conducted treaty negotiations," because "States possess the freedom to negotiate treaties as they deem proper" as "an essential attribute of sovereignty that gives rise to the corollary duty of other States or international organizations not to interfere with this power." Lakshman Guruswamy, *The Annihilation of Sea Turtles: World Trade Organization Intrasigence and U.S. Equivocation*, 30 ENVTL. L. REP. 10,261, 10,267 (2000).

(3) Third, the United States gave fourteen countries a three-year phase-in period (1991-1994). The United States did not impose an import ban on others until 1996, when it did so with only four-months notice.[37] The shorter phase-in period was not only more burdensome but also accompanied by less effort by the United States to transfer TED technology to the exporting countries.[38]

The Appellate Body held that the foregoing problems in the application of the statute "considered in their cumulative effect" were "unjustifiable discrimination" in violation of Article XX.[39] The phrase "in their cumulative effect" indicates that one of these defects standing alone would not necessarily render the U.S. policy inconsistent with the GATT. Thus, had the United States discriminated among exporting countries only in terms of phase-in periods or efforts to transfer technology, those discriminatory practices standing alone might not amount to "unjustifiable discrimination" within the meaning of Article XX.

(4) Finally, the Appellate Body complained that the U.S. certification process was not "transparent": that is, there is "no formal opportunity for an applicant country to be heard, or to respond to arguments . . . made against it," "no formal written, reasoned decision" with reasons for a denial of certification, and "no procedure for review of, or appeal from, a denial."[40] Thus, the United States denied certification without a process to ensure that the statute is "applied in a fair and just manner."[41] The Appellate Body concluded that denials under this procedure amount to "arbitrary discrimination" against those countries denied certification.[42]

---

37 *See* 1998 Appellate Body, *supra* note 3, para. 174.

38 *See id.* para. 175.

39 *Id.* para. 176.

40 *Id.* para. 180. For an insightful analysis of the requirement of transparency, see Patricia Isela Hansen, *Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment*, 39 VA. J. INT'L L. 1017, 1057-67 (1999).

41 1998 Appellate Body, *supra* note 3, para. 181.

42 *Id.* para. 184; *see id.* para. 181. For a critique of this interpretation of the term "discrimination," see Gaines, *supra* note 33, at 824-25. "Those who received certification were, after all, subject to the same non-transparent process as the others. There is no claim of discrimination in the procedures followed or decision criteria applied; the only difference is the result." *Id.* at 824; *see* Knox, *supra* note 20, at 58 ("[I]t is hard to see how these procedures necessarily discriminated among applicant countries if . . . they were applied to all countries equally."). Although this process may have created the *potential* for arbitrary discrimination among countries with equally effective conservation programs, the Appellate Body did not find such discrimination in the administration of the statute as a matter of fact. Gaines argues that "it was incumbent upon the Appellate Body to establish that there was discrimination in practice, not merely the procedural possibility" of "abusive discrimination." Gaines, *supra* note 33, at 824; *see* Axel Bree, *Article XX GATT – Quo Vadis? The Environmental Exception After the Shrimp/Turtle Appellate Body Report*, 17 DICK. J. INT'L L. 99, 128 (1998) ("The existence of procedural

B. The 2001 Appellate Body Ruling

To comply with the 1998 Appellate Body ruling in the shrimp-turtle case, the United States began efforts to negotiate with the four complainants in the case, seeking an agreement on the conservation of sea turtles in the Indian Ocean region, as well as efforts to provide technical assistance to those countries to assist in the development of TED programs. The U.S. State Department also issued new guidelines in 1999 to ensure consideration of evidence that an exporting country's program for protecting sea turtles is comparable to the U.S. program in light of different conditions or the use of methods other than TED requirements and also to provide greater transparency and due process for nations seeking certification under section 609.[43] Malaysia nevertheless brought a complaint to the WTO claiming that section 609 violated the GATT despite these U.S. efforts to comply with the 1998 Appellate Body ruling. The WTO panel reviewing U.S. implementation of that 1998 decision ruled in favor of the United States in 2001,[44] and Malaysia appealed to the Appellate Body.

First, Malaysia argued that to avoid unjustifiable discrimination, the United States had to conclude an international agreement before imposing an import ban.[45] The Appellate Body rejected this suggestion, holding instead that the United States must show "good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other."[46] These "negotiations need not be identical" or "lead to identical results."[47] Instead, "the negotiations must be comparable in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement."[48] The Appellate Body looked to the Inter-American Convention for comparison and found the United States had

flaws . . . does not automatically indicate arbitrariness.").

43 *See* Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946 (July 8, 1999).

44 Report of the Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/RW (June 15, 2001) [hereinafter 2001 Panel].

45 *See* 2001 Appellate Body, *supra* note 4, para. 115. Some commentators took a similar view of the 1998 Appellate Body decision. *See, e.g.*, Gary P. Sampson, *Effective Multilateral Environmental Agreements and Why the WTO Needs Them*, 24 WORLD ECONOMY 1109, 1126 (2001) (claiming that the Appellate Body "found that . . . the failure to have established an environmental agreement . . . had resulted in unilateralism which was discriminatory and unjustifiable").

46 2001 Appellate Body, *supra* note 4, para. 122.

47 *Id.*

48 *Id.*

made comparable efforts in the Indian Ocean region.[49]

Second, Malaysia argued that the U.S. import ban still violated the GATT because it still required exporting countries to meet standards "unilaterally" prescribed by the United States.[50] The Appellate Body, however, found no problem with the United States "conditioning market access on the adoption of a programme *comparable in effectiveness*" to that adopted unilaterally by the United States.[51] To require "a programme *comparable in effectiveness*" rather than "essentially the same programme" allows "sufficient flexibility . . . so as to avoid 'arbitrary or unjustifiable discrimination.'"[52] By finally placing its stamp of approval on a unilateral import ban, the Appellate Body underscored how thoroughly it had rejected the reasoning advanced in the past by the tuna-dolphin panels.

II. THE INTERPRETATION OF THE APPELLATE BODY RULINGS

Given the ease with which the United States brought its unilateral import ban into compliance with the 1998 Appellate Body ruling, without even amending section 609,[53] one might expect environmentalist critics of the tuna-dolphin decisions to celebrate the dramatic changes in the interpretation of GATT Article XX evident in the Appellate Body's analysis. Some critics, however, perceive little improvement in the prospects for environmental trade measures under the GATT. Sanford Gaines, for example, argues that the 1998 Appellate Body ruling "continues the tradition of trade jurisprudence that has almost completely closed off the policy space Article XX should leave open for national trade measures designed to protect the environment."[54] The Appellate Body, he maintains, "gave little ground for hope that the WTO will tolerate *any* real-world unilateral use of trade leverage in furtherance of environmental protection objectives reaching beyond national boundaries."[55] Gaines even claims that his "pessimistic assessment is confirmed

49 *Id.* para. 133.

50 *Id.* para. 135.

51 *Id.* para. 144.

52 *Id.*

53 To satisfy the Appellate Body regarding the flexibility of the U.S. certification criteria, for example, the United States needed to make only minor changes in its guidelines for the implementation of section 609. As Sanford Gaines notes, the United States only had to leave open "the possibility and the process for an exporting country to rebut" the "presumption" in favor of the "same" regulatory approach as that of the United States. Gaines, *supra* note 33, at 794. "That possibility was, in fact, always there in the U.S. program. The revised guidelines simply state it more explicitly." *Id.*

54 Gaines, *supra* note 33, at 773. He complains that the Appellate Body's interpretation of the Article XX chapeau creates tests for non-discrimination that "become a proverbial 'eye of the needle' through which hardly any national environmental measures will be able to pass." *Id.*

55 *Id.* at 743-44 (emphasis added).

by the 2001 report of the WTO panel in the follow-on proceeding,"[56] despite the fact that the 2001 panel upheld the section 609 import ban, an example of the type of "real-world unilateral use of trade leverage" about which he worries. Even the 2001 Appellate Body ruling, which "takes some of the hard edges off the panel's conclusions and . . . limits some of the damage," according to Gaines, "imposes extraordinary preconditions on member governments before they resort to Article XX for environmental measures."[57]

While the shrimp-turtle rulings may well have imposed some unwarranted "preconditions" on the use of environmental trade measures, I will suggest that at least some of the concerns of environmentalist critics derive from an unduly broad interpretation of the "preconditions" set forth by the Appellate Body. Ambiguities in the 1998 and 2001 Appellate Body reports have generated disagreements among observers regarding the correct interpretation of those decisions. In particular, I will address three questions left open by those decisions and argue that in each case, fidelity to the "ordinary meaning" of the text of Article XX militates decisively in favor of the interpretation that leaves greater scope for the use of environmental trade measures.

A. The Jurisdiction of the Importing Country

The Appellate Body agreed that section 609 was a measure "relating to the conservation of exhaustible natural resources."[58] Therefore, the Appellate Body concluded that the statute came within the exception in Article XX(g) despite the fact that section 609 called for a unilateral ban on imports based on the process by which they were made or harvested outside the United States. These types of attempts to influence production and process methods (PPMs) outside the jurisdiction of the importing country have been anathema to many in the GATT community, and some have since expressed alarm that the Appellate Body decision apparently allows the use of these process standards. Thailand, for example, complained that the decision "will result in an explosive growth in the number of environmental . . . measures applied to PPMs and justified pursuant to Article XX."[59]

Expressing similar concerns, the 1991 tuna-dolphin panel ruled that the MMPA could not come within the Article XX exceptions because it sought to protect dolphins from fishing

56 *Id.* at 744.

57 *Id.* at 745.

58 1998 Appellate Body, *supra* note 3, para. 145

59 Daniel Pruzin, *WTO Formally Adopts Shrimp-Turtle Ruling as Thailand Fears Victory May Be Pyrrhic*, 15 Int'l Trade Rep. (BNA) 1884, 1885 (Nov. 11, 1998).

fleets outside the jurisdiction of the United States.[60] The Appellate Body holding in the shrimp-turtle case rejects that particular jurisdictional requirement, so it does not rule against the U.S. import ban because it seeks to protect sea turtles from activities outside U.S. jurisdiction. The opinion, however, leaves open the question of whether there may be *some* jurisdictional limitation implicit in Article XX(g):

> We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).[61]

The opinion hints that it might be relevant that sea turtles migrate through U.S. territory, and consequently several commentators have suggested that such a nexus may be necessary to justify an environmental trade measure under Article XX(g).[62]

The Appellate Body, however, expressly declines to rule on whether such a nexus is actually required, and the reasoning in the opinion militates against any such jurisdictional requirement. Such a requirement would be inconsistent with the Appellate Body's emphasis on the ordinary meaning of the text of Article XX. In fact, the 1994 tuna-dolphin panel explicitly rejected any limitation on the scope of the Article XX(g) exception based on the location of the natural resources protected by the trade measure in question, because the panel found no such limitation in the text of Article XX(g).[63] In the future, WTO dispute settlement panels and the Appellate Body should similarly reject any such jurisdictional requirement as a test with absolutely no basis in the text of Article XX.[64]

---

60 *See* 1991 Panel, *supra* note 14, paras. 5.25, .32, at 198, 200-01.

61 *See* 1998 Appellate Body, *supra* note 3, para. 133.

62 *See, e.g.*, Hansen, *supra* note 40, at 1057 ("States may permissibly use trade measures to protect resources outside their territorial jurisdiction so long as . . . the state has a sufficient 'nexus' with those resources . . . ."); Nancy L. Perkins, *Introductory Note, World Trade Organization: United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 38 I.L.M. 118, 119 (1999) (suggesting that states may use trade measures to protect environmental resources in the global commons "so long as there is at least *some* jurisdictional relationship between those resources and that WTO Member"); Asif H. Qureshi, *Extraterritorial Shrimps, NGOs and the WTO Appellate Body*, 48 INT'L & COMP. L.Q. 199, 204 (1999) (reading the Appellate Body opinion as "stipulating the need for a nexus between the State and the object of environmental concern"); Simmons, *supra* note 30, at 440 ("[I]t remains unclear whether future panels will allow countries to implement measures protecting natural resources outside their jurisdiction."); Wofford, *supra* note 21, at 584 (suggesting that "a nation may still need to prove that its territory is affected by the environmental concern" to clear "the hurdle of jurisdiction").

63 *See* 1994 Panel, *supra* note 14, paras. 5.15, .20.

64 Robert Howse suggests that "[t]he question . . . of whether there is an implicit

As I have argued elsewhere, restrictions on imports produced by environmentally harmful processes may protect important resources wholly outside the jurisdiction of the importing country.[65] Some countries may regulate their own fishing fleets to ensure that they provide optimal protection for marine resources, but as long as these regulations raise costs for the regulated producers and reduce their output, then these countries must also support these regulations with trade measures against imports harvested using harmful practices. Otherwise, these imports would displace sales of domestic products harvested subject to environmental regulation. Furthermore, fishing operations may move to unregulated countries in order to avoid these environmental regulations. In the extreme, if imports displace sales by domestic producers entirely, then countries that regulate succeed only in destroying their domestic fishing industry without protecting the environment.

By not only regulating the domestic fishing industry but also shielding it against those foreign competitors that use practices that harm the environment, a country can ensure that its efforts to change the practices of its own producers will not be in vain. Moreover, these trade measures protect the environment by inducing foreign fishing fleets to reform their practices in order to gain access to regulated markets. Through these effects on both domestic and foreign fishing fleets, the application of a process standard to imports contributes to the protection of the global environment.

B. The Environmental Policies of the Exporting Country

In the shrimp-turtle case, however, the United States banned shrimp imports based not only on the processes used to harvest the particular shipment of shrimp in question but also on the environmental policies of the exporting country. Therefore, the panel below ruled against the United States because it was "conditioning access to its market . . . upon the adoption . . . of

territorial or jurisdictional limitation . . . may . . . be largely moot," because "Article XX(g) by its explicit language only applies to environmental trade measures that are coupled with domestic environmental regulation." Howse, *supra* note 26, at 504. The requirement in Article XX(g) that conservation measures be "made effective in conjunction with restrictions on domestic production or consumption," however, does not render the question of territorial jurisdiction moot. Suppose, for example, the United States were to ban imports in an effort to protect an endangered marine species wholly outside U.S. territory. A complainant could raise the question of a jurisdictional requirement even if the United States were to make that import ban effective in conjunction with restrictions on domestic producers that threaten the species through their operations outside U.S. territory.

65 *See* Chang, *Trade Measures*, *supra* note 8, at 2177-78.

certain policies" by the exporting country's government.[66] The Appellate Body, however, explicitly and emphatically rejected this rationale as an "error in legal interpretation" with "no basis . . . in the text" of Article XX.[67] Indeed, in paragraph 121 of its report, the Appellate Body even went so far as to declare that import bans based on whether the governments of exporting countries have adopted policies "unilaterally prescribed" by the importing country will be "a common aspect" of Article XX measures.[68] In the same remarkable paragraph, the Appellate Body concluded that to consider such unilateral import bans "a priori incapable of justification" under Article XX would be "abhorrent to the principles of interpretation we are bound to apply," because it would render "most, if not all, of the specific exceptions of Article XX inutile."[69]

Thus, the Appellate Body held that countries may *unilaterally* ban imports based not only on the process used in producing the particular units in question but also on the environmental policies of the targeted *countries*. In support of its 2001 complaint, Malaysia argued that paragraph 121 of the 1998 Appellate Body ruling was mere dicta, but the Appellate Body firmly and emphatically rejected this suggestion in its 2001 ruling.[70] In case there remained any doubt regarding the significance of paragraph 121 of the 1998 ruling, the Appellate Body quotes that paragraph at length and proclaims that it "expresses a principle that was central to our ruling" in the shrimp-turtle case.[71] Thus, the Appellate Body leaves no doubt that GATT Article XX allows countries to impose a unilateral import ban broader than a mere process standard.

The 1994 tuna-dolphin panel cited the country-wide breadth of the import ban imposed by the MMPA as the reason that it ruled against the United States. The 1994 panel inferred that the United States banned tuna imports "so as to force other countries to change their policies" and held explicitly that those import bans therefore fell outside Article XX.[72] The Appellate Body made a similar inference regarding the purpose of the U.S. ban on shrimp imports, but did not hold that the U.S. measure

66 1998 Panel, *supra* note 12, para. 7.45.

67 1998 Appellate Body, *supra* note 3, paras. 121-122.

68 *Id.* para. 121.

69 *Id.*

70 2001 Appellate Body, *supra* note 4, para. 138 ("Contrary to what Malaysia suggests, this statement is not '*dicta*.'").

71 *Id.*; *see id.* para. 137 (quoting 1998 Appellate Body, *supra* note 3, para. 121, at length and adding emphasis).

72 1994 Panel, *supra* note 14, para. 5.27.

therefore falls outside Article XX.[73] On the contrary, the Appellate Body instead declared that "a requirement that a country adopt a regulatory program requiring the use of TEDs" is "directly connected with the policy of conservation of sea turtles."[74] Thus, consistent with the ordinary meaning of the text of Article XX, the Appellate Body's opinion permits import bans designed to change the policies of other governments. In fact, the Appellate Body does not rule out the possibility that even trade sanctions imposed with respect to products completely unrelated to the marine resource in question may fall within Article XX if they are intended to induce other countries to improve their efforts at conservation of that resource.[75]

Importing countries can promote important environmental objectives by requiring exporting countries to improve their conservation efforts as a condition for access to domestic market of the importing country.[76] When process standards alone are not effective in promoting more environmentally sound practices or policies, broader import bans are often useful in inducing other countries to join multilateral agreements and to comply with them.[77] Other countries who harm the environment must have some reason to come to the negotiating table and to sign an agreement, especially given the powerful economic incentives for them to "free ride" on the restraint exercised by the countries that do agree to regulate.[78] The types of trade measures condemned by past panels can create the incentives necessary for countries to join a multilateral agreement that imposes

73 *See* Bruce Neuling, *The* Shrimp-Turtle *Case: Implications for Article XX of GATT and the Trade and Environment Debate*, 22 LOY. L.A. INT'L & COMP. L. REV. 1, 45 (1999) (noting that the Appellate Body "implicitly rejected" the reasoning of the 1994 panel).

74 1998 Appellate Body, *supra* note 3, para. 140; *see* Susan L. Sakmar, *Free Trade and Sea Turtles: The International and Domestic Implications of the* Shrimp-Turtles *Case*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 345, 345 (1999) (concluding that a WTO member may "impose its domestic environmental regulations on another member so long as certain safeguards are met").

75 For a defense of such trade sanctions, see Chang, *Trade Measures*, *supra* note 8, at 2199-207.

76 For a comprehensive study of the role of import bans in promoting dolphin conservation, see Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn From the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999).

77 Broader import bans may also discourage environmentally harmful production processes more effectively than process standards, even without changing the environmental policies of foreign governments, because broader import bans make it even more difficult for the producers using those harmful processes to find markets where they can sell their products at a profit. *See* Chang, *Trade Measures*, *supra* note 8, at 2178-84.

78 We can reward countries that regulate with "carrots," or we can threaten the use of "sticks" against those who do not. The prospect of "carrots," however, would create perverse incentives to harm the environment. *See* Chang, *International Externalities*, *supra* note 8; Chang, *Trade Measures*, *supra* note 8, at 2150-60.

environmental regulations on them.[79]

Despite the Appellate Body's endorsement of country-based import bans in paragraph 121 of its 1998 ruling, the shrimp-turtle litigation has left some doubts regarding the permissible scope of these import bans. The 1998 Appellate Body opinion acknowledges explicitly that while the dispute was before the panel and the Appellate Body, the United States excluded even shrimp caught using TEDs if the shrimp came from countries not certified by the United States, and the Appellate Body expresses some concern about this ban in paragraph 165 of its opinion, suggesting that "[t]he resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles."[80] Some observers have concluded that the U.S. import ban violated the GATT because it applied even to imports that themselves were harvested by environmentally friendly processes.

The question has been moot since 1998, when the U.S. State Department adopted a policy allowing shrimp imports if the individual shipment was caught with the use of TEDs, after the U.S. Court of Appeals for the Federal Circuit vacated on procedural grounds an earlier decision by the U.S. Court of International Trade that had prohibited such imports.[81] The State Department issued final guidelines in 1999 that affirmed this "shipment-by-shipment exception."[82] Environmentalists continued to advocate a "country-by-country" import ban, however, arguing that a "shipment-by-shipment" approach would be ineffective in protecting sea turtles,[83] and the U.S. Court of

79 *See* Chang, *Trade Measures*, *supra* note 8, at 2146-60. There are, of course, devices other than trade measures that can induce the cooperation of foreign governments, and a GATT prohibition on import bans would not render the use of other sanctions illegal. Nevertheless, many of these other sanctions may sacrifice other important interests or often have little effect on the governments of particular countries. Because other sanctions on behalf of the environment may be costly or ineffective, trade restrictions have proven particularly useful instruments in protecting environmental interests. *See id.* at 2149; Chang, *International Externalities*, *supra* note 8, at 323-24.

80 1998 Appellate Body, *supra* note 3, para. 165.

81 *See* Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46,094, 46,094-95 (1998); Earth Island Inst. v. Albright, 147 F.3d 1352 (Fed. Cir. 1998), *vacating* Earth Island Inst. v. Christopher, 942 F. Supp. 597 (Ct. Int'l Trade 1996).

82 Rossella Brevetti, *State Department Issues Guidelines to Comply with WTO Shrimp Ban Ruling*, 16 Int'l Trade Rep. (BNA) 1183 (July 14, 1999).

83 Rossella Brevetti, *USTR to Consult with Interested Parties on How to Respond to Shrimp Ruling*, 15 Int'l Trade Rep. (BNA) 1768, 1768-69 (Oct. 21, 1998). Critics of the shipment-by-shipment approach complain that it undermines "the incentive to create a national program" and encourages "countries with existing national programs to abandon their all-encompassing programs." Jennifer A. Bernaz, Note, *The Eagle, the Turtle, the Shrimp and the WTO: Implications for the Future of Environmental Trade Measures*, 15 CONN. J. INT'L L. 207, 229 (2000).

International Trade ruled in favor of environmentalist plaintiffs again in 2000, holding that section 609 permits the importation of wild shrimp only from certified nations.[84] Malaysia claimed in its 2001 complaint that this ruling put the United States out of compliance with the GATT as interpreted by the 1998 Appellate Body decision, but both the panel and the Appellate Body rejected Malaysia's claim because the Court of International Trade did not issue an injunction pending appeal, so that the shipment-by-shipment exception continued to allow imports caught using TEDs.[85] Thus, Malaysia did not prevail with this claim, but the Appellate Body's basis for rejecting this claim in 2001 leaves open the substantive question of whether a country-based import ban would violate the GATT in the absence of a shipment-by-shipment exception.

Some commentators agree with Malaysia's reading of the 1998 Appellate Body ruling on this issue. Eric Richards and Martin McCrory, for example, claimed that by ruling against the shipment-by-shipment exception, the Court of International Trade could "sabotage United States compliance efforts."[86] They interpret the shrimp-turtle ruling to imply that the use of "trade leverage to force similar regulations on . . . trading partners" would "run afoul of GATT rules."[87] To support this claim, they quote passages in paragraph 161 of the 1998 ruling stating that "[p]erhaps the most conspicuous flaw" in the "application" of section 609 "relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments."[88] Adopting a similar view of this language from the 1998 ruling, Sanford Gaines complains that "[b]y disqualifying . . . any measure that has the result of applying the economic pressure of

84 *See* Turtle Island Restoration Network v. Mallett, 110 F. Supp. 2d 1005 (Ct. Int'l Trade 2000). The Federal Circuit would later overturn this decision on appeal in 2002 and uphold the shipment-by-shipment exception. *See* Turtle Island Restoration Network v. Evans, 284 F.3d 1282 (Fed. Cir. 2002), *reh'g en banc denied*, 299 F.3d 1373 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1748 (2003).

85 2001 Appellate Body, *supra* note 4, para. 151 (holding that "the Panel took into account the status of municipal law at the time, and reached the correct conclusion").

86 Eric L. Richards & Martin A. McCrory, *The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law*, 71 U. COLO. L. REV. 295, 325 (2000).

87 *Id.* at 333; *see* Brooks Ware, *Staying Out of the Grasp of the GATT: Attempts to Protect Animals at the Expense of Free Trade*, CURRENTS, Winter 1998, at 69, 73 ("Section 609 ran afoul of Article XX because the U.S. had been excluding shrimp caught with TEDs simply because the country where the shrimp were caught had not been 'certified' by section 609.").

88 1998 Appellate Body, *supra* note 3, para. 161; *see* Richards & McCrory, *supra* note 86, at 321. As a result of these passages, some observers consider the legality of a country-by-country import ban "not so clear." Rosella Brevetti, *U.S. Examining Ways to Make Restrictions on Shrimp Imports More Transparent*, 16 Int'l Trade Rep. (BNA) 309, 310 (Feb. 24, 1999) (quoting one source as stating that the Appellate Body's decision "is kind of grey" on this issue).

a trade restriction on other governments unless they change their resource conservation policies, the Appellate Body effectively nullified Article XX(g)."[89] Sydney Cone also infers that the Appellate Body deemed a country-by-country import ban to be a violation of the GATT.[90] Therefore, Cone criticizes the Appellate Body, which he believes "seems to have lost sight of its own statement . . . that there is a reasonable relationship between the US rules . . . 'and the legitimate policy of conserving an . . . endangered species.'"[91]

If we read the Appellate Body's 1998 decision as criticizing the United States for imposing a country-by-country ban, then this criticism would indeed be inconsistent with earlier passages in the same opinion, including paragraph 121, which the Appellate Body would later emphasize so forcefully in 2001.[92] If we read each of the Appellate Body's critical sentences carefully in context, however, we find that each sentence is followed immediately by an explanation that makes clear that the 1998 ruling did not object to a country-by-country import ban *per se.* Instead, the Appellate Body's specific complaint in paragraph 165 is that the United States applies this import ban to induce other countries to adopt "essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers" even though many of these countries "may be differently situated," and the Appellate Body objects to the import ban on these narrower grounds instead.[93] Similarly,

89 Gaines, *supra* note 33, at 804; *see* Bree, *supra* note 42, at 122 ("[I]t remains questionable whether the underlying rationale of pushing other countries to adopt policies is permissible.").

90 *See* Sydney M. Cone, III, *The Appellate Body, the Protection of Sea Turtles and the Technique of "Completing the Analysis,"* J. WORLD TRADE, Apr. 1999, at 51, 53, 55, 58.

91 *Id.* (quoting Appellate Body, *supra* note 3, para. 141). Cone complains that "the Appellate Body ignored the difficult question of whether vessel-specific (as opposed to country-by-country) enforcement of the US regulations would be too limited" to protect sea turtles. *Id.* at 58; *see* Bree, *supra* note 42, at 122-23 ("Case by case decisions about the import of particular shrimps depending on . . . how they are fished are not verifiable and enforceable, and thus would lead to the failure of the conservation objective . . . ."); Neuling, *supra* note 73, at 47 (complaining that "the suggestion that the U.S. Government should not exclude shrimp caught with TEDs" will limit "the ability of the U.S. Government to influence environmental practices abroad" and that "any system relying on shipment-by-shipment inspections . . . would be vulnerable to fraud").

92 *See* Howse, *supra* note 26, at 513 ("To say that the chapeau requires shipment-by-shipment inspection . . . would be to interpret the chapeau in a manner that is inconsistent with the [Appellate Body's] overall understanding of the structure and purpose of Article XX, as articulated in paragraph 121 of its original ruling, and reaffirmed with emphasis in paragraph 138 of its [2001] ruling.").

93 Appellate Body, *supra* note 3, para. 165 (noting that "*shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*" and concluding from this fact that "this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the

this inflexibility is the *particular aspect* of the "coercive effect" of the section 609 import ban that disturbs the Appellate Body in paragraph 161.[94]

Thus, at most, the absence of a shipment-by-shipment exception is merely an aggravating circumstance that contributes to the "arbitrary and unjustifiable" nature of the discrimination that may result from an inflexible certification process.[95] That is, the absence of such an exception is *not* itself a violation of any requirement in Article XX. Observers have drawn a contrary conclusion only by taking isolated statements from the 1998 Appellate Body ruling out of context.[96]

The Appellate Body has *never* claimed that Article XX requires a shipment-by-shipment exception.[97] The Appellate Body made no such claim, for the simple reason that such a claim would have no plausible basis in the ordinary meaning of the text of Article XX. The Appellate Body could not derive such a claim from its analysis of the Article XX chapeau, for example, without distorting the ordinary meaning of the phrase "arbitrary or unjustifiable discrimination between countries where the same conditions prevail."[98] While a country-by-country import ban

United States"); *see supra* notes 31-33 and accompanying text.

94 *See id.* para. 161 (criticizing the embargo for requiring other countries "to adopt *essentially the same* policy . . . as that applied to . . . United States domestic shrimp trawlers"). Thus, as Gaines recognizes, "[t]wo intertwined thoughts" prompted the Appellate Body's conclusion that the U.S. import ban had a "coercive effect" that produced "unjustifiable discrimination." Gaines, *supra* note 33, at 791. Both the rigid application of the certification criteria, requiring policies identical to those of the United States, and the use of trade measures to induce other governments to comply with those criteria combined to produce "unjustifiable discrimination." *Id.*

95 The 2001 panel addressed the shipment-by-shipment exception as if it were a separate requirement distinct from the requirement of greater flexibility in the certification criteria applied to exporting countries by the United States. *See* 2001 Panel, *supra* note 44, para. 5.106. Robert Howse suggests that the United States did not appeal this aspect of the 2001 panel's interpretation of the 1998 Appellate Body ruling because the executive branch of the U.S. government found that interpretation useful in defending the shipment-by-shipment exception in federal court. *See* Howse, *supra* note 26, at 512.

96 *See, e.g.*, Gregory Shaffer, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 93 AM. J. INT'L L. 507, 511 (1999). Shaffer quotes paragraph 165 as identifying the absence of a shipment-by-shipment exception as a second flaw in the U.S. import ban, separate from the first flaw, which was the application of inflexible criteria requiring exporting countries "to adopt *essentially the same* policy" as that adopted by the United States. *Id.* His quote from paragraph 165, however, omits the language in that paragraph identifying the inflexibility of the U.S. criteria, which required "essentially the same" conservation policies as those adopted by the United States, as the fundamental problem. 1998 Appellate Body, *supra* note 3, para. 165. This omitted language makes clear that the objection raised in paragraph 165 is merely an elaboration of the flaw of inflexibility identified in the preceding paragraphs, not a separate independent flaw.

97 *See* Howse, *supra* note 26, at 512 (noting that "shipment-by-shipment inspection was not presented as a separate requirement implicit in the chapeau" in the 1998 Appellate Body ruling, nor does it appear "as a separate sine qua non requirement" in the 2001 Appellate Body ruling).

98 GATT, *supra* note 2, art. XX, 61 Stat. pt. 5, at A60-61, 55 U.N.T.S. at 262.

without a shipment-by-shipment exception might discriminate between *producers* harvesting shrimp using similar processes, this discrimination does *not* entail any discrimination between *countries* "where the same conditions prevail."[99]

The *only* aspect of the substantive criteria used by the United States to ban imports that the Appellate Body could plausibly describe as "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" was the inflexibility of the U.S. certification criteria, which raised the possibility of discrimination between countries with comparably effective conservation policies. Once the United States eliminated this inflexibility, those criteria were no longer a means of any discrimination that the WTO could condemn under the Article XX chapeau. Therefore, the United States can apply a country-by-country import ban as long as it allows an exporting country to argue that it is "differently situated" so that its program for the protection of sea turtles may be certified as "comparable" to that of the United States.[100] Thus, the United States would be in compliance with the GATT even if it were to return to a country-by-country import ban under section 609, because it has already revised its guidelines to allow for this more flexible approach to certification.

C. Unilateral Measures Without Multilateral Negotiations

The Appellate Body's critique of the U.S. implementation of section 609 has also generated some commentary suggesting that "it is generally *not* acceptable for one WTO Member to restrict trade based on the failure of other Members to conform their natural resource conservation . . . policies to the *unilateral* dictates of that WTO Member."[101] Richards and McCrory, for example, assert that it is "permissible for a country to adopt

99 As the Appellate Body itself implied in its 1998 ruling, either "the same conditions" do not prevail between countries with conservation policies that are not comparably effective or discrimination between such countries is generally not "arbitrary or unjustifiable." To hold otherwise, according to paragraph 121 of that ruling, would be "abhorrent," because it would render "most, if not all, of the specific exceptions of Article XX inutile." 1998 Appellate Body, *supra* note 3, para. 121.

100 *See* Joseph Robert Berger, Note, *Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case*, 24 COLUM. J. ENVTL. L. 355, 376 (1999) (noting that "[t]he WTO focused on the *combination* of the nationwide approach with the imposition of an inflexible, comprehensive regulatory program on all targeted nations" and suggesting that "[i]f the United States can address the latter problem," then "the nationwide embargo approach might be accepted") (emphasis added). Peter Fugazzotto of the Earth Island Institute has expressed the view that the shipment-by-shipment approach is not necessary for compliance with the Appellate Body ruling, but he concedes that "[w]hether the Asian nations agree with that remains to be seen." Brevetti, *supra* note 88, at 310.

101 Perkins, *supra* note 62, at 119.

unilateral measures" only "in rare circumstances."[102] They cite the discussion in the 1998 Appellate Body report of the general preference for multilateral solutions to international environmental problems over unilateral actions.[103] In paragraph 171 of that report, for example, the Appellate Body points to the Inter-American Convention as evidence that "an alternative course of action" featuring "cooperative efforts" rather than "the unilateral and non-consensual procedures of the import prohibition" under section 609 "was reasonably open to the United States."[104]

On the other hand, the Appellate Body's 1998 opinion carefully avoids the suggestion that unilateral measures generally fall outside Article XX. Such a claim would be inconsistent with passages in paragraph 121 of the same opinion implying that such a rule would render "most, if not all, of the specific exceptions of Article XX inutile" and thus would be "abhorrent."[105] Such a claim would also be inconsistent with the use of the singular noun in Article XX, which permits "any contracting party" to adopt the measures in question, and with GATT case law, which has often found unilateral measures to fall within Article XX.[106] Nothing in the language of Article XX suggests that unilateral measures are illegal if they are directed at resources outside the jurisdiction of the importing country.

Opposing views of the Appellate Body's 1998 ruling have produced opposing views of the Appellate Body's 2001 ruling, which required the United States "to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other."[107] Robert Howse reads this statement to require the United States only "to negotiate

102 Richards & McCrory, *supra* note 86, at 340-41.

103 *See id.* at 322 (quoting 1998 Appellate Body, *supra* note 3, paras. 168, 171).

104 Appellate Body, *supra* note 3, para. 171; *see* Arthur E. Appleton, *Shrimp/Turtle: Untangling the Nets*, 2 J. INT'L ECON. L. 477, 493 (1999) (concluding that the "need for a co-operative as opposed to a unilateral approach is among the central points of the Appellate Body's finding that the US measure constituted unjustifiable discrimination"); Bree, *supra* note 42, at 125 (concluding that "unilateral measures are not permissible"). Thus, Charles Arden-Clarke of the World Wide Fund for Nature International complained that the Appellate Body ruling "still prevents countries from taking unilateral action on the global commons when irreversible environmental damage takes place." *WTO Appeals Body Faults Implementation of Shrimp-Turtle Law*, 15 Int'l Trade Rep. (BNA) 1698, 1699 (Oct. 14, 1998).

105 Appellate Body, *supra* note 3, para. 121; *see* Sakmar, *supra* note 74, at 383 (noting that "the WTO Appellate Body . . . recognized that unilateral measures aimed at protecting the environment could be valid," because "if such measures were not valid, the exceptions found in Article XX would be superfluous"); Wofford, *supra* note 21, at 581 ("[T]he Appellate Body asserted that unilateral environmental policies are not only legitimate, but also to be expected under Article XX exceptions.").

106 GATT, *supra* note 2, art. XX, 61 Stat. pt. 5, at A61, 55 U.N.T.S. at 262.

107 2001 Appellate Body, *supra* note 4, para. 122.

seriously with the complainants exactly to the extent it had already negotiated with the western hemisphere countries, no more and no less."[108] That is, the Appellate Body does not impose "a self-standing duty to negotiate" independent of the duty not to discriminate in these efforts.[109] "The 'unjustified discrimination' was not the failure to negotiate as such, but the failure to treat the complainants as well as . . . the western hemisphere countries."[110] Thus, had the United States "negotiated with *no one*, it would not have run afoul of the chapeau."[111]

John Knox, however, reads the same statement from the 2001 ruling to express two separate requirements: "(1) to make good faith efforts to negotiate international agreements; and (2) to make sure that the efforts are comparable across the board."[112] That is, the Article XX chapeau required the United States to negotiate with the 1998 complainants not only to avoid discrimination against them but also to pursue the "multilateral 'alternative course of action'" urged in paragraph 171 of the 1998 Appellate Body ruling.[113] Based on a similar reading of the Appellate Body rulings, Gaines worries that "unilateral measures affecting transnational or global resources outside the context of any systematic effort to promote a multilateral solution will, *ipso facto*, not qualify under Article XX."[114]

Furthermore, Gaines complains, the Appellate Body has left open the "problematic" question of what "efforts, resources, and

---

108 Howse, *supra* note 26, at 508.

109 *Id.*

110 *Id.* at 508-09.

111 *Id.* at 509 n.39.

112 Knox, *supra* note 20, at 41 n.165.

113 *Id.* at 42 n.165; *see* Bree, *supra* note 42, at 123 (concluding that the 1998 Appellate Body decision "required serious negotiations before taking unilateral action as a last resort"). Knox claims that the 2001 panel took a similar view of the 1998 Appellate Body ruling. *See* Knox, *supra* note 20, at 41 n.165 (citing 2001 Panel, *supra* note 44, paras. 5.59, .74, .76.). Gaines agrees, noting that the 2001 Appellate Body report "does not specifically comment on, much less disavow, the panel's extreme interpretation of the 'requirement' for prior effort at multilateral solutions before invoking Article XX rights." Gaines, *supra* note 33, at 818-19. Knox infers from the Appellate Body's silence that it agrees with the 2001 panel's reading of the 1998 Appellate Body ruling. Knox, *supra* note 20, at 41 n.165 ("If Howse were right, surely the Appellate Body would have corrected the panel's basic mischaracterization of its earlier decision."). The 2001 panel decision, however, is not much clearer than the 1998 Appellate Body ruling on this question. Both decisions impose a duty to negotiate upon the United States, but neither makes clear whether this duty arises only because the United States had already negotiated with some countries or because such a duty exists even in the absence of any discrimination among exporting countries. In any event, the 2001 Appellate Body report, as Gaines reads it, "shifts the emphasis away from 'prior' recourse to a more mundane concern with the perceived discrimination in treatment between the Western Hemisphere nations and the Asian nations in United States diplomacy." Gaines, *supra* note 33, at 819. According to Howse, that report "clarified" that there is no self-standing duty to negotiate. Howse, *supra* note 26, at 509 n.39.

114 Gaines, *supra* note 33, at 819.

energies" would "satisfy the implicit . . . general requirement . . . that there must always be a good faith effort at negotiations before invoking Article XX rights."[115] What standard would a WTO panel apply in the absence of any discrimination among exporting countries? If the Appellate Body has indeed imposed a duty to negotiate on WTO members invoking Article XX(g), then it has also saddled WTO panels with the difficult task of developing an appropriate standard with little guidance on the question: How much of a diplomatic effort must the importing country make before resorting to unilateral import restrictions? Howse infers from the Appellate Body's silence on this question that there is no such independent duty to negotiate before invoking Article XX, arguing that had the Appellate Body "intended to read into the chapeau a self-standing duty to negotiate seriously, it would have given some guidance as to the extent of the duty."[116]

Most important, once we recall the Appellate Body's focus on the ordinary meaning of the text of Article XX, we cannot reasonably read the Appellate Body's rulings to impose a duty to negotiate in the absence of any "discrimination between countries where the same conditions prevail."[117] There is simply no basis in the text of Article XX for any such duty. As Gaines observes, "the text of Article XX makes no explicit reference to unilateral or multilateral action."[118] Indeed, "[n]othing in the lettered paragraphs or the chapeau constrains a member government's choice among multilateral, regional, bilateral, or unilateral approaches."[119]

The only provision in Article XX that the Appellate Body *ever* identifies as imposing a duty to negotiate on the United States is the chapeau language against "discrimination," and as Gaines

115 *Id.*; *see id.* at 805 (noting that the 1998 Appellate Body report "sets no definable, predictable standard for determining how much effort at negotiations will satisfy the WTO"); Neuling, *supra* note 73, at 47 (noting that the 1998 Appellate Body report does not address the question of "how much of a diplomatic effort must the importing nation make?").

116 Howse, *supra* note 26, at 508.

117 We should distinguish negotiations from those discussions that may be necessary to avoid discrimination among countries with comparably effective conservation programs. The Appellate Body required a country imposing an import ban to consider whether the conservation policies of the exporting country are as effective as those of the importing country. This requirement may entail some discussions between the importing country and the exporting country but does not imply that the importing country must negotiate a compromise with the exporting country over the appropriate level of effectiveness for these conservation policies.

118 Gaines, *supra* note 33, at 807. "Nor does the language of Article XX offer any basis from which to infer that multilateral action is a chapeau precondition for national measures." *Id.*

119 *Id.*

notes, "[t]here is no inherent connection between unilateralism and discrimination."[120] He complains that the Appellate Body "articulates no historical foundation or legal basis for the conclusion that failure to make bona fide efforts to negotiate a treaty comes within the chapeau's concept of 'unjustifiable' discrimination."[121] Thus, Gaines takes the Appellate Body to task for imposing the "condition that unilateral measures under Article XX can only be taken after serious efforts at multilateral negotiations."[122]

The ordinary meaning of the text of Article XX, however, is not a reason to criticize the Appellate Body for imposing this condition as much as it is a reason to reject the notion that the Appellate Body ever imposed this condition at all. After all, as Howse notes, the Appellate Body "never held that the requirements of the chapeau, in and of themselves, impose a *sui generis* duty to negotiate."[123] Given the lack of any textual basis for such a duty, and in the absence of any explicit statement by the Appellate Body imposing such a duty, we should not readily infer such a duty from the Appellate Body's rulings. This supposed duty to negotiate is implausible as an interpretation of the Appellate Body rulings precisely because it is implausible as an interpretation of Article XX.

Knox points to paragraph 171 of the 1998 ruling, in which the Appellate Body contrasts the multilateral "alternative course of action" with "the unilateral and non-consensual procedures of the import prohibition," as support for a duty to negotiate before imposing a unilateral import ban.[124] If we read paragraph 171 as a whole, however, and especially if we view it in context rather than in isolation, we find that the Appellate Body points to this multilateral alternative to underscore the feasibility of serious negotiations with *all* affected parties rather than only some and to demonstrate that this discrimination in diplomatic efforts was "unjustifiable."[125] That is, the Appellate Body points to the Inter-American Convention and this "cooperative" alternative only to criticize the failure of the United States "to negotiate similar agreements with any other country or group of countries."[126]

120 *Id*. at 805.

121 *Id*.; *see* Simmons, *supra* note 30, at 444 ("[T]here is currently no mandate within the GATT to engage in bilateral and multilateral negotiations prior to taking unilateral actions.").

122 Gaines, *supra* note 33, at 814.

123 Howse, *supra* note 26, at 507.

124 Knox, *supra* note 20, at 41 n.165.

125 *See* Howse, *supra* note 26, at 507-08. Paragraph 172 in particular is quite explicit in relating "unilateralism" to the "unjustifiable nature of this discrimination" in negotiating efforts. 1998 Appellate Body, *supra* note 3, para. 172.

126 1998 Appellate Body, *supra* note 3, para. 171.

Knox concedes that the text of Article XX "provides no apparent link" to "the principle of multilateralism."[127] Thus, he can derive an independent duty to negotiate from the Appellate Body opinions only by claiming that the Appellate Body "read the chapeau as giving it broad powers to strike a balance, or find a 'line of equilibrium,' between trade and environmental interests."[128] In support of this claim, he quotes paragraph 159 of the 1998 Appellate Body ruling.[129] This paragraph describes "[t]he task of interpreting and applying the chapeau" as "essentially the delicate one of locating and marking out a line of equilibrium between the right of a [WTO] Member to invoke an exception under Article XX and the rights of the other Members."[130]

This paragraph, however, does not suggest that the Appellate Body has given itself broad powers to distort the ordinary meaning of the text of the chapeau or to replace treaty language with a balancing test. After all, the Appellate Body describes itself as locating "a line of equilibrium" only in the course of "interpreting and applying the chapeau." Thus, the quoted passage merely acknowledges that when the Appellate Body interprets certain words in the chapeau, such as "arbitrary" and "unjustifiable," and applies them to specific facts, their precise meaning will invariably be subject to dispute, because reasonable minds can differ on the precise meaning of such words. In choosing among different plausible interpretations of

127 Knox, *supra* note 20, at 56-57. He does suggest, however, that "relying on rigid unilateral measures in the absence of attempts to find a multilateral solution to regional or global environmental problems could be seen as unjustifiable discrimination against other countries in favor of the country applying the trade restriction," because "the failure to take into account the views and interests of other affected countries could lead to a presumption that the resulting unilateralism will unjustifiably discriminate against those interests." *Id.* at 65. If Knox uses the term "rigid" to refer to the inflexibility in certification criteria that the 1998 Appellate Body ruling condemned, then an importing country can avoid "unjustifiable discrimination" by eliminating this inflexibility, just as the United States did with respect to section 609, rather than by attempting to negotiate a multilateral agreement. If Knox has a broader notion of "rigid" in mind, on the other hand, then his suggestion must deem countries with conservation policies that are not comparably effective to be "countries where the same conditions prevail" in the sense relevant under the chapeau. This interpretation of the chapeau, however, would give the phrase "where the same conditions prevail" virtually no effect in restricting the type of "discrimination" prohibited by the chapeau. Furthermore, this interpretation of "same conditions" would seem to be at odds with the reasoning of the Appellate Body in the shrimp-turtle rulings, which deems countries with conservation policies that are not comparably effective to be different enough in a relevant respect to justify discrimination between them. *See, e.g.*, 1998 Appellate Body, *supra* note 3, para. 121.

128 Knox, *supra* note 20, at 56.

129 *Id.* at 37.

130 1998 Appellate Body, *supra* note 3, para. 159. Axel Bree also reads this language as Knox does. *See* Bree, *supra* note 42, at 119 ("By introducing a balancing test . . ., the Appellate Body has opened the door for arguments and requirements that do not necessarily need to have a textual basis.").

those words, the Appellate Body will inevitably have to balance the opposing interests at stake in deciding which interpretation to adopt in resolving the dispute. The Appellate Body did not, however, give itself license to invent requirements without any basis in the text of the chapeau. Such an extraordinary reading of paragraph 159 would be inconsistent with the Appellate Body's explicit focus on the ordinary meaning of the text of Article XX. Thus, this paragraph does not support the duty to negotiate that Knox seeks to derive from the shrimp-turtle rulings, and we are left with the conclusion that neither the ordinary meaning of the text of the chapeau nor the Appellate Body's interpretation of the chapeau imposes any such duty.

III. CONCLUSION

The Appellate Body's rulings in the shrimp-turtle case indicates that importing countries can defend environmental trade measures, even unilateral import bans, under GATT Article XX as long as they avoid unfair discrimination. These unilateral trade measures may justifiably discriminate against imports produced by processes that harm natural resources located outside the jurisdiction of the importing countries or against imports from countries that have environmental policies deemed inadequate by the importing country. The 2001 Appellate Body ruling, by emphasizing paragraph 121 from the 1998 Appellate Body ruling so forcefully, confirmed that WTO members enjoy a right to restrict imports based on environmental standards unilaterally prescribed by the importing country and applied to the conservation policies of exporting countries.

The case-by-case approach endorsed by the Appellate Body should provide much broader leeway for the use of environmental trade measures than suggested by past panel decisions. Under the Article XX chapeau, an exporting country can challenge such measures if they are applied in a manner that amounts to "a means of arbitrary or unjustifiable discrimination between countries" or "a disguised restriction on international trade."[131] In particular, the Appellate Body held that to avoid "arbitrary or unjustifiable discrimination," the country imposing a ban on imports from an exporting country must provide a formal hearing that allows the exporting country to argue that it has comparable environmental policies even if they are not precisely the same as the policies in the importing country, make the same efforts to negotiate with all exporting countries, make the same efforts to

131 GATT, *supra* note 2, art. XX, 61 Stat. pt. 5, at A60-61, 55 U.N.T.S. at 262.

transfer technology to all exporting countries, and provide a formal notice of the reasons for adverse decisions and some procedure for review of or appeal from these denials. By basing its scrutiny of environmental trade measures only on requirements that are explicit in the text of Article XX of the GATT, the Appellate Body strikes a more reasonable balance between environmental and trade interests than panels in prior decisions have struck.

The Appellate Body can continue this progress by making good on its promise to remain faithful to the ordinary meaning of the text of GATT Article XX. By focusing on that text, we can resolve many of the disagreements that have arisen regarding the proper interpretation of the Appellate Body's rulings in the shrimp-turtle case. In particular, the ordinary meaning of that text militates against any jurisdictional limitation on the conservation exception in Article XX, against a requirement that import bans based on the conservation policies of exporting countries include shipment-by-shipment exceptions, and against an independent duty for importing countries to open negotiations with exporting countries before imposing an import ban.

Closer attention to the text of the GATT would not only make for better legal reasoning but also give greater legitimacy to WTO rulings. To impose restrictions on environmental trade measures without a basis in the text of Article XX erodes respect for the WTO in particular and undermines the political support for free trade in general. In this sense, WTO rulings that are more sensitive to environmental interests will also do a better job of serving our interest in free trade as well.

SUSTAINABLE DEVELOPMENT, INTERNATIONAL TRADE AND THE DOHA AGENDA FOR DEVELOPMENT*

*Ved P. Nanda***

This article revisits the core concept of sustainable development in a historical context, focusing on the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro (Rio Summit),[1] the 2002 World Summit on Sustainable Development (Johannesburg Summit),[2] and subsequent developments. It will also provide a review of various highlights of the World Trade Organization's Doha Round of multilateral trade negotiations, especially the Doha Development Agenda, the Monterrey Consensus, and recent developments.[3]

I. SUSTAINABLE DEVELOPMENT

As a concept, sustainable development remains imprecise. Although the concept is vague, it is nevertheless widely endorsed by national and international decisionmakers, nongovernmental organizations (NGOs), and scholars.[4] Thus, it continues to shape

*This article is an adapted and updated version of my presentation on Feb. 24, 2005, at the Chapman Law Review symposium entitled "International Law Confronts the Global Economy." I will provide a bird's eye view of the subject of my session, "International Trade, Multilateralism, and Sustainable Development."

**Vice Provost, John Evans University Professor, Thompson G. Marsh Professor of Law and Director, International Legal Studies Program, The University of Denver.

1 For general information on the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, please visit http://www.ciesin.org/TG/PI/TREATY/unced.html (last visited May 1, 2005). For a collection of documents resulting from the conference, please visit http://www.ciesin.org/datasets/unced/unced.html (last visited May 1, 2005).

2 For information on the Johannesburg Summit, please visit http://www.un.org/events/wssd/ (last visited May 1, 2005).

3 For briefing on the World Trade Organization's (WTO) Doha Round see the International Institute for Sustainable Development's Doha Round Briefing Series at http://www.iisd.org/trade/wto/doha_briefing.asp (last visited May 1, 2005).

4 *See, e.g.,* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS (1987); Alhaji B.M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 GEO. INT'L ENVTL. L. REV. 21, 22-26 (2003); George W. Pring, *Sustainable Development: Historic*

not only international, regional, and bilateral agreements, especially on environmental issues, but also legal and policy decisions on the national level. It would be an accurate assessment to state that sustainable development has emerged as an international paradigm for the new millennium in reconciling and integrating the goals of economic development, social development, and environmental protection, goals that can often be at odds with one another.

The genesis of sustainable development may be traced as far back as 2,000 years, as suggested by Judge Weeramantry in his 1997 separate opinion in the *Gabcíkovo-Nagymaros* case.[5] However, its current incarnation can perhaps be dated to 1980 when the idea of sustainable development was introduced in the World Conservation Strategy,[6] a joint product of the International Union for the Conservation of Nature (IUCN),[7] World Wildlife Fund,[8] and the United Nations Environment Programme (UNEP),[9] with IUCN in the lead. This was followed in 1986 by the report of a group of legal experts which enumerated twenty-two legal principles for environmental protection and sustainable development.[10] These included, among others, an international responsibility to prevent environmental harm, the right to an environmental impact assessment, a fundamental human right to "an environment adequate for . . . health and well-being," an intergenerational equity, and the overall conservation and sustainable use of natural resources.[11] It was initially envisaged that these

Perspectives and Challenges for the 21st Century, *in* UNITED NATIONS DEVELOPMENT PROGRAMME AND UNITED NATIONS REVOLVING FUND FOR NATURAL RESOURCES EXPLORATION: PROCEEDINGS OF THE WORKSHOP ON THE SUSTAINABLE DEVELOPMENT OF NON-RENEWABLE RESOURCES TOWARDS THE 21ST CENTURY 13-29 (1999).

5 Gabcíkovo-Nagymaros Project, 1997 I.C.J. 7, 97-110 (separate opinion of Judge Weeramantry), *available at* http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm. There is voluminous literature on sustainable development, including its history. *See also* VED P. NANDA & GEORGE W. PRING, INTERNATIONAL ENVIRONMENTAL LAW & POLICY FOR THE 21ST CENTURY 22-27, 90-119 (2003); Marong, *supra* note 4, at 22-26; Pring, *supra* note 4, at 13-29; Phillipe Sands, *International Law in the Field of Sustainable Development,* 1994 BRIT. Y.B. INT'L L. 303 (1995); RETHINKING SUSTAINABLE DEVELOPMENT, 590 ANNALS (SPECIAL ISSUE) (Nov. 2003); Ved P. Nanda, *International Environmental Challenges: "Sustainable Development" and "Environmental Terrorism,"* 3 TOURO J. TRANSNAT'L L. 1 (1992).

6 INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES, WORLD CONSERVATION STRATEGY (1980).

7 For general information on IUCN see http://www.iucn.org/ (last visited May 1, 2005).

8 For general information on the World Wildlife Fund see http://www.worldwildlife.org/ (last visited May 1, 2005).

9 For general information on UNEP see http://www.unep.org/ (last visited May 1, 2005).

10 WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 4.

11 *Id*. at 9-14.

principles would constitute the foundation of a proposed Convention on Environmental Protection and Sustainable Development, but that did not come to pass.[12] As will be discussed later, these principles did find a place in the 1992 Rio Declaration on Environment and Development (Rio Declaration).[13]

In 1987, the World Commission on Environment and Development, chaired by Gro Harlem Brundtland, then Prime Minister of Norway and now Director-General of the World Health Organization, released its influential report entitled "Our Common Future," which gave high visibility to sustainable development.[14] The report, popularly known as the Brundtland Report, described sustainable development as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[15] However, the report failed to provide normative content to sustainable development and did not provide any guidance on how to operationalize the concept.

Two years later, the Governing Council of UNEP elaborated the meaning of sustainable development, emphasizing international cooperation, national and international equity, a supportive international economic environment, rational use of natural resources, and incorporation of environmental concerns in development planning as conditions to achieve the goal of sustainable development.[16] The next important event, the one that catapulted the concept of sustainable development into prominence on the world stage, was the 1992 Rio Summit. The conference's mandate was contained in a 1990 United Nations General Assembly resolution which called upon UNCED to "elaborate strategies" for the promotion of "environmentally sound and sustainable development in all countries."[17]

By focusing the world's attention on the goal of achieving sustainable development, UNCED successfully enhanced international awareness and called for a concerted effort by both

12 *Id.* at 2.

13 Rio Declaration on Environment and Development, United Nations Conference on Environment and Development (UNCED), U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex 1, at 3 (1992) [hereinafter Rio Declaration].

14 *See* OUR COMMON FUTURE: THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT (Gro Brundtland ed., 1987).

15 *Id.* at 43.

16 *See* Report of the Governing Council on the Work of its Fifteenth Session, United Nations Environment Programme, U.N. GAOR, 44th Sess., Supp. No. 25, 12th mtg. at 153, U.N. Doc A44/25 (1989).

17 United Nations Conference on Environment and Development, U.N. GAOR, 85th mtg., at 152-53, U.N. Doc. A/RES/44/228 (1990).

developed and developing countries.[18] The conference established two treaties: the Framework Convention on Climate Change[19] and the Convention on Biological Diversity.[20] In addition, the conference established the nonbinding Forest Principles,[21] the Rio Declaration[22] and the Agenda 21 Plan of Implementation.[23] The following is a discussion of the Rio Declaration Principles and Agenda 21 and how they have given meaning to sustainable development.

II. DEVELOPMENTS AT THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT

Negotiations preceding UNCED revealed a deep North-South divide on the goals of the conference leaving no hope that an agreement for a binding convention on environmental protection and sustainable development could be reached.[24] The focus of developed countries was primarily on the environment—less stringent environmental standards and increased financial and technical assistance from developed countries in order to meet environmental and developmental needs.[25] The focus of developing countries was on the right to development.[26] Consequently, the stage was set for acrimonious debates on the principles UNCED should adopt. After considerable debate and concessions, negotiators struck a compromise and eventually adopted, by consensus, the Rio Declaration and its Twenty-Seven Principles.[27]

A. Rio Declaration on Environment and Development

The Principles of the Rio Declaration reflect a new paradigm of sustainable development. Its title clearly links the

18 *Id.* at 152.

19 United Nations Framework Convention on Climate Change, UNCED, May 9, 1992, S. Treaty Doc. No. 102-38, *reprinted in* 31 I.L.M. 849, *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf.

20 Convention on Biological Diversity, UNCED, June 5, 1992, *reprinted in* 31 I.L.M. 818, *available at* http://www.biodiv.org/doc/legal/cbd-en.pdf.

21 Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, UNCED, U.N. Doc. A/CONF.151/26 (Vol. III), Annex 3 (1992).

22 Rio Declaration, *supra* note 13.

23 Agenda 21, U.N. Conference on Environment and Development, U.N. Doc. A/Conf. 151/26/Rev.1 (Vol. I), Annex 2 (1992) [hereinafter Agenda 21].

24 *See, e.g.*, Gaetan Verhoosel, *Beyond the Unsustainable Rhetoric of Sustainable Development: Transferring Environmentally Sound Technologies*, 11 GEO. INT'L ENVT'L. L. REV. 49 (1998) (discussing the history of the North-South divide); Marong, *supra* note 4, at 22-26.

25 *Id.*

26 *Id.*

27 Rio Declaration, *supra* note 13.

environment with development, not emphasizing the former over the latter—a goal sought by developing countries.[28] Principle Two reiterates Principle Twenty-One of the Stockholm Declaration on the Environment, adopted at the conclusion of the Stockholm Conference on the Human Environment in 1972, the very first U.N. conference on the environment.[29] It prescribes the no-harm rule under which a state is duty bound not to cause environmental damage outside its borders.[30] Principle Two also recognizes that a sovereign retains the right to use its natural resources pursuant to its own environmental policies.[31] Principle Four explicitly links environmental protection to the development process: "In order to achieve sustainable development, environmental protections shall constitute an integral part of the development process and cannot be considered in isolation from it."[32]

The Rio Declaration also unequivocally recognizes the "right to development" and the principle of intergenerational equity by stating that this right "must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[33] While exhorting states to cooperate "to conserve, protect and restore the health and integrity of the Earth's ecosystem," it recognizes that States possess "common but differentiated responsibilities" in view of their "different contributions to global environmental degradation."[34] In Principle Six, the Rio Declaration gives "special priority" to the "needs of developing countries, particularly the least developed and those most environmentally vulnerable."[35]

Of special note is the proclamation in the Rio Declaration that "[h]uman beings are at the centre of concerns for sustainable

---

28 *Id.*

29 *See* United Nations Conference on the Human Environment, Stockholm Declaration**,** June 16, 1972, U.N. Doc. A/CONF.48/14 (1972), princ. 21, *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration]; Rio Declaration, *supra* note 13, princ. 2.

30 Rio Declaration, *supra* note 13, princ. 2.

31 *Id.*

32 *Id.* princ. 4.

33 *Id.* princ. 3.

34 *Id.* princ. 7. The entire principle reads as follows:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Id.

35 *Id.* princ. 6.

development. They are entitled to a healthy and productive life in harmony with nature."[36] Professor Robert Araujo aptly interprets this Principle to mean that "human beings are of paramount significance but not of isolated importance, and their welfare must take into account the preservation of the natural environment on which mankind is dependent."[37] In elaborating his thesis, Professor Araujo relies on natural law principles to focus on the three-fold relationship of the common good, solidarity and subsidiarity.[38] Equally noteworthy in this context are Principles Four, linking environment and development, and Five, which calls on "all states and all people [to] cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world."[39]

In addition to the Principles discussed above, a number of other Rio Declaration Principles exemplify how the Rio Declaration laid the foundation for the 2002 World Summit on Sustainable Development by clarifying the meaning of sustainable development. Principle Eight declares "States should reduce and eliminate unsustainable patterns of production and consumption."[40] Principle Fifteen calls for wide application of the "precautionary approach," which maintains that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[41] Principle Sixteen adopts the "polluter-pays principle," which underscores the importance of applying free market principles to address environmental problems.[42] Principle Seventeen calls upon nations to undertake "environmental impact assessment as a national instrument . . . for proposed activities that are likely to have a significant

36 *Id.* princ. 1.

37 Robert J. Araujo, *Rio+10 and the World Summit on Sustainable Development: Why Human Beings are at the Center of Concerns,* 2 GEO. J. L. & PUB. POL'Y 201, 211 (2004).

38 *Id.* at 211-45.

39 Rio Declaration, *supra* note 13, princs. 4, 5.

40 *Id.* princ. 8.

41 *Id.* princ. 15. The rationale is that once environmental damage has occurred, it may be irreparable, as in the case of species extinction, ocean pollution, waste of non-renewable resources, or nuclear fallout. However, even if such damage was reparable, advance prevention is usually less costly than allowing the harm to occur and/or to find its cure. The burden of proof under this principle shifts to the party causing the harm, thereby resolving the problem of scientific uncertainty. Questionable risks, substances, or activities are to be prevented until proved safe by their development proponents rather than permitted until proved harmful by their opponents.

42 *See id.* princ. 16. *See generally* Sanford E. Gaines, *The Polluter-Pays Principle: From Economic Equity to Environmental Ethos*, 26 TEXAS INT'L L.J. 463 (1991).

adverse impact on the environment and are subject to a decision of a competent national authority."[43] Finally, Principles Eighteen and Nineteen adopt widely accepted notification and consultation principles.[44]

What is striking about the Principles discussed above is the emphasis on international cooperation and public participation throughout.[45] For example, there is a call for cooperation as an essential element "to decrease the disparities in standards of living" and similarly "to conserve, protect and restore the health and integrity of the Earth's ecosystem."[46] In addition, several other Principles emphasize the importance of public participation in the process of sustainable development, especially by women, youth, and indigenous people and local communities.[47] By emphasizing cooperation and participation, the Rio Declaration manages to take a much more human-centered approach, one that its predecessor, the Stockholm Declaration, lacked.[48]

Finally, the delegates at UNCED were particularly concerned with the linkage of international trade with sustainable development.[49] Principle Twelve calls for the states to "cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation."[50] This was in response to the fear that developed countries might use environmental concerns as an excuse to take protectionist measures and close

43 Rio Declaration, *supra* note 13, princ. 17.

44 Principle Eighteen reads: "States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted." *Id.* princ. 18. Principle Nineteen reads: "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith." *Id.* princ. 19.

45 *See, e.g.,* Rio Declaration, *supra* note 13, princs. 5, 7, 9, 12, 14.

46 *Id.* princs. 5, 7.

47 *See, e.g.,* princs. 10, 20, 21, 23.

48 The goal of the Stockholm Declaration was to "defend and improve the human environment for present and future generations," along with the "fundamental goals of peace and of worldwide economic and social development." Stockholm Declaration, *supra* note 29, para. 6. Moreover, Principle One of the Stockholm Declaration recognized an individual right to a quality environment and linked this right to a responsibility on the part of the individual "to protect and improve the environment for present and future generations." *Id.* princ. 1. As already noted, the environment-development linkage and integration was the focus at the Rio Conference, with priority to development and deference to the developing states' concerns. *See* M. Strong, *Beyond Rio: Prospects and Portents*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 21, 24-25 (1993) (Maurice Strong was Secretary-General of both the Stockholm and Rio Conferences).

49 Stockholm Declaration, *supra* note 29, at pmbl.

50 *Id*. princ. 12.

their markets to developing countries' products. Principle Twelve continues:

> Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.[51]

B. Agenda 21[52]

Agenda 21 is the blueprint for action—the "action plan" for implementation of the two conventions and the non-binding Principles of the Rio Declaration.[53] This plan further attempts to clarify the meaning of sustainable development and to provide content for the concept.[54] A detailed 500-page document, Agenda 21 also prescribes numerous policies, programs, and processes for international organizations and government officials to follow in order to implement the recommendations and declarations of the Rio Summit.[55] Today, over 2,500 actions cover a wide range of programs.[56]

Agenda 21's forty chapters are divided into four sections. Section One covers social and economic dimensions, and includes recommendations on sustainable development, consumption patterns, poverty, and integration of environment and development in decisionmaking.[57] Section Two covers conservation and management of resources for development, and includes chapters on the protection of the atmosphere, land resources, combating deforestation, desertification, and drought, agricultural development, biological diversity, protection of the oceans and of freshwater resources, management of toxic chemicals, and hazardous, solid and radioactive wastes.[58] Section Three includes ways to increase the participation of major groups in sustainable development efforts, including women, youth, indigenous peoples, NGOs, trade unions, and business and industry.[59] Finally, Section Four focuses on means

---

51 *Id.*

52 Agenda 21, *supra* note 23.

53 *See supra* Part II.A.

54 *See* United Nations Department of Economic and Social Affairs (UNDESA), *Agenda 21*, *available at* http://www.un.org/esa/sustdev/documents/agenda21/index.htm (last visited May 1, 2005).

55 *Id.*

56 *Id.*

57 Agenda 21, *supra* note 23, sec. 1.

58 *Id.* sec. 2.

59 *Id.* sec. 3.

of implementation, including chapters on technology transfer, financial resources and mechanisms, international institutional arrangements, and international legal instruments and mechanisms.[60]

Agenda 21 calls for an effective legal and regulatory framework and urges action on five fronts: (1) make laws and regulations more effective; (2) establish improved judicial and administrative procedures; (3) create legal reference and support services; (4) establish cooperative training networks for lawyers; and (5) develop effective regional, national, and local programs for implementing Agenda 21.[61] It also specifically addresses international legal instruments and mechanisms within four priority areas.[62] The first area calls for review and assessment of previous performance and priorities "for future lawmaking on sustainable development."[63] The second area concerns "[i]mplementation mechanisms" and calls for the establishment of "efficient and practical reporting systems on the effective, full and prompt implementation of international legal instruments."[64] The third area addresses "[e]ffective participation in international lawmaking," especially for developing countries.[65] The fourth area calls for avoidance and settlement of disputes and for effective dispute resolution techniques.[66]

C. The Commission on Sustainable Development

The U.N. General Assembly established the Commission on Sustainable Development (CSD) to assist in the implementation of the Rio Summit's recommendations and decisions.[67] The CSD is headquartered in New York and is composed of rotating elected representatives from fifty-three States.[68] The CSD was created to act as a central forum to review progress made in the implementation of Agenda 21 and to "advance global dialogue and foster partnerships for sustainable development."[69]

The mandate of the CSD is to first review progress in the

60 *Id.* sec. 4.
61 *Id.* sec. 2, chs. 8.11-8.22.
62 *Id.* sec. 4, ch. 39.
63 *Id.* sec. 4, chs. 39.5-39.7.
64 *Id.* sec. 4, ch. 39.8.
65 *Id.* sec. 4, ch. 39.9.
66 *Id.* sec. 4, ch. 39.10.
67 Report of the United Nations Conference on Environment and Development, G.A. Res. 190, U.N. GAOR, 47th Sess., 93d plen. mtg., U.N. Doc. A/RES/47/190 (1992).
68 *See* UNDESA, *About the Commission On Sustainable Development (CSD)*, *available at* http://www.un.org/esa/sustdev/csd/about_csd.htm (last visited May 1, 2005).
69 Programme for the Further Implementation of Agenda 21, G.A. Res. 2, U.N. GAOR, 19th Special Sess., Annex 1, Agenda Item 8, para. 16, U.N. Doc. A/RES/S-19/2 (1997).

implementation of recommendations and commitments arising out of UNCED.[70] Second, the CSD is to elaborate policy guidance and options for activities in pursuance of the goals of Agenda 21.[71] Finally, the CSD is to promote dialogue and build partnerships among governments, the international community and groups that have a significant role to play in bringing about sustainable development.[72] In particular, the CSD is to include indigenous peoples, women, youth, NGOs, scientists, labor, farmers, industry and business, and local authorities.[73]

III. WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT

The World Summit on Sustainable Development (Johannesburg Summit) met in Johannesburg from August 26 to September 4, 2002, attracting a large gathering of heads of state and other government officials, representatives of international organizations and leaders of civil society.[74] The U.N. General Assembly convened the Summit ten years after the Rio Summit "to reinvigorate the global commitment to sustainable development" and to "focus on the identification of accomplishments and areas where further efforts are needed to implement Agenda 21."[75] By all accounts, during the ten years following the Rio Summit, environmental degradations had worsened, poverty had deepened, and progress in implementing sustainable development had been disappointing.[76]

That the implementation of sustainable development had been disappointing was no secret. In June 1997, at a Special Session of the U.N. General Assembly just five years after the Rio Summit, it was noted that progress had been slow in several critical areas, including "the areas of finance and technology transfer, technical assistance and capacity-building."[77] The Special Session went further and identified three areas in need of attention: "[i]ntegration of economic, social, and environmental

70 Institutional Arrangements to Follow Up the United Nations Conference on Environment and Development, G.A. Res. 191, U.N. GAOR, 47th Sess., Agenda Item 79, para. 3, U.N. Doc. A/RES/47/191 (1993).

71 *Id.*

72 *Id.*

73 *Id. See also* UNDESA, *Mandate of the Commission on Sustainable Development*, *available at* http://www.un.org/esa/sustdev/csd/csd_mandate.htm (last visited May 1, 2005).

74 *See supra* note 2.

75 *See* Ten-Year Review of Progress Achieved in the Implementation of the Outcome of the United Nations Conference on Environment and Development, G.A. Res. 199, U.N. GAOR, 55th Sess., Agenda Item 95, paras. 1, 3; U.N. Doc. A/RES/55/99 (2001) (citation omitted).

76 *See, e.g., The Johannesburg Summit Test: What Will Change?,* Sept. 2005, *available at* http://www.johannesburgsummit.org/html/whats_new/feature_story41.html.

77 Programme for the Further Implementation of Agenda 21, *supra* note 69, para. 17.

objectives," "[s]ectors and issues," and "[m]eans of implementation."[78] To further integration, the General Assembly established the goals of eradicating poverty, changing production and consumption patterns, making trade and environment mutually supportive, and health and sustainable human settlements.[79] Freshwater, oceans and seas, forests, energy, transport, atmosphere, toxic chemicals, hazardous and radioactive wastes, land and sustainable agriculture, desertification and drought, and biodiversity and natural disasters were specifically targeted under the heading "Sectors and issues."[80] Among the means of implementation were financial resources and mechanisms, transfer of environmentally sound technologies, capacity-building, education and awareness, and information and tools for measuring progress were particularly noted.[81] The Special Session made recommendations about the CSD's program of work for the period 1998-2002, particularly emphasizing poverty reduction and consumption and production patterns.[82]

At the Johannesburg Summit, heads of state reaffirmed their commitment to achieving sustainable development and adopted two documents: the Johannesburg Declaration on Sustainable Development[83] and the Plan of Implementation.[84] However, unlike the Rio Summit, no legally binding instrument was produced and few significant targets and timetables were set. The Johannesburg Declaration did emphasize multilateralism, stating, "To achieve our goals of sustainable development, we need more effective, democratic and accountable international and multilateral institutions."[85] In addition, three especially noteworthy statements were made: two in the Johannesburg Declaration and one in the Plan of Implementation. The first statement recognized "a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental

78 *Id.* paras. 23-115.

79 *Id.* paras. 27-32.

80 *Id.* paras. 34-75.

81 *Id.* paras. 76-115.

82 *Id.* at app.

83 The Johannesburg Declaration on Sustainable Development, Sept. 4, 2002 [hereinafter Johannesburg Declaration], *available at* http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.htm.

84 World Summit on Sustainable Development Plan of Implementation, Sept. 23, 2002 [hereinafter Plan of Implementation], *available at* http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm.

85 Johannesburg Declaration, *supra* note 83, para. 31.

protection—at local, national, regional and global levels."[86] The second statement declared a commitment "to build a humane, equitable and caring global society cognizant of the need for human dignity for all."[87] In the final statement of importance, there was an acknowledgement of "the importance of ethics for sustainable development," and a "need to consider ethics in the implementation of Agenda 21."[88]

The Johannesburg Summit recognized "that poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base for economic and social development are overarching objectives of, and essential requirements for sustainable development."[89] The Plan of Implementation, divided in ten sections, focused on several critical goals for implementing Agenda 21. Some of these had been previously set forth in prior instruments, including Agenda 21 itself,[90] the U.N. Millennium Declaration,[91] the Doha Development Agenda,[92] and the Monterrey Consensus.[93] These were categorized under broad headings: poverty eradication,[94] changing unsustainable patterns of consumption and production,[95] protecting and managing the natural resource base of economic and social development,[96] sustainable development in a globalizing world,[97] health and sustainable development,[98] means of implementation,[99] and institutional framework for sustainable development.[100] Special provisions are contained for

86 *Id.* para. 5.

87 *Id.* para. 2.

88 Plan of Implementation, *supra* note 84, para. 5. The focus of the Johannesburg Summit on equity and ethics is important, and there have been recent efforts to incorporate these values into the processes of sustainable development and environmental policy. To illustrate, Juan Maldonado, former Minister of the Environment of Colombia, followed a similar call by U.N. Secretary-General Kofi Annan by promoting a text on ethics for sustainable development at the G-77 meeting in Bali that was a Prep-Com preceding the Johannesburg Summit. *See* Juan Mayr Maldonado, *Ethical Considerations for Sustainable Development,* 20 PACE ENVTL. L. REV. 663, 671-74 (2003).

89 Johannesburg Declaration, *supra* note 83, para. 11.

90 *See* Agenda 21, *supra* note 23.

91 United Nations Millennium Declaration, G.A. Res. 2, U.N. GAOR, 55th Sess., Agenda Item 60, U.N. Doc. A/RES/55/2 (2000).

92 World Trade Organization, *Ministerial Declaration*, 4th Sess., WTO Doc. WT/MIN(01)/DEC/1 (2001), *available at* http://www.wto.org/english/tratop_e/dda_e/dda_e.htm.

93 UNITED NATIONS, REPORT OF THE INTERNATIONAL CONFERENCE ON FINANCING FOR DEVELOPMENT, U.N. Doc. A/CONF.198/11, U.N. Sales No. E.02.II.A.7 (2002), *available at* http://www.un.org/esa/ffd/aconf198-11.doc.

94 Plan of Implementation, *supra* note 84, paras. 6-12.

95 *Id.* paras. 13-22.

96 *Id.* paras. 23-44.

97 *Id.* para. 45.

98 *Id.* paras. 46-50.

99 *Id.* paras. 75-119.

100 *Id.* paras. 120-153.

sustainable development of small island developing states,[101] Africa,[102] Latin America and the Caribbean,[103] Asia and the Pacific,[104] the West Asia region,[105] and the Economic Commission for Europe region.[106]

A few key commitments, targets, and timetables provided for in each of the above sections will be highlighted here:

Poverty Eradication. A sampling of the goals under this section include: (a) to "[h]alve, by the year 2015, the proportion of the world's people whose income is less than $1 a day and the proportion of people who suffer from hunger;"[107] (b) to "achieve a significant improvement in the lives of at least 100 million slum dwellers;"[108] and (c) to "[e]stablish a world solidarity fund to eradicate poverty and to promote social and human development in the developing countries."[109]

Water and Sanitation. The goal is to "halve by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water . . . and the proportion of people without access to basic sanitation."[110]

Sustainable Production and Consumption. The general goal of this section is to "[e]ncourage and promote the development of a 10-year framework of programmes . . . to accelerate the shift towards sustainable consumption and production."[111]

Energy. The overall goal is to diversify energy supply and substantially increase the global share of renewable energy sources.[112] In order to achieve this goal the plan calls for, among other things, an effort to "[i]mprove access to reliable, affordable, economically viable, socially acceptable and environmentally sound energy services and resources;"[113] and to "remov[e] market distortions, including restructuring taxation and phasing out harmful subsidies, where they exist."[114]

Chemicals. There are numerous provisions pertaining to the area of chemicals and in particular hazardous wastes. A few of

101 *Id.* paras. 52-55.
102 *Id.* paras. 56-65.
103 *Id.* paras. 67-68.
104 *Id.* paras. 69-70.
105 *Id.* paras. 71-72.
106 *Id.* paras. 73-74.
107 *Id.* para. 6(a).
108 *Id.* para. 10.
109 *Id.* para. 6(b).
110 *Id.* para. 24.
111 *Id.* para. 14.
112 *Id.* para. 19.
113 *Id.* para. 8(a).
114 *Id.* para. 19(p).

those provisions call for the need to (a) "renew the commitment, as advanced by Agenda 21, to sound management of chemicals . . . and of hazardous wastes;" (b) aim by 2020 to use and produce chemicals so that they do not result in "significant adverse effects on human health and the environment;"[115] (c) "[p]romote the ratification and implementation of relevant international instruments on chemicals and hazardous waste," including both the Rotterdam and Stockholm Conventions;[116] (d) by 2005, "[f]urther develop a strategic approach to international chemicals management, based on the Bahia Declaration and Priorities for Action beyond 2000;"[117] and (e) "[e]ncourage countries to implement the new globally harmonized system for the classification and labelling of chemicals" so the system is "fully operational by 2008."[118]

Protection and Management of the Natural Resource Base. There are two major areas of focus under this section:

Water. The idea is to "[d]evelop integrated water resources management and water efficiency plans by 2005."[119]

Oceans and Fisheries. The goal is to encourage by 2010 the application of "the ecosystem approach" for the sustainable development of the oceans,[120] and take specific actions to achieve sustainable fisheries, including "maintain[ing] or restor[ing] [depleted fish] stocks to levels that can produce the maximum sustainable yield . . . on an urgent basis and where possible not later than 2015."[121]

Atmosphere. In order to "[e]nhance cooperation at the international, regional and national levels to reduce air pollution,"[122] this section calls for, among others things, an effort to (a) "[f]acilitate implementation of the Montreal Protocol on Substances that Deplete the Ozone Layer by ensuring adequate replenishment of its fund by 2003/2005,"[123] and (b) to "[i]mprove access by developing countries to affordable, accessible, cost-effective, safe and environmentally sound alternatives to ozone-depleting substances by 2010, and assist them in complying with the phase-out schedule under the Montreal Protocol."[124]

115 *Id.* para. 22.
116 *Id.* para. 22(a).
117 *Id.* para. 22(b).
118 *Id.* para. 22(c).
119 *Id.* para. 25.
120 *Id.* para. 29(d).
121 *Id.* para. 30(a).
122 *Id.* para. 37.
123 *Id.* para. 37(b).
124 *Id.* para. 37(d).

Biodiversity. The overall goal is to significantly reduce biodiversity loss by 2010[125] and "to reverse the current trend in natural resource degradation as soon as possible."[126]

Forests. The goal is to "[a]ccelerate implementation of the IPF/IFF proposals for action by countries and by the Collaborative Partnership on Forests, and intensify efforts on reporting to the United Nations Forum on Forests to contribute to an assessment of progress in 2005."[127]

Corporate Responsibility and Accountability. For sustainable development, there is a need to "[a]ctively promote corporate responsibility and accountability . . . through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national regulations."[128]

Health. While there are a number of goals relating to health, some of the more pertinent include the enhancement of "health education with the objective of achieving improved health literacy on a global basis by 2010;"[129] "to reduce, by the year 2015, mortality rates for infants and children under 5 by two thirds, and maternal mortality rates by three quarters, of the prevailing rate in 2000;"[130] and to reduce "HIV prevalence among young men and women aged 15-24 by 25 per cent in the most affected countries by 2005 and globally by 2010, as well as combat malaria, tuberculosis and other diseases."[131]

Means of Implementation. There are a number of mechanisms of goal implementation including to "[u]rge the developed countries . . . to make concrete efforts towards the target of 0.7 per cent of GNP as ODA to developing countries;"[132] to ensure "that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling;[133] to "[r]ecommend to the United Nations General Assembly that it consider adopting a decade of education for sustainable development, starting in 2005;"[134] and to aim "at substantial improvements in market access, [and at] reductions . . . with a view to phasing out all forms of export subsidies, and substantial reductions in trade-distorting domestic

125 *Id.* para. 42.
126 *Id.* para. 23.
127 *Id.* para. 43(g).
128 *Id.* para. 45.
129 *Id.* para. 47(e).
130 *Id.* para. 47(f).
131 *Id.* para. 48.
132 *Id.* para. 79(a).
133 *Id.* para. 109(a).
134 *Id.* para. 117(d).

support, while agreeing that the provisions for special and differential treatment for developing countries shall be an integral part of [WTO Doha] negotiations."[135]

Institutional Framework for Sustainable Development. The goals include the "[i]ntegration of the economic, social and environmental dimensions of sustainable development in a balanced manner;"[136] to "[e]nhance the integration of sustainable development goals" into the work programs of relevant U.N. agencies;[137] and to enhance the role of the Commission on Sustainable Development.[138]

Other. On a cross-cutting issue, the plan intends to effectively prepare, manage, and mitigate natural disasters and conflicts.[139]

In addition, the Plan of Implementation pays special attention to Africa.[140] To illustrate, it undertakes a commitment to support "access [to energy] for at least 35 per cent of the African population within 20 years, especially in rural areas,"[141] to develop "food security" strategies for Africa by 2005,[142] to "[d]evelop and implement integrated river basin and watershed management strategies and plans for all major water bodies,"[143] and to promote "equitable access to health-care services . . . [and make] available necessary drugs and technology . . . [for] HIV/AIDS, malaria and tuberculosis," among other diseases.[144]

Another special feature of the Johannesburg Summit was the promotion of public-private partnerships for sustainable development between governments, businesses, and NGOs that are specifically linked to implementation of the agreed commitments in the Plan of Implementation and Agenda 21.[145] According to the chairman of the Johannesburg Summit Preparatory Committee, they are "focused on deliverables [that] would contribute in translating political commitments into action."[146] Although these partnerships are not seen as a substitute for government responsibilities and commitments,

135 *Id.* para. 86(c).
136 *Id.* para. 121(b).
137 *Id.* para. 122(a).
138 *Id.* paras. 127-32.
139 *Id.* paras. 35(g), 59, 99(e), 119.
140 *Id.* paras. 56-65.
141 *Id.* paras. 56(j)(i).
142 *Id.* para. 61.
143 *Id.* para. 60(b).
144 *Id.* para. 58(a)-(b).
145 Linkages, *Background Information on Type II Outcomes: Explanatory Note by the Chairman of the World Summit on Sustainable Development Preparatory Committee, available at* http://www.iisd.ca/wssd/partnerships.html (last visited May 1, 2005).
146 *Id.*

critics charge that they take the focus away from government agreements and

> provide an opportunity for multinationals to continue with business as usual and wrap their operations in the flag of the U.N. and sustainability to inoculate themselves against criticism. . . . When it comes to issues like climate change, it's clear that partnerships are incapable of making the necessary global connections. Commitments and leadership from governments are the only solution.[147]

IV. SUBSEQUENT DEVELOPMENTS

As the designated U.N. body to take the lead on reviewing progress toward realizing the commitments and meeting the targets agreed to in Agenda 21 and the Johannesburg Summit, the CSD reported in February of 2004 that the state of progress in implementing the Johannesburg Plan of Implementation is "moderately encouraging in certain areas."[148] As less than two years had lapsed since the Johannesburg Summit, the CSD report noted that implementation of the Plan "must be measured mostly in terms of process, although at national and local levels experience is richer and lessons are beginning to emerge."[149]

The Report covered the progress toward poverty eradication,[150] protection and management of the natural resource base,[151] changing unsustainable patterns of consumption and production,[152] means of implementation,[153] and international, regional, and national strategies for sustainable development.[154] It concluded that one of the most challenging areas remains managing the global commons.[155] More specifically, the report found faster progress in reducing risks to the marine environment from shipping than in reforming fishery subsidies.[156] On the other hand, it found progress has been slow

147 Nathaniel Wyeth, *Final Thoughts on the WSSD, available at* http://www.sierraclub.org/ssc/wssd/article.html (last visited May 1, 2005). For further critique of the WSSD, see the critique prepared by my co-author, George Pring, *The 2002 Johannesburg World Summit on Sustainable Development, in* VED NANDA & GEORGE PRING, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY FOR THE 21ST CENTURY 110-119 (2003).

148 *Overview of Progress Towards Sustainable Development: A Review of the Implementation of Agenda 21, the Programme for the Further Implantation of Agenda 21 and the Johannesburg Plan of Implementation*, U.N. ECOSOC, Commission on Sustainable Development, 12th Sess., Agenda Item 3, at 31, U.N. Doc. E/CN.17/2004/2 (2004).

149 *Id.*

150 *Id.* at 4-10.

151 *Id.* at 10-18.

152 *Id.* at 18-21.

153 *Id.* at 22-29.

154 *Id.* at 30-31.

155 *Id.* at 31.

156 *Id.*

in addressing climate change, slowing deforestation, biodiversity loss, and reform of developed countries' agricultural policies.[157] It also found progress related to corporate social responsibility that has also resulted in the increased availability of anti-retroviral drugs to the developing countries.[158] Poor countries have also received some debt relief.[159] At the regional level, however, the report found a mixed picture, with the biggest challenges in sub-Saharan Africa and most progress in poverty reduction in East Asia and to a lesser extent in South Asia.[160] Latin America and the Caribbean have made little progress.[161]

The report noted that the developed countries have shown global leadership toward sustainable development "far below their potential."[162] Official development assistance has remained far below international targets, markets have remained quite protectionist regarding "exports of particular interest to developing countries . . . [and much more needs to be done] to make consumption and production patterns more sustainable" in the developed countries.[163] On climate change, the report said that the developed countries' efforts to "develop and transfer cleaner energy technologies will be crucial to addressing climate change."[164]

The following year, in preparation for the CSD's thirteenth session in April 2005 in New York, its Division for Sustainable Development provided an update entitled *Partnerships for Sustainable Development*.[165] "A total of 300 partnerships had been registered with the CSD Secretariat as of February 15, 2005. Two-thirds of these partnerships (209) were registered around the time of the WSSD [Johannesburg Summit], and 91 partnerships have registered since the Summit."[166] According to the report, "a majority (98%) of registered partnerships have provided information on funding. Based on the information reported, 78% of registered partnerships (235) have funding and

157 *Id.*
158 *Id.* at 31-32.
159 *Id.* at 32.
160 *Id.* at 32-33.
161 *Id.*
162 *Id.* at 33.
163 *Id.*
164 *Id.*
165 Partnerships for Sustainable Development – Update, U.N. Department of Economic and Social Affairs, 13th Sess., Doc. DESA/DSD/2005/1 (2005) [hereinafter CSD Partnerships Report].
166 *Id.* at 2. Since the January 2004 U.N. Secretary-General's report on such partnerships, 34 new partnerships have registered with the CSD Secretariat. *See* Partnerships for Sustainable Development: Report of the Secretary-General, U.N. Doc. E/CN.17/2004/16 (2004). Currently, according to the 2005 report, 25 activities to initiate partnerships are also registered. CSD Partnerships Report, *supra* note 165, at 2.

20% (59) have yet to secure funding."[167] The sources of funding are varied with "72% reported having funding from Governments, 36% are receiving funding from intergovernmental organizations (including U.N. system organizations)[,] and 20% are receiving funding from private sector donors."[168] The level of funding, of course, varies, with four partnerships funded for over $100 million and eight partnerships between $10 million and $100 million. Fifty-six partnerships are less than $1 million.[169] 68% of all registered partnerships are currently seeking additional funding and the amount ranges from $100,000 to $82 million.[170]

A review of the report gives a snapshot of the efforts being put forth in existing partnerships in the area of water, sanitation, and/or human settlements, which is the focus of the current CSD policy session. The report gives special attention to these areas, outlining the trends in geographic coverage, timeframe, partner involvement, major groups involved, size, and resources of the partnerships.[171] Data in the report indicates that 60% are global and most (40%) were initiated in 2002.[172] The great majority (86%) have major group involvement as well as involvement of governments (82%), the U.N. system (59%), other intergovernmental organizations (55%) and other organizations, such as academic institutions (42%).[173] When major groups' numbers are disaggregated, the greatest numbers of partnerships are with NGO partners, while somewhat lower numbers are with scientific and technological partners, local authorities, and business and industry.[174] The average number of partners within water, sanitation and human settlements partnerships is seventeen.[175]

Most of these partnerships working in water, sanitation, and human settlements areas are also engaged in cross-cutting issues, many having a primary or secondary theme of protecting and managing the natural resource base, education, institutional framework for sustainable development, means of implementation, sustainable development for Africa, poverty eradication or sustainable development in a globalizing world.[176]

167 CSD Partnerships Report, *supra* note 165, at 8.
168 *Id.*
169 *Id.*
170 *Id.* at 9.
171 *Id.* at 10.
172 *Id.*
173 *Id.*
174 *Id.*
175 *Id.*
176 *Id.*

For example, the report notes that partnerships working on the cross-cutting themes of water, sanitation, and human settlements and of poverty eradication have undertaken target activities ranging from providing water services for agricultural and industrial projects and income generation to capacity-building projects for local institutions in poor areas, which can help to improve the quality of life in their communities.[177]

The report highlights the data compiled on a wide range of efforts in this focus area. Indications are that implementation mechanisms most often employed in this area include educational components in their plans, materializing in the form of information dissemination to raise awareness and instruction to school children and communities in basic sanitation and hygiene.[178] In the human settlement partnerships, regional centers are often used as information clearinghouses on sustainable urbanization efforts while others might use a model of networks organized around regional conferences or city-to-city cooperation.[179] 55% of these partnerships are engaged in technology transfer, "such as the construction of rainwater harvesting tanks on rooftops of schools to provide clean drinking water to children in communities with acute water shortage."[180]

In summary, as the data on partnerships shows, new partnerships are being launched and progress is slowly being made as these partnerships continue to grow. Although the amount of money is not huge, collaboration across all levels has increased. These partnerships continue to add value to the implementation of sustainable development goals and commitments as they share "skills, resources and expertise, and . . . develop innovative solutions to global concerns."[181]

V. APPRAISAL: SUSTAINABLE DEVELOPMENT TODAY

In an interview conducted fifteen years after the publication of *Our Common Future,* Dr. Brundtland responded to the question on how she views "sustainable development" today.[182] She responded:

> The phrase sustainable development embodies the concept of a development path that meets people's needs in a way that the social,

177 *Id.§* at 11.
178 *Id.*
179 *Id.* at 12.
180 *Id.*
181 *Id.* at 13.
182 Hans Christian Bugge & Lawrence Watters, *A Perspective on Sustainable Development After Johannesburg on the Fifteenth Anniversary of Our Common Future: An Interview with Gro Harlem Brundtland,* 15 GEO. INT'L ENVTL. L. REV. 359, 363 (2003).

> economic and environmental stock on which that development depends is not depleted in the process. The concept is as valid today as it was when it was first conceived.[183]

Notwithstanding Brundtland's reaffirmation, the developments at the Rio Summit, Agenda 21, and the Johannesburg Summit commitments and Plan of Implementation, critics still consider the concept a fuzzy one. According to one such critic, "[m]any analysts have come to regard it as an insubstantial and clichéd platitude unworthy of further interests or research, and perhaps even more significantly, theorizing of the idea seems to have reached something of an impasse."[184]

Criticism has also been leveled at the parties' commitment to reach the goals of sustainable development. For example, at the Johannesburg Summit there was no consensus on targets for the use of renewable energy. Also, few new promises beside those on sanitation and the marine environment were made at Johannesburg; and many of those that were made were considerably vague, such as the aim for a significant reduction in biodiversity loss and the promotion of clean fossil fuels.

Despite these criticisms, this author agrees with Professor Fernando's statement that "[t]o reject the concept is to tacitly accept unsustainability and is an admission of our failure 'to address the key conceptual and methodological challenges'" to providing a coherent framework so we might realize the goals of sustainable development.[185] Among several attempts to provide such a framework comes a social justice-centered perspective in rethinking sustainable development linking "inequality, capitalism, and sustainable development" in a more "direct and concrete" fashion.[186]

The International Law Association conducted a ten-year study to identify principles, norms, and rules of international law to provide a normative framework for sustainable development and suggested two sets of principles toward that end.[187] The

---

183 *Id.* at 363.

184 Jude L. Fernando, THE POWER OF UNSUSTAINABLE DEVELOPMENT: WHAT IS TO BE DONE?, 590 ANNALS 6, 7 (2003) (quoting Julian Agyeman et al., *Joined-Up Thinking: Bringing Together Sustainability, Environmental Justice and Equity, in* JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD (Julian Agyeman et al. eds., 2002).

185 Fernando, *supra* note 184, at 7 (quoting IAN DRUMMOND & TERRY MARSDEN, THE CONDITION OF SUSTAINABILITY 2 (1999)).

186 *Id.*

187 International Law Association, *Committee on Legal Aspects of Sustainable Development, Searching for the Contours of International Law in the Field of Sustainable Development* 6 (2002), *available at* http://www.ila-hq.org/pdf/Sustainable%20Development/Sustainable%20Development%20Final%20Report%202002.pdf.

ILA's general principles include (1) the observance of the rule of law in international relations; (2) the duty to cooperate toward global sustainable development; (3) the observance of human rights; and (4) the principle of integration.[188] Specific principles include (1) sovereignty over natural resources and the duty to protect the domestic as well as transboundary environment; (2) the sustainable use of natural resources; (3) intergenerational equity; (4) intragenerational equity; (5) common but differentiated responsibility; (6) common heritage of humankind; (7) the precautionary principle; (8) public participation and access to information; and (9) good governance and democratic accountability.[189]

Among others, Dr. Graham Mayeda reinterprets sustainable development through the principle of common but differentiated responsibilities and the precautionary principle, while rejecting intergenerational equity as "incoherent both from an ethical and a legal standpoint."[190] Alhaji Marong offers the precautionary principle, the environmental impact assessment principle and public participation in decision-making as the "three principles relevant to the question of how legal regimes could contribute to the realization of sustainable development."[191]

Despite criticisms, it must be acknowledged that sustainable development has become a central element of international discourse. As the above analysis of the current status of sustainable development indicates, sustainable development has assumed a prominent role on the international agenda. Whether and how it can be achieved will depend upon the political will and concerted international efforts by the developed as well as developing countries, international organizations, and civil society. As these parties continue to work together to find a solution, the concept and confines of sustainable development will continue to grow. What can be said from the current status of sustainable development is neither the concept itself or its ultimate purpose will be disappearing from that worldview anytime soon.

188 *Id.* at 6-7.

189 *Id.* at 8-10.

190 Graham Mayeda, *Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 29, 30 (2004).

191 Marong, *supra* note 4, at 64.

ENERGY, ENVIRONMENT & SUSTAINABLE DEVELOPMENT

Lakshman D. Guruswamy[*]

I. INTRODUCTION

This article is based on three major premises. The first is that the greatest international environmental challenge of the 21st Century is the manner and extent to which increasing global energy demand can be met within the framework of sustainable development (SD).[1] This idea underscores the fact that energy constitutes a primary life force in both developed and developing countries. The peoples of the world rely on cheap and accessible energy for transportation on land, air and water, using millions of cars, buses, trains, planes and ships. In addition, energy is essential for domestic and commercial heating and cooling in many parts of the world, as well as for agriculture, manufacturing, mining, information technology, and a variety of service industries. Furthermore, men and women the world over use a plethora of energy dependent personal devices and instruments from flashlights and laptops to telephones and watches.

Two important corollaries to this premise emphasize the pressing need for more and better quality energy especially in the developing world. First, 1.6 billion people, or one quarter of the world's population, preponderantly located in developing countries, do not have access to electricity.[2] The right of these

[*] Nicholas Doman Professor of International Environmental Law; Director, Energy Environmental Security Initiative, University of Colorado at Boulder. This article is based upon and reproduces significant parts of the author's white paper entitled *A New Framework: Post Kyoto Energy & Environmental Security*, *available at* http://www.colorado.edu/law/eesi/projectproposal.htm (last visited May 1, 2005).

1 Though extensively and ubiquitously employed there is no canonical or authoritative definition of the open-textured concept of "Sustainable Development." It is a difficult syncopated idea calling both for economic growth and environmental protection, and it is broadly perceived as development that uses and expands the human and natural resource heritage and base in a manner that meets the needs of the present generation without jeopardizing future generations.

2 INTERNATIONAL ENERGY AGENCY, WORLD ENERGY OUTLOOK 2002 365 (2d ed. 2002), *available at* http://www.iea.org/textbase/nppdf/free/2000/weo2002.pdf (last visited May 1, 2005).

countries to sustainable development is inconceivable without electricity. Second, 2.4 billion people rely on wood agricultural products and animal waste for their cooking and heating needs.[3] While wood and agricultural products may formally be classified as renewable biomass, the manner in which wood and agricultural products are collected, harvested and used has led to an acute loss of biodiversity and environmental degradation.[4] Consequently, if we are to meet our energy needs, and more pertinently, those of the developing world, we need to search for new sources of sustainable primary energy.

Primary energy refers to the kind of high energy required by modern humans that is found in natural resources such as coal, gas, crude oil, sunlight, and uranium and is subjected to anthropogenic conversion or transformation. Sustainable primary energy refers to energy that can be produced *without* causing significant and destructive environmental impact. Moreover, the search for new sources of sustainable energy must be paired with an unyielding and persistent thrust toward energy conservation and efficiency.

The second premise of this article is that it is not possible to move toward a sustainable energy future without new international instruments. The reference to international agreements is to a genus that could include a variety of multilateral and bilateral agreements, pacts, treaties, protocols and conventions dealing, *inter alia*, with science and technology (S&T), trade and investment (T&I), research and development (R&D), technology transfer, and SD. The task of finding new sources of energy to replace the present global reliance on hydrocarbons cannot be undertaken by one nation alone. Rather, it is a quintessentially international challenge calling for international responses. Thus, the principal objective of these instruments will be to facilitate the development of primary sources of energy, i.e. energy in its naturally occurring form, as well as energy conversion, transmission and end-use distribution.

This article's third premise is that it is necessary to provide decision-makers with a comprehensive scientific, engineering, economic and socio-political knowledge base and policy compass. This information base will illuminate pathways toward an integrated approach to the development and deployment of renewable energy through international instruments.

This article begins by making the case for new energy

3 *Id*.

4 *See* LAKSHMAN D. GURUSWAMY, INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL 129-32 (2d ed. 2003) [hereinafter NUTSHELL].

accords in Section II, followed in Section III by the delineation of a preliminary framework that allows for entities to enter into appropriate international agreements. Section IV addresses some questions not answered by the preliminary framework. Section V describes the need for a comprehensive treaty review that will form the baseline for the negotiation of new international instruments, and Section VI will provide a brief conclusion.

II. THE CASE FOR NEW ENERGY TREATIES

The case for new energy accords to address the challenge of sustainable energy is premised upon six widely recognized phenomena, including: (i) burgeoning energy demand, especially from the developing world; (ii) the fearful environmental consequences of using fossil fuels or hydrocarbons as sources of energy; (iii) the finite nature of oil and gas reserves; (iv) the energy insecurity caused by reliance on oil; (v) the unsatisfactory nature of the international legal response to the looming shortage of sustainable energy; and (vi) the lack of satisfactory technological, legal, economic and social mechanisms currently addressing the issue.

First, according to some estimates, today's current primary global power consumption of about 12 TW[5] will reach 30 TW by 2040.[6] Other forecasts suggest that total global energy consumption will expand by 54 percent between 2001 and 2025.[7] A significant and troubling portion of this projected increase in energy demand will occur in developing countries, which rely primarily upon the combustion of hydrocarbons, such as coal, to produce the electricity necessary to meet their energy demands.

As a result of the increasing reliance of developing countries on fossil fuels – particularly coal, which is the most carbon-

5 One terawatt (TW) equals 1,000 gigawatts or one million megawatts. *See* British Energy Website, *at* http://www.british-energy.com/corporate/safety/reports2002_03/begen_2002_03/glossary/glossary.htm (last visited May 1, 2005).

6 *See* Martin I. Hoffert et al., *Advanced Technology Paths to Global Climate Stability: Energy for a Greenhouse Planet*, SCI. MAG., Nov. 1, 2002, at 981; Martin I. Hoffert et al., *Energy Implications of Future Stabilization of Atmospheric CO_2 Content*, NATURE, Oct. 29, 1998, at 883. Future energy scenarios are based on complex demographic, socioeconomic and technological assumptions and, thus, may vary significantly.

7 ENERGY INFORMATION ADMINISTRATION, INTERNATIONAL ENERGY OUTLOOK 2004 1, 7 (2004), *available at* http://www.eia.doe.gov/oiaf/ieo/index.html (last modified Apr. 15, 2005 [hereinafter IEO 2004]. In addition, "[t]otal primary energy consumption . . . is projected to increase from 98.2 quadrillion British thermal units (Btu) in 2003 to 133.2 quadrillion Btu in 2025 (an average annual increase of 1.4 percent)." ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK 2005, para. 14, *available at* http://www.eia.doe.gov/oiaf/aeo/ (last modified May 1, 2005) [hereinafter AEO 2005].

intensive of fossil fuels – CO_2 emissions from developing countries will be *greater* than those of developed countries by 2020 despite the lower projected energy consumption levels by developing countries. In fact, in 2001, developing nations consumed about 64 percent as much oil as industrialized nations, and by 2025 they are expected to consume 94 percent as much as developed countries.[8]

Currently, the U.S. emits considerably more CO_2 from burning oil than any other country. For example, as of 2002, the U.S. was discharging more CO_2 than Africa and Western Europe combined, and more than twice as much as the amount emitted by India and China.[9] Unfortunately, the developing countries of Asia are projected to have the strongest energy consumption growth rate, which will account for nearly 40 percent of the entire projected increase in world energy consumption through 2025. For developing Asia alone, CO_2 emissions are projected to increase from 6,012 million metric tons in 2001 to 11,801 million metric tons in 2025.[10] During this same period of time, total U.S. CO_2 emissions from energy use are projected to increase by 0.6 million metric tons.[11]

Second, the environmental consequences of using fossil fuels or hydrocarbons to produce energy are formidable and fearsome. Apart from the possibility that hydrocarbons are greenhouse gases (GHG), which may cause anthropogenic global warming, the entire hydrocarbon energy cycle of production, mining, transportation, refinement, use, and emissions is fraught with daunting environmental and public health problems. The environmental and health effects of acid rain, heavy metals, and urban smog, which are created by the mining and burning of fossil fuels, can be damaging to both developing and developed countries.

Third, oil and gas are finite and non-renewable natural resources. While their finite nature is not in doubt, controversy abounds as to the extent, and the anticipated life span, of petroleum reserves.[12] There is sharp disagreement among experts about whether the world faces an imminent oil peak followed by an inevitable decline and exhaustion of resources.

8 IEO 2004, *supra* note 7, at 3.

9 ENERGY INFORMATION ADMINISTRATION, INTERNATIONAL ENERGY ANNUAL 2002, CARBON DIOXIDE EMISSIONS FROM USE OF FOSSIL FUELS (2004), *available at* http://www.eia.doe.gov/emeu/iea/carbon.html (last visited May 1, 2005).

10 IEO 2004, *supra* note 7, at 14.

11 *Id.*

12 One thing is clear: While geologists may discover possible oil resources, they will remain in the ground until petroleum engineers can convert those resources into actual producible oil reserves.

Advocates on both sides have relied on a variety of forecasting tools, and many issues were resolved when, after a five-year collaboration with representatives from the petroleum industry and other U.S. government agencies, the U.S. Geological Survey (USGS) completed a comprehensive study of petroleum resources in 2000. The "USGS World Petroleum Assessment 2000" has been viewed as the most thorough and methodologically modern assessment of world crude oil and natural gas resources ever attempted.[13] The U.S. Energy Information Administration (EIA) responded to the USGS study by providing the first federal analysis of long-term world oil supply since the study published by Dr. M. King Hubbert of the USGS in 1974.[14]

Although the USGS is less optimistic than the EIA this disagreement is not of particular relevance on this occasion because even the EIA conclusions, are consistent with the thesis of this article.[15] According to the EIA forecast, the peaking of oil resources will occur toward the middle of the century.[16] The specific date will partly depend on the rate of demand growth because higher demand for petroleum will accelerate and advance its exhaustion.

This article argues that such demand may be reduced through technological advancements in petroleum-product usage such as hybrid-powered automobiles, and the substitution of new energy source technologies, such as Hydrogen-fed fuel cells.[17] The demand for petroleum, it is further argued, can be reduced even more drastically if international instruments are used to facilitate an increased reliance on renewable energy.

---

13 *See* U.S. GEOLOGICAL SURVEY WORLD ASSESSMENT TEAM, U.S. GEOLOGICAL WORLD SURVEY PETROLEUM ASSESSMENT 2000 (2000) [hereinafter USGS SURVEY]. The assessment is available at http://energy.cr.usgs.gov/WEReport.pdf and on compact disc. A detailed analysis using the assessment appears in Alfred Cavallo, *Predicting the Peak in World Oil Production*, 11 NAT. RESOURCES RES. 187 (2002).

14 For a recent EIA presentation that references Dr. Hubbert's study, see JOHN WOOD & GARY LONG, LONG TERM WORLD OIL SUPPLY (A RESOURCE BASE/PRODUCTION PATH ANALYSIS) (July 28, 2000), *at* http://tonto.eia.doe.gov/FTPROOT/presentations /long_term_supply/index.htm.

15 While the EIA concludes that the world production peak for conventionally reservoired crude oil will be closer to the middle of the 21st Century than to its beginning, DOE's Office of Naval Petroleum and Oil Shale Reserves has not concurred with the EIA's projections and supports the thesis of an imminent oil peak. *See* John H. Wood et al., *Long-Term World Oil Supply Scenarios: The Future is Neither as Bleak or Rosy as Some Assert*, Aug. 18, 2004, *at* http://www.eia.doe.gov/pub/oil_gas/petroleum/feature_articles/ 2004/worldoilsupply/oilsupply04.html; OFFICE OF DEPUTY ASST. SECRETARY FOR PETROLEUM RESERVES, U.S. DEPARTMENT OF ENERGY, 1 STRATEGIC SIGNIFICANCE OF AMERICA'S OIL SHALE RESOURCE: ASSESSMENT OF STRATEGIC ISSUES 5 (2004), *at* http://www.fe.doe.gov/programs/reserves/publications/Pubs-NPR/npr_strategic_significan cev1.pdf.

16 *Id.*

17 *See* WOOD & LONG, *supra* note 14.

The fourth reason for new energy treaties is based on national security. Traditionally, national security has been associated with armed aggression and the ability to thwart military invasions or subversion. However, more contemporary concepts of security include critical threats to vital national and international support systems, such as the economy, energy and the environment. In this context, the increasing reliance on hydrocarbons has created energy, environmental and economic insecurity.

The concept of energy security is based on three pillars.[18] The first seeks to limit energy vulnerability by reducing dependence on oil use from unstable parts of the world.[19] The second attempts to offer access to adequate supplies at reasonable prices.[20] The third endeavors to prevent international sabotage of oil pipelines and cables, tankers, offshore and onshore installations.[21] Some of these are of particular relevance to this article.

Because the demand for oil and gas far exceeds the supply of those countries that rely most heavily upon them, these countries are compelled to import oil and gas from politically volatile parts of the world. For example, the Middle East, which contains half of the world's remaining conventional oil reserves, is projected to meet almost two-thirds of the increase in global oil demand between 2003 and 2030.[22] The International Energy Agency (IEA) reports that through the year 2010, nearly 80 percent of the expected increase in the world's demand for oil is likely to be supplied by Kuwait, Iran, Iraq, Saudi Arabia, the United Arab Emirate, and the Caspian Region, leaving Venezuela as the only major, low-cost, non-Middle Eastern petroleum producer.[23] According to an assessment by the Center for Strategic and International Studies, by 2020, half of the world's oil demand will be met from countries that have a high risk of internal instability.[24]

This phenomenon exposes many developed countries, including the United States, the European Union, and Japan, to

18 ENERGY SECURITY: MANAGING RISK IN A DYNAMIC LEGAL AND REGULATORY ENVIRONMENT 17-28 (Barry Barton et al. eds., 2004).

19 *Id.*

20 *Id*.

21 *Id.*

22 INTERNATIONAL ENERGY AGENCY, WORLD ENERGY INVESTMENT OUTLOOK 30 (2003).

23 CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS), EXECUTIVE SUMMARY: THE GEOPOLITICS OF ENERGY INTO THE 21ST CENTURY – REPORT OF THE CSIS STRATEGIC ENERGY INITIATIVE (2000), *available at* http://www.csis.org/sei/geopolitic sexecsum.pdf (last visited May 1, 2005).

24 *Id*.

shortages of vital energy sources and threats to national security. According to the present U.S. administration, this country faces the most serious energy shortage since the oil embargoes of the 1970s.[25] Estimates indicate that over the next 20 years, U.S. oil consumption will increase by 33 percent, natural gas consumption by as much as 50 percent, and demand for electricity will rise by 45 percent.[26] The implications of such increases in energy consumption are ominous.

Fifth, even taking into consideration the 1974 Agreement on an International Energy Program (IEP),[27] the 1992 United Nations Framework Convention on Climate Change (UNFCCC),[28] and the Energy Charter Treaty of 1994 (ECT),[29] all three of which are discussed further in Section IV, the global response to the world's energy crisis has been unsatisfactory. In 1997, the Kyoto Protocol attempted to address the danger of global warming by requiring reductions of carbon dioxide emissions. Unfortunately, Kyoto almost totally disregarded the need to find alternative sources of energy to supply the burgeoning energy needs of the world. Thus, even Parties to Kyoto recognized the absence of suitable energy options and, as a result, balked at cutting down on usage of coal.

The sidelining of Kyoto, this article argues, has been foreshadowed by an emerging consensus in the scientific community that the reports of the Intergovernmental Panel on Climate Change (IPCC) significantly overestimated the extent and availability of alternative sources of primary energy that

25 While experts disagree as to precisely when world oil production will peak, they are in general agreement that sooner or later this peak will occur. Estimates range from 2004 to 2112 with a median estimate of about 2037. The timing debate is essentially a dispute over the size of the world's endowment of recoverable oil, i.e., an amount consisting of global cumulative production, remaining reserves, reserve growth and undiscovered resources. THE ARLINGTON INSTITUTE, STRATEGY: MOVING AMERICAN AWAY FROM OIL 29 (2003), *available at* http://www.arlingtoninstitute.org/library/A%20Strategy%20-%20Moving%20America%20Away%20from%20Oil.pdf (last visited May. 1, 2005). In a probabilistic assessment study released in 2000, the U.S. Geologic Survey (USGS) estimated this endowment at approximately 3 trillion barrels of oil. On flip side of the debate, experts who disagree with this estimate generally posit the amount as being much closer to 2 trillion barrels. *Id.* To meet projected growth in the world's oil demand, worldwide refining capacity is expected to increase about 60 percent by 2025. AEO 2005, *supra* note 7, at 44.

26 *See* NATIONAL ENERGY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY 9 (May 2001), *at* http://www.whitehouse.gov/energy/National-Energy-Policy.pdf.

27 Agreement on the International Energy Program, Nov. 18, 1974, *available at* http://www.iea.org/Textbase/about/IEP.PDF.

28 United Nations Framework Convention on Climate Change, UNCED, May 9, 1992, S. Treaty Doc. No. 102-38, *reprinted in* 31 I.L.M. 849, *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf.

29 The Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360, *available at* http://www.encharter.org/upload/9/120520674515751158192049714743532131935190860213f2543v3.pdf

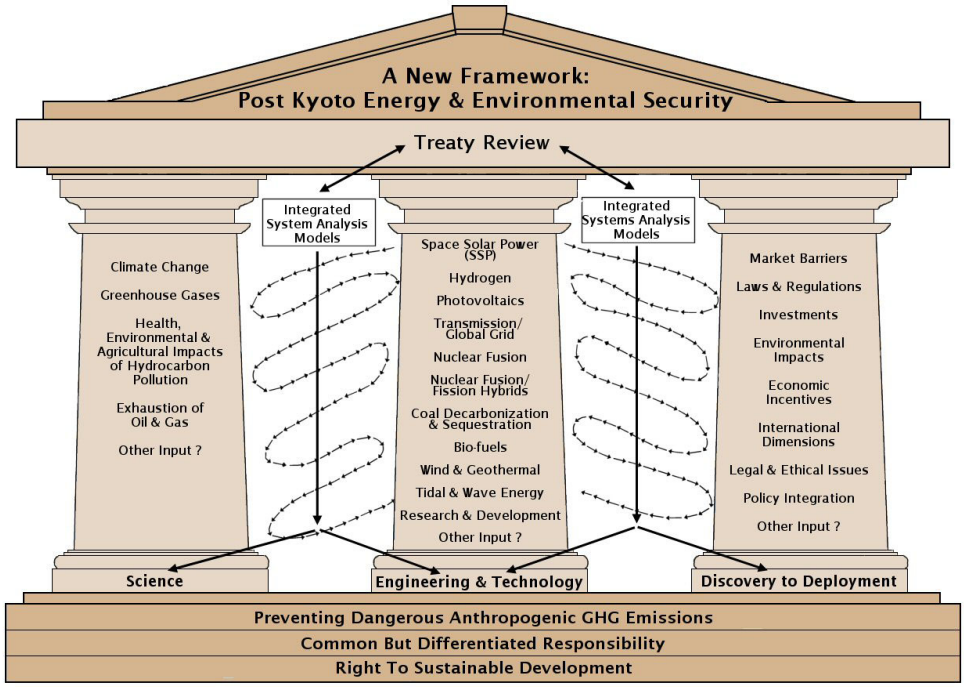
could fill the energy gap created by reductions in the use of coal and other hydrocarbons.[30] Russia's recent decision to ratify Kyoto may breathe some life into the agreement, but does not alter the fact that Kyoto fails to address the world's looming energy deficit by identifying and developing new sources of energy.

Sixth, the search for "smart energy" that is plentiful, efficient, and accessible enough to replace or supplement our present environmentally-damaging fossil fuel sources will involve new technological developments and creative assumptive frameworks, dealing inter alia with energy production, distribution, delivery, storage, conversion, end uses, and environmental protection. These technologies and assumptive frameworks need to be assessed and expressed in a manner that facilitates and secures global, national, and multinational corporate responses.

III. A PRELIMINARY CONCEPTUAL STRUCTURE

The relevance and appeal of any international instrument, and the extent of its acceptance, will depend in great measure on the strength of its scientific, engineering, technological, legal, social, economic and behavioral knowledge base and underlying analysis. For example, the instruments discussed in this paper must be multidimensional, and will require specific expertise, and entail diverse forms of analysis. Thereafter, the varying analytical strands, which are based on fragmented knowledge blocks dealing with science, technology, markets and deployment, will need to be integrated and configured into a sociopolitical aesthetic that lends itself to treaty-making. However, this kind of comprehensive analysis will involve a dynamic interactive process. The framework below, conceptualized as a Greek temple, is a preliminary attempt to provide a schematic of this process.

30 NUTSHELL, *supra* note 4, at 132.



The questions presented in the Doric columns of the figure must be critically evaluated by a broad spectrum of contributors and collaborators, including natural and physical scientists, social scientists, engineers, economists, philosophers and lawyers. These experts must evaluate the various subjects enumerated in the three columns, and such an effort must entail a dynamic and continuous assessment process for analyzing and exploring each column's components. This article will highlight seven facets of this undertaking in the following order: Foundations and Science (column 1) will deal with first and second facets, Engineering and Market Solutions (column 2) will cover the third, fourth and fifth facets, while Discovery to Deployment (column 3) will canvas the sixth and seventh facets.

A. Foundations and Science (Column 1)

First, there is a need for fundamental scientific research on a number of questions referred to in Column 1. Among the most important are those relating to the behavior and feedback of water vapor, clouds and their interaction with radiation, the importance of the stratosphere in the climate change system, and

the ocean.[31] Uncertainties still exist about narrow and broad currents along coastlines. Moreover, many changes affecting climate occur within the individual components of the climate system, e.g., atmosphere, ocean, cryosphere and land surface. These changes are compounded by the coupling and interface of two components of the climate system such as the atmosphere and the oceans.

Second, any such assessment must include the possible climatic perils posed by various GHGs; the health, environmental, and agricultural impacts of hydrocarbons; and projections concerning (1) the finite nature of geologic reserves of oil and gas, and (2) how long these particular hydrocarbons may last in the face of increasing world demand. There is an abundance of scientific writing discussing the environmental pollution caused by a range of activities from mining to the final disposal of fossil fuels, and an even greater mass of literature dealing with global warming and climate change. Natural, physical and atmospheric scientists can collaborate with distinguished research institutions and laboratories to synthesize and summarize these scientific findings.

B. Engineering Solutions & Markets (Column 2)

Third, this endeavor must include a ***Technical Review*** of potential engineering solutions, either established or in progress, addressing the various elements in Column 2.

1. Hydrogen

Hydrogen (H_2) holds promise as an ultra-clean, environmentally-friendly, and secure energy option for the world's energy future. Hydrogen can fuel pollution-free internal combustion engines, thereby reducing auto emissions by more than 99 percent. The U.S has focused on developing Hydrogen production, infrastructure, and fuel cell technologies for vehicles that could eliminate America's dependence on oil. In addition, Hydrogen could have broader use as a fuel of the future through stationary power generation and portable power systems, which could be used in consumer electronics.

The Draft Strategic Plan (DSP) of the U.S. Department of Energy (DOE) cogently argues and concludes that the challenge posed by energy insecurity should be addressed by the development of technologies that foster a diverse supply of

31 *See, e.g.*, IPCC, THIRD ASSESSMENT REPORT: CLIMATE CHANGE 2001: SYNTHESIS REPORT, *at* http://www.ipcc.ch/pub/reports.htm (last visited May 1, 2005).

affordable and environmentally sound energy.[32] Thus, in addition to further research into alternative energy and advanced nuclear technologies, the DSP envisions the creation of technologies that will enhance the efficacy of exploration, development and production processes for domestic oil fields. The DSP has also committed to developing new technologies for the DOE's Integrated Sequestration and Hydrogen Research Initiative (ISHRI). This initiative is a 10-year, $1 billion collaboration between government and industry for the purpose of designing, building, and operating FutureGen, which will be the world's first virtually zero-emission, coal-to-Hydrogen power plant. In addition, FutureGen is intended to serve as an international test facility for advanced carbon sequestration technologies.

Internationally, the U.S. envisions that the International Partnership for the Hydrogen Economy (IPHE) will foster the implementation of cooperative efforts to advance research, development, and deployment of Hydrogen production, storage, transport, and distribution technologies.[33] The IPHE will also enhance collaboration on fuel cell technologies, common codes, and standards for Hydrogen fuel utilization, and will help to coordinate international efforts to develop a global Hydrogen economy. In addition, the IPHE will seek to coordinate its efforts with the IEA's complementary work.

The creation of a Hydrogen economy faces many challenges, and prevailing uncertainties. An array of difficulties on technological, economic and infrastructural fronts could mean that the investments of today may not yield the Hydrogen economy of tomorrow. Although Hydrogen is the most abundant element in the universe, it occurs primarily in compounds on earth. Thus, H_2 needs to be produced from diverse primary sources, including natural gas, coal, nuclear power and renewable resources, e.g., wind and solar. Today, "[p]er unit of heat generated, more CO_2 is produced by making H_2 from fossil fuel than by burning fossil fuel directly."[34] In light of the problems encountered in producing and using it, Hydrogen can emerge as the fuel of the future only if other sources of primary energy, such as renewables or nuclear power, can be harnessed to produce H_2 more efficiently and safely.

---

32 DEPARTMENT OF ENERGY, DRAFT STRATEGIC PLAN 13 (Aug. 6, 2003), *at* http://strategicplan.doe.gov/Draft%20SP.pdf [hereinafter STRATEGIC PLAN].

33 *See* DOE, REVISED DRAFT: TERMS OF REFERENCE FOR THE INTERNATIONAL PARTNERSHIP FOR THE HYDROGEN ECONOMY (2003), *at* http://www.eere.energy.gov/hydrogenandfuelcells/pdfs/rev_terms_ref_iphe.pdf (last visited May 1, 2005).

34 Hoffert, *supra* note 6, at 983.

In contrast to an answer based on Hydrogen alone, producing more primary energy offers a win-win solution to the energy and environmental problems of the world. Finding better sources of primary energy will enable us to replace hydrocarbons regardless of whether we do so through Hydrogen. Consequently, it is necessary to explore the extent and feasibility of producing or harnessing more primary sources of energy, such as solar, wind, ocean thermal, geothermal, tidal power, de-carbonized coal, nuclear fission, fusion and other hybrid technologies, which could replace hydrocarbons and perhaps, though not necessarily, be used to produce Hydrogen.

2. Other Sources of Primary Energy

Despite Hydrogen's possible shortcomings, it is difficult to refute its promise and the desirability of moving to a Hydrogen economy. However, the idea of producing more primary energy based on renewable sources, as well as "new traditionals," e.g., hydrocarbons stripped of their defects, offers a better transitional, as well as final, outcome to the energy crisis. As a transitional strategy, finding new sources of energy will ease the move to a Hydrogen economy. As a final outcome, new sources of energy will always be required to create Hydrogen. Consequently, the development of new sources of primary energy will ultimately enable us to replace hydrocarbons while simultaneously moving toward a Hydrogen economy.

In addition to evaluating the feasibility of producing Hydrogen through such renewable energy sources as solar, wind, ocean thermal, geothermal, tidal power and biofuels, any complete assessment must also canvass technologies that have the potential to facilitate an optimal Hydrogen economy transition by significantly contributing to the availability and utilization of primary energy sources. Candidate technologies referred to in the diagram above include solar space power, de-carbonization and sequestration of carbon dioxide from fossil fuels, nuclear fission, nuclear fusion, and fission-fusion hybrids. This aspect of the study must also traverse Hydrogen production, storage and transport, superconducting electric grids, and energy conservation and efficiency.

For example, in examining solar space power, the ***Technical Review*** should assess the feasibility and strategic efficacy of utilizing space-based geo-engineering and wireless power transmission to capitalize on the unique attributes of space in order to provide energy on Earth. Of particular importance to the geopolitics of energy is the possibility of using satellites to beam solar energy to developing equatorial countries that might

otherwise rely on fossil fuels. In addition, a comprehensive analysis of energy options conducive to the attainment of a Hydrogen economy requires the examination of the potential for producing Hydrogen with both nuclear fission and fusion. Such an analysis must also explore technologies and techniques capable of mitigating the adverse environmental impacts of fossil fuel utilization, and evaluate the extent to which decarbonization and carbon sequestration can effectively remediate these impacts. An assessment must also explore the potential for conservation techniques and efficiency technologies to assist in meeting the energy demands of an increasingly voracious global population.

Fourth, the effort must address the ***Market Barriers***, as distinct from technical hurdles, to deploying technology and attracting investment.[35] Deployment refers to the commercial adoption, market viability, penetration and societal acceptance of renewable energy technologies. Currently, there is a cluster of renewable energy technologies, such as those harnessing wind energy, that are commercially viable. However, there are other technologies, including some referred to in Column 2, which may take many decades to come online. Thus, an assessment should identify present market barriers to the deployment of new renewable energy technologies, including high costs and financial barriers of new technologies, issues of sunk costs, information barriers, transaction costs, price distortions, capital turnover rates, market organization and regulations that make deter or delay operation.

Fifth, any effort must address the extent to which ***Organizational and Technological Infrastructure*** could reduce the time lines from discovery to deployment that can currently take up to six decades. The journey from invention to demonstration projects to commercially viable technologies and services capable of market penetration can be an arduous one. Organizationally, the length of time from discovery to market can be shortened by the extent and efficacy of horizontal networks that weave together R&D, capital, knowledge, products and talent.[36] However, such an endeavor requires the active collaboration of governments, private firms, research institutions, financiers, suppliers and consumers. In addition to other precedents for international collaboration, i.e., those offered

35 *See generally* IEA, ENHANCING THE MARKET DEPLOYMENT OF ENERGY TECHNOLOGY: A SURVEY OF EIGHT TECHNOLOGIES 16 (1997), *at* http://www.iea.org/textbase/publications/newfreedetail2.asp?F_PUBS_ID=547 (last visited May 1, 2005).

36 George Gilboy, *The Myth Behind China's Miracle,* 83.4 FOREIGN AFFAIRS 33, 41 (Aug. 2004).

by high-energy physics, nuclear fusion and astronomy, the ISHRI process may provide a model for the sort of public and private collaboration required. One thing is clear: Any large-scale effort must examine these and other collaborative ventures with a view toward drawing up possible road maps to achieve a higher level of organization in getting from discovery to market deployment.

On the technological front, the present hub-and-spoke energy transmission networks that currently form the grid system were designed for central power plants close to users. However, in some cases, renewable energy needs to be conveyed thousands of miles. For example, the winds on the plains of North Dakota could make substantial contributions to the energy needs on either U.S. coast. However, the absence of necessary transmission lines and grids prevents the transfer of wind power from North Dakota to the Pacific or Atlantic Coast.[37]

Moreover, while cost-effective photovoltaics and wind turbines, which may serve as catalysts for Hydrogen production, may be expected to come online in the foreseeable future, they presently face formidable transmission problems due to their intermittent and dispersed character. It has been suggested that an advanced global electric grid is a possible alternative to conventional power distribution systems.[38] Consequently, national grid systems may need to be re-engineered, particularly as there is currently no global grid system that could ensure worldwide distribution of photovoltaic, wind, or space solar power. Therefore, any assessment must examine the feasibility of re-engineering national and international grids.

C. Discovery to Deployment (Column 3)

The third column depicted in the above schematic calls for a multi-tiered analysis of the legal, sociopolitical and economic challenges of achieving a sustainable global energy future. As already stated, any such analysis must explicitly recognize and incorporate the need for economic strategies, incentives and modalities for promoting both government and private investment in developing the S&T necessary to make progress toward a clean energy future. This aspect of the project must also address the attendant questions of technology transfer and property rights. While the concept of sustainable development will provide the initial framework for dealing with these issues, it will be necessary to formulate a functional definition of sustainable development, i.e., as it relates to both energy and

37 VACLAV SMIL, ENERGY AT THE CROSSROADS 277–78 (2003).
38 *Id*. at 984.

environmental security. The proffered definition of SD should also lend more specificity to the three interconnected foundational obligations established by the UNFCCC, which are discussed below in Section V(D).

Sixth among the factors enumerated above, is the fact that the technical and economic barriers to the deployment of renewable energy technologies are heavily influenced by governmental decision-making. In fact, governmental regulation dealing with economic incentives, taxes, charges, subsidies, licensing, R&D, conservation and environmental regulations could encourage or discourage the use of renewable energy. Thus, any assessment must identify government regulations that have successfully encouraged market deployment of renewable energy technologies.

Seventh, although R&D policies are referred to in column 2 and subsumed under Governmental Regulations in column 3, the importance of R&D merits discussion on its own merits. The required investment in R&D for the technologies referred to in Column 2, especially space solar power, fission, and Hydrogen, will reach billions of dollars. Technologies accelerated by government research, such as gas turbines, commercial aircraft, spaceflight, radar, lasers, integrated circuits, satellite telecommunications, personal computers, fiber optics and cell phones, took less than multiple decades to move from invention to markets.[39] Currently, however, almost all energy technologies are developed and sold by corporations in the private sector. Thus, while there is little doubt that government-sponsored basic science and technology research is vital,[40] it is equally important to recognize the critical role of private capital and research. In looking at the interplay between the public and private sectors, difficult questions persist about the extent, stage, character and form of focused government R&D expenditures, and how they might be synthesized with private research.

IV. REMAINING QUESTIONS

The foregoing offers a preliminary evaluation – the final picture will emerge only after an integrated policy analysis and assessment is performed. The final stage of such a project will paint a comprehensive account of the scientific, technological, economic, engineering and socio-legal contours of potential primary energy sources, i.e., those that can be used to facilitate

39 Martin I. Hoffert et al., *Response*, 300 SCIENCE 581 (2003) (responding to Brian O'Neill et al., *Letter to the Editor*, 300 SCIENCE 581 (2003)) [hereinafter *Response*].

40 *See id.*

the development of a non-hydrocarbon, and possibly even a Hydrogen, economy. It is at that point that an interdisciplinary assessment, pursued within an integrated and interdisciplinary framework that spans the physical, chemical, biological, social and political sciences, as well as economics, engineering and the law. Such an analysis should focus on the identification and analysis of general and specific solutions to the broad array of issues and problems implicated by transition scenarios.[41] Overall, the assessment will have to include an evaluation of the strengths, weaknesses, costs, and environmental impacts implicated by such transition scenarios, and offer informed conclusions on the extent to which renewable or other energy options are capable – or incapable – of adequately meeting the Hydrogen challenge.

V. LEGAL FOUNDATIONS & TREATY REVIEW[42]

Numerous questions still abound. One such question is: Who will sponsor these instruments? Other questions pertain to the number of countries involved as well the subject matter. The prospect of negotiating a global treaty in law-making assemblies that include almost all nations of the world, such as a Conference of the Parties under UNFCCC or a freestanding framework convention on energy, seems bleak. Comprehensive global agreements are notoriously difficult to negotiate and implement. It may be more feasible to consider drafting a targeted yet limited and functional instrument that includes Organization for Economic Cooperation and Development (OECD) countries as well as stakeholder developing countries such as China and India. Science and technology as well as trade and investment agreements may be the easiest from a negotiating standpoint, but run the risk of fragmenting the necessary global response.

It is perfectly conceivable that targeted pragmatism may prevail over comprehensive idealism. Consequently, an ambitious protocol encompassing all sources of energy may prove too complex. Rather, it is more likely that consensus may form around a more narrowly tailored protocol that, for example, focuses only on de-carbonization and sequestration, space solar power, or fission-fusion hybrid technologies. One such instrument is the United Nations Statute establishing the

41 *See generally* DOE, A NATIONAL VISION OF AMERICA'S TRANSITION TO A HYDROGEN ECONOMY (2002); DOE, NATIONAL HYDROGEN ENERGY ROADMAP (2002), *at* http://www.eere.energy.gov/hydrogenandfuelcells/pdfs/vision_doc.pdf (last visited May 2, 2005).

42 The following section is a description of the work undertaken by the Energy Environmental Security Initiative (EESI) of the University of Colorado at Boulder.

International Atomic Energy Agency (IAEA), which is a precedent-setting treaty dealing with only one source of energy: civilian nuclear power.[43] Numerous treaties addressing differing aspects of nuclear power have been negotiated under the aegis of the IAEA.[44] In addition, the U.S. recently created an International Partnership for the Hydrogen Economy (IPHE), which is comprised of 15 countries, including the European Union and India, and will focus on the advancement of Hydrogen R&D.[45] Clearly, the particular content and scope of a proposed draft energy instrument will depend on unfolding scientific, technological and geopolitical developments.

A. Rationale for Treaty Review

The task of facilitating the design and negotiation of new instruments is better undertaken when such instruments can be examined against the backdrop, and integrated with, prior international endeavors. Doing so will offer opportunities for building upon strengths while avoiding weaknesses of the existing treaty overlay. The University of Colorado's Energy Environmental Security Initiative (EESI) has chosen to begin the treaty-review process by undertaking a crosscutting ***Sustainable Energy Treaty Analysis*** **(SETA)**, which offers an overview of EESI's research agenda, while simultaneously crafting the project 's legal foundation.

The challenges caused by renewable energy have been addressed, with varying success, in a variety of ways by countries throughout the world. Researching the individual responses of each country to determine how each nation responded is a Sisyphean task. A number of these problems, nonetheless, are common to many nations of the world who have recognized their inability to solve them purely by their own endeavors. This realization has led them into cooperative international agreements addressing these issues. Such international agreements distil and re-state the thinking of the parties, while revealing how different countries have responded to common problems. A study of treaties, therefore, becomes a pathway for garnering the world's common understanding and perception of the energy crisis, and the attendant global responses.

43 Agreement Governing the Relationship Between the United Nations and the International Atomic Energy Agency, G.A. Res. 1145, U.N. GAOR, 12th Sess., at 55 (1957).

44 For more information on the IAEA, see http://www.iaea.org (last visited May 1, 2005).

45 For more information on the IPHE, see http://www.iphe.net/ (last visited May 1, 2005).

International Environmental Law (IEL) offers a compelling analogy. A review of the environmental laws of the various nations comprising the international community reveals the extent to which environmental problems – whether arising from air and water pollution, land use, or exploitation – are omnipresent. In large part, this is because the laws of nature can give rise to identical biophysical reactions. For example, if the receiving medium is the same, then the discharge of waste or residuals, whether in Los Angeles, Liverpool, Düsseldorf or Auckland, will lead to pollution, i.e., because common biophysical reactions take place regardless of where in the world the environment is abused. Likewise, polychlorinated biphenyls act to cause cancer in West Virginia in the same way as they do in Newcastle upon Tyne, UK or Colombo, Sri Lanka.

In addressing these common problems, nation states have often arrived at common regulatory patterns of control. In large part, this is because national boundaries do not serve as biophysical or chemical boundaries. Perhaps more significantly, national boundaries do not serve as biophysical or chemical boundaries. Rather, pollution sometimes migrates from one area to another, thereby causing transboundary legal problems that fall within the province of international, not national, law. The customary IEL principle prohibiting a state from using its property to injure that of another responds to this phenomena, reflects the climate of world opinion, and symbolizes the confluence of national and international law. This principle is restated in numerous declarations and treaties founded upon a universal appreciation of the need to control damage caused by pollution. These articulations recognize a principle, rooted as much in national law as in international comity that has become part of the common law of humankind.

There are a range of international instruments that deal with renewable energy and address R&D, T&I, S&T, energy efficiency, energy conservation, energy transit, technology transfer and energy markets. As part of its comprehensive ***Treaty Review***, EESI will examine all such relevant energy treaties and instruments, although apart from the IEP and the ECT, most of the other agreements are piecemeal efforts designed to deal with discrete questions on a case-by-case basis. In addition, the ***Treaty Review*** will examine a range of related and analogous international (government to government); transnational (private agreements crossing national boundaries); and corporate efforts addressing renewable energy, high energy physics, fusion, and space exploration to determine the most effective and efficient forms of international cooperation.

EESI researchers will analyze the information yielded by the ***Treaty Review*** with a view toward developing an integrated analytical map, which depicts the existing overlay of engineering, geopolitical, socioeconomic, environmental and commercial responses embodied in treaties. This map will be superimposed upon the conceptual vision of EESI in order to provide a cartography of energy challenges and responses. In addition, EESI will also attempt to distil the objectives, principles, cooperative frameworks, institutional structures and dispute settlement mechanisms that might be relevant to the creation of new, and more comprehensive, instruments addressing renewable energy.

The world will be divided into hubs-and-spokes, i.e., with the ***Treaty Review*** organized around the following geographic hubs: (1) United States; (2) International Energy Agency (IEA); (3) European Union (EU); (4) China; and (5) India.

B. Why Begin With The United States?

There are a number of reasons for beginning a treaty review with the U.S. First, from a geopolitical standpoint, the U.S. is the only superpower in the world and has always played a dominant role in forging agreements addressing different facets of energy security. In fact, within the last 40 years, the United States has entered into nearly 350 energy agreements, as well as over 500 agreements dealing with atomic energy.

The U.S. was instrumental in setting up the IEP, which was a response to the energy crisis of 1973–74 when the Arab oil embargo sent oil prices spiraling upward and left the major industrialized countries feeling very vulnerable. Led by the U.S., the rich industrial countries of the world, who were members of the OECD, responded with the IEP, which was a new international treaty aimed primarily at ensuring an adequate supply of oil at an affordable price, and created a new international organization, the IEA, as its implementing agency. More recently, the U.S. has renewed its commitment toward global leadership by hosting the inaugural meeting of the IPHE.[46]

Second, the U.S. recognizes the nature of the energy insecurity confronting the world and is committed to addressing

46 Fact Sheet, U.S. Department of Energy, International Partnership for the Hydrogen Economy (IPHE) (Nov. 25, 2003), *at* http://www.state.gov/g/oes/rls/fs/2003/25983.htm; *see also* DEPARTMENT OF ENERGY: TERMS OF REFERENCE FOR THE INTERNATIONAL PARTNERSHIP FOR THE HYDROGEN ECONOMY (2003), *at* http://www.eere.energy.gov/hydrogenandfuelcells/pdfs/rev_terms_ref_iphe.pdf (last updated Oct. 31, 2003).

it. The DOE is principally a national security agency and this core objective governs all its other activities. Thus, safeguarding energy security lies at the heart of its mission.[47] As previously stated, in the United States, demand for oil is projected to increase by nearly 50 percent by 2025. Petroleum imports already supply more than 55 percent of U.S. domestic needs, and those imports are projected to increase to more than 68 percent by 2025. Because this growing dependence on foreign sources of energy threatens our national security,[48] it is important to understand how the U.S. has addressed the international ramifications of energy security in the past.

Third, between 1974 and 2004, the U.S. entered into hundreds of energy treaties where, for a variety of reasons, the energy challenge called for U.S cooperation with other countries. The EESI ***Treaty Review*** of this large corpus of U.S. energy treaties is facilitated by the treaties' availability and accessibility. In the initial research phase for this project, EESI will identify and analyze all bilateral and multilateral international energy agreements to which the U.S. is a party or active participant.

C. Organizational Structure

Formal U.S. treaties can be identified using the State Department's Treaties in Force. In addition, there are a number of search engines, such as HeinOnline, Westlaw, LexisNexis and Oceana, that can be used to identify U.S. international energy treaties. Executive agreements, however, are also a particularly fertile area for this type of research. While executive agreements are not considered treaties under U.S. law, in some situations, they are nevertheless construed as binding international agreements. Thus, the research for this project will not only need to identify and analyze formal U.S. energy treaties, but also two categories of executive agreements: (1) those that are considered binding international treaties under international law; and (2) informal agreements and general memorandums of understanding, which are a species of international contract. This type of study will help draw a baseline from which the next steps and the new contours of U.S. energy policy may be drawn.

Using a variety of print and online reference sources, EESI has preliminarily identified approximately 500 U.S. treaties dealing with atomic energy. The search of primary U.S. treaty

47 STRATEGIC PLAN, *supra* note 32, at 5.

48 DEPARTMENT OF ENERGY, HYDROGEN POSTURE PLAN 3 (Feb. 2004), *at* http://www.eere.energy.gov/hydrogenandfuelcells/pdfs/hydrogen_posture_plan.pdf.

sources, however, is not yet complete. Therefore, it is entirely possible that the number of U.S. atomic energy treaties identified will exceed 600. With respect to other types of U.S. international energy agreements, EESI has identified 340 U.S. treaties dealing with energy, and the identification of non-atomic U.S. international energy agreements is still continuing. Additionally, research has yet to begin on congressional-executive agreements and sole executive agreements. Thus, the preliminary analysis of the identified agreements has only partially begun.

Given the considerable amount of information this database seeks to encompass, it is essential to organize the identified agreements into pre-established typologies. For instance, U.S. agreements will be categorized according to their legal status, e.g., U.S. treaty (as defined under U.S. law); congressional-executive agreements; and executive agreements. Additionally, each of these agreements will need to be categorized according to subject matter, e.g., renewable energy (and all appropriate sub-categories); nuclear fission; fossil fuels (and all appropriate sub-categories). Each agreement will also be grouped according to its general purpose, e.g., S&T Agreements; R&D Agreements; commercial agreements.

Certain categories, such as purpose or subject matter, will need to work in conjunction with a relevancy hierarchy. For instance, an international agreement may be "primarily," "substantially," or "nominally" relevant to the subject-matter category of "natural gas." Thus, in addition to identifying international energy agreements, EESI's research will also need to cover a preliminary analysis of each identified agreements in order to assign predetermined "signals" to the overall agreement and various parts of the text. This will enable the database to be fully searchable using a variety of field combinations.

Following such identification and categorization, EESI will evaluate each treaty's relevance to energy and environmental security and embark upon a comprehensive analysis of the treaty's implementing machinery, the extent to which implementation has been carried out, and any tangible results achieved, as well as the implications of those results. EESI will use this information to build a freely accessible, online database, which will expand into a truly global undertaking. The database will assist researchers in understanding (1) the impact of these agreements (and their attendant organizations) on key domestic and international policy issues, such as the environment, the economy, and energy security; and (2) the extent to which these agreements can be used to facilitate progress toward a

sustainable global energy future.

Moreover, such a database program, using Geographic Information System (GIS) software to display information in a variety of formats, will have considerable pedagogical value. GIS will enable the information to be accessed and combined with other sources, thereby catering to a spectrum of differing user needs. Simply put, researchers could use this program to visually depict different types of energy agreements between countries, as well as international blocs, and to display other attributes, e.g., levels and types of implementation. In addition, this type of program would be a very effective method for teaching undergraduate and graduate students about the role and efficacy of international energy agreements.

This project will enhance the understanding of the efficacy of international energy agreements in achieving their stated goals, and enable the formulations of an integrated analytical map of the technological, geopolitical, socioeconomic, environmental and commercial responses embodied in these agreements. The database will also further sharpen an appreciation of how to utilize and configure international energy agreements in order to help facilitate progress toward a sustainable global energy future.

The comprehensive informational database created by EESI will enhance the knowledge and understanding of key U.S. and international legal and policy questions relating to natural resources, energy and the environment. Sources of energy are critical natural resources, which impact a host of U.S. and international issues relating to economic growth, energy security and sustainable development. Thus, a systematic assessment of international energy agreements entered into by the U.S. will 1) illuminate how America and its treaty partners deal with common challenges; 2) how the parties have succeeded or failed to address various problems; and 3) disclose how America's treaties interface with the existing U.S. statutory and regulatory energy provisions. In addition, specific treaties may provide models for new agreements and suggest an optimal manner of implementation.

D. Foundational Treaties

Three existing treaties are of particular importance: the IEP and the UNFCCC, to which the United States is a Party, and the ECT. Ensuring the stability and security of oil supplies remains the primary objective of the IEA, although its mission is supplemented by a number of environmentally significant long-term objectives pertaining to the conservation of energy, the

development of alternative sources of energy, and the R&D of renewable energy. In fact, the latter objectives have assumed great practical importance, and have led the IEA to create a number of Standing Groups and Working Parties dealing with different aspects of the energy-environmental interface. The IEA has also facilitated a host of Implementing Agreements on a variety of renewable energy frontiers, including advanced fuel cells, photovoltaic power systems, Hydrogen, and wind turbine systems.

Internationally, the IEA has become the primary functional engine for facilitating renewable energy research. However, the operational significance attached by the IEA to renewable energy does not arise from legally binding obligations, i.e., the IEP does not contain any legal requirements regarding the creation, transmission and deployment of renewable energy to address the current energy and environmental insecurity. Rather, the renewable energy aims of the IEP are hortatory, not mandatory, and remain secondary to the treaty's primary objective.

In addition, the IEA is essentially comprised of rich developed nations, and does not include developing countries, such as China and India, which, by 2015, will emit more carbon dioxide than the combined emissions of IEP Parties. Moreover, while the IEA has sought to include some developing countries in its Implementing Agreements, such developing countries remain invitees, not peers, and lack parity of status with IEP members. Therefore, new international instruments, which include developing countries as primary parties and stakeholders, could (1) offer better vehicles for fulfilling the work begun by the IEA, and (2) more sharply clarify and define the rather vague and amorphous renewable energy mandates of the IEP, as well as rendering them more specific and enforceable.

The ECT, which came into force in 1998, has sought to provide a non-discriminatory legal foundation for international energy cooperation by facilitating agreements dealing with investment protection, trade in energy, freedom of energy transit, and improvements in energy efficiency. The ECT has been ratified by nearly fifty nations comprised primarily of countries in old and new Europe and the now independent countries of the ex-Soviet Union. The treaty is mainly focused on trade and investment, and provides for the protection of foreign outlay, which helps to ensure a stable basis for cross-border investments among countries with differing social, cultural, economic and legal backgrounds.

In 1998, under the ECT's umbrella, the Parties negotiated a Protocol on Energy Efficiency and Related Environmental

Aspects, which provided a platform for cooperation in the development of energy efficiency. However, although the ECT has taken a step toward global energy cooperation, it does not specifically address how to develop primary sources of renewable energy, and the Parties have, thus far, been unable to agree on a Protocol that addresses either renewable energy or the re-engineering of infrastructure. Moreover, the United States, China, India, Japan, and Australia are not Parties to the ECT. Regardless, it is important to carry the momentum of both the IEP and ECT toward the formation of new international agreements, which must include the developing countries that are destined to become the largest users of hydrocarbons.

The UNFCCC is a response to global climate change, and contains a cluster of amorphous legal obligations. It has the unique distinction of having been ratified by all the countries in the world. Three interlocking mandates are of special importance: (i) stabilization of GHGs; (ii) common, but differentiated, responsibility (CBDR); and (iii) the right to sustainable development. First, UNFCCC requires all parties to stabilize GHG concentrations "at a level that would prevent dangerous anthropogenic interference with the climate system" within a time frame consistent with sustainable development.[49] The implications of this obligation are extensive. Coal, oil, and, to a lesser extent, natural gas, are the primary GHGs implicated in climate change, and the obligation to stabilize GHGs requires the Parties to create or find alternative or substitute sources of energy in order to replace potentially dangerous hydrocarbons and facilitate sustainable development.

Second, this obligation is accentuated by the principles of "equity" and CBDR[50] for protecting the climate system. Equity and CBDR require developed countries to shoulder the primary responsibility and take the lead in combating climate change. Therefore, developed countries have accepted the duty to create and share new technologies that use and enable non-climate changing sources of primary energy.

Third, the first two sets of obligations interlock with the idea of institutionalizing the right to sustainable development.[51] The

49 *See* United Nations Framework Convention on Climate Change, May 9, 1992, art. 2, *at* http://www.globelaw.com/Climate/fcc.htm [hereinafter Climate Change].

50 *See id*. art. 3, para. 1.

51 As set forth in the seminal "Brundtland Report," sustainable development is described as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." *Report of the World Commission on Environment and Development*, U.N. GAOR, 42nd Sess., Agenda Item 83(e), at 54, U.N. Doc. A/42/427 (1987). The report further notes that "[i]n essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments,

assertion that the "Parties have a right to . . . promote sustainable development [and] . . . that economic development is essential for adopting measures to address climate change"[52] was an affirmation of the primary theme of the 1992 United Nations Conference on Environment and Development (UNCED). The primacy of sustainable and economic development was resoundingly re-asserted at the 2002 World Summit on Sustainable Development (WSSD).

These three legal obligations require developed countries, independent of their own energy predicament, to strive for a more diversified energy portfolio, and promote sustainable development in the developing world. A commitment to SD requires the developed world to undertake fundamental R&D on new technologies for producing better forms of primary energy, and then to transfer such technologies to developing countries.[53] The creation of new technologies will remove the threat of energy insecurity in developed countries, while the transfer to developing countries will promote sustainable economic and energy growth.

The major issues arising in this context pertain to (1) the existence, availability and practicability of future sources of primary energy; (2) the candidate technologies that offer feasible solutions to the energy and environmental crisis; and (3) the manner and mode in which new energy sources will be deployed. The canvassing of promising new directions in innovative technologies, which are able to exploit a variety of energy sources, will form a vital element of the proposed knowledge base, and help traverse the cobbled passage from invention to commercial deployment.

VI. CONCLUSION

EESI's research agenda, which is presented above, builds upon research frameworks already delineated[54] that are fostering the development of low GHG global energy systems primarily by facilitating technology research. The present article complements

the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations." *Id*. at 57.

52 *See supra* note 49, art. 3, para. 4.

53 *See id*. art. 4, para. 5. The treaty commits developed country Parties to "take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention." *See generally* Climate Change, *supra* note 49.

54 *See* Franklin M. Orr, *Global Climate & Energy Project (GCEP White Paper), at* http://gcep.stanford.edu/pdfs/gcep_white_paper.pdf (last visited May 1, 2005).

this process by introducing a comprehensive, multi-disciplinary, systems-based policy domain that integrates fragmented scientific, engineering, and policy responses. The primary objective of such a policy domain is to explore ways of institutionalizing and deploying new generation technologies being developed by other more scientifically driven and technologically grounded initiatives. The research identified in this article would provide decision makers with a comprehensive scientific, engineering, economic, and socio-political knowledge base and policy compass that will point toward an integrated approach to the development and deployment of renewable energy through international instruments.

NO LONGER LITTLE KNOWN BUT NOW A DOOR AJAR: AN OVERVIEW OF THE EVOLVING AND DANGEROUS ROLE OF THE ALIEN TORT STATUTE IN HUMAN RIGHTS AND INTERNATIONAL LAW JURISPRUDENCE

*Donald J. Kochan**

I. INTRODUCTION

Human rights' and other international law activists have long worked to add teeth to their tasks. Their endeavors are increased in value to the extent enforcement options exist for alleged violations of international norms and rights. Documents generated to purport to establish international law gain in value in relation to their acceptance as authority in judicial decisions. Symbolic and aspirational efforts have a certain bite when employed on the ground or in public relations to advance human rights goals against allegedly "bad actors." Persuasive statements and condemnations by "international" bodies can go a long way to influencing the actions of nation-states and corporations operating abroad – yet litigation options present an entirely different tool.

The possibility of imposing legal, judicially enforceable liability standards for violations of such purported international norms may be a much more powerful tool for such activists than mere statements of desire. Thus, when courts or other tribunals begin to recognize causes of action and remedies for violations of these international norms and rights, then the power, persuasion, and influence of expansionist international law advocates become more potent.

One of the most interesting avenues for such enforcement has been the Alien Tort Statute ("ATS").[1] Old but little known[2]

*Assistant Professor of Law, Chapman University School of Law. J.D. 1998 Cornell Law School; B.A. 1995 Western Michigan University. Former Visiting Assistant Professor of Law, George Mason University School of Law, 2002-2003; Olin Research Fellow, University of Virginia School of Law, 2003-2004. I thank my research assistant Miles

until very recent years, the Alien Tort Statute has become the primary vehicle for injecting international norms and human rights into United States courts – against nation-states, state actors, and even private individuals or corporations alleged to actually or in complicity or conspiracy been responsible for supposed violations of international law. The federal Alien Tort Statute (or Alien Tort Claims Act ("ATCA")),[3] 28 U.S.C. § 1350, has seen an interesting evolution in the past twenty-five years after remaining almost entirely dormant for nearly two hundred years since its passage with the Judiciary Act of 1789.

This Article provides an overview of the ATS evolution (or revolution), discusses the most recent significant development in the evolution arising from some long-awaited guidance from the U.S. Supreme Court, and briefly sets forth the bases for concern that injecting international law into United States jurisprudence presents a number of dangers – on constitutional, legal, policy, and economic grounds. Whether recent developments at the U.S. Supreme Court have curbed the procession of the ATS human rights revolution or simply added further indeterminacy into its progression is still up for debate. Quotes from a *Wall Street Journal* article sum up the varying interpretations of the next wave of the ATS evolution in light of recent Supreme Court opinions:

> Robin Conrad, a senior vice president of the U.S. Chamber of Commerce's litigation arm, said the 45-page decision [by the U.S. Supreme Court in June 2004] is "riddled with mixed signals" and ambiguous language. . . .
>
> . . . Daniel Petrocelli, outside counsel for Unocal, said the Supreme Court decision represents a "sound rejection" of the way that human-rights groups have been using the Alien Tort law. . . .
>
> . . . .
>
> . . . "We think that business's and government's effort to eliminate the statute as a basis for relief was defeated," said Jennifer Green of the New York-based Center for Constitutional Rights.[4]

Recent developments at the Supreme Court, discussed later, may

Brandon Fuller for his assistance in preparation for portions of this Article.

1 28 U.S.C. § 1350 (2000).

2 Judge Friendly has described the Act as an "old but little used section [that] is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (citation omitted) (holding fraud not a violation of international law).

3 *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) (explaining that "Alien Tort Statute" is preferable to "Alien Tort Claims Act" if one believes that § 1350 does not create a cause of action).

4 Robert S. Greenberger & Pui-Wing Tam, *Human-Rights Suits Against U.S. Firms Curbed*, WALL ST. J., June 30, 2004, at A-3.

indeed shape the debate but have certainly not fully resolved the judicially acceptable breadth of ATS litigation with sufficient clarity.

Given its increasing prominence today, many are shocked that such an old law with prolonged dormancy has seen such new life and debate. The ATS grants the federal courts subject-matter jurisdiction over cases in which an alien sues for a tort only committed in violation of the law of nations.[5] The ATS provides: "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."[6] This grant exists apart from both federal question[7] and diversity[8] jurisdiction, as well as from jurisdiction over admiralty, maritime and prize cases.[9] There is little evidence of Congress's legislative intent in relation to the ATS. The Senate debates over the Judiciary Act of 1789 were not recorded and the provision is never mentioned in the debates of the House of Representatives.[10]

Until June 2004, in the case of *Sosa v. Alvarez-Machain*,[11] neither the U.S. Supreme Court nor Congress had provided any useful guidance for the application of the ATS.[12] Prior to 1980, jurisdiction under the ATS was hardly exercised – only two cases

5 28 U.S.C. § 1350 (2000). For annotation based histories of ATS litigation, see Russell G. Donaldson, *Construction and Application of Alien Tort Statute (28 U.S.C.A. §1350), Providing for Federal Jurisdiction Over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387 (2005); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 14A FEDERAL PRACTICE AND PROCEDURE § 3661.1 (2005).

6 28 U.S.C. § 1350 (2000). The original Act, enacted by the First Congress, read: "[The 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." Judiciary Act of Sept. 24, 1789, ch. 20, sec. 9, 1 Stat. 73, 76-77.

7 28 U.S.C. § 1331 (2000).

8 28 U.S.C. § 1332 (2000). The original statute granting diversity jurisdiction did not equate "aliens" with "citizens." Thus, one might argue that the First Congress intended only to give aliens the same opportunity as citizens would receive under diversity jurisdiction, at least in relation to torts. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813-14 (D.C. Cir. 1984) (Bork, J., concurring).

9 28 U.S.C. § 1333 (2000).

10 *See Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring) (citing 1 ANNALS OF CONG. 782-833 (J. Gales ed., 1789)). For a discussion of the case, see generally Debra A. Harvey, Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply 'Historical Trivia'?,* 21 J. MARSHALL L. REV. 341, 349-52 (1988); Kenneth Marc Schneider, Note, *Hanoch Tel-Oren: The Retreat From Filartiga*, 4 CARDOZO L. REV. 665 (1983).

11 *See infra* Part II.

12 *See* E. Hardy Smith, Note, *Federal Jurisdiction Under the Alien Tort Claims Act: Can This Antiquated Statute Fulfill Its Modern Role?*, 27 ARIZ. L. REV. 437, 438 (1985). For a discussion of Supreme Court cases that have addressed issues of international law, see generally Paul B. Stephan III, *International Law in the Supreme Court*, 1990 SUP. CT. REV. 133 (1990).

involved its application.[13] Therefore, for over 200 years this statute remained essentially unaccessed, unused, and largely unknown.

The evolution of ATS litigation began in 1980 when the ATS was raised from dormancy, and a federal appeals court found that suits based on customary international law for human rights abuses could be entertained under the ATS.[14] It expanded most notably again in 1995 when a federal appeals court held that quasi-public and even private actors might be bound by customary international law for certain egregious violations.[15] It evolved further in 1997 when a federal district court held that a private corporation was subject to ATS jurisdiction for alleged human rights abuses abroad. [16] Since then, dozens of lawsuits against private actors – principally corporations – have been filed. Since the U.S. Supreme Court finally addressed the ATS in part in 2004, the continued evolution and the form that evolution will take is now in flux awaiting future applications in light of the Supreme Court's limited guidance provided by its interpretation of the ATS in *Sosa v. Alvarez-Machain*.[17]

Principally – under the ATS – United States district and

13 *See* Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (child custody dispute between two aliens; wrongful withholding of custody is a tort, and defendant's falsification of child's passport to procure custody violated the law of nations); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (suit for restitution of three slaves who were on board a Spanish ship seized as a prize of war; treaty of France superseded the law of nations; § 1350 alternative basis of jurisdiction). Because a tort must be found to be the type which violates the law of nations before jurisdiction will be granted, some cases prior to 1980 considered application of the ATS, but found the alleged tort did not meet the law of nations threshold. *See* Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (no generally accepted international rule granting custody of children to grandparents); Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978) (negligence law not part of the law of nations), *cert. denied*, 439 U.S. 1114 (1979); Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976) (wrongful confiscation of property not part of the law of nations), *cert. denied*, 429 U.S. 835 (1976); IIT v. Vencap, Ltd., 519 F.2d. at 1015 (fraud not violative of international law); Abiodun v. Martin Oil Serv., Inc. 475 F.2d 142, 145 (7th Cir. 1973) (fraud not violative of the law of nations); Khedivial Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49, 51-52 (2d Cir. 1960) (illegal picketing not in violation of international law); Valanga v. Metro. Life Ins. Co., 259 F. Supp. 324, 328 (E.D. Pa. 1966) (breach of contract not in violation of the law of nations); Damaskinos v. Societa Navigacion Interamericana, S.A., Panama, 255 F. Supp. 919, 923 (S.D.N.Y. 1966) (negligence law not part of the law of nations); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963) (unseaworthiness doctrine not part of the law of nations).

14 Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980).

15 Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

16 Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (upholding subject matter jurisdiction under ATS based on allegations that an American oil company, acting in concert with the Burmese government, committed various civil and human rights abuses), *aff'd in part & rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *rehearing en banc granted, opinion vacated by* Doe v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003).

17 124 S. Ct. 2739 (2004). For brief summaries of the decision, see *Supreme Court Interpretations of Alien Tort Claims Act*, 98 AM. J. INT'L L. 845 (2004); Brad R. Roth, Sosa v. Alvarez-Machain, 98 AM. J. INT'L L. 798 (2004).

appeals courts have, with increasing frequency, recognized various treaties, as well as resolutions, understandings, declarations, proclamations, conventions, programmes, protocols, and similar forms of inter- or multi-national "legislation" as evidence of a body of "customary international law" enforceable in domestic courts, particularly in the area of tort liability. These instruments, referred to herein as customary international law outputs ("CILOs"), are seen by some courts as evidence of norms that bind not only nations and state actors, but also private individuals. ATS plaintiffs often allege "a veritable cornucopia of international law violations"[18] stuffed with a feast of potentially applicable customary international law outputs in an attempt to establish liability. As this Article examines the waves of ATS litigation, the question becomes how courts will treat CILOs in their attempt to analyze customary international law complaints.

Such enforceability of customary international law outputs has occurred in U.S. courts even where such customary international law outputs have not been codified or otherwise adopted by the U.S. Congress. As a *Washington Post* editorial recently opined, reading the ATS to generally allow suits based on a judge's determination of customary international law

> not only misconstrues its text and likely purpose, but it also creates serious problems of democratic governance. Courts have found bases for suit not only in treaties to which the president and Senate have agreed but in nonbinding U.N. General Assembly resolutions and even in international instruments the government has rejected.[19]

Surely then, rule of law issues, let alone other constitutional or prudential concerns, abound when one considers the appropriate role for international "law" in the judicial system.

Several commentators have chimed in on this ATS evolution – although surprisingly the evolution (or revolution) has only captured the public eye in very recent years, long after the federal courts began shaping and expanding the role of customary international law since it arrived principally on the litigation scene twenty-five years ago. I hypothesize that this lack of attention was a result of (1) a limited, although growing, impact; and (2) because early cases were morally easy to justify – the nastiest of the nastiest in the world community were being held accountable for their dastardly deeds. But with any evolution that begins with easy facts and great sympathies, there is an evolutionary tendency for legal doctrines and

---

18 In re South African Apartheid Litigation, 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2004).

19 *Human Rights in Court*, WASH. POST, Apr. 6, 2004, at A20.

pronouncements to then expand and create more questionable foundational rules and assumptions that require a more critical examination of the appropriate application of certain principles – herein principally the scope and role of international "law" in domestic adjudication.[20]

As a *Financial Times* columnist stated in a March 14, 2003 article: "US plaintiffs' lawyers have revived a dormant 18th-century law and made it their chief weapon in a 21st-century battle over corporate responsibility in an age of globalisation."[21] This evolution is occurring "[i]n the best traditions of American legal creativity."[22] Conversely, as one international labor activist

20 I am amazed that when I first started analyzing this issue in 1997, I was able to compile the complete literature specifically related to the topic in a couple of binders. Now, it takes a couple of large file cabinets at least. This is simply personal evidence of the dramatic, recent, and spiraling interest in the use of the ATS. Once thought obscure, the ATS is no longer little known (nor little examined in the courts, academic scholarship, and the popular press). Further personal evidence of the change in interest involves inquiries in the late 1990's to those potentially subject to ATS liability. Such parties, in my personal experience, were largely ambivalent to raise concerns regarding potential liability. The awareness and concern regarding ATS liability – from my personal experiences and observations – has dramatically risen in the past four years or so. This underscores my observation that evolutionary legal developments have a tendency to mutate in manners that are not immediately recognizable or not immediately financially understood. Yet, when it comes to tort liabilities, there is often an evolutionary tendency to expand the reach of liable parties and actionable claims. Failures to recognize this fact often cause parties not faced with the immediacy of potential liability to remain complacent in attempting to shape that evolution. Thus, again, doctrines developed in early waves of ATS jurisprudence against clearly bad and unsympathetic defendants, and then again evolved in further waves to expand the reach of liability. Anticipation of evolution (especially in tort liability) has not been, in my experience, a particularly well-honed skill within business practice. One role as the lawyer-as-counselor, however, should always be to at least raise awareness of potentially predictable results of evolutionary trends and the anticipation of its potential, future reach.

21 Patti Waldmeir, *An Abuse of Power*, FIN. TIMES, Mar. 14, 2003, at 12.

22 *Id.* In commenting on the ongoing ATS suit against Unocal, *The Economist* in its April 24, 1999 issue described the potential implications of this new trend in tort litigation: "The next big test will be whether the Alien Tort Claims Act can be used against companies as well as individuals." *To Sue a Dictator*, THE ECONOMIST, Apr. 24, 1999, at 26. And, if companies begin losing in this emerging field of litigation, it could "provide a major headache for many American companies operating abroad." *Id.* When discussing an award against Serbian leader Karadzic, an August 2000 *Washington Post* editorial called the new line of ATS human rights' cases "troubling" as "proceed[ing] under an ill-conceived but now well-accepted reading of a 1789 law that . . . . is a modern graft on a largely moribund statute; international human rights law did not exist in the 18th century." *Lawsuits and Foreign Policy*, WASH. POST, Aug. 12, 2000, at A20.

Furthermore, a staff reporter from the *Corporate Legal Times* summed up the current situation with the following headline in October 2002: "No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts." *See* Robert Vosper, *Conduct Unbecoming; No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts*, CORP. LEG. TIMES, October 2002, at 35. In November 2002, it has been opined in the *Financial Times* that the current ATS jurisprudential trend presents a "danger that the US judicial system will become the world's civil court of first resort." Thomas Niles, *The Very Long Arm of American Law*, FIN. TIMES, Nov. 6, 2002, at 15.

spearheading many of these "creative" lawsuits has claimed, the ATS is a "vital tool for preventing corporations from violating fundamental human rights."[23] There is a growing awareness and growing debate regarding the appropriateness of using U.S. courts to extraterritorially enforce supposedly internationally accepted norms and impose liability for violations of such norms by overseas actors, in overseas venues, and otherwise subject to overseas laws and regulations.

A *Washington Post* editorial raised concerns when it juxtaposed care for human rights from the vehicles used to protect them as not necessarily mutually consistent: "You don't have to be indifferent to human rights abuses to have misgivings about this reading [of the ATS], because it creates troubling problems for democratic government and permits the courts to interfere excessively in the conduct of foreign policy."[24] This statement underscores the distinction between believing in the advancement of human rights, but perhaps disputing whether U.S. courts constitute the appropriate forum for such efforts.

A backdrop to the ATS discussion is the debate over the proper invocation of international "law" or foreign laws as persuasive or informing authority for the general interpretation of United States domestic law. Most notably are three U.S. Supreme Court cases that have stimulated the debate – *Lawrence v. Texas*,[25] *Atkins v. Virginia*,[26] and *Roper v. Simmons*.[27]

There are several problems with this trend toward enforceability and applicability of "customary international law" or otherwise "foreign" law in U.S. courts. The litigation trend has infirmities related to the Constitution, foreign policy, national security, and the public policies supporting economic development and its concomitant effect on the advance of democracy and political liberty. These concerns have been

---

As the *Legal Times* reported recently, suits against corporations in U.S. courts for alleged violations of customary international law constitutes, according to the U.S. Chamber of Commerce, "'global forum shopping,' in which foreigners resort to U.S. courts, with their favorable class action and discovery rules, to litigate over alleged human rights abuses overseas by U.S. corporations. 'The U.S. is increasingly becoming the jurisdiction of choice for opportunistic foreign plaintiffs,' says Chamber President Thomas Donohue." Tony Mauro, *Justices Debate Alien Tort Law*, LEG. TIMES, April 5, 2004, at 8.

23 TERRY COLLINGSWORTH, INTERNATIONAL LABOR RIGHTS FUND, THE ALIEN TORT CLAIMS ACT – A VITAL TOOL FOR PREVENTING CORPORATIONS FROM VIOLATING FUNDAMENTAL RIGHTS (2003), *available at* http://www.laborrights.org/publications/ATCA.pdf.

24 *Old Law, New Questions*, WASH. POST, July 20, 2004, at A16.

25 539 U.S. 558 (2003).

26 536 U.S. 304 (2002).

27 125 S. Ct. 1183 (2005).

previously addressed by this author[28] and others,[29] and the principal goal of this Article is to reexamine some of these concerns in light of the ongoing ATS evolution, especially as sparked by recent and original pronouncements from the U.S. Supreme Court on the interpretation and role of the ATS.

II. THE FIRST FOUR PRINCIPAL WAVES IN THE ATS EVOLUTION

Rather than rehash previous and substantial literature in this field (including presentation of specific case facts), I will briefly summarize what I will in this Article – and have in the past – identified as the five principal waves in the evolution of ATS litigation. Although there are many cases of interest, this analysis is limited to the "milestone" cases in each wave of evolution.

The ATS cases have generally followed a continuously-expanding five-wave trend: The first wave was disuse and dormancy; the second was the acceptance of liability under the ATS for official state acts, including its recognition as a statute providing both jurisdiction and a cause of action and liability evidenced by noncompliance with customary international law outputs; and the third was the movement toward an acceptance that quasi-state, and, indeed, private individuals, could be liable for violations of customary international law. The fourth wave in ATS jurisprudence, discussed in the next subpart, involves suits against private individuals and corporations. The fifth wave involves the first guidance from the U.S. Supreme Court, so the idea of expansive evolution and predictions for the future of ATS evolution remain a bit indeterminate.

As stated, wave one was that of dormancy. For over 200 years, therefore, the ATS remained essentially unaccessed – or "dormant" in the parlance of literature in this field. In essence, it remained ink that had never before been copied, applied, or un-dried.

---

28 *See, e.g.,* Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of Non-Governmental Organizations in U.S. Courts*, 22 BERKELEY J. INT'L L. 240 (2004); Donald J. Kochan, Note, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153 (1998); Donald J. Kochan, *After Burma*: *Like the Massachusetts Law, the Alien Tort Claims Act Allows Improper Interference in U.S. Foreign Policy*, LEGAL TIMES, Aug. 21, 2000, at 54; Donald J. Kochan, *Foreign Policy, Freelanced: Suits Brought Under Alien Tort Claims Act Undermine Federal Government's Authority*, THE RECORDER (San Francisco), Aug. 23, 2000, at 5; Donald J. Kochan, *Rein in Alien Claims Act: Reconstituted 'Law of Nations' Standard Needs Defining by Congress*, FULTON COUNTY DAILY REP., Aug. 24, 2000, at 6.

29 *See, e.g.,* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 834-36 (1997); Bradley, *supra* note 3.

But some lawyers thought out of the box and used the ATS to move forward the possibility that human rights might have a role in, and courts could be a vehicle for, extraterritorial litigation within the United States. And, the second wave was born.

In 1980, the U.S. Court of Appeals for the Second Circuit agreed with these creative lawyers. In *Filartiga v. Pena-Irala*,[30] the U.S. Court of Appeals for the Second Circuit breathed life and spurred evolutionary growth for the ATS from its previously dormant status.[31] Dolly Filartiga, a citizen of the Republic of Paraguay, sued Americo Norberto Pena-Irala, formerly an Inspector General of Police of Paraguay, for allegedly kidnapping, torturing, and killing her brother while in office.[32] The alleged actions took place in Paraguay.[33] The district court dismissed the action for lack of subject matter jurisdiction.[34] The Second Circuit reversed and remanded, holding that deliberate torture by state officials violates international law, and that alleging such torture creates jurisdiction under the ATS.[35] The decision sparked a multi-wave movement in which the strength of the ATS grew in the civil enforcement of international norms within the United States, even for extraterritorial actions. The court found that the ATS created jurisdiction *and* provided a cause of action.

The *Filartiga* Court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[36] The ATS was applied in the modern

30 630 F.2d 876 (2d Cir. 1980). For general discussions of the case and its approach, see, for example, Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53 (1981); Farooq Hassan, Note, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 INT'L & COMP. L.Q. 250, 256 (1983); Mark P. Jacobsen, Comment, *28 U.S.C. 1350: A Legal Remedy for Torture in Paraguay?*, 69 GEO. L.J. 833, 834, 849 (1981); Donald Johnson, Jr., *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 GA. J. INT'L & COMP. L. 335 (1981); Dean Rusk, *A Comment on* Filartiga v. Pena-Irala, 11 GA. J. INT'L & COMP. L. 311 (1981); Michael C. Small, Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers,* 74 GEO. L.J. 163 (1985); Louis B. Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307 (1981); Gabriel M. Wilner, Filartiga v. Pena-Irala*: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 GA. J. INT'L & COMP. L. 317 (1981).

31 Judge Robb of the U.S. Court of Appeals for the D.C. Circuit described the *Filartiga* approach as "judicially will[ing] that statute a new life." Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 827 (D.C. Cir. 1984) (Robb, J., concurring).

32 *Filartiga*, 630 F.2d at 878.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

context of human rights for the first time. Furthermore, *Filartiga* established that modern concepts of "international law" were coterminous with previous concepts of the "law of nations," and that this international law is an evolving concept to be ascertained by the courts.[37] The Second Circuit held that courts ascertaining the law of nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[38]

This second wave invited multiple lawsuits against states and state actors. Nonetheless, during this evolution, a few hiccups occurred. Perhaps the most significant was *Tel-Oren v. Libyan Arab Republic*, decided by the U.S. Court of Appeals for the D.C. Circuit.[39] Representatives of persons killed in a civilian bus in Israel, along with the injured survivors of the attack, sued the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.[40] The plaintiffs claimed the defendants committed multiple tortious acts in violation of international law.[41]

The panel at the D.C. Circuit agreed unanimously that the court lacked jurisdiction over the plaintiffs' causes of action.[42] Each judge, however, wrote a separate concurring opinion, each with a different rationale. Judge Edwards, adhering to *Filartiga*, contended that violations of the law of nations are a narrow category reserved to "a handful of heinous actions – each of which violates definable, universal and obligatory norms,"[43] and that the alleged actions in this case did not trigger such jurisdiction.[44] Edwards, however, held open the possibility that the judiciary should exercise jurisdiction in cases where a proper cause of action satisfies the requirements of the ATS.[45]

---

37 *Id.*

38 *Id.*

39 726 F.2d 774 (D.C. Cir. 1984) (per curiam), *cert. denied*, 470 U.S. 1003 (1985). For a discussion of the case, see generally Debra A. Harvey, Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply 'Historical Trivia'?,* 21 J. MARSHALL L. REV. 341, 349-52 (1988); Kenneth Marc Schneider, Note, Hanoch Tel-Oren*: The Retreat From* Filartiga, 4 CARDOZO L. REV. 665 (1983).

40 Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 544-45 (D.D.C. 1981). For a discussion of the district court opinion, see generally Eileen Rose Pollock, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236 (1982).

41 *Tel-Oren*, 517 F. Supp. at 544.

42 *Tel-Oren*, 726 F.2d at 775.

43 *Id.* at 781 (Edwards, J., concurring).

44 *See generally id.* at 775-98. *See also* Beanel v. Freeport-McMoran, Inc., 969 F. Supp. 362 (E.D. La. 1997) (accepting a broader scope of the law of nations, which included action by private individuals, but dismissing for failure to state a claim under the ATS upon which relief can be granted).

45 *Tel-Oren*, 726 F.2d at 789 (Edwards, J., concurring).

In his concurrence, Judge Robb relied primarily on the political question doctrine, explaining that an exercise of jurisdiction would improperly involve the judiciary in foreign affairs – an area beyond its expertise and one dangerously risking interference with the province of the political branches.[46] In addition, Judge Robb rejected the *Filartiga* formulation for ascertaining international law under the ATS[47] and, in the process, rejected the holding of *The Paquete Habana*.[48] Citing Chief Justice Fuller's dissent in *The Paquete Habana*,[49] Judge Robb stated that:

> Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed under § 1350. . . . The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international "law".[50]

With the absence of congressional guidelines to inform the interpretation of the ATS's application or purpose, Judge Robb opined that the judiciary had no cognizance under the statute.[51]

Judge Bork, also concurring in a separate opinion, found that the ATS provided only jurisdiction at best and did not provide a separate, private cause of action for violations of international law.[52] Judge Bork proclaimed that even if international law provides rules of decision, it does not automatically provide causes of action.[53] When there exists "sufficient controversy of a politically sensitive nature about the content of any relevant international legal principles" involved in the litigation, Bork opined that it is improper to adjudicate those claims in light of separation of powers principles.[54] Finally, Judge Bork extended his opinion to argue that the meaning of "law of nations" in the

46 *Id.* at 823 (Robb, J., concurring).

47 *Id.* at 827 ("We ought not to cobble together for [the ATS] a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate.").

48 *Id.* at 827.

49 175 U.S. 677, 720 (1900) (Fuller, J., dissenting) (stating that it was "needless to review the speculations and repetitions of writers on international law . . . . Their lucubrations may be persuasive, but are not authoritative").

50 *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring).

51 *Id.*

52 *Id.* at 799 (Bork, J., concurring).

53 *Id.* at 811.

54 *Id.* at 808. Judge Bork further stated, "[a]djudication of those claims would require the analysis of international legal principles that are anything but clearly defined and that are the subject of controversy touching 'sharply on national nerves.'" *Id.* at 805 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1963)).

ATS should be limited to the types of offenses understood to constitute the whole of international law at the Founding.[55]

Many creative lawsuits followed *Filartiga* and *Tel-Oren*, some successful and some not. But in what this author identifies as wave three, the ATS evolution opened up some new opportunities for liability. The expansion of the judicial application of the ATS reached new heights in 1995 with the *Kadic v. Karadzic* decision.[56] The plaintiffs in *Kadic* were Croat and Muslim citizens of Bosnia-Herzegovina,[57] alleging that they were victims, and representatives of victims, of various atrocities including rape, torture, and summary executions by the Bosnian-Serb military forces.[58] The suit was brought against Karadzic, in his capacity as the President of the Bosnian-Serb faction. The district court dismissed the case for lack of subject-matter jurisdiction.[59] The Second Circuit reversed this ruling[60] and, as a result, significantly expanded the jurisdiction conferred by, and scope of, the ATS – at least within the Second Circuit.[61]

The Second Circuit held that the ATS applies to actions by state actors *or* even private individuals that are in violation of the most egregious portions of law identified as customary international law.[62] According to the court in *Kadic*, state action is not necessary for a cognizable violation of the law of nations to exist.[63] The court expanded upon the principles it enunciated in *Filartiga*, noting that international law is constantly evolving. It

55 *Id.* at 807-808.

56 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996). Judge Newman highlighted the odd nature of the case in his opinion: "Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian- Serb forces in a United States District Court in Manhattan." *Id.* at 236. Several case notes and articles have been published on the *Kadic* opinion. *See, e.g.*, Judith Hippler Bello et al., *International Decision*, 90 AM. J. INT'L L. 658 (1996); David S. Bloch, *Dangers of Righteousness: Unintended Consequences of* Kadic v. Karadzic, 4 TULSA J. COMP. & INT'L L. 35, 47 (1996) (arguing that while international law litigation in U.S. courts is generally good, Kadic itself "muddies international law, weakens American diplomacy and strengthens the very outlaws it is intended to attack"); Pamala Brondos, Note, *International Law—The Use of the Torture Victim Protection Act as an Enforcement Mechanism*, 32 LAND & WATER L. REV. 221 (1997); Amy E. Eckert, Note, Kadic v. Karadzic: *Whose International Law?*, 25 DENV. J. INT'L L. & POL'Y 173 (1996) (concluding Kadic went too far); Alan Frederick Enslen, Note, Filartiga's *Offspring*: *The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with Its Decision in* Kadic v. Karadzic, 48 ALA. L. REV. 695 (1997); Justin Lu, Note, *Jurisdiction over Non-State Activity under the Alien Tort Claims Act,* 35 COLUM. J. TRANSNAT'L L. 531 (1997).

57 *Kadic*, 70 F.3d at 236.

58 *Id.* at 236-37.

59 *Id.*

60 *Id.* at 251.

61 *See* Charles F. Marshall, *Re-framing the Alien Tort Act After* Kadic v. Karadzic, 21 N.C. J. INT'L L. & COM. REG. 591, 597 (1996).

62 *Kadic*, 70 F.3d at 239.

63 *Id.*

consulted a similar list of authorities to ascertain the norms of contemporary international law, as it had in the past.[64] The court relied upon various international conventions, declarations, and resolutions to determine that the acts alleged – including genocide, torture, and rape – constituted violations of generally accepted norms of international law and were, therefore, cognizable violations under the ATS.[65]

Wave three did not end at the jurisdictional boundaries of the Second Circuit. Others followed. In 1996, two significant decisions expanded the geographical scope of ATS expansion. In *Abebe-Jira v. Negewo*, the U.S. Court of Appeals for the Eleventh Circuit affirmed a decision awarding compensatory and punitive damages for "torture and cruel, inhuman, and degrading treatment, pursuant to the Alien Tort Claims Act."[66] The Eleventh Circuit determined that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law."[67]

The U.S. Court of Appeals for the Ninth Circuit revisited its application of the ATS[68] in 1996, with two decisions (from appeals addressing different issues) in the case of *Hilao v. Estate of Marcos*.[69] Opponents of the Marcos regime in the Philippines alleged they were victims of torture. Applying its earlier test that "[a]ctionable violations of international law [under the ATS] must be of a norm that is *specific*, universal, and obligatory,"[70] the Ninth Circuit found that the international norm against torture and arbitrary detention was sufficiently specific to be actionable under the ATS.[71]

The *Kadic* decision was the precipice for what I will call wave four in the ATS evolution. Throughout the 1980s and early

64 *Id.* at 238-39.

65 *Id.* at 241-44.

66 72 F.3d 844, 845 (11th Cir. 1996).

67 *Id.* at 848.

68 *See* Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation), 978 F.2d 493, 501-03 (9th Cir. 1992) [hereinafter *Estate I*], *cert. denied*, 508 U.S. 972 (1993); Hilao v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation), 25 F.3d 1467, 1472-74 (9th Cir. 1994) [hereinafter *Estate II*], *cert. denied*, 513 U.S. 1126 (1995). For a discussion of *Trajano v. Marcos*, see Sung Teak Kim, Note, *Adjudicating Violations of International Law: Defining the Scope of Jurisdiction Under the Alien Tort Statute*– Trajano v. Marcos, 27 CORNELL INT'L L.J. 387 (1994).

69 103 F.3d 767 (9th Cir. 1996) [hereinafter *Estate III*]; 103 F.3d 789 (9th Cir. 1996) [hereinafter *Estate IV*]. *See also* Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (upholding subject matter jurisdiction under ATS based on allegations that an American oil company, acting in concert with the Burmese government, committed various civil and human rights abuses).

70 *Estate IV*, 103 F.3d at 794 (citing *Estate II*, 25 F.3d at 1475)(first alteration in original).

71 *Id.*

1990s, several suits were brought against multinational corporations for alleged violations of customary international law. These suits were largely unsuccessful, but a significant turning point occurred in 1997 when a federal district court in California issued its decision in the case of *Doe I v. Unocal Corp.*, upholding subject matter jurisdiction under the ATS based on allegations that an American oil company, acting allegedly in concert with the Myanmar/Burmese government, committed various civil and human rights abuses.[72]

That case was then reviewed in a 2002 opinion by the U.S. Court of Appeals for the Ninth Circuit, when the circuit court reversed in part a decision by the district court to grant a motion for summary judgment in favor of Unocal.[73] There, the circuit court held that sufficient evidence existed to support the plaintiffs' allegations – accusing Unocal of aiding and abetting forced labor, murder, rape, and torture, committed by the Myanmar/Burmese government – to allow the case to proceed to trial.[74] The court again took a broad view of international law, citing many customary international law outputs to which the United States is not a party or for which the United States has adopted no implementing legislation. Moreover, the court saw the application of international law as superior to state, federal, or foreign law.[75] It reasoned that international law was a *preferable* law of first application:

> Application of international law – rather than the law of Myanmar, California state law, or our federal common law – is also favored by a consideration of the factors listed in the Restatement (Second) of Conflict of Laws § 6 (1969). First, "the needs of the . . . international system[]" are better served by applying international rather than national law. Second, "the relevant policies of the forum" cannot be ascertained by referring–as the concurrence does–to one out-of-circuit decision which happens to favor federal common law and ignoring other decisions which have favored other law, including international law . . . . Third, regarding "the protection of justified expectations," the "certainty, predictability and uniformity of result," and the "ease in the determination and application of the law to be applied," we note that the standard we adopt today from an admittedly recent case nevertheless goes back at least to the Nuremberg trials and is similar to that of the Restatement (Second) of Torts . . . . *Finally, "the basic polic[y] underlying the particular field of law" is to provide tort*

72 963 F.Supp. 880 (C.D. Cal. 1997), *aff'd in part & rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

73 *See* John Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *district court opinion vacated by* 403 F.3d 708 (9th Cir. 2005).

74 *Id*. at 954-55.

75 *Id*. at 948-49.

> *remedies for violations of international law. This goal is furthered by the application of international law, even when the international law in question is criminal law but is similar to domestic tort law . . . .*[76]

The court's holding was an endorsement of a sweeping reach for the ATS. This case has been the subject of additional appeals, decisions, and, apparently, settlement agreements. Nonetheless, the foundation of various court holdings including *Unocal* – that corporations may be liable for violations of human rights under theories of customary international law – is the critical consequence of this case and the most significant and defining moment for the fourth wave of ATS litigation.

Since the original 1997 *Unocal* decision, scores of new lawsuits against private corporations have been filed.[77] For a wide range of alleged wrongs and in a wide range of countries, cases have been brought against Abercrombie & Fitch, BHP, Chevron, Coca-Cola, Del Monte, Dole, Drummond Coal, ExxonMobil, The Gap, J.C. Penney Co., Levis Strauss, Nike, Pfizer, Rio Tinto, Shell, Siemans, Southern Peru Copper Corporation, Target, Texaco, Total, Union Carbide, Unocal – just to name a few.[78] Some of these cases involve aiding-and-abetting or vicarious liability theories; still others say that corporations should be responsible under customary international law for direct and independent corporate actions. The possibility of large judgments or substantial settlements have driven many of these litigations, and the plaintiffs' bar has latched itself on to these potential new torts and the concomitant potential for settlements or judgments. There is some evidence of an intent to dispute, but also some evidence of early "caving" into settlements due to the indeterminacy of these new theories of liability under the ATS.[79] A broad range of suits have also been filed against state actors in the past few years.[80] The assumption of utility behind ATS litigation – by plaintiffs, trial lawyers, and human rights' advocates – has been fueled by the evolution of liability acceptance that has, to date, increased the pool of potential defendants.[81]

---

76 *Id.* at 949 (citations omitted) (footnote omitted) (emphasis added) (alterations in original).

77 *See generally, e.g.*, Vosper, *supra* note 22.

78 *See generally id.*

79 *See generally id.*

80 *See generally id.*

81 A selection of recent opinions follows: Rasul v. Bush, 124 S. Ct. 2686 (2004) (holding that a district court was not barred from hearing claims based on the ATS; Justice Scalia's dissent notes that the ATS claim was not raised in the petition for certiorari); Igartua-De La Rosa v. United States, 386 F.3d 313, 319 n.17 (1st Cir. 2004) (mentioning ATS in a footnote regarding US courts application of the ICCPR under ATS); Mohammad v. Bin Tarraf, No. 02-7627, 2004 U.S. App. LEXIS 19874 (2nd Cir. 2004)

There have indeed been significant defeats in some courts in the attempt to expand the scope of supposed international "law" liability under the ATS. The question becomes whether such defeats demonstrate a restraint, or are simply a temporary setback, or speed bump, in the increased evolution of liability in the face of a continuing effort to promote private, civil enforcement of supposed international norms. Additional suits will undoubtedly be filed as a result of this fourth wave of ATS jurisprudence, and the question becomes whether further avenues for civil enforcement of international norms will follow the expansive nature of these first few waves or whether the next wave will limit civil enforcement. Much depends on how lower courts interpret the pivotal, first impression opinion by the U.S. Supreme Court on the ATS in 2004.

III. WAVE FIVE: THE U.S. SUPREME COURT FINALLY SPEAKS: IS THE EVOLUTION OF ATS LITIGATION NOW MORE CERTAIN OR LESS CERTAIN? DIRECTIONED OR LESS-DIRECTIONED?

For the first time in 215 years, the Supreme Court finally had something to say about the ATS in its opinions in *Rasul v. Bush*[82] and *Sosa v. Alvarez-Machain*[83] – both opinions in June 2004. What it actually said, I do not confess to clearly know, and I fear lower courts will be caught in a similar state of confusion. Nonetheless, this Part will attempt to summarize the opinion and its potential implications for the future evolution of ATS

(Canadian resident brought action for tort claims under ATS); Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227 (11th Cir. 2004) (plaintiff's claim against German banks for stolen items during the Nazi era could not be sustained under ATS because plaintiff was a US citizen); Van Tu v. Koster, 364 F.3d 1196 (10th Cir. 2004) (Vietnamese plaintiffs' claims against US soldiers under the ATS were dismissed because of the statute of limitations); Bano v. Union Carbide Corp., 361 F.3d 696 (2nd Cir. 2004) (citizens of India brought claim against US chemical plant for injuries stemming from a toxic disaster); Adbullahi v. Pfizer, Inc., No. 02-9223, 2003 U.S. App. LEXIS 20704 (2nd Cir. 2003) (Nigerian plaintiffs sued Pfizer for CCPR violations under ATS and the appellate court reversed a district court dismissal for forum non conveniens); Flores v. Southern Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003) (Peruvian plaintiffs' claims of local, intranational environmental pollution were not actionable under the ATCA because such pollution does not violate CIL); Aranda v. Department of Social and Health Services, No. 03-15056, 2003 U.S. App. LEXIS 15227 (9th Cir. 2003) (dismissal of a prisoner's ATCA claim was upheld under the 10-year statute of limitations); Hwang Geum Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003) (female plaintiffs from Asian countries brought claim against Japan under ATCA, but court dismissed for lack of jurisdiction over a foreign sovereign); Soudavar v. Islamic Republic of Iran, No. 02-7129, 2003 U.S. App. LEXIS 11661 (D.C. Cir. 2003) (plaintiff's claims dismissed for lack of jurisdiction under FSIA); United States v. Yousef, 327 F.3d 56, 103 n.37 (2nd Cir. 2003) (ATS cited in a footnote stating that the idea that scholarly opinions do not create CIL is consistent with past interpretations of the ATS); Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003) (World War II slave labor claims were barred under ten-year statute of limitations).

82 124 S. Ct. 2686 (2004). For a brief summary of the decision, see David L. Sloss, Rasul v. Bush, 98 AM. J. INT'L L. 788 (2004).

83 124 S. Ct. 2739 (2004).

litigation.

In *Rasul v. Bush*, the U.S. Supreme Court concluded without significant commentary that the district court below had jurisdiction to hear ATS claims brought by individuals in U.S. military custody at Guantanamo Bay.[84] As Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) pointed out in dissent, however, the ATS controversy was not even raised in the appeal for the Court's review.[85] The ruling added little to our understanding of the ATS evolution.

Far more interesting and substantive was the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain* – involving the abduction and transportation to the United States of a Mexican national, Alvarez, at the instigation of U.S. Drug Enforcement Agency ("DEA") officials.[86] Alvarez sued the United States and the abductor, Sosa, under the Federal Tort Claims Act ("FTCA") and the ATS respectively.[87] Putting aside the FTCA claims, for purposes of this Article, the most important holding was that the U.S. Supreme Court decided that Alvarez was not entitled to recover damages from Sosa under the ATS.[88] This was the first

84 124 S. Ct. at 2698.

85 The ATS jurisdictional issue "is not presented to us. The ATS, while invoked below, was repudiated as a basis for jurisdiction by all petitioners, either in their petition for certiorari, in their briefing before this Court, or at oral argument. See Pet. for Cert. in No. 03-334, p. 2, n.1 ("Petitioners withdraw any reliance on the Alien Tort Claims Act."); Brief for Petitioners in No. 03-343, p. 13; Tr. of Oral Arg. 6." *Id.* at 2710 n.6 (Scalia, J. dissenting).

The lower court opinion was more interesting. In March 2003, Judge Raymond Randolph of the Court of Appeals for the D.C. Circuit wrote a concurring opinion in the lower opinion, *Al Odah v. United States*, which seriously questioned the expansive reach of recent ATS judicial recognition. 321 F.3d 1134 (D.C. Cir. 2003). *Al Odah* (on appeal to the Supreme Court, *Rasul*) involved habeas corpus petitions brought against the United States by detainees in Guantanamo Bay, Cuba, that the D.C. Circuit ultimately rejected. *Id.* The detainees premised part of their claims on the ATS and international law. The majority opinion did not address the ATS or its proper interpretation, but Judge Randolph's concurring opinion in *Al Odah* did address that issue. His opinion constitutes one of very few judicial opinions to question the legitimacy of modern ATS application, and will undoubtedly serve as motivation for more critical judicial examination of the ATS in forthcoming decisions. In *Al Odah*, Judge Randolph questioned many of the premises upon which ATS jurisprudential expansion has been based for the past twenty-three years. Randolph opined, "To have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Id.* at 1148, (Randolph, J., concurring).

In a similar interesting development in *United States v. Yousef*, the Second Circuit on April 4, 2003, in a lengthy opinion, also called into question, and, some argue, took a newly restrictive view of the appropriate sources that courts may look to when attempting to define customary international law. 327 F.3d 56 (2d Cir. 2003) (holding *inter alia* that the United States could exercise extraterritorial criminal jurisdiction over defendants who were charged with attempted plane bombing in Southeast Asia).

86 124 S. Ct. at 2739.

87 *Id.* at 2746-47.

88 *Id.* at 2754-55.

time the U.S. Supreme Court had substantively decided an ATS claim.

The Supreme Court held principally that "we agree the [ATS] is in terms only jurisdictional, [but] we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."[89] Thus, although the majority opinion recognizes that the ATS is purely jurisdictional, it acknowledges that federal courts may recognize some international norms as enforceable law in some situations – a sort of endorsement for tort actions based on a "we know it when we see it" mentality. The Sosa opinion is, therefore, a lesson in ambiguity and incapable of informing the next steps in the ATS evolution.

The Court endorsed a discretion-based framework that hardly provides clear guidance to lower courts addressing ATS cases and indeed may empower such courts to exercise such discretion to serve their own, personal interpretations of which international norms should or should not be recognized as "enforceable." This is especially true because, although the Supreme Court demanded "caution," it nonetheless accepted the ideas adopted in earlier wave cases that international law is part of "Our law," that international law evolves, and that there are a number of sources that courts should reference to identify customary international law including the works of jurists and scholars in the field (persons often biased by the self-perpetuation of their field). The majority in *Sosa* simply says "don't go too far," but the door is still ajar and you can go somewhere. No academic predictions can possibly have currency with such marsh-like judicial guidance.

The Supreme Court held that the ATS is jurisdictional in nature but that the federal courts could then recognize causes of action in common law similar in character to, but not limited to, the international "wrongs" understood in 1789.[90] Given its significance and groundbreaking consideration after 215 years, this author will quote from the U.S. Supreme Court's opinion at length.

The primary holding of the Supreme Court in *Sosa* was that the ATS is a jurisdictional statute but causes of action for

89 *Id.* at 2754.

90 "Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under §1350, we are persuaded that federal 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." *Id.* at 2765.

violations of "international law" may still be considered:

> In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. 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.
>
> We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we 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,* 630 F.2d 876 (C.A.2 1980), 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.[91]

Thus, the Supreme Court set certain standards but did not close the door to modern ATS litigation as it has evolved in the first four waves.

The Supreme Court nonetheless called for great caution in light of the potential for international law jurisprudence to interfere with foreign affairs' responsibilities of the elected branches. It called for:

> a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs . . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.[92]

---

91 *Id.* at 2761-62.

92 *Id.* at 2763. "[J]urisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as

At best, the Supreme Court's *Sosa* opinion created a rule of "great caution in adapting the law of nations to private rights,"[93] but "[i]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals."[94]

The true ambiguity in guidance is underscored by the majority proceeding to state that, when confronted with ATS claims, "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[95] "Good fences make good neighbors."[96] Good doors make good barriers against intrusions. But, the *Sosa* opinion does not much advise the nature of the locks necessary or advisable to control inappropriate invasions of supposed international law into U.S. courts. It does little to define this "narrow class" and who and what claims can have a key and get through that door.[97]

Despite "caution," some words of the *Sosa* majority seemed

within the common law enforceable without further statutory authority." *Id.* at 2764.

93 *Id.* at 2764.

94 *Id.* at 2764-65.

95 *Id.* at 2764.

96 Robert Frost, *Mending Wall*, *in* COLLECTED POEMS, PROSE, & PLAYS 39, 39-40 (Literary Classics of the U.S. 1995) (1914).

97 For a sampling of some recent decisions applying, interpreting, and sometimes struggling with the *Sosa* decision's ATS approach, see Alperin v. Vatican Bank, 2005 WL 878603 (9th Cir. Apr. 18, 2005) (Nos. 03-15208, 03-16166) (extensive discussion of *Sosa* and refusing to dismiss WWII claims because they, allegedly, could interfere with the powers and deference of the political branches); In re Agent Orange Product Liability Litigation, 2005 WL 729177, 2 (E.D.N.Y. Mar 28, 2005) (No. MDL 381, 04-CV-400) (extensive discussion of *Sosa*, ultimately holding that herbicide manufacturers were not entitled to government contractor defense in claims that use of the herbicide violated international law and constituted a war crime, but the allegations were insufficient to state claims for violations of international law and war crimes); In re South African Apartheid Litigation, 346 F. Supp. 2d 538, 546 (S.D.N.Y. 2004) (suit against corporations for actions in South Africa dismissed because corporations were not state actors and did not violate the law of nations); Doe v. Rafael Saravia, 348 F. Supp. 2d 1112 (E.D. Cal. 2004) (interpreting ATS and *Sosa* to hold for plaintiffs against El Salvadoran paramilitary troops); Jama v. INS, 343 F. Supp. 2d 348 (D.N.J. 2004) (holding that contract guards used by INS were not entitled to summary judgment on ATS claims for alleged mistreatment of asylum seekers under their care); Arndt v. UBS AG, 342 F. Supp. 2d 132, 138 (E.D.N.Y. 2004) (recognizing *Sosa* established a high standard, determining that plaintiffs did not make out a claim against German companies regarding holocaust claims); Weiss v. American Jewish Committee, 335 F. Supp. 2d 469, 475 (S.D.N.Y. 2004) (recognizing an "opening" from *Sosa* to find common law international law claims, using *Sosa*'s "caution" to find against Holocaust descendents seeking preliminary injunction against actions near death camp); Presbyterian Church of Sudan v. Talisman Energy, Inc., 226 F.R.D. 456, 469 (S.D.N.Y. 2005) (after extensive discussion of ATS history denying class certification in case regarding Sudanese plaintiffs and a Canadian defendant); Mohammad v. Bin Tarraf, 114 Fed. Appx. 417, 419 (2d Cir. 2004) (because the ATS allows suits "regardless of the existence of a close United States connection," court granted pro se plaintiff an opportunity to amend his complaint to include an ATS claim).

to have no problem with, and in fact endorsed, the expansionist evolution of ATS jurisprudence described in the first four waves:

> We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism. Later Congresses seem to have shared our view. The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala,* 630 F.2d 876 (C.A.2 1980), and for practical purposes the point of today's disagreement has been focused since the exchange between Judge Edwards and Judge Bork in *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774 (C.A.D.C.1984). Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.[98]

Notwithstanding these pronouncements, the *Sosa* Court found Alvarez's claim for unlawful abduction in violation of international law unconvincing.[99]

In *Sosa*, Justice Scalia concurred in part and concurred in the *Sosa* judgment but opined separately (joined by Chief Justice Rehnquist and Justice Thomas). Some of his most poignant pronouncements challenging the majority are presented below.

First, Justice Scalia questioned the idea of federal common law based on international law as it has burgeoned in the past 25 years:

> In modern international human rights litigation of the sort that has proliferated since *Filartiga v. Pena-Irala,* 630 F.2d 876 (C.A.2 1980), a federal court must first *create* the underlying federal command. But "the fact that a rule has been recognized as [customary international law], by itself, is not an adequate basis for viewing that rule as part of federal common law." . . . In Benthamite terms, creating a federal

---

98 124 S. Ct. at 2765.

> While we agree with Justice SCALIA to the point that we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field) just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.

Id.

99 *Id.* at 2769.

> Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise.

Id. (footnotes omitted).

> command (federal common law) out of "international norms," and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.[100]

Justice Scalia emphasized the general rejection of federal "common law" since *Erie R. Co v. Tompkins* and so questioned a general acceptance of federal recognition of common international law.[101]

Justice Scalia also questioned the interference with Congress and foreign relations associated with judicial recognition of customary international law claims.[102] He opined that asking judges to define international laws applicable in United States courts threatens democratic principles:

> To be sure, today's opinion does not itself precipitate a direct confrontation with Congress by creating a cause of action that Congress has not. But it invites precisely that action by the lower courts, even while recognizing (1) that Congress understood the difference between granting jurisdiction and creating a federal cause of action in 1789, . . . (2) that Congress understands that difference today, . . . and (3) that the ATS itself supplies only jurisdiction, ... In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives. One does not need a crystal ball to predict that this occupation will not be long in coming, since the Court endorses the

---

100 *Id.* at 2772 (Scalia, J., concurring) (citations omitted) (alterations in original).

101 *Id.* at 2772-73 (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)). Scalia explained:

> The Court masks the novelty of its approach when it suggests that the difference between us is that we would "close the door to further independent judicial recognition of actionable international norms," whereas the Court would permit the exercise of judicial power "on the understanding that the door is still ajar subject to vigilant doorkeeping." . . . The general common law was the old door. We do not close that door today, for the deed was done in *Erie*. . . . Federal common law is a *new* door. The question is not whether that door will be left ajar, but whether this Court will open it.

Id. at 2773-74 (Scalia, J., concurring) (citations omitted).

102 *Id.* at 2774 (Scalia, J., concurring). Justice Scalia stated the following:

> [M]any attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences." . . . *"Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law."* . . . These considerations are not, as the Court thinks them, reasons why courts must be circumspect in use of their extant general-common-law-making powers. They are reasons why courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law.

Id. (alterations in original) "The Second Circuit, which started the Judiciary down the path the Court today tries to hedge in, is a good indicator of where that path leads us: directly into confrontation with the political branches." *Id.* at 2775 (Scalia, J., concurring).

> reasoning of "many of the courts and judges who faced the issue before it reached this Court," including the Second and Ninth Circuits.[103]

Justice Scalia thus concurred in the result but not the reasoning of the *Sosa* majority which he felt left open too much discretion to federal courts and too much potential interference with the prerogatives of the political branches.

The idea that a potential endorsement of the expansionist evolution of ATS litigation was endorsed or enabled by the *Sosa* majority concerned Justice Scalia:

> The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates. [104]

Justice Scalia expanded his analysis by concluding that the *Sosa* majority had left the expansionist agenda open for further endeavors in international tort liability:

> We Americans have a method for making the laws that are over us . . . . For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained. This Court seems incapable of admitting that some matters—*any* matters—are none of its business . . . . In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* have used—invites them to try again. [105]

So, Justice Scalia reached the same conclusion as this author – *Sosa* emphasizes "caution" but offers little else to know where courts can or should go in this fifth wave of ATS litigation.[106] All we really can discern from *Sosa* is that courts must be cautious

---

103 *Id.* at 2774 (Scalia, J., concurring) (citations omitted). Scalia questioned:

> Does this Court truly wish to encourage the use of a jurisdiction-granting statute with respect to which there is "no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; [and] no record even of debate on the section," . . . to override a clear indication from the political branches that a "specific, universal, and obligatory" norm against genocide is *not* to be enforced through a private damages action? Today's opinion leads the lower courts right down that perilous path.

Id. at 2775 (Scalia, J., concurring) (citations omitted) (alteration in original).

104 *Id.* at 2776 (Scalia, J., concurring).

105 *Id.* (Scalia, J., concurring).

106 Justices Ginsburg and Breyer also filed concurrences in *Sosa*, but focused on the FTCA claims rather than substantively disputing the majority's ATS discussion.

in invoking international liability under the ATS, but courts can entertain ATS lawsuits and indeed decide whether there is a cause of action recognizable in any particular case.

IV. BEYOND THE ATS: THE INCREASING INFUSION OF INTERNATIONAL OR FOREIGN LAW IN DOMESTIC JUDGMENTS

Aside from ATS litigation, there is a growing debate about the invocation and citation of international "law" or foreign law to inform the domestic decisions on United States law. This raises many of the same concerns related to acceptance, invocation or recognition of some superceding foreign authority involved in ATS litigation.

Three recent Supreme Court cases have been the primary focus of this debate – *Atkins v. Virginia*,[107] *Lawrence v. Texas*,[108] and *Roper v. Simmons*.[109] Each involved decisions of U.S. domestic law, but the decisions were infused by foreign and international law by at least a few justices.

In *Atkins v. Virginia*,[110] the Court invalidated laws providing that the mentally retarded could be sentenced to death, using in part foreign authorities. In footnotes, the majority cited the opinion of the "world community" to support its conclusion.[111] The Court relied, in part, on an amicus brief filed by the European Union, concluding that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[112] Unsurprisingly, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) dissented and disagreed with the Court's invocation of extraterritorial authority. Scalia stated in dissent:

> [T]he Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls . . . . [I]rrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the

107 536 U.S. at 304.
108 539 U.S. at 558.
109 125 S. Ct. at 1183.
110 *Atkins*, 536 U.S. at 316.
111 *Id.* at 316 n.21.
112 *Id.*

> Constitution."[113]

Justice Scalia's dissent contributed to a growing debate as to the appropriateness of world views to influence domestic law.

Lawrence v. Texas involved overturning a Texas statute barring same-sex sodomy. Writing for the majority, Justice Kennedy, cited as authority a decision by the European Court of Human Rights permitting homosexual conduct as evidence of a lack of consensus on such conduct's illegality.[114] Again, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) dissented, in part related on the Court's reference to foreign authorities. Here, Justice Scalia stated in dissent:

> In any event, an "emerging awareness" is by definition not "deeply rooted in this Nation's history and tradition[s]," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence . . . because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization," . . . but rather rejected the claimed right to sodomy on the ground that such a right was not "'deeply rooted in *this Nation's* history and tradition,'" " . . . *Bowers*' rational-basis holding is likewise devoid of any reliance on the views of a "wider civilization," . . . The Court's discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans."[115]

According to Justice Scalia, national law should not be dependent on international or foreign views.

The most recent Supreme Court debate over the invocation of international or foreign law came in the March 2005 decision in *Roper v. Simmons*.[116] *Roper* held that the Constitution forbids the imposition of the death penalty on juvenile offenders – those under age 18 when their crimes were committed.[117] The Court relied substantially on the supposed views of the "international community" on the matter.[118]

Dissenting in *Roper*, Justice Scalia (in an opinion joined by Chief Justice Rehnquist and Justice Thomas) was scolding in his disagreement with the Court's reliance on foreign sources to reach their conclusion.[119] For example, Justice Scalia found

---

113 *Id.* at 347-48 (Scalia, J., dissenting) (quoting *Thompson,* 487 U.S., at 868-869, n.4 (Scalia, J., dissenting)) (citations omitted) (alteration in original).

114 539 U.S. at 573.

115 *Id.* at 598 (Scalia, J., dissenting) (quoting *Foster v. Florida,* 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)) (alterations in original).

116 125 S. Ct. at 1183.

117 *Id.* at 1200.

118 *Id.* at 1198-1200.

119 *See id.* at 1217-30 (Scalia, J., dissenting).

reliance on some international consensus entirely inappropriate in setting domestic constitutional standards:

> More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself.[120]

After describing multiple court rulings that would need to be overturned if the Court were to consistently rely on foreign sources of authority, Justice Scalia continued:

> The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.[121]

In essence, Justice Scalia argued that the Court's invocation of international and foreign authorities is selective and inappropriate.

Also dissenting in *Roper*, Justice O'Connor nonetheless rejected Justice Scalia's rebuke regarding reference to international or foreign law. Justice O'Connor explained that international and foreign law has a role in U.S. jurisprudence:

> I disagree . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency . . . . Obviously, American law is distinctive in many respects . . . . But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights.[122]

Thus, although Justice O'Connor disagreed with the majority, she failed to reject its reliance on international and foreign laws as authority to inform constitutional interpretation.

---

120 *Id.* at 1226 (Scalia, J., dissenting).
121 *Id.* at 1228 (Scalia, J., dissenting) (footnote omitted).
122 *Id.* at 1215-16 (O'Connor, J., dissenting) (emphasis omitted) (citations omitted).

Beyond the docket, this debate has also reached the podium where several Supreme Court Justices have recently expressed their views on the use of international law in interpretation and decisions of U.S. law. For example, several U.S. Supreme Court Justices have delivered presentations on the topic.[123] Justices Scalia and Breyer even engaged in an unprecedented debate on the use of international law in U.S. jurisprudence, which was broadcasted on C-SPAN.[124] There is no doubt that the role of international law in domestic jurisprudence is increasing in its application and its controversy.

V. THE DANGERS OF INVOKING INTERNATIONAL LAW IN DOMESTIC JURISPRUDENCE

Although sympathies run high in many allegations of human rights abuses, there are several dangers in allowing these disputes and allegations to be decided in U.S. courts. Limitations beyond mere "caution" should be directed toward the federal courts. This Part briefly summarizes the principal dangers raised by involving U.S. courts in issues of international "law".

The first and most fundamental objection to an expansionist view of international law in U.S. jurisprudence is a constitutional one. Article III of the United States Constitution does not give federal judges unlimited authority to fashion a federal common law based on international norms.[125] Moreover, attempts by Article III courts to do so necessarily interfere with the constitutional prerogatives of the elected branches (the Executive

123 *See, e.g.*, Ruth Bader Ginsburg, Address to the American Constitution Society, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication, (Aug. 2, 2003) (transcript available at http://www.humanrightsfirst.org/us_law/inthecourts/Ginsburg_transcript_080203.pdf); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003); Stephen Breyer, Address at the American Society of International Law, The Supreme Court and the New International Law (Apr. 4, 2003) (transcript available at http://www.humanrightsfirst.org/us_law/inthecourts/Supreme_Court_New_Interl_Law_Just_Breyer%20.pdf); Sandra Day O'Connor, Remarks to the Southern Center for International Studies, (Oct. 28, 2003) (transcript *available at* http://www.humanrightsfirst.org/us_law/inthecourts/SOUTHERN_CENTER_INTERNATIONAL_STUDIES_Justice_O%27Connor.pdf) ; Sandra Day O'Connor, Keynote Address, Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002) (transcript available at http://www.humanrightsfirst.org/us_law/inthecourts/ASIL_Keynote_Add_2002_Just_O%27Connor.pdf)

124 *Justices Debate International Law on TV*, WASH. POST, Jan. 13, 2005, (transcript available at http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument); Antonin Scalia, Keynote Address: Foreign Legal Authority in the Federal Courts, (2004), *in* 98 ASIL PROC. 305.

125 *See generally, e.g.*, Donald J. Kochan, Note, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153 (1998); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002).

and Congress) and thereby raise serious separation of powers issues.

The second problematic issue involves foreign policy and control over national security.[126] To the extent private plaintiffs are allowed to sue nation-states or corporations acting in concert with such states for alleged human rights' abuses, judicial decisions necessarily make pronouncements regarding the appropriate behavior of foreign countries. This could embroil the United States elected branches in unwanted controversy and remove their negotiating options and discretion on the world stage.

The next principal objection to expansive ATS litigation is based on rule of law concerns. Courts are too often relying on customary international law outputs that lack the formal elements or intentions as enforceable law. Often, customary international law outputs are intended only as aspirational or symbolic rather than drafted as enforceable legal obligations or with the intent of creating liability.[127] Once these CILOs are used as evidence of enforceable customary international law obligations and liabilities, courts under the ATS mutate the purpose, intention, and effect of such international outputs. Furthermore, reliance on extraterritorial "law" is a run around Congress's ability, prerogative, and responsibility to define U.S. law. Indeed, some cases have relied on certain CILOs despite direct evidence of Congress's intent that such documents *not* create legal obligations or liabilities.

When courts have discretion to look beyond the U.S. Code to fashion international law actions, there is a serious danger to the rule of law and the sanctity of the concept that the law is known and ascertainable by persons subject to it. Congress has failed to ratify the vast majority of human rights treaties sponsored by the United Nations.[128] This record indicates a general

126 *See generally, e.g.*, Donald J. Kochan, *After Burma*, LEGAL TIMES, Aug. 21, 2000, at 54.; Donald J. Kochan, *Foreign Policy, Freelanced*, THE RECORDER (San Francisco), Aug. 23, 2000, at 5.; Donald J. Kochan, *Rein in Alien Tort Claims Act: Reconstituted Law of Nations Standard Needs Defining by Congress*, FULTON COUNTY DAILY REPORT, Aug. 24, 2000.

127 *See* Kochan, *supra* note 125, at 182-87. For example, "The simple fact is that this [Universal] Declaration [of Human Rights] was not drafted or proclaimed to serve as law." Dean Rusk, *A Comment on Filartiga v. Pena-Irala*, 11 GA. J. INT'L & COMP. L. 311, 313 (1981) Rusk also quoted Eleanor Roosevelt, Chairman of the Commission on Human Rights, who stated when presenting the Declaration to the U.N. General Assembly, stating that "[i]t is not and does not purport to be a statement of law or of legal obligation. It is . . . a common standard of achievement . . . ." *Id.* at 313 & n.7 (quoting XIX Bulletin, Dep't St. Bull., Dec. 19, 1948, No. 494, at 751). Despite this, courts in cases like *Filartiga* and *Kadic* relied on the UDHR and other CILOs crafted under similar means and intentions.

128 See Mark P. Jacobsen, Comment, *28 U.S.C. 1350: A Legal Remedy for Torture in*

unwillingness on the part of the United States to recognize broad principles of human rights as controlling legal authority.[129] For the courts to ignore this reality and insist that these documents form a foundation for ascertaining the "law of nations" component of the ATCA is to harm Congress in two ways. First, it ignores Congress's power to refrain from codifying certain principles or norms into U.S. law. Second, it restricts congressional power to legislate in a manner contrary to these principles or norms. By proclaiming that this principle or norm is universal and binding upon all states (or all states and some private individuals), the court is stating that an obligation Congress has been specifically unwilling to accept will now bind the United States and its Congress.

The final principal objection involves the concept of economic development and its concomitant contribution to the advancement of human rights and democracy.[130] If corporate investment is chilled because of potential international "law" liability, one of the major contributions to economic development, democracy, and the enhancement of human rights is chilled as well. As private companies increasingly become subject to ATS suits, such suits threaten to discourage the very overseas investment and development that helps expand individual liberty, human rights, and democracy abroad. Discouraging foreign investment by advancing new liabilities may actually hinder the advancement of human rights in developing countries.

Paraguay?, 69 GEO. L.J. 833, 834, 847-48 (1981) (describing the "amorphous law of nations" and arguing that the application of the ATCA is "restricted . . . by difficulty in defining when an act is governed by the law of nations"; and "[T]he Senate has been unwilling to extend international law to encompass the protection of human rights"). *See also* Donald Johnson, Jr., *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 GA. J. INT'L & COMP. L. 335, 336-37 (1981) (arguing "[t]he difficulty of the task [of defining international law] is made more obvious by the wide variance among academic specialists in the field in approaching the sources of international law," and describing the "often nebulous law represented by the usage and practice of nations").

129 *See* Jacobsen, *supra* note 128, at 849. Jacobsen states:

> The Senate has refrained thus far from ratifying . . . numerous . . . human rights treaties, thereby expressing an unwillingness to create any internationally recognized legal protections for human rights. The Senate's primary concern has been that the treaty provisions might intrude upon the sovereignty of nations and of the United States in particular.

Id. *See also* Bradley & Goldsmith, *supra* note 29, at 869 (stating that, "[f]ar from authorizing the application of the new CIL [customary international law] as domestic federal law, the political branches have made clear that they do not want the new CIL to have domestic law status").

130 *See, e.g.*, Marc A. Miles *et al.*, INDEX OF ECONOMIC FREEDOM (2005) (arguing and documenting that market-based investment is directly correlated with the advancement of economic freedom and other human rights).

VI. CONCLUSION

The ATS and the use of international law in litigation has been in a rapid state of evolution for the past twenty-five years. This Article has attempted to provide a brief overview of the ATS evolution and the issues involved in the infusion of international law into domestic jurisprudence, with additional clarity and debate provided by other authors and presenters involved.

Only recently have scholars and other commentators taken serious notice of the ATS revolution. Some hoped that the Supreme Court would add clarity to the evolution in *Sosa*, but instead it has simply left the door ajar cautioning good doorkeeping.[131] The ATS is no longer little known, but its future *is* unkown. Only Congress or more concrete guidance from the U.S. Supreme Court can truly define the ATS's future. Where the ATS door will swing in the future remains uncertain.

131 As one District Court echoed when struggling to interpret *Sosa*:

> While it would have been unquestionably preferable for the lower federal courts if the Supreme Court had created a bright-line rule that limited the ATCA to those violations of international law clearly recognized at the time of its enactment, the Supreme Court left the door at least slightly ajar for the federal courts to apply that statute to a narrow and limited class of international law violations beyond those well-recognized at that time.

In re South African Apartheid Litigation, 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004).

DOE V. UNOCAL: HOLDING CORPORATIONS LIABLE FOR HUMAN RIGHTS ABUSES ON THEIR WATCH

*Armin Rosencranz**
*David Louk***

I. INTRODUCTION

In the last twenty-five years, the Alien Tort Claims Act (ATCA), a little known provision of the Judiciary Act of 1789, has become a leading tool for pursuing human rights abusers in U.S. courts.[1] Allowing foreigners to sue in U.S. courts for customary international law violations committed abroad, the ATCA seems to enable victims of human rights abuses to sue both individuals and corporations.[2] After an eight year legal battle, the plaintiffs in the most notable ATCA case against a corporation, *Doe v. Unocal*, recently settled with Unocal out of court for an undisclosed sum just prior to a jury being empanelled in a California state case that paralleled the federal ATCA-based case.[3]

As *Unocal* advanced through both the federal and state court proceedings, the judges upheld the plaintiffs on many of their motions.[4] Notwithstanding the settlement, the United States

*Armin Rosencranz (A.B., Princeton; J.D., Ph.D., Stanford) is a consulting professor at Stanford.
**David Louk, a Stanford student, took Professor Rosencranz' 2003 seminar on the Alien Tort Claims Act of 1789.

1 28 U.S.C. § 1350 (1993) ("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."). The Alien Tort Claims Act is also often referred to as the Alien Tort Statute. *See, e.g.,* LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION 70-71 (1996).

2 *See* Terese M. O'Toole, Amerada Hess Shipping Corp. v. Argentine Republic: *An Alien Tort Statute Exception to Foreign Sovereign Immunity*, 72 MINN. L. REV. 829, 839 (1988).

3 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *district court opinion vacated by* 403 F.3d 708 (9th Cir. 2005) [hereinafter *Unocal III*].

4 *See* Unocal v. Super. Ct., No. S114884, 2003 Cal. LEXIS 3270 (Cal. May 14, 2003); Doe v. Unocal, 963 F. Supp. 880 (C.D. Cal. 1997) [hereinafter *Unocal I*]; Doe v. Unocal,

Court of Appeals for the Ninth Circuit's decision upholding the ATCA's reach has given human rights activists reason to believe that, in certain instances, the ATCA grants the federal jurisdiction necessary to hold corporations liable for human rights offenses that corporations commit or contribute to abroad.[5]

II. *DOE V. UNOCAL*: U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, THE QUESTION OF JURISDICTION

The case of *Doe v. Unocal* involved the construction of the Yadana pipeline in Burma.[6] The plaintiffs, villagers from the Tenasserim region of Burma, sued Unocal for its complicity in human rights atrocities committed by the Burmese government and military during the construction of the pipeline.[7] The plaintiffs claimed that Unocal, through the Burmese military, intelligence and/or police forces, used violence and intimidation to relocate whole villages, enslave villagers living in the area of the pipeline, steal property, and commit assault, rape, torture, forced labor, and murder.[8]

The plaintiffs' lawsuit first came before Judge Richard Paez of the United States District Court for the Central District of California in 1996 (*Unocal I*).[9] In *Unocal I*, Judge Paez' role was to determine whether the plaintiffs had shown sufficient evidence to survive Unocal's motion to dismiss under Rule 19 of the Federal Rules of Civil Procedure (FRCP).[10] The *Unocal I* lawsuit included Myanmar Oil and Gas Enterprise (MOGE) and State Law and Order Restoration Council (SLORC) as

110 F. Supp. 2d. 1294 (C.D. Cal. 2000) [hereinafter *Unocal II*]; *Unocal III*, 395 F.3d 932.

5 *See Unocal III*, 395 F.3d 932.

6 *Unocal I*, 963 F. Supp. at 884-85.

7 *Id*. Since 1988, the military junta in Burma has promoted the name of the state as Myanmar. *Id*. at 884. The U.S. continues to refer to the state as Burma. Although referenced as Burma in this document, both names are used throughout the *Doe v. Unocal* lawsuits.

8 *Id*. at 883.

9 *Id*.

10 *Id*. at 884. Rule 19 of the Federal Rules of Civil Procedure states that a person is a necessary party if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

FED. R. CIV. P. 19(a).

defendants in the case.[11] Due to immunities granted by the Federal Sovereign Immunities Act,[12] Judge Paez found that MOGE and SLORC, entities controlled by the Burmese government, were immune from prosecution.[13] They were dropped as co-defendants in the case.[14]

In its motion to dismiss, Unocal argued that under FRCP Rule 19, SLORC and MOGE were required parties in the lawsuit.[15] Judge Paez disagreed: because plaintiffs were claiming Unocal was liable as a joint tortfeasor, compensatory relief could be accorded, even if SLORC and MOGE were not defendants.[16] Because plaintiffs were seeking injunctive and declaratory relief, the case went forward without MOGE or SLORC as named defendants.[17] Judge Paez' ruling was significant in that it allowed the plaintiffs to seek damages from a U.S. corporation, even if it was only one of several named responsible parties for a violation of the ATCA. In addition, he recognized that corporations are viable defendants for plaintiffs claiming an ATCA violation.[18]

III. *DOE V. UNOCAL*: U.S. DISTRICT COURT, MOTION FOR SUMMARY JUDGMENT

Unocal then moved for summary judgment on all of the plaintiffs' claims before U.S. District Judge Ronald Lew.[19] In arguing for summary judgment, Unocal contended that plaintiffs provided no evidence that made their case actionable under the

11 *Unocal I*, 963 F. Supp. at 883.

12 28 U.S.C § 1330 (1993). *See, e.g.,* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998) (holding that under the Foreign Sovereign Immunities Act (FSIA), a foreign state enjoys general immunity from civil actions for damages unless the damages occurred in the United States or the matter falls within one of FSIA's enumerated exceptions to foreign sovereign immunity); Argentine Republic v. Amerada Hess Shipping, 488 U.S. 428, 434-39 (1989) (holding that FSIA's enumerated exceptions provide the only mechanism for obtaining jurisdiction over a foreign state and its agencies or instrumentalities). The FSIA is, therefore, often crucial to a plaintiff's attempt to bring not only a U.S. multinational corporation before the court, but also its foreign state business partners as well.

13 *Unocal I*, 963 F. Supp. at 887.

14 *Id*. at 888.

15 *Id*. at 889.

16 *Id*.

17 *Id.* at 889. Unlike similar ATCA cases in which the plaintiffs sought environmental cleanup or other forms of equitable relief, the Doe plaintiffs sought "an order directing defendants to cease payment to SLORC, and an order directing defendants to cease their participation in the joint enterprise until the resulting human rights violations in the Tenasserim region cease." *Id*.

18 *Id.* at 891.

19 *Unocal II*, 110 F. Supp. 2d at 1295. Summary judgment is appropriate when no genuine issue of material fact exists. *Id.* at 1303 (citing FED. R. CIV. P. 56(c)). If the moving party can show that there is insufficient evidence for a reasonable fact finder to return a verdict for the non-moving party, the case must be dismissed. *Id.*

ATCA.[20] For the ATCA to grant jurisdiction over a suit, the defendant must either be a state actor, linked to state action, or have committed one of the "handful" of *jus cogens* violations.[21]

A. Requirement of State Action

After MOGE and SLORC were removed as defendants, Unocal, the remaining defendant, could not reasonably be considered a state actor.[22] However, plaintiffs sought to prove that the Burmese army's actions were linked to Unocal's will and for Unocal's benefit.[23] To determine whether Unocal's actions could be considered "state action," Judge Lew used two tests: the joint action test,[24] and the proximate cause test.[25] Because the joint action test is only appropriate in instances where the private actor is accused of having committed the crime and is aided by the state, he found it inapplicable.[26]

Instead, Judge Lew used the proximate cause test. To prove proximate cause, a plaintiff must show that a non-state actor exercised control over the government's decision to commit a

20 *Id*. at 1303.

21 *Id*. at 1304. *Jus Cogens* violations are acts that are so heinous that, when committed by any party, state or private, they violate "the law of nations." *Id*. at 1303-04 (quoting 28 U.S.C § 1350 (1993)). Violations of the law of nations violate customary international law, which governs the actions of both state and non-state actors. The norms of customary international law emerge over time through widespread repetition by the practice of states. *Id*. at 1304-05.

22 *Id*. at 1306-07.

23 *Id*. at 1303-10.

24 *Id*. at 1305. The Supreme Court first established the joint action test in *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). In a unanimous opinion written by Justice White, it noted that to act "'under color of' state law . . . does not require that the defendant be an officer of the State. It is enough that he is a willful participant in *joint action* with the State or its agents." *Id*. at 27 (emphasis added). In *Dennis*, the defendant bribed a judge to obtain an illegally issued injunction. The judge's immunity from liability did not change the character of his actions or that of his conspirators, who together jointly acted under color of law in granting the injunction. Since the judge had immunity only because his act was an official judicial action, the injunction must have been granted under color of law. *Id*. at 24.

Since *Dennis*, courts have varied in their application of the joint action test. To find joint action, some courts require a conspiracy between the two parties. *See* Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1454 (10th Cir. 1995). In the case of *Cunningham v. Southlake Ctr. for Mental Health*, 924 F.2d 106, 107 (7th Cir. 1991), the Court of Appeals for the Seventh Circuit found that "[a] requirement of the joint action charge . . . is that both public and private actors share a common, unconstitutional goal." Other courts have simply required a more complicit state role to qualify as joint action. For instance, the Court of Appeals for the Ninth Circuit found that "[j]oint action . . . requires a substantial degree of cooperative action." Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989). Moreover, in *Hoai v. Vo,* 935 F.2d 308, 313 (D.C. Cir. 1991), the D.C. Circuit Court determined that "joint activity" requires, "at a minimum, some overt and significant state participation in the challenged action." (internal quotation and citation omitted).

25 *Unocal II*, 110 F. Supp. 2d at 1307.

26 *Id*. at 1306-07.

violation.[27] The proximate cause test first arose in *Arnold v. IBM*.[28] In *Arnold*, state officials searched the plaintiff's property with a warrant granted because of IBM's withholding of specific information regarding the allegations against him.[29] He sued, claiming that IBM's actions were under color of law since IBM was part of a conspiracy with state officials.[30] The U.S. Court of Appeals for the Ninth Circuit found that proving proximate cause requires more than action by the state.[31] Although it was undisputed that IBM was involved in the task force investigating Arnold (it would not have existed but for IBM's actions), no evidence indicated that the defendants exerted control over the decisions of the task force.[32] The court therefore ruled that IBM's involvement with the task force did not proximately cause Arnold's injuries.[33] In *Brower v. County of Inyo*, the court specifically stated that for a complaint to sufficiently prove a private party acted under color of law, "it must allege that specific conduct by a party was a *proximate cause*" of the act.[34]

In considering Unocal's motion, Judge Lew chose to interpret proximate cause as the Ninth Circuit did in *King v. Massarweh*.[35] There, the court cited *Arnold* in determining that "absent some showing that a private party had some control over state officials' decision" to commit the alleged act, "the private party did not proximately cause the injuries stemming from [it]."[36] Because "[p]laintiffs present[ed] no evidence [alleging that] Unocal 'controlled' the Myanmar military's decision to commit the alleged tortious acts[,]" Judge Lew found that Unocal did not act under "color of law" for purposes of the ATCA.[37]

In addition, plaintiffs claimed that a tort claim of forced labor, an act akin to modern slavery, is actionable under the ATCA regardless of whether the actor is a private individual or acting under the "color of law."[38] Judge Lew agreed and dismissed Unocal's claims that the forced labor was more akin to a public service requirement of limited duration.[39]

---

27 *Id*. at 1307.

28 637 F.2d 1350, 1354 (9th Cir. 1981).

29 *Id*. at 1353.

30 *Id*. at 1354.

31 *Id*. at 1355-56.

32 *Id*. at 1357.

33 Arnold v. Int'l Bus. Machs. Corp., 637 F.2d at 1357.

34 817 F.2d 540, 547 (9th Cir. 1987) (emphasis added).

35 *Unocal II*, 110 F. Supp. 2d at 1307 (citing King v. Masserweh, 782 F.2d 825, 829 (9th Cir. 1986)).

36 *King*, 782 F.2d at 829.

37 *Unocal II*, 110 F. Supp. 2d at 1307.

38 *Id*.

39 *Id*.

B. Secondary Liability

Plaintiffs also had to prove "that Unocal [was] legally responsible for the Myanmar [Burmese] military's forced labor practices."[40] Plaintiffs cited decisions during the U.S. Military Tribunals after World War II as setting the precedent that the knowledge and approval of slave labor practices by an industrialist profiting from such actions is sufficient for a finding of liability.[41] The court disagreed and found that, under international law, the vicarious liability of directors requires participation and cooperation in the practice of forced labor.[42] Although Judge Lew acknowledged that the evidence pointed to Unocal's knowledge of the forced labor practices, he dismissed plaintiffs' claims that Unocal could be held legally responsible for the forced labor because none of the plaintiffs' evidence suggested Unocal actively sought to employ forced labor.[43]

The plaintiffs thereafter amended their suit. In *Unocal II*, they invoked the Racketeer Influenced Corrupt Organization Act (RICO), which makes it illegal for organized criminal conspiracies to operate legitimate businesses.[44] Plaintiffs also invoked federal court jurisdiction under 28 U.S.C. § 1331[45] in addition to filing under California state law.[46] Again, Judge Lew dismissed the plaintiffs' claims.[47] He declined to exercise supplemental jurisdiction over the claims under California state law, which, under 28 U.S.C. § 1367(c), he could have done if all federal claims are dismissed.[48]

Because Judge Lew found that no genuine issue of material fact existed, he granted Unocal summary judgment and

40 *Id*. at 1309.

41 *Id*. *See, e.g.,* United States v. Alfried Felix Alwyn Krupp von Bohlen und Halbach (The Krupp Case), 9 Trials of War Criminals Before the Nuremberg Military Tribs. Under Control Council Law No. 10 (1950).

42 *Unocal II*, 110 F. Supp. 2d at 1310.

43 *Id*.

44 *See* 18 U.S.C. §§ 1961-1968 (2003). Unocal believed that RICO could not be used to hold corporations liable for acts committed extraterritorially. *Unocal II,* 110 F. Supp. 2d at 1310-11. Judge Lew agreed. *Id.* And because he found plaintiffs' evidence of "substantial acts in furtherance of the Project [that] occurred within the United States," he rejected their claim under RICO. *Id.* at 1311.

45 28 U.S.C § 1331 (1993). Plaintiffs argued that the law of nations is incorporated into federal common law such that, under the federal question statute, the district court would have jurisdiction over a violation of the law of nations. *Unocal II,* 110 F. Supp. 2d at 1311. Judge Lew found that plaintiffs' claims lacked jurisdiction under the federal question statute for the same reasons he found them lacking under the ATCA: plaintiffs provided insufficient proof of Unocal's direct or vicarious liability for the actions of the Myanmar military. *Id*.

46 *Unocal II*, 110 F. Supp. 2d at 1303.

47 *Id*. at 1310-12.

48 *Id*. at 1311-12.

dismissed the plaintiffs' claims without prejudice.[49] As the state law claims were dismissed without ruling on them, both plaintiffs appealed Judge Lew's ruling to the Court of Appeals for the Ninth Circuit and re-filed the claims in California state court.[50] At this point, *Doe v. Unocal* split into two cases: one federal and one state.

IV. *DOE V. UNOCAL*: UNOCAL'S NINTH CIRCUIT SUMMARY JUDGMENT APPEAL

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit heard the plaintiffs' appeal of summary judgment in favor of Unocal.[51] The panel agreed with the lower court's ruling that state agencies MOGE and SLORC were immune from prosecution under the Foreign Sovereign Immunities Act.[52] However, the court reversed the lower court's grant of summary judgment in favor of Unocal and determined that a reasonable fact finder could find genuine issues of material fact upon the evidence submitted.[53] Although all three judges found in favor of the plaintiffs, Judge Stephen Reinhardt filed a concurring opinion to Judge Harry Pregerson's majority opinion.[54]

The majority disagreed with the lower court's finding that no evidence suggested that Unocal could be held accountable for the actions of the Burmese military under the ATCA.[55] The majority cited *Kadic v. Karadžić*, a Court of Appeals for the Second Circuit ruling in which the court found that certain crimes, such as rape, torture and summary execution, while ordinarily requiring state action under the ATCA, do not need to be committed under "color of law" if done so in the furtherance of other more heinous crimes, such as slave trading, genocide, or war crimes.[56] These crimes, known as *jus cogens* crimes, do not require state action and are so egregious that they violate the law of nations regardless of whether they are committed under "color of law."[57]

---

49 *Id*. at 1312.

50 *See Unocal III*, 395 F.3d 932 (9th Cir. 2002); Pl.'s Compl., Doe I v. Unocal Corp., Nos. BC 237 980 & BC 237 679 (Cal. Super. Ct. Oct. 4, 2000), *available at* http://www.earthrights.org/unocal/statecomplaint2003.doc (last updated Oct. 15, 2004).

51 *Unocal III*, 395 F.3d at 936.

52 *Id*. at 958.

53 *Id*. at 962.

54 *Id*. at 963 (Reinhardt, J., concurring).

55 *Id*. at 947.

56 *Id*. at 945-46 (citing Kadic v. Karadžić, 70 F.3d 232, 242-43 (2d Cir. 1995)).

57 The court in *Kadic* investigated whether other crimes committed by private individuals could be *jus cogens* violations, under which the ATCA grants jurisdiction. *Kadic*, 70 F.3d at 241. The court looked at three crimes: genocide, war crimes, and torture. *Id*. at 241-43. First, it determined that genocide is a crime applicable to private non-state actors since the Genocide Convention Implementation Act of 1987 criminalizes acts of genocide regardless of whether the perpetrator acts under color of law. *Id*. at 242

The majority also reversed the lower court's determination that the plaintiffs provided insufficient evidence to prove "active participation" on the part of Unocal, as was necessary during the Nuremberg War Tribunals after World War II.[58] The majority noted that during the Nuremberg Tribunals, "active participation" was only required to overcome the defendants' "necessity defense."[59] Since Unocal did not, and could not, argue necessity, plaintiffs did not need to prove "active participation."[60]

The majority agreed to apply international law and considered whether a private actor had to act "under color of law."[61] Instead of looking solely at the Nuremberg trials, the court found the two-pronged "aiding and abetting" test, *actus reus* and *mens rea*, set by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda instructive.[62] For *actus reus*, the court relied on the ICTY's ruling in *Prosecutor v. Furundzija,* which found that *actus reus* "requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[63] The ICTY determined that the acts of the accomplice must have had a "substantial [enough] effect on the commission of the crime" that it would have been unlikely to occur in "the same way [without] someone act[ing] in the role that the [accomplice] in fact assumed.[64]

(citing Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091(a) (1988)). Second, considering war crimes, it found that they too granted jurisdiction because of the long standing liability of private individuals committing war crimes. *Id*. at 242-43. Finally, courts have recognized this liability since before World War I and reconfirmed it at the Nuremberg Trials after World War II. *Id*. at 243.

Other courts have supported that a "handful of crimes" violate *jus cogens* norms. In *Tel-Oren v. Libyan Arab Republic*, Judge Edwards supported the notion that although most violations of the law of nations require state action for the ATCA to attach liability, there are a "handful of crimes" that violate *jus cogens* norms and are actionable when committed by non-state actors. 726 F.2d 774, 795 (D.C. Cir. 1984). The U.S. District Court for the Eastern District of Louisiana, in *Beanal v. Freeport-McMoran, Inc.*, came to the same conclusion, finding that courts have "universal jurisdiction" for such acts as genocide, war crimes and terrorism. 969 F. Supp. 362, 371 (E.D. La. 1997). The Court of Appeals for the Fifth Circuit declined to disagree when it heard the case on appeal. *See* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 169 (5th Cir. 1999). The Court of Appeals for the Ninth Circuit, in *United States v. Matta-Ballesteros*, also concluded that certain crimes such as murder, genocide and slavery are all violations of *jus cogens* norms. 71 F.3d 754, 764 (9th Cir. 1995).

58 *Unocal III*, 395 F.3d at 947-48.

59 *Id*. at 947.

60 *Id*. at 948.

61 *Id*.

62 *Id*. at 949-51.

63 *Id*. at 950.

64 *Id*. (quoting Prosecutor v. Tadic, Case No. IT-94-1-T, 112 I.L.R. 1 (Int'l Crim. Trib. For Former Yugoslavia Trial Chamber II May 7, 1997)).

For the *mens rea*, the court also relied upon the ICTY's decision in *Furundzija*. The tribunal found that *mens rea* is fulfilled when the accomplice has reasonable knowledge that his or her "actions will assist the perpetrator in the commission of the crime."[65] The tribunal said it was unnecessary for the accomplice to know the precise nature of the crimes.[66] The accomplice need only know that one of a number of crimes would likely be committed, and that the abettor would be facilitating the commission of that crime.[67] The accomplice does not have to *intend* to commit the offense, but only have the knowledge that he will be aiding and abetting it.[68]

The court determined that a reasonable fact finder could conclude that Unocal's conduct could meet the *actus reus* and the *mens rea* requirements of aiding and abetting the Burmese military's actions.[69] Evidence that Unocal provided practical assistance to the military in subjecting plaintiffs to forced labor, without which the perpetration of forced labor would likely not have occurred, was sufficient for *actus reus*.[70] For *mens rea*, the court found genuine issues of material fact regarding Unocal's knowledge that forced labor was being used to the benefit of the pipeline's owners.[71]

The court found that there were genuine issues of material fact regarding whether Unocal aided and abetted the forced labor practices of the Burmese military.[72] This holding, combined with the conclusion that the plaintiffs' other claims of rape and murder did not need to be committed "under color of law" as long as they were committed in furtherance of the forced labor,[73] compelled the Ninth Circuit to overturn the District Court's grant of summary judgment for Unocal.[74] The Ninth Circuit declared that the plaintiffs had offered sufficient evidence for their case to move forward.[75]

65 *Id.* at 951 (quoting Prosecutor v. Furundzija, Case No. IT-95-17/1-T (Int'l Crim. Trib. For Former Yugoslavia Trial Chamber Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999)).

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.* at 952.

70 *Id.* at 952.

71 *Id.* at 953.

72 *Id.*

73 *Id.* at 954 (quoting Kadic v. Karadžić, 70 F.3d 232, 243-44 (2d Cir. 1995)).

74 *Id.* at 962-63 (reversing District Court's grant of summary judgment in favor of Unocal on plaintiff's ATCA claims for forced labor, murder, and rape; affirming District Court's grant of summary judgment in favor of Unocal on plaintiff's ATCA claims for torture).

75 *Id.* at 962-63.

A. Concurring Opinion

In his concurring opinion, Judge Reinhardt went a step further and argued that it was unnecessary to apply international criminal law standards of aiding and abetting.[76] Instead, he asserted that "federal common law tort principles, such as agency, joint venture, and reckless disregard," were entirely appropriate for ATCA cases.[77] For the claims of forced labor, Judge Reinhardt found it irrelevant whether forced labor was a modern equivalent of slavery, and therefore a *jus cogens* violation.[78] Because plaintiffs were alleging that the Burmese military committed the forced labor abuses, and that Unocal should be held responsible under the theory of third-party liability, it was unnecessary for them to prove that the alleged abuses were *jus cogens* violations.[79]

Judge Reinhardt also looked more favorably on the plaintiffs' claims of Unocal's third-party liability. He determined that their alleged complaints of joint venture, agency, and reckless disregard are all common third-party liability theories in federal common law, so federal common law – not international law – should be applied to their claims.[80]

Under federal common law, the judge found that, for joint venture liability, any member of the joint venture can be liable for the torts of its co-venturers.[81] Unocal argued that a separate, independent corporation, Moattama Gas Transportation Co. (MGTC), oversaw construction of the pipeline.[82] However, plaintiffs provided evidence to the contrary, including a Unocal business manager stating that the appearance of two separate entities was nothing but an illusion.[83] Since the evidence suggested that MGTC was part of the joint venture, and not a separate corporation as Unocal contended, Judge Reinhardt determined that the plaintiffs could proceed to trial on their joint venture claim.[84]

For the agency liability claim, plaintiffs argued that Unocal should be held liable for the Burmese military's actions because the military acted as its agent.[85] Judge Reinhardt found significant evidence that Unocal asserted control over aspects of

76 *Id.* at 963 (Reinhardt, J., concurring).
77 *Id.*
78 *Id.*
79 *Id.* at 964.
80 *Id.* at 971.
81 *Id.* at 970.
82 *Id.* at 971-72.
83 *Id.*
84 *Id.* at 972.
85 *Unocal III*, 395 F.3d at 972.

the military's operations in relation to the construction of the pipeline.[86] Internal documents, memoranda by Unocal executives, and public statements that Unocal had control over the military all suggested that Unocal had control over aspects of the military's operations.[87] This was sufficient evidence for Judge Reinhardt to find that the plaintiffs' claim that Unocal's control over aspects of the Burmese military's actions, if proven, would indicate a relationship of agency.[88]

Judge Reinhardt then considered the claim that Unocal was liable for reckless disregard of the human rights abuses committed by the Myanmar military in performing tasks related to the pipeline project.[89] Under his interpretation of recklessness, proof of acting in conscious disregard to known dangers, even without the proof of intent, is all that is necessary to be considered reckless disregard.[90] Plaintiffs provided considerable evidence suggesting that Unocal knew of the likely outcome of its involvement with the Myanmar military, including meetings with human rights groups in which Unocal was informed of the military's brutal treatment of its people; a risk management consulting firm's report prior to Unocal's joining the project, suggesting that the risk of forced labor abuses in connection with the project was high; and testimony from Unocal executives acknowledging their concerns before entering into the project, in particular the potential for human rights abuses.[91] Judge Reinhardt found the evidence supporting the claim of reckless disregard satisfactory for the plaintiffs to move to trial with the claim.

Finally, Judge Reinhardt considered the plaintiffs' claims of

---

86 *Id.* at 973. Judge Reinhardt turned to the Supreme Court for guidance in developing his agency argument:

> The theory of agency liability is also well-supported in the federal common law. The Supreme Court has observed in the context of the Copyright Act that "when we have concluded that Congress intended terms such as employee, employer, and scope of employment to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms."

Id. at 972 (citation omitted).

87 *Id.* at 973.

88 *Id.* at 974.

89 *Id.* at 974-76.

90 *Id.* at 975. Judge Reinhardt considered objective recklessness and subjective recklessness. As to objective recklessness, he stated that the "Supreme Court has stated that '[t]he civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Id.* at 974 (citation omitted). Judge Reinhardt then considered subjective recklessness, stating that "[t]his doctrine requires actual knowledge of a substantial risk which the defendant subsequently disregards." *Id.*

91 *Id.* at 976.

Unocal's liability for murder and rape.[92] Once again, he agreed with the majority that the plaintiffs could bring the claims to trial, but disagreed with their reasoning.[93] He determined that if plaintiffs could prove the acts of murder and rape were committed in furtherance of the forced labor program, and if they could prove Unocal was liable for the forced labor practices of the Burmese military, then it would again be unnecessary for them to prove third party liability.[94]

V. FEDERAL *DOE V. UNOCAL*: NINTH CIRCUIT *EN BANC* ORDER

After the three-judge panel's ruling, *Doe v. Unocal* was ready to go to a jury trial. However, on February 14, 2003, the Ninth Circuit, upon a vote of the majority of non-recused judges on the court, ordered that the case be reheard *en banc*.[95] This order vacated the previous three-judge panel ruling in favor of the plaintiffs and held that the decision cannot be cited as precedent in future cases.[96] This was as far as the federal *Doe v. Unocal* case went before the December 2004 settlement, although the *en banc* panel was days away from hearing evidence when the settlement aborted that process.

VI. STATE *DOE V. UNOCAL*: CALIFORNIA SUPERIOR COURT

A. Phase I

Because the plaintiffs' causes of action for violation of the California Constitution Article I § 6 and violation of the California Business and Professions Code § 17200 were never considered by the federal district court, plaintiffs re-filed these claims in California state court.[97] Phase I of the state trial focused on "piercing the corporate veil:" Plaintiffs alleged that Unocal was the alter ego of the subsidiaries that had contracted with the Burmese government.[98] The scope of Phase I was limited to determining whether there was such a unity of interest and ownership between Unocal and its subsidiary that the individuality, or separateness between Unocal and its

92 *Id.* at 976-77.

93 *Id.* at 977.

94 *Id.*

95 Doe I v. Unocal Corp., 395 F.3d 978, 978-79.

96 *Id.*

97 Pl.'s Compl., Doe I v. Unocal Corp., Nos. BC 237 980, BC 237 679, (Cal. Super. Ct. Oct. 4, 2000), *available at* http://www.earthrights.org/unocal/statecomplaint2003.doc.

98 Doe I v. Unocal Corp., Nos. BC 237 980, BC 237 679, at 3-9 (Cal. Super. Ct. Jun. 7, 2002), *at* http://www.earthrights.org/unocal/PlaintiffMSARuling.doc (Court order denying Plaintiffs' Motion for Summary Adjudication)

subsidiaries ceased to exist.[99] The question was control: Did Unocal have control over its subsidiaries' actions? Superior Court Judge Victoria Chaney found that it did not, and that Unocal's subsidiaries were not sham entities.[100]

B. Phase II

Phase II of the trial discussed liability and damages.[101] Unocal moved for summary judgment on the grounds that the factual findings in Phase I precluded going forward to Phase II on the agency, control, joint enterprise and joint venture theories.[102] In Phase I of the trial, to pierce the corporate veil, plaintiffs had to provide evidence to suggest that the parent controlled the subsidiary sufficiently to deprive the subsidiary of its independent personality.[103] The court found that plaintiffs did not show this.[104] Unocal argued that because the court ruled that Unocal did not control its subsidiary, it should not be held liable for its subsidiary's actions.[105] The court disagreed: It found no reason why a principal cannot be held liable for the wrongdoing of its agent, committed in the scope of its agency, merely because the agent is a distinct corporation.[106] Judge Chaney ruled that although the case was bound by the applicable factual determinations made in Phase I, the question before the court in Phase I was alter ego, not agency or joint venture.[107] Thus, because both the burdens of proof and the claims made in each phase of the trial were different, the finding of fact in Phase I did not preclude a finding of fact in Phase II.[108] Therefore, the court found that the finding of fact in Phase I did not automatically transfer to Phase II to resolve the issues of agency, control, enterprise or joint venture.[109] Judge Chaney denied

99 *Id.*

100 *Doe v. Unocal* (Oct. 15, 2004), *at* http://www.earthrights.org/unocal/index.shtml (stating that in the first phase of the trial, Judge Chaney concluded that the Unocal subsidiaries involved in the Project are not sham entities).

101 Doe I v. Unocal Corp., Nos. BC 237 980, BC 237 679 (Cal. Super. Ct. Sept. 14, 2004), *at* http://www.earthrights.org/unocal/doevunocal09142004.pdf (Court order denying Defendant's Motion for Judgment).

102 *Id.*

103 Doe I v. Unocal Corp., Nos. BC 237 980, BC 237 679, at 3-9 (Cal. Super. Ct. Jun. 7, 2002), *at* http://www.earthrights.org/unocal/PlaintiffMSARuling.doc (Court order denying Plaintiff's Motion for Summary Adjudication)

104 *Id.*

105 Doe I v. Unocal Corp., Nos. BC 237 980, BC 237 679, at 3 (Cal. Super. Ct. Sept. 14, 2004), *at* http://www.earthrights.org/unocal/doevunocal09142004.pdf (Court order denying Defendant's Motion for Summary Judgment).

106 *Id.* at 4.

107 *Id.* at 6-8.

108 *Id.*

109 *Id.*

Unocal's motion for summary judgment.[110]

VII. *DOE V. UNOCAL* SETTLEMENT

After Judge Chaney's ruling, the next step for the *Doe v. Unocal* state case was to empanel a jury to hear the case. However, before this began, Unocal and the plaintiffs reached an out-of-court settlement. In a joint-announcement made on December 14, 2004, Unocal and EarthRights International, the human rights group representing the Burmese plaintiffs, announced that they had a reached a settlement that would end both the state and federal cases against Unocal.[111]

Although EarthRights International declared it was "thrilled" and "ecstatic" at the settlement, many questions were unanswered regarding the ATCA's applicability and Unocal's liability.[112] Because of the *en banc* order from the Ninth Circuit, the plaintiffs' earlier victories in the Ninth Circuit cannot be used as precedent for future cases. And because the settlement prevents the case from being heard before the full *en banc* court, no ruling will ever be issued on the merits of the plaintiffs' claims.

VIII. FUTURE ATCA CASES AGAINST CORPORATIONS

Although the Ninth Circuit three-judge panel's rulings are not legal precedent, they do suggest that the Alien Tort Claims Act is a promising avenue for holding corporations liable for international human rights violations. The Ninth Circuit ruling, combined with the California Superior Court's denial of Unocal's Motion for Summary Judgment on the vicarious liability claims, seems to verify the ATCA's ability to grant jurisdiction for certain torts against U.S. corporations for their actions overseas. These two cases were likely to set new precedents as to the applicability of the ATCA.

A. Aiding and Abetting

The three-judge Ninth Circuit ruling was voided by the *en banc* order, but the ruling suggests that at least some of the judges on the Ninth Circuit take an expansive view of the jurisdiction granted by the ATCA. In applying the standards of both the ICTY and the Nuremberg Tribunals, the court arrived

110 *Doe v. Unocal,* Nos. BC 237 980, BC 237 679, at 8.

111 Jim Lobe, *Foreign crimes come home to the US*, ASIA TIMES (Dec. 16, 2004), *at* http://www.atimes.com/atimes/Southeast_Asia/FL16Ae01.html.

112 Duncan Campbell, *Energy Giant Agrees Settlement with Burmese Villagers*, THE GUARDIAN, Dec.15, 2004, *available at* http://www.guardian.co.uk/international/story/0,,1373704,00.html.

at lenient requirements for aiding and abetting.[113] The *actus reus* and *mens rea* tests are less restrictive than other tests used in federal courts (such as the joint action and proximate cause tests), though they are commonly used in international courts.[114]

B. Judge Reinhardt's Concurring Opinion

More promising for future plaintiffs was Judge Reinhardt's concurring opinion in the Ninth Circuit's overruling of the district court's grant of summary judgment. Judge Reinhardt found that plaintiffs did not need to produce international law tests of liability to hold Unocal accountable.[115] In using the federal common law theories of joint venture liability, agency liability, and reckless disregard liability, Reinhardt created more viable ways for future plaintiffs to pursue corporations under the ATCA.[116] Even more promising is that he found the Burmese plaintiffs had provided sufficient evidence for all three theories of liability.[117]

Judge Reinhardt's concurring opinion on the plaintiffs' burden to prove liability for violations that are not *jus cogens* crimes is also more lenient. Reinhardt concluded that plaintiffs' third party liability claims against Unocal do not need to be *jus cogens* violations themselves, since they are actionable under federal common law.[118] It remains to be seen whether future courts will agree with Judge Reinhardt's reasoning.

C. Vicarious Liability

In the state case, the California Superior Court rejected Unocal's Motion for Summary Judgment in Phase II.[119] Judge Chaney's finding that under California law a principal can be held liable for the acts of its agent, committed in the scope of its agency, gives future plaintiffs firmer ground for holding corporations liable for their subsidiaries' and joint venturers' actions.[120] Going forward, corporations will have a stronger burden to prove that they should not be held liable in any way for their subsidiaries' actions, even if they do not control the entire subsidiary.

113 *See Unocal III*, 395 F.3d at 949-53.

114 *Id.*

115 *Id.* at 965 (Reinhardt, J., concurring).

116 *Id.*

117 *Id.* at 976.

118 *Id.* at 964 (Reinhardt, J., concurring).

119 Doe I v. Unocal Corp., Nos. BC 237 980, BC 237 679 (Cal. Super. Ct. Sept. 14, 2004), *at* http://www.earthrights.org/unocal/doevunocal09142004.pdf (denying Unocal's Motion for Summary Judgment).

120 *Id.* at 6.

D. California Business and Professions Code § 17200

Judge Chaney's rulings in the California state case also suggested that the *Doe v. Unocal* plaintiffs could have shown, in Phase II of the trial, that Unocal was unjustly enriched by the human rights abuses of its pipeline project, and that its involvement with the Burmese military amounted to an unfair business practice under the California Business and Professions Code § 17200.[121]

E. Indispensable Parties

By setting aside Unocal's argument that Burmese entities were indispensable parties in both the state and federal cases, the courts signaled to plaintiffs that corporations can be held liable as third-party actors for violations committed overseas, even if U.S. courts have no jurisdiction over the foreign party committing the violations.[122] Given the close relationships between many corporations and foreign regimes in constructing and operating projects that result in human rights abuses, this ruling bolsters plaintiffs' ability to pursue corporations for their knowing participation in violating customary international law.

IX. SUPREME COURT REVIEW OF THE ATCA: *SOSA V. ALVAREZ-MACHAIN* (2004)

Although the Supreme Court has not yet addressed questions relating to whether, and under what circumstances, the ATCA creates a cause of action for plaintiffs to sue corporations for violations of customary international law, it did recently rule on the ATCA generally. In *Sosa v Alvarez-Machain*, the Court unanimously indicated that the ATCA creates a cause of action in a "modest" number of cases involving clear international law violations.[123] Because it did not go into specific causes of action, the Court did not settle the ongoing matter of what claims, if any, are actionable under the ATCA. Harold Koh, Dean of Yale Law School, and an expert on international law, suggested that the ATCA probably still creates a cause of action

121 Doe I v. Unocal Corp., Nos. BC 237 980, BC 237 679, at 13-16 (Cal. Super. Ct. Jun. 7, 2002), *at* http://www.earthrights.org/unocal/TortLiabilityMSARuling.doc (granting Unocal's Motions For Summary Adjudication as to the intentional torts and negligence causes of action, but denying Unocal's motion as to the California Business and Professions Code § 17200).

122 *See* Doe v. Unocal Corp., 963 F. Supp. 880, 889 (C.D. Cal. 1997); NCGUB v. Unocal, Inc., 176 F.R.D. 329, 358 (C.D. Cal. 1997); Doe I v. Unocal Corp., Nos. BC 237 980, BC 237 679, at 14-15 (Cal. Super. Ct. Jun. 7, 2002), *at* http://www.earthrights.org/unocal/VicariousLiabilityMSARuling.doc (denying Unocal Defendants' Motion for Summary Judgment Based on Absence of Vicarious Liability).

123 124 S. Ct. 2739, 2744 (2004).

for torture, genocide, slavery, apartheid, and other widespread and commonly accepted violations.[124]

It is unclear from *Sosa* whether corporations that "aid and abet" repressive foreign governments with whom they do business may be held liable under the ATCA. Outside of clearly actionable causes, the Court's ruling did not clarify just how much discretion federal court judges have to find causes of action under the ATCA. A 6-to-3 majority seemed to leave it up to federal judges to decide (a) which international standards apply in a case, and (b) whether the conduct in question violates those standards under the ATCA.[125] However, in his concurring opinion, Justice Scalia observed that the federal judiciary "is neither authorized nor suited to" make decisions on which international law standards to apply and when certain conduct violates them.[126] In response to this, Justice Souter, joined by Justices Stevens, O'Conner, Kennedy, Ginsburg, and Breyer, suggested that as long as independent judicial recognition of actionable international norms is conducted vigilantly, federal judges may still have some discretion over finding causes of action in customary international law.[127] Thus, at least for now, a narrow range of cases involving violations of *jus cogens* norms are actionable under the ATCA, and federal judges may continue to use limited discretion in adjudicating such cases.

X. CONCLUSION

Both the state and the federal *Doe v. Unocal* cases were on the verge of setting major new precedents for the liability of American corporations for human rights abuses committed abroad in which they aided and abetted or from which they benefited. Although many of the plaintiffs' arguments were rejected, substantial portions of their case withstood multiple motions for summary judgment by Unocal. Undoubtedly, Unocal had cause for alarm. The *Doe v. Unocal* case also must have frightened the Justice Department, as it filed *amici curiae* briefs on Unocal's behalf throughout the lawsuit.[128] As one journalist observed, "Unocal . . . probably calculated that the bad publicity they would face in a trial is worse than the high cost of settling the claim."[129]

---

124 Warren Richey, *Ruling Makes It Harder for Foreigners to Sue in US Courts*, CHRISTIAN SCIENCE MONITOR, Jun. 30, 2004, at 3.

125 *Sosa*, 124 S. Ct. at 2761-70.

126 *Id.* at 2769-70 (Scalia, J., concurring in part and concurring in the judgment).

127 *Id.* at 2764.

128 *See, e.g.,* Brief of Amici Curiae United States, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (No. 03-339).

129 Campbell, *supra* note 112.

The suggestions of aiding and abetting, vicarious liability, and unjust enrichment seemed ripe for adjudication. It was quite probably a sound business decision on Unocal's part to settle both cases before risking the establishment of such powerful precedents. In view of the federal judges' various rulings in the Doe v. Unocal lawsuit, future plaintiffs seem on firm ground for pursuing corporations in federal court under the ATCA for their human rights abuses committed abroad. Such plaintiffs may have even greater success pursuing comparable state claims based on state constitutional and statutory provisions forbidding forced labor, unfair competition, and unjust enrichment.

PROMOTING ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES

*Jon M. Van Dyke**

The world community has affirmed repeatedly during the past sixty years that the human rights listed in the 1948 Universal Declaration of Human Rights,[1] the 1966 International Covenant on Civil and Political Rights,[2] and the 1966 International Covenant on Economic, Social, and Cultural Rights[3] reflect universal norms of customary international law binding on all nations. These documents also make it clear that, in addition to the right to be free from human rights abuses, individuals have a separate right to compensation if they are subjected to such abuses and to have their abuses investigated and the perpetrators prosecuted and brought to justice. Despite the affirmations, the world community is today still struggling to find a cohesive means of enforcing human rights around the globe. The following materials examine these strategies that have been used to protect the victims and prosecute the wrongdoers, and the challenges that lie ahead.

*Professor of Law, William S. Richardson School of Law, University of Hawaii at Manoa; B.A. Yale University, 1964; J.D. Harvard University, 1967.

1 G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

2 G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

3 G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

THE OBLIGATION TO ADDRESS AND RESOLVE HUMAN RIGHTS ABUSES[4]

Article 8 of the Universal Declaration of Human Rights states that "Everyone has the right to *an effective remedy* by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[5] Similarly, Article 2(3)(a) of the International Covenant on Civil and Political Rights, which has been ratified by more than 140 countries, says that "[e]ach State Party to the present Covenant undertakes . . . . [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have *an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity."[6]

Regional human rights treaties also emphasize the right to redress for human rights violations. Article 6(1) of the European Convention on Human Rights says that "[i]n the determination of his civil rights . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[7] Similarly, Article 25(1) of the American Convention on Human Rights says that:

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the

4 Some of the materials in the paragraphs that follow are adapted and updated from Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation,* 29 DENVER J. INT'L L. & POL'Y 77 (2001), and Jon M. Van Dyke, *The Fundamental Right of the Marcos Human Rights Victims to Compensation*, 76 PHILIPPINE L.J. 169 (2001). *See also* Jon M. Van Dyke and Gerald W. Berkley, *Redressing Human Rights Abuses,* 20 DENVER J. INT'L L. & POL'Y 243 (1992); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399 (2002); Raquel Aldana-Pindell, *An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes*, 26 HUMAN RIGHTS QUARTERLY 605 (2004).

5 Universal Declaration of Human Rights*, supra* note 1, at 73 (emphasis added).

6 International Covenant on Civil and Political Rights, *supra* note 2, at 53 (emphasis added).

7 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, 312 U.N.T.S. 221 (1950). The European Court of Human Rights ruled in the Golder Case that the right to bring a civil claim to an independent judge "ranks as one of the universally 'recognised' fundamental principles of law." Golder v. Unite Kingdom, 18 Eur. Ct. H.R. 524, 535-36 ¶ 35 (1975). More recently, in Mentes v. Turkey, 59 Eur. Ct. H.R. 2689 (1997), *reprinted in* 37 I.L.M. 858, 882 (1998), the European Court of Human Rights ruled that Turkey violated the rights of citizens who were prevented from bringing a claim for the deliberate destruction of their houses and possession, noting that "the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure."

> constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.[8]

The Human Rights Committee in Geneva, established by the International Covenant on Civil and Political Rights, has emphasized the importance of bringing human rights abusers to justice by formally opposing amnesties:

> The Committee has noted that some States have granted amnesty in respect of acts of torture. *Amnesties are generally incompatible with the duty of States to investigate such acts;* to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.[9]

The process of bringing a sense of closure and reconciliation typically requires four separate and distinct elements: (1) an apology for the wrong, (2) an investigation and accounting, (3)

---

8 American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978. Decisions in the Inter-American system confirm that the right to an effective remedy is a continuing one that cannot be waived. The seminal case of the Inter-American Court of Human Rights is the Velasquez Rodriguez Case, Case No. 4, Inter-Am. C.H.R. (Ser. C) ¶ 174 (1988), *reprinted in* 28 I.L.M. 291 (1989), which holds that the American Convention on Human Rights imposes on each state party a "legal duty to . . . ensure the victim adequate compensation." The court explained that each country has the duty to protect the human rights listed in the Convention and articulated this responsibility as follows:

> This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must *prevent, investigate and punish* any violation of the rights recognized by the Convention . . . .

Id. ¶ 166 (emphasis added). Other opinions that confirm this result include The "Street Children Case," Villagran Morales v. Guatemala, Case No. 77, Inter-Am.C.H.R., OEA/Ser. C., ¶ 99 (2001) (confirming that the duty to prosecute and provide reparations are separate and distinct duties); Hermosilla v. Chile, Report No. 36/96, Case No. 10.843 Inter-Am. C.H.R. ¶¶ 68, 105, 112, OEA/Ser.L/V/II.95, doc. 7 rev. (1996) (ruling that Chile's 1978 Amnesty Decree Law violated Article 25 of the American Convention on Human Rights because "the [human rights] victims and their families were deprived of their right to effective recourse against the violation of their rights"); Chanfeau Orayce and Others v. Chile, Report No. 25/98, Case Nos. 11.505 et al. Inter-Am. C.H.R. ¶ 86, OEA/ser.L/V/II.98, doc. 7 rev. (1997) (stating that Chile's amnesty law violated Articles 1.1, 2, and 25 of the American Convention on Human Rights and that each country has a duty to "investigate the violations committed within its jurisdiction, identify those responsible and impose the pertinent sanctions on them, as well as ensure the adequate reparation of the consequences suffered by the victim").

9 General Comment No. 20, art. 7, Human Rights Committee, 44th Sess., ¶ 15, *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 (1994). *See also* Rodríguez v. Uruguay, Human Rights Committee, 51st Sess., Communication No. 322/1988, ¶ 12.4, U.N. Doc. CCPR/C/51/D/322/1988 (1994) (stating that "amnesties for gross violations of human rights . . . are incompatible with the obligations of the State party" under the International Covenant on Civil and Political Rights and that each country has a "responsibility to provide effective remedies to the victims of those abuses" to allow the victims to gain appropriate compensation for their injuries).

compensation for the victims, and (4) prosecution of the wrongdoers.[10] Efforts to promote a consistent response to human rights violations have resulted in some progress, but it must be acknowledged that the international legal system is just now beginning the long process of developing effective mechanisms to bring wrongdoers to justice and to provide remedies for victims. The establishment of the International Criminal Court is certainly a promising development, but the refusal of the United States to participate in this new tribunal provides us with a dramatic reminder of how difficult this process will continue to be.

APOLOGY

The apology is a crucial underpinning for every process designed to bring closure to human rights abuses or other unresolved injury. For example, on March 12, 2000, Pope John Paul II issued a sweeping apology for the errors of the Roman Catholic Church during the previous 2,000 years.[11] By acknowledging "intolerance and injustice toward Jews, women, indigenous peoples, immigrants, the poor, and the unborn" this apology had the effect of clearing the air and establishing the basis for a new relationship with members of the injured groups.[12] In 1993, the United States Congress apologized for the participation by its military and diplomats in the illegal overthrow of the Kingdom of Hawai'i a hundred years earlier and set in motion a process of "reconciliation" designed to provide an appropriate settlement and heal the wounds. [13] Both of these examples show that although an apology alone is not sufficient to right the wrongs inflicted, it is a necessary step toward resolving wrongs.

INVESTIGATION AND ACCOUNTING

Victims of human rights abuses have a strong need to understand what happened and to identify the wrongdoers. Based in part on the model set by the South African Truth and Reconciliation Commission,[14] some twenty-three other countries

10 *See generally* Van Dyke, *The Fundamental Human Right to Prosecution and Compensation, supra* note 4, at 86-94.

11 Alessandra Stanley, *Pope Asks Forgiveness for Errors of the Church Over 2,000 Years*, N.Y. TIMES, Mar. 13, 2000, at A1.

12 *Id.*

13 Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, S.J. Res. 19, 103d Cong. (1993). *See* S. REP. NO. 108-85, at 1-2 (2003) (discussing "necessary elements of a process to provide for the reconciliation").

14 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (Truth & Reconciliation Comm'n. eds. 1999). This Commission met for two and a half years to

have set up commissions to provide some documentation for previous human rights abuses.[15] Some have been more successful than others. In the Philippines, for instance, then-President Corazon Aquino gave broad power in 1986 to the seven-member Presidential Committee on Human Rights to investigate human rights violations attributed to the military during the 1972-1986 rule of President Ferdinand Marcos.[16] Unfortunately, the committee never issued a final report.[17]

In Chile, after General Augusto Pinochet allowed elections to take place in the late 1980s while at the same time retaining firm control over the military and keeping a watchful eye on the new government, the new civilian President Patricio Aylwin appointed a Commission of Truth and Reconciliation.[18] This Commission prepared a comprehensive report documenting 2,000 cases involving persons who had been murdered or who disappeared after arrest.[19] Released in February 1991, the report described each case and provided the following composite statistics for the years of military rule beginning September 11, 1973 and ending March 11, 1990:[20]

document as many of the human rights abuses as possible and issued a report blaming both sides for abuses. Persons who came forward with truthful accounts of their participation in violent acts linked to a political objective were pardoned as part of the national healing effort, but others have been prosecuted for their role in these atrocities. A challenge to the legitimacy of granting amnesties was rejected in Azanian Peoples Org. v. President of the Republic of South Africa, 1996 (4) SA 671 (CC). The court justified its conclusion by explaining that the amnesty was not "a uniform act of compulsory statutory amnesia," but was appropriately linked to promoting "a constructive transition towards a democratic order . . . available only where there is a full disclosure of all facts" and only for acts committed "with a political objective." *Id*. para. 32.

15 The countries that have set up some form of a truth and reconciliation commission include Argentina, Bolivia, Chad, Chile, East Timor, Ecuador, El Salvador, Germany, Ghana, Guatemala, Haiti, Nepal, Nigeria, Panama, Peru, Philippines, Serbia and Montenegro, Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda, Uruguay, and Zimbabwe. *See* U.S. INST. FOR PEACE, TRUTH COMMISSION DIGITAL COLLECTION, *available at* http://www.usip.org/library/truth.html (last updated Feb. 22, 2005).

16 *Id.*

17 *Id.*

18 *Id.*

19 This report is popularly known as the "Rettig Report" for former Senator Raul Rettig, president of the commission and is available at http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html [hereinafter *Rettig Report*]. *See also* Van Dyke & Berkley, *supra* note 4, at 249-51.

20 See *Rettig Report*, *supra* note 19, at pt. 3, chs. 1-3.

Victims of Government Agents or Persons at their Service		
1. Killed		
In war tribunals	59	2.8%
During protests	93	4.4%
During alleged escape attempts	101	4.8%
Other executions & deaths by torture	815	38.5%
TOTAL KILLED	1,068	50.5%
2. Disappeared after arrest	957	45.2%
Victims of Politically Motivated Private Citizens		
Killed	90	4.3%
SUB-TOTAL OF VICTIMS	2,115	100.0%

As the years went by, and as General Pinochet's power declined, the Chilean public demanded even further documentation, focusing in particular on those who had been tortured. A second effort was then undertaken to describe those cases. On November 29, 2004, the Chilean Presidential Commission issued a report detailing some 27,000 cases of torture in the 1973-1990 period.[21] More than 18,000 of those cases took place in the four months after General Pinochet took power in September 1973, and another 5,266 individuals were tortured between January 1974 and August 1977.[22] Like the relatives of those summarily executed or forced to disappear, the 27,000 torture victims will receive health, education, and housing benefits,[23] but their monthly pension was set at US$190, substantially less than the amount that has been provided to the heirs of those murdered or who disappeared after arrest.[24]

COMPENSATION THROUGH CIVIL LITIGATION

To address those many examples where countries have not been forthcoming to provide compensation to the victims of human rights abuses, some victims have brought claims in the courts of the United States against those who have violated their fundamental human rights. Such claims can be brought,

21 Human Rights Watch, *Chile: Government Discloses Torture Was State Policy*, Nov. 29, 2004, *available at* http://www.hrw.org/english/docs/2004/11/29/chile9742.htm.

22 *Id.*

23 *Id.*

24 *Id. See also* PRISCILLA .B. HAYNER, UNSPEAKABLE TRUTHS 317 (Routledge 2002) (2001) (discussing The Law Creating the National Corporation for Reparation and Reconciliation, Law No. 19,123, Chile, Jan. 31, 1992).

however, only if the wrongdoer comes into the United States and thus is subject to the personal jurisdiction of U.S. courts. In such situations, victims have utilized the Alien Tort Claims Act, which says: "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."[25] In the case of *Sosa v. Alvarez-Machain*, the U.S. Supreme Court upheld the use of this statute in a six-to-three vote.[26] Referring to the traditionally-recognized offenses against diplomats, violations of safe conduct, and piracy, the Court explained that additional claims can be brought based on "present-day law of nations [if they] 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."[27] Justice Souter, writing for the majority, further explained that the Alien Tort Claims Act is a jurisdictional statute, but that Congress does not have to explicitly enact a cause of action statute before claims can be brought under it.[28]

THE MARCOS HUMAN RIGHTS LITIGATION

Although most human rights victims have prevailed in their lawsuits for compensation, very few have actually collected because defendants are frequently either indigent or have disappeared after the case was filed.[29] One case where the possibility of victims' receiving actual compensation is promising is the protracted litigation by 9,531 victims of human rights abuses against Ferdinand E. Marcos and his Estate.[30] This class action was brought by those victims and/or their heirs who were tortured or murdered, or who disappeared after arrest, during the martial law regime in the Philippines from 1972 to 1986.

Ferdinand Marcos declared martial law on September 21, 1972 and proceeded to arrest (without judicial warrants) leading

25 28 U.S.C. § 1350 (2000).

26 124 U.S. 2739, 2755 (2004).

27 *Id.* at 2761-62.

28 *Id.*

29 Exceptions to this general rule include the settlements reached in the cases of Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) and John Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *district court opinion vacated by* 403 F.3d 708 (9th Cir. 2005).

30 Among the many reported decisions in this litigation are: *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 910 F. Supp. 1460 (D. Haw. 1995); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F. 2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *In re* Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994); and Hilao v. Estate of Ferdinand Marcos, 103 F.3d 767 (9th Cir. 1996). The author is one of the attorneys who has been representing the Class of Human Rights Victims in these cases.

opposition figures as well as a wide variety of other dissidents.[31] U.S. District Judge Manuel Real later explained that "Marcos gradually increased his own power to such an extent that there were no limits to his orders of the human rights violations suffered by plaintiffs in this action."[32] Marcos ruled the country by autocratic decree, issuing almost daily lists of individuals who were to be rounded up. Many of those detained were subject to "tactical interrogation," the code phrase used to refer to the various torture techniques listed as follows:

> Beatings while blindfolded by punching, kicking and hitting with the butts of rifles;
>
> The "telephone" where a detainee's ears were clapped simultaneously, producing a ringing sound in the head;
>
> Insertion of bullets between the fingers of a detainee and squeezing the hand;
>
> The "wet submarine," where a detainee's head was submerged in a toilet bowl full of excrement;
>
> The "water cure," where a cloth was placed over the detainee's mouth and nose, and water poured over it producing a drowning sensation;
>
> The "dry submarine," where a plastic bag was placed over the detainee's head producing suffocation;
>
> Use of a detainee's hands for putting out lighted cigarettes;
>
> Use of flat-irons on the soles of a detainee's feet;
>
> Forcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice;
>
> Injection of a clear substance into the body a detainee believed to be truth serum;
>
> Stripping, sexually molesting and raping female detainees; one male plaintiff testified he was threatened with rape;
>
> Electric shock where one electrode is attached to the genitals of males or the breast of females and another electrode to some other part of the body, usually a finger, and electrical energy produced from a military field telephone is sent through the body;
>
> Russian roulette; and

---

31 Marcos signed Proclamation No. 1081 on September 21, 1972, placing the entire Philippines under martial law. *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 910 F. Supp. at 1462. He then issued General Order No. 1 proclaiming that he would "govern the nation and direct the operation of the entire Government, including all its agencies and instrumentalities" and General Orders 2 and 2-A, instructing the military to arrest without judicial warrant a long list of opposition leaders including Benigno Aquino, Jr., Jose Diokno, Chino Roces, Teodoro Locsin Sr., Soc Rodrigo, and Ramon Mitra. *Id.* at 1463; Joker P. Arroyo, *Do Pinoys Remember Martial Law?* PHILIPPINES DAILY INQUIRER, Sept.21, 2000, *reprinted in* KILOSBAYAN MAGAZINE, Oct. 2000, at 20.

32 *In re* Estate of Ferdinand E. Marcos Human Rights Litig.**,** 910 F. Supp. at 1463.

> Solitary confinement while hand-cuffed or tied to a bed.[33]

The lawsuit against Marcos was initially dismissed in 1986 by the U.S. District Court based on the act of state doctrine.[34] The U.S. Court of Appeals for the Ninth Circuit overturned this ruling in 1989, confirming that U.S. courts have a duty under international law to provide a forum for the claims of human rights victims.[35] In a related case involving torture in Argentina, this same court stated:

> The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being.[36]

It is thus now clear that torture committed by governmental officials violates fundamental principles of international law. When the Marcos class action finally went to trial, the jury concluded that Ferdinand E. Marcos was personally responsible for human rights abuses and awarded the class of 9,531 plaintiffs (the Class of Human Rights Victims) $1.2 billion in exemplary damages and $766 million in compensatory damages.[37]

---

33 *Id.*

34 The act of state doctrine is a prudential court-created doctrine used by U.S. courts to keep the judiciary out of controversial foreign policy issues. The doctrine prevents U.S. courts from questioning the legitimacy of official acts of foreign governments taken within their borders, but exceptions exist if the actions violate uncontroverted or treaty-based principles of international law. *See, e.g.,* Underhill v. Hernandez, 168 U.S. 250 (1897); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The Ninth Circuit ruled that the doctrine should not block the claims of the human rights victims because Marcos's acts of torture and murder were not "official acts," but were instead acts undertaken for his personal benefit, to maintain his hold on power and facilitate his efforts to steal assets from the Republic of the Philippines. *In re* Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d at 1471. *See generally* JORDAN J. PAUST, JOAN M. FITZPATRICK & JON M. VAN DYKE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 707-12 (West 2000).

35 *Hilao*, 878 F.2d 1438 (9th Cir.1989) (table decision).

36 *Siderman de Blake*, 965 F.2d at 717.

37 In May 1997, the human rights victims filed a complaint in the Makati regional trial court to make the U.S. judgment enforceable in the Philippines. *See* Mike Frialde, *Rights Victims Go After Marcos Estate*, PHILIPPINE STAR, May 21, 1997 (on file with author). The court said that the victims would have to file a bond of $8.4 million to file their complaint in a Philippine court. *Id.* This ruling was appealed in 1999, and six years later, on April 12, 2005, the Philippine Supreme Court reversed the lower court judgment. Mijares v. Javier Ranada, G.R. No. 139325 (Philippines Supreme Court, April 12, 2005). The Court's decision relied on both Philippine and international law, and described the lower court's ruling as "legally infirm and unabashedly unjust." Slip op. at 3. The Court emphasized the "rules of comity, utility and convenience of nations" which "have established a usage among civilized states by which final judgments of foreign courts of competent jurisdiction are reciprocally respected and rendered efficacious under certain conditions that may vary in different countries." *Id.* at 12. "The preclusion of an action for enforcement of a foreign judgment in this country merely due to an exorbitant assessment of docket fees is alien to generally accepted practices and principles in international law." *Id.* at 31. In its conclusion, the Court emphasized that the U.S.

The Class of Human Rights Victims has spent the past decade in search of assets. One source was in Swiss banks. After extensive negotiation and litigation, the Swiss Federal Supreme Court ruled that deposits in Marcos' Swiss bank accounts amounting to some $658 million should be transferred to the Philippines,[38] but attached several important conditions to this transfer. The Swiss Court stated explicitly in its ruling that the Philippine Government had (1) a responsibility to ensure that the human rights victims receive adequate compensation for their injuries and (2) a duty to keep the Swiss Government informed about the steps it took to provide compensation to the human rights victims.[39] The ruling also provided that the Swiss Government should monitor the situation to ensure that such compensation was forthcoming.[40]

This ruling is particularly significant, because it was made in spite of the acknowledgment by the Swiss Court that the moneys in question had "illegal origins."[41] The Court explained that both the Philippines and Switzerland had duties under international law to "safeguard[] human rights" and that this duty is "incumbent upon. . .the courts as executors of the international law regime."[42] The Court recognized that all parties to the International Covenant on Civil and Political Rights[43] and the Convention Against Torture[44] have a duty to ensure that victims of human rights abuses can establish their right to compensation through competent judicial tribunals.[45]

judgment "is not conclusive yet, but presumptive evidence of a right of the petitioners against the Marcos Estate. . . .[T]he Marcos Estate is not precluded to present evidence, if any, of want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact." *Id.* at 33. "On the other hand, the speedy resolution of this claim by the trial court is encouraged, and contumacious delay of the decision on the merits will not be brooked by this Court." *Id.* at 33-34. In the course of its opinion, the Court referred to "the colossal damage wrought under the oppressive conditions of the martial law period. The cries of justice for the tortured, the murdered, and the *desaparacidos* arouse outrage and sympathy in the hearts of the fair minded. . . ." *Id.* at 2.

38 Federal Office for Police Matters v. District Attorney's Office IV for the Canton of Zurich, 1A.87/1994/err (Swiss Federal Supreme Court, Dec. 10, 1997) [hereinafter *Canton of Zurich Case*]. *See also* Associated Press, *Swiss Court Approves Return of Marcos Funds*, N.Y. TIMES, June 16, 1998, at A13.

39 *Canton of Zurich Case*, *supra* note 38.

40 *Id.*

41 *Id.* ¶ 5(b).

42 *Id.* ¶ 7(c).

43 International Covenant on Civil and Political Rights, *supra* note 2.

44 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., 93d mtg., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

45 *Canton of Zurich Case*, *supra* note 38, at ¶ 7(c)(aa), (cc). The Swiss Court also recognized that the Philippine judiciary has "shortcomings" and that it is "reputed to be ponderous and susceptible to corruption and political influence." *Id.* ¶ 7(c)(ee). For this reason, the Swiss Court included as a condition of transferring the money to the Philippines the requirement that the Philippine government "regularly update" the Swiss

The Philippine government has not fulfilled the conditions promulgated by the Swiss court. Instead, on July 15, 2003, the Philippine Supreme Court exacerbated the problem by ruling – in a case where the Human Rights Victims were excluded – that all these assets should go to the Philippine government.[46]

More recently, a Merrill Lynch securities account valued at about $35,000,000 has been identified, and after extensive discovery and trial, the District Court ruled in 2004 that these funds should be awarded to the Class of Human Rights Victims.[47] This matter is now on appeal before the U.S. Court of Appeals for the Ninth Circuit.

The position of the Philippine Government opposing the efforts of the human rights victims to collect their hard-earned judgment is hard to understand or accept. After the end of the Marcos era in 1986, the Philippine Government established the Presidential Commission on Good Government (PCGG) to pursue assets plundered by Marcos and his family.[48] Despite the establishment of PCGG, no affirmative steps have been taken to compensate the victims of human rights abuses during the Marcos Regime, even though, as discussed above, international law has recognized the unambiguous duty of a government to do so.[49] In 2004, the Class of Human Rights Victims filed a petition with the United Nations Human Rights Committee complaining

authorities on the procedures established "to compensate the victims of human rights violations under the Marcos regime." *Id.* ¶ 7 (c)(hh).

46 Republic of the Philippines v. Ferdinand E. Marcos, G.R. No. 152154 (S.Ct. 2003), *available at* http://www.lawphil.net/judjuris/juri2003/jul2003/gr_152154_2003 .html.

47 Merrill Lynch, Pierce, Fenner & Smith Inc. v. Arelma, Inc., No. CV00-595MLR (D.Haw. 2004). For a description of the holding, please see InterNet Bankruptcy Library, *Ferdinand Marcos: HI Court Orders $40M To Be Paid To Victims*, CLASS ACTION REPORTER, July 14, 2004, *available at* http://bankrupt.com/CAR_Public/040714.mbx.

48 President Corazon Aquino created the Presidential Commission on Good Government (PCGG) on February 28, 1986 in Executive Order No. 1, instructing this body to document and recover the moneys stolen by Ferdinand Marcos, his family, and his associates. *See* JOVITO R. SALONGA, PRESIDENTIAL PLUNDER: THE QUEST FOR THE MARCOS ILL-GOTTEN WEALTH (2000)(Senator Salonga was the first Chair of the PCGG).

49 In 1988, the Philippine Legislature enacted the Comprehensive Agrarian Reform Law of 1988 which provides that "[a]ll receipts from assets recovered and from sales of ill-gotten wealth recovered through the Presidential Commission on Good Government" should be deposited in the Agrarian Reform Fund. Comprehensive Agrarian Reform Law of 1988, Republic Act No. 6657, ch. 14, § 63(b), *available at* http://www.chanrobles.com/legal4agrarianlaw.htm (last visited Mar. 1, 2005). In the Velasquez Rodriguez Case, for instance, the Inter-American Court of Human Rights explained that the duty to investigate human rights abuses and compensate the victims of these abuses continues despite "changes of government" even if the "the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred." Velasquez Rodriguez Case, *supra* note 8, ¶ 184. It is, therefore, irrelevant whether the money from Switzerland in the escrow account is "ill-gotten wealth," because the Philippine Government has a continuing duty to compensate the human rights victims, and this money provides an appropriate source for such compensation.

that the government of the Philippines has failed in its obligation to provide an effective remedy.[50]

CRIMINAL PROSECUTIONS IN NATIONAL COURTS

The final element in bringing reconciliation and closure to human rights violations is the criminal prosecution of the wrongdoers, which can occur in a national or international court. An example of attempts to conduct national prosecutions can be found in Chile, after Pinochet's power ended, but the Chilean military has continued to vigorously oppose these efforts.[51] Because of this opposition, the Chilean Supreme Court issued a resolution on January 27, 2005 requiring judges to conclude their investigations into abuses committed during Chile's military dictatorship within six months, which was viewed by many as a move that would cripple efforts to promote accountability for past human rights violations.[52]

Another example of criminal prosecutions in national courts occurred in Germany after the reunification of East and West Germany. In November 1999, the appeals court in Leipzig, Germany upheld a manslaughter conviction against Egon Krenz, the last Communist leader of East Germany, and two other leading Politburo members, Gunther Kleiber and Gunther Schabowski, for their roles in the shootings of persons trying to escape to the West during the period when Germany was divided.[53]

INTERNATIONAL CRIMINAL TRIBUNALS

Many countries have been unable to pursue prosecutions in their national courts because trials of former leaders are inevitably divisive and impose severe burdens on fragile governmental institutions. Some situations, therefore, seem to require international tribunals. A few efforts to prosecute war criminals occurred after World War I and in isolated situations in earlier eras, but the systematic trials of Germans and Japanese

50 Complaint, *Pimentel v. Republic of the Philippines,* United Nations Human Rights Committee, September 2004 (on file with author). *See also* Rainier Allan Ronda, *RP, SC Charged Before U.N. Human Rights Body By Victims Of Marcos Era*, PHILIPPINE HEADLINE NEWS ONLINE, Oct. 16, 2004, *at* http://www.newsflash.org/2004/02/hl/hl101161.htm.

51 See AMNESTY INTERNATIONAL, TRANSITION AT THE CROSSROADS: HUMAN RIGHTS VIOLATIONS UNDER PINOCHET RULE REMAIN THE CRUX (1998), *available at* http://web.amnesty.org/library/pdf/AMR220011996ENGLISH/$File/AMR2200196.pdf.

52 *See* Human Rights Watch, *Chile: Limits on Abuse Probes Close Door on Justice*, Jan. 27, 2005, *available at* http://hrw.org/english/docs/2005/01/27/chile10084.htm.

53 Roger Cohen, *Verdict in Berlin Wall Deaths Is Upheld*, N.Y. TIMES, Nov. 9, 1999, at A10.

after World War II is usually thought of as the real beginning of the international criminal legal process.[54] The Nuremberg and Far Eastern Trials were established in order to document completely the atrocities committed by the German and Japanese.[55] Their purpose was to identify the specific individuals responsible for the policies that led to these atrocities, to punish those individuals, and to deter others who might be tempted to commit similar atrocities in the future.[56] The leaders of Germany and Japan, and those lower ranking individuals who committed war crimes, were prosecuted before judges from the Allied Powers.[57] Justice Robert Jackson, in order to bring a sense of legitimacy to the effort, took a leave from the United States Supreme Court to serve as chief U.S. prosecutor.[58] When he outlined the theory of these prosecutions, Justice Jackson made it clear that the principles utilized were universal and generalizable: "[W]e are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."[59] Some of the principles confirmed by the Nuremberg/Far East tribunals were that:

* Individuals are responsible if they commit "a crime under international law."[60]

* Heads of State do not have immunity from prosecution.[61]

* The "defense of superior orders" will not relieve an individual of responsibility, "provided a moral choice was in fact possible to him."[62]

A. Recent Ad Hoc International Criminal Tribunals

After extensive post-World-War-II trials in Europe and Asia, no further international criminal trials were held anywhere until the 1990s, even though many international crimes were committed during those years. Because of the Cold War and the gridlock that the veto created in the U.N. Security Council, no agreement was possible on the need to bring any human rights abusers to justice after the closing of the Nuremberg/Far East

54 *See* PAUST, FITZPATRICK & VAN DYKE, *supra* note 34, at 873-82.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, International Org. & Conf. ser. II, European & British Commonwealth 1, Dep't of State Pub. No. 3080, at 330 (London 1945) [hereinafter *Jackson Statement*].

60 *See* PAUST, FITZPATRICK & VAN DYKE, *supra* note 34, at 873-82.

61 *Id.*

62 *Id.*

tribunals. As discussed above, the world community made progress in identifying the fundamental human rights of each individual, but was not successful in creating effective mechanisms to protect these rights and punish wrongdoers.

1. The International Criminal Tribunals of Yugoslavia and Rwanda

After the Cold War ended, a series of tribunals were established beginning with the International Criminal Tribunal for the Former Yugoslavia in 1993 (Yugoslav Tribunal) and followed shortly by the International Criminal Tribunal for Rwanda in 1997 (Rwanda Tribunal).[63] Although the world community reacted much too slowly to the atrocities committed during the Yugoslav Civil War and the 1994 Rwanda genocide, the Security Council was able eventually to agree to establish these tribunals to bring to justice the main figures who were responsible for human rights abuses.[64]

In the Yugoslav Tribunal, as of August 2004,

* 82 individuals had been indicted
* 20 remained at large
* 56 were incarcerated (5 were on provisional release)
* 2 had been discharged
* 3 had been released
* 1 had died
* 47 cases remained active.[65]

Illustrative of the Yugoslav Tribunal decisions are the

63 For more information on the founding and history of these tribunals, visit their websites at http://www.un.org/icty/ (Yugoslav Tribunal) and http://www.ictr.org/ (Rwanda Tribunal).

64 *See* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 (1994). *See generally* LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER, & DAVID W. LEEBRON, HUMAN RIGHTS 618-30 (1999). The International Criminal Tribunal for Rwanda was established by the Security Council in November 1994 in response to the more than 800,000-1,000,000 minority ethnic Tutsi and Hutu opposition members who were killed during three months of slaughter in 1994 by the Hutu-dominated government. *See generally Rwanda: How the Genocide Happened,* BBC NEWS, Apr. 1, 2004, *at* http://news.bbc.co.uk/1/hi/world/africa/1288230.stm.

65 *See* Eleventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. GAOR, 59th Sess., Annex I-III, Agenda Item 52, at 91-112, U.N. Doc. A/59/215 (2004) [hereinafter *Yugoslav Tribunal Report*].

conviction of Maj. Gen. Radislav Krstić of genocide for his directing of the 1995 Serbian attack on Srebrenica[66] and the conviction of Anto Furundžija, a twenty-nine-year-old Bosnian Croat, for aiding and abetting torture and rape while in command.[67] Krstić was sentenced to thirty-five years in prison and Furundžija was sentenced to a ten-year prison term.[68] The trial of the Serbian leader Slobodan Milošević has been going on for more than two years and is expected to continue for another two years.[69] Among those not yet apprehended are Radovan Karadžić and Ratko Mladić, the civilian and military leaders of the Bosnian Serbs.[70] In March 2005, General Rasim Delić, former head of the Muslim-dominated Bosnian army, and General Radivoj Miletić, of the Serbian forces, both surrendered to the International Tribunal for the Former Yugoslavia.[71]

In the Rwanda Tribunal, as of February 2005,

* Judgments had been issued against 25 defendants
* 5 were released
* 20 were convicted (9 of which were on appeal)
* Trials were ongoing regarding 26 others
* 17 were in custody awaiting trial
* 9 accused were still at large.[72]

Perhaps the most prominent of the convictions was that of Jean Kambanda, the Prime Minister of Rwanda during the three months in 1994 when 800,000-1,000,000 people were killed.[73] While Prime Minister, Kambanda made speeches encouraging the killing of Tutsi, signed directives legalizing the militia, and facilitated the distribution of arms.[74] He pled guilty to six counts of genocide and crimes against humanity and was sentenced to

66 Krstić was found to have directed the attack in which 7,000 Bosnian Muslim men were marched off to their deaths. *Id.* at 61-62.

67 Furundžija was found to have stood by in 1993 while a subordinate repeatedly raped at knifepoint a naked Muslim woman during interrogation. *See Bosnian War Criminal Loses Appeal,* BBC NEWS, July 21, 2000, *at* http://news.bbc.co.uk/1/hi/world/europe/844377.stm.

68 *Yugoslav Tribunal Report*, *supra* note 65, at 62; *Bosnian War Criminal Loses Appeal, supra* note 67.

69 For more information on the ongoing Milošević trial, see the Milošević Trial Public Archive, http://hague.bard.edu/ (last visited Mar. 1, 2005).

70 *Yugoslav Tribunal Report*, *supra* note 65, at 112.

71 *See 2 Bosnian Generals Surrender To UN Court*, THE TORONTO SUN, Mar. 1, 2005, at 28.

72 *See* The Tribunal at a Glance, *available at* http://www.ictr.org/ENGLISH/factsheets/1.htm (last visited Mar. 1, 2005).

73 *Id.*

74 *See* Bill Berkeley, *Judgment Day*, THE WASHINGTON POST, Oct. 11, 1998, at W10.

life imprisonment.[75]

The investigations conducted by the Yugoslavia and Rwanda Tribunals came to an end as of December 31, 2004.[76] All trials in the Tribunals must be completed by 2008, and all appeals completed by 2010.[77] Cases that cannot be completed by then must be transferred to local courts.

2. The Special Court for War Crimes in Sierra Leone

The Special Court for War Crimes in Sierra Leone differs from the Yugoslav and Rwanda Tribunals in that it has both international and local judges.[78] As of February 2005, eleven persons associated with all three of the country's former warring factions had been indicted by the Special Court.[79] They were charged with war crimes and crimes against humanity, based on murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, and attacks on UN peacekeepers and humanitarian workers.[80] A significant decision was issued by the Appeals Chamber of the Special Court on May 31, 2004 ruling that recruitment of child soldiers is a crime and a violation of international law.[81]

3. The Special Panel for Serious Crimes-East Timor

East Timor was granted its independence from Indonesia in 1999, after which Indonesian militias killed about 1,400 people, mainly independence supporters.[82] The militias also tortured

75 *Id.*

76 International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda, S.C. Res. 1503, U.N. SCOR, 4817th mtg., U.N. Doc. S/RES/1503 (2003) (affirming ICTY Completion Strategy).

77 *Id.*

78 *See* The Special Court for Sierra Leone, *at* http://www.sc-sl.org (last visited Mar. 1, 2005); Global Policy Forum, *Special Court for Sierra Leone*, *at* http://www.globalpolicy.org/intljustice/sierraindx.htm (last visited Mar. 1, 2005). *See also* Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone*, Sept. 2004, *available at* http://www.globalpolicy.org/intljustice/tribunals/sierra/2004/0904sierra.pdf. For background on the atrocities committed during the Sierra Leone civil war see Van Dyke, *The Fundamental Human Right to Prosecution and Compensation, supra* note 4, at 77-81 (2001).

79 Of these eleven individuals, three were alleged leaders of the former Civil Defense Forces, five were alleged leaders of the former Revolutionary United Front, and the final three were alleged leaders of the former Armed Forces Revolutionary Council. The Special Court for Sierra Leone, *at* http://www.sc-sl.org (last visited Mar. 1, 2005).

80 *Id.*

81 Prosecutor v. Norman, 43 I.L.M. 1129 (Appeals Chamber of the Special Ct. for Sierra Leone 2004) (unpublished report to the United Nations), *available at* http://www.sc-sl.org/CDF-decisions.html.

82 James Dunn, *Crimes Against Humanity in East Timor, January to October 1999: Their Nature and Causes*, Feb. 14, 2001, para. 28, *available at* http://www.etan.org/news/2001a/dunn1.htm#_Toc512331035.

and raped an unknown number of people.[83] More than a quarter of a million people, or some thirty percent of East Timor's population, were forcibly deported or fled across the border to West Timor in Indonesia.[84] The United Nations coordinated with local courts to support and staff two Special Panel for Serious Crimes.[85] This process led to the conviction of seventy-five persons for their involvement in the events of 1999, with two acquittals and two indictment dismissals.[86]

This Special Panels was in the process of closing down in early 2005, after the final trial of Aprecio Guterres was completed.[87] Indonesian courts in Jakarta have also prosecuted some of the military leaders connected with the East Timor massacres.[88] As of early 2005, eighteen people had been prosecuted in Indonesia in an *ad hoc* Indonesian Human Rights Court, but none are currently in jail as their cases are being appealed[89]

4. The Cambodian Tribunal

During the Cambodian genocide of 1975-79, some 1.7 million people lost their lives, constituting twenty-one percent of the country's population.[90] The Khmer Rouge regime headed by Pol Pot combined extremist ideology with ethnic animosity and a diabolical disregard for human life to produce repression, misery, and murder on a massive scale. In late 2004, after six years of deliberation, the Cambodian National Assembly finally ratified an agreement with the United Nations to establish a tribunal utilizing both international and national judges to try the Khmer Rouge leaders.[91] As of May 2005, this tribunal was still awaiting funding from international donors to allow it to function properly.[92] Secretary General Kofi Annan, in his report to the

83 *Id.*

84 *Id.*

85 *See* Human Rights Watch, *Human Rights Overview: East Timor*, *at* http://hrw.org/english/docs/2005/01/13/eastti9825.htm (last visited Mar. 1, 2005).

86 David Lyon, *Justice for Timor War Criminals?* BBC NEWS, Feb. 18, 2005, *at* http://news.bbc.co.uk/2/hi/asia-pacific/4277601.stm.

87 *Id. See generally* Justice Initiative and the Coalition for International Justice, *Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor*, Nov. 24, 2004, *available at* http://www.justiceinitiative.org/db/resource2?res_id=102368.

88 David Lyon, *supra note* 86.

89 *Id.*

90 U.S. Bureau of East Asian and Pacific Affairs, *Background Note: Cambodia*, April 2005, *available at* http://www.state.gov/r/pa/ei/bgn/2732.htm.

91 *See* Ed Cropley, *UN, Cambodia Sign Deal on Khmer Rouge Trial*, REUTERS, June 6, 2003, *available at* http://www.globalpolicy.org/intljustice/tribunals/cambodia/2003/0606agreement.htm. *See also* Situation on Human Rights in Cambodia, G.A. Res. 191, U.N. GAOR, 58th Sess., Agenda Item 117, U.N. Doc. A/RES/58/191 (2003).

92 *See* Press Release, Pledging Conference for UN Assistance to Khmer Rouge Trials, *Governments Pledge $38.48 Million for Khmer Rouge Trials in Cambodia* (Mar. 28, 2005)

General Assembly, said Cambodia must have the funds for the tribunal's first year of operations and pledges for another two years in hand before the trials can begin.[93]

THE INTERNATIONAL CRIMINAL COURT

Although *ad hoc* criminal tribunals have been important in prosecuting and punishing wrongdoers, the process of developing a new court for every situation has been time-consuming, expensive, and exhausting for the world community. Both the lessons learned from these efforts and the frustrations involved in each separate situation led many governments to decide that the time had come to develop a permanent International Criminal Court (ICC). The treaty establishing the ICC was drafted in Rome during the summer of 1998,[94] and the Court came into being on July 1, 2002, after the sixtieth country ratified the treaty. As of April 2005, ninety-eight countries had ratified and one hundred and thirty nine countries had signed the Rome Treaty.[95] Of these, twenty-six were from Western Europe, fifteen were from Eastern Europe, nineteen were from Latin America and the Caribbean, twenty-six were from Africa, and eleven were from Asia.[96]

In February 2003, the contracting nations elected seven females and eleven males representing the geographical variety of the global community to serve as the initial judges on the court.[97] The ICC has jurisdiction over crimes against humanity, genocide, war crimes, and will have jurisdiction over crimes of "aggression" when the contracting parties are able to define that

(stating how pledge left the "Extraordinary Chambers for the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, $4.52 million short of the goal of $43 million").

93 Report of the Secretary-General on Khmer Rouge Trials, U.N. GAOR, 59th Sess., Agenda Item 105, at 4, U.N. Doc. A/59/432 (2004).

94 Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 [hereinafter *Rome Statute*].

95 *See* Ratification Status of the Rome Statute, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last visited Mar. 1, 2005).

96 *Id.* This includes *every nation in Western Europe* except a couple of the mini-states. *Id.*

97 These judges and their respective nations are: Maureen Harding Clark (Ireland); Fatoumata Dembele Diarra (Mali); Sir Adrian Fulford (United Kingdom); Karl T. Hudson-Phillips (Trinidad and Tobago); Claude Jorda (France); Elizabeth Odio Benito (Costa Rica); Gheorghios M. Pikis (Cyprus); Tuiloma Neroni Slade (Samoa); Sang-Hyun Song (Republic of Korea); Sylvia Steiner (Brazil); René Blattmann (Bolivia); Hans-Peter Kaul (Germany); Philippe Kirsch (Canada); Erkki Kourula (Finland); Akua Kuenyehia (Ghana); Navanethem Pillay (South Africa); Mauro Politi (Italy); and Anita Ušacka (Latvia). For biographical information on each of the judges, see http://www.icc-cpi.int/chambers/judges.html (last visited May 1, 2005).

term at a forthcoming meeting.[98] In short, the ICC has jurisdiction in situations where national courts are unable or unwilling to prosecute crimes. Cases can be brought to the Court by the United Nations Security Council (acting under Chapter VII of the UN Charter), or by a contracting party, or by the Court's Prosecutor, if such a proceeding is approved by the Court's "Pre-Trial Chamber."[99]

The United States participated in the 1998 drafting session that produced the ICC, but it started to express doubts about the ICC almost immediately after the ink was dry on the 1998 treaty.[100] During the Clinton Administration, David Scheffer, the U.S. Ambassador at Large for War Crimes Issues, led the U.S. effort to thwart the emergence of the ICC. He expressed the concern that the ICC would have jurisdiction over nationals of countries that have not ratified the treaty if they commit the designated crimes in a country that has ratified the treaty.[101] The Clinton Administration was apparently comfortable with the listing of war crimes and their elements, but was concerned that a political agenda (*i.e.,* the Middle East peace process) could lead to prosecutions when an occupying power transfers its population into the territory it occupies.[102] Concerns were also expressed that the threat of prosecutions for committing the crime of aggression, once defined, might interfere with the ability of the international community to respond to humanitarian and other crises.[103]

Another situation the United States has been concerned about involves an atrocity committed by a U.S. soldier on a peacekeeping mission in a country that has accepted the jurisdiction of the ICC.[104] The United States would have the responsibility to prosecute the soldier under applicable treaties

98 *Rome Statute, supra* note 94, art. 5.

99 U.N. Charter arts. 39-51; *Rome Statute*, *supra* note 94, arts. 14-15.

100 *See* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 14 (1999).

101 *Id.* at 19. *See, e.g.,* David Scheffer, Evolution of U.S. Policy Toward the International Criminal Court, Address at American University (September 14, 2000), *available at http://www.state.gov/documents/organization/7095.doc;* David Scheffer, On-The-Record Briefing at the Foreign Press Center (July 31, 1998), *available at* http://www.amicc.org/docs/Scheffer7_31_98.pdf; Statement By David Scheffer U.S. Ambassador at Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of an International Criminal Court (July 15,1998), *available at* http://www.amicc.org/docs/Scheffer7_15_98.pdf.

102 *See generally* Scheffer, *supra* note 101, at 19.

103 *Id.* at 17-20. *See also* David J. Scheffer, Statement in the Sixth Committee of the General Assembly on the International Criminal Court (Oct. 21, 1998), U.S. Mission to the United Nations Press Release No. 179 (98), *available at* http://www.un.int/usa/98_179.htm.

104 *Id.*

and U.S. statutes, but if the United States failed to exercise jurisdiction, the country in which the atrocity took place could prosecute. Could this host country transfer its jurisdiction over the violation to the ICC? Ambassador Scheffer argued vigorously that such jurisdiction could not be delegated, quoting Duke Law Professor Madeline Morris for the proposition that "territorial jurisdiction is not 'a form of negotiable instrument.'"[105]

President Clinton finally signed the Rome Treaty creating the ICC at the very end of his Administration, but the Bush Administration revoked this signature within a few months.[106] Since then, President Bush has denounced the ICC on a number of occasions, and spoke proudly of his decision in his second debate with John Kerry on October 8, 2004:

> I made a decision not to join the International Criminal Court in The Hague, which is where our troops could be brought to—brought in front of a judge, an unaccounted judge.
>
> I don't think we ought to join that. That [decision] was unpopular.
>
> . . . .
>
> You don't want to join the International Criminal Court just because it's popular in certain capitals in Europe."[107]

Although the United States has been trying to generate a lot of smoke to explain its reservations about the ICC, many cannot understand why our country is not able to embrace enthusiastically this important international initiative and work with other enlightened countries to make it work effectively. The advantages of having such an institution in place to ensure effective prosecution of those committing atrocities surely outweighs the highly-technical and mostly-unlikely scenarios developed by Ambassador Scheffer. In any event, the Court is now operational, and as of April 2005 it had been authorized to investigate cases from the Central African Republic, Democratic

105 *See* David Scheffer, International Criminal Court: The Challenge of Jurisdiction, Address at the Annual Meeting of the American Society of International Law (March 26, 1999), *available at* http://www.state.gov/documents/organization/6552.doc. Ambassador Scheffer offered in horror the hypothetical that the country where the atrocity took place might transfer jurisdiction to Libya (in exchange for Libya's transferring jurisdiction over a national of the country where the atrocity occurred). *Id.* Although it is always possible to come up with blood-curdling hypotheticals, it seems disingenuous and is ultimately unconvincing to compare the exercise of jurisdiction by the carefully-constructed and internationally-recognized International Criminal Court with that of an international pariah like Libya.

106 *See* United Nations Assoc. in Canada, *U.S. Revokes Obligations to International Criminal Court*, May 8, 2002, *available at* http://www.unac.org/en/news_events/statements/usicc.asp.

107 The transcript for the October 8, 2004 Presidential Debate between President George W. Bush and U.S. Senator John F. Kerry (MA) can be found at http://www.debates.org/pages/trans2004c.html.

Republic of Congo, the Ivory Coast, and the Republic of Uganda.[108]

A. The ICC and Darfur

The question of how to deal with war crimes committed during the crisis in Darfur became a defining moment for the ICC. Indiscriminate attacks by government forces and militias, including the killing, torture, rape, and forced disappearances of civilians, the destruction and pillaging of villages, and other forms of forced displacement, have produced 300,000 deaths and 2,000,000 homeless African villagers.[109] A UN commission released a report in early 2005 identifying and explaining the evidence against fifty-one suspects (including members of the Sudan government).[110] Louise Arbour, the UN High Commissioner for Human Rights, emphasized on February 15, 2005 that this issue must be referred to the ICC, explaining that "[t]here is no hope for sustainable peace in Darfur without immediate access to justice."[111] UN Secretary-General Kofi Annan supported this view, saying that "[i]t is vital that these crimes are not left unpunished."[112] The United States took a different view, because of its general opposition to the ICC, and advocated that a new *ad hoc* international court be established in Arusha, Tanzania, where the Rwanda Tribunal has been meeting, to prosecute those accused of atrocities in Darfur.[113] China and Algeria took a third view, opposing international adjudication, and arguing that Sudan's own courts should try those who have been implicated.[114]

Because of the united European view favoring the referral of these cases to the ICC, the United States finally abandoned its opposition on March 31, 2005 and agreed not to veto the Security

108 The Uganda referral stemmed from the civil war in northern Uganda that has led to 100,000 dead and 1,500,000 refugees. In February 2005, a spokesperson for the Court announced that arrests warrants would issue shortly for up to a dozen suspects, the first arrest warrants issued by the Court. *See* The Hague, *President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC,* Jan. 29, 2004, *available at* http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html; Human Rights Watch, *Human Rights Overview: Uganda*, *at* http://hrw.org/english/docs/2005/01/13/uganda9862.htm (last visited Mar. 1, 2005).

109 *See* Human Rights Watch, *Human Rights Overview: Sudan*, *at* http://hrw.org/english/docs/2005/01/13/sudan9885.htm (last visited Mar. 1, 2005).

110 *See* Report of the Secretary-General on the Sudan, U.N. SCOR, U.N. Doc. S/2005/68 (2005).

111 Warren Hoge, *Human Rights Chief Urges U.N. to Act Quickly on Sudan*, N.Y. TIMES, Feb. 17, 2005, at A9.

112 *Id.*

113 *Id.*

114 *Id.*

Council's referral of the Darfur crimes.[115] The Council's vote was 11-0, with Algeria, Brazil, China, and the United States abstaining.[116] The United States was persuaded to abstain after it received assurances that any U.S. citizens accused of war crimes in the Sudan would not be handed over to the ICC or to any non-U.S. court.[117] The Acting U.S. Ambassador to the United Nations, Anne Patterson, reiterated that the United States still "fundamentally objects" to the Court, but was going along with the referral because "[i]t is important that the international community speak with one voice in order to help promote effective accountability."[118]

B. Saddam Hussein

Other current unresolved matters include the prosecution of Saddam Hussein and those liable for the abuse of the detainees incarcerated during the Afghanistan and Iraqi conflicts. Hussein has been held since his capture in December 2003, and has made one appearance in an Iraqi court.[119] It remains unclear, however, whether the Iraqi judicial system is capable of trying him. Interim Prime Minister Iyad Allawi has said that Hussein has committed crimes against humanity, explaining that "[m]ore than a million Iraqis are missing as a result of events that occurred during the former regime" and "[h]undreds of thousands of Iraqis of all religions and ethnic groups are believed to be buried in mass graves."[120] In addition, a number of lower-ranking soldiers have been prosecuted in U.S. and British military courts for the abuses imposed on incarcerated Iraqis, but no one in a position of authority has been charged and no independent investigation has been conducted regarding these widespread abuses.[121]

115 Associated Press, *U.S. Agrees to Use U.N. Court for Darfur Cases,* L.A. TIMES, March 31, 2005, at A10.

116 Associated Press, *U.N. Votes for Court to Try Sudan Cases,* L.A. TIMES, April 1, 2005, at A7.

117 Hoge, *supra* note 111.

118 *Sudan War Suspects Now to Face ICC*, CNN NEWS, April 1, 2005, *at* http://edition.cnn.com/2005/WORLD/africa/03/31/un.sudan.reut/.

119 *Defiant Saddam Appears in Court*, BBC NEWS, July 1, 2004, *at* http://news.bbc.co.uk/1/hi/world/middle_east/3855359.stm.

120 John F. Burns, *Iraq Will Charge Hussein In Court Along With Aides*, N.Y. TIMES, June 30, 2004, at A1.

121 *See, e.g.,* Associated Press, *3 British Soldiers Sentenced for Abusing Iraqis*, N.Y. TIMES, Feb. 26, 2005, at A7; Kate Zernike, *U.S. Soldier Found Guilty in Iraq Prison Abuse Case*, N.Y. TIMES, Jan. 15, 2005, at Al.

C. Abuses of Detainees in Iraq, Afghanistan, Guantanamo Bay, and Elsewhere

As this article is being prepared for publication, an increasing number of reports continue to surface regarding a wide range of abuses suffered by those held at the U.S. Naval Base at Guantanamo Bay, Cuba, and in prisons in Iraq and Afghanistan. A few low-ranking soldiers have been prosecuted for the widely-photographed abuses at the Abu Ghraib prison, but no U.S. official has been held accountable for what seems to be a systematic use of torture to obtain information.[122] To date, no independent investigation into the use of torture by the Unites States has been conducted.

To give just one of a number of possible examples, the United States has acknowledged utilizing the practice of "water-boarding," which involves strapping detainees to boards and immersing them in water to make them think they are drowning.[123] This activity is clearly an example of "torture" that violates the Torture Convention, but no one has been charged or prosecuted for authorizing or conducting this practice. U.S. officials have also permitted its armed forces to use dogs to terrify detainees, to place detainees in painful positions for protracted periods of time so that they would talk, to increase or decrease the room temperature dramatically, to use nauseating smells, and to disrupt normal sleep patterns.[124] These atrocities will continue to haunt the efforts of the coalition forces until a full and fair independent investigation is conducted and those who authorized or allowed them to occur are brought to justice. As one commentator explained in March 2005:

> The Bush administration is desperately trying to keep the full story from emerging. But there is no longer any doubt that prisoners seized by the U.S. in Iraq, Afghanistan and elsewhere have been killed, tortured, sexually humiliated and otherwise grotesquely abused.
>
> . . . .
>
> . . . If you pay close attention to what is already known about the sadistic and barbaric treatment of prisoners by the U.S., you can begin to wonder how far we've come from the Middle Ages.[125]

---

122 *See, e.g.,* Douglas Jehl, *White House Has Tightly Restricted Oversight of C.I.A. Detentions, Officials Say*, NY TIMES, at A21; Douglas Jehl, *Pentagon Will Not Try 17 G.I.'s Implicated in Prisoners' Deaths*, NY TIMES, Mar. 26, 2005, at A4; Zernike, *supra* note 121.

123 Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry Into Interrogation Tactics*, NY TIMES, Aug. 29, 2004, at 10.

124 *Harsh Tactics Were Allowed, General Told Jailers in Iraq*, N.Y. TIMES, March 29, 2005, at A8 (quoting from a memorandum signed by Lt. General Ricardo Sanchez, then senior commander in Iraq, on Sept. 14, 2003).

125 Bob Herbert, *Is No One Accountable?* N.Y. TIMES, March 28, 2005, at A17.

CONCLUSION

Over the last century, the world has made substantial progress in identifying the fundamental norms of human rights that are accepted by all nations and peoples across the globe. Despite this progress, we have a long way to go towards building effective mechanisms to ensure that these norms are respected by all nations and peoples. "Unfortunately, most state-sponsored gross human rights violations are never investigated, or, if investigated, are subject to grave omissions or irregularities, including the corruption of evidence."[126] In order to ensure that human rights abuses around the globe are stopped, the international community must come together and agree on how violators will be identified and prosecuted for their crimes. Once that agreement is made, the international community must abide by that agreement and work collectively to prosecute and punish individuals for their crimes against humanity.

As Professor Ved Nanda explained simply and eloquently in 1983, writing in the Rocky Mountain News, "What we're saying is there are international standards nations must obey. If you tolerate violations of human rights anywhere, you encourage it everywhere."[127] To stop human rights violations, a cohesive agreement amongst nations is necessary. To date, the United States has fallen short of its responsibility and has not stayed true to Justice Robert Jackson's statement at Nuremberg that if certain acts are crimes, "they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would be unwilling to have invoked against us."[128] As another commentator states: "Lawlessness should never be an option for the United States. Once the rule of law has been extinguished, you're left with an environment in which moral degeneracy can flourish and a great nation can lose its soul."[129] Unquestionably, a decision by the United States to become a contracting party to the International Criminal Court would be a major step in the direction of promoting universal adherence to universal human rights norms.

126 Aldana-Pindell, *Emerging Universality, supra* note 4, at 608.
127 Ved Nanda, ROCKY MOUNTAIN NEWS, 1983 (on file with author).
128 *Jackson Statement*, *supra* note 59.
129 Herbert, *supra* note 125.

THE TRANSFORMATION OF STATE SOVEREIGN RIGHTS AND RESPONSIBILITIES UNDER THE ROME STATUTE FOR THE INTERNATIONAL CRIMINAL COURT

Michael J. Struett[*]

I. INTRODUCTION

It has become popular in recent years to suggest that state sovereignty, as a phenomenon in the international legal system, is in decline.[1] One such challenge to state sovereignty is the empowerment of international organizations or institutions to make binding decisions in areas that historically have been the prerogative of sovereign states. A prime example of this phenomenon is the International Criminal Court (ICC). The states party to the ICC statute, also known as the Rome Statute, grant the court considerable authority over the prosecution of war crimes, crimes against humanity, and genocide, when those crimes are committed by the member state's citizens or on its territory.[2] It has been alleged by the United States that, in addition to the voluntary sacrifice of sovereign authority by states party to the ICC, the new ICC also infringes on the sovereign rights of non-state parties.[3] This would occur if the establishment of the International Criminal Court modifies the sovereign rights of both state parties and non-state parties.

State sovereignty, however, remains a foundational norm of

[*]Ph.D. candidate, International Relations, University of California Irvine; M.A. George Washington University, 1998; B.A. University of California Berkeley, 1995. Email: mstruett@uci.edu. The author thanks Wayne Sandholtz and Steven Weldon for helpful comments on this work, and the editorial staff of the Chapman Law Review, especially Anthony Geraci for improving the article.

1 JAMES N. ROSENAU, TURBULENCE IN WORLD POLITICS: A THEORY OF CHANGE AND CONTINUITY 40 (Princeton University Press 1990). *See generally* Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7 (1997).

2 The Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

3 David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529, 533-34 (1999).

the international legal system. This article will examine the challenges to state sovereignty that are brought about under the Rome Statute of the International Criminal Court, but will argue that these are developments of the concept of state sovereignty and not a radical departure from it. Viewed from this perspective, arguments by the United States government that the Rome Statute violates the sovereign rights of non-state parties[4] have little merit, as the principles of the ICC statute are well in line with the traditional state sovereignty norms that are the foundation of international law. The essential impact on non-state parties' sovereignty is that nationals of such states who commit crimes on the territory of states party to the ICC statute could potentially be punished for their crimes before the new international court. However, under the traditional rules of international law, nationals of a foreign state are normally subject to the laws of the state where they are traveling.[5] Consequently, to the extent that the establishment of the International Criminal Court creates obligations for non-state parties, it does so in a way that is perfectly consistent with the foundational international law norm of state sovereignty. States that consent to become parties to the Rome Statute of the International Criminal Court do engage in a significant redefinition of their sovereign rights and responsibilities, but they do so in a way that is consistent with the gradual evolution of the concept of state sovereignty over the centuries. Therefore, the establishment of the International Criminal Court does not radically undermine the concept of state sovereignty; instead, it modifies sovereignty norms in a direction that promises to permit the continued utility of the concept for international law in the twenty-first century.

II. THE CONCEPT OF STATE SOVEREIGNTY

A. Sovereignty as a Social Construct

State sovereignty is a foundational legal concept of international law which holds that states should have autonomy to act, and be free from, unwanted intrusions by other states.[6] However, the precise rule content of the sovereignty concept has changed a great deal over time. For instance, it was once

4 Pierre-Richard Prosper, Foreign Press Center Briefing (May 6, 2002), *available at* http://fpc.state.gov/9965.htm.

5 Covey T. Oliver, *The Jurisdiction (Competence) of States*, *in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 307, 309 (M. Bedjaoui ed. 1991).

6 State sovereignty is defined as "[t]he right of a state to self-government; the supreme authority exercised by each state." BLACK'S LAW DICTIONARY 1446 (8th ed. 2004).

accepted that one of the privileges of sovereign states was the right to use force in world politics. Today, in contrast, the concept of state sovereignty includes the right to be free from armed attack on a state's sovereign territory.[7] I accept the notion articulated by Werner and others that sovereignty is a conceptual category of international law whose specific content changes over time through the discursive practices of states.[8] As Werner puts clearly:

> State sovereignty is not a descriptive concept which stands for ('mirrors') a pre-given state of affairs and which can be measured and counted in an objective way. The very fact that collapsed states still count as sovereign states in international law suggests otherwise. Rather than being a representation of a state of affairs, state sovereignty is a *claim to authority*; a claim which has been institutionalized, defined and redefined within the framework of international law.[9]

This perspective is at odds with the view that sovereignty is an actual political characteristic of independent political entities that have *de facto* political autonomy. In such a view, international law simply takes note of that empirical situation.[10] I assume, instead, that the discourse of international law has substantiated the conceptual category of sovereignty. The existence of a body of law based on the principle of the independence of sovereign states has legitimized and institutionalized the existence of political forms that claim the status of sovereign states. Moreover, the particular bundle of rights and duties that sovereign states claim to possess as a result of qualifying for legal sovereign status has changed considerably over time.

Biersteker and Weber elaborate on the view that sovereignty is a socially constructed legal concept whose exact content changes considerably over time. They assert that:

> Sovereignty provides the basis in international law for claims for state actions, and its violation is routinely invoked as a justification for the use of force in international relations. Sovereignty, therefore, is an inherently *social* concept. States' claims to sovereignty construct a social environment in which they can interact as an international society of states, while at the same time the mutual recognition of

7 Wouter Werner, *State Sovereignty and International Legal Discourse*, *in* GOVERNANCE AND INTERNATIONAL LEGAL THEORY 127 (Wouter G. Werner & Ige F. Dekker eds., 2004).

8 *Id.* at 131-33.

9 *Id.* at 133 (emphasis added).

10 For an articulation of the view that sovereignty is an empirical phenomenon that is merely recognized by international law, see *generally* ALAN JAMES, SOVEREIGN STATEHOOD, THE BASIS OF INTERNATIONAL SOCIETY (Allen & Unwin 1986).

> claims to sovereignty is an important element in the construction of states themselves.[11]

Thus, sovereignty is a social fact. States exist as meaningful entities because they are constituted by international law rules of recognition. At the same time, states constitute those institutional rules of international law by interacting in ways that develop and modify the meaning of sovereignty over time. The relationship between states, as agents, and international law, as an institution, is mutually constitutive.[12] While the specific rules of conduct for sovereign states shift over time, the sovereignty idea always refers to some capacity of the state to act independently from other sources of authority.[13]

One consequence of the view that sovereignty is a socially constructed phenomenon is that it is no longer necessary to view the international norm of state sovereignty and the norm of individual human rights as existing in opposition to one another.[14] Instead, constructivist scholars of international relations have argued that, since 1945, with the era of de-colonization and self-determination, the obligation of sovereign states to protect the individual human rights of their citizens has become essential to legitimizing the existence of the international state system itself.[15] The reason for the legitimacy of the state system in earlier centuries was the divine right of kings, but, since the middle of the twentieth century, the foundational reason for the existence of modern states is to protect the most basic human rights of their populations. As Reus-Smit puts it: "Far from being a categorical right with no strings attached, therefore, the post-1945 right to self-determination was deliberately and explicitly tied to the satisfaction of basic human rights."[16]

---

11 Thomas J. Biersteker & Cynthia Weber, *The Social Construction of State Sovereignty, in* STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 1, 1-2 (Thomas J. Biersteker & Cynthia Weber eds. 1996) (emphasis in original) (footnote omitted).

12 On the sociology of agents and structures, see generally ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION (University of California Press 1984). With respect to states and international society, see ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 67 (1999).

13 Biersteker & Weber, *supra* note 11, at 14.

14 For the opposite view that the ICC is a challenge to states' sovereign rights, rather than a transformation of them, see Rod Jensen, *Globalization and the International Criminal Court: Accountability and a New Conception of State*, *in* GOVERNANCE AND INTERNATIONAL LEGAL THEORY 170-71 (Wouter G. Werner & Ige F. Dekker eds., 2004).

15 Christian Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, 27 REV. OF INT'L STUD. 519, 519-20, 531-36 (2001).

16 *Id.* at 536.

B. Sovereignty and the Juridical Equality of States

Of course, a crucial aspect of the legal concept of state sovereignty is the juridical equality of the states in the international system. However, Michael Byers notes the fiction of legal equality masks significant differences in a state's actual power, and those power differences suggest that states have differing abilities to influence the content of international law.[17] Byers argues that powerful states tend to be more engaged in the international system, and, therefore, their acts have a disproportionate impact on the evolution of customary international law. Additionally, they tend to maintain larger diplomatic corps that give them added influence in bilateral and multilateral treaty drafting. As I have argued elsewhere, one of the consequences of the establishment of the International Criminal Court is that it gives judges of that court substantial authority to direct the evolution of the practical application of the laws of war.[18] I elaborate on this power of the ICC below. This power to define the law comes partly at the expense of powerful states that have historically determined the application of the rules of international humanitarian law through their own practices of discourse and prosecution.

Critical legal theorists have noted that international law, like virtually all legal orders, is not inherently fair in its application precisely because power plays a role in the development and application of the law.[19] One important change in the legal rights of sovereign states that ratify the Rome Statute of the International Criminal Court is that they grant significant authority to the Court's prosecutor and judges to determine whether or not particular actions carried out by individuals constitute violations of international humanitarian law. As a consequence, the establishment of the Court shifts real legal control from the great powers towards this newly constituted international judiciary. Since military powers historically defined the application of international criminal law standards to their own soldiers, personnel, and citizens, they exercised enormous discretion over the practical definition of the crimes mentioned under the Geneva Protocols of 1949 or the

17 MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 35-40 (Cambridge University Press 1999).

18 Michael Struett, *NGOs, the International Criminal Court, and the Politics of Writing International Law*, *in* GOVERNANCE AND INTERNATIONAL LEGAL THEORY 327-28 (Wouter G. Werner & Ige F. Dekker eds., 2004).

19 *See generally* DAVID KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (Basic Books 3d ed. 1998) (1982).

Genocide Convention.[20] If the judges of the ICC are fair and professional in their application of the standards, this development could weaken the argument that international law ultimately is a legal system that serves the interest of only the most powerful states that participate in the international legal system.

C. Sovereignty and Individuals as Subjects of International Law

Historically, individuals were not recognized as subjects of international law, and it was assumed that only states, not individuals, had rights and obligations under international criminal law.[21] Chinese writers on international law have recently reiterated this view, claiming that international law gives no status to individuals on Chinese territory to claim rights against the state.[22] However, this argument has been widely criticized as being the obvious manipulation of international law by totalitarian states to preserve its own absolute power.[23] Moreover, in the twentieth century, the view that individuals have both rights and obligations under international law has gained widespread acceptance.[24] Indeed, since international law, like any legal system, is ultimately a standard for human behavior, it would seem to be a logical necessity that it would regulate individual human conduct, even if the formal constitution of international law is premised on specific acts undertaken by states as corporate entities.[25]

International Criminal Law as a field rests upon the reality that states have deliberately created rights and duties for individuals under international treaties and customs.[26] The International Criminal Court is a direct challenge to traditional conceptions of state sovereignty because it creates a supranational judicial authority with the power to rule whether

20 Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res 260 (III), U.N. GAOR, 3rd Sess., at 174, U.N. Doc A/810, (Dec. 9, 1948), 78 U.N.T.S. 277, *entered into force* January 12, 1951.

21 Jeremy Bentham, *Principles of International Law*, in 2 THE WORKS 537 (J. Bowring ed. 1843).

22 *See generally* Hungdah Chiu, G*uojifa Xin Lingyu Jianlun (A Concise Introduction to the New Areas of International Law)*, 82 AM. J. INT'L L. 892 (1988) (book review).

23 *See generally* LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE (1989).

24 *See generally* RICHARD A. FALK ET AL., INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE (Westview Press 1985).

25 *Id.* at 205.

26 *See generally* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (Kluwer Law International 2d ed. 1999); JORDAN J. PAUST, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS (Carolina Academic Press 2d ed. 2000).

or not particular uses of force by state officials are criminal and sanctionable violations of international law.[27] This means that the court, and not states alone, will have the authority to help determine what constitutes a legal use of force. Of course, the notion that states have a monopoly on the legitimate use of force within their territory is central to the legal concept of sovereignty. That circumstance is not undermined by the establishment of the International Criminal Court, because the court does not constitute any new authority with police power. However, states that ratify the statute give the court a role in determining which particular uses of force are legitimate.[28] Consequently, the legal privileges of sovereignty are altered by the court's establishment. In effect, states that are parties to the ICC statute limit their own autonomy in determining whether or not the conduct of their public officials comports with obligations that states have adopted to limit their use of force.

D. Popular Sovereignty and the Legal Concept of State Sovereignty

State sovereignty is increasingly conceptualized as a phenomenon that creates both rights and responsibilities for governments.[29] In effect, there is an emerging norm in international law that States owe certain obligations to their own citizens, and to the international community.[30] The political liberty that comes with state sovereignty has to be tempered by a responsibility to exercise that liberty in a way that is not severely detrimental to people living inside or outside of the sovereign state's jurisdiction. For example, the emerging preference in the international legal system for democratic forms of government suggests that sovereign states have a legal obligation to consider the needs of the citizens of their state.[31]

In all the states where the United Nations has recently been involved in "state-building" exercises after a period of war or other upheaval, democracy has repeatedly been the form of government preferred by international organizations and their members.[32] This pattern of state practice suggests an emerging

27 Rome Statute, *supra* note 2.

28 *Id.*

29 *See generally* INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), *available at* http://www.iciss.ca/pdf/commission-report.pdf.

30 *See generally id.*

31 *See generally id.*

32 *See generally* Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments, in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 123 (Gregory H. Fox & Brad R. Roth eds., 2000).

standard that participatory forms of political organization are to be preferred over forms of government where a political elite is not accountable to the general populace.[33] This suggests that the legal concept of sovereignty in international law now focuses increasingly on the popular sovereignty of the citizenry rather than on the political sovereignty of the government. The now extensive pattern of international treaties that recognize participatory political rights means there has been a shift in the locus of sovereignty.[34] As Greg Fox writes, this "shift in the locus of sovereignty undermines arguments against participatory rights based on an infringement of sovereignty. For a non-democratic regime to claim that participatory rights violate its national sovereignty begs the question of whether that regime has legitimate authority to make such a statement."[35]

Another example of the increasing significance of the norm of state responsibility over taking the rights aspect of state sovereignty can be seen in the emergence of "The Guiding Principles on Internal Displacement" adopted by the UN Commission on Human Rights.[36] In this case, we are not dealing with legally binding law. Still the development of workable norms in this area, their adoption by a major UN body, and their use in the field by Non-Governmental Organizations (NGOs) and other actors, all serve to reinforce the notion that sovereign states have responsibilities and not just rights. The question of internally displaced persons is a classic example of a lacuna created in international law by the doctrine of absolute state sovereignty.[37] Of course, persons displaced across international boundaries now benefit from a number of international law rights and privileges. Conversely, persons displaced from their homes by armed conflict who remain within the boundaries of a sovereign state have more limited international legal rights because such persons are traditionally at the complete mercy of their sovereign state governments.[38]

The development of the Guiding Principles for Internally Displaced Persons is a study in the growing recognition that states have obligations to their own citizens. Roberta Cohen

33 Gregory H. Fox, *The Right to Political Participation in International Law, in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, 48, 71-86 (Gregory H. Fox & Brad R. Roth eds., 2000).

34 *Id.*

35 *Id.* at 89.

36 Guiding Principles on Internal Displacement, U.N. Commission Human Rights, 54th Sess., U.N. Doc. E/CN.4/1998/53/Add.2 (1998).

37 *See generally* Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, *in* 10 GLOBAL GOVERNANCE 459 (2004).

38 *Id.*

writes: "[w]hile acknowledging that primary responsibility rests with national authorities, the Guiding Principles recast sovereignty as a form of national responsibility toward one's vulnerable populations with a role provided for the international community when governments did not have the capacity or willingness to protect their uprooted populations."[39] We are witnessing the gradual strengthening of the notion of popular sovereignty in the international political normative order, at the expense of strict privileges of state sovereignty. State sovereignty is increasingly only viewed as legitimate to the extent that it gives expression to the popular sovereignty rights of the people.

The International Criminal Court creates new norms that are of precisely this type. The primary effect of the ICC on member states' sovereign rights is to create an important institutional incentive for member states to prosecute genocide, war crimes, or crimes against humanity when they occur on the states territory. Since the ICC only has jurisdiction if states fail to prosecute themselves,[40] the existence of the court puts pressure on states to exercise their own criminal jurisdiction over these crimes. In the absence of the ICC, other things being equal, states would have more latitude to decide for themselves whether or not it was politically desirable to prosecute these types of cases. Of course, states had already accepted the legal obligation to punish or extradite for genocide, if they ratified the 1948 Genocide Convention, and grave breaches of the war crimes law, if they ratified the Geneva Conventions of 1949.[41]

What is new about the ICC is that it threatens to proceed with international enforcement of these crimes if states fail to punish. In effect, the ICC promises to uphold a certain minimal standard of compliance with the requirement on states to punish violations of international criminal law. This can be viewed as recognizing the rights of the citizens of states to be free from victimization as a result of crimes recognized under international criminal law. As such, it is a modification of the meaning of state sovereignty. Of course, in some cases, states will be glad to shift

39 *Id.* at 459.

40 Rome Statute, *supra* note 2, art. 17.

41 Regarding the duty to prosecute war crimes, see STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 82 (Oxford University Press 2d ed. 2001). Regarding the duty to prosecute Genocide, see Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 20, arts. 6-7; but be aware of numerous reservations to these provisions. *See also* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 39-40 (2001).

the burden of prosecution to the ICC rather than undertake such prosecutions themselves. This possibility is discussed more below. But for the majority of states, the incentive will clearly be to handle such matters within their own legal systems.

III. BASIC POWERS OF THE INTERNATIONAL CRIMINAL COURT

By creating an individual standard of accountability for violations of the laws of war, the International Criminal Court potentially places meaningful restrictions on the way states can employ organized violence.[42] The four classes of crimes over which the ICC will have jurisdiction all involve international norms that restrict the way in which states can exercise the use of force.[43] It does this by forcing state officials to consider the possible legal repercussions should the force be deemed inappropriate by outside legal authorities. Historically, this fact was seen as the major political stumbling block to the establishment of a permanent ICC.[44]

The establishment of the International Criminal Court also places restrictions on a state's ability to determine for itself whether or not particular acts qualify as war crimes, crimes against humanity, or genocide. The absence of a clearly specified international criminal code has also been seen as a major stumbling block to prosecuting international crimes in a court of law.[45] Of course, there is no recognized legislative body in the international system. Both customary and treaty based international law criminalize specific acts, but whether or not those crimes were sufficiently specified so as to make them enforceable in a court of law was debated before the establishment of the ICC.[46] States have traditionally exercised a great deal of control over the content of international law,

42 Michael Struett, *The Meaning of the International Criminal Court*, 16 PEACE REVIEW 317, 319 (2004).

43 The four crimes are genocide, crimes against humanity, war crimes, and aggression. Rome Statute, *supra* note 2, art. 5. Significantly, the court will not exercise its jurisdiction over the crime of aggression until the states who are parties to the Rome Statute agree on a definition of that crime. *Id.* Of course, non-state actors can also commit these crimes.

44 BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE : A DOCUMENTARY HISTORY AND ANALYSIS, xii (Oceana Publications 1980). *See generally* Benjamin B. Ferencz, *An International Criminal Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 375-81, 84. (1992); Michael P. Scharf, *Getting Serious About an International Criminal Court*, 6 PACE INT'L L. REV. 103, 111-13 (1994). These works document the reluctance of states to define international law crimes with sufficient precision for an international criminal court to convict violators.

45 Scharf, *Getting Serious About an International Criminal Court*, *supra* note 44.

46 *See generally* Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PACE INT'L L. REV. 121 (1994); FERENCZ, *supra* note 44.

including the ability to determine in large part through custom what is considered a war crime and what is not.

The traditional sources of international law are primarily controlled by state governments. Article 38 of the Statute of the International Court of Justice formally recognizes four sources of international law: treaties, custom, general principles of law, and the commentary of judicial decisions or leading publicists on international law.[47] Sovereign states have control over the first two sources, since states conclude treaties and custom refers explicitly to the practice of states. As a result, states have traditionally exercised a great deal of control over the content of international law, including the ability to determine in large part through custom what is considered a war crime and what is not. Since the general principles of law are essentially constant over time, and the role of commentary is a subsidiary one that is parasitic on the actual behavior of states, states historically have exercised a virtual monopoly on the actual legislation of international law.

Within the last century, the doctrine that only sovereign states can be the authors of international law has come under challenge.[48] To the extent that the resolutions of international organizations and decisions of international administrative bodies can have binding effects in law, at times by means of parliamentary style voting, as in the Security Council, or the General Assembly, or other international bodies, this introduces an element in the source of law that is not directly controlled by states.[49] Even so, states do exercise some influence here, because the state governments choose the representatives of such international organizations.[50] Judicial bodies can also play a role by offering authoritative interpretations on ill defined areas of the law. While the ICJ is limited in this respect by Article 59, which proscribes the precedential value for the World Court's decisions,[51] other international and domestic courts, including Nuremberg, the ICTY and the ICTR are not so limited. The ICC, as a permanent judicial body, has the potential to exercise considerable influence over the content of international criminal law, and the ICC's decisions will have precedential value, at least for future cases heard under the statute itself.[52]

---

47 Statute of the International Court of Justice, June 26, 1946, 59 Stat. 1055, 8 U.N.T.S. 993.

48 FALK, *supra* note 24.

49 U.N. CHARTER art. 24.

50 The European Parliament is an important exception.

51 Statute of the International Court of Justice, *supra* note 47, art. 59.

52 Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 144, 157-158

The International Criminal Court was established by a multilateral treaty negotiated by the representatives of sovereign states.[53] As such, it is not an organ of the United Nations, nor is it functionally a part of any other international organization, but the statute does give particular privileges to various United Nations organs. The treaty, normally referred to as the Rome Statute for the International Criminal Court, like any treaty, is only binding on those states that have formally ratified it. The Rome Statute establishes the court and gives it jurisdiction over persons "for the most serious crimes of international concern" as provided for in Article 1 of the treaty.[54] It also gives the court "international legal personality."[55]

The Rome Statute gives the court jurisdiction over the crimes of Genocide, crimes against humanity, and war crimes, and it specifically defines those crimes in Articles 5-8.[56] The Rome Statute also gives the ICC jurisdiction over the crime of Aggression but only if and when the states agree to a definition of that crime via an amendment to Article 5 of the ICC statute.[57] Such an amendment would need to be ratified or accepted by seven-eighths of the states that are ICC members before it would come into effect, and cannot be formally considered until July 2009.[58] This procedure could also be used to add additional crimes to the jurisdiction of the court in the future. There are some very specific restrictions on when the ICC can exercise its jurisdiction, which will be discussed after the main structures of the court have been outlined.

Part IV of the Rome Statute, Articles 34-52, provide for the election of eighteen judges, a prosecutor and deputy prosecutor by the Assembly of States Party to the ICC.[59] The registrar of the court is elected by the judges.[60] The Assembly of States Parties is composed of a representative from each state that ratifies the Rome Statute. The Assemblies organization and administrative powers over the other organs of the court are described in Part 11 of the statute, Articles 112-118.[61]

The jurisdiction of the court is complementary to the

(1999) (stating that Article 10 of the Rome Statute, which stipulates that the Rome Statute is not intended to modify any existing provisions of international law for purposes other than those of the statute, does not block the ICC from following its own precedents).

53 Rome Statute, *supra* note 2.

54 *Id.* art. 1.

55 *Id.* art. 4.

56 *Id.* arts. 5-8.

57 *Id.* art. 5.

58 *Id.* arts. 121, 123.

59 *Id.* arts. 34-52.

60 *Id.* art. 43.

61 *Id.* arts.112-118.

jurisdiction of national courts, which also presumably have the authority to prosecute the international law crimes covered by the Rome Statute.[62] This concept of concurrent jurisdiction was labeled "complementarity" during the ICC negotiations.[63] Complementarity means simply that the court's jurisdiction overlaps without allowing the supranational court to act as an appellate court for domestic criminal trials. In general, a case is inadmissible before the ICC if it is being investigated or prosecuted by a State with jurisdiction "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution . . . ."[64] In other words, the ICC is intended to defer to trials by states in their domestic legal systems. The jurisdiction of the ICC is limited to handling cases where national courts fail to prosecute. The ICC statute adopts the traditional legal norm against double jeopardy, so the ICC will not hear cases where a domestic court has already rendered a not guilty verdict, unless it can be shown that the domestic trial was a show-trial intended to shield the accused.[65] The statute does give the ICC judges the authority to determine whether or not a state is genuinely willing and able to prosecute, and therefore, whether or not the ICC prosecutor can investigate any particular case.[66]

This feature does represent a significant change in the sovereign rights of states. For the first time, it allows for a supranational review of national judicial systems decisions. This feature was viewed as essential by advocates of a strong court, because otherwise, governments could always shield their citizens from prosecution by the ICC by holding a show trial.[67] Rod Jensen has commented that this feature of the court's jurisdiction compels states that want to avoid the ICC prosecutor from intervening in events that take place on their territory to adopt criminal legislation to enable the prosecution of those crimes under their domestic law.[68] If ICC member states fail to adopt such legislation they invite a determination by the ICC prosecutor that the state is unable to prosecute.

While the ICC does have the authority to determine whether or not decisions taken in national courts were genuine

62 *Id.* art. 1, pmbl.

63 *Id.*

64 *Id.* art. 17.

65 *Id.* arts. 17, 20.

66 *Id.* at arts. 18, 19.

67 For an early example of an non-governmental organizations policy paper arguing this point, see AMNESTY INTERNATIONAL, ESTABLISHING A JUST, FAIR AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 14 (1994).

68 Jensen, *supra* note 14, at 181.

prosecutions, this is not nearly so broadly defined as a general appellate review power. This relationship between national courts and the ICC was critical to the willingness of States to establish a permanent international criminal court, and the exact specification of this relationship was a central issue in the negotiations.[69]

The court can exercise its jurisdiction over the core crimes whenever they take place on the territory of a state that has ratified the statute, or when the perpetrator is the national of a state party.[70] Additionally, the ICC's statute allows the Security Council of the United Nations to refer cases when they take place anywhere in the world,[71] using its powers to regulate international peace and security under Chapter 7 of the United Nations Charter.[72] Significantly, the Rome Statute does not grant the ICC universal jurisdiction over Genocide, or any of the other crimes, even though the 1947 Genocide Convention does give municipal courts the authority to prosecute that crime regardless of where in the world it occurs.[73] The ICC can only exercise its jurisdiction if a state party or the Security Council refers a situation where crimes have allegedly occurred to the prosecutor, or if the prosecutor has information indicating that crimes within the jurisdiction of the court have been committed and he receives authorization from the pre-trial chamber of judges to open an investigation.[74] Finally, the ICC only has jurisdiction over crimes that were committed after the Rome Statute entered into force on July 1st, 2002.[75]

IV. SOVEREIGNTY IMPLICATIONS OF THE ICC FOR STATE PARTIES

The International Criminal Court is dependent on sovereign states in order for it to function effectively. However, it also creates incentives that are likely to modify state behavior in significant ways. Over time, that modified behavior will likely change peoples' expectations around the world about the enforcement of criminal sanctions for gross human rights abuses. These changes will be brought about through the exercise of individual states' sovereign rights and privileges, not by undermining them.

---

69 *See, e.g.*, Press Release, USG for Legal Affairs and U.N. Legal Counsel, May 18, 1998, *available at* http://www.un.org/icc/usgpress.htm.

70 Rome Statute, *supra* note 2, art. 12.

71 *Id.* art. 13 (b).

72 U.N. CHARTER arts. 39-51.

73 Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 20.

74 Rome Statute, *supra* note 2, arts. 13-15.

75 *Id.* art. 11.

The ICC creates incentives in two different ways. First, as its founders intended, it creates an incentive for states to be more consistent in punishing violations of international criminal law that occur on their territory. However, the first few investigations that the ICC has undertaken in Uganda and the Congo, and the recent request for Court action in Burundi, suggest another dynamic that is likely to develop between states and the ICC.[76] Second, for weak states that have difficulty maintaining law and order in their own territory, the ICC creates a tremendous incentive and a standing mechanism to request international assistance in carrying out investigations and trials of gross human rights abusers. This is a type of burden shifting that transfers responsibility from the individual state to the International Criminal Court.

Of course, given its own resource constraints, the ICC will be tremendously limited in the number of cases it can take on this basis. To combat this problem, the ICC is permitted to take funding donations from private sources.[77] One hopes that a sufficient number of governments, foundations, and/or private individuals will be willing to donate funds to ensure that the most egregious cases of violations of international criminal law will be adequately investigated and prosecuted. However, it is far from certain that the potential donor pool is equal to the task of providing enough funds to deal with what may be an unfortunately large number of war crimes or crimes against humanity.

For state parties, the most intrusive changes in sovereignty norms will appear when the ICC prosecutes a case with respect to events that took place on that state's territory or involving its citizens. The power of the ICC prosecutor to conduct on site investigations under Part 9 of the ICC statute was an extremely contentious issue during the ICC negotiations.[78] The Rome Statute envisions two different scenarios for the capacity of the ICC prosecutor to conduct "on-site" investigations.[79] In the ideal situation, the state party on whose territory the investigation is being conducted will be willing to cooperate with the investigation. In that case, the Rome Statute provides for elaborate set of notification requirements designed to facilitate

76 For more information on these ICC investigations, see http://www.icc-cpi.int/cases.html (discussing the investigation in Uganda and Congo); http://globalsolutions.org/programs/law_justice/news/burundi.html (discussing Burundi).

77 Rome Statute, *supra* note 2, art. 116.

78 Fabricio Guariglia, *International Law Criminal Procedures: Investigation and Prosecution, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS AND RESULTS 227, 231 (Roy S. Lee ed. 1999).

79 *Id.*

close cooperation between the prosecutor's office and the relevant state party.[80]

However, it was also felt that it would be important for the prosecutor to have some power to conduct interviews even when the state was either completely ineffective, and therefore unable to facilitate the ICC prosecutor's investigation, or in situations where the state was unwilling to cooperate.[81] In those cases, the ICC statute gives the prosecutor's office some authority, in carefully limited circumstances, to conduct interviews of witnesses on the state's territory without the presence of state officials, but only under the close supervision of the judges of the ICC's pre-trial chamber.[82] This power of the ICC prosecutor can only be exercised on the territory of state parties.

This later scenario is a substantial change from the normal sovereign prerogatives of states. Still, it is an arrangement that states only enter into by voluntarily ratifying the ICC statute. A state's willingness to do this can be understood when looked at in conjunction with the emerging standard of popular sovereignty discussed above. By ratifying the ICC statute, sovereign governments are attempting to ensure that if the rule of law should break down in their societies, resulting in massive violations of international criminal law, they, via the international community, have the capacity to bring the individual perpetrators to justice.

This international intervention could be interpreted as a step toward restoring the legitimate sovereignty of the people, since in a time of lawless conflict, the true sovereign authority of the people would be incapable of expression. Because of this, sovereign states feel a need to ratify the ICC statute, granting investigative powers to the ICC prosecutor and judges in advance.

V. SOVEREIGNTY IMPLICATIONS OF THE ICC FOR NON-STATE PARTIES

The central legal implication for states that have not ratified the Rome Statute is that their nationals could be tried by the ICC if they commit crimes encompassed by the ICC within the territory of a state that has ratified the Rome Statute.[83] Additionally, non-state parties' could be tried through the Security Council mechanism, even with respect to events that

80 *Id.* at 231-32.
81 *Id.*
82 *Id.* at 232-33.
83 Rome Statute, *supra* note 2, art. 12.

happen on the territory of a non-state party.[84] These developments, while significant, do not substantially change the *legal* situation that United Nations member states faced prior to the establishment of the ICC. As a matter of power politics, the ICC may command more authority to bring suspects to justice than would be the case with municipal legal systems of many less powerful states. As a result, the ICC may make deliberate political action by states to shield persons from accountability more difficult. However, the view that the ICC statute creates new legal obligations for non-state parties cannot be sustained. To the extent that the Court may have an impact on the exercise of non-state parties' sovereign rights, it does so in a way that is perfectly consistent with existing international law.

In the closing days of the Clinton Administration David Scheffer lobbied for states supporting the ICC to agree to limit the ability of the court to detain official personnel of non-state parties. He said, "we believe there should be a means to preclude the automatic surrender to the Court of official personnel of a non-party State that acts responsibly in the international community and is willing to exercise and capable of exercising complementarity with respect to its own personnel."[85] Scheffer referred to this as "a fundamental issue [that] needs to be resolved [whose] . . . . outcome would open the door for the United States to become the good neighbor to the Court."[86] Of course, this issue was never resolved in a way that was satisfactory to the United States government.

According to a crucial rule of international law, states cannot be obligated to obey a treaty unless it agrees to so obligate itself.[87] Diane Amann has argued forcefully that the ICC creates "non-consensual" legal jurisdiction in a way that violates the principle that treaties are not binding on non-signatory states.[88] The governments of the United States, China, and India have also complained that the ICC Statute impinges unfairly on their sovereign rights. As Amann rightly points out, it is essential to the quasi- democratic legitimacy of international law that states cannot be made to accept international legal obligations except

84 *Id.* art. 13.

85 David Scheffer, *Statement Before the Sixth Committee of the 53rd General Assembly (U.N.): The International Criminal Court* (Oct. 18, 2000), *available at* http://www.un.int/usa/98_179.htm.

86 *Id.*

87 Vienna Convention on the Law of Treaties, May 23, 1968, arts. 34-38, 1155 U.N.T.S. 331, *entered into force* Jan. 27 1980, *available at* www.un.org/law/ilc/texts /treaties.htm.

88 Diane Marie Amann, *The International Criminal Court and the Sovereign State, in* GOVERNANCE AND INTERNATIONAL LEGAL THEORY 187-98 (Wouter G. Werner & Ige F. Dekker eds., 2004).

through their own consent. Careful analysis shows however that the Rome Statute is not guilty of creating new legal obligations for non-state parties.

The legal impact of the ICC's establishment on the citizens of non-state parties is that there is one additional forum in which they may be tried for war crimes, crime against humanity, and genocide.[89] Such persons could already have been tried in the courts of a foreign state if they committed those crimes in that state before the establishment of the ICC. In many cases, they could have been subject to trial in a foreign state court even for acts committed in their home state under universal jurisdiction rules.[90] As a legal matter, it seems there is little difference between individuals being held responsible for violations of municipal law in states they visit versus being held responsible for violations of international law in states they visit. The traditional rules of international law have long maintained that states have the jurisdiction to prosecute foreigners for conduct on their territory.[91] As many advocates of the ICC have pointed out, there is no logical reason why such states should be barred from cooperating by a multilateral treaty to punish conduct which each of them had a clear right to punish individually.

Amann argues that this transfer of jurisdiction from national legal systems to a supranational court is illegitimate.[92] The central line of reasoning is that ICC jurisdiction is substantially different from one state transferring its territorial judicial authority to another state. Here the argument relies on the fact that many states have been reluctant to grant such authority in the context of European judicial cooperation.[93] However, arguing that states have been reluctant for political reasons to engage in this practice is not the same thing as arguing that there is a well recognized rule of international law that disallows the practice.

Amann goes on to argue that the ICC is different from states exercising jurisdiction over crimes on their territory individually because ICC decisions are much more likely to have precedent-setting effects.[94] She cites as evidence of this, the decision by the

89 *See, e.g.*, Jerry Fowler, *Not Fade Away: The International Criminal Court and the State of Sovereignty*, 2 SAN DIEGO INT'L J.L. 125 (2001) (book review); Cosmos Eubany, *Justice for Some? U.S. Efforts Under Article 98 to Escape the Jurisdiction of the International Criminal Court*, 27 HASTINGS INT'L & COMP. L. REV. 103 (2003).

90 RATNER & ABRAMS, *supra* note 41.

91 Emer de Vattel, 3 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (Charles G. Fenwick trans., Hein & Co., Inc. 1995) (1758).

92 Amann, *supra* note 88, at 194.

93 *Id.*

94 *Id.*

Court of Appeals for the Ninth Circuit in *Doe I v. Unocal,*[95] wherein the judges relied in part on a legal standard developed by the UN *ad hoc* criminal tribunals.[96] However, it is simply incorrect to consider this as an imposition on American sovereignty. The judges in the American court were not compelled to follow the international precedent in this case. Instead, they *chose* to do so. In so doing, they were exercising U.S. sovereign rights, by voluntarily complying with emerging international standards. This is a consensual acceptance of the legitimacy of international norms, not an imposition by a supranational court that is compelled against the will of a state sovereign.

If the ICC develops into a globally respected judicial institution, there is every reason to believe it will issue decisions interpreting the laws of war in ways that diverse legal scholars will find persuasive. The ICC may indeed have a definitive impact on shaping the legal enforcement norms concerning these international crimes. Politically, this undoubtedly weakens the ability of the United States and other great powers to shape the development of these international norms to their own liking. This fact is at the core of some of the opposition to the court within the US Government. Of course, the United States can resist normative developments that occur at the ICC and limit their tendency to be enshrined in Customary International Law by consistently objecting to the ICC's practice. This is undoubtedly part of the unstated logic behind the campaign of the Bush Administration to belittle the ICC at every available turn. But the precedent setting effects of the ICC could always be resisted by US judges if they desire. The Rome Statute clearly states that its contents cannot "be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this statute."[97] This gives sufficient latitude to municipal judges to reach their own interpretations of provisions of international humanitarian law even if they are at odds with rulings by ICC judges.

All of this means that the complaints that the ICC creates unfair legal effects on non-state parties, through precedent or some other mechanism, are really not substantial.

A. The ICC and the Relationship Between Law and War

Since 2001, the policy of the United States government has

95 395 F.3d 932 (9th Cir. 2002).
96 *Id.* at 948.
97 Rome Statute, *supra* note 2, art. 10.

been to defend the idea that the United States is entitled to use force preemptively as an extension of the traditional right to self-defense enshrined in Article 51 of the UN Charter.[98] A number of American legal scholars have perplexingly defended the legality of this proposition.[99] The American position does not recognize a similar right on the part of other states to use force against the United States if they feel similarly threatened. This lack of reciprocity will ultimately undermine the credibility of international law itself if the United States continues to pursue this route.

Curtis Doebbler and Maha Eid argue persuasively that, at best, the legal reasoning behind these arguments involves a selective interpretation of existing law, while, at worst, an attempt by respected scholars to ensure their own access to the corridors of power by saying what powerful government officials want to hear.[100] This issue is relevant here because it is essential to understand the legal debate about the impact of the ICC statute on non-state parties in the context of this larger political question regarding the relationship between US national security strategy and international law. Much of the world is now quite convinced that the United States aims to exempt itself entirely from compliance with the rules of international humanitarian law. The U.S. need not accede to the ICC Statute if it does not believe it is in U.S. interests to do so. Still, it is unnecessary for the United States to complain that the establishment of the ICC unfairly impinges on U.S. sovereignty. The U.S. may not like the existence of the court, but it has no legal right to prevent other states from establishing it and attempting to develop the ICC into an effective institution.

VI. CONCLUSION

Others have argued that the debate between the United States and supporters of the ICC about the effect of the Court's statute is, in effect, a conflict between two differently valued positions: preserving traditional sovereignty rules of international law versus ensuring an end to impunity for the

98 *See, e.g.*, Letter from John Negroponte, the Permanent Representative of the United States of America to the United Nations to the President of the United Nations Security Council (Oct.7, 2001), *available at* http://www.un.int/usa/s-2001-946.htm.

99 *See, e.g.,* William C. Bradford, *"The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365 (2004); Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559 (2002).

100 Curtis F.J. Doebbler & Maha W. Eid, *American International Lawyers and the Use of Force,* 16 PEACE REVIEW 279, 284 (2004).

perpetrators of severe international crimes.[101]

However, I would argue that the Rome Statute was actually careful to balance these values. As we have seen, it is true that the existence of the Court potentially impacts the citizens of non-state parties. However, it does so in a way that does not substantially change their legal rights. As a practical matter however, it increases the likelihood of prosecution because it establishes a court with considerable independence from outside political forces. Because the ICC is a supranational institution, it will not be subject to the same diplomatic pressures as the courts of less-powerful states. This is the real source of the hostility toward the ICC's impact on non-state parties and it really is not a legal complaint. Rather, it is a political one. The establishment of the ICC may very well lessen the capacity of powerful states to use extra-legal political pressure to block the prosecution of persons accused of ICC crimes when they see such prosecutions as contrary to their national interests. This is an objection to the ICC's political impact on (some) sovereign states *de facto* autonomy. It is not a reasonable legal objection to the ICC's impact on transforming the legal concept of state sovereignty.

101 *See generally* Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent With the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 27-28 (2001) (describing the views of the proponents of the International Criminal Court that state sovereignty should be subordinated to the greater good of the world community). *But see* Scheffer, *supra* note 85 (describing the United State's position that the ICC interferes with state sovereignty).

THE INTERNATIONAL HUMAN RIGHT TO CULTURE: RECLAMATION OF THE CULTURAL IDENTITIES OF INDIGENOUS PEOPLES UNDER INTERNATIONAL LAW

*Marina Hadjioannou**

"The defence [sic] of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples."[1]

I. INTRODUCTION

Indigenous peoples across the globe have experienced a severe fragmentation of their cultural identity caused by the intentional exclusion and destruction of their cultural practices by colonizing forces that have sought to assimilate indigenous culture or to completely eliminate it from mainstream society. Taken over time, these acts of destruction have been characterized as cultural genocide, ethnocide and likened to acts of segregation, similar to apartheid.[2] Denial of cultural rights continues into the present day and is said to be "[o]ne of the most

*Indigenous Peoples Law and Policy Program Staff Attorney and Program Coordinator. B.S. 1996, Lewis and Clark College; J.D. 2003, James E. Rogers College of Law; M.P.H., 2004, Mel and Enid Zuckerman University of Arizona College of Public Health. The author would like to recognize the support of the Indigenous Peoples Law and Policy Program at The University of Arizona James E. Rogers College of Law. She would also like to give recognition and thanks to the indigenous communities and groups that she has worked with who inform this writing: the Mayangna community of Awas Tingni in Nicaragua, the Maya communities of Southern Belize and the Chiricahua Apache Alliance of North America.

1 Universal Declaration on Cultural Diversity, Nov. 2, 2001, U.N.E.S.C.O. Rec. Of Gen. Conf., 31st Sess., art. 4.

2 *See* Rodolfo Stavenhagen, *Cultural Diversity in the Development of the Americas: Indigenous Peoples and States in Spanish America*, Cultural Studies Series No. 11 Unit for Social Development Education and Culture, ¶ 32, *available at* http://www.oas.org/udse/studies/stavenhagen.doc (last visited Mar. 1, 2005).

persistent forms of discrimination" against indigenous peoples.[3] These transgressions have led indigenous peoples to seek protection of specific rights at domestic and international forums, which over time has compelled some multilateral institutions and their Member States to increase affirmative protections of indigenous rights through international legal instruments in support of these efforts.[4] With this push at the international level, and the integration of international standards into domestic law, there has been a shift of attention to the protection of indigenous peoples' rights.

Along with emerging international human rights for indigenous peoples is the right to culture in various forms. Despite some progress made with international standards and norms, cultural rights remain among the least understood of all human rights. Cultural identity has been referred to as "a treasure which vitalizes mankind's possibilities for self-fulfilment [sic] by encouraging every people and every group to seek nurture in the past . . . and so to continue the process of their own creation."[5] The same author maintains that the recognition of cultural rights of persons belonging to minorities is an important factor in maintaining stability and peace among these groups.[6] The "cultural integrity and durability" of minorities has been identified as a concern in the era of a rapidly transforming society.[7] With respect to indigenous peoples, the right to culture calls for particular attention.[8] Specifically, the cultural identity of indigenous peoples has been said to be at high risk of deterioration and thus requires special protection.[9]

The first part of this article sets forth the right to culture as articulated by multilateral institutions, in particular, those associated with international human rights. It identifies the

3 *Id*.

4 *See, e.g.*, S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004).

5 Janusz Symonides, *Cultural Rights: A Neglected Category of Human Rights,* 50 INT'L. SOC. SCI. J. 559, 560 (1998).

6 *Id*. at 561.

7 Chandran Kukathas, *Are There Any Cultural Rights? in* THE RIGHTS OF MINORITY CULTURES 228 (Will Kymlicka ed., 1995). *See also* CULTURE, RIGHTS AND CULTURAL RIGHTS: PERSPECTIVE FROM THE SOUTH PACIFIC (Margaret Wilson & Paul Hunt eds., 2000).

8 For a discussion on cultural relativism, which speaks to the cultural practices and expressions of indigenous groups in balance with other human rights see HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 166-255 (1996).

9 *See* Erica-Irene Daes, *Discrimination Against Indigenous Peoples: Study on the protection of the cultural and intellectual property of indigenous peoples,* Sub-Commission on Prevention of Discrimination and Protection of Minorities*,* 45 Sess., Agenda Item 14, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993).

major protections for indigenous peoples' cultural rights on the part of the United Nations (UN) and the Organization of American States (OAS) to observe how the right to culture has been articulated in general terms and in terms particular to indigenous peoples. Furthermore, it examines other regional organizations to demonstrate how the right to culture has been articulated commonly across regions. The evolution of cultural rights culminates with the movement towards creating an optional protocol to the International Covenant for Educational, Social, and Cultural Rights,[10] creating a real possibility that state parties will become more accountable to indigenous peoples' claims of cultural harms.

The second part of this article discusses the practice of restoring cultural rights on the part of the indigenous communities who are claiming these rights. It identifies the theoretical significance of having that movement initiated from within rather than orchestrated by cultural technicians, such as anthropologists, historians, ethnographers and others. Further, it turns to three specific indigenous groups in various parts of the world who have taken measures to reclaim and renew their own cultural identities in a range of forums. First, it looks to the Red Power Movement in the United States and how it led many native communities to express self-determination by asserting many components of their traditional customs.[11] This reclamation was part of an effort to redefine power and influence over the federal government in the United States and also has had a significant impact on the international development of indigenous peoples' rights. Next, it looks at an unprecedented mapping initiative on the part of indigenous Maya communities in Belize, which eventually led to the support of a positive decision from the Inter-American Commission on Human Rights[12] declaring Belize in violation of international human rights law.[13] Finally, it examines the Ainu people of Japan and their mobilization efforts to reform legislative and judicial arenas in respect to their cultural identity as indigenous peoples within Japan.

---

10 *See Report to the Economic and Social Council*, U.N. Commission on Human Rights, 59 Sess., Agenda Item 21(b), at ¶ 13, U.N. Doc. E/CN.4/2003/L/11/Add.3 (2003) (requesting the development of an optional protocol to the International Covenant of Economic, Social and Cultural Rights) and discussion, *infra.*

11 For an overview of the Red Power Movement see RED POWER: THE AMERICAN INDIANS' FIGHT FOR FREEDOM (Alvin M. Josephy et al. eds., 2d ed. 1999).

12 For information on the Inter-American Commission on Human Rights [hereinafter Inter-Am. C.H.R.] see http://www.cidh.org/what.htm.

13 *See Maya Indigenous Communities of the Toledo District*, Case No. 12.053, Inter-Am. C.H.R. 40/04 (Oct. 12, 2004) [hereinafter *Maya Indigenous Communities* case], *available at* http://www.cidh.org/annualrep/2004eng/belize.12053eng.htm.

All of these efforts demonstrate how the right to culture plays out on the ground and how, in turn, grassroots efforts to reclaim cultural identity lead back to the development and greater legal recognition of cultural rights.

II. CULTIVATING SURVIVAL: THE RIGHT TO CULTURE AS ESTABLISHED UNDER INTERNATIONAL LAW

A number of international and regional human rights instruments make reference to culture, but the implementation of cultural rights has been somewhat neglected.[14] Culture, in and of itself, has not often been articulated as a free standing human right; rather, it is commonly understood as an underlying principal of human rights law with which other rights overlap. The present discussion suggests that with the weight of multilateral protections for culture in force, along with a demonstrated movement towards the support of multiculturalism with respect to indigenous peoples and minorities, the landscape is ready for culture to emerge more singularly as a freestanding human right.[15] In that manner, the right to culture for indigenous peoples must be recognized and can be most basically justified as a collective right that is as essential as the right to exist.

A social anthropologist explains culture as an all-encompassing means of interpreting the world, as well as a means of survival:

> Culture means the total body of tradition borne by a society and transmitted from generation to generation. It thus refers to the norms, values, standards by which people act, and it includes the ways distinctive in each society of ordering the world and rendering it intelligible. Culture is. . .a set of mechanisms for survival, but it provides us also with a definition of reality. It is the matrix into which we are born, it is the anvil upon which our persons and destinies are forged.[16]

The parameters and definition of culture can be deconstructed and debated, but for the purpose of this discussion, the essence of indigenous culture has do to with the core body of beliefs, knowledge, traditions and ways of life that is passed on from generation to generation in indigenous communities.

Roldolfo Stavenhagen, the UN Special Rapporteur on

---

14 *See* Symonides, *supra* note 5, at 560.

15 *See* S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ J. INT'L & COMP. L. 13, 15-16 (2004); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995).

16 ROBERT MURPHY, CULTURE AND SOCIAL ANTHROPOLOGY: AN OVERTURE 14 (2d ed. 1986).

Indigenous Issues, states that "[r]ecognition of the valuable cultural contributions of ancient indigenous civilizations strengthens ties with the country's historical past and seeks symbolically to overcome the trauma of the conquest and colonization."[17] Not only does the recognition of indigenous cultures strengthen a country's ties to its past, but it also mobilizes indigenous peoples to grow in force and power when advocating for their own cultural and other essential human rights. As indigenous peoples have gained confidence and influence in the international playing field, the international community has responded with the development of international human rights norms that set forth affirmative protections for the cultural rights of minorities, and in particular, indigenous peoples.

A. The United Nations

The universal right of all people to participate in culture can be found within international law in several articles of the United Nations Charter[18] and the Universal Declaration of Human Rights.[19] The right to culture, in general, can also be found in the International Covenant on Economic, Social and Cultural Rights,[20] the International Convention on the Elimination of All Forms of Racial Discrimination,[21] the Convention Against Discrimination in Education,[22] and the International Covenant on Civil and Political Rights.[23] Under these conventions and the UN Declaration of Human Rights, every human being has the right to culture, including the right to enjoy and develop cultural life.[24]

17 Stavenhagen, *supra* note 2, ¶ 19.

18 U.N. CHARTER arts. 13, 55, 57, 73.

19 Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., at arts. 22, 27, U.N. Doc. A/810 (1948). For a discussion on the omission of specific mention of minority rights in relation to the right to culture in the Universal Declaration of Human Rights see JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTINGS & INTENT 269-280 (Bert B. Lockwood, Jr. ed., 1999).

20 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at arts. 1, 3, 6, 15, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

21 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, at art. 7, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

22 The Convention Against Discrimination in Education, Dec. 14, 1960, U.N.E.S.C.O. Rec. Of Gen. Conf., 12th Sess., at art. 5, 429 U.N.T.S. 93, *entered into force* May 22, 1962.

23 International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at art. 27, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR].

24 *See* U.N. CHARTER, *supra* note 18; Universal Declaration of Human Rights, *supra* note 19; International Covenant on Economic, Social and Cultural Rights, *supra* note 20; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 21; The Convention Against Discrimination in Education, *supra* note 22; ICCPR,

According to Article 27 of the International Covenant on Civil and Political Rights (ICCPR), members of "ethnic, religious, or linguistic minorities . . . shall not be denied the right . . . to enjoy their own culture, to profess and practise [sic] their own religion, or to use their own language" and do all of these things both as individuals and as a group.[25] The Human Rights Committee, the monitoring body charged with overseeing Member State compliance with the ICCPR, recognizes a link between culture and other activities that are essential to the cultural survival of indigenous peoples. In its General Comment No. 23(50), it stated:

> [C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. . . The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[26]

Historically, positive legal measures of protection have been few and far between for indigenous peoples. However, the UN has provided an opening to enforce cultural and other related rights under the ICCPR.

Indigenous peoples have utilized the complaint mechanism available under the Optional Protocol of the ICCPR[27] to assert abuses of their cultural rights under Article 27 with respect to violations that infringe upon other customary property, such as traditional land and resources.[28] Action at the Organization of

---

supra note 23.

25 ICCPR, *supra* note 23. *See also* General Comment Adopted by the Human Rights Committee under Article 27 of the ICCPR:

> Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise [sic] their religion, in community with the other members of the group.

General Comment No. 23, art. 27, Human Rights Committee, 50th Sess., at 38, U.N. Doc. HRI\GEN\1\Rev.1 (1994) [hereinafter *General Comment No. 23*]; *General Comment No. 12*, art. 1, Human Rights Committee, 21st Sess., at 12, U.N. Doc. HRI\GEN\1\Rev.1 (1994); *General Recommendation No. 21: Self-Determination*, U.N. Committee on the Elimination of Racial Discrimination, 48th Sess., Annex VII, at 125, U.N. Doc. A/51/18 (1996), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 209 (2003).

26 *General Comment No. 23*, *supra* note 25. The comment goes on to state, "[t]hat right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law." *Id.*

27 Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. No. 16, at 59-60, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

28 *See, e.g.,* Ominayak, Chief of the Lubicon Lake Band v. Canada, Comm. No. 167/1984, Human Rights Committee, U.N. GAOR, 45th Sess., Supp. No. 40, Vol. 2, Annex

American States signals that other multilateral institutional monitoring bodies are incorporating the cultural integrity principal of Article 27 into their decisions with respect to indigenous peoples.[29] Furthermore, indigenous peoples have increasingly been successful at asserting cultural rights under Article 27 in domestic forums.[30]

The protection of cultural identity is further upheld by the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, which was adopted by the General Assembly in 1992.[31] Article 1 provides that "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity."[32] Over time, UN human rights law has recognized the value of culture at large and more recently, the value of preserving cultural identity for distinct groups, namely indigenous peoples.[33]

The right to culture is further supported by a number of declarations set forth by various bodies within the UN system which speak to the development of an individual's own identity. In 1966, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) proclaimed in the Declaration of the Principles of International Cultural Co-operation, that "[e]very people has the right and the

9(A), at 1, U.N. Doc. A45/40 (1990), *opinion adopted* Mar. 26, 1990 (linking cultural rights of article 27 to economic and social activities related to natural resource development).

29 *See*, *e.g.,* Case No. 7615, Inter-Am. C.H.R. 12/85, OEA/ser.L./V./II.66, doc. 10 rev. 1, at 24, 31 (1985) [hereinafter *Yanomami* case] (deciding that preservation of cultural identity of the Yanomami of Brazil is linked to protection of their traditional lands).

30 *See*, *e.g.,* Kayano v. Hokkaidō Expropriation Committee, 1598 HANREI JIHŌ 33, 938 HANREI TIMES 75 (Sapporo Dist. Ct., Mar. 27, 1997) (Japan), *translated in* 38 I.L.M. 394 (Mark A. Levin trans., 1999), *available at* http://www.hawaii.edu/law/facpubs/nibutani.pdf [hereinafter *Nibutani Dam Decision*] (finding that article 27 provided duties for the government of Japan to affirmatively recognize the Ainu as indigenous peoples), discussed *infra*. For more summaries of cases where indigenous peoples have been successful at asserting cultural rights, see Sup. Cot. of Finland, Case No. 117 (June 22, 1995), *available at* http://nordic.humanrights.dk/tema/tema3/caselaw/#117 (recognizing Saami reindeer herding as a protected interest under art. 27); Sup. Admin. Ct. of Finland, Case Nos. 692, 693 (Mar. 31, 1999), *available at* http://nordic.humanrights.dk/tema/tema3/caselaw/#117 (applying article 27 to protect Saami reindeer herding from interference of mineral exploration).

31 Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/47/49 (1992), *reprinted in* 1 HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 140, U.N. Doc. ST/HR/1/rev.4, U.N. Sales No. E.93.XIV.1 (1993).

32 *Id*.

33 For a discussion on the nexus between minority rights and collective rights for indigenous peoples see ANAYA, *supra* note 4, at 131-141. *See also* Kukathas, *supra* note 7.

duty to develop its culture."[34] At its General Conference in 1978, UNESCO expanded on the right to culture as it relates to racial discrimination in its Declaration on Race and Racial Prejudice:

> Culture, as a product of all human beings and a common heritage of mankind, and education in its broadest sense, offer men and women increasingly effective means of adaptation, enabling them not only to affirm that they are born equal in dignity and rights, but also to recognize that they should respect the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international contexts, it being understood that it rests with each group to decide in complete freedom on the maintenance and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity.[35]

Here, cultural expression, identified as a vehicle to combat racial discrimination, is best controlled and maintained by the people who are the subject of the cultural life.

UNESCO also adopted the Universal Declaration on Cultural Diversity, cited at the beginning of this article, which links cultural diversity to human dignity and seeks special attention for persons belonging to minorities and indigenous groups.[36] The transition from the recognition to enjoy culture at large (culture of the dominant society) to the recognition of a specific group of people enjoying culture both unique to them and to their own identity is a leap in human rights law.

As already stated, the right to culture for indigenous peoples has unique requirements, which can be exemplified in part by the push to preserve and protect specific sub-groups and special interests, such as children and the environment. International instruments that give explicit mention to the rights of indigenous peoples include the Convention on the Rights of the Child[37] and the Convention on Biological Diversity.[38] Both of these

---

34 Declaration of the Principles of International Cultural Co-operation, Nov. 4, 1966, U.N.E.S.C.O., Res. 8, Rec. of the Gen. Conf., 14th Sess. at 87.

35 Declaration on Race and Racial Prejudice, U.N.E.S.C.O. Res. 3/1.1/2, Rec. of the Gen. Conf., 20th Sess., (Nov. 27, 1978), *available at* http://unesdoc.unesco.org/images/0011/001140/114032e.pdf.

36 Universal Declaration on Cultural Diversity, *supra* note 1.

37 Convention on the Rights of the Child, G.A. Res. 44/25, U.N. G.A.O.R., 44th Sess., Supp. No. 49, at 67, U.N. Doc. A/44/49 (1989), *entered into force* Sep. 2, 1990 ("In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise [sic] his or her own religion, or to use his or her own language").

38 Convention on Biological Diversity, U.N. Conference on Environment and Development, art. 8, UNEP.Bio.Div./CONF.L2.1992 (1992), *available at* http://www.biodiv.org/doc/legal/cbd-en.pdf (stating that each signatory must "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles").

conventions link the right to culture with specific rights to indigenous peoples.[39] Recognizing that protections for indigenous peoples are inconsistent across the UN, a mechanism was established to promote centralized discussion with indigenous peoples and experts across the institution.

The Permanent Forum on Indigenous Issues (Permanent Forum), a body within the UN Economic and Social Council, was created to attend to the most pressing issues of indigenous peoples and to promote inquiry and progress on issues that relate to indigenous peoples law and policy.[40] The Permanent Forum addressed the issue of culture in its most recent report of proceedings.[41] In this report, the Permanent Forum recommended that "member States adopt legislation acknowledging that the traditional knowledge of indigenous peoples is their inalienable cultural heritage and embodies their cultural identity and that they make available such legislation and information in local indigenous languages."[42] The report additionally recommended that indigenous cultures should be recognized as "intrinsically connected" to the traditional territories of indigenous peoples, including lands, waters, and natural resources.[43] Increasingly, indigenous peoples have the opportunity, such as the one that has been created by the Permanent Forum, to engage in consultations with the international community on matters that are most pertinent to their cultural survival as peoples.

Other bodies within the UN have affirmatively supported indigenous peoples' rights to cultural protection. In 1997, the Committee on the Elimination of Racial Discrimination made a recommendation under the International Convention on the Elimination of All Forms of Racial Discrimination[44] to call attention to the situation of indigenous peoples and to advise Member States in particular to:

> Recognise [sic] and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural

39 *See* Convention on the Rights of the Child, *supra* note 37; Convention on Biological Diversity, *supra* note 38.

40 The first meeting of the Permanent Forum on Indigenous Issues was in 2002 and it is currently in its 4th year of meetings. Prior documents of the proceedings of these meetings are available through the U.N. website at http://www.un.org/esa/socdev/unpfii/ (last visited Mar. 1, 2005).

41 Report of the Permanent Forum on Indigenous Issues, 3rd Sess., U.N. Doc. E/2004/43/e/C.19/2004/23 (2004), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N04/384/66/PDF/N0438466.pdf?OpenElement (last visited Mar. 1, 2005).

42 *Id.* ¶ 27.

43 *Id.* ¶ 32.

44 International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 21.

> identity and to promote its preservation;
>
> Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
>
> Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
>
> Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
>
> Ensure that indigenous communities can exercise their rights to practise [sic] and revitalize their cultural traditions and customs and to preserve and to practise [sic] their languages.[45]

The recommendation goes on to appeal to Member States to acknowledge traditional land holdings and customary land tenure systems for indigenous peoples, both of which are intrinsically linked to indigenous culture.[46]

The cultural rights of indigenous peoples also include the right to cultural heritage and indigenous intellectual property. With respect to cultural heritage, the General Conference of UNESCO has recently launched the Convention for the Safeguarding of the Intangible Cultural Heritage.[47] It is also in the early stages of developing a future convention of cultural diversity.[48] The World Intellectual Property Organization (WIPO), a large and growing contributor to the discussions on indigenous cultural rights, has initiated a number of internal debates on the outer limits of protection for indigenous peoples'

---

45 General Recommendation 23, Committee on the Elimination of Racial Discrimination, 51st Sess. at 122, U.N. Doc. A/52/18, annex V (1997), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 212 (2003).

46 *Id*.

47 Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, U.N. Doc. MISC/2003/CLT/CH/14 (2003), *available at* http://unesdoc.unesco.org/images/0013/001325/132540e.pdf. The Convention for the Safeguarding of the Intangible Cultural Heritage is intended to provide for the safeguarding of communities, in particular indigenous communities, the maintenance and recreation of the intangible cultural heritage. *Id.* art. 1. In her report on the protection of cultural heritage for indigenous peoples, Erica-Irene Daes stated "each indigenous community must retain permanent control over all elements of its own heritage. It may share the right to enjoy and use certain elements of its heritage, under its own laws and procedures, but always reserves a perpetual right to determine how shared knowledge is used." Erica-Irene Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples,* Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1 (XXIV), U.N. Doc. E/CN.4/Sub.2/1993/28 (1993).

48 *See* Desirability of Drawing up an International Standard-Setting Instrument on Cultural Diversity, U.N.E.S.C.O., Res. 32 C/52, 32d Sess. (2003).

intellectual property.[49] In May of 2004, the Permanent Forum made a special recommendation to WIPO to take steps that will prevent misappropriation of traditional knowledge and cultural expressions.[50]

The UN is currently in the process of developing a Draft United Nations Declaration on the Rights of Indigenous Peoples (UN Draft Declaration), which may provide the largest set of protections for human rights and specifically, cultural rights, of indigenous peoples.[51] The first line of its preamble recognizes "the right of all peoples to be different, to consider themselves different, and to be respected as such."[52] More directly, the cultural rights of indigenous peoples are set forth in Article 12:

> Indigenous peoples have the right to practise [sic] and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.[53]

The mention of culture or custom is found in almost half of the UN Draft Declaration's forty-five articles.[54]

With such an expansive view of rights for indigenous peoples as demonstrated in the UN Draft Declaration, it should be noted that although universal, cultural rights are not thought to be unlimited. Rather, the right to culture is limited at the point at which it infringes on another human right.[55] This limitation creates tensions between cultural and indigenous rights, as is most explicitly demonstrated by the practice of rituals that

---

49 *See, e.g.,* Roundtable on Intellectual Property and Traditional Knowledge, Doc. No. WIPO/IPTK/RT/99/7, *available at* http://www.wipo.int/documents/en/meetings/1999/folklore/tkrt99_7.htm (May 4, 2000); Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 1st Sess., Doc. No. WIPO/GRTKF/IC/1/13, *available at* http://www.wipo.int/documents/en/meetings/2001/igc/pdf/grtkfic1_13.pdf (May 23, 2001); Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3d Sess., Doc. No. WIPO/GRTKF/IC/3/17, *available at* http://www.wipo.int/documents/en/meetings/2002/igc/wipo_grtkfic_3_17.htm (June 21, 2002).

50 *See* Report of the Permanent Forum on Indigenous Issues, *supra* note 42, ¶ 36.

51 *Draft Declaration on the Rights of Indigenous Peoples*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 1994/45, art. 2., 46th Sess., at 105, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994).

52 *Id*. at pmbl., ¶1.

53 *Id*. art. 12.

54 *Id*. arts. 3-4, 7, 9, 12-13, 15-17, 26, 29-33, 35, 38.

55 UNESCO states that cultural diversity may not infringe upon the human rights that are guaranteed under international law. Universal Declaration on Cultural Diversity, *supra* note 1, art. 4.

involve physical injury to the body. These sorts of practices creates a conflict between individual rights on one hand, and collective rights on the other.

In part to create a forum to resolve difficult cases, such as those that cause tension between human rights and cultural rights, and in part to compel Member State compliance, the UN is currently considering the establishment of an optional protocol to the International Covenant of Economic, Social and Cultural Rights. A treaty monitoring body would be established in the form of a committee to oversee a complaint procedure for individuals and groups whose rights under this covenant have been violated.[56] The committee will be faced with the challenge of balancing individual rights on one hand, against and the collective rights of groups on the other.[57] The significance of this new potential monitoring body should not be overlooked as it has the potential to change the face of state behavior regarding cultural rights for minorities and indigenous peoples.

The actions of UN bodies are significant in that they have the greatest effect on the largest number of states with indigenous peoples. While the UN is the institution that in and of itself has taken the most abundant steps towards affirming the cultural rights of indigenous peoples, other multilateral and regional institutions have taken efforts to do the same.

B. The Organization of American States

Similar to the United Nations, the Organization of American

---

56 *See Question Of The Realization In All Countries Of The Economic, Social And Cultural Rights Contained In The Universal Declaration Of Human Rights And In The International Covenant On Economic, Social And Cultural Rights, And Study Of Special Problems Which The Developing Countries Face In Their Efforts To Achieve These Human Rights***,** Commission on Human Rights, Res. 2003/18, at ¶ 13, 59th Sess., 55th mtg., U.N. Doc. No. E/CN.4/2003/L.21 (2003) (requesting the development of an optional protocol to the International Covenant of Economic, Social and Cultural Rights); *Report of the Secretary-General In Response to Commission Resolution 2003/18,* Commission on Human Rights, 60th Sess., U.N. Doc. E/CN.4/2004/WG.23/2 (2003). While seeking procedural mechanisms to guarantee cultural rights, it has been proposed that a legal remedy be created to ensure compliance by government authorities to uphold the commitments it makes in its own procedures, programs and guidelines. J. Benvenuto Lima has called this an "Action Calling for Compliance with Social Commitments." Jayme Benvenuto Lima, Jr., *The Expanding Nature of Human Rights and the Affirmation of Their Indivisibility and Enforceability, in* DIGNITY AND HUMAN RIGHTS: THE IMPLEMENTATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 45, 55 (BERMA KLEIN GOLDEWIJK et al. eds., 2002). Under Benvenuto's theory, this remedy "would hold civil servants liable under both civil and criminal law" when failing to comply fully with state law and guidelines that relate to economic, social, and cultural commitments. *Id.*

57 *See* Länsman et al. v. Finland, Communication No. 511/1992, Human Rights Committee, U.N. Doc. CCPR/C/52/D/511/1992 (1994) (concluding that Saami herders' rights, under article 27, to enjoy their own culture were not absolute when balanced against societal interests).

States (OAS) considers the right to experience culture as a fundamental right in some of its founding documents, such as the American Convention on Human Rights,[58] the American Declaration on the Rights and Duties of Man,[59] and the Charter of the Organization of the American States.[60] In the Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights, also known as the Protocol of San Salvador, the OAS has embraced the rights and benefits of culture by engaging in both the artistic and cultural areas of life.[61]

The Inter-American Council for Integral Development of the OAS has recently held a series of meetings for Ministers of Culture and Highest Appropriate Authorities.[62] These meetings were compelled within the framework of the agreements made at the Third Summit of the Americas. The Declaration states that "[r]espect for and value of our diversity must be a cohesive factor that strengthens the social fabric and the development of our nations,"[63] and the Plan of Action of the Third Summit dedicates an entire chapter to the topic.[64] Furthering the framework of the

58 American Convention on Human Rights, Nov. 22, 1969, arts. 16, 26, 42, O.A.S. Treaty Ser. No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978.

59 American Declaration on the Rights and Duties of Man, *adopted by* Ninth International Conference of American States (1948), art. 8, O.A.S. Res. 30, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, O.A.S. Doc. OENSer.UV/I.4, rev. at 17 (1992) (affirming that every person has the right to take part in the cultural life of the community).

60 Charter of the Organization of American States, art. 3(m), 119 U.N.T.S. 3, *entered into force* Dec. 13, 1951; *amended by* Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; *amended by* Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* Nov. 16, 1988; *amended by* Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* Sept. 25, 1997; *amended by* Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* Jan. 29, 1996 ("The spiritual unity of the continent is based on respect for the cultural values of the American countries and requires their close cooperation for the high purposes of civilization.").

61 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," Nov. 17, 1988, O.A.S. Treaty Series No. 69, *entered into force* Nov. 16, 1999.

62 *See Preliminary Agenda for the Second Inter-American Meeting of Ministers of Culture and Highest Appropriate Authorities*, Inter-American Council for Integral Development, O.A.S. Doc. OEA/Ser.K/XXVII.2 REMIC-II/doc. 2/04 (2004), *available at* http://www.oas.org/usde/english/documentos/cidi01298E01.doc. *See also Declaration of Mexico*, Inter-American Council for Integral Development, O.A.S. Doc. OEA/Ser.K/XXVII.2, REMIC-II/DEC. 1/ 04 cor. 1 (2004), *available at* http://www.oas.org/OASpage/esp/ultimasnoticias/Declaracion-Educacion-082404E.pdf; *Plan of Action of Mexico*, Inter-American Council for Integral Development, O.A.S. Doc. OEA/Ser.K/XXVII.2, REMIC-II/doc. 4/04 Rev. 4 cor. 2 (2004), *available at* http://www.oas.org/udse/english/documentos/CIDI01322E01.doc.

63 *Declaration of Quebec City*, Third Summit of the Americas, *available at* http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/Quebec/Declaration%20of%20Quebec%20City%20(final).htm (Apr. 22, 2001).

64 *See Plan of Action*, Third Summit of the Americas, *available at*

Third Summit of the Americas, the Declaration and Plan of Action of the Cartagena de Indias established the Inter-American Committee on Culture "to enable and facilitate exchange on issues of cultural policy [and] diversity."[65]

Following suit, the General Secretariat of the OAS added "culture" to the Unit for Social Development and Education, thereby creating the Unit for Social Development, Education and Culture (UDSEC), where culture is referred to as the "unifying element, the common denominator of the other areas."[66] This move on the part of the OAS indicates a shift from a time when culture was interwoven with other rights and somewhat forgotten, to a new era wherein the international community is better prepared to address cultural harms for minorities and indigenous peoples.

Particular to the cultural identity of indigenous peoples, the OAS, like the UN, is in the process of creating a Proposed American Declaration on the Rights of Indigenous Peoples (American Draft Declaration).[67] In the American Draft Declaration, cultural identity is closely linked to land and resources. Section 3 of the Preamble of the American Draft Declaration "consider[s] the special relationship between the indigenous peoples and the environment, lands, resources and territories on which they live."[68] In section 5 of the Preamble, indigenous peoples' "traditional collective systems for control and use of land, territory and resources . . . are a necessary condition for their survival, social organization, development and their individual and collective well-being."[69] Finally, while culture and custom appear throughout the American Draft Declaration, cultural integrity is given special mention when "[i]ndigenous peoples are entitled to restitution in respect of the [cultural] property of which they have been dispossessed, and where that is not possible, compensation on a basis not less favorable than the

http://www.summit-americas.org/Documents%20for%20Quebec%20city%20summit/quebec/plan-e.pdf (Apr. 22, 2001).

65 *Declaration and Plan of Action of Cartagena de Indias*, First Inter-American Meeting of Ministers of Culture and Highest Appropriate Authorities, ¶ 1, O.A.S. Doc. OEA/Ser.K/XXVII REMIC-I/DEC. 1/02, *available at* http://scm.oas.org/doc_public/ENGLISH/HIST_02/CIDI01002E04.DOC (July 13, 2002).

66 Sofialeticia Morales, *Cultural Diversity, Development and Globalization: A Perspective of the Organization of American States*, Presentation at the Experts Seminar on Cultural Diversity, at 2, *available at* http://www.oas.org/udse/reference-udse/div-des-glob.doc (Mar. 19, 2002).

67 Proposed American Declaration on the Rights of Indigenous Peoples, *approved by* Inter-Am. C.H.R., 1333d Sess., 95th Reg. Sess., at art. 6, ¶ 1, OAS Doc. OEA/Ser.L/V/II.95, Doc.6 (1997) [hereinafter Inter-American Draft Declaration].

68 *Id*. at pmbl., § 3.

69 *Id*. at pmbl., § 5.

standard of international law."[70] When in full force, the American Declaration, along with the UN Draft Declaration, will provide immense support to indigenous communities seeking redress at an international level.

Even before the passage of these draft declarations of indigenous rights, a number of cases have come to the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights asserting violations of the rights of indigenous communities on the part of member states in regard to their cultural practices and customary relationship to their land and resources.[71] In granting favorable decisions for indigenous communities, many of these cases rely on both guarantees within OAS instruments and customary international law of indigenous peoples.[72] As suggested by the language of the American Draft Declaration,[73] these decisions have not so much turned on the right to culture as a free-standing right, but rather on the nexus between both culture and traditional land and resources when indigenous communities are concerned.[74]

C. The International Labour Organization

The International Labour Organization (ILO) is another international institution with an established history in terms of granting rights for indigenous peoples.[75] In its Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169), it incorporates provisions for the protection and integrity of indigenous social, cultural, religious and

70 *Id*. art. 7, ¶ 2.

71 *See Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin*, Inter-Amer. C.H.R., OEA/Ser.L/V/II.62, doc. 10 rev. 3 (1983), [hereinafter *Miskito* case]; *Yanomami* case, *supra* note 30; Inter-Am C.H.R., *Report on the Situation of Human Rights in Ecuador,* O.A.S. Doc. OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997); The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (Aug. 31, 2001) *in* 19 ARIZ. J. INT'L & COMP. L. 395 (2002) [hereinafter *Awas Tingni* case]; Dann v. United States, Case No. 11.140, Inter-Am. C.H.R. 75/02, Doc. 5 rev. 1 at 860 (2002) [hereinafter *Dann* case]; *Maya Indigenous Communities* case, *supra* note 13.

72 *See Awas Tingni* case, *supra* note 71, ¶ 148; *Dann* case, *supra* note 72, ¶¶ 124-33; *Maya Indigenous Communities* case, *supra* note 13, ¶¶ 86-88.

73 *See* Inter-American Draft Declaration, *supra* note 67, at pmbl, ¶ 3.

74 *See Miskito* case, *supra* note 72, at 81; *Yanomami* case, *supra* note 29, at 24, 31; *Report on the Situation of Human Rights in Ecuador, supra* note 71, ¶ 24; *Awas Tingni* case, *supra* note 72, ¶ 149; *Dann* case, *supra* note 71, ¶¶ 128-34; *Maya Indigenous Communities* case, *supra* note 13, ¶ 170.

75 *See* Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries (No. 107), *available at* www.ilo.org/images/empent/static/coop/pdf/conv/conv107.pdf (June 26, 1957); Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989,* 15 OKL. CITY U. L. REV. 677 (1990).

spiritual values and practices.[76] Article 2 places responsibilities on the government to provide special protections for the cultural identity of indigenous peoples:

> 1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated [sic] and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
>
> 2. Such action shall include measures for:
>
> (a) Ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
>
> (b) Promoting the full realisation [sic] of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions . . . .[77]

Article 23 provides further protection of specific cultural rights: "handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised [sic] as important factors in the maintenance of their cultures and in their economic self-reliance and development."[78] Similar to the UN and the OAS, monitoring bodies within the ILO have reviewed cases that relate to indigenous communities cultural integrity and the relationship between their customary way of life through their relationship to land and resources.[79]

D. Other Multilateral Institutional and Regional Initiatives

Regional groups have followed the lead of multilateral institutions by setting forth affirmative agreements to support culture, facilitate cultural cooperation, and in some cases, specifically support indigenous culture. These texts, while promoting cultural rights, often endorse cultural diversity as a precondition for successful economic and cultural development. Regional agreements that affirm cultural rights include the Protocol on the Cultural Integration of Mercosur,[80] the Cartagena

---

76 International Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), June 27, 1989, 72 ILO Official Bull. 59, at arts. 2, 4-5, 7-10, 14-15, 22-23, 25, 27-28, 30, 32, *entered into force* Sept. 5. 1991.

77 *Id.* art. 2.

78 *Id.* art. 23, ¶ 1.

79 *See* ANAYA, *supra* note 4, at 142-45, 250-52.

80 *Mercosur Protocol of Cultural Integration*, MERCOSUR/CMC/DEC No. 11/96 (Dec. 1996), *available at* http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/1996/9611.htm (fostering the creation of cultural policies that display historical traditions, common values and cultural diversity of member countries). Mercosur was created by

Agreement of the Andean Community,[81] the Final Declaration of the Moncton Summit of Francophonie,[82] the Cultural Treaty of the Arab League,[83] the European Cultural Convention,[84] the Charter of the South Asian Association for Regional Cooperation,[85] the Charter of Civil Society for the Caribbean Community[86] and the Cultural Charter for Africa.[87]

Regional organizations have also paid special attention to protecting the culture of indigenous peoples. The Declaration of Machu-Picchu on Democracy the Rights of Indigenous Peoples and the Fight Against Poverty guarantees specific protection of indigenous and local cultures.[88] This Declaration commits to "firmly support every effort to promote and safeguard the rights and fundamental freedoms of indigenous peoples, including: the right to their identity and spiritual, cultural, linguistic, social,

Argentina, Brazil, Paraguay and Uruguay in March 1991 with the signing of the Treaty of Asuncion with the purpose of establishing a free trade agreement between these countries. *Id.*

81 Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910, *entered into force* Oct. 16, 1969 [hereinafter Cartagena Agreement]. This agreement states: "[t]he Member Countries shall take measures in the area of social communication and action oriented toward disseminating a fuller understanding of the subregion's cultural, historical, and geographic heritage, the economic and social situation of the subregion, and the Andean integration process." *Id.* art. 131. The Cartagena Agreement was subsequently modified in 1987 by the Quito Protocol (the Andean Pact Treaty), by the Trujillo Act of March 10, 1996, and by the Protocol of Sucre signed on June 25, 1997.

82 *Final Declaration of the Moncton Summit*, 8th Conference of Heads of State and Government of Countries Using French as a Common Language, ¶ 4, *available at* http://www.sommet99.net/english/page.cfm?id=122 (Sept. 5, 1999) (stating "[w]e intend to promote, in the process of global integration that is currently under way, respect for cultural diversity, which is an undeniable factor in the enrichment of universal heritage").

83 Cultural Treaty of the Arab League, art. 1, *available at* http://www.jewishvirtual library.org/jsource/Peace/arabcult.html (Nov. 20, 1946) (encouraging cultural cooperation between the Arab States).

84 European Cultural Convention, ETS No. 018 (Dec. 19, 1954), *entered into force* May 5, 1955 (developing the mutual understanding among the peoples of Europe to support cultural diversity and promote cultural heritage). *See also* Decision No 508/2000/EC of the European Parliament and of the Council of February 14, 2000 establishing the Culture 2000 programme, 2000 O.J. (L 063) 1, *available at* http://europa.eu.int/infonet/library/e/5082000ce/en.htm.

85 Charter of the South Asian Association for Regional Cooperation, *available at* http://www.saarc-sec.org/main.php?id=10&t=4 (Dec. 8, 1985) (affirming economic growth, social progress and cultural development).

86 Charter of Civil Society for the Caribbean Community, *available at* http://www.caricom.org/CHARTER.html (July 1, 1973). This charter affirms that "each culture has a dignity and a value which shall be respected and that every person has the right to preserve and to develop his or her culture." *Id.* art. 10, ¶ a.

87 Cultural Charter for Africa, Organisation of African Unity, *available at* http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/ Cultural_Charter_for_Africa.pdf (July 5, 1976). *See also* African Charter on Human and Peoples' Rights, 21 I.L.M. 58, OAU Doc. CAB/LEG/67/3 rev. 5 (1981), *entered into force* Oct. 21, 1986.

88 Declaration of Machu-Picchu on Democracy, The Rights of Indigenous Peoples and the Fight Against Poverty, Permanent Council of the Organization of American States, O.A.S. Doc. OEA/Ser.K/XVI, GT/DADIN/doc.34/01 (2001).

political, and economic traditions; individually and collectively."[89] In quite a different region of the world, the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples states that the UN should "take action against any States whose persistent policies and activities damage the cultural and intellectual property rights of indigenous peoples."[90] Finally, the Caribbean Community (CARICOM) sets forth protection of intellectual property rights by, *inter alia,* the preservation of indigenous Caribbean culture, including the legal protection of folklore, traditional knowledge and indigenous cultural heritage.[91]

As indicated by the wide array of legal protections of culture in general, and of cultural identity of indigenous peoples in particular, indigenous peoples of the twenty-first century have a strong starting point when asserting cultural harms to the international community. However, though these formal legal protections exist, it must be acknowledged that it has been the work of the indigenous communities themselves to mobilize their own protection mechanisms with respect to their cultural survival. Assertions of cultural survival demonstrate perhaps the most powerful display of momentum, which has called attention to cultural harms and propelled the search for equitable redress, thereby causing the expansion of protection for indigenous cultural rights. It is the process of self-identification and the support of that process that cannot be forgotten in the discussion of the development of the right to culture under international law.

III. CULTURAL RESTORATION THROUGH SELF-IDENTIFICATION

The case for allowing indigenous peoples to engage in their own process of culture restoration supports a longer-term approach to cultural survival. Vine Deloria, Jr., in a discussion on cultural renewal, stated "[u]ntil Indians can get a more comprehensive idea of their own regarding the content of their cultures, resolution of conflicts with the larger society will be almost impossible."[92] He discusses efforts on the part of the U.S.

89 *Id.* ¶ 7.

90 The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, at art. 3.3, U.N. Doc. E/CN.4/Sub.2/AC.4/1993/CRP.5 (1993).

91 Protocol Amending the Treaty Establishing the Caribbean Community (Protocol III Industrial Policy), *available at* http://www.sice.oas.org/trade/ccme/PROTOC3a.asp (June 13, 1998).

92 VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 250 (1984).

government to incorporate Indian education into mainstream school curriculum and cautions that "reducing the respective tribal traditions to an academic subject for student consumption" is a threat to the ultimate vitality of native culture.[93] While supporting bilingual education programs that teach students in their own native tongues, he warns that "[u]ntil Indians accept responsibility for preserving and enhancing their own knowledge of themselves, no institution can enable them to remain as Indians."[94] This section looks to three regions of the world: North America, Central America and Asia to explore self-preservation efforts by indigenous peoples in these regions and corresponding responses by institutions and governments. It demonstrates different ways that native communities of people have engaged in the process of reclaiming their cultural identities through practicing traditional customs, retelling their history, drawing their traditional territories, and demanding political and legal recognition.

A. Red Power: American Indian Cultural Renewal in the United States

Within the United States, much like in other parts of the world, from the time of European contact onward, American Indian communities have been subjugated to near cultural extinction.[95] These unique challenges faced by modern American Indians reflect an "assault on tribalism, the dismissal of indigenous culture, and the usurpation of Indian freedom."[96] After centuries of disparaging U.S. policies that relocated, assimilated, and at times exterminated entire cultural practices of American Indians, many indigenous communities began engaging in a collective effort of renewal to preserve their traditional cultures and to promote their cultural identity, while at the same time seeking recognition and exerting self-determination in their relations with the U.S. federal government.

Although protest activity is apparent throughout the history of the colonization of North America,[97] during the 1960's and

93 *Id.*

94 *Id.*

95 For an overview of American Indian history from colonization forward see EDWARD H. SPICER, CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960 (1962); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONFLICT (1990).

96 STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 66 (1988).

97 Two well known resistant movements were the Handsome Lake movement and the Ghost Dance Movement, both involving protests in respect to customary way of life

1970's the American Indian communities sought cultural recognition through the Red Power Movement, which began to change the course of history.[98] During the period of time when the Red Power movement was growing, many native communities began embracing and exercising the cultural practices of their ancestors. For example, people wore traditional dress, learned their native tongue, and turned to traditional spiritual practices.[99] Demonstrations of protest and resistance during this period exhibited with a unifying theme of reclaiming what had been taken away, all the while maintaining a strong cultural native identity.[100]

In other cases, communities came together in their attempt to gain federal recognition and to assert land claims. This process often involved participatory research into historical, genealogical and ethnographic records, thereby creating a collective sense of identity and community among the people conducting the research. During this process, others have taken it upon themselves to redefine their self-governance systems based on customary practices. The following account demonstrates the mobilization on the part of a small native community:

> The Deer Clan are a small group, around twenty-five people, who are lost and looking to get back their past and to become spiritually bonded to the land, not to develop it, but to be connected. They asked me to become their medicine man because I'm the only one who speaks a native language. I grew up with my grandparents, who taught me spiritual and cultural ways. They asked me to look at their bylaws. I told them they looked like a bunch of European white man's rules to me. So they asked me to rewrite their bylaws. I came up with a Council of Clan Mothers. All elder women over fifty are automatically members. I told them, it's worked for the Iroquois Confederacy for hundreds of years, why not for you? The women loved

and cultural practices. *See* CORNELL, *supra* note 96, at 62-67. For a discussion specific to the Ghost Dance Movement see ALICE BECK KEHOE, THE GHOST DANCE: ETHNOHISTORY AND REVITALIZATION (1989).

98 *See* JOANE NAGEL, AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE (1996).

99 *Id.* at 190-94; s*ee also* Vine Deloria, Jr., *American Indians, in* MULTICULTURALISM IN THE UNITED STATES: A COMPARATIVE GUIDE TO ACCULTURATION AND ETHNICITY 31 (John D. Buenker and Lorman A. Ratner eds., 1992).

100 Notable in this respect is the American Indian Movement (AIM), born of an effort to prevent the mistreatment of Indians within Minneapolis, Minnesota. By 1970, AIM had grown to become a nationwide group that rallied and lobbied for protection and recognition of American Indian rights within urban centers and on reservations. CORNELL, *supra* note 96, at 189-90. AIM first gained notoriety with its participation of the takeover of the Bureau of Indian Affairs in 1972, and again attracted media attention with the siege of a small church on Pine Ridge Reservation in Wounded Knee, South Dakota. *Id.*

it, but men were a little nervous about it.[101]

This sort of cultural reconstruction exemplifies the creative and organic processes that U.S. native peoples used to build their capacity to govern themselves in the shadow of the federal government.

Joane Nagel claims that this type of cultural renewal explains how and why American Indian communities have remained both viable and growing components of the U.S. ethnic landscape.[102] It also explains how indigenous communities have gained the attention of the international community in their commanding demonstrations of self-determination and cultural pride.

A natural extension of the Red Power Movement within the United States is the contemporary Indigenous Rights Movement that has been gaining momentum over the past several decades. In the 1970s at the height of the Red Power Movement, indigenous peoples began attending international conferences, submitting appeals to international institutions, and participating in policy formation.[103] Frequently in their traditional clothing and often accompanied by other displays of culture, such as drums, dance and native languages, indigenous peoples from the United States have joined those from other places across the world to participate in the development of the rights that affect them at the highest policy level. Notably, it was the initial return to culture that set this movement in motion. With developments on the international front, other native communities that are actively engaging in various forms of cultural renewal and restoration have enjoyed the benefits of these growing protections of their indigenous cultural rights under international law.

B. The Maya Atlas Project: Reclaiming Traditional Boundaries in Southern Belize

In the southernmost region of Belize are over forty Maya indigenous communities have been engaged in a complex struggle for their traditional homeland. The Maya indigenous peoples have traditionally owned and occupied land and resources in the Toledo District of Southern Belize. Like the American Indians in the United States, they have faced

101 NAGEL, *supra* note 98, at 193 (citation omitted).

102 NAGEL, *supra* note 98.

103 For a discussion about how the Indigenous Rights Movement has influenced the development of customary international law of indigenous peoples, see ANAYA, *supra* note 4, at 56-58.

infringements and policies that threaten their cultural practices, livelihood and customary systems of land tenure.[104] The recent and continuous actions of the government of Belize have encouraged non-indigenous settlement and large scale logging and oil development on Maya traditional lands. These actions impose systems of land tenure that conflict with Maya custom and threaten not only the Maya people, but the natural environment upon which their culture and subsistence depends.[105] The long road to protect themselves from these infringements is ongoing, but in the early stages, the Maya took on a notable effort to put forth their own understanding of their land and resource holdings, as well as the cultural practices and identities that they claim are traditionally their own.

With threats to land and livelihood at stake, forty-two Ke'kchi and Mopan Maya communities entered into a comprehensive documentation initiative to describe their land and cultural ways of life through their own words and drawings that eventually led to the publication of the *Maya Atlas,* the first atlas produced by indigenous peoples.[106] The Toledo Maya Cultural Council (TMCC) and the Toledo Alcades Association (TAA) partnered and sought the assistance of the Indian Law Resource Center (ILRC) and GeoMap from the Universtiy of California at Berkeley to begin a participatory mapping project.[107] The purpose of the project was to determine the historical boundaries as understood by the Maya communities based upon their land use and customary practices of controlling their land. The ultimate goal of the project was "the demarcation of the proposed Maya Homeland."[108] In addition to hand-drawn maps that reflect the traditional boundaries of these communities, the *Maya Atlas* provides a record of oral history and Maya customs, a thorough introduction to Maya culture, a description of land uses and land threats, and population counts of each community, which includes a breakdown of age, language use, religion and work.[109]

In her report on *Indigenous Peoples and their Relationship to Land*, Erica-Irene A. Daes, then UN Special Rapporteur on

104 For a history of the Maya communities of southern Belize and their struggle to retain their traditional land and resources according to their own customs, see S. James Anaya, *Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize*, 1 YALE HUM. RTS. & DEV. L.J. 17 (1998).

105 *Id.*

106 *See* TOLEDO MAYA CULTURAL COUNCIL & THE TOLEDO ALCALDES ASSOCIATION, MAYA ATLAS: THE STRUGGLE TO PRESERVE MAYA LAND IN SOUTHERN BELIZE (1997).

107 *Id*. at. 1.

108 *Id*.

109 *Id*.

Indigenous Issues, affirmed that indigenous initiatives, such as the one demonstrated by the production of the *Maya Atlas*, have given rise to enhanced protection of indigenous rights.[110] While giving special notice to the Maya communities, she also stated:

> It must be noted that indigenous peoples themselves are initiating various projects and programmes [sic] with regard to their lands, territories and resources which contribute to the safeguarding and promotion of their rights. . . .
>
> . . . This may prove to be an important means for creating broader awareness and understanding of indigenous land ownership and for creating a basis for eventual legal recognition and protection of these land and resource rights.[111]

The mobilization that began with the *Maya Atlas* grew into a larger resistance effort for legal recognition of traditional land and cultural rights under the Constitution of Belize and international law.[112]

The Maya began publicly asserting their rights to occupy and use their traditional land and resources during this period of time. Protests began by way of written and oral communications with the Minister of Natural Resources, other government officials, and by use of the national and international press.[113] Without any positive response from the government, Maya leaders' first legal action in the form of a constitutional redress was initiated in the Supreme Court of Belize in 1996,[114] and a petition to the Inter-American Commission on Human Rights in August of 1998.[115]

The petition, citing the *Maya Atlas* as authority, asked the commission to use its powers under the Charter of the Organization of American States to intervene in the matter and either mediate a resolution to the dispute, or declare Belize in violation of their rights to property, to cultural integrity, to a healthy environment, and to consultation as articulated by the

110 Erica-Irene A. Daes, *Indigenous People and their Relationship to Land,* Sub-Commission on Prevention of Discrimination and Protection of Minorities, 51 Sess., U.N. Doc. E/CN.4/Sub.2/1999/18 (1999).

111 *Id.* ¶¶ 102-03.

112 For an overview of this effort see ANAYA, *supra* note 4.

113 *See Toledo Shocked at Logging License*, THE BELIZE TIMES, Sunday, Oct. 29, 1995; *Toledo Opposes Logging Concession*, THE BELIZE TIMES, Oct. 29, 1995; *Mayan Homeland in Belizean Rainforest Under Siege by Malaysian Loggers*, THE BELIZE TIMES, Nov. 5, 1995; *Maya Leaders Speak Out Against Malaysian Logging*, THE BELIZE TIMES, Nov. 26, 1995; *Opposition Mounts to Logging License*, THE BELIZE TIMES, Dec. 3, 1995.

114 TMCC v. Attorney Gen. of Belize, No. 510 (1996).

115 *See* S. James Anaya, *The Maya Petition to the Inter-American Commission on Human Rights: Indigenous Land and Resource Rights, and the Conflict over Logging and Oil in Southern Belize, in* GIVING MEANING TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS 180 (Isfahan Merali & Valerie Oosterveld eds., 2001).

American Declaration on the Rights and Duties of Man,[116] and customary international human rights law. Relying on precedent set in the case of *Awas Tingni vs. Nicaragua*,[117] the commission issued a report in favor of the Maya communities and affirmed that the government of Belize must affirmatively protect their rights to traditional land and resource holdings and protect the customary way of life with respect to these lands and resources.[118]

The Maya of Belize began the process of challenging the incursions against them by setting forth their traditional boundaries on their own terms and telling the story of their culture in their own words. The result of the Inter-American Commission on Human Rights report has yet to be seen. Given the lack of response on the part of the government there, indigenous peoples in Belize might benefit from learning about the political and legislative actions taken within domestic forums by other indigenous communities who are also seeking some sort of formal recognition of land or cultural identity.

C. The Ainu of Japan: Recognition of Ethnic Identity through Cultural Mobilization

The Ainu are indigenous to the islands of Honshu and Hokkaido, Japan where they speak their own language, practice traditional religion, and have cultural practices that differ distinctly from the majority of the population in Japan.[119] Similar to the United States and Australia, Japan attempted to assimilate the Ainu into mainstream Japanese society by dispossessing them of their lands, promoting an agricultural lifestyle that contradicted their traditional practices of hunting, fishing and gathering, and banning certain cultural practices that were essential to their identity, such as speaking in the Ainu native tongue.[120]

In the 1980s, the Ainu began mobilizing themselves to resist the assimilation that had been imposed on them by the Japanese government.[121] As part of this resistance, the Ainu formed a

116 American Declaration on the Rights and Duties of Man, *supra* note 59.

117 *See Awas Tingni* case, *supra* note 71.

118 *See Maya Indigenous Communities* case, *supra* note 13.

119 For a general background of the history of the Ainu people and their fight to attain cultural legal rights in Japan, see Teruki Tsunemoto, *Ainu and Korean Minorities in Japan,* 2 ASIA-PAC. J. ON HUM. RTS. & L. 119 (2001). *See also* BRETT L. WALKER, THE CONQUEST OF AINU LANDS: ECOLOGY AND CULTURE IN JAPANESE EXPANSION, 1590-1800 (2001).

120 *See* Tsunemoto, *supra* note 119, at 120.

121 *See* Giichi Nomura, *The Ainu and the Japanese State: An Appeal for Justice, in* INDIGENOUS MINORITIES AND EDUCATION: AUSTRALIAN AND JAPANESE PERSPECTIVES OF

number of organizations advocating for the protection of their cultural heritage and basic rights. The Ainu Association of Hokkaido, the largest of these organizations, is credited for drafting new proposed legislation that, after a number of years of negotiating with the government and actively participating in political processes, specifically recognized indigenous Ainu rights and the promotion of Ainu culture.[122]

During the negotiations over new legislation, the Ainu brought their case for cultural and legal recognition to the courts of Japan in a legal challenge against the construction of a dam over traditional Ainu territory.[123] For the first time in Japanese history, a court recognized the indigenous Ainu peoples with minority rights to culture based on Article 13 of the Japanese Constitution,[124] as well as Article 27 of the International Covenant on Civil and Political Rights.[125]

In what has come to be known as the Nibutani Dam Decision, the Hokkaido Court recognized the cultural link between the Ainu and their lands.[126] "[T]he nearby mountains and rivers having mythical traditions, is not merely a historical legacy, but something for which present-day efforts to sustain its ethnic culture are extremely important."[127] Furthermore, as a signatory to the ICCPR, the court held that the Japanese government had a duty to recognize the Ainu as a minority group with the benefits of cultural rights.[128] The cultural rights of the Ainu arose from the linkage between Article 13 of Japan's Constitution to Article 27 of ICCPR:

> The minority's distinct ethnic culture is an essential commodity to sustain its ethnicity without being assimilated into the majority. And thus, it must be said that for the individuals who belong to an ethnic group, the right to enjoy their distinct ethnic culture is a right that is needed for their self-survival as a person.[129]

THEIR INDIGENOUS PEOPLES, THE AINU, ABORIGINES AND TORRES STRAIT ISLANDERS 83 (Noel Loos and Takeshi Osanai eds., 1993). During this period of time, the Ainu people looked to the American Indian Movement in the United States to gain inspiration and guidance on how to redefine themselves in the face of their assimilist government. *See* Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan,* 33 N.Y.U. J. INT'L L. & POL. 419, 442 (2001).

122 *See* Tsunemoto, *supra* note 119, at 122-23.

123 *Id*. at 126-27. *See also* Levin, *supra* note 121.

124 Kenpō, art. 13 (stating "[a]ll of the people shall be respected as individuals" and guarantees each individual the right to "life, liberty, and the pursuit of happiness"), *available at* http://www.solon.org/Constitutions/Japan/English/english-Constitution.html (last visited Mar. 1, 2005).

125 ICCPR, *supra* note 23; *Nibutani Dam Decision*, *supra* note 30.

126 *Nibutani Dam Decision*, *supra* note 30.

127 *Id*. at 411.

128 *Id*. at 418.

129 *Id*. at 419.

Additionally, the Hokkaido court held that a person who belongs to an indigenous minority is entitled to enhanced protection of cultural rights.[130]

The Nibutani Dam Decision eventually led to the enactment of the Ainu Shinpou and its Act for the Promotion of Ainu Culture and Dissemination of Knowledge Regarding Ainu Traditions in May of 1997.[131] This was the government's first legislative acknowledgment of the existence of an ethnic minority in Japan. In response to this new law, the Foundation for Research and Promotion of Ainu Culture was established with government funding to implement the law by promoting the history and culture of the Ainu people.[132]

V. CONCLUSION

Without the monumental efforts of the Ainu indigenous peoples and others who have actively participated in the reclamation of their cultural practices and who have engaged in domestic and international legal spheres, the indigenous rights to culture would not be in the position that it is in today. Through efforts, like those of the American Indians of the United States, to resist forces of assimilation and collectively initiate a movement to reinstate their traditional ways, the cultural identity displayed by indigenous peoples is something now demonstrated with pride. That is not to say that efforts on the part of oppressive forces do not continue to assault the cultural survival of these peoples and their communal practices. However, in the face of this oppression, at least in the international human rights forum, there are mechanisms and protections in place to foster the perpetuity of cultural survival for indigenous peoples. In many of these forums, demonstrations of identity such as language, dress, music, and dance are now celebrated instead of forbidden.

Cultural identity obviously extends beyond the most apparent attributes of culture that indigenous peoples carry with

130 *Id.* at 396.

131 *See* Masako Yoshida Hitchingham, *Translation: Ainu Shinpou,* 1 ASIAN-PACIFIC L. & POL'Y J. 11 (2000) (stating "[t]his act aims to have Japanese society respect the Ainu's pride in being an Ainu people and to contribute to supporting the various cultures in our country by implementing policies to disseminate knowledge regarding Ainu tradition and culture . . . which are the sources of Ainu people's ethnic pride, and to promote Ainu culture . . . as well as to educate the nation to the state of Ainu Traditions").

132 There are four main initiatives that this Foundation focuses on, including; 1) promotion of comprehensive and practical research on the Ainu; 2) promotion of the Ainu language; 3) promotion of Ainu culture; and 4) dissemination of knowledge about the Ainu traditions. *See History of the Foundation's Establishment,* The Foundation for Research and Promotion Ainu Culture, *available at* http://www.frpac.or.jp/english/e_index2.html (last visited Mar. 1, 2005).

them. In fact, the cultural identity of indigenous peoples is deeply rooted into their lands and traditional territory, demonstrated by their relationship to those lands and the resources used on those lands.[133] Practices that create the nexus between land and culture include traditional farming methods, spiritual customs that are practiced on or about the territory, mechanisms of governing the land and resource use, and other uses including hunting, fishing, and gathering of traditional plants.[134]

The Maya of Belize took an organic approach to frame these very elements of culture with their own expressions through the *Maya Atlas* project. Most pointedly, by literally drawing their own boundaries, they were able to present their traditional homeland and the threats upon it to the government of Belize and to the world through the publication of the Atlas. By characterizing Maya culture with such fluency and illustrating the threats to their land and culture in a visual manner, the Atlas effectively supported efforts to alert the international community to the threat of the deterioration of the Maya communal cultural practices and to the infringements of their land and resource rights. While the struggle over land and resources perpetuates in Belize and the corruption of customary practices grow with continual threats from the government and outsiders, the Atlas itself remains an authority in its own right about Maya lands and traditional practices that may be used to continually assert the cultural rights of these peoples.

Recognizing that efforts to express culture through the expression of traditional identity is vital and the extension of this identity must be understood to include traditional territories and practices associated with those territories, a final critical factor of cultural survival are the forms of legal recognition and subsequent rights for indigenous peoples as articulated by indigenous self-governing bodies, state governments and international institutions. The efforts of the Ainu of Japan and the corresponding changes that were effected in both the legislative and judicial arms of the government create a solid starting point for the Ainu people to protect their cultural identity and survival as indigenous peoples.

The reclamation of indigenous cultural identity in all of its forms is likely the most effective means of counteracting the

133 *See* KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE (1996); Enrique Salmon, *Sharing Breath: Some Links Between Land, Plants, and People*, *in* THE COLORS OF NATURE: CULTURE, IDENTITY, AND THE NATURAL WORLD (Alison H. Deming & Lauret E. Savoy eds., 2002).

134 *See General Comment No. 23, supra* note 26.

forces that threaten to assimilate or outright destroy the customary practices of indigenous peoples. Clearly, the fullest embodiment of cultural identity is best defined by the indigenous peoples who fight for the survival of their culture by acknowledging their customs, who express those customs clearly to the world, and who demand recognition.[135] Likewise, when indigenous peoples mobilize themselves in an effort to publicly exercise their cultural rights, the recognition and affirmation of those rights are more likely to occur. Developments on the part of multilateral institutions provide promise that this trend will continue.

This is not to say that all state governments are apt to respond with affirmative legal recognition of indigenous peoples and domestic protections for their cultural rights. More often than not states will either deny the existence of indigenous peoples or selectively recognize elements of indigenous culture to benefit itself, such as to promote tourism or to entertain a foreign audience for example. This type of treatment only leads to an objectification and display of possession of indigenous culture, but not one that provides true recognition or control to the people that it concerns. With this in mind, the importance of allowing indigenous communities to create their own forums of cultural expression becomes imperative to the goal of perpetuating the culture on terms defined by the people whose cultural survival is at stake.

It is apparent through actions, such as those of the American Indians, the Maya of Belize and the Ainu of Japan that movement within indigenous communities to assert their cultural rights can result in corresponding developments that respond to those rights on political, judicial, or legislative grounds. Whether specific states are ready to respond by acknowledging and protecting the rights of indigenous peoples in respect to their cultural identities is certainly not guaranteed. However, the expansion of international and domestic protections for indigenous cultural rights will naturally create an environment that is increasingly more receptive to indigenous cultural expression. Over time, a positive feedback loop, initiated by the efforts of indigenous peoples and reinforced by the legal evolution of cultural rights under international law, will foster the creation of effective mechanisms to protect the cultural identities of indigenous peoples. These protection mechanisms, if perpetuated over time, can serve to sustain the cultural survival

135 *See* AT THE RISK OF BEING HEARD: IDENTITY, INDIGENOUS RIGHTS, AND POSTCOLONIAL STATES (Bartholomew Dean and Jerome M. Levi eds., 2003).

of indigenous peoples' traditions and practices, their relationship to land and resources, and can lead to the legal recognition of customary rights that are the very building blocks of indigenous cultural identity.

INDIGENOUS PEOPLES AT THE MARGIN OF THE GLOBAL ECONOMY: A VIOLATION OF INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL TRADE LAW

*Arthur Manuel**
*Nicole Schabus***

> In the 1999 *Human Development Report*, which uses data from 1996 and 1997, Canada was ranked first among the 174 countries included in the report, and had the highest over all Human Development Index [HDI] score. Calculating HDI scores for Registered Indians, including those living on and off reserve, reveals a substantially lower HDI score for the Registered Indian population, which would be ranked about forty-eighth among the countries in the report.[1]

I. INTRODUCTION: A WIDE RANGE OF INDIGENOUS RIGHTS

Over the last three decades, Indigenous Peoples around the world have won important constitutional recognition of their inherent rights and jurisdiction. Yet, despite these gains, the socio-economic status of Indigenous Peoples has not improved and they continue to be the poorest populations of those countries

* Arthur Manuel is a member of the Secwepemc Nation, in the South-Central Interior of British Columbia, Canada. He served as Chief of the Neskonlith Indian Band for eight years and as Chairperson for the Shuswap Nation Tribal Council for seven years. He also headed the Interior Alliance and currently serves as volunteer Chairperson for the Indigenous Network on Economies and Trade (INET). This paper is an ongoing case study and portions have been borrowed from an unpublished conference paper entitled *Aboriginal Peoples v. Companies And Governments: Who are the Real Stewards of the Land and Forests? Growing International Understanding of Indigenous Proprietary Interests*, submitted for the New York University's Conference on Indigenous Peoples and Multilateral Trade Regimes: Navigating New Opportunities for Advocacy (May 2002).

** Nicole Schabus holds Master Degrees in Law and International Business Administration from the University of Vienna. She is working on her PhD in Law with a grant from the Austrian Academy of Science. Nicole is practicing law and has been called to the bar in British Columbia. he continues to work as a volunteer for INET.

1 Dan Beavon & Martin Cooke, *An Application of the United Nations Human Development Index to Registered Indians in Canada, 1996*, *in* ABORIGINAL CONDITIONS: RESEARCH AS A FOUNDATION FOR PUBLIC POLICY 207 (Jerry P. White et al. eds., 2003). In the past decade, the United Nations Development Program (UNDP) Human Development Index (HDI) has become one of the most commonly cited and used indices of well-being. Canada has consistently scored at or near the top of the United Nations' ranking of countries based on the HDI scores. *Id.*

in which they live. This socio-economic status is perpetuated partly because, despite certain gains, many governments still refuse to implement constitutional provisions recognizing the rights of Indigenous Peoples. In addition, the 1990s saw an unprecedented consolidation of international trade law with the creation of the World Trade Organization (WTO) in 1995 and the signing of important global and international trade agreements. This consolidation undermines the rights of Indigenous Peoples around the globe by increasing corporate access to both land and resources held by Indigenous Peoples and it serves to perpetuate an already tenuous socio-economic status.

This article is a case study into the historic and ongoing efforts of Aboriginal Peoples from the Interior of British Columbia to secure the recognition and implementation of their land rights. It will be argued that the real property interest of Indigenous Peoples should be valued over the alleged quasi-proprietary interests of corporations. Unlike so many state governments, Indigenous Peoples have never ceded their sovereignty through accession to free trade agreements. Because Indigenous Peoples still maintain legally recognizable property rights, this article argues that Indigenous Peoples are in a unique position to challenge corporate control over their land and resources under the current international law regime.

II. BACKGROUND ON THE SOCIO-ECONOMIC MARGINALIZATION OF THE INDIGENOUS PEOPLES OF CANADA

A. Indian Reserves: The "Fourth World" Inside the "First World"

The United Nations Development Program first published its Human Development Index in 1990.[2] Since then Canada has always been ranked on or near the top.[3] This high ranking indicates that Canada would be one of the best countries in the world in which to live.[4] However, if you are an indigenous person born in Canada, statistics show that you would likely not be living at Canada's much touted high level of development.[5] Instead, you would be living at a much lower level of development.[6] This is especially true among registered Indians living on reserves in Canada whose living conditions, on average,

2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*

are below living conditions found in developing countries.[7] Living conditions on Canadian Indian reserves are ranked at the same level as a country with a rank of seventy-eight on the Human Development Index.[8]

The situation in the United States is similar. A recent study conducted by the Harvard Project on American Indian Economic Development found that "reservation Indians perennially have been the poorest identifiable group in the United States. American Indian/Alaska Native families on and off reservation are two-and-a-half times more likely than the average American family to live in poverty, and the situation is worse for families on reservations."[9] Yet the Harvard Study also found that "the era of self-determination has brought progress, [given that] Indian nations have had a long way to go in terms of their economic development."[10]

Addressing tribal sovereignty, the study went on to state:

> Supported by every U.S. President since the 1960s and bolstered, for a time, by a combination of federal court rulings and congressional policies, tribal self-rule – *sovereignty* – has proven to be the only policy that has shown concrete success in breaking debilitating economic dependence on federal spending programs and replenishing the social and cultural fabric that can support vibrant and healthy communities and families.[11]

The study further notes that tribal sovereignty is increasingly under attack by the courts and congressional bills that want to abolish the tribes' economic and legal independence.[12] When Indigenous Peoples first started organizing at the international level during the 1970s, they vowed to work together to overcome their socio-economic marginalization through recognition of their inherent rights. They called themselves the "Fourth World Movement," in reference to the fact that Indigenous Peoples are the poorest peoples in the world.[13]

---

7 *Id.*

8 *Id.* at 208.

9 Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, Joint Occasional Papers on Native Affairs No. 2004-03, at 35 (2004), *available at* http://www.jopna.net/pubs/JOPNA06_MythsandRealities.pdf.

10 *Id.* (footnote omitted).

11 *Id.* at 1.

12 *Id.* at 7.

13 *See* GEORGE MANUEL & MICHAEL POSLUNS, THE FOURTH WORLD: AN INDIAN REALITY (1974).

B. The Underlying Problem: Constitutional Breaches in Canada and the United States

Tribal sovereignty and the right to control tribal lands was first recognized in a series of cases known as the Marshall trilogy.[14] The first case, *Johnson v. McIntosh*, decided in 1823, found that Indian title to land was compatible with U.S. property law and could only be extinguished by the federal government.[15] One decade later, in *Cherokee Nation v. Georgia*, the state of Georgia attempted to oust the Cherokee from their traditional territories within the state despite a treaty with the federal government of the United States.[16] The Cherokee took their case directly to the U.S. Supreme Court, who found them to be "domestic dependent nations."[17] Just one year later, in *Worcester v. Georgia*, the Court found that the Cherokee had not surrendered their right to self-government through contact with the colonial powers, and still had the power to remain in and govern their territory.[18]

President Andrew Jackson did not agree with the *Worcester* decision and is said to have stated: "John Marshall made his decision; let him enforce it now if he can."[19] President Jackson ordered the removal of the Cherokee in an act of unconstitutional defiance against the Supreme Court ruling.[20] Known as the Trail of Tears, the forced march of nearly 17,000 Cherokee from northern Georgia to present-day Oklahoma resulted in the deaths of over 4,000 Cherokee.[21]

The U.S. policy of removal was followed by equally cruel and destructive policies including the making and subsequent breaching of treaties with Indian populations until 1871, the practice of assimilation and allotment until 1928, reorganization until 1942; and termination until 1968.[22] All of these policies were aimed at destroying and undermining the very fabric of Native American Tribes and their control over their tribal lands.

14 The Marshall trilogy consists of the following three cases, decided by Chief Justice John Marshall in the early 1800s: Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

15 21 U.S. (8 Wheat.) at 592-93.

16 30 U.S. (5 Pet.) at 3.

17 *Id.* at 17.

18 31 U.S. (6 Pet.) at 560-61.

19 JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION 255 (1988).

20 *Id.*

21 *Id.* at 391.

22 For more information on these different U.S. policies see United States Environmental Protection Agency Tribal Training Resource Guide 29-38 (2004), *available at* http://www.epa.gov/indian/resource/modules/entire.pdf.

Still, Native Americans organized themselves in opposition to these policies. In 1953, tribal leaders in the northwest formed the Affiliated Tribes of Northwest Indians (Affiliated Tribes), an organization dedicated to tribal sovereignty and self-determination.[23] The Affiliated Tribes finally secured the recognition and implementation of their tribal sovereignty in the late 1960s, with their own authorities taking control over the administration of tribal affairs and the extraction of resources from tribal lands.[24]

In their paper *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, Joseph Kalt and Joseph Singer detail how important strengthening tribal sovereignty is:

> [S]overeignty holds the prospect of being a win-win strategy for all contending parties. Obviously, tribes are winners *by their own standards* – as they demonstrate daily by pushing unerringly for self-rule. But states and the federal government stand to gain as well, as tribes make economic and social progress, contribute to their local and regional economies, and take pressure off of state and federal budgets otherwise needed to fight problems of poverty and social disarray.[25]

While the policy in the United States leaves some room for Native American tribes to slowly close the gap and overcome poverty amongst their peoples, the policy in Canada remains the extinguishment of Aboriginal Title.[26] This policy of extinguishments, similar to the earlier US policy of termination, contributes to the inability of the Indigenous Peoples to regain their economic independence.[27] In many ways, Canada is now facing in the twentieth century the same choice the United States faced in the 1830s. Canada must choose to either recognize the judicially prescribed and constitutionally supported proprietary interests of Aboriginal Peoples, or it can continue its unconstitutional policy of extinguishing Aboriginal land rights.

---

23 *See* Affiliated Tribes of Northwest Indians, *available at* http://www.atnitribes.org /about.html.

24 *See* Ed Goodman, *Protecting Habitat For Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279 (2000)

25 Kalt & Singer, *supra* note 9, at 41.

26 *See* Indian and Northern Affairs Canada, *Comprehensive Claims Policy and Status of Claims (2003)*, *available at* http://www.ainc-inac.gc.ca/ps/clm/brieft_e.html.

27 Beavon & Cooke, *supra* note 1. Canada has created an elaborate system of federal spending and funding programs for numerous Indian bands and tribal organizations. These programs not only contribute to the economic dependence of Indigenous People, but they help to perpetuate poverty on Indian reserves. For example, in 1996 the GDP per capita for an average Canadian amounted to $ 22,480. *Id.* at 208. In contrast, the GDP per capita for a registered Indian living on reserve amounted to $8,720, almost one third the national average. *Id.* For more information on the Canadian spending and funding programs see Royal Commission on Aboriginal Peoples, 5 *Report of the Royal Commission on Aboriginal Peoples* § 2 (1996), *available at* http://www.ainc-inac.gc.ca/ch/rcap/sg/ sgmm_e.html.

In the 1997 decision, *Delgamuukw v. British Columbia*, the Supreme Court of Canada recognized Aboriginal Title as the collective proprietary interests of Aboriginal Peoples in their traditional territories.[28] The decision applies to all territories where no treaties between the Crown and the Indigenous Peoples had been entered into, with British Columbia being the largest area effected..[29] In most provinces east of the Rockies historic treaties were signed, but the debate about their implementation continues. Many Indigenous Peoples argue that the "spirit and intent" of the treaties also ensures indigenous control over their traditional territories. Aboriginal nations and organizations are now pressuring Canadian provincial governments to recognize the Aboriginal sovereignty enshrined in these treaties and to right past breaches of these historic documents.[30]

In British Columbia on the other hand, a number of Aboriginal nations in the Interior refuse to enter into any type of agreement that would extinguish their inherent land rights and/or limit their sovereignty.[31] Instead, these nations continue to fight for the recognition of their land rights and their right to control traditional territories.[32] These rights were recognized in *Delgamuukw* in which the Court called for the Canadian government to enter into negotiations based on the recognition of Aboriginal Title:

> Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Vander Peet*, to be a basic purpose of s. 35(1) – "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." Let us face it, we are all here to stay.[33]

---

28 [1997] 3 S.C.R. 1010, 1014 (Can.) (stating "aboriginal title is held communally.").

29 *Id.* at 1014-15.

30 *Id.* at 37-43.

31 *See* Bernard Schulmann, *Getting Treaty Talks Off Square One*, POLICY OPTIONS, Oct. 2000, at 60, *available at* http://www.irpp.org/po/archive/oct00/schulman.pdf.

32 *See e.g.* Haida Nation v. British Columbia, [2004] 3 S.C.R. 511 (Can.).

33 *Delgamuukw*, [1997] 3 S.C.R. at 1123-24 (citation omitted). Chief Justice Lamer references Section 35 of the Canadian Constitution as the basis for the coexistence of Aboriginal sovereignty and the sovereignty of the Crown. *Id.* Section 35 is part of the new Canadian Constitution that came into force in 1982. *See* CAN. CONST. § 35 (1982). Prior to that, Canada's Constitution was enshrined in a treaty with the United Kingdom entitled the 1867 British North America Act. CAN CONST. (Constitution Act, 1867), § 30 & 31 Victoria, c. 3.

In the early 1980s, Prime Minister Trudeau wanted to "patriate" the Constitution, making it a solely Canadian Act and leaving its amendment to federal parliament and the provinces. He also wanted to introduce the Charter of Rights and Freedoms, enshrining individual civil rights in the Constitution. At the same time, he attempted to remove any reference to Indigenous Peoples and their collective rights from the Constitution. It was because of this that Aboriginal nations from across Canada were opposed to the patriation of the Constitution. Led by Indigenous Peoples from British Columbia who rented a train

The first and most important paragraph of Section 35 of the 1982 Canadian Constitution reads "[t]he existing aboriginal and treaty rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed."[34] This provision constitutes the unconditional recognition of Aboriginal rights and extends constitutional protection to them. Many Indigenous Peoples also consider Section 35 the source for Aboriginal jurisdiction, placing it on equal footing with federal and provincial jurisdiction. However, since its enactment in 1982, the Canadian government has refused to implement Section 35 so that it has arguably become nothing more than an "empty box."[35]

In conjunction with its reductionist reading of Section 35, the federal government has also refused to revoke its land rights policy entitled the Comprehensive Claims Policy. Taking advantage of the Supreme Court of Canada's divisive position on Aboriginal Title in the 1973 case *Calder v. British Columbia*,[36] the federal government devised the Comprehensive Claims Policy in order to accomplish the "blanket extinguishment" of Aboriginal Title.[37] Following the recognition of Aboriginal rights in the Constitution of 1982, this policy of extinguishment should have been revoked or reformed. It was not. Today, Aboriginal Peoples from across British Columbia continue to reject this federal policy. For example, in 2000, all major provincial Indian organizations in British Columbia signed the following Consensus Statement:

---

that became known as the Constitution Express, they travelled to Ottawa to protest. A year later, in 1981, they sent a delegation of indigenous leaders to England to stop the patriation. As a result, Canada had to add Section 35 to the 1982 Canadian Constitution. *See generally* George Egerton, *Trudeau, God, and The Canadian Constitution: Religion, Human Rights, and Government Authority in the Making of the 1982 Constitution*, *in* RETHINKING CHURCH, STATE, AND MODERNITY: CANADA BETWEEN EUROPE AND AMERICA (David Lyon and Marguerite Van Die eds., 2000); James Ross Hurley, *The Canadian Constitutional Debate: From the Death of the Meech Lake Accord of 1997 to the 1992 Referendum*, Dec. 16, 1992, *available at* http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile&Sub=TheConstitutionalDebate; Union of British Columbia Indian Chiefs, *Constitutional Express*, *available at* http://www.ubcic.bc.ca/conxprss.htm (last modified Feb. 23, 2005).

34 CAN. CONST. (Constitution Act, 1982), Schedule B, c. 11, § 35.

35 For more information on this ongoing debate, *see* ARDITH EALKEM, BOX OF TREASURES OR EMPTY BOX?: 20 YEARS OF SECTION 35 (2003).

36 Calder v. British Columbia, [1973] S.C.R. 313 (Can.). In *Calder*, three judges held that the inherent land rights of Aboriginal Peoples had not been extinguished, three judges found they had been, and the last judge dismissed the matter on a technicality. *Id.*

37 *See* Indian and Northern Affairs Canada, *supra* note 26. Only a very limited number of Aboriginal Nations from across Canada entered into negotiations with the federal government. The only resulting agreements were the James Bay and Northern Quebec Agreement of 1975 and the Northeastern Quebec Agreement of 1978. *See* Indian and Northern Affairs Canada, *The James Bay and Northern Quebec Agreement and Northeastern Quebec Agreement*, *available at* http://www.ainc-inac.gc.ca/pr/info/info14_e.html.

> The Assembly of First Nations, the Union of B.C. Indian Chiefs, the Interior Alliance and the First Nations Summit, hereby join together publicly to affirm the Aboriginal [T]itle and rights of all First Nations of British Columbia and Canada. Canada's Comprehensive Claims Policy is predicated on the denial of our rights and title. We categorically reject this policy and Canada's implementation of this policy. We call upon Canada to assert the honour of the Crown and to adopt a new policy of recognition, affirmation and implementation of Aboriginal [T]itle.[38]

Due to the failure of the federal and provincial governments to take the necessary steps to implement Aboriginal rights, the Supreme Court of Canada in a number of decisions throughout the 1990s, began to give meaning to Section 35 and itself defined the fiduciary obligation of the federal government with Aboriginal Peoples.[39] In 1997, in a unanimous judgment written by Chief Justice Lamer in the *Delgamuukw* case, the Supreme Court of Canada not only recognized Aboriginal Title, but also held Aboriginal Title was protected by Section 35 of the Canadian Constitution.[40] Although Aboriginal Title is recognized under Canadian law, the Court went further to define it as a *sui generis* right, controlled by the indigenous laws of the respective nation.[41]

This decision by the Supreme Court of Canada clearly rendered the Comprehensive Claims Policy of 1986 unconstitutional. Yet, despite repeated calls by indigenous leadership to adopt a new policy of recognition, affirmation and implementation of Aboriginal Title, the federal government has made it very clear that it has no intention of changing its policy or its laws.[42] This categorical refusal to honor Supreme Court decisions defining constitutional rights amounts to the same type of constitutional crisis sparked by President Andrew Jackson in the 1830s. The Canadian federal government's refusal to abide by the constitutional rulings of the Supreme Court is also a blow in the face of Aboriginal Peoples who have historically attempted to work with the federal government to find a solution.

---

38 BUSINESS COUNCIL OF BRITISH COLUMBIA, THE BRITISH COLUMBIA TREATY PROCESS: A ROAD MAP FOR FURTHER PROGRESS (2004), *available at* http://www.bcbc.com/archive/FinalTreatyPaper_may2004.pdf.

39 Amongst the most important decisions on Aboriginal rights in the 1990's were R. v. Sparrow, [1990] 1 S.C.R 1075 (Can.); R. v. Van der Peet, [1996] 2 S.C.R. 507 (Can.); R. v. Gladstone, [1996] 2 S.C.R. 723 (Can.).

40 *Delgamuukw*, [1997] 3 S.C.R. at 1010.

41 *Id.* at 1014.

42 Janice G.A.E. Switlo, *In a Perfect World*, at 10, *at* http://www.ualberta.ca/NATIVESTUDIES/LegalPDF/In a perfect world.pdf (stating that a letter from Hon. Robert Nault, Minister of Indian And Northern Affairs, to Phil Fontaine, National First Nations Chief, that "Canada was not prepared to change the Comprehensive Land Claims policy" in response to First Nation's pressure.).

For example, the Royal Commission on Aboriginal Peoples had the monumental task of shedding light on the history of dispossession of Aboriginal Peoples in Canada and making recommendations to the federal government on how past wrongs could be resolved.[43] The commissioners concluded that current levels of poverty and underdevelopment are directly linked to the dispossession of Indigenous Peoples from their lands and the de-legitimization of their institutions of society and governance.[44] The commissioners also concluded that land and governance questions needed to be resolved in a meaningful way.[45] The entire last volume of the Royal Commission's five-volume report to the federal government was dedicated to the Commission's recommendations for possible resolution.[46] In addition to its comprehensive recommendations, the Royal Commission highlighted the urgency and volatility of the situation and emphasized the need for timely and fundamental changes.[47]

The federal government's response to the Commission's efforts exemplifies the federal government's unwillingness to recognize Aboriginal Title and Rights. In "Gathering Strength," which speaks of "a renewed partnership with Aboriginal People and governments,"[48] and its response in "Agenda for Action with First Nations,"[49] the government claimed its willingness to develop a partnership with Indigenous Peoples. Yet, the way the government envisioned the "partnership," Indigenous Peoples would have had to recognize the existing land tenure system and abide by the very policies that the Royal Commission so emphatically discredited in its study.[50] This "partnership" was therefore nothing more than the government's endorsement of the status quo. Despite the efforts of the Royal Commission and its subsequent findings, the federal government chose to continue on as before and endorsed policies like the 1973 and 1986

43 *See generally* Royal Commission on Aboriginal Peoples, *supra* note 27.

44 *See* Royal Commission on Aboriginal Peoples, 1 Royal Commission on Aboriginal Peoples*, Report of the Royal Commission on Aboriginal Peoples* §§ 11.2-11.4 (1996), *available at* http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html.

45 *See* Royal Commission on Aboriginal Peoples, 2 *Report of the Royal Commission on Aboriginal Peoples* §§ 4-6 (1996), *available at* http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html.

46 *See* Royal Commission on Aboriginal Peoples, 5 *Report of the Royal Commission on Aboriginal Peoples* (1996), *available at* http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html.

47 *See id.* § 2.

48 Minister of Indian and Northern Affairs Canada, *Gathering Strength: Canada's Aboriginal Action Plan* (1997), *available at* http://www.ainc-inac.gc.ca/gs/chg_e.html.

49 Minister of Indian and Northern Affairs Canada, *Agenda for Action with First Nations* (1998), *available at* http://www.ainc-inac.gc.ca/gs/agn_e.html.

50 *See generally* ABORIGINAL RIGHTS COALITION, BLIND SPOTS: AN EXAMINATION OF THE FEDERAL GOVERNMENT'S RESPONSE TO THE REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES (Patricia Sherlock ed., 2001).

Comprehensive Claims Policies that subject its Indigenous populations to subjugation and suffering.

C. Continuing Violations of International Human Rights

The growing gap between the findings of the Royal Commission and the rulings of the Supreme Court of Canada on the one hand, and the actions of the federal government on the other, drew the attention of numerous international human rights bodies. In December of 1998, the United Nations Committee on Economic, Social and Cultural Rights presented its concluding observations on the reports submitted by the government of Canada pursuant to Articles 16 and 17 of the Covenant on Economic, Social and Cultural Rights.[51] In its report, the Committee made reference to the disparity between the living conditions for non-indigenous and indigenous Canadians:

> 3. The Committee notes that, for the past five years, Canada has been ranked at the top of the United Nations Development Programme's Human Development Index (HDI). . . .
>
> . . . .
>
> 17. The Committee is greatly concerned at the gross disparity between Aboriginal [P]eople and the majority of Canadians with respect to the enjoyment of Covenant rights. There has been little or no progress in the alleviation of social and economic deprivation among Aboriginal [P]eople. . . .
>
> 18. The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal [P]eople from their lands, as recognized by RCAP, and endorses the recommendations of RCAP that policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party. . . .[52]

The Committee, concerned about the poor standard of living among Aboriginal Peoples, the inadequate food and housing, the inadequate legal protection, and the mass unemployment, found Canada to be in violation of the Covenant on Economic, Social and Cultural Rights.[53] The following year, the United Nations Human Rights Committee reviewed the fourth periodic report submitted by Canada and came to similar conclusions:

> The Committee notes that, as the State party acknowledged, the situation of the [A]boriginal [P]eoples remains 'the most pressing

51 *See generally* U.N. ESCOR, 19th Sess., 57th mtg. U.N. Doc. E/C.12/1/Add.31 (1998).

52 *Id.* at 2, 4.

53 *Id.* at 4.

> human rights issue facing Canadians'. In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence . . . .[54]

Since then, the United Nations Committee on the Elimination of Racial Discrimination (CERD) has noted similar concerns with regard to Canada's policies on land rights and self-government.[55] Despite repeated findings of human rights violations regarding Indigenous Peoples in Canada, the Canadian government has done nothing to act in accordance with the recommendations of the various United Nations human rights bodies.

D. Exploring Alternative Avenues

A growing number of Indigenous Nations from Canada are attempting to draw the international community's attention to the federal government's violations of international law. Although international human rights bodies, such as the United Nations, have repeatedly found Canada to be in violation of international law, these bodies lack the power enforcing their decisions at the international level.[56] Thus, Indigenous Peoples in Canada are now faced with the challenge of remedying the constitutional crisis facing them and are attempting on their own to right the wrongs recognized by international human rights organizations.

One avenue considered by Indigenous Peoples and organizations is a return to the Canadian courts for judicial remedies. There are some Aboriginal Title and rights cases currently underway before Canadian courts.[57] However, it takes over ten years and substantial funds for an Aboriginal Title case to wind its way through the Canadian judicial system.

---

54 *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, U.N. Human Rights Committee, 65th Sess., at ¶ 8, U.N. Doc. CCPR/C/79/Add.105 (1999).

55 *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 57th Sess., at 58, U.N. Doc. A/57/18 (2002).

56 *See, e.g.,* U. N. ESCOR, *supra* note 51, at 2, 4.

57 *See, e.g.,* Brian Thom, *Rising to the Test: Meeting Lamer's Tests for Aboriginal Rights and Title After* Delgamuukw, Meeting of the Canadian Anthropology Society, *at* http://home.istar.ca/~bthom/tests.htm (May 1999) (discussing several recent cases regarding Aboriginal Title.).

Hampered by an inability to pay the necessary fees to successfully win a judgment and the need for quicker resolution, most Aboriginal Nations are unable to utilize the Canadian court option.

A number of Indigenous Peoples, unable to wait ten years for a resolution of their rights, have taken alternative actions to assert and protect their Aboriginal Title. For example, many Indigenous Peoples have actively tried to stop the exploitation of natural resources on their lands by blocking access to mining and logging sites.[58] In response, affected corporations seek injunctions, those are interim remedied in which the courts weigh the economic loss of the corporations against the interests of Indigenous Peoples.[59] Based on a minimal showing of hardship and often without a hearing, the injunctions are granted. Once these injunctions are granted, Indigenous Nations are then faced with a decision: obey the order or be found in contempt of court.[60] Unable to get the federal and provincial governments to recognize their rights, Indigenous Peoples across Canada now face criminal prosecution for exercising what the Supreme Court of Canada has already deemed a constitutional right.

Another avenue for Indigenous Peoples is to enlist the international community. By lobbying for the international recognition of indigenous rights, pointing to Canadian violations of international human rights laws, and calling for the enforcement of the financial and social responsibilities of international corporations that are active on Indigenous lands, the Indigenous Peoples of Canada strive to win recognition of their Aboriginal Title and rights from the international community.

III. CHALLENGING THE STATUS QUO: ASSERTING INDIGENOUS PROPERTY RIGHTS ON AN INTERNATIONAL LEVEL

As alluded to above, Indigenous Peoples adapt to changing realities and use different avenues to maintain their inherent rights. Indigenous rights, especially property rights, are *sui generis*, defined by respective Indigenous laws, which maintain a strong connection to traditional territories.[61] Indigenous rights are extremely multifaceted, containing social, cultural, environmental and economic dimensions. Per their customs,

58 *See* Julia E. Lawn, *The John Doe Injunction in Mass Protest Cases*, 56 U. TORONTO FAC. L. REV. 101 (1998).

59 *See id*. at 104.

60 *See id.*

61 *Delgamuukw*, [1997] 3 S.C.R. at 1014.

Indigenous Peoples see and assert their rights in a holistic manner. However, because of ever-changing political and legal climates, Indigenous Peoples have been forced to venture into the unchartered territory of international law to assert their proprietary interests and win recognition of their inherent rights.

A. How International Trade Agreements Threaten to Undermine Indigenous Rights

The 1990s was an important decade in terms of recognition of Indigenous rights, both in Canada and across the Americas. Today, many new Latin American constitutions not only recognize, but also protect Indigenous rights and jurisdictions.[62] The 1990s also saw an increased strengthening of international trade law regimes. One of the most significant was the creation of the WTO and the passage of its new Dispute Settlement Understanding, which strengthens sanctions and enforcement mechanisms for international trade law.[63]

Yet, despite these gains, there were losses in the international arena. In North America, the North American Free Trade Agreement (NAFTA) entered into force on January 1, 1994 and proved to be a setback for the recognition of Indigenous rights.[64] The same day of its enactment, Indigenous Peoples in the Southern Highlands of Mexico staged the Zapatista uprising in protest.[65] The reason for the protest lied in Mexico's elimination of all constitutional protections for collective Indigenous land rights in order to comport with the membership requirements of NAFTA.[66] NAFTA secures increased corporate access to natural resources and threatens to freeze environmental, social, and human rights standards.

Chapter 11 of NAFTA, the Investor State Chapter, allows international corporations to sue states for expropriation or loss of their investments.[67] If a regulation deprives a company of the

62 *See* Theodore McDonald, *Indigenous Rights: Configuring Citizenships*, REVISTA: HARVARD REVIEW OF LATIN AMERICA (2003), *available at* http://drclas.fas.harvard.edu/revista/tcontents_issue.php?issue=15&article=291; North American Free Trade Agreement, Jan. 1, 1994, U.S.-Can.-Mex., art. 1110, 32 I.L.M. 289.

63 For more information on the WTO's Dispute Settlement Understanding, please visit http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

64 *See* WILLIAM J. DAVEY, PINE & SWINE: CANADA-UNITED STATES TRADE DISPUTE SETTLEMENT: THE FTA EXPERIENCE AND NAFTA PROSPECTS 2 (1996).

65 *See* Amelia M. DeAngelis, Note, *Coffee, Mexico's Other Bean: An Examination of the Globalization of the Coffee Industry, its Impact on Mexican Villages, and the Possibility of Surviving the Grind*, 3 WASH. U. GLOBAL STUD. L. REV. 887 (2004). *See also* http://www.abstractdynamics.org/archives/2004/01/02/zapatista_nafta.html.

66 *Id.*

67 North American Free Trade Agreement, Jan. 1, 1994, U.S.-Can.-Mex., art. 1110, 32 I.L.M. 289.

right to profit from its investment, or even invest in the first place, the foreign corporation is entitled to fair market value compensation for the "expropriation" of its profits.[68] NAFTA provisions on investment and the rights of investors contained in Chapter 11 not only grant preferential treatment to foreign investors but also guarantees them the right to invest despite domestic laws and regulations. Moreover, in the case of a change in public policy (i.e. environmental protection) corporations can claim expropriation for the mere loss of opportunities.[69] Thus, foreign investors now have the ability to sue countries where they have lost profits, or have been prohibited from investing in the first place, even where domestic companies could not do the same.[70]

As a result of international trade agreements like NAFTA, Indigenous Peoples are in direct competition with multinational corporations for control over their lands. While multinational firms can sue even for the expropriation of future profits, Indigenous Peoples still have not been able to secure the implementation of their ancestral land rights. Indigenous Peoples are still fighting to stop the expropriation and third party alienation of their lands and resources. Unfortunately, Indigenous Peoples are fighting this fight without much in the way of ammunition. With no remuneration rights and with few efficient remedies available to enforce recognized rights, Indigenous Peoples are fighting an uphill battle against the illegal expropriation of their lands by multinational companies.

IV. THE SOFTWOOD LUMBER DISPUTE: DEALING WITH INDIGENOUS PROPERTY RIGHTS

A. The Perspective of the Indigenous Peoples of British Columbia

The Indigenous Peoples of the South Central Interior of British Columbia have never given up their land rights. Even as far back as 1910, the Indian tribes of the Interior of British Columbia gathered to call upon the then Prime Minister of Canada, Sir Wilfrid Laurier, to recognize their proprietary interests:

---

68 *Id.*

69 For example, on August 25, 2000, a NAFTA Chapter 11 tribunal ordered the government of Mexico to pay an American company, Metalclad, almost seventeen million U.S. dollars because a Mexican community refused to allow the company to operate a waste disposal site on ecologically sensitive land. Stephen L. Kass & Jean McCarroll, *The 'Metalclad' Decision Under NAFTA's Chapter 11*, N.Y.L.J., October 27, 2000, at 3.

70 North American Free Trade Agreement, *supra* note 67, arts. 1115-38.

> The whites made a government in Victoria . . . . At this time they did not deny the Indian tribes owned the whole country and everything in it. . . . We trusted the whites and waited patiently for their chiefs to declare their intentions toward us and our lands. . . . They told us to have no fear, the queen's laws would prevail in this country, and everything would be well for the Indians here. . . . They let us think this would be done soon . . . .[71]

They also made it very clear that they did not accept reservations as a replacement for their rights to the land:

> This was their proposal not ours, and we never accepted these reservations as settlement for anything, nor did we sign any papers or make any treaties about same. They thought we would be satisfied with this, but we never have been satisfied and never will be until we get our rights.[72]

When the Supreme Court of Canada finally recognized Aboriginal Title in 1997,[73] Indigenous Peoples in the Interior of British Columbia celebrated. Expectations were that the Canadian government would act promptly to implement the Supreme Court decision, just as the government of Australia had done by passing the Native Title Act one year after its High Court recognized inherent Indigenous land rights.[74] The Interior Alliance, an organization consisting of Interior Tribes of British Columbia, called on the federal and provincial governments to recognize and implement Aboriginal Title.[75] As discussed previously, that recognition and implementation never came. So in 1999, the leaders of the Interior Tribes decided that it was time to take action.

B. Attacking the Lumber Industry: The Fight in British Columbia

The dominant industry in the Interior of British Columbia is forestry,[76] and, for the past 50 years, the majority of land tenure has been allocated to large integrated wood-processing corporations holding long-term renewable licenses.[77] The

71 Memorial from the Chiefs of the Shuswap, Okanagan and Couteau Tribes of British Columbia, to Sir Wilfrid Laurier 3 (August 25, 1910), *available at* http://www.secwepemc.org/memorial.htm.

72 *Id.* at 4.

73 *Delgamuukw*, [1997] 3 S.C.R. at 1014.

74 *See* Mabo v. Queensland [No 2] (1992) 175 CLR 1.

75 *See* Richard Cowan, *Environmentalists, Tribes Seek Duties on Canada Lumbar*, Canada Forest Conservation News & Information, *available at* http://forests.org/archive/canada/entrseek.htm (May 11, 2001).

76 British Columbia Ministry of Management Services, *British Columbia Manufacturing Shipments 1997-2004*, *available at* http://www.bcstats.gov.bc.ca/data/dd/handout/mannaics.pdf (showing that wood and paper make up over 50% of British Columbia's manufacturing shipments).

77 Roland Stiven, *Social Involvement in Forestry: Eight Cases Studies from British*

recognition of Aboriginal Title would therefore require a major reallocation of land tenure away from these corporations. To win recognition of proprietary rights in the lumber industry would not only equate recognition of Aboriginal Title but would also serve to protect the natural resources Indigenous Peoples have relied on for so long.

In their efforts to assert Aboriginal Title via the lumber industry, some Indian Nations issued logging permits pursuant to their jurisdiction under Section 35 of the Canadian Constitution.[78] These permits allowed the permit holder to log on a small cut block according to the highest environmental standards. No provincial permits were acquired. In September 1999, a number of Indian bands, including the Adams Lake, Neskonlith and Spallumcheen Indian bands, went logging with the authorization and in the name of their Secwepemc Nation.[79] Similarly the Okanagan Indian Band went logging in the name of the Okanagan Nation. The province of British Columbia charged them with stealing the timber.[80] In return, the Indian bands brought a defense, arguing that they had property rights in the timber and asserted Aboriginal Title as their defense.[81]

The case regarding the property rights of Interior Tribes over timber will be heard in the British Columbia Supreme Court in 2006. While the final outcome is years away, the Aboriginal Peoples have already won one major battle in *British Columbia v. Okanagan Indian Band*.[82] Due to the socio-economic status of many of the tribes involved, the Indian bands argued that they were not in a financial position to properly fight a case of substantial national importance.[83] The British Columbia Court of Appeal agreed.[84] The Court held that the provincial government would have to pay for the Indian plaintiffs' legal costs.[85] The Supreme Court of Canada, finding the case to be of national importance, upheld the cost decision.[86]

Yet, with no final ruling in sight and an initial trial set to

Columbia and Quebec, The Caledonia Centre for Social Development, *at* http://www.caledonia.org.uk/socialland/canada.htm (Aug. 2000).

78 Section 35 of the Canadian Constitution guarantees Aboriginal rights. *See* Richard Spaulding, *Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective*, 47 U. TORONTO L.J. 35 (1997).

79 British Columbia v. Jules, [2001] 92 C.R.R. 2d 319.

80 *Id.*

81 *Id.*

82 [2003] 3 S.C.R. 371.

83 *Id.* at 373.

84 *Id.*

85 *Id.*

86 *Id.*

start seven years after the logging took place, the issue of who controls the forests of British Columbia might be sidelined in the Canadian courts for decades. During this time, the integrated wood processing corporations, with government support, may continue to exploit and potentially exhaust the forestry resources in the respective Indigenous territories. Therefore, while Indigenous Peoples continue to seek recognition of their Aboriginal Title and rights in the Canadian Courts, they continue to look for other avenues through which they can assert and protect their property rights.

C. Beyond British Columbia: The Fight Against the Lumber Industry and the United States

The Interior Alliance, deciding to take its struggle to the international level, turned to the United States. The U.S. is the main export market for timber and lumber from Canada, with a major share originating from the Interior of British Columbia.[87] The year 2000, when representatives of the Interior Tribes first headed to the United States, was just the right year to start discussing forestry imports from Canada and the associated violations of Indigenous rights. The Softwood Lumber Agreement imposing export quotas on Canadian lumber producers, entered into force on April 1, 1996, was set to expire on March 31, 2001.[88]

In 2000, it was already clear that both countries wanted the quota system to end and that the Softwood Lumber Agreement would not be extended. Canadian producers were pushing for free trade in lumber and unlimited access to the U.S. market.[89] The U.S. lumber industry, claiming injury from cheap Canadian lumber imports, pushed Senators from the most affected U.S. states for a stronger stand on Canadian lumber imports and fundamental changes in the land tenure and wood allocation system.[90] Environmental groups that opposed clear-cutting and

87 The Interior of British Columbia is not only a stronghold of Aboriginal Title, but it is also the heartland of softwood lumber exploitation. Canadian softwood lumber exports to the United States amount to over six billion dollars annually, making it the single-largest trade good between the two countries. *See* International Trade Canada, *Softwood Lumber*, *at* http://www.dfait-maeci.gc.ca/eicb/softwood/intro-en.asp (last modified March 26, 2004). More than 40% of the exports come from British Columbia, and the majority of that lumber originates from the traditional territories of Indigenous Peoples in the Interior. *See* British Columbia Ministry of Management Services, *supra* note 76. *See also* Greg Mastel, *Stopping the Giveaway of Canada's Forests: Establishing True Free Trade in Softwood Lumber* (Oct. 2000), *at* http://www.newamerica.net/Download_Docs/pdfs/Pub_File_628_1.pdf.

88 *See* Greg Mastel, *supra* note 87, at 8.

89 *Id.*

90 Sign on Letter from United State Senate to US Department Of Commerce and

forestry practices in Canada supported this position.[91]

Groups from Canada and the United States submitted their concerns in response to a call for positions regarding the Softwood Lumber Agreement issued by the U.S. Trade Representative.[92] For the first time in the history of international trade disputes, Indigenous Nations from Canada also submitted their positions.[93] The Interior Alliance made a submission based on Aboriginal Title to their traditional territories, detailing the refusal of the Canadian government to let them share in the management of the land and its resources.[94]

At the same time, the Interior Alliance also lobbied the U.S. Congress, which was more understanding of the threats to Indigenous rights than the Canadian government had ever been. The co-chairs of the Human Rights Caucus of the House of Representatives circulated a special sign-on letter entitled "Canadian Logging Threatens First Nations Habitats: Support Native Peoples' Right for Self-Determination in Canada."[95] This letter stated "[i]t appears that while (Native) rights are being defined in the court system that Canadian logging companies are trampling them by clear-cutting these forest areas for profit, at the same time eviscerating valuable wildlife habitat and medicinal plants that are used by these people."[96]

United States Trade Representative, (July 17, 2000) (on file with author).

91 *See*, *e.g.*, Letter from Northwest Ecosystem Alliance, et al., to The Hon. Marc Racicot, Special Ambassador, U.S./Canada Softwood Lumber (February 13, 2002), *available at* http://albertawilderness.ca/News/NR2002/NR020213/LET020213NKNB/LET020213NKNB.htm.

92 Request for Public Comment Regarding Softwood Lumber Practices in Canada and Softwood Lumber Trade Between the United States and Canada, Office of the United States Trade Representative, 65 Fed. Reg. 11363 (2000).

93 It was important for Indigenous Peoples to be involved in the U.S.-Canada Softwood Lumber Dispute because it touched the core of their livelihood and deeply impacted their Aboriginal Title and rights. Canadian softwood lumber imports also impact Native American tribes in the United States: through self-determination and self-rule many tribes, especially those in the Pacific Northwest, have gained control over forestry on their lands. Those tribes have developed sustainable forest management practices that make it impossible for them to compete with cheap Canadian lumber imports that neither take into account Indigenous rights nor environmental standards when harvested. *See, e.g.,* Ernie Atencio, *After a Heavy Harvest and a Death, Navajo Forestry Realigns with Culture*, HIGH COUNTRY NEWS, *available at* http://www.hcn.org/servlets/hcn.URLRemapper/1994/oct31/dir/wr4.html (stating that BIA's interest in Indian self-determination has led to the Navajo Indians saving the rest of their forests).

94 *See Canadian First Nations Join Together in Washington, DC to Present Views on Softwood Lumber Agreement*, KAHTOU NEWS, May 2000, *available at* http://www.kahtou.com/images/lumber.html.

95 Sign-on Letter from Tom Lantos et al., entitled Canadian Logging Threatens First Nations Habitats: Support Native Peoples' Right for Self-Determination in Canada (2000) (on file with author).

96 *Id.*

D. The Softwood Lumber Dispute: United States v. Canada

The U.S.-Canada Softwood Lumber Dispute has been one of the most contentious trade issues between these two neighboring countries in the past few decades.[97] In the early 1980s, the U.S. lumber industry organized under the Coalition for Fair Lumber Imports (CFLI).[98] CFLI argued that the Canadian government was, through non-competitive allocation, subsidizing the timber production of Canadian producers.[99] At issue was "whether fees charged by provincial authorities to lumber firms to harvest trees on public land (stumpage rights) [were] artificially low and constitute[d] countervailable subsidies."[100] In response to CFLI's contentions, the U.S. Department of Commerce investigated and found that the actions of the provincial governments might be inflicting material injury on U.S. industry.[101] In what is known as *Softwood Lumber I*, the Department of Commerce found that stumpage was a good but was unable to conclude that the Canadian government significantly subsidized its industry.[102]

The U.S. lumber industry was undeterred, however, and brought another complaint in 1986: *Softwood Lumber II*.[103] Due to changes in its interpretation of U.S. countervailing duties law, the Department of Commerce departed from its decision three years earlier and found "Canada's timber pricing and allocation policies [did] constitute a countervailable subsidy."[104] Facing a preliminary decision to impose a provincial duty of fifteen percent or more, the Canadian government entered a last minute agreement in December 1986 which imposed a fifteen percent

97 Debates of the Senate (Hansard), 1st Session, 38th Parliament, Volume 142, Issue 11, November 2, 2004, *available at* http://www.parl.gc.ca/38/1/parlbus/chambus/senate/deb-e/011db_2004-11-02-E.htm?Language=E&Parl=38&Ses=1 (statement from Hon. Jack Austin stating that "[g]iven the dependence of the British Columbia economy on the United States market, the long dispute with the lumber industry in the United States over their trade protectionism and claims of harm to their industry goes on and on and continues to damage B.C. interests and Canada-United States trade relations.").

98 GEORGE HOBERG & PAUL HOWE, LAW, KNOWLEDGE AND NATIONAL INTERESTS IN TRADE DISPUTES: THE SOFTWOOD LUMBER CASE 4 (Univ. of British Columbia, Inst. of Int'l Relations, Working Paper No. 29, 1999), *available at* http://www.iir.ubc.ca/pdffiles/webwp29.pdf.

99 *See* Letter from Coalition for Fair Lumber Imports to Undersecretary of Commerce Grant Aldonas and Deputy U.S. Trade Representative Peter Allgeler (June 16, 2003), *available at* http://www.ftlc.org/index.cfm?Section=2&DownloadID=79 (discussing need for negotiations on subsidized and dumped Canadian lumber).

100 Gilbert Gagne, *The NAFTA and the Softwood Lumber Dispute: What Kind of Canada-U.S. Partnership?* 3 (November 2002), *at* http://www.unites.uqam.ca/gric/pdf/Cahier_Gagne.pdf.

101 *Id.* at 12.

102 Final Negative Countervailing Duty Determinations on Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 24,159 (1983).

103 Gilbert Gagne, *supra* note 100, at 7.

104 *Id.* at 8.

export tax on all softwood lumber exported to the U.S.[105] After this agreement expired in 1991, another countervailing duty investigation was launched. In 1992, following the conclusion of its investigation, the Department of Commerce imposed a six and a half percent duty on Canadian imports.[106]

Canada launched three appeals against the duty determination, including one under the terms of the General Agreement on Tariffs and Trade (GATT),[107] but no decision was ever adopted or publicized. This was primarily due to the weak dispute settlement procedures that were then in place. At that time, two bi-national panels had been set up under the Canada-U.S. Free Trade Agreement (CUSFTA) – one to look at the question of injury, another to look at the question of subsidies.[108] Due to a lack of evidence, neither panel agreed with the decisions of the U.S. authorities and sent the cases back for further consideration.[109]

The Department of Commerce maintained its decision to impose a duty on Canadian imports.[110] After the bi-national panel rejected it once more, the Department of Commerce resorted to a procedure provided for in the CUSFTA, which allowed it to bring its case before an Extraordinary Challenge Committee.[111] Voting along national lines, the Committee rejected the U.S. appeal in 1994.[112] The United States had to rescind its countervailing duties and frustrations with the partisan dispute settlement process were great.[113]

In 1994, when Canadian exports to the U.S. hit a record 16.4 billion board feet, the U.S. industry proclaimed its readiness to launch another countervailing duty investigation.[114] Instead, bi-national discussions between the U.S. and Canada were launched in 1995 and an agreement, now known as the Softwood Lumber Agreement, was reached. This agreement imposed a quota system that allowed British Columbia, Alberta, Ontario, and Quebec to export 14.7 billion board feet of lumber to the U.S.

105 *Id.*

106 Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570 (1992).

107 *Gagne*, *supra* note 100, at 9-11.

108 *Id.* at 11.

109 *See id.* at 12.

110 *Id.*

111 *Id.* at 13.

112 *See* DAVEY, *supra* note 64, at 232.

113 Gagne, *supra* note 100, at 13-14.

114 *U.S.-Canada Trade Agreement Timeline, 1982-Present* (Random Lengths Publications, Inc.), March 29, 2005, at 7, *available at* http://www.randomlengths.com/base.asp?s1=In_Depth&s2=U.S.-Canada_Trade_Dispute&s3=U.S.-Canada_Trade_Agreement_Timeline_1995-present.

annually without penalty.[115] The Softwood Lumber Agreement went into effect on April 1, 1996 and expired on March 31, 2001.[116] The following day, on April 1, 2001, the U.S. softwood lumber industry, represented by CFLI, brought its petition alleging that,

> [t]he Government of Canada and Canadian provincial governments are providing countervailable subsidies with respect to the export, manufacture and production of softwood lumber (the "Subject Merchandise"), within the meaning of Section 701 and 702(b) of the Tariff Act of 1930 (the "Tariff Act"), 19 U.S.C. §§ 1671 and 1671a(b).[117]

1. First Indigenous Submissions to International Trade Tribunals

In May 2001, the U.S. Department of Commerce once again began an investigation into softwood lumber imports from Canada (*Softwood Lumber III)*.[118] This was the first investigation into the subsidization of Canadian lumber since the recognition of Aboriginal rights to land and resources in the *Delgamuukw* Decision. Understanding the pressure that free trade in natural resources was putting on Aboriginal lands and economies, the Aboriginal Peoples of the Interior decided to involve themselves in the dispute. They filed substantive submissions with the U.S. Department of Commerce, alleging that the non-recognition of Aboriginal Title constituted a subsidy under international trade law.[119]

The investigative authorities, although interested in this novel issue, lacked both the expertise and the time to investigate these additional subsidy claims in detail. Instead, the Department of Commerce found that the potential subsidies for the non-recognition of Aboriginal Title and non-implementation of treaties and environmental provisions would be included in the overall market value: "[T]o the extent that Canadian lumber companies are being provided with stumpage from provincial governments, we are measuring that financial contribution in our preliminary determination based upon a market rate for

115 *Id.* at 8.

116 *Id.*

117 Petition for the Imposition of Antidumping Duties Pursuant to Section 731 of the Tariff Act of 1930 as Amended, at 1, In Matter of Certain Softwood Lumber Products from Canada, USITC Inv. No. A-122-838 (April 2, 2001), *available at* http://www.dbtrade.com/casework/softwood/Common%20Volume.pdf.

118 *See Gagne*, *supra* note 100, at 20.

119 Charles M. Gastle, *Shadows of a Talking Circle: Aboriginal Advocacy Before International Institutions and Tribunals*, at 31 (Dec. 2002), *at* http://www.esteycentre.ca/Shadowsofatalkingcircle_final.pdf.

stumpage."[120] The U.S. Department of Commerce then went on to deliver its preliminary decision in the *Softwood Lumber III* and imposed countervailing duties of 19.31 percent on all Softwood Lumber Imports from Canada.[121]

Throughout *Softwood Lumber III*, Canada openly opposed submissions by Indigenous Peoples, arguing that questions of land rights had to be first dealt with in Canadian courts.[122] Knowing that Aboriginal Title cases take decades to litigate, the federal government was attempting to perpetuate its "business as usual" approach: ignore the already constitutionally recognized Aboriginal rights within the territories at issue and encourage the exploitation of the natural resources by Canadian companies. Aboriginal Peoples understood that they had to continue to assert their rights in venues outside Canada in order to stop the third party alienation and exploitation of their lands and resources. Despite Canada's attempt to block indigenous participation in the Softwood Labor Dispute, organizations like the Interior Alliance pressed on to ensure that their voices were heard.

2. Rejection of the "Business as Usual" Approach: Strengthening the Indigenous Position in the Softwood Labor Dispute

Interior Alliance's position that it had a right to continue participating in the Softwood Lumber Dispute despite Canada's opposition was strengthened by rulings of Canadian courts rejecting Canada's "business as usual" approach." One such decision, *Haida Nation v. British Columbia,* rendered on February 27, 2002 by the Court of Appeal for British Columbia, further defined Canada's legal obligations towards Indigenous Peoples.[123] In its holding that indigenous interests have to be accommodated and taken into account on a provincial level, the Court inferred that indigenous rights must also be accounted for on both the national and international level.[124]

The decision was especially relevant to the Softwood Lumber

120 *Id.* at 34.

121 Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Political Circumstances Determination, and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 43,186 (2001).

122 For more information on Canada's opposition, see Arthur Manuel and Nicole Schabus, *Aboriginal Peoples v. Companies and Governments: Who are the Real Stewards of the Land and Forests?* 4 (2002), *available at* http://www.iiirm.org/publications/Articles%20Reports%20Papers/NYU%20Trade%20Conference/Schabus-Manuel%20Forestry%20Paper.pdf.

123 [2002] B.C.A.C. Lexis 130 ¶¶ 58, 60.

124 *Id.* ¶ 58.

Dispute and is deserving of brief discussion here. The case dealt with the replacement of tree farm licenses and subsequent transfer of lands to large forestry firms on Haida Gwaii.[125] Haida Gwaii is an island claimed in its totality by the Indigenous Haida people who have lived there for many generations.[126] The Haida, claiming Aboriginal Title over the area, had always opposed any grant of right over their land. For a number of years leading up to the case, the Haida had consistently expressed their objections to the Crown about the rate at which the old-growth forests of Haida Gwaii were being logged, the methods of logging being used, and the environmental effects of the logging on the land, watersheds, fish, and wildlife.[127]

Yet, true to its "business as usual" policy, the Crown and Weyerhauser Company Ltd., a named co-defendant in the *Haida Nation* case, failed to recognize the proprietary interests of the Haida. In its opinion, the Court of Appeal for British Columbia condemned this "business as usual" approach:

> [T]he Crown Provincial and Weyerhaeuser were in breach of an enforceable, legal and equitable duty to consult with the Haida people and to seek an accommodation with them at the time when the processes were under way for a replacement of T.F.L. 39 and Block 6 and for a transfer of T.F.L. 39 from MacMillan Bloedel to Weyerhaeuser in the year 2000. That enforceable legal and equitable duty has continued from then until the present time and will continue until the Haida title and rights are determined by treaty or by a Court of competent jurisdiction. . . .
>
> . . . .
>
> However, I would grant a declaration to the petitioners that the Crown Provincial and Weyerhaeuser have now, and had in 1999 and 2000, and earlier, a legally enforceable duty to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Haida people, on the one hand, and the short term and long term objectives of the Crown and Weyerhaeuser to manage T.F.L. 39 and Block 6 in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand.[128]

In a unanimous decision, the Supreme Court of Canada affirmed the lower court's ruling on a duty to consult with regard to the Crown:

> The government's duty to consult with Aboriginal [P]eoples and accommodate their interests is grounded in the honour of the Crown.

125 *Id.* ¶¶ 20-23
126 *Id.*
127 *Id.*
128 *Haida,* [2002] B.C.A.C. Lexis 130, ¶¶ 58 & 60.

. . . .

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.[129]

The Supreme Court also held that the "honour of the Crown" could not be delegated and the legal responsibility for consultation and accommodation rested with the Crown.[130] This does not mean, however, that third parties can never be liable to Aboriginal Peoples. The court found that "[t]he fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal [P]eoples."[131]

The importance of this ruling to the Interior Nation's position with regard to the Softwood Lumber Dispute is clear. In finding a duty to consult and accommodate Aboriginal Peoples, the Supreme Court supported the argument that the Canadian government's refusal to recognize Aboriginal Title serves as a subsidy for Canadian lumber companies. In other words, the "honour of the Crown," clearly mandates that the Canadian government recognize the proprietary interests of Indigenous Peoples. By failing to do so, the Canadian government is subsidizing corporations, allowing them to bypass their obligation of negotiation and remuneration. In other words, by refusing to acknowledge Aboriginal Title, the Canadian government is subsidizing an entire industry and making it easier for Canadian companies to exploit the lands of Indigenous Peoples.

V. THE WTO: SETTING PRECEDENT ON SUBSIDIZATION

Since the preliminary determination of the U.S. Department of Commerce in the Softwood Lumber Dispute, Canada has brought the Softwood Lumber dispute before the international trade tribunals.[132] Dispute settlement panels have been set up under both the WTO and NAFTA to address Canada's

129 Haida Nation v. British Columbia, [2004] 3 S.C.R. 511, 522, 528.

130 *Id.* at 521.

131 *Id.* at 539.

132 In April 2002, the U.S. Department of Commerce released its final determination on subsidies and on dumping Canadian softwood lumber imports to the United States. The Department imposed a countervailing duty of 19.34% and antidumping margins ranging between 2.26 and 15.83. *See* Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15,545 (2002); Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15,539 (2002). For more information on WTO disputes please visit the WTO Dispute Settlement site at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2002.

complaints.[133] The first panel set up under the WTO addressed the U.S. Department of Commerce's preliminary determination imposing countervailing duties on certain softwood lumber from Canada. A second panel addressing the final countervailing duty determination soon followed.

A. Canada Arguing for Corporate Rights

The cases brought before the WTO by Canada disputing subsidization of softwood lumber have created important precedent as they were the first cases involving natural resource exploitation brought under the WTO's new Dispute Settlement Understanding. In its complaints, the government of Canada argued that the integrated wood-processing companies from Canada had quasi-proprietary interests in the timber growing on public lands in Aboriginal Title territories.[134]

Attempting to move the entire natural resource exploitation sector outside the scope of countervailing duty investigations, Canada argued in favor of timber harvesters:

> Timber harvesters have the right to harvest timber from Crown lands by virtue of their tenures or licenses; they do not pay stumpage charges as remuneration to acquire this right. Rather, a "stumpage charge" is a levy on the exercise of an existing right to harvest timber. Stumpage charges are properly viewed as a form of revenue collection that is the economic equivalent of a tax.[135]

Canada argued that there should not be remuneration for the acquisition of the right to harvest timber.[136] Instead of remuneration for the provision of public timber, it contended that it was merely collecting part of an economic rent, like a tax.[137] Thus, companies that harvested the lumber could acquire limited ownership through the general licensing agreement long before they met all statutory requirements, including the payment of stumpage.[138] In other words, Canada tried to resurrect its already rejected contention that stumpage could not be subject to a countervailing duty because it was not a good.[139] In doing so,

---

133 *See DSB Establishes Panel to Examine Softwood Lumber Dispute*, WTO NEWS, Dec. 5, 2001, *at* http://www.wto.org/english/news_e/news01_e/dsb_5dec01_e.htm; Status Report of Panel Proceedings: Active NAFTA Panel Reviews, *at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?ArticleID=616 (last modified July 25, 2003).

134 *See Report of the Dispute Settlement Panel: United States - Preliminary Determinations With Respect To Certain Softwood Lumber From Canada*, World Trade Organization, Doc. No. WT/DS236/R (2002), ¶¶ 1.1-1.3 [hereinafter *WTO Panel Report*], *available at* http://docsonline.wto.org.

135 *Id.* ¶ 4.117.

136 *Id.* ¶¶ 4.116-4.122.

137 *Id.*

138 *Id.*

139 To reiterate, international trade tribunals have consistently found that stumpage

the Canadian government was attempting to outmaneuver the imposition of a countervailing duty and the application of the WTO Subsidies and Countervailing Measures Agreement.[140]

B. Indigenous Peoples Make Their Case

In opposition to Canada's arguments that integrated wood processing companies had quasi-proprietary interests in the timber on Aboriginal Title lands, the Interior Alliance argued in its amicus curiae brief that there could be no transfer of ownership until they had given their consent and received fair remuneration.[141] Again, the Indigenous Peoples of Canada were forced to make their claim for Aboriginal Title and rights, despite the fact that the Canadian Constitution and Supreme Court had already recognized these rights. One of the reasons why the Interior Alliance chose to once again make its case was the pending reality that, if Canada's arguments were accepted by the WTO, it would have opened the way for free corporate access to natural resources within the traditional territories of Indigenous Peoples.[142] Therefore, the Interior Alliance felt it needed to submit its argument that the Canadian government's refusal to recognize Aboriginal Title constituted a subsidy.

Canada has always argued for a restrictive interpretation of terms like "direct subsidies," arguing that they could not be payments in kind because they were not a financial

is a good. In three prior countervailing duty investigations covering softwood lumber products from Canada, the U.S. Department of Commerce determined that stumpage programs involve the provision of a good. *See* Final Negative Countervailing Duty Determinations: Certain Softwood Lumber Products from Canada , 48 Fed. Reg. 24,159, 24,167 (May 31, 1983); Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada , 51 Fed. Reg. 37,453, 37,457 (Oct. 22, 1986); Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada , 57 Fed. Reg. 22,570, (May 28, 1992). In 1992, a GATT panel rejected Canada's contention that stumpage cannot be countervailing because it is not a good. *See* United States –Measures Affecting Imports of Softwood Lumber from Canada, GATT B.I.S.D., 40th Supp., (1993), at 358, ¶ 346-47 (Feb. 19, 1993), *available at* http://www.sice.oas.org/dispute/gatt/91lumber.asp.

140 For more information on the WTO Subsidies and Countervailing Measures Agreement see http://www.wto.org/english/tratop_e/scm_e/scm_e.htm.

141 *See* Brief of Amici Curiae Interior Alliance Indigenous Nations, WTO Panel on US – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada (No. DS-236) (2002) (on file with author) [hereinafter *Interior Alliance Amicus Brief*].

142 If Canada's arguments had been accepted by the WTO, Aboriginal proprietary interests would have gotten lost somewhere in the process of resource distribution and would not form part of any economic equation or remuneration scheme. Under the guise that they were simply collecting economic rent, the provinces could, in the future, have continued to keep Indigenous Peoples out of all remuneration schemes. At present, Aboriginal Peoples are not remunerated for their ownership and have not passed on their ownership in the timber to the governments or companies. Therefore, those entities have not acquired full ownership at any point in the licensing, harvesting and marketing processes.

contribution.[143] Other countries, like the United States, have argued the opposite: payments in kind can be the basis for a direct subsidy.[144] The WTO appellate body, in previous cases, has also spoken on the issue, ruling against Canada and its restrictive interpretation that payments must be in the form of money: "[w]e, therefore, agree with the Panel that the ordinary meaning of the word 'payments' in Article 9.1(c) encompasses 'payments' made in forms other than money, including revenue foregone."[145] Accordingly, it is not necessary that the cost for the reduced price of an input be born by the government.[146] It is deemed sufficient that such a transfer of resources takes place "by virtue of governmental action."[147]

The past position of the WTO applied perfectly to the issue of an Aboriginal Title subsidy. The argument of the Indigenous Peoples of Canada was that the federal government's Comprehensive Claims Policy was a subsidy.[148] That policy, along with its "business as usual" approach, constituted government actions that allowed corporations to exploit natural resources in the traditional territories of Indigenous Peoples without remuneration.[149] In other words, the policy of the Canadian government conferred a benefit on Canadian integrated wood processing corporations, amounting to what many consider a subsidy.[150]

C. Indigenous Peoples' Precedent: Amicus Brief Accepted

The Interior Alliance's submission to the WTO presented the first ever substantive, rights-based Indigenous submission to an international trade tribunal. In making its finding, the WTO panel at the outset commented on its receipt of the amicus brief:

> As a preliminary matter, we note that in the course of these proceedings, we decided to accept for consideration one unsolicited

143 *See WTO Panel Report*, *supra* note 134, ¶¶ 4.26-4.29.

144 *See id.* ¶¶ 4.93-4.96.

145 *Report of the Appellate Body: Canada - Measures Affecting The Importation Of Milk And The Exportation Of Dairy Products*, World Trade Organization, Doc. No. WT/DS103/AB/R (1999), ¶ 112, *available at* http://docsonline.wto.org.

146 *Id.* ¶ 115.

147 *Id.* ¶ 116.

148 *Interior Alliance Amicus Brief, supra* note 141.

149 *Id.*

150 Further supporting the argument for the finding of a subsidy was the reality that a sale of lumber resources by the province of British Columbia without accounting for the revenue due to Indigenous Peoples directly contributed to the artificial undervaluing of the resource. *Interior Alliance Amicus Brief, supra* note 141. The amicus curiae brief also noted that the province of British Columbia had repeatedly refused to discuss revenue sharing with the Interior Alliance and the federal government had refused to change its Comprehensive Claims Policy that provides the Aboriginal Title subsidy to corporations. *Id.*

> *amicus curiae* brief from a Canadian non-governmental organization, the Interior Alliance. This brief was submitted to us prior to the first substantive meeting of the Panel with the parties and the parties and third parties were given an opportunity to comment on this amicus curiae brief. After this meeting, we received three additional unsolicited amicus curiae briefs. For reasons relating to the timing of these submissions, we decided not to accept any of these later briefs.[151]

The official acceptance of the first ever substantive submission made by Indigenous Peoples to a WTO panel set an important procedural precedent. Prior to its acceptance, the WTO had rejected a number of amicus curiae briefs. The acceptance of the amicus curiae brief was hailed as a great breakthrough by non-governmental actors. While the ability to provide additional legal and substantive information on behalf of the Indigenous populations of Canada was important in and of itself, perhaps one of the most important results was a procedural one. In accepting the amicus brief, the WTO officially circulated the brief to all parties and third parties for their comments. By inviting comment on the brief, the WTO has taken a step towards opening the dialogue between nations and Indigenous Peoples, forcing countries who are parties to a WTO action to acknowledge and respond to the Indigenous position.[152]

Of the five parties in the case, only two countries objected to the acceptance of the brief. India objected on the grounds that the acceptance of amicus curiae submissions in WTO panel proceedings could open the door to industry. Its fear was that corporations, who often have more resources than governments of developing countries, could use the amicus curiae process to undermine the arguments and position of sovereign nations.[153] Not surprisingly, Canada also opposed the filing of the amicus curiae brief, contradicting its earlier position that amicus curiae briefs, usually filed in support of the government's position, should be considered. In the end, only the United States, unopposed to the submission of the amicus curiae brief, actually

---

151 *WTO Panel Report*, *supra* note 134, ¶ 7.2.

152 Another procedural element determined by the WTO's acceptance of the brief was the timeline for third party involvement. Following the resolution of this dispute, Indigenous populations now know that, in WTO proceedings, third parties are only actively involved until the end of the first hearing by the panel or upon the panel's specific request. Any briefs received after the first panel hearing (such as the three additional briefs submitted in this case) will not be accepted.

153 Aboriginal Peoples involved in proceedings before the WTO have since made it clear that they would not bring industry arguments, and that even if such arguments where brought by an Indigenous group arguing commercial-industrial interests over Aboriginal interests, they should be rejected. This was the case in the Softwood Lumber Dispute where the Meadow Lake Tribal Council filed a submission relying on industry arguments and the submission was rejected.

acknowledged the substantive argument posed in the brief in its second written submission to the panel.[154]

The acceptance of the amicus curiae brief did not end the involvement of the Aboriginal Peoples in the WTO proceedings. Unfortunately, the often-criticized lack of transparency of the WTO, hurt Aboriginal participation and involvement in the proceedings. For example, notification of the acceptance of their brief was only sent to the State parties, not the Aboriginal submitters. In addition, throughout the proceedings, Aboriginal Peoples were forced to rely heavily on discussions and information being passed on by other parties, especially third parties.[155] Despite some difficulty, the involvement of Aboriginal Peoples in the WTO proceedings was historic in and of itself. Almost more important was the ensuing communications that resulted between Aboriginal Peoples and state parties. For the first time, state parties had to conceptualize Aboriginal rights on an international level, contributing to an important learning process and a growing international awareness of Indigenous proprietary interests.

The general outcome of the WTO's investigation was also encouraging for Aboriginal Peoples. In general, Aboriginal Peoples support the finding of the WTO panel:

> In sum, and in the context of Article 1.1(a)(1)(iii) SCM Agreement, we are of the view that where a government allows the exercise of harvesting rights, it is providing standing timber to the harvesting companies. From the perspective of the harvesting company the situation is clear: most forest land is Crown land, and if the company wants to cut the trees for processing or sale, it will need to enter into a stumpage contract with the provincial government, under which it will have to take on a number of obligations in addition to paying a stumpage fee for the trees actually harvested.[156]

In other words, the WTO found that Canada was providing a good through its present stumpage system. In so finding, the WTO also found that Canada's providing of this was a potential subsidy against which countervailing duties could be levied in measure of the benefit incurred by the industry.[157]

VI. CONCLUSION

It must be recognized, in light of the WTO's holding, that Indigenous Peoples believe they hold collective proprietary

154 *WTO Panel Report*, *supra* note 134, ¶ 4.252-4.297.

155 Even states that usually support high transparency, such as the member states of the European Union, often feel restricted by the rules and procedures of the WTO.

156 *WTO Panel Report*, *supra* note 134, ¶ 7.18.

157 *Id.* ¶¶ 7.20-7.30.

interests in their traditional territories. In other words, it is the position of the Indigenous Peoples of Canada that Aboriginal Title coexists with, and is not subsumed by, the Title of the Crown. Aboriginal Peoples should therefore be part of the decision making process over their land and resources, and companies should also be required to remunerate Indigenous Peoples' proprietary interests.

Canada's arguments against the recognition of Aboriginal Title before the WTO and its own Courts illustrates just how many provinces try to undermine the proprietary interests of Aboriginal Peoples by strengthening commercial and industrial interests. The provinces provide a benefit to companies in the form of a good by facilitating the taking of title from Aboriginal lands without requiring the consent of and remuneration to Indigenous Peoples. In other words, the federal government provides a subsidy through government action enshrined in its policy of the non-recognition of Aboriginal Title, exonerating companies from having to remunerate Indigenous proprietary interests.

The first submissions by Aboriginal Nations from the Interior of British Columbia to international trade tribunals, along with the acceptance of their amicus curiae brief by the WTO panel on the subsidization of softwood lumber, were important first steps in recognizing Aboriginal Title and resource rights. These first substantive Indigenous submissions have opened the door for the debate of Indigenous rights at the international level and for future Indigenous interventions in trade disputes that impact their rights.

Since the WTO investigation, the Interior Alliance nations were joined by a number of Aboriginal Nations from across Canada. The platform for Indigenous rights has expanded to both a national and international level and is now known as the Indigenous Network on Economies and Trade (INET).[158] INET is open to Indigenous nations that want to assert and protect their rights to their lands and resources. As a platform that focuses on the macro-economic dimension of Indigenous rights, INET is working towards the fair and equitable recognition of Indigenous proprietary interests in the global economy. Indigenous Peoples must continue to assert their rights both within their respective countries and on an international level in order to counter current trends calling for increased corporate control. By involving themselves on an international front, Indigenous

158 For more information please visit http://www.indigenousnet.org/ or contact INET at inet@earthlink.net.

Peoples are hoping to not only win recognition of their proprietary rights, but also be active participants in trade negotiations impacting their lands and resources.

THE WAL-MART EFFECT: THE WORLD TRADE ORGANIZATION AND THE RACE TO THE BOTTOM

Ellen Israel Rosen[*]

In the current global free-trade regime, there is no doubt that Wal-Mart Stores, Inc. is the most significant corporate player. As the world's largest retailer, Wal-Mart now sets the rules of competition as it vies with other multinational retail corporations over control of the world's consumer goods market.[1]

However, bigger is not always better, and Wal-Mart's method of conducting business is not good for America, nor is it good for developing nations. Rather, it is likely that Wal-Mart's trade choices will actually lead to further extremes of wealth and poverty wherever the company does business. The winners will be Wal-Mart's executives and large shareholders, and its corporate competitors that are able to remain in business. The losers will be those individuals, mainly women, who are employed in export processing jobs, as well as hourly workers, such as salesclerks and cashiers, working in the U.S. retail industry.

Wal-Mart's much studied and hotly debated business model has been the foundation for a newly liberalized type of global free enterprise, e.g., "a template of 21st century capitalism."[2] In order to truly grasp Wal-Mart's effect on the world's economy, it is critical to explore the strategies the company has used to dominate the marketplace. In effect, the business tactics Wal-Mart has pioneered can be used as a prism: a lens through which one can view the reemergence of "a capitalism that increasingly resembles a capitalism of 100 years ago. . . . It combines the

[*] Professor Emeritus of Sociology, Nichols College. This article contains and expands views expressed in previous works by the author: ELLEN ISRAEL ROSEN, BITTER CHOICES : BLUE-COLLAR WOMEN IN AND OUT OF WORK (1990); ELLEN ISRAEL ROSEN, MAKING SWEATSHOPS: THE GLOBALIZATION OF THE U.S. APPAREL INDUSTRY (2002)..

1 Andy Rowell, *Welcome to Wal-World Wal-Mart's Inexhaustible March to Conquer the Globe,* MULTINATIONAL MONITOR, Oct. 2003, at 13.

2 Steven Greenhouse, *Wal-Mart, a Nation Unto Itself,* N.Y. TIMES, Apr. 17, 2004, at B7 (quoting Simon Head, author of "The New Ruthless Economy," on Wal-Mart's pay scale and labor practices).

extremely dynamic use of technology with a very authoritarian and ruthless managerial culture."[3] Wal-Mart's sheer size ensures that it is a force to be reckoned with in global retailing,[4] particularly as it continues to grow.[5]

However, Wal-Mart's impact on the economy in general cannot be understated. When McKinsey Global Institute analyzed the increase in labor productivity in the late 1990s, it was surprised to learn that "the primary source of the productivity gains of 1995 to 1999 was . . . . managerial and technological innovations in only six highly competitive industries" including retail trade.[6] In fact, one study showed that in 2002, Wal-Mart saved its customers twenty billion dollars, although after factoring in the myriad of "price cuts other retailers must make to compete," the total savings to consumers is actually closer to $100 billion.[7] It is "no wonder that economists refer to a broad 'Wal-Mart effect' that has suppressed inflation and rippled productivity gains through the economy year after year."[8]

Business analysts explain Wal-Mart's success as a function of four major factors: a big box format,[9] every day low pricing, efficiency in logistics,[10] and competitive intensity.[11] Business

3 *Id.*

4 Wal-Mart "is three times the size of the No. 2 retailer, France's Carrefour. Every week, 138 million shoppers visit Wal-Mart's 4,750 stores; last year, 82% of American households made at least one purchase at Wal-Mart." Anthony Bianco & Wendy Zellner, *Is Wal-Mart Too Powerful?*, BUSINESSWEEK, Oct. 6, 2003, at 101, 102. Wal-Mart's 2002 sales reached $259 billion placing it at the top of the Fortune 500 list for the third straight year and surpassing well-known companies such as Exxon Mobil, General Motors, Ford and General Electric. *Wal-Mart Tops Fortune 500 List*, Mar. 21, 2004, *available at* http://www.msnbc.msn.com/id/4573885/print/1/1displaymode/1098. In addition, Wal-Mart's more than a quarter of a trillion dollars in sales were four times greater than Home Depot and five times more than Target, Wal-Mart's closest competitors in discount retailing. *See* THE HOME DEPOT, INC., 2003 ANNUAL REPORT 1 (2004) (showing 2003 fiscal sales were $64.8 billion)*;* TARGET CORPORATION, 2003 ANNUAL REPORT i (2004) (showing total revenues for 2003 were $48.163 billion).

5 Wal-Mart is the largest private employer in the United States. Bianco & Zellner, *supra* note 4, at 102. The retailer employs 1.4 million people, which makes it 56 times bigger than the average Fortune 500 company. David Olive, *Hitting The Wall,* THE TORONTO STAR, Aug. 29, 2004, at E01. As one researcher stated, "[t]here's nothing like Wal-Mart . . . They are so much bigger than any retailer has ever been that it's not possible to compare." Bianco & Zellner, *supra* note 4, at 102 (quoting Ira Kalish, Global Director of Deloitte Research). Also, Wal-Mart plans to hire 800,000 additional workers by 2008. *Id.* at 106.

6 Virginia Postrel, *Lessons in Keeping Business Humming, Courtesy of Wal-Mart U.*, N.Y. TIMES, Feb. 28, 2002, at C2.

7 Bianco and Zellner, *supra* note 4.

8 *Id.* at 102.

9 The "big box format" is the principle of how "[l]arger stores increase sales per square foot by encouraging customers to buy additional goods, often on impulse. Big-box stores also let retailers spread fixed labor costs like store management and cleaning crews across more sales." Postrel, *supra* note 6.

10 One of Wal-Mart's greatest achievement is its use and development of IT

schools throughout the nation have begun using the Wal-Mart model as a real-world way to instruct students what – and what not – to do in terms of business "strategy, pricing, the behavior of competitors, the decision making of suppliers, cost structure and promotion."[12] Even the prestigious Harvard Business School "sells Wal-Mart case studies to business schools around the world."[13] Wal-Mart creates the perfect paradigm through which students can learn about the costs and efficiencies of the new WTO-based economy.

However, although Wal-Mart topped the Fortune 500 List of Most Admired Companies in 2003 and 2004,[14] its "seemingly simple and virtuous business model is fraught with complications and perverse consequences."[15] In America, low wages, anti-union tendencies and lawsuits for unpaid overtime and sex-discrimination are just some of the issues haunting this corporate giant. In addition, Wal-Mart's use of factories abroad has raised serious concerns about low-wage employees in poverty-stricken countries working in sweatshop conditions with no feasible alternatives. In effect, Wal-Mart's unrelenting push to succeed and unreasonable demands on its suppliers have

applications:

> It is widely regarded as the leader in the use of IT in retail and pioneered a number of IT applications [including], for example:
>
> > Early adoption of computers to track inventory in distribution centers (1969)
> >
> > Use of computer terminals in stores to facilitate communication (1977)
> >
> > Scanning using UPC codes (1980)
> >
> > Groundbreaking use of electronic data interchange (EDI) (1985)
> >
> > Satellite communications network (1987)
> >
> > Use of radio frequency (RF) guns (late 1980s)
> >
> > Expansion of the EDI system to include an extranet, which became an early form of eSCM (beginning in 1991)
> >
> > Development of 'Retail Link,' a micro-merchandising and supply chain management tool (beginning in 1991)
> >
> > As with its managerial innovations, these innovative uses of IT improved Wal-Mart's productivity (both capital and labor) and cost position. They also resulted in continued market share gain due to their contribution to lower prices, lower out of stocks, and more effective merchandising.

MCKINSEY & CO., U.S. PRODUCTIVITY GROWTH, 1995-2000 1, 10 (Oct. 2001), *available at* http://www.mckinsey.com/mgi/reports/pdfs/productivity/Retail.pdf.

11 *Id*. at 11.

12 Constance L. Hays, *The Wal-Mart Way Becomes Topic A in Business Schools*, N.Y. TIMES, Jul. 27, 2003, § 3 (Money and Business), at 10.

13 *Id*.

14 "Dell Inc. was No. 1 on *Fortune* magazine's annual list of the nation's most admired companies, displacing Wal-Mart, which has held the top spot for the past two years and fell to No. 4." *Dell Beats Wal-Mart as "Most Admired,"* CNN Money, Feb. 22. 2005, *at* http://money.cnn.com/2005/02/21/news/fortune500/most_admired/.

15 Bianco and Zellner, *supra* note 4, at 102.

created a "race to the bottom," where the lowest production price wins, regardless of the human cost.

This article seeks to examine the impact of Wal-Mart on the global retailing industry. Part I will study the winners and losers in the new global economy resulting from the WTO's quota elimination. Part II will discuss Wal-Mart's expansion into the international market, and, in particular, into China. Part III will look at the negative aspects of Wal-Mart's business strategy, which is leading to harsher social and economic stratification, particularly in poor countries. Part IV takes a closer look at the effect Wal-Mart is having on its female workers in China and America. Finally, Part V will conclude with a short summary and opinion on where Wal-Mart is headed.

I. THE WORLD TRADE ORGANIZATION'S QUOTA ELIMINATION: THE WINNERS AND THE LOSERS

There is no question that the global production of garments and textiles is big business. Currently, there are approximately 40 million people around the world who are working in the garment and textile industries, which accounts for 14 percent of global employment.[16] The majority of "garment workers supplying the U.S. market – upwards of 80 percent – are young women in the developing world, 16 to 25 years old, who are already forced to work long hours for below-subsistence wages under conditions which violate internationally recognized human and worker rights standards."[17] Unbelievably, due to a change in export policies, the lives of these women have changed dramatically for the worse.

Since the 1970s, "all textile and apparel trade worldwide has been governed by a system of quotas which were reached through bi-lateral negotiations under what was known as the multi-fiber agreement, or MFA."[18] The underlying goal of these quotas was to guarantee "developing countries access to the major U.S. and European markets. For example, in 2003 Bangladesh knew it had enough quota to export approximately 900 million garments to the U.S., in effect guaranteeing many of the country's 1.8 million apparel jobs."[19] However, the World Trade Organization (WTO) chose to eliminate all textile and apparel quotas as of

16 NATIONAL LABOR COMMITTEE, ELIMINATION OF TEXTILE AND APPAREL QUOTAS IN 2005 WILL SHOCK THE DEVELOPING WORLD 1 (Sept. 2004), *available at* http://www.nlcnet.org/ news/publicfiles/upload.quotas2005_en.pdf.

17 *Id*.

18 *Id*.

19 *Id*.

January 1, 2005.[20]

It is likely that the inevitable efforts by retailers, including Wal-Mart, to take advantage of the new no-quota rule means that clothing production will move to countries that can produce the largest volume of apparel for the lowest cost.[21] The U.S. Association of Importers of Textile and Apparel anticipates that its members, some of the largest retailers in the world, will "react to the WTO's lifting of quotas . . . by slashing the number of countries they source production in from 50 today to just five or six countries by 2007."[22] This will ensure that retailers like Wal-Mart can purchase their desired goods for the lowest production price without regard for the standards under which it was produced. As a result, countries such as Costa Rica, Haiti, Jamaica, South Africa, Mauritius, Malaysia, Indonesia, Philippines, Kenya, Lesotho, Madagascar, Bangladesh, Cambodia, and, arguably, Mexico, are likely to be huge losers in this race to the bottom.[23]

For example, Bangladesh's "economy has improved significantly during the last decade, driven primarily by the garment sector, which brought in US$6 billion in export earnings in 2001-2002."[24] The country's garment production industry currently employs nearly two million people, eighty percent of whom are women, "and generates almost $2 billion worth of economic activity in areas such as banking, transport, insurance, packaging, real estate, utility services, and consumer goods."[25] However, the United Nations estimates that upward of one million garment workers in Bangladesh will lose their jobs as a direct result of the WTO's quota elimination.[26] Simply put, like many other poor countries, Bangladesh cannot compete with the state-of-the-art logistics of quota-elimination beneficiary China:

---

20 *Id*.

21 *See* Jenny Strasburg, *American Shoppers Could Find Wider Selections; Flood of China-made Garments Means Job Losses for Millions in Other Countries,* S.F. CHRON., Jan. 18, 2005, at A7 (explaining that the end of a WTO quota system will cause a shift in production to China, a country known for producing low-cost goods).

22 NATIONAL LABOR COMMITTEE, *supra* note 16, at 2. "Gary Ross, Vice President of Worldwide Operations for Liz Claiborne asked, rhetorically: 'Would we be in 35 countries if quotas didn't exist?' Answering his own question, he said, 'We'd probably be in as few as ten or fifteen countries.'" *Id*.

23 *See id.* at 6; UNITED NATIONS DEVELOPMENT PROGRAMME, LOOMING TRADE CURBS PUT BANGLADESH JOBS AT RISK (Jun. 18, 2003) [hereinafter *UNDP*], *available at* http://www.undp.org/dpa/frontpagearchive/2003/june/18june03/; Peter S. Goodman, *Pinning Hope on Fair Labor Standards,* WASH. POST, Nov. 17, 2004, at A19.

24 *UNDP*, *supra* note 23, at 1.

25 *Id*.

26 *Id*. *But see* Keith Bradsher, *Bangladesh Survives to Export Again,* N.Y. TIMES, Dec. 14, 2004, at C1. (quoting Wal-Mart's vice president for global purchasing who stated, "Bangladesh is very competitive because the labor cost in Bangladesh is only half of what China is, and maybe less than that").

"[L]abor for a shirt made in Bangladesh runs just $1.52, compared with $2.28 in China, but after factoring in materials and transportation, the total cost of the Chinese shirt is $11.15 – almost a dollar cheaper [than can be produced in Bangladesh]."[27]

However, Bangladesh is not alone. Cambodia is also prone to significant post-quota job loss. Five years ago, the country signed a trade deal with the United States where Cambodia's "[f]actories . . . gained duty-free access to the U.S. market in exchange for submitting to inspections from the International Labour Organization, a watchdog group. The volume of clothing Cambodia could ship was pegged directly to improvements in labor conditions."[28] As a result, Cambodia's garment industry truly blossomed and its workers saw positive changes in the way they were treated.

However, along with textile quotas, Cambodia's arrangement with the United States ended in January. Thus, a country whose garment production comprises 98 percent of its total exports, and which ships two-thirds of those garments to the United States, will now be forced to pay customs duties, which could have a devastating effect on its economy.[29] Currently, approximately 230,000 of Cambodia's thirteen million people work in the garment industry, and many of them may find their jobs eliminated in the post-quota environment.[30] Women, who comprise the majority of factory workers, have an even greater concern when faced with the possibility of job loss: "If the garment factories [are forced to fire workers,] . . . women from rural districts can fall back on field work. But for urban women, the only employment alternative may be as a bar hostess or prostitute."[31]

Some argue, though, that the biggest loser could be Mexico. In 1965, the Mexican government created the maquiladora program,[32] which boasts a low cost and trainable labor force, close proximity to the U.S., and a "[p]redominately nonunion work force."[33] After the implementation of the North American

27 George Wehrfritz & Alexandra A. Seno, *Succeeding at Sewing*, NEWSWEEK, Jan. 10, 2005, at 38.

28 Goodman, *supra* note 23.

29 *Id.*

30 *Id.*

31 James Brooke, *A Year of Worry for Cambodia's Garment Makers,* N.Y. TIMES, Jan. 24, 2004, at C1.

32 A maquiladora "[a]llows a foreign (non-Mexican) individual or firm to establish wholly-owned operations in Mexico for the purpose of manufacturing products for exportation." CITY OF EL PASO, ECONOMIC OVERVIEW- EL PASO/CD. JUAREZ BORDER REGION – MAQUILADORA PROGRAM 1, *at* http://www.elpasotexas.gov/econdev/maquiladora.asp (last visited Mar. 1, 2005).

33 *Id.*

Free Trade Agreement (NAFTA) in 1994, "few anticipated the massive rush to the region that followed the December, 1994, peso crash, when Mexican wages plunged 40% in dollar terms."[34] As a result, in 2001, the maquiladora "industry sold $77 billion of goods abroad . . . almost half Mexico's total exports."[35]

Retailers were among those who originally found the low "wage, rent, and electricity costs" extremely attractive, as they amounted to only one-fourth of that charged in the United States.[36] Recently, however, many factories have begun to leave Mexico, many of them heading for China.[37] There are two major reasons for this phenomenon. First, Mexican maquiladora wages are between $2 and $2.50 per hour, which is a rate much higher than in some other countries, including China.[38] Second, "[f]or years, a cheap peso had masked inefficiencies in Mexican manufacturing, including high employee turnover and unwieldy logistics. But since the currency began appreciating in 1999, costs have risen some 30 percent."[39] As a result, the maquiladora industry lost 287,000 jobs – a twenty-one percent drop – between October 2000 and March 2002.[40]

Thus, the quota elimination has some analysts wondering whether Mexico will be able to compete in the new global economy. One recent study opines that, in spite of its higher wages, Mexico has a distinct advantage over other countries in its proximity to the United States,[41] because "Wal-Mart Stores Inc. and other U.S. chains prefer North and Central American and Caribbean suppliers who are closer to home for products like jeans and T-shirts that must be quickly replaced on store shelves as stocks run out."[42] However, even such optimists point out that in order "[t]o stay competitive [in the new economic environment], Mexico will need to develop its strengths."[43]

Despite the grim outlook for many of the world's poorest countries, other nations – like China and India – are expected to

34 Geri Smith & Elisabeth Malkin, *The Border,* BUSINESSWEEK, May 12, 1997, at 64, 65.

35 Elisabeth Malkin, *Manufacturing Jobs Are Exiting Mexico,* N.Y. TIMES, Nov. 5, 2002, at W1.

36 Smith & Malkin, *supra* note 34, at 65.

37 Malkin, *supra* note 35.

38 *Id*.

39 *Id*.

40 *Id*.

41 Andy Mukherjee, *Wal-Mart and Distance Can Save U.S. Textiles*, Dec. 21, 2004, *available at* http://www.tradealert.us/news_item.asp?NID=1344203 (citing a study by the Harvard Center for Textile and Apparel Research).

42 *Id*.

43 Malkin, *supra* note 35.

benefit greatly from the WTO's quota elimination.[44] "Within their vast borders, the two countries – the most populous in the world – can offer the low wages of poor nations along with the efficiencies of modern economies."[45] As one writer points out, "[t]he advantages are perhaps most evident in the textile and apparel industry, which requires large pools of unskilled laborers but also depends on fast delivery and the ability to change production specs on a dime."[46] In particular, China is seen as the biggest threat to the well being of poorer countries in the textile and apparel industry because it "sets the standard for efficient, low-cost production."[47] Whereas the pre-2005 quota restrictions "protected millions of jobs in countries that lacked China's huge low-cost workforce, manufacturing know-how, willing investors and efficiencies of scale[,]"[48] now that big retailers, such as Wal-Mart, "aren't bound by import quotas, it's far easier to funnel orders to the factories that produce the most, the fastest and the cheapest."[49]

Currently, the WTO estimates that "China produces about 17 percent of all apparel and textiles [worldwide]. . . . Within three years, the country is expected to own 50 percent of the $400-billion-a-year market."[50] Wal-Mart has played a significant role in China's hold on the industry. In fact, in pre-quota 2003, Wal-Mart alone was responsible for nearly 10 percent of China's total exports to the United States.[51] However, one of the major concerns surrounding the WTO's quota elimination is that "huge multinationals such as Wal-Mart . . . can make or break entire economies with their orders."[52] For example, whereas Wal-Mart currently "buys as much as one-third of the clothes made in Bangladesh," the corporation's predictable attempt to capitalize on China's low production costs will result in job loss or, at a minimum, a further lessening of factory labor conditions.[53]

---

44 Tyler Marshall et al., *A World Unravels: Clothes Will Cost Less, but Some Nations Pay*, L.A. TIMES, Jan. 16, 2005, at A1.

45 *Id*.

46 *Id*.

47 Strasburg, *supra* note 21.

48 *Id*.

49 Marshall, *supra* note 44.

50 Strasburg, *supra* note 21.

51 *Id*. In 2003, Wal-Mart exported $15 billion from China. *Id*.

52 Marshall, *supra* note 44.

53 *Id*.

> Already, gains in wage levels and working conditions are starting to unravel. In Lesotho, the government has agreed to give apparel and textile factory owners an exemption from paying a mandatory cost-of-living increase. Salvadoran business leaders want to reduce the nation's $5.04-a-day maquiladora minimum wage in rural areas to stay competitive with China and its lower-cost neighbors in Central America.

For this reason, "[m]any trade specialists see the post-quota era as every bit as potentially destructive as the unrestrained capitalism of the late 19th and early 20th centuries that spawned sweatshop conditions and price-fixing monopolies."[54] Like China, India is also expected to be successful in this new trade regime, and will likely become the second biggest winner, increasing "its share of the global textile business from 3% to 15% by 2010."[55] Currently, the country's garment manufacturers already export to large U.S. retailers, such as Wal-Mart, Gap and Target, who collectively import approximately $1.3 billion in textiles per year from India.[56] Although China has approximately five times the volume of textile exports as India,[57] the latter is already benefiting from the quota elimination. In January 2005, "India's overall exports were 33 per cent up on the previous January, driven mostly by Indian garment makers making the most of the abolition of quota ceilings."[58]

Nevertheless, Indian manufacturers are concerned about their competitive position vis-à-vis China, whose labor productivity in textiles and apparel leads the industry; for example, to produce the same cotton shirt, it takes 22.2 minutes in India and only 12.5 minutes in China.[59] In addition, India has a "rusting infrastructure" in comparison to China, which has "impressively modern ports, highways and power supply."[60] However, as one of India's largest clothing exporters states: "[India has] skills where the Chinese are weak: high quality design and software, the ability to interact with western customers in English and a managerial talent pool which has a very flexible and cosmopolitan mindset."[61]

One thing is certain – in the post-quota environment, low wages will continue to be a necessary condition for success in exporting textiles and apparel to the U.S. However, high

> Halfway around the world in the Philippines, a panel of business and government officials has proposed exempting garment makers from paying the minimum daily wage, which ranges from about $3.75 to $5.

Id.

54 *Id*.

55 Geeta Pandey, *India Awaits Textiles Boom*, Dec. 22, 2004, *available at* http://news.bbc.co.uk/1/hi/world/south_asia/4105973.stm.

56 Khozem Merchant, *India Looks to Make a Stitch in Time*, FIN. TIMES, Jan. 6, 2005, at 20.

57 Edward Luce & Richard McGregor, *India's Prowess in Services and China's Manufacturing Strength Are Complementary but Both Countries Can Also Grow in Sectors Where They Compete Directly*, FIN. TIMES, Feb. 24, 2005, at 17.

58 *Id*.

59 David J. Lynch, *As Quotas End, China Stands Ready to be Clothing Giant*, USA TODAY, Dec. 22, 2004, at 1B.

60 Luce & McGregor, *supra* note 57.

61 *Id*. (quoting Dinesh Hinduja, chief executive of Gokal Das Exports).

productivity and low-cost merchandise will increasingly depend on logistics and technology, which is extremely disadvantageous for the world's poorest countries.

II. WAL-MART AND CHINA

In 1991, after two decades of dramatic growth in the U.S., Wal-Mart executives began to look toward the future, recognizing that international sales would someday be needed to sustain the company when domestic profits slow down.[62] As one Wal-Mart executive noted: "[t]he United States is 37 percent of the world's economy, which leaves 63 percent for international. If we do our job, international operations should someday be twice as large as the United States."[63] With that goal in mind, Wal-Mart began its foray into the international market. Between 1991 and 1995, the company opened its first non-U.S. stores in "strategic countries in the Americas," including Mexico, Puerto Rico, Canada, Argentina and Brazil.[64] The company's success in those countries encouraged further global growth, and as of January 2005, Wal-Mart owned 1,355 discount stores, Supercenters, Sam's Clubs, and neighborhood markets abroad.[65]

Then, in 1996, Wal-Mart opened its first Chinese store outlet in Shenzhen.[66] However, Wal-Mart's plan was about more than just *selling* goods to China – it had already begun to buy from them, too. In the 1980s, as China began to focus more on capitalistic ideals, it already had the benefit of more than 30 years of industrial development. Thus, though the country still had a collectivist state-run economy, it was in a position to compete with the West and learn the principles of capitalist growth. In addition, unlike poorer countries, which were encumbered with structural adjustment programs, China adopted export processing, in part, as a way to develop its free market economy. Accordingly, by the 1990s, the Chinese government was strongly encouraging foreign investment, which, by 2003, totaled approximately $52 billion.[67]

Over the past decade, the symbiotic relationship between Wal-Mart and China has become one of the most significant in the retail industry, and certainly the best example of Wal-Mart's foreign business dealings. Despite its famous, "Buy American,"

62 Rowell, *supra* note 1, at 13.
63 *Id*.
64 *Id*.
65 WAL-MART STORES, INC., 2004 ANNUAL REPORT 55 (2005).
66 Rowell, *supra* note 1.
67 Marshall, *supra* note 44.

slogan,[68] Wal-Mart is "the single largest buyer of Chinese products (if Wal-Mart were a nation, it would be China's eighth-largest export destination)."[69] In addition, China plays a critical role in Wal-Mart's operations – the country currently produces more than 70 percent of merchandise sold in Wal-Mart's stores.[70] Wal-Mart's preference for China stems from the country's rare combination of production factors, e.g. low wage labor and increasingly advanced technology, which enable its manufacturers to make quality goods at an extremely low cost – something few other countries, including the United States, can claim.

Wal-Mart has ambitious plans for a long-range course of development in China. Most recently the company, along with Singapore's CapitaLand, invested $120 million for the purchase of six new shopping malls where Wal-Mart will be the largest tenant.[71] In addition, CapitaLand also has an option to acquire 14 more malls with Wal-Mart outlets, and Wal-Mart plans to open between 20 and 30 new Supercenters in the next four years.[72] Wal-Mart has also joined with the Chinese-owned CITIC Pacific and is expected to open hundreds of stores in China over the next five years.[73] Significantly, Wal-Mart's venture into China will likely be hastened by a recent change in China's foreign retail investment policy. As of December 11, 2004, foreign firms will be able to invest without forming joint ventures with Chinese partners.[74] Thus, companies like Wal-Mart will no longer be limited by location – they will be able to build production facilities anywhere in the country.

Wal-Mart is certainly not alone in its enthusiasm for China. In fact, in the past ten years, many of the world's retailers have

68 Interview with Jon Lehman, former Wal-Mart manager (June 4, 2004 and Oct. 7, 2004), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/walmart/interviews/lehman.html.

69 Rowell, *supra* note 1.

70 Jiang Jingjing, *Wal-Mart's China Inventory to Hit US $18b This Year*, CHINA DAILY, Nov. 29, 2004, *at* http://www.chinadaily.com.cn/english/doc/2004-11/29/content_395728.htm.

71 Dai Yan, *CapitaLand Cashes in on Retail Property Sector*, CHINA INVEST, Dec. 24, 2004, *at* http://www.chinainvest.com.cn/E/invest/spotlight/S20041224-03.html; Chan Sue Ling & Linus Chua, *CapitaLand to Invest in Chinese Malls*, INT'L. HERALD TRIB., Dec. 24, 2004, *available at* http://www.iht.com/articles/2004/12/23/bloomberg/sxmall.html.

72 Yan, *supra* note 71.

73 *Wal-Mart, CITIC Pacific Plan Expansion*, CHINA DAILY, Jan. 20, 2005, *at* http://www.chinadaily.com.cn/english/doc/2005-01/20/content_410802.htm; *Wal-Mart, CITIC Pacific Plan Big on Mainland Shops*, WORLD BUSINESS NEWSWIRE, Jan. 20, 2005, *at* http://en.icxo.com/htmlnews/2005/01/20/7741.htm.

74 Julie Walton, *At Your Service: Foreign Service Providers are Starting to Make Inroads in the China Market – With Some Exceptions*, CHINA BUS. REV., *at* http://www.chinabusinessreview.com/public/0409/walton.html (last visited on March 1, 2005).

chosen to put down stakes. The country's market for foreign retail giants is so promising that some analysts believe China's foreign companies will actually outperform the country's domestic businesses.[75] Thus, it is not surprising that Wal-Mart's international business interests have pushed the company to engage in lobbying activities for the first time in its forty-plus years. In late 1999, just three years after Wal-Mart opened its first store in China, former U.S. Senate Majority Leader Trent Lott traveled to Wal-Mart headquarters where he met with company executives and suggested that Wal-Mart increase its political profile.[76] As a result, shortly thereafter, the company opened an office in Washington, D.C., where it currently employs five fulltime lobbyists.[77]

Currently, Wal-Mart is among the top twenty political action committee (PAC) contributors to federal candidates,[78] and was the second largest overall donor in the 2004 election.[79] Wal-Mart's legislative interests include consumer protection, ergonomics, port security and prescription drug reform.[80] Representatives of the company have also been known to testify in front of Congress as proponents for beneficial trade laws.[81]

Because China is so important to its overall success strategy, Wal-Mart has also begun to instruct the Chinese on the most effective ways of doing business. On November 2, 2004, Wal-Mart's CEO visited Beijing to announce his company's gift of $1 million to establish the "China Retail Research Center," at Tsinghua University.[82] This center will "focus on China-oriented retail theory and retail policy and will provide consulting services to domestic retailers."[83] However, some argue that letting Wal-Mart into China is a "bold and risky move even for Beijing," because it is "reshaping the global economy, [and] restraining wage and price levels on both sides of the Pacific."[84] Regardless,

75 Don Lee, *China Draws in Foreign Retailers*, L.A. TIMES, Jan. 1, 2005, at C2.

76 Edward Alden & Neil Buckley, *Wal-Mart Finds it Pays to Have a Say in Washington*, FIN. TIMES, Feb. 25, 2004, at 8.

77 *Id.*

78 Alison Vekshin, *Wal-Mart Beefs up Federal Presence,* ARK. NEWS BUREAU, Jan. 18, 2004, *at* http://www.arkansasnews.com/archive/2004/01/18/WashingtonDCBureau/107230.html. "Of the 435 members of Congress, 191 received PAC contributions from Wal-Mart in 2003." *Id.*

79 Jim Hopkins, *Wal-Mart Widens Political Reach, Giving Primarily to GOP,* USA TODAY, Feb. 3, 2004, at B1.

80 Vekshin, *supra* note 78.

81 *Id.*

82 *Wal-Mart Donating US $1 Million to Establish Tsinghua University China Retail Research Center*, WAL-MART NEWS, Nov. 2, 2004, *at* http://www.wal-martchina.com/english/news/20041102.htm.

83 *Id.*

84 Sarah Schafer, *A Welcome to Wal-Mart*, NEWSWEEK, Dec. 20, 2004, at 30.

the government seems to "welcome[] the disruptive impact of Wal-Mart's business model," which is "already having a transformative effect on everything from supply chains, to distribution networks, to customer service."[85]

This "transformative effect" results from the fact that Wal-Mart's growth plans are complementary to China's industrial needs. For example, Wal-Mart's way of doing business changes the way that its suppliers produce, which, in turn, raises productivity and accelerates China's transition from a state-planned economy to a free market system.[86] In addition, many of Wal-Mart's Chinese suppliers like this new system because they find it superior to the Chinese way of doing business, which consisted mainly of personal relationships and bribes.[87] The Chinese are also eager to expand the number of production jobs that multinationals like Wal-Mart can provide, particularly as China's increasing number of impoverished migrant workers, most of them women, continue to emigrate from the Chinese countryside to its industrial zones in search of work.[88]

III. WAL-MART AND THE HUMAN COST OF LOW-PRICE CONSUMER GOODS

There is a serious downside, though, to Wal-Mart's relationship with China. The company uses its power to drive down prices among American suppliers, which are often encouraged to relocate to China as a method of reducing wages and pricing.[89] As a result, thousands of U.S. workers lose their jobs.[90] Even America's largest producers, Procter and Gamble, and Gillette, have been unable to avoid Wal-Mart's demands. In fact, they have recently merged in an effort "to take back some pricing power from Wal-Mart and other retailers, who have increased their leverage by consolidating, and eliminating rivals."[91]

China also feels pressure from Wal-Mart to cut prices and has responded by forcing employees to work longer hours –

85 *Id.*

86 *Id.*

87 *Id.*

88 *China Offers More Jobs to Migrant Workers,* XINHUA NEWS AGENCY, Mar. 3, 2005, *at* http://www.china.org.cn/english/government/121631.htm.

89 Pete Engardio & Dexter Roberts, *The China Price*, BUSINESSWEEK, Dec. 6, 2004, at 102; George Stalk & Rob Lachenauer, *Playing Hardball with Wal-Mart,* FORBES GLOBAL, Oct. 18, 2004, at 18; Charles Fishman, *The Wal-Mart You Don't Know,* FAST COMPANY, Dec. 2003, at 68; Frontline, *Is Wal-Mart Good for America?*, PBS Documentary, *at* http://www.pbs.org/wgbh/pages/frontline/shows/walmart/ (posted Nov. 16, 2004).

90 Fishman, *supra* note 89.

91 Constance L. Hays, *What's Behind the Proctor Deal?*, N.Y. TIMES, Jan. 20, 2005, at C1.

usually for less pay.[92] Further, Wal-Mart's procurement centers in Shanghai and Shenzhen, which are in close proximity to China's factories, give it up-to-the-minute information on prices.[93] Thus, Wal-Mart can leverage its enormous merchandising power to squeeze concessions from suppliers. These firms are asked to cut their production costs deeper and deeper, and, in some cases, even open their books, so Wal-Mart executives can find "unnecessary costs."[94] However, Wal-Mart's employees, whether in retail stores in the U.S., or supplier factories in China, are most negatively impacted by Wal-Mart's actions.

In China, Wal-Mart's business methods have made a dire economic situation even worse. Already, the company's migrant workers in the Guangdong Province, a primary area of development encompassing the industrial areas of Guangdong near the Southeast of China, are paid wages that remain far below that needed for subsistence.[95] Thus, Wal-Mart's ability to wring out lower costs is not merely due to newfound efficiencies in its supply chains – the reduced prices come primarily from the sweated labor that Chinese manufacturers impose on their workers. Unfortunately, the Chinese government, which is too concerned with needed jobs and revenues from exports, often does not enforce, or is unable to enforce, the country's current employee protection laws.[96]

For example, the legal workday in China is eight hours a day, and the required minimum wage is thirty-one cents per hour.[97] However, many of the employees receive only half of the minimum wage and work twice the legal number of hours – up to sixteen hours per day – without overtime pay, and sometimes without any pay at all.[98] In fact, according to the All China Federation of Trade Unions (ACFTU), China now has an estimated ninety-four million migrant workers who are owed over 100 billion yuan in back wages.[99] Moreover, Chinese factory

92 Jim Jubak, *Jubak's Journal: 3 Big Threats to China's Economic Miracle,* May 7, 2004, *at* http://moneycentral.msn.com/content/P82353.asp.

93 *Id*.

94 Fishman, *supra* note 89.

95 Jon E. Dougherty, *Free Trade v. Slave Trade,* May, 24, 2000, *at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=15367.

96 CONGRESSIONAL EXECUTIVE COMMISSION. ON CHINA, 108TH CONG., ANNUAL REPORT 2003 1 (Comm'n. Print 2003).

97 National Labor Committee & China Labor Watch, *Toys of Misery* 2004, Feb. 2004, *available at* http://www.nlcnet.org/campaigns/he-yi/he-yi.shtml [hereinafter *Toys of Misery* 2004].

98 *Id*.

99 *Trade Unions Help Workers to Recover Unpaid Wages,* PEOPLE'S DAILY, Dec. 30, 2003, *available at* http://english.people.com.cn/200312/30/eng20031230_131489.shtml.

employees get no social security or health insurance of any kind.[100]

In addition, the working conditions in many of China's factories are sub-standard. In 2002, the National Labor Committee (NLC) released a report detailing the conditions in a typical Chinese toy factory staffed mainly with "young women between the ages of 18 and 30, migrants from rural areas who live and work with restricted rights."[101] During the peak season, which lasts approximately six months, "[a] typical work day . . . begins at 8:00 a.m. and often goes past midnight."[102] In addition, the women work seven days per week for $0.12 to $0.14 cents per hour in 104-degree factory temperature; are fired if sick; share one small dorm room with fifteen other women; and are constantly "dizzy, nauseous, and on the verge of throwing up from the strong chemical paint odor . . . in the factory air."[103] As the report notes, these factories exist because seventy-one percent of U.S. toys are imported from China.[104] In fact, Wal-Mart alone accounts for one out of every five toys sold in the United States.[105]

Wal-Mart is not the only multinational corporation responsible for sweated labor in China's economic zones, or in the export processing zones of other developing countries. Nevertheless, like other major retailers, it is unquestionably accountable for conditions in its own factories. Accordingly, Wal-Mart enacted a "Code of Conduct" addressing workers' rights provisions, which it now claims are in place in all its contracting firms.[106] Further, it employs PricewaterhouseCoopers (PwC) and other large accounting firms as auditors, which Wal-Mart says are responsible for inspecting all its suppliers in China, e.g. making sure that each is in compliance with labor and safety laws.[107] In 2003, as a direct result of Wal-Mart's actions, seventy-two factories were permanently blacklisted from doing business with the company for violating child labor laws, and

100 *Toys of Misery* 2004, *supra* note 97.

101 *See* National Labor Committee & China Labor Watch, *Toys of Misery* 2001 6, Dec. 2001, *available at* http://www.nlcnet.org/campaigns/china/chinatoys01.pdf [hereinafter *Toys of Misery* 2001].

102 *Id*. at 6.

103 *Id*. at 5.

104 *Id*. at 4.

105 *Toys of Misery* 2001, *supra* note 101, at 4.

106 *See* JEAN-PAUL SAJHAU, BUSINESS ETHICS IN THE TEXTILE, CLOTHING AND FOOTWEAR (TCF) INDUSTRIES, (International Labour Organization, Working Paper No. 110, 2000), *available at* http://www.ilo.org/public/english/dialogue/sector/papers/bzethics/bthics8.htm.

107 Peter S. Goodman & Philip P. Pan, *Chinese Workers Pay for Wal-Mart's Low Prices,* WASH. POST, Feb. 8, 2004, at A1.

another four hundred suppliers had their contracts suspended for overtime violations.[108]

Thus, Wal-Mart clearly has all the institutional components to effectively do these inspections. It even has "labor supervision departments" in Shenzhen, Donguan, Putian City, Guangdong, and the Fujian Province.[109] However, a major study of Wal-Mart's monitoring operations showed that PwC missed significant labor problems in the company's contracting firms, such as hazardous chemical use and other safety hazards, barriers to freedom and collective bargaining, and violations of wage and overtime laws.[110] In addition, there were instances of employers falsifying time cards in order to simulate compliance with labor regulations.[111]

Although Wal-Mart has claimed that it does its audits unannounced, evidence from its factory inspections showed that the monitors' visits were revealed well beforehand, which gave the factory owners time to "fix" any abuses prior to any visit.[112] Thus, employers were able "prepare" for these audits by cleaning up, creating fake time sheets, and briefing workers on what to say if they were questioned.[113] For example, in a memo entitled "Instructions on Inspections from Wal-Mart," workers at one factory were told to wear their uniforms and work "carefully," "keep clean" and ensure that they "hav[e] [their] Health Certificate and Training Certificate on them;" and wear their gauze masks and earplugs.[114] The memo also directed that the kitchen dormitories and public space should be cleaned and food cooked "strictly according to the requirements."[115] In addition, factory personnel were told to unlock the fire exits (presumably closed before the inspection), and unlock the first aid or medical boxes (presumably locked prior to the audit).[116] Workers told those conducting the study that they were paid substantially better than usual for cooperating with the ruse.[117]

In order to remedy this situation, the auditors must conduct

108 *Id*.

109 *Condemnation of Wal-Mart Sparks Labor Rights*, CHINA LABOR WATCH, *available at* http://www.chinalaborwatch.org/en/web/article.php?article_id=50045 (last visited Mar. 1, 2005).

110 DARA O'ROURKE, MONITORING THE MONITORS: A CRITIQUE OF PRICEWATERHOUSECOOPERS (PWC) LABOR MONITORING 1 (Mass. Inst. of Tech., 2000), *available at* http://web.mit.edu/dorourke/www/PDF/pwc.pdf.

111 *Id*.

112 *Id*. at 3.

113 *Id*. at 6.

114 *Toys of Misery* 2004, *supra* note 97, at 3.

115 *Id*.

116 *Id*. at 1.

117 *Id*. at 2.

surprise visits and longer inspections. Additionally, independent auditors might be more effective in reporting the true conditions of these workplaces.[118] Charles Kernaghan of the NLC commented:

> It is impossible that Wal-Mart is still so totally ignorant of the common practice in China for factories to keep two sets of time cards and payroll sheets, and to clean the factory, unlock emergency exits, provide safety gear and take whatever other steps are necessary in preparation for Wal-Mart's announced visit. No company could be that shallow and gullible – unless of course it were consciously acting out a role with the full intent of achieving the desired result – a whitewash.[119]

Robert J. Rosoff, a writer for The China Business Review, the official magazine of the U.S.- China Business Council, similarly noted:

> In practice, however, the rights of Chinese workers are routinely violated. Workers are often required to work far more than 40 hours a week, have few days off, are paid below the minimum wage, and are not paid required overtime. Improper deductions from wages are common. Some Chinese workers must pay a large sum of money as a "deposit" to their employer, and they may have to pay a "recruitment fee" in order to be hired. These payments can prevent workers from leaving jobs where their rights are violated. Physical abuse of workers, and dangerous working conditions, are also common.[120]

The tragedy is that these labor violations are inevitably repeated because no one takes responsibility by punishing those who break the law.[121] Even other multinationals, such as Hasbro and Mattel, which have made much broader commitments than Wal-Mart to the remediation of working conditions in China, agree that there is a long way to go to make things right.[122]

Chinese workers are not alone, though, in suffering labor violations at the hands of Wal-Mart. On the contrary, if the company saves costs by contracting with sweatshops in China, it also saves money by developing policies and practices that make employees in its U.S. retail stores work under sweatshop-like conditions.[123] Although Wal-Mart may not be the only store to

---

118 Steven Frost, *China: Chinese Workers Pay for Wal-Mart's Low Prices*, ASIAN LABOUR NEWS, Feb. 8, 2004, *at* http://www.asianlabour.org/archives/000795.php.

119 *Toys of Misery* 2004, *supra* note 97, at 1.

120 Robert J. Rosoff, *Beyond Codes of Conduct: Addressing Labor Rights Problems in China*, CHINA BUS. REV., Mar. - Apr. 2004, at 44.

121 Bama Athreya, *China's Changing Labor Relations*, CHINA BUS. REV., Jan. - Feb. 2004, at 20, 21.

122 *See generally* Abigail Goldman, *Mattel Struggles to Balance Profit with Morality*, SEATTLE TIMES, Nov. 28, 2004, at A1; Toh Han Shih, *Time for Toy Industry Rogues to Sweat*, SOUTH CHINA MORNING POST, Jan. 31, 2005, at 4.

123 *Audit Details Violations at Wal-Mart*, L.A. TIMES, Jan. 14, 2004, at C3. The

impose these conditions on its workers, it has acquired – perhaps more than any other retailer – a reputation for paying its workers poorly and treating them badly.[124]

Wal-Mart is alleged to have one of the most poorly paid work forces in the U.S. economy, and offers low-quality health benefits, which many employees cannot afford.[125] As a result, employees are forced to turn to the public sector for a variety of subsidies, including health care, at great cost to American taxpayers.[126] Wal-Mart's policies also have far-reaching effects on other industries. In fact, some argue that without Wal-Mart's low wages and poor health insurance, its grocery store competitors, e.g. Vons, Albertson's and Safeway, might have been willing to bear the higher wages and health care benefits requested by their unionized workers, thus avoiding California's 2003 grocery strike.[127]

In addition, some of Wal-Mart's policies have come under legal fire. The company recently agreed to pay $11 million to settle claims stemming from the federal investigation of illegal workers hired by Wal-Mart's cleaning contractors, who forced approximately 345 illegal immigrants to "work[] seven days or nights a week without overtime pay or injury compensation."[128] In addition, "[t]hose who worked nights were often locked in the store until the morning."[129] Wal-Mart is also the target of the largest sex discrimination class action lawsuit in history, which currently includes 1.6 million workers.[130] The plaintiffs allege that (1) regardless of rank or seniority, women employed at Wal-Mart are paid less than men in the same jobs; and (2) Wal-Mart has purposely discriminated against women when it comes to job promotion.[131]

---

definition of a sweatshop is a workplace where labor laws, and/or health and safety regulations that are already on the books, are routinely violated. *See* ELLEN I. ROSEN, MAKING SWEATSHOPS: THE GLOBALIZATION OF THE U.S. APPAREL INDUSTRY 2 (2002).

124 *Wal-Mart's Child Labor Deal Draws Fire, Allows Notification Before Future Probes*, BELLEVILLE NEWS DEMOCRAT, Feb. 19, 2005, at A7.

125 DEMOCRATIC STAFF OF THE COMMISSION ON EDUCATION AND THE WORKFORCE, 108TH CONG., EVERYDAY LOW WAGES: THE HIDDEN PRICE 4, 5 (Comm. Print 2004), *available at* http://www.walmartclass.com/walmartclass94.pl?wsi=0&websys_screen=all_reports_view&websys_id=18 [hereinafter EVERYDAY LOW WAGES]; Abigail Goldman & Nancy Cleeland, *The Wal-Mart Effect: An Empire Built on Bargains Remakes the Working World,* L.A. TIMES, Nov. 23, 2003, at A1.

126 Goldman & Cleeland, *supra* note 125.

127 *Id*.

128 Associated Press, *Wal-Mart Pays $11M to Settle Illegal Immigrant Janitors Case*, USA TODAY, Mar. 18, 2005, *available at* http://yahoo.usatoday.com/money/industries/retail/2005-03-18-wal-mart-immigrants_x.htm?csp=1.

129 *Id*.

130 James Doran, *These Men Stripped Me of My Dignity*, TIMES, Aug. 19, 2004, at 6.

131 Richard Drogin, *Statistical Analysis of Gender Patterns in Wal-Mart Workforce*, February 2003, *at* http://www.walmartclass.com/walmartclass94.pl?wsi=0&websys_screen

Wal-Mart is also accused of multiple violations of the National Labor Relations Act, which gives employees the right to organize.[132] The company shows all new employees a video describing its anti-union position, and a handbook which instructs management how to fend off efforts by employees who even discuss forming a union.[133] A telephone number is given to all store managers to alert company executives about such behavior, and a team from national headquarters is then sent to the store to discourage union activity.[134] The company has been brought up on a number of charges by the National Labor Relations Board and has been fined multiple times for violating workers' right to organize.[135]

In addition, Wal-Mart's systematic practice of understaffing stores, e.g. to keep costs low, is extremely problematic because employees, and even management, have to do more work than is possible during the hours of their officially paid employment.[136] Thus, they face a Hobson's choice – either work off the clock or face losing their jobs. This type of behavior is permitted because Wal-Mart's unique culture is designed to legitimize its authority by routinely disciplining its employees using shame and intimidation.[137] Unfortunately, because women are sixty-five percent of Wal-Mart's hourly workforce, they are the worst victims of these abuses.[138]

IV. CHINESE AND AMERICAN WOMEN: THE REAL LOSERS

There is no doubt that female workers in developing countries will suffer most from the changes wrought by the WTO's quota elimination. Nevertheless, it is critical to focus on the convergence that is occurring between women who produce for export, e.g. for Wal-Mart and other multinationals, and Wal-Mart's female retail workers in the U.S. There are signs that conditions in China may actually improve, whereas, in the U.S., all signs point to a worsening situation. Under President George W. Bush's administration, there is currently no active movement to improve or enforce existing wage and hour or labor laws for

=all_reports_view&websys_id=18; EVERYDAY LOW WAGES, *supra* note 125, at 3.

132 EVERYDAY LOW WAGES, *supra* note 125, at 3.

133 *Id*. at 4.

134 *Id*.

135 Elizabeth DiNovella, *The True Costs of Low Prices: Selling Women Short: The Landmark Battle for Workers' Rights at Wal-Mart*, THE PROGRESSIVE, Jan. 1, 2005, at 44.

136 Seth Slabaugh, *'Off-the-Clock' Work Allegations Bring the Heat on Giant Retailer,* THE STAR PRESS, Oct. 17, 2004, at 5A.

137 Ellen Rosen, *Untitled*, *in* WAL-MART: TEMPLATE FOR 21ST CENTURY CAPITALISM (Nathan Lichtenstein ed., forthcoming 2005) (on file with author); Ellen Rosen, *Wal-Mart: The New Retail Colossus and Women Workers*, 6 GEO. J. GENDER & L. (forthcoming 2005).

138 Drogin, *supra* note 131, at 11.

workers in American companies, e.g. Wal-Mart.[139] In addition, there has yet to be any action by the U.S. Equal Employment Opportunity Commission to try and reduce the degree of sex discrimination in American workplaces.[140] Further, President Bush has urged Congress to pass tort reform legislation that will "do away with . . . frivolous and costly lawsuits," a proposal that his critics say is "meant to protect big companies [like Wal-Mart] and their insurers."[141]

In contrast, in China, awareness of labor abuses is growing. While the country does not publish an official number of factory protests, one Hong Kong labor rights group suggests that the number has grown dramatically, reaching 300,000 in 2003.[142] Many stories about these protests are now published by the Western press and Chinese newspapers. Since the latter are censored, some believe that the coverage reflects the Chinese government's desire to see these problems aired and resolved.[143] Because protests are illegal, protesters continue to be arrested and beaten.[144] However, China may nevertheless be offering signs that it is ready to engage in reform, lest the legitimacy of the Party's authority be questioned.[145]

In addition, salaries for Chinese workers, which have risen sharply in recent years, are fast approaching ninety cents an hour on average, which is thirty percent higher than Bangladesh, and more than double the wages paid in Indonesia.[146] Recently, the government of the Guangdong Province has increased wages and incorporated a medical and social security program.[147] It remains to be seen how well this new plan will be implemented.

There is also the possibility of worker representation in China. The ACFTU has traditionally been allied with the

139 David Moberg, *Under the Microscope: An Aggressive Audit of Labor Unions is Only One Front in Republicans' Multi-Pronged Attack,* IN THESE TIMES, Mar. 28, 2005, at 22; *Obstacles Grow for Workers Facing Discrimination*, LRA ONLINE, *at* http://www.laborresearch.org/story2.php/378 (last visited May 1, 2005).

140 Ellen Chesler, *A Progressive Agenda for Women's Rights*, 2 NEW DEMOCRACY PROJECT NEWSLETTER 8, Oct. 1, 2004, *available at* http://www.newdemocracyproject.org/newsletter.cfm?nl_id=88&nla_id=213.

141 Stephen Labaton, *Bush's Calls for Tort Overhaul Face Action in Congress,* N.Y. TIMES, Feb. 3, 2005, at A16.

142 Dexter Roberts, *China: A Workers State Helping the Workers?*, BUSINESSWEEK, Dec. 13, 2004, at 61.

143 Robert Marquand, *In China, Stresses Spill Over Into Riots*, CHRISTIAN SCI. MONITOR, Nov. 22, 2004, at 1.

144 Kathy Chen, *Chinese Protests Grow More Frequent, Violent*, CHINA LABOR WATCH, May 11, 2004, *available at* http://www.chinalaborwatch.org/en/web/article.php?article_id=50225.

145 *Id*.

146 Wehrfritz & Seno, *supra* note 27.

147 *Guangdong Raises Minimum Wage Level*, CHINA LABOR WATCH, Dec. 4, 2004, *available at* http://www.chinalaborwatch.org/en/web/article.php?article_id=50226.

Chinese Communist Party and was extensively involved in China's state-run enterprises. Thus, it has always been a so-called company union, rather than a free trade union, and has been challenged by international labor movement leaders, including the AFL-CIO, for its alliance with the government.[148] For a variety of reasons, however, the ACFTU is now trying to encourage membership among multinationals and other privately-owned firms, particularly those in the export processing sector.

In large part, the Party sees it as a way to improve conditions in the factories that form the foundation of China's participation in the new global economy.[149] As one ACFTU official noted: "Unions work as a bridge to communicate between employees and company owners to deal with conflicts, and therefore protect workers' rights."[150] However, some companies, including Eastman Kodak, Dell, McDonald's, KFC, the Japanese Samsung Group, and Wal-Mart, have strenuously fought against joining the ACFTU.[151] Regardless, according to Chinese trade union law, the ACFTU does not need the companies' approval - ACFTU is authorized to send its representatives to organize unions without any interference from the individual enterprise.[152]

In October of 2004, after a considerable struggle with Wal-Mart, which refused to follow Chinese law and allow the formation of a union, the ACFTU threatened to blacklist companies that did not comply.[153] Shortly thereafter, Wal-Mart accepted the ultimatum, despite its continued opposition to unions in the U.S., Canada, and Germany.[154] However, some believe that Wal-Mart is simply stalling. Company executives have said that they will accept a union, in accordance with the law, but only if workers request it.[155] Chinese workers, though, are fearful of getting fired, and, unsurprisingly, Wal-Mart has yet to receive any requests for union organization.[156]

148 *See* Adam Daifallah, *Labor Unions in a Rift Over Communist China*, N.Y. SUN, Oct. 21, 2002, at 1.

149 Roberts, *supra* note 142.

150 Jiang Jingjing, *Trade Unions Need Update,* CHINA BUS. WEEKLY, Nov. 16, 2004, at para. 4, *available at* http://www.chinadaily.com.cn/english/doc/2004-11/16/content_39252 9.htm (internal quotation marks omitted).

151 Roberts, *supra* note 142.

152 *See generally* Lan Xinzhen, *Coming to Terms With Unions,* BEIJING REVIEW, Dec. 9, 2004, at 32, *available at* http://www.bjreview.com.cn/ml-zhong/ml-200449-z.htm.

153 Jingjing, *supra* note 150.

154 *Id*.

155 Xinzhen, *supra* note 152.

156 *Id*.

V. CONCLUSION

Multinationals have entered into a new kind of competitive regime whose principles have become increasingly dominated by the Wal-Mart model, e.g. squeezing suppliers to drive down prices without regard for the human cost involved in the process. Accordingly, Wal-Mart's competitors, as well as garment industry employees throughout the world, are suffering from an increasingly competitive "race to the bottom." Now that the quotas for textiles and apparel have been eliminated, new manufacturing for these products will likely go to China, which will only serve to further stress the poverty-stricken countries that can least afford to lose business. As it stands, Wal-Mart is expected to reduce its apparel production to six out of the sixty or so countries that currently supply it.[157]

It is not clear how large corporations will be able to compete in this new business context without using sweated labor, both at home and abroad. In spite of its bad reputation, Wal-Mart is defending its business tactics by attempting to "educate" the public – the company took out advertisements in 100 major U.S. newspapers to answer its critics.[158] However, the reality is that regardless of Wal-Mart's words, its actions, or lack thereof, speak volumes – even now, Wal-Mart continues to refuse to make meaningful changes to its policies or practices, which means that suppliers and workers all over the world will still ensure hardship courtesy of Wal-Mart.

157 *Global Unions and Wal-Mart,* ASIAN LABOUR NEWS, *available at* http://www.asianlabour .org/archives/003304.php.

158 *Wal-Mart is Working for Everyone* (Nationwide Advertisement), Jan. 13, 2005, *available at* http://dodo.netcomsus.com/walmart/8p75x11p25-en.pdf.

TRAPPED IN A TANGLED WEB *UNITED STATES V. LARA:* THE TROUBLE WITH TRIBES AND THE SOVEREIGNTY DEBACLE

*MacKenzie T. Batzer**

> Stretched across the upper part of the doorway was a big spiderweb, and hanging from the top of the web, head down, was a large grey spider. She was about the size of a gumdrop. She had eight legs . . . "I'm not as flashy as some . . . but I'm near-sighted."[1]

INTRODUCTION

Indigenous peoples have been present on United States soil even before the nation became independent. When the Europeans came to the country and attempted to colonize the Indigenous peoples, conflict inevitably arose, and the colonizers were victorious in transforming tribes from self-governing bodies abundant with rich traditions and cultural innovations to timid groups at the mercy of white settlers. The transformation "manifested itself through tremendous loss of life and land" and established a "boundary line between the Indigenous and colonial societies."[2] Relations between Indian tribes and the United States government have continued to be unstable and ill-defined since colonization. The status of Indian tribes relative to the federal government has been difficult to characterize because tribes do not possess the same sovereign power as the states.[3]

Indians and Indian reservations make up a larger portion of the United States than most people realize. In Washington,

* JD/MBA candidate, 2007, Chapman University School of Law and Chapman University Argyros School of Business & Economics, Orange, California. Thank you to Professor Timothy A. Canova of the Chapman University School of Law for all of your guidance. Thank you to Dr. Theodore, Dorothy, Zoe, Bree, Theo, and the Honorable James M. Batzer, Tive Robertson, and last but most certainly not least, Rose Batzer. All of you mean the world to me. Thank you for everything.

1 E.B. WHITE, CHARLOTTE'S WEB 36-37 (Harper & Row, Inc. 1952),

2 Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 78 (2002).

3 *See generally* Alexander Reichert, *Counsel for Billy Jo Lara*, 28 AM. INDIAN L. REV. 285 (2003/2004).

Oregon, and Idaho alone, there are forty-two federally recognized tribes that occupy over 5.6 million acres of land.[4] Washington tribes employ 15,000 Indian and non-Indian people.[5] Indian reservations across the United States generate $246 million in tax revenue each year for state and local governments, in addition to $4.1 billion in tax revenue for the federal government.[6] Additionally, there are over 250 tribal courts in the United States today.[7]

Given the increasing financial power and political influence of Indian tribes and the growing impact they have on non-Indian citizens, it is becoming increasingly important to identify Indian tribes' roles within the United States. That is, what civil or criminal control do Indian tribes have over their own members, over other Indians who are not members of their tribes, and over non-Indians? Additionally, what powers do Indian tribes possess under the laws of the federal government? Moreover, if Congress and the United States Supreme Court have the authority to make and to interpret law with regard to Indian tribes, then to what extent are Indian tribes sovereign?

Before colonization, Indian tribes were self-governing. However, after Europeans arrived in the New World, they began to introduce, and in many cases force, their values onto the Indians. Tribes were stripped of some of their power, and Indians began the struggle to preserve their own beliefs, cultures, and ways of life. While some Indians welcomed change and facilitated interaction between tribes and European colonists, and while some Indigenous peoples and Europeans believed both groups were on equal footing, most Europeans believed they were superior to the Indians.[8] Conflicting views among the colonists and the Indigenous peoples "resulted in the weakening, and in some cases, the extinction, of the Indigenous peoples, and the commensurate empowerment of the colonizing peoples."[9]

Even though colonists, and eventually the United States Supreme Court and Congress, began referring to Indian tribes as "sovereign," their actions with regard to the tribes speak louder than words. The acknowledgment of tribes as sovereign

4 Dan Murdock, *Ethical Implications in Indian Law*, 28 AM. INDIAN L. REV. 313, 313 (2003/2004).

5 *Id.*

6 *Id.* at 313-14.

7 Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 103-04 (2004).

8 Porter, *supra* note 2, at 79.

9 *Id.* at 78.

"increasingly looks like lip service,"[10] while Congress' plenary power over tribes serves "as a continuing reminder that the United States controls the Indian nations, very much like the way prison guards serve as a constant reminder to the convicts that they are not staying at the Holiday Inn."[11]

Arising out of this sovereignty debacle is the question of what constitutes a separate sovereign for purposes of Double Jeopardy in criminal prosecution. A recent Supreme Court decision attempts to clarify the issue, but only muddies the waters. *United States v. Lara*[12] demonstrates Congress' and the Supreme Court's continued refusal to truly recognize Indian tribes as sovereigns. Part I of this note reviews the history of Indian tribal relations with the United States government that has given rise to the present status of Indian tribes. Part II of this note discusses the Indian Civil Rights Act of 1968, its subsequent 1990 amendment, and the implications of this amendment on Indian tribes' rights to criminally prosecute their own members as well as nonmember Indians. Part III of this note summarizes *United States v. Lara*, examines the issue of tribal sovereignty in the context of *Lara*, and analyzes the implications of the Court's decision on the future of tribal sovereignty.

I HISTORY OF INDIAN TRIBAL RELATIONS WITH THE UNITED STATES

A. What is Indian Country?

Spiders catch their prey with their legs and use their fangs to inject poison.

"The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else."[13] King George's Royal Proclamation of 1763 was the first instance in which the term "Indian country" was used to separate Indian-inhabited land from land owned by the colonists.[14] Of course, this was also an effort to by the government to gain centralized control over Indigenous peoples by segregating them from white settlers.[15] Still, the Crown understood that any person who

10 *Id.* at 84.
11 *Id.* at 86.
12 541 U.S. 193 (2004).
13 Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831).
14 Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 289 (1997).
15 *Id.*

ventured into "Indian country" did so at his own risk.[16]

After the United States became independent, it preserved the concepts of Indian country and centralized control because the government's goal was to "prevent Indian uprisings and preserve the peace along the frontier."[17] The United States concocted the first formal definition of "Indian country" through the Indian Trade and Intercourse Act of 1796.[18] It amended the Act in 1834 to include a newer, more accurate definition of Indian country after treaties and Indian removal rendered the borders set by the 1796 Act obsolete.[19] The new, but perhaps unimproved, definition characterized Indian country as:

> [A]ll that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.[20]

The government continued to push Indian tribes westward and away from white settlers and citizens, and subsequently decided to settle the Indians on reservations within new states.[21] In 1874, the Indian Intercourse Act was repealed.[22] However, since the government moved Indian tribes within state borders, it was inevitable that conflicts between states and the tribes would develop.[23] Therefore, Congress decided to make Indian reservations "enclaves of exclusive federal jurisdiction" by requiring cessation of state jurisdiction over Indian land.[24]

One of the first cases in which the Supreme Court attempted to define Indian country was *Ex Parte Crow Dog*.[25] In *Crow Dog*, the Supreme Court characterized Indian country as all territory "'to which the Indian title has not been extinguished,' and which were either outside 'the exterior geographical limits of a state' or 'excepted from its jurisdiction . . . at the time of its admission.'"[26]

As Indian country and state territory continued to collide, the government passed the General Allotment Act of 1887, a

16 *Id.*

17 Mashpee Tribe v. Watt, 542 F. Supp. 797, 803 (D. Mass. 1982) (citing Mohegan Tribe v. State of Conn., 638 F.2d 612, 621 (2nd Cir. 1980)).

18 4 Cong. Ch. 30, 1 Stat. 469 (1796). S*ee also* Matal, *supra* note 14, at 290.

19 23 Cong. Ch. 161, 4 Stat. 729 (1834). S*ee also* Matal, *supra* note 14, at 290.

20 Act of June 30, 1834, ch. 161, 4 Stat. 729, 734.

21 Matal, *supra* note 14, at 290. *See, e.g.,* Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

22 Matal, *supra* note 14, at 291.

23 *Id.* at 295.

24 *Id.* at 293.

25 109 U.S. 556 (1883).

26 Matal, *supra* note 14, at 301 (quoting *Ex Parte Crow Dog,* 109 U.S. at 561).

comprehensive piece of legislation allowing Indians fractional interests in land.[27] The General Allotment Act, also known as the Dawes Act, gave the President the power to allocate tribal lands to individual Indians.[28] Under the original General Allotment Act, Indians could purchase plots of 160 acres, and white settlers could purchase any left over land.[29] However, the allotments were held in trust by the United States for a minimum of twenty-five years.[30] After the Supreme Court decision in another case involving tribes, *In re Heff*[31], and several subsequent revisions of the General Allotment Act, the Indian Reorganization Act ended the allotment policy in 1934.[32] However, the General Allotment Act had far-reaching adverse consequences on the treatment of Indian country and tribal sovereignty because "the Court no longer considered tribal governments to exist, and it no longer viewed Indian lands as having unique jurisdictional status."[33]

In 1948 the United States codified the definition of Indian country:

> [T]he term "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[34]

Following this codification, there was a plethora of court cases that sought to interpret the term "Indian country," focusing on a variety of factors. It seemed as if neither courts nor Congress had a consistent idea of what Indian country was, or what jurisdiction Indians or the government had over crimes committed in Indian country.

---

27 *See generally* FELIX COHEN, COHEN'S HANDBOOK ON FEDERAL INDIAN LAW (Rennard Strickland & Charles F. Wilkinson eds., Michie 1982), for an overview of several sections of the General Allotment Act and other pieces of legislation affecting it, as well as a comprehensive history of Indian relations with the government.

28 Matal, *supra* note 14, at 306 (citing Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887)).

29 *Id.* (citing 24 Stat. 388, 390).

30 COHEN, *supra* note 27, § 2.C.

31 197 U.S. 488 (1905).

32 Matal, *supra* note 14, at 307.

33 *Id.*

34 18 U.S.C. § 1151 (1948).

B. Trouble at the Court

The poison contains an agent that assists in dissolving the prey so the spider can consume it.

Since the Constitution gives very little guidance on Congress' power to regulate Indian affairs, in early cases the Supreme Court was forced to look outside the Constitution to make decisions about the power of Indian tribes to own and use land, their status as sovereigns, and their self-governance. Three cases that have come to be known as the "Marshall trilogy" provided yet another Supreme Court interpretation of the status of Indian tribes in the United States.[35]

In *Johnson v. M'Intosh*, the plaintiffs, British subjects and their heirs, claimed title to property conveyed to them by the Indians.[36] The defendants, on the other hand, received their title directly from the United States government. Both claimed that their title was superior.[37] The Court concluded that even though Indian tribes held title to land, the United States had superior title.[38] Therefore, the white settlers who had title conveyed by the U.S. government were permitted to purchase and sell the land, while tribes retained only the right to occupy and use it.[39]

In *Cherokee Nation v. Georgia*, the Court held that Indian tribes were "domestic dependent nations."[40] However, the Court at the same time acknowledged that tribal self-government was important, laying the foundation for future conflicts over tribal autonomy.[41] The following year, in *Worcester v. Georgia*, the Court held that Georgia state laws did not have an effect within Cherokee Nation territorial boundaries and referred to tribes as, "distinct, independent political communities, retaining their original natural rights."[42] Through this language, the Court again appeared to express the importance of tribal self-governance.[43] Unfortunately, neither the Court nor the government expounded on what they believed these "original

35 *See generally* Frank Pommersheim, *Native Americans and the Constitution: Is There a (Little or Not So Little) Constitutional Crisis Developing In Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271 (2003). The three cases, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), are known as the "Marshall trilogy" because the opinions in each were delivered by Justice Marshall. *Id.*

36 21 U.S. (8 Wheat.) at 571-605.

37 *Id*.

38 *Id*.

39 *Id*.

40 30 U.S. (5 Pet.) at 17.

41 Pommersheim, *supra* note 35, at 275.

42 31 U.S. (6 Pet.) at 559.

43 Pommersheim, *supra* note 35, at 275.

natural rights" to be.

Clearly, issues of Indian tribal sovereignty and tribes' relationships to the government were abundant. In *Ex Parte Crow Dog*, the Supreme Court not only sought to define Indian country but also sought to determine whether federal statutes and treaties had extended criminal jurisdiction to cover crimes committed by one Indian against another in Indian territory.[44] Crow Dog was convicted of murdering Spotted Tail, an Indian from a different tribe.[45] The murder took place in Sioux territory, but under Sioux law Crow Dog's punishment would have been limited to his support of Spotted Tail's family.[46] The Court's opinion in *Ex Parte Crow Dog* addressed the issue specifically in reference to Sioux territory, but the opinion had a farther-reaching impact because of its holding and broad language. While the Court held that federal courts did not have jurisdiction to hear intra-state Indian criminal affairs, the Court thought that Indians should be judged, "by the customs of their people [and] the law of their land," and vacated Crow Dog's federal conviction.[47] There was such a public outcry following this decision that Congress passed the Indian Major Crimes Act, under which Indians who committed serious felonies, even within Indian territory, could be tried in federal court.[48]

Three years later, in *United States v. Kagama*, the Court upheld Congress' ability to enact the Indian Major Crimes Act and reaffirmed the notion that states did not have legislative power over Indian tribes, because the federal government had that power.[49] *Kagama* has come to be known as the foundation of Congress' plenary power over Indian tribes.[50] The Court stated that the "power of the general government over these remnants of a race once powerful"[51] is broad and plenary because "it alone can enforce its laws on all the tribes."[52]

---

44 109 U.S. 556 (1883).

45 *Id.* at 557.

46 Matal, *supra* note 14, at 303 (citing COHEN, *supra* note 27, at § 4.A).

47 *Ex Parte Crow Dog,* 109 U.S. at 571-72.

48 18 U.S.C. § 1153 (2000). *See also* Matal, *supra* note 14, at 303. The original version of the Indian Major Crimes Act allowed for federal prosecution of Indians for seven named offenses committed throughout organized territories and on Indian reservations. Today, the Act provides for federal prosecution of fourteen named offenses committed within Indian country. 18 U.S.C. § 1153. These offenses include, but are not limited to, murder, manslaughter, kidnapping, maiming, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under 16 years of age, arson, burglary, and robbery. *Id.*

49 118 U.S. 375, 384-85 (1886).

50 Matal, *supra* note 14, at 305.

51 118 U.S. at 384.

52 *Id.* at 385.

In the mid-to-late 1900s, the issue of tribal sovereignty again began to mix with the issues of criminal prosecution and jurisdiction. In *Ophilant v. Suquamish Indian Tribe*, the Supreme Court held that tribal governments had lost inherent jurisdiction over non-Indians, and stated that when tribal land became part of United States territory, Indian tribes' rights as completely independent, sovereign nations were diminished.[53] However, the Court left open the question of whether tribes had jurisdiction over nonmember Indians.

II. *DURO V. REINA* AND THE INDIAN CIVIL RIGHTS ACT OF 1968

"I always give them a little anesthetic so they won't feel pain. It's a little service I throw in."[54]

In 1968, Congress passed the Indian Civil Rights Act (ICRA).[55] Also known as the Indian Bill of Rights, the ICRA imposes certain constitutional restrictions upon Indian tribal governments and guarantees Indians' basic civil rights.[56] The ICRA also requires that defendants in tribal court be accorded most of the protections that the Constitution extends to defendants in state and federal court, and provides for federal habeas review of tribal court convictions."[57] Additionally, the ICRA guarantees tribal members equal protection.[58]

The 1968 version of the ICRA repeatedly uses the phrase "any person" in connection with its various sections. The original interpretation of the Act, however, was not meant to imply that "Indian tribes can exercise civil jurisdiction over non-Indians."[59] A turning point for tribes everywhere took place with the Supreme Court's holding in *Duro v. Reina* and Congress' actions after the Court handed down its decision.[60] The events in *Duro* took place on the Salt River Indian Reservation just east of Scottsdale, Arizona.[61] Albert Duro was an enrolled member of a different tribe, the Torres-Martinez Band of Cahuilla Mission Indians.[62] Between March and June 1984, he resided on the Salt River Indian Reservation with a female companion who was a

53 435 U.S. 191, 195 (1978).
54 E.B. WHITE, *supra* note 1, at 48.
55 25 U.S.C.. §§ 1301 et. seq. (1968).
56 41 AM. JUR. 2d *Indians* § 13.
57 Brief for the United States at 34, United States v. Lara, 541 U.S. 193 (2004) (No. 03-107) (citing 25 U.S.C. § 1301 (1968)).
58 25 U.S.C. § 1301 (1968).
59 41 AM. JUR. 2d *Indians* § 13 (West 2004).
60 Duro v. Reina, 495 U.S. 676 (1990).
61 *Id.* at 679.
62 *Id.*

member of the Salt River Tribe.[63] In June 1984, Duro shot and killed a fourteen-year-old boy on the Salt River Reservation.[64] The boy was a member of the Gila River Indian Tribe.[65] Duro was placed in custody and taken to stand trial in tribal court.[66] However, at that time, the tribal court was limited to imposing criminal penalties only up to six months imprisonment and a $500 fine, because the court's powers were regulated by federal statute.[67] The tribal court charged Duro with illegal firing of a weapon on the reservation pursuant to the Indian Civil Rights Act authorizing tribes to exercise jurisdiction over nonmember Indians, and Duro moved to have the prosecution dismissed for lack of jurisdiction.[68]

After the tribal court denied his motion, Duro filed a petition for habeas corpus with the United States District Court for the District of Arizona.[69] The District Court granted the writ, and held that if the tribe asserted jurisdiction over Duro, a nonmember, it would violate the equal protection rights afforded Indians by the ICRA.[70] A divided panel of the Court of Appeals for the Ninth Circuit reversed, stating that "if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they would have done so."[71] Judge Sneed, dissenting from the panel opinion, argued that giving a tribal court jurisdiction over a nonmember Indian would subject him to "impermissible racial classification" and there would be a "potential for bias" by a tribal court that consisted of Indians with whom Duro was not necessarily affiliated.[72] The panel opinion and the dissenting opinion were subsequently revised; however, during the revision period, the Eighth Circuit in *Greywater v. Joshua* held that tribal courts *did not* possess inherent criminal jurisdiction over nonmember Indians.[73] The United States Supreme Court granted certiorari to help resolve the conflict between the Eighth and Ninth Circuit decisions.[74] The Supreme Court went on to reverse the Ninth Circuit's decision, concluding that "Indian tribes lack jurisdiction over

63 *Id.*
64 *Id.*
65 *Id.* at 679.
66 *Id.* at 681.
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.* at 681.
71 *Id.* at 683.
72 *Id.* at 684.
73 846 F.2d 486 (8th Cir. 1988).
74 Duro v. Reina, 851 F.2d 1136 (9th Cir. 1987), *cert granted*, 490 U.S. 1034 (1989), *and rev'd by* 495 U.S. 676 (1990).

persons who are not tribe members."[75]

A. Tribal Pandemonium

"'Will you walk into my parlour' Said a spider to a fly; 'Tis the prettiest little parlour that ever you did spy.'"[76]

The Supreme Court's decision in *Duro* prompted outcry from Indian tribes across the nation.[77] Before the *Duro* decision, tribes had been exercising criminal jurisdiction over all Indians, including members and nonmembers, for over 200 years, and the United States had recognized the exercise of this jurisdiction.[78] Additionally, pursuant to the Indian Major Crimes Act,

> the United States has asserted exclusive jurisdiction over certain specified major crimes committed in Indian country by an Indian against another Indian. This provision excludes state jurisdiction and may also exclude concurrent tribal jurisdiction . . . .Section 1152 [the Indian Country Crimes Act] establishes exclusive Federal jurisdiction over all other general crimes except over crimes committed in Indian country by an Indian against another Indian. The section recognizes exclusive jurisdiction of a tribal government over such crimes.[79]

The decision in *Duro*, however, "established an arbitrary line by differentiating between members and nonmembers instead of American Indians and non-American Indians."[80] In reaching its conclusion, the *Duro* court did not address the history of relations between Indian tribes.[81] Indian tribes quickly pointed out that nonmember Indians play a sizeable role in the activities of other tribes and in the lives of other Indians; nonmember Indians are valued members of the community.[82] In addition, the Arizona, South Dakota, Nevada, North Dakota, and Montana legislatures called upon Congress to reaffirm Indian tribal jurisdiction over nonmember Indians who commit misdemeanors on host reservations.[83]

In response to this outcry, Congress used its plenary power to amend the Indian Civil Rights Act. This amendment is

---

75 *Duro*, 495 U.S. at 685.

76 Mary Howitt, *The Spider and the Fly*, *in* SKETCHES OF NATURAL HISTORY 128, 128 (Effingham Wilson, London 1834).

77 Matthew L.M. Fletcher, *American-Indian Law:* United States v. Lara: *Affirmation of Tribal Criminal Jurisdiction over Nonmember American Indians*, 83.7 MI B. J. 24 (2004).

78 S. REP. NO. 102-153, at 1 (1991).

79 *Id*. at 3. *See also* 18 U.S.C. § 1153 (1994).

80 Fletcher, s*upra* note 77, at 25.

81 S. REP. NO. 102-153, at 2 (1991).

82 Fletcher, *supra* note 77, at 25 (citing Carole Goldberg-Amberose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123 (1994)).

83 S. REP. NO. 102-153, at 2 (1991).

commonly called the "*Duro* fix" and restores the power of Indian tribes to prosecute nonmember Indians for crimes committed on their tribal land. The fix was supported by all of the tribes that testified before Congress prior to Congress amending the Act.[84] Through the *Duro* fix, Congress appeared to recognize that tribes need more power over events that occur within their borders. Indians who commit crimes on reservations of which they are not members will be subject to criminal prosecution "by the host tribal government in the same manner that they would be subject to prosecution by the United States for major crimes committed on Indian lands."[85] The Act, as amended, defines "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code [the Indian Major Crimes Act], if that person were to commit an offense listed in that section in Indian country to which that section applies."[86]

Given the Congressional history and the plain language of the Indian Civil Rights Act of 1968 as amended, it seems appropriate to conclude that Congress was reinvesting Indian tribes with a power they already had: the power to prosecute *all* Indians who commit crimes on tribal land. This was an optimistic piece of legislation for Indian tribes in that they felt that a right they once had as a result of their inherent sovereign powers had been restored, and they would be able to enforce laws against nonmember Indians that may not otherwise be enforced in any other court.[87]

Around the time of the 1990 *Duro* decision and Congress' subsequent fix, tribes began to put forth even more of a concerted effort to make their voices heard, realizing if they did not, their past efforts could be thwarted and subsequent pleas may fall on deaf ears. Attempting to help themselves, the already-existing Native American Rights Fund, in conjunction with the National Congress of American Indians, formed the Tribal Supreme Court Project, which allows tribes to pool their resources in order to respond to the Supreme Court and Congress in a way which may help give them a voice that others can hear.[88] This effort developed a network of "attorneys and academics to share legal information and experience," which has helped ensure that the Supreme Court hears the best possible arguments in favor of the

84 Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 768 (1993).

85 S. REP. NO. 102-153, at 2 (1991).

86 25 U.S.C. § 1301 (1990).

87 Fletcher, *supra* note 77, at 25.

88 Bethany R. Berger, United States v. Lara *as a Story of Native Agency*, 40 TULSA L. REV. 5, 16 (2004).

tribes when it opts to consider questions impacting Indian tribes and tribal relations.[89]

III. THE PROBLEM OF SOVEREIGNTY: *UNITED STATES V. LARA*

"In the spider-web of facts, many a truth is strangled."[90]

After the Supreme Court's decision in *Duro*, Congress amended the Indian Civil Rights Act to reaffirm Indian tribes' jurisdiction over all Indians. Congress' actions raise several important issues. First, by amending the Act to overrule the Supreme Court, Congress presumed that the *Duro* decision was based on federal common law rather than on constitutional grounds.[91] Second, by "reinvesting" tribes with a jurisdictional power the tribes presumed they retained all along, Congress acted as if tribes were not truly sovereign nations. Third, Congress' actions indicate that "tribes lost all power over persons other than members at conquest and whatever powers tribes have are the result of affirmative federal government grants."[92] This view of "delegated sovereignty" is an oxymoron: after all, "Indians like all other citizens share allegiance to the *overriding sovereign*, the United States."[93] Any other authority a tribe possesses "comes from the consent of its members, and so . . . marks the bounds of tribal authority."[94]

A. *United States v. Lara*: Background and Procedural History

1. District Court

Billy Jo Lara is a member of the Turtle Mountain Band of Chippewa Indians in North Dakota. He is married to a member of the Spirit Lake Tribe and resided with his wife and children on the Spirit Lake reservation in North Dakota.[95] On June 13, 2001, while on the Spirit Lake reservation, Bureau of Indian Affairs police officers arrested Lara for public intoxication.[96] When the officers informed Lara that there was an exclusion order prohibiting him from being on the Spirit Lake reservation,

89 *Id.* at 19 (citing Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695, 697 (2003)).

90 Paul Eldridge, *available at* http://www.worldofquotes.com/author/Paul-Eldridge/1/index.html.

91 *See* United States v. Lara, 294 F. 3d 1004, 1006 (8th Cir. 2002) (citing Cooper v. Aaron, 385 U.S. 1, 18, (1958)), *reh'g en banc granted and rev'd by* 324 F.3d 635 (8th Cir. 2003), *cert. granted and en banc opinion rev'd by* 541 U.S. 193 (2004).

92 Resnik, *supra* note 7, at 115.

93 Skibine, 66 S. CAL. L. REV. at 775 (emphasis added).

94 *Id.*

95 United States v. Lara, 541 U.S. 193, 196 (2004).

96 United States v. Lara, 324 F.3d 635, 636 (8th Cir. 2003).

Lara struck one of them with his fist.[97] The Spirit Lake tribe charged Lara with five violations of the Sprit Lake Tribal Code, including violence to a policeman.[98] However, Lara had another problem on his hands: Bureau of Indian Affairs ("BIA") officers are not only tribal officers, but also federal officers. Thus, when Lara punched the BIA officer, he opened the door to federal prosecution as well.[99] This is precisely what occurred: a federal grand jury indicted Lara for assault on a federal officer, in violation of 18 U.S.C. § 111(a)(1).[100] Lara moved to dismiss the indictment, claiming that the federal charges violated the Double Jeopardy clause[101] and impermissible selective prosecution.[102] The magistrate judge denied the motion, and Lara entered a guilty plea on the condition that he could seek appellate review of his motion to dismiss the indictment.[103]

2. United States Court of Appeals, Round 1: 2002

A panel of the United States Court of Appeals for the Eighth Circuit affirmed the district court's denial of Lara's motion to dismiss the indictment.[104] The court cited the "separate sovereigns" doctrine, under which a tribal court and the federal government may prosecute a defendant for the same conduct if the tribal court and the federal government draw their authority from separate sources of power.[105] Lara argued to the panel that the separate sovereigns doctrine did not apply to his case because the tribe that prosecuted him, the Sprit Lake Nation, and the federal government both derive their power from the same source: the United States Constitution.[106] The government argued the opposite: "the Spirit Lake Nation draws its authority from retained sovereignty, [and] not from a Congressional

97 *Id.*

98 *Id.*

99 *See* Melissa L. Tatum, Symposium, *Tribal Sovereignty and* United States v. Lara*: Symposium Foreword*, 40 TULSA L. REV. 1 (2004).

100 The language of the statute is as follows:

> Whoever (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties . . . shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both.

18 U.S.C. § 111(a) (2005).

101 "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend V.

102 United States v. Lara, 294 F.3d 1004 (8th Cir. 2002).

103 *Id.*

104 *Id.* at 1005-06.

105 *Id.* at 1006.

106 *Id.*

delegation of power."[107]

Therefore, the government argued that the Sprit Lake Nation is a separate sovereign from the federal government and both may prosecute Lara under the separate sovereigns doctrine.[108] The Court of Appeals agreed with the government, explaining that, "*Duro* grounds its holding in federal common law, not Constitutional law, because *Duro* discusses tribal sovereignty without reference to the Constitution."[109] Accordingly, tribal sovereignty is governed by federal common law, and the court "must defer to Congress."[110] Turning then to Congress' amendment of the Indian Civil Rights Act (ICRA), the court concluded that Congress did not intend to expressly delegate Congressional authority when it amended the ICRA; instead, Congress' intent was to recognize inherent tribal power.[111] Thus, since the Sprit Lake tribe drew its power from retained sovereignty and the federal government drew its power from a different source, Lara's Double Jeopardy argument failed.[112]

3. United States Court of Appeals, Round 2: 2003

After the Court of Appeals' 2002 decision, Lara petitioned for a rehearing en banc.[113] The Court of Appeals granted Lara's petition and reversed the panel's 2002 decision.[114] The court recognized that the Ninth Circuit, in *United States v. Enas*, held that *Duro* was a common law decision and thus Congress had the power to override it by amending the Indian Civil Rights Act.[115] The court also noted that the *Enas* court, "conceded that sovereignty has 'constitutional implications'" but nevertheless decided that *Duro* was a common law decision.[116] The Court of Appeals went on to respectfully disagree with the Ninth Circuit's holding in *Enas*, concluding instead that, "the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court. Absent a delegation from

107 *Id.* at 1006.

108 *Id.*

109 *Id.* at 1007. *See also Duro*, 495 U.S. at 676.

110 *Lara*, 294 F.3d at 1007.

111 *Id. See also* United States v. Weaselhead, 36 F. Supp. 2d 908, 913 (Neb. 1997), quoting H.R. CONF. REP. NO. 102-261, at 3-4 (1991) ("Indian tribal-governments have retained the criminal jurisdiction over non-member Indians and [the Indian Civil Rights Act amendment] is not a delegation of this jurisdiction but a clarification.").

112 *Lara*, 294 F.3d at 1007.

113 United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (en banc).

114 *Id.* at 640-41.

115 *Id.* at 639 (citing United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (en banc), *cert. denied*, 534 U.S. 1115 (2002)).

116 *Id.* (quoting *Enas*, 255 F.3d at 673).

Congress, a tribe's powers are those 'inherent powers of a limited sovereignty which has never been extinguished.'"[117]

4. United States Supreme Court

The United States Supreme Court granted certiorari to decide "whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority."[118] The Court decided that Congress does possess such power and Lara's conviction was therefore not barred by the Double Jeopardy clause.[119] At first glance, this decision seems to be somewhat of a victory for tribes since it reaffirms the *Duro* fix, which allows tribes criminal jurisdiction over non-member Indians who commit crimes on tribal land.[120] The Court's ultimate conclusion, that tribes retain such criminal jurisdiction over non-member Indians, is proper in that it does give tribes a small amount of control over what happens within tribal borders. However, the Court's reasoning is flawed and a deeper examination leads to the conclusion that both the Court and Congress wish Indian tribes to remain virtually powerless to control relations, both within their borders and outside of their reservations' physical boundaries.

In reaching its decision, the Court broke its rationale into six elements: First, the Indian Commerce and Treaty Clauses gave Congress plenary and exclusive authority to write and pass laws with regard to Indian tribes.[121] Second, Congress had interpreted those "'plenary' grants of power as authorizing it to enact legislation that restricts and" relaxes tribal powers.[122] Third, Congress' goal of altering "the degree of autonomy" of a dependent sovereign that is not a State is a familiar legislative objective.[123] Fourth, Lara did not point to any language in the Constitution suggesting that there is a limit on Congress' "authority to relax restrictions on tribal" powers.[124] Fifth, the power that Congress "reinvested" in the tribes was similar to a tribe's powers to prosecute its own members, which makes the

117 *Id.* at 639 (quoting United States v. Wheeler, 435 U.S 313, 322(1978)) (emphasis omitted).

118 *Lara*, 541 U.S. at 196.

119 *Id.* at 197, 210.

120 *See* Kevin K. Washburn, *Lara, Lawrence, Supreme Court Litigation, and Lessons from Social Movements*, 40 TULSA L. REV. 25, 25, 28(2004).

121 *Lara*, 541 U.S. at 200. *See also*, *e.g.*, Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 470-71, (1979) ("Congress in the exercise of its plenary and exclusive power over Indian affairs . . . ."); *Wheeler*, 435 U.S. at 323.

122 *Lara*, 541 U.S. at 202.

123 *Id.* at 203.

124 *Id.* at 204.

change at issue limited.[125] Finally, the idea that Congress possessed the power to relax restrictions on tribes' inherent prosecutorial authority was consistent with decisions in other Supreme Court cases.[126]

B. What's Wrong With this Picture?

The doctrine of inherent sovereignty in federal Indian law holds that "tribes are domestic dependent nations which may exercise powers free of the strictures of the Constitution unless limited by treaty or Congress."[127] The idea of inherent sovereignty stems from the Marshall trilogy, which limited tribes in two areas: the ability (or lack thereof) to convey land, and the inability to deal as foreign nations to create treaties with the United States.[128] Essentially, "Native Americans were *mere occupiers* with an individuality not subject to the laws of the federal government *but not completely independent of them either*."[129] The doctrine of inherent sovereignty is troubling in and of itself because if tribes are sovereign, or were ever meant to be treated as such, they should not be "mere occupiers," or "dependent nations," which are subject to the mercy of Congress. Indian tribes are not sovereign, autonomous, or independent; Indian tribes are more accurately described as dependent nations.

At issue in *Lara* is the separate sovereign doctrine, an exception to the Double Jeopardy clause, in which multiple governmental units may prosecute a defendant for the same conduct if those governmental units draw their authority from separate sources of power. The fundamental concept underlying the separate sovereigns doctrine is "sovereigns." If Indian tribes draw their authority to prosecute Indians who commit crimes on tribal land from a source other than their own inherent power, then tribes are not sovereign.

The Supreme Court has previously held that when an Indian tribe prosecutes its own members, it is acting as a separate sovereign.[130] The Court also found that when a tribe prosecuted

125 *Id.*

126 *Id.* at 205.

127 L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 810 (1996).

128 *Id.*

129 April L. Seibert, Note, *Who Defines Tribal Sovereignty? An Analysis of* United States v. Lara, 28 AM. INDIAN L. REV. 393, 394 (2003/2004) (emphasis added).

130 *Lara*, 541 U.S. at 199. *See also Wheeler*, 435 U.S. at 318, 322-23 (1978) (a tribe's "*sovereign* power to punish *tribal* offenders," while subject to congressional "defeasance," remains among those "'inherent powers of a limited sovereignty which has never been extinguished'" (emphasis added and deleted)).

a member or a non-member Indian, its source of power to do so was the tribe's own inherent power; thus, it was acting as a separate sovereign.[131] However, by analyzing whether Congress has the power to relax restrictions placed on the exercise of a tribe's *inherent* legal authority by political branches, one must necessarily conclude that tribes are not regarded by either Congress or the Supreme Court as sovereign, and they do not possess any authority without either the Constitution or Congress granting them such authority.

C. Problems with the *Lara* Factors

1. If Congress Has Plenary Power over Indian Tribes They Cannot Be Independent Sovereigns

The Court reasoned that the Constitution, via the Indian Commerce and Treaty Clauses, gives Congress "plenary and exclusive" power to legislate with regard to Indian tribes.[132] Second, Congress has interpreted those plenary grants of power as authorizing it to enact legislation that restricts and relaxes tribal powers.[133] The plenary powers doctrine has been the source of much agony for Indian tribes in the United States "because of its potential to allow Congress to obliterate tribal governments and treaties."[134]

"[T]he sovereignty of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of tribes."[135] With regard to Indians, Congress has authorized different policies at different times throughout United States history.[136] Aside from attempting to define Indian country through the Indian Intercourse Act and subsequently through steps to provide Indians with their own territories within states, Indian tribes are also specifically mentioned in the Indian Commerce Clause of the United States Constitution. This clause gives Congress the power to "regulate commerce with foreign Nations and among the several states and with the Indian tribes."[137] The Indian Commerce Clause is derived from Article IX of the Articles of Confederation, which stated that Congress has "the sole and exclusive right and power of . . . regulating the

131 *Lara*, 541 U.S. at 199.

132 *Id.* at 200.

133 *Id.*

134 Edwin Kneedler, *Indian Law in the Last Thirty Years: How Cases Get to the Supreme Court and How They Are Briefed*, 28 AM. INDIAN L. REV. 274, 279 (2003).

135 William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 1 (1987).

136 *Lara*, 541 U.S. at 200.

137 Pommersheim, *supra* note 35, at 273 n.12.

trade and managing all affairs with the Indians."[138]

In the early years of the United States, Congress may have been well served to interpret the Indian Commerce Clause as granting to it the power to regulate *all* Indian affairs, despite the fact that that the clause specifically grants power over only Indian *commerce*. However, even with changing times and the increased purchasing and political power of Indian tribes in this country, the Court continues to interpret this clause as not only giving Congress the power to regulate trade and commerce with the tribes, but also as authority to legislate other issues with regard to tribal affairs.[139] The problem with this interpretation is that "the treaty power does not literally authorize Congress to act legislatively," because it actually gives the President the power and authority to make treaties.[140]

In 1871, Congress ended the practice of entering into treaties with Indian tribes, but the Supreme Court nonetheless stated that the statute terminating such power, 25 U.S.C. § 71, "in no way affected Congress' plenary powers to legislate on problems of Indians."[141] Congressional policy today still purports to seek "greater tribal autonomy within the framework of a 'government-to-government relationship.'"[142] Yet, Congress has made major policy changes with regard to Indians, even in the last fifteen years, indicating that tribes are not as autonomous as the government makes them out to be.[143]

If Congress has plenary and exclusive power to legislate with regard to Indian tribes, then tribes are not truly sovereign, because they do not possess the ultimate power to decide whether they and their members will interact with the federal government and various states. Because Congress gave Indian tribes their recognized status within this country, it follows that because of its plenary power to legislate with regard to tribes, Congress has the power to extinguish tribal status. If a separate body has the complete power to regulate tribal affairs, then tribes are not sovereign; instead, they are dependent.

138 *Id.* (quoting the Articles of Confederation art XII).

139 *Id.* at 273.

140 *Lara*, 541 U.S. at 201.

141 *Id.* (quoting Antoine v. Washington, 420 U.S. 194, 203 (1975)).

142 *Id.* at 202 (quoting 59 Fed. Reg. 22951 (April 29, 1994)).

143 In the past fifteen years, Congress has, among other things, enacted the *Duro* fix and written multiple laws with regard to Indian gaming. With the increasing influence tribes have on the communities in which they are situated, and therefore on the United States itself, the government continues to step in and regulate Indian tribes.

2. The Constitution Does Not Give Congress An Enumerated Power To Alter Tribal Sovereignty

The Court in *Lara* noted that Congress' statutory goal of modifying the degree of autonomy of a dependent sovereign that is not a State is a common legislative objective.[144] Here again, the Court states that Congress may modify a tribe's degree of autonomy within the United States. As the court in *Wheeler* noted, Indian tribes enjoy a sovereignty that, "exists only at the sufferance of Congress and is subject to complete defeasance."[145] The Court refers to Indian tribes as "dependent sovereign[s]," however, the terms contradict one another. If a tribe is dependent, then it is not truly sovereign.[146] Since Congress may write laws with regard to tribes' internal affairs and jurisdiction, as well as tribal relations with the government, then Indian tribes are not entirely self-governing, even though they possess the power to write laws with regard to certain aspects of internal tribal affairs. Thus, they lack true sovereignty.

The Court states that Lara does not point to any explicit language in the Constitution suggesting there is a limit on Congressional authority to restrict or relax tribal powers.[147] What the Court does not recognize is that tribal members cannot point to explicit language in the Constitution with regard to Congress' authority on tribal affairs, because none exists. Justice Thomas, although concurring in the judgment, notes that "[t]he Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty."[148] There are only three places in which the term "Indian" appears in the United States Constitution.[149] First, it appears in Article I regarding apportionment of the House of Representatives.[150] Second, it appears in substantially the same form in the Fourteenth Amendment, which superseded the Article I reference. [151] Finally, the Indian Commerce Clause appears in Article I.[152]

The Court concedes that the treaty power, which is often referred to as a source of Congressional power over tribes, does not literally give Congress the authority to legislate with regard

144 *Lara*, 541 U.S. at 202.
145 *Wheeler*, 435 U.S. at 323.
146 *See generally Lara*, 541 U.S. at 193.
147 *Id*. at 196.
148 *Id*. at 224 (Thomas, J., concurring in the judgment).
149 Resnik, *supra* note 7, at 80.
150 U.S. CONST. art. I, § 2, cl. 3 ("[E]xcluding Indians not taxed.").
151 U.S. CONST. amend XIV, § 2.
152 U.S. CONST. art. I, § 8, cl 3.

to Indian affairs.[153] Thus, "it provides *no* power to *Congress*, at least in the absence of a specific treaty."[154] The treaty power problem was prevalent even in the early 1900s, as illustrated in *Missouri v. Holland*.[155] Although *Holland* challenged the Migratory Bird Treaty Act, it provides a good illustration of the sovereignty debacle and constitutional problems that plague the *Lara* decision and Indian affairs in general.

In *Holland*, Missouri filed a suit against the United States game warden to enjoin the United States from trying to enforce the Migratory Bird Treaty Act and certain regulations made by the Secretary of Agriculture on the grounds that the statute was unconstitutional.[156] The state argued that the statute interfered with states' sovereign rights because it provided for specified close seasons and other protections for certain species of birds that migrated between the United States and Canada.[157] The Supreme Court held that the Act was constitutional as the treaty-making power was expressly delegated to the United States under the Treaty clause[158] and the Supremacy Clause.[159] However, the decision tells the tale of a power struggle between the states and the federal government that is analogous to the situation facing Native Americans today.

Ironically, only six years prior to the *Holland* decision, the United States District Court for the Eastern District of Arkansas in *United States v. Shauver* struck down as unconstitutional an earlier federal statute regulating migratory birds because Congress "attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States."[160] Despite the fact that the court in *Shauver* found that migratory birds fell under the purview of matters that should be regulated by the states, counsel for the Attorney General in *Holland* argued that the government may exercise its powers within the various states to the extent necessary, "although they may involve an interference with what would otherwise lie exclusively within the province of the state."[161] The Supreme Court accepted

153 *Lara*, 541 U.S. at 201.

154 *Id.* at 225 (Thomas, J., concurring in the judgment).

155 252 U.S. 416 (1920).

156 *Id.* at 430-31.

157 *Id.* at 431.

158 U.S. CONST. art. II, § 2, cl. 2.

159 U.S. CONST. art. VI, cl. 2.

160 *Holland*, 252 U.S. at 432. *See also* United States v. Shauver, 214 F. 154 (1914) ("The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional.").

161 Brief for Appellee, Missouri v. Holland, 252 U.S. 416, 419 (1920) (No. 609).

the government's argument despite the fact that the government, by deviously going through the back door and entering into a treaty with Canada, sought to accomplish the same objective it attempted to undertake in *Shauver*. Counsel for the Appellant in *Holland*, recognizing the irony of the situation, aptly noted that

> [i]f it had even been suggested that, although Congress had no power to control the taking of wild game within the borders of any State, yet indirectly by means of a treaty with some foreign power it could acquire the power and by this means its long arm could reach into the States and take food from the tables of their people, who can for one moment believe that such a constitution would have been ratified?[162]

By the same token, even though the treaty power gives Congress no authority to regulate the relationship between tribes and the federal government absent a specific treaty, Congress uses its long arm to delve into tribal affairs via the treaty power and take from tribes that which it has no authority to seize: sovereignty.

> If Congress by means of a treaty can tell the people of a State when and under what conditions they may take wild game which they own in their collective sovereign capacity . . . then . . . they are states in name only, and our government a very different government from that presupposed and intended by the people who ratified the Constitution.[163]

Similarly, with regard to tribal self-government, because Congress bestowed upon itself the power to legislate with regard to Indian affairs and did not leave that task to the tribes, Congress does not view the tribes as sovereign. Instead, Congress views the tribes as dependent on the government to regulate virtually every aspect of their affairs, something Indians likely never pondered and the government, if it views tribes as sovereign, should never have contemplated either.

3. If Congress Has Power To "Reinvest" Tribes With Prosecutorial Power, Then The Tribes Are Not Sovereign

The Court states that the power that Congress reinvested in the tribes is similar to a tribe's powers to prosecute its own members, which makes the change at issue limited.[164] True, the *change* at issue may be limited, but the overreaching powers of the Supreme Court and Congress with respect to tribes are not. The trouble with *Lara* is that the Court circumvents the issue that has been at the core of Indian law and legislation since

162 Brief for Appellant, Missouri v. Holland, 252 U.S. 416, 418 (1920) (No. 609).
163 *Id*.
164 *Lara*, 541 U.S. at 203.

colonization: sovereignty. Simply because Congress reinvests tribes with a power that they already had, or which is similar to another power tribes possess, it does not necessarily follow that Congress believes that tribes are sovereign. Limited power does not equate to sovereignty.

The Court states that Congress' power to relax restrictions on tribes' inherent prosecutorial authority is consistent with other Supreme Court cases.[165] While this may be the case, it still does not mean that Congress and the Supreme Court view tribes as separate sovereigns. This is evidenced by the fact that Congress and the Supreme Court decide the laws of Indian nations with regard to dealings with the government and non-Indians. In fact, Congress, through its 1990 amendment of the Indian Civil Rights Act, dictated the way it believed Indians should behave with respect to other Indians within Indian territory. Although it is true that prior to the ICRA amendment tribes had been exercising authority over nonmember Indians who committed crimes on host tribal land, when Congress reaffirmed that power, it was essentially dictating to Indian tribes what they could or could not legally do with regard to nonmember Indians. Congress, if it had chosen to do so, could have refrained from amending the ICRA or amended it differently, denying Indian tribes all power to prosecute nonmember Indians who commit crimes on host territory.

D. Double Jeopardy

The Supreme Court found that Lara's tribal prosecution and subsequent federal prosecution for the same crime did not violate the Double Jeopardy clause of the Fifth Amendment.[166] The Double Jeopardy clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[167] Under normal circumstances, the Double Jeopardy clause would bar Lara's subsequent federal prosecution. However, there is an exception to the double jeopardy clause: the separate sovereigns, or dual sovereignty, doctrine. This doctrine holds that when an individual violates the "peace and dignity" of two sovereigns by a single act, that is, they violate the laws of two separate sovereigns, there are two distinct offenses.[168] Because the *Lara* Court found that Indian tribes possess the inherent sovereignty to prosecute nonmember Indians who commit crimes on host

165 *Id.*

166 *Id.* at 210.

167 U.S. CONST. amend. V.

168 *Lara*, 541 U.S. at 220 (Thomas, J., concurring) (quoting Heath v. Alabama, 474 U.S. 82, 88 (1985)).

tribal land, the Court found that the Sprit Lake Nation was a separate sovereign from the federal government. Thus, the dual sovereignty doctrine permitted both the tribal and the federal prosecutions.[169] However, this conclusion was not without criticism. Justice Thomas, although concurring in the judgment, pointed out that confusion and mixed messages are still abundant in tribal sovereignty cases. He noted two diametrically opposed assumptions underlying sovereignty cases: First, Congress possesses the power to "regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity."[170] Second, the tribes somehow remain inherently sovereign with the ability "to enforce their criminal laws against their own members."[171]

Over twenty years ago, the Supreme Court faced the same dilemma in *United States v. Wheeler*. The Court noted that an Indian tribe's power to punish tribal members who commit crimes on tribal land was among the inherent powers of Indian tribes. However, those powers were subject to "complete" congressional "defeasance."[172] Even after Congress amended the Indian Civil Rights Act in 1990, purporting to "reinvest" Indian tribes with the inherent power to prosecute nonmember Indians, Congress still holds the puppet strings. That is, Congress ultimately has the power to take away tribes' authority to prosecute both member and nonmember Indians. Both the Court and Congress appear to promote the idea that the Indians' source of power to prosecute criminals is a power derived from inherent sovereignty. However, in reality, this power seems to be a delegated federal power. Justice Kennedy, concurring in the *Lara* judgment, points out that

> [t]he terms of the [amended Indian Civil Rights Act] are best understood as a *grant or cession from Congress* to the tribes, and it should not be doubted that what Congress has attempted to do is subject American citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject. The relaxing-restrictions formulation is further belied by the involvement of the United States in all aspects of the tribal prosecution of a non-member Indian. . . . This does not indicate the sort of detachment from the exercise of prosecutorial authority implicit in the description of Congress' Act as having relaxed restrictions.[173]

Adding an interesting twist to the plot, both Justice Souter and Justice Scalia, who rarely share the same point of view,

169 *See Lara*, 541 U.S. at 210.
170 *Id.* at 215 (Thomas, J. concurring).
171 *Id.*
172 *Wheeler*, 435. at 322.
173 *Lara*, 541 U.S. at 213 (Kennedy, J., concurring) (emphasis added).

dissented. Justice Souter wrote that the majority's reasoning implied that allowing Congress to amend the Indian Civil Rights Act was "more like the delegation of lawmaking power to an administrative agency, whose jurisdiction would not even exist absent congressional authorization."[174] An application of the Double Jeopardy doctrine turns on just how far inherent jurisdiction extends.[175]

Although Indian tribes do have limited powers to punish offenders who commit crimes within tribal territory, that power is still scrutinized by the ever watchful eye of the federal government. Congress and the Supreme Court still maintain that Indian tribes are separate sovereigns, and therefore, when an Indian commits a crime on tribal land, both the tribal and federal governments may prosecute him without offending the Double Jeopardy clause. Yet, if Congress has the plenary authority to disinvest tribes of that power by making it illegal to prosecute tribal members or nonmembers for crimes they commit on tribal land, then it does not seem to follow that Indian tribes are separate sovereigns. If this is the case, then tribal power is delegated federal power, and the Fifth Amendment should bar the Court from twice putting Lara in jeopardy.

There is no way to deny that the United States government has extensive power over Indian tribes. Realistically speaking, because tribes are reliant on the federal government, Congress' continual interference with tribal affairs and jurisdictional issues is at odds with the tribes' dependent status and most definitely at odds with their independent status. When Congress enacted the *Duro* fix to reinvest tribes with powers they possessed from their inception, Congress gave powers to the tribes that dependent bodies cannot really possess. Hence, Congress confused the situation even further with its "largely rhetorical" notions of indigenous nation sovereignty and independence.

IV. CONCLUSION

"The bird a nest, the spider a web, man friendship."[176]

Congress undeniably has the power to regulate Indian tribes, controlling a multitude of tribal affairs, both externally, and, to some extent, internally. However, this leads to the conclusion that Indian tribes are not sovereign bodies and probably have not been since colonization. The United States government and

174 *Id.* at 227 (Souter, J., dissenting).

175 *Id.*

176 William Blake, *available at* http://www.worldofquotes.com/author/William-Blake/1/index.html.

Indian tribes alike have made progress in leaps and bounds since both bodies experienced a head-on collision during the nation's inception. However, the government, while insisting that Indian tribes are sovereign nations, continuously appears to disregard their sovereignty by enacting laws that impact the tribes. If the Supreme Court and Congress believe that Indian tribes are sovereign, they should treat them as such.

Tribes have made countless efforts to improve their status within this country. Unfortunately, sometimes those efforts do not succeed. Making improvements, while partially the tribes' responsibility, should also be a priority for the government. The Court and Congress should take the initiative to recognize that when they refer to Indian nations as sovereign, they are perpetuating a false sense of independence and ability to completely self-govern. Our nation's law and policymaking bodies should reveal their true stance on how they view Indian nations.

Although there is no easy solution to such a deeply-rooted historical issue, recognizing that there is a problem, and identifying the source of that problem is at least a first step. Although "[t]he case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago,"[177] it still appears that Congress and the Supreme Court would rather continue giving lip service to tribal sovereignty than come to a resolution that allows the government to remain powerful but also allows tribes to preserve an independence and heritage that, if destroyed, could drive a stake through the rich traditions that are at heart of this nation.

177 *Holland*, 252 U.S. at 433.

GIMME THAT OL' TIME SEPARATION: A REVIEW ESSAY

Philip Hamburger, *Separation of Church and State*

*Francis J. Beckwith**

The United States Constitution addresses religion in only two places. First, Article VI states that "no religious Test shall ever be required as a Qualification to any Office or public Trust"[1] Second, the First Amendment contains a sequence of words that many Americans can recite by memory: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[2] The phrase "separation of church and state" has often been employed as a shorthand way to describe the legal principles that many believe are the basis for the Establishment and Free Exercise Clauses. However, the language is notoriously vague, for it gives us no direction as to the precise meaning of "free exercise," "establishment," or even "religion."[3]

It is clear, though, from the text that the First Amendment was intended solely to limit the law-making power of *Congress* and not any other branch of the state or federal governments. But since the early twentieth century, the Supreme Court, in a piecemeal fashion, began applying the First Amendment to *all* governments in the United States.[4] For example, in 1947, in

* Associate Professor of Church-State Studies, and Associate Director of the J. M. Dawson Institute of Church-State Studies, Baylor University. Ph.D. (philosophy), M.A. (philosophy), Fordham University; M.J.S. (Master of Juridical Studies), Washington University School of Law, St. Louis.

1 U.S. CONST. art.VI cl. 3.

2 U.S. CONST. amend. I.

3 *Id*.

4 The Court first incorporated the Freedom of Speech and Press Clauses, eventually incorporating the entire First Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (stating that freedom of speech and press "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States"); Near v. Minnesota, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by

Everson v. Board of Education, the Supreme Court applied the Establishment Clause to a non-federal government.[5] The Court's justification was a theory of constitutional interpretation known as the incorporation doctrine.[6] The Fourteenth Amendment states that no citizen may be deprived of "life, liberty, or property, without due process of law."[7] Thus, according to the Supreme Court and many constitutional scholars, many of the guarantees found in the Bill of Rights, including the religion clauses found in the First Amendment, apply to the States *in addition to* the federal government.[8] Whether such a move is justified is outside the scope of this review. Regardless, Americans have grown so accustomed to thinking of their Federal Constitutional rights as restraints on all governments – federal, state, and local – that even a logically sound argument against incorporation is not likely to get very far.[9]

---

state action."); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (agreeing 9-0 that the Establishment Clause applies to the States through the Fourteenth Amendment).

5 330 U.S. at 15-18.

6 *Id*. at 8. For an explanation of the incorporation doctrine, see *Gideon v. Wainwright*, 372 U.S. 335, 341-42 (1963):

> [T]his Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explictly recognized to be of this "fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.

Id. at 341 (emphasis added).

7 U.S. Const. amend. XIV, § 1.

8 There are disagreements among jurists as to what aspects or provisions of the Bill of Rights should be incorporated through the Fourteenth Amendment. *See* Doug Linder, *The Incorporation Debate*, *at* http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/incorp.htm (last visited May 1, 2005).

9 *See, e.g.*, Elk Grove v. Newdow, 124 S.Ct. 2301, 2328 (Thomas, J., concurring). Justice Thomas writes:

> Because I agree with THE CHIEF JUSTICE that respondent Newdow has standing, I would take this opportunity to begin the process of rethinking the Establishment Clause. I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation. Moreover, as I will explain, the Pledge policy is not implicated by any sensible incorporation of the Establishment Clause, which would probably cover little more than the Free Exercise Clause.

Id. at 2328 (Thomas, J., concurring).

According to Justice Thomas, the Establishment Clause was intended to be a limit on federal power by forbidding the federal government to establish a national church while permitting each state to establish a state church if it desired. *Id*. at 2330. Thus, because it was not intended to protect any individual liberty relative to the federal government, it cannot be incorporated through the "liberty" referred to in the Fourteenth Amendment. *Id*. at 2331. One could add to Justice Thomas' analysis that, given the

The notion of "separation of church and state" is a largely unquestioned dogma in American political and legal discourse even though the phrase does not appear in the text of the Constitution. A plain reading of the religion clauses is just as consistent with some forms of moderate separationism as it is with strong separationism.[10] In his masterful work entitled *Separation of Church and State*, Philip Hamburger demonstrates that separationism has achieved its status in American politics and jurisprudence largely as a result of an ignoble pedigree, which harnessed an ambiguously understood slogan – separation of church and state – to advance a particular view of religion, state, and liberty, which its proponents consider to be the "American Way."[11]

I. STORY OF A SLOGAN

Hamburger, who is the John P. Wilson Professor of Law at the University of Chicago, divides his book into four sections: Late Eighteenth-Century Religious Liberty; Early Nineteenth-Century Republicanism; Mid-Nineteenth-Century Americanism; and Late Nineteenth and Twentieth-Century Constitutional Law. Hamburger tells the story of a slogan, which was famously employed by Thomas Jefferson in his Letter to the Danbury Baptists:

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should

Establishment Clause's original purpose, an incorporation of the Clause through the Fourteenth Amendment would technically entail that the state, like the federal government, may not establish a religion. A local government, however, *would* be able to establish a religion, just as the states were able to do prior to incorporation.

10 Although it is difficult to precisely define the difference between moderate separationism and strong separationism, it seems to me that the following is a fair distinction. First, both affirm that the government should maximize religious liberty consistent with the public good and prohibit both ecclesiastical control of government powers and government control of ecclesiastical powers. Second, moderate separationism does not attempt to marginalize religion in public life, and, for example, would support public funding programs for similarly-situated religious and secular entities. On the other hand, strong separationism forbids any direct aid to religion, even when similarly situated secular entities are given aid. In addition, strong separationists seem willing to marginalize the political proposals of religious citizens if those proposals are religiously motivated, though similarly-situated non-religious citizens offering proposals based on secular grounds are unlikely to suffer the same fate. *See* Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations,* 33 LOY. U. CHI. L.J. 121, 122 n.5 (2001); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997); Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285 (1999).

11 *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (Paperback ed. 2004).

> "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of *separation between Church & State*.[12]

Because Jefferson is one of America's Founding Fathers, this letter, which Jefferson wrote while President, has the status of a sacred text in separationist circles. In fact, among some Christian church-state separationists, Jefferson's Letter to the Danbury Baptists carries with it an authority not unlike Paul's Letter to the Galatians. And yet, Jefferson's letter is, after all, a type of communication that presidents produce at least several times a day to a wide range of constituencies. Given that, it seems somewhat dubious to base constitutional doctrine on what amounts to nothing more than a note to political allies seeking the president's support for their religious liberty. This note was not part of an executive order, proposed legislation, or even a directive offered by the president to the attorney general as a suggested way to interpret the Establishment Clause. It is not clear, therefore, why one should take Jefferson's letter to the Baptists as any more normative for constitutional interpretation as, for example, Ronald Reagan's published book defending the pro-life position on abortion.[13] After all, Reagan, as California's governor, signed into law one of the first statutes that significantly liberalized access to abortion.[14] Thus, because the California law pre-dated *Roe v. Wade*[15] by six years, Governor Reagan was, in reality, one of legalized abortion's "founding fathers," and thus perhaps possessed a special insight into the issue's jurisprudence.

Hamburger points out that Jefferson's letter embodied a particular understanding of the relationship between church and state that was not shared by the Danbury Baptists.[16] Rather, the

---

12 Thomas Jefferson, *Jefferson's Letter to the Danbury Baptists* (Jan. 1, 1802), 57 THE LIBRARY OF CONGRESS INFORMATION BULLETIN 6 (June 1998), *available at* http://www.loc.gov/loc/lcib/9806/danpre.html (last visited May 1, 2005).

13 RONALD W. REAGAN, ABORTION AND THE CONSCIENCE OF THE NATION (1984).

14 *See* Carole Joffe, *30 Years After Roe v. Wade: Lessons about Abortion from the San Francisco Nine*, *at* http://www.prochoiceforum.org.uk/ocrabortlaw6.asp (Jan. 2003). She writes:

> The case [of the San Francisco Nine] reverberated in California and across the nation. In California, it gave new momentum to a bill, previously introduced in the legislature, that reformers had designed to broaden the grounds on which abortion would be legally permitted in the state. In 1967 this law passed, and a reluctant Governor Ronald Reagan signed the California Therapeutic Abortion Act.

Id.

15 410 U.S. 113 (1973).

16 According to Hamburger, "Jefferson's letter was not entirely a declaration of liberty. Separation was an idea first introduced into American politics by Jefferson's allies, the Republicans, who used it to elicit popular distaste against Federalist clergymen in their exercise of their religious freedom." HAMBURGER, *supra* note 11, at 109-10. For

Danbury Baptists were known as dissenters – those who opposed religious establishment but did *not* oppose the influence of religion on government.[17] In fact, because it was assumed that the moral ecology of a society could not be maintained without the influence of religion, dissenters had to constantly deal with the false charge that they were really separationists wanting to remove any vestiges of religion from the public square. As Hamburger points out, that was why the "Baptists who sought the support of the president were . . . silent about his letter . . . ."[18] Jefferson's letter, in fact, would have been counterproductive in quelling the fears of those who equated anti-establishment with separationism.[19] According to Hamburger, "Baptists merely sought disestablishment and did not challenge the widespread assumption that republican government depended upon the people's morals and thus upon religion."[20]

The Danbury Baptists, like most Americans at the time, maintained that the church and state were two separate spheres. However, they believed that the church, like other non-government institutions, played a vital role in civilizing the nation's citizens. In addition, they noted that the church instilled in citizens the notion that their rights were not derived from the fiat of governments, but were stamped on them by their Creator. The Baptists believed that the role of government was to protect the people's God-given rights, whereas the role of religion was to shape the moral understanding of the nation's people in order that they might be upstanding citizens.[21]

According to this view, the United States of America is a constitutional republic whose institutions presuppose and entail certain beliefs about the order and nature of things. These beliefs are nonnegotiable and necessary to maintain the continuity and purpose of the nation, including the rights of its people and the powers of its governments (both state and federal). The philosophical infrastructure of the American Republic consists of a cluster of ideals, beliefs, practices, and

---

the Federalist clergy had "inveighed against Jefferson, often from their pulpits, excoriating his infidelity and deism." *Id.* at 111. Although "[t]he religious dissenters, including the Baptists, sympathized with the Republicans and distrusted the Federalists, particularly the Federalist clergy. Yet, when invited by Jefferson to join the Republican demand for separation, the Baptists quietly declined." *Id.* at 110.

17 HAMBURGER, *supra* note 11, at 163-80.

18 *Id.* at 165.

19 Hamburger notes that: "[I]t may be useful to begin by considering [the Baptists'] awkward situation. . . . [E]stablishment ministers had long accused dissenters of advocating separation, whether of church from state or religion from government." *Id.*

20 *Id*.

21 *See generally* HAMBURGER, *supra* note 11.

institutions that are best sustained by a people who see this cluster as grounded in certain unchanging moral truths that are religious in nature.

Although the New Testament speaks very little about government and the Christian's responsibility as a citizen, there is one particular passage that may illuminate this Early American understanding. Jesus, in a familiar scene, is confronted by the Pharisees with an apparent dilemma:

> "Tell us, then, what is your opinion: Is it lawful to pay the census tax to Caesar or not?" Knowing their malice, Jesus said, "Why are you testing me, you hypocrites? Show me the coin that pays the census tax." Then they handed him the Roman coin. He said to them, "Whose image is this and whose inscription?" They replied, "Caesar's." At that he said to them, "Then repay to Caesar what belongs to Caesar and to God what belongs to God." When they heard this they were amazed, and leaving him they went away. [22]

Generally, "[t]he dominant understanding of this passage is that Jesus was instructing His audience that the church and government have jurisdiction over different spheres of authority."[23] As I have previously expressed:

> I believe this understanding is largely correct; however, those who present it often miss the subtle and political implications of what Jesus said. He asked whose image was on the coin. The answer was, of course, Caesar's. There is, however, an unsaid question that begs to be answered: What or who has the image of God on it? If the coin under the authority of Caesar because it bore his image, then we are under the authority of God because we bear His image. Good governments, nevertheless, ought to be concerned with the well-being of their citizens, and these citizens correctly believe that their well-being is best sustained by a just government. It follows that both government and church, though having separate jurisdictions, share a common obligation to advance the well-being of those who bear God's image. [24]

Given this understanding, the Danbury Baptists were troubled that their state, Connecticut, levied a tax to support the state's established religion: Congregationalism. Although Connecticut did allow Baptists and other citizens to request that the state redirect their tax money to their own churches, the process required that "they first. . .obtain, fill out, and properly

22 *Matthew* 22:11-13 (New American Bible).

23 Francis J. Beckwith, *Wise as Serpents: Christians, Politics & Strategic Voting*, 27 CHRISTIAN RESEARCH JOURNAL 3, 52-53 (2004) *at* http://homepage.mac.com/francis.beckwith/WiseAsSerpents.html (original manuscript on file with author) [hereinafter Beckwith, *Wise as Serpents*].

24 *Id.* (citation omitted).

file an exemption certificate."[25] And because "Baptists were a harassed minority, some communities made it difficult for them to receive these exemptions,"[26] which is why they shared their complaint with President Jefferson. However, like many Americans at the time, the Danbury Baptists did not see their resistance to religious establishment as inconsistent with a government that accommodates, and even encourages, its people to embrace an account of rights and human institutions in which religion, and its moral instruction, is essential.[27]

II. ANTI-CATHOLIC PREJUDICE AND THE TRIUMPH OF SEPARATIONISM

In the nineteenth century, separationism surged to prominence, largely as a Protestant reaction against the influx of immigrants from predominantly Roman Catholic countries. Some of these immigrant groups, including Irish and Italians, had set up their own private religious schools. However, many non-Catholic Americans believed that Catholic schools indoctrinated students with superstitions that were inconsistent with the principles of American democracy.[28] Therefore, in order to make sure that such schools would not receive government funding of any sort, federal and state legislation was proposed that forbade the use of public resources for religious, e.g.

---

25 Derek H. Davis, *Thomas Jefferson and the "Wall Of Separation" Metaphor,* 45 J. CHURCH & STATE 5, 10 (2003).

26 *Id.*

27 Of course, establishment supporters saw anti-establishment dissenters as no different than separationists. *See* HAMBURGER, *supra* note 11, at 65-78.

28 Take, for example, these comments by Joseph Martin Dawson:

> The Catholics, who [in 1948] are claiming a near majority over all Protestants in the United States, would abolish our public school system which is our greatest single factor in national unity and would substitute their old-world, medieval parochial schools with their alien culture. Or else they make it plain that they wish to install facilities for teaching their religion in the public schools.
>
> . . . .
>
> Perhaps the burning issue has arisen soon enough to enable the friends of the native American culture to arrest the progress of the long-range plan of those who would supplant it. There can be no doubt about the Catholic plan. Having lost enormous prestige in Europe, the Church now looks to the United States as a suitable stage for the recovery of its lost influence. Here it would seek new ground, consolidate and expand, as compensation for its weakened position in bankrupt Europe, with the hope of transforming this continent, a Protestant country, into a Catholic citadel from which to exert a more powerful rule. If this seems exaggerated and fanciful, the reader has only to open his eyes to what the Catholics are doing to achieve this end.

JOSEPH MARTIN DAWSON, SEPARATE CHURCH AND STATE NOW 98-100 (1948). Special thanks to the Rev. Dawson's granddaughter, Alice Baird, for bringing this book to my attention in her personal correspondence with me. (Personal correspondence on file with author).

Catholic, purposes. The most ambitious attempt to put this sentiment into law was the so-called "Blaine Amendment,"[29] which was named after the Congressman who proposed it.[30] Although it never became part of the Constitution, some individual states passed Blaine-type statutes or constitutional amendments that still remain on the books.[31]

Hamburger astutely points out that by arguing there was a need for these amendments, supporters of the Blaine Amendment and its progeny implicitly conceded that the First Amendment's Establishment Clause, by itself, does not prohibit the use of public resources for religious purposes.[32] Of course, this would mean that separationist jurisprudence relying on a Blaine-type understanding of church and state is likely an improper reading of the First Amendment. This does not mean, of course, that some modest form of separationism, such as the traditional anti-establishment position of the Danbury Baptists, is not correct (as I believe is, in fact, the case). Rather, it means that a doctrine borne of anti-Catholic animus and a desire to declare an American Protestant hegemony as the *established understanding of public faith* is hardly the "neutral" and "separationist" creed its proponents have led us to believe.

Ironically, as Hamburger points out, the underlying principles of separationism were adopted in the twentieth century by secularists, who were hostile to *all* religion in public life.[33] They used these principles to eliminate some of the most cherished practices of many (though not all) nineteenth century Anti-Catholic Protestant Separationists, including prayer[34] and Bible-reading in public schools.[35] These separationist principles were eventually applied by jurists and scholars to laws reflecting

29 The proposed amendment text reads:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

4 CONG. REC. 205 (1875).

30 James G. Blaine was a Republican Congressman from Maine. Biographical Directory of the United States Congress, 1774-Present, *at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000519 (last visited May 1, 2005).

31 For example, the Constitution of Texas states: "No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes." TEX. CONST. art. 1, § 7.

32 HAMBURGER, *supra* note 11, at 296-312.

33 *Id*. at 478.

34 *See* Engel v. Vitale, 370 U. S. 421 (1962); Wallace v. Jaffree, 472 U. S. 38 (1985).

35 *See* Sch. Dist. of Abington Township v. Schempp, 374 U. S. 203 (1963).

traditional moral understandings on abortion[36] and homosexuality,[37] as well as to the idea that just government and constitutional jurisprudence both presuppose that we can know and apply unchanging moral truths.[38]

---

36 Justice John Paul Stevens, for example, offers the following analysis of a Missouri statute that placed restrictions on abortion and included a preamble that asserted that human life begins at conception:

> Indeed, I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions . . . or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. . . .Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.
>
> . . . .
>
> As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid.

Webster v. Reproductive Health Services, 492 U.S. 490, 566-67, 569 (1989) (Stevens, J., concurring in part and dissenting in part) (citations and footnotes omitted). Justice Stevens' judgment that there is no prima facie wrong in killing a pre-sentient human being because she is not yet sentient is curious. What Justice Stevens should have done is provide an argument as to why full sentience is the property a human being must possess in order for the law to be justified in recognizing it as a being worthy of legal protection. Stipulation just doesn't cut it.

37 *E.g.*, in his dissenting opinion in *Bowers v. Hardwick*, Justice Stevens writes:

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (citations and footnote omitted).

In *Lawrence v. Texas*, the Court embraced Justice Stevens' reasoning in a holding that overturned *Bowers* and concluded that homosexual sodomy is a protected liberty under the Fourteenth Amendment: "Justice STEVENS' analysis, in our view, should have been controlling in *Bowers* and should control here." 539 U.S. 558, 578 (2003).

38 For example, separationist law professor Steven G. Gey writes:

> The establishment clause should be viewed as a reflection of the secular, relativist political values of the Enlightenment, which are incompatible with the fundamental nature of religious faith. As an embodiment of these Enlightenment values, the establishment clause requires that the political influence of religion be substantially diminished. . . . Religious belief and practice should be protected under the first amendment, but only to the same extent and for the same reason that all other forms of expression and conscience are protected – because the first amendment prohibits government from enacting into law any religious, political, or aesthetic orthodoxy.

As America moved into the twentieth century, separationism was increasingly perceived as *the* American understanding of the Establishment Clause. Among its most vocal and public advocates were Baptists, Freemasons, the Ku Klux Klan, Nativists, and Secularists. One of the most ardent separationists of the twentieth century, Supreme Court Justice Hugo Black, was a Baptist and Freemason and, up until about ten years prior to his 1937 nomination to the Court, a member of the Ku Klux Klan. Although, as Hamburger points out, Black, "[i]n later years, would discount his association with the Invisible Empire of the Ku Klux Klan" as an innocent membership in a fraternal

---

> . . . .
>
> [R]eligious principles are not based on logic or reason, and, therefore, may not be proved or disproved.
>
> . . . .
>
> Whereas religion asserts that its principles are immutable and absolutely authoritative, democratic theory asserts just the opposite. The sine qua non of any democratic state is that everything political is open to question; not only specific policies and programs, but the very structure of the state itself must always be subject to challenge. Democracies are by nature inhospitable to political or intellectual stasis or certainty. Religion is fundamentally incompatible with this intellectual cornerstone of the modern democratic state. The irreconcilable distinction between democracy and religion is that, although there can be no sacrosanct principles or unquestioned truths in a democracy, no religion can exist without sacrosanct principles and unquestioned truths.

Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 79, 167, 174 (Fall 1990).

Aside from raising the awkward question of whether the claim that "no religion can exist without sacrosanct principles and unquestioned truths" is an unquestioned truth about which Professor Gey is certain, one may consult the following responses to the sort of "reasoning" he is offering his readers. *See generally* Mark Fisher, *The Sacred and the Secular: An Examination of the "Wall of Separation" and Its Impact on the Religious World View*, 54 U. PITT. L. REV. 325 (Fall 1992); HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE (1986); HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE (2002); FRANCIS J. BECKWITH & GREGORY P. KOUKL, RELATIVISM: FEET FIRMLY PLANTED IN MID-AIR (1998); C. S. LEWIS, MERE CHRISTIANITY (1952); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality,* 106 YALE L.J. 2475, 2486-95 (1997); and Ronald Dworkin, *Darwin's New Bulldog,* 111 HARV. L. REV. 1718 (1998).

Because Gey does not interact with any of the relevant literature on religious belief, morality, and rationality, it is difficult to know how he would reply to the sophisticated and/or compelling arguments offered by members of the growing intellectual movement of theistic philosophers in North America and Britain. Among the works that include these arguments are numerous books that were published before 1990 (the year Gey's article appeared in print). They include the following: RICHARD SWINBURNE, THE EXISTENCE OF GOD (1979); RICHARD SWINBURNE, FAITH AND REASON (1981); FAITH & RATIONALITY: REASON & BELIEF IN GOD (Alvin Plantinga & Nicholas Wolterstorff eds., 1983); WILLIAM LANE CRAIG, THE *KALAM* COSMOLOGICAL ARGUMENT (1979); ALVIN PLANTINGA, GOD AND OTHER MINDS: A STUDY OF THE RATIONAL JUSTIFICATION OF BELIEF IN GOD (1967); J. P. MORELAND, SCALING THE SECULAR CITY (1987); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); JOHN FINNIS, FUNDAMENTALS OF ETHICS (1983); MORTIMER ADLER, TEN PHILOSOPHICAL MISTAKES (1985); MORTIMER ADLER, HOW TO THINK ABOUT GOD: A GUIDE FOR THE 20TH CENTURY PAGAN (1980).

organization, "Black's account of his participat[ion] in the Klan was, at best, understated."[39] Hamburger presents a detailed history of Black's Klan affiliation which leaves no doubt that Black was much more than a nominal Klansman who wore his sheets only on holidays and for weddings.[40] According to Hamburger, "[i]n September 1923, Black joined the powerful Richard E. Lee Klan No. 1 and promptly became Kladd of his Klavern [which meant that he was] the officer who initiated new members by administering the oath about 'white supremacy' and 'separation of church and state.'"[41] Apparently, to quote the comedian Dennis Miller, Black was "burning the cross at both ends!"[42]

According to Hamburger, by the time the U. S. Supreme Court applied the Establishment Clause to the states in *Everson*, the separationist understanding was so widely accepted throughout the country that the Court could make it a fixed point in constitutional law without the need for any Blaine-type amendment.[43] And the Court did so in *Everson*, whose majority opinion was penned by Justice Black.[44] The case concerned the question of whether the Township of Ewing, New Jersey's payment to parents for the busing of their children to Catholic parochial schools, violated the Establishment Clause. Black concluded that it did not because (1) the payment was not given directly to a religious organization; (2) the payment was available to children in all schools, including non-religious private schools; and (3) it was much like other public services, such as the police and fire department.[45] Although many of Black's separationist allies on and off the Court – four of his brethren dissented [46] – did not like the fact that the Township of Ewing won the lawsuit, they would in coming years, upon reflection, realize that Black had delicately and cleverly placed into the arsenal of constitutional law adjudication, for the first time, the principles of separationism. Black wrote:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a

39 HAMBURGER, *supra* note 11, at 423-24.

40 *Id.* at 422-34.

41 *Id.* at 426.

42 Joe Kovacs, "Dennis Miller jabs Democrat all-stars," WorldNetDaily, *at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=34524 (last visited May 1, 2005) (talking about Senator Robert Byrd (D-WV), another former member of the Ku Klux Klan).

43 HAMBURGER, *supra* note 11, at 455.

44 330 U.S. at 3-18.

45 *Id.* at 6, 17-18.

46 *Id.* at 18-63. Justices Jackson, Rutledge, Frankfurter, and Burton dissented from Justice Black's majority opinion.

> church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[47]

Hamburger writes that Black "understood what he was doing. Only ten years before, when Black was appointed to the Court, Catholics vociferously condemned him for his Klan membership."[48] Thus, the facts and circumstances of *Everson* afforded Black "an opportunity to make separation the unanimous standard of the Court while reaching a judgment that would undercut Catholic criticism."[49] A fellow Baptist and separationist ally of Black's, the Reverend Joseph Martin Dawson, the namesake of the institute in which I hold my academic appointment, began to understand this as well. In commenting on the *Everson* case in his autobiography, he wrote, "We had lost a battle, but won the war!"[50]

Despite this victory, and a few subsequent ones for the separationists,[51] the Supreme Court has not fully absorbed the

---

47 *Id.* at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

48 HAMBURGER, *supra* note 11, at 461-62.

49 *Id.* at 462.

50 *Id.* at 462. *See also* JOSEPH MARTIN DAWSON, A THOUSAND MONTHS TO REMEMBER: AN AUTOBIOGRAPHY 194 (1964) (citing the same sentence). It should be noted that the Rev. Dawson never shared Justice Black's affection for the Klan. In fact, Dawson was a courageous opponent of racial prejudice. He writes in graphic detail:

> The First Baptist Church upheld a free pulpit. I denounced the Ku Klux Klan in face of nearly all in the church being members of the Klan. I was most severe when the Klan's mob lynched a Negro. My resolutions adopted by the Waco Pastor's Association are still being quoted around the country. These resolutions had been written just after I had seen the mob drag the terror-stricken Negro youth to the city hall square, seen the crazed mobsters toss him into the flames, in horror beheld them heap the faggots about his tortured body, gasped as they seized his torso, tied a rope around it to be hitched to the horn of a saddle for a so-called man to race with it hurtling on the ground to a creek bed in the country.

DAWSON, *supra* note 28, at 165. *See also*, James M. Dunn, *The Ethical Thought of Joseph Martin Dawson* 151-186 (1966) (unpublished Th.D. dissertation, Southwestern Baptist Theological Seminary) (on file with the Baylor University Church-State Research Center).

51 *See*, *e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985) (holding that New York City's use of federal funds to help underprivileged children, who attended parochial schools and were in need of remedial reading and math, violated the Establishment Clause because of excessive entanglement. The program involved the use of public school teachers,

premises of its jurisprudence. In fact, the contemporary Court seems to be moving in a direction more accommodating of religion, especially in the areas of religious speech and public funding of schools when the funds are directed to the schools by private choice or when there is no evidence that the funds are being used for indoctrination.[52] There are exceptions, however, in free exercise cases involving states with Blaine-type laws.[53]

III. TAKING HAMBURGER SERIOUSLY

By making a convincing case that there are good historical

although no religious symbols in the classrooms or religious indoctrination in the students' lessons were allowed), *overruled by* Agostini v. Felton, 521 U.S. 203, 236 (1997). *See also* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (issued the same day as *Aguilar* and involved similar issues that led the Court to strike down two school district programs on Establishment Clause grounds based on excessive entanglement), *overruled in part by Agostini*, 521 U.S. at 236 (overruling the aspect of *Ball* pertaining to the "Shared Time" program).

52 *See* Widmer v. Vincent, 454 U.S. 263 (1981) (finding that a religious student group's free speech and association rights were violated when it was prohibited by a state university from meeting on campus); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (ruling that it does not violate the Establishment Clause for a public school district to permit a church to show, after school hours and on school property, a religiously-oriented film on family life); Zobrest v. Catalina, 509 U.S. 1 (1993) (ruling that a school district may not refuse to supply a sign-language interpreter to a student at a religious high school when such government benefits are neutrally dispensed to students without regard to the public-nonpublic or sectarian-nonsectarian nature of the school); Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) (finding that it was content-based discrimination for the government to prohibit a controversial organization from sponsoring a religious display in a public park); Rosenberger v. Rector, 515 U.S 819 (1995) (ruling that it was a denial of college students' free speech rights, as well as a risk of nurturing hostility toward religion, to prohibit the students from using student-funds for a religiously-oriented publication); Mitchell v. Helms, 530 U.S. 793 (2000) (finding that direct funding to private schools, including religious schools, does not violate the Establishment Clause, since the distribution is evenhanded and the use of the money to indoctrinate students in religious schools cannot reasonably be attributed to government); *Mitchell*, 530 U.S. at 837-40, 867 (O'Connor, J., concurring) (finding that direct funding to private schools including religious schools does not violate the Establishment Clause, since the distribution is evenhanded *and* there is no evidence that funds given to religious schools were used to indoctrinate students).

53 *See, e.g.,* Locke v. Davey, 540 U.S. 712, 715 (2004) (refusing to overturn Washington's Blaine-type amendment on free exercise grounds) In pertinent part, Washington's Blaine-type amendment reads: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." *Id.* at 719 n.2 (quoting WASH. CONST., art I, § 11). The case concerned Joshua Davey, a theology student who qualified for a state scholarship, but was denied it on the grounds that Washington law forbade any funding for theological education, even though similarly situated students majoring in philosophy, history, or chemistry could make use of the same financial help. *Id.* at 717, 721. The Court held that states have much leeway in the area of funding, and that Washington could have a Blaine-type law without violating Mr. Davey's free exercise rights. *Id.* at 721. However, the flip-side of this "leeway" is that if Washington had funded Davey's theology education it would not have violated the Establishment Clause. *Id.* at 719. So, contrary to conventional wisdom and the beliefs of some separationist groups, *Locke* was not a victory for separationism. *See also* Witters v. Comm'n for the Blind, 771 P. 2d 1119 (Wash. 1989).

and textual reasons not to equate separationism with anti-establishment, Hamburger has provided a conceptual scheme by which courts may affirm the constitutionality of laws that are tied to religious understandings, but, nevertheless, do not constitute state establishments of religion. In other words, a government within the United States may pass laws providing public approval and sustenance to moral understandings that are consistent with, congenial to, or have their grounding in certain religious traditions, and which, simultaneously, are thought to advance the public good *without* offending the First Amendment religion clauses. Although not in line with the agenda of many contemporary separationists, such an approach would have been well-received by their anti-establishment predecessors, such as the Danbury Baptists, who believed in the importance of religion and morality in the preservation of a Constitutional Republic.[54]

For example, consider the debate over abortion. Contemporary separationists generally support abortion rights on anti-establishment and/or free exercise grounds.[55] They argue that the pro-life position on abortion, that the fetus is a full-fledged member of the human community and is entitled to

---

54 As Daniel Dreisbach writes:

> Although no friend of religious establishments, many evangelical dissenters resisted efforts to inhibit religion's ability to influence public life and culture, to deprive religious leaders of the civil liberty to participate in politics armed with political opinions informed by religious values, and to restrain the freedom of churches to define and advance their own mission and ministries, whether spiritual, social, or civic.

DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 52 (2002). Concerning the era in which President Jefferson penned his letter to the Danbury Baptists, Hamburger writes:

> In all probability, therefore, only a handful of Baptists, if any, and no Baptist organizations made separation their demand. Instead, Baptists focused on other, more traditional, claims of religious liberty.
>
> What Baptists sought not only differed from separation of church and state but also conflicted with it. Tactically, dissenters could not afford to demand separation, for a potent argument against them had been that they denied the connection between religion and government – a serious charge in a society in which religion was widely understood to be the necessary foundation of morality and government.

HAMBURGER, *supra* note 11, at 177-78.

55 *See, e.g.*, PETER S. WENZ, ABORTION RIGHTS AS RELIGIOUS FREEDOM (1992); Paul D. Simmons, *Religious Liberty and Abortion Policy:* Casey *as "Catch-22"*, 42 J. CHURCH & STATE 69 (2000) [hereinafter Simmons, *Religious Liberty and Abortion Policy*]; Paul D. Simmons, *Religious Liberty and the Abortion Debate*, 32 J. CHURCH & STATE 567 (1990); Stuart Rosenbaum, *Abortion, the Constitution, and Metaphysics*, 43 J. CHURCH & STATE 707 (2001); Judith Jarvis Thomson, *Abortion*, 20 BOSTON REV. 11 (Summer 1995). *But cf.* Francis J. Beckwith, *Law, Religion and the Metaphysics of Abortion: A Reply to Simmons*, 43 J. CHURCH & STATE 19 (2001); Francis J. Beckwith, *When You Come to a Fork in the Road, Take It?: Abortion, Personhood, and the Jurisprudence of Neutrality*, 45 J. CHURCH & STATE 485 (2003). Francis J. Beckwith, *Thomson's "Equal Reasonableness" Argument For Abortion Rights: A Critique*, 49 AM. J. JURIS. 118 (2004).

constitutional protection from the moment of conception, depends on "[a]bstract metaphysical speculation."[56] Therefore, any law prohibiting abortion on pro-life grounds would either constitute the establishment of religion, and/or violate the Free Exercise Clause by impeding the right of a woman who *wants* to obtain an abortion because, under her religious convictions, a fetus is not entitled to any legal rights.

Of course, it is no coincidence that opponents of abortion are generally more religious than those who support abortion-choice.[57] Opponents of abortion usually accept a view of the nature of the unborn that is consistent with their religion's philosophical anthropology.[58] However, those who offer this point of view in the public square do not merely stipulate the veracity of their position, as one would expect from people whose purpose is simply to propound dogmas condemning the "infidels."[59] Rather, they offer arguments consisting of reasoning that is remarkably public.[60] These arguments are not extracted

---

56 Simmons, *Religious Liberty and Abortion Policy*, *supra* note 55, at 75. Simmons writes:

> The fact that many people believe strongly that a zygote is a person is by now well established. The First Amendment allows people to believe as they will as a matter of conscience or religious belief. That is a matter *of* freedom of religion. But as a definition of personhood for constitutional protections in a pluralistic society, the zygote-as-person rationale is untenable in the extreme.
>
> . . . Abstract metaphysical speculation has its rightful place in theology; but it must finally be rejected as inappropriate to the logic necessary for democratic rule.

Id.

57 There are, of course, exceptions. For example, Doris Gordon (Founder, Libertarians for Life) and Nat Hentoff (writer, THE VILLAGE VOICE) are pro-life atheists. As far as I know, it is Doris Gordon who coined the term "abortion-choice," which I use in this essay and elsewhere. See Doris Gordon, *How I Became Pro-Life: Remarks on Abortion, Parental Obligation, and the Draft*, 19 INT'L J. SOC.& SOC. POL'Y 14 (1999).

58 *See, e.g.*, PATRICK LEE, ABORTION AND UNBORN HUMAN LIFE (1996); J. P. MORELAND & SCOTT B. RAE, BODY & SOUL: HUMAN NATURE & THE CRISIS IN ETHICS (2000); Francis J. Beckwith, *The Explanatory Power of the Substance View of Persons*, 10.1 CHRISTIAN BIOETHICS 33 (2004).

59 This is the stereotype advanced by Simmons when he writes that the pro-life view of the unborn's intrinsic value is *merely* a claim of "Catholic dogma" and/or "special knowledge" that is neither "subject to critical analysis" nor rooted in "reason." Simmons, *Religious Liberty and Abortion Policy*, *supra* note 55, at 71-5.

60 Sophisticated pro-life advocates typically argue from the nature of the unborn in order to establish its standing as a rights-bearer who ought to be protected by our laws. This type of argument is meant to rebut the typical abortion-choice argument that equates a human being's intrinsic value with whether it has the present ability to exercise or exhibit certain functions, e.g., consciousness, self-awareness, ability to communicate, or having a self-concept. *See, e.g.*, DAVID BOONIN, A DEFENSE OF ABORTION (2002); Dean Stretton, *The Fallacy of Essential Moral Personhood*, *at* http://www.pcug.org.au/~dean/fe mp.html (last visited May 1, 2003) [hereinafter Stretton, *Fallacy*]; MICHAEL TOOLEY, ABORTION AND INFANTICIDE (1983). In a nutshell, pro-lifers respond to this sort of argument by arguing that there is a deep connection between our human nature and the rights that spring from it, which a just government is obligated recognize. The unborn – from zygote to blastocyst to embryo to fetus – is the same being, the same substance, that

uncritically from a religious text or from the pronouncements of a religious authority. On the contrary, they are fully accessible to a wide range of people, even those who dispute their veracity and/or the conclusion for which they are conscripted.

It is not surprising, therefore, that supporters of abortion-choice rebut the pro-life case by offering their own philosophical anthropology. That is, they present arguments to show that the unborn, though a human being, does not possess the requisite characteristics that would require the government to protect it as a subject of rights.[61]

Both the pro-life proponent and the abortion-choice advocate offer contrary accounts of the same being – the unborn. The former offers a view of the human person that is at home in a religious worldview, though it is certainly not unreasonable to accept the pro-life position while rejecting the religious tradition from which it sprang.[62] On the other hand, the abortion-choice advocate offers an explanation of the human person that denies the soundness of the pro-life position. The abortion-choice position is widely held by citizens who are secular in their worldview and harbor an antipathy to the influence of traditional religion on public life.[63]

develops into an adult. The actualization of a human being's potential, e.g. her "human" appearance and the exercise of her rational and moral powers as an adult (which abortion-choice advocates argue determine the unborn's intrinsic value), is merely the public presentation of functions latent in every human substance from the moment it is brought into being. A human may lose and regain those functions throughout her life, but the substance remains the same being. Moreover, if one's value is conditioned on certain accidental properties then the human equality presupposed by our legal institutions and our form of government – the philosophical foundation of our constitutional regime – is a fiction. In that case, there is no principled basis for rejecting the notion that human rights ought to be distributed to individuals on the basis of native intellectual abilities or other value-giving properties, such as rationality or self-awareness. One can only reject this notion by affirming that human beings are intrinsically valuable because they possess a particular *nature* from the moment they come into existence. That is to say, what a human being *is,* and not what she *does*, makes her a subject of rights.

61 *See* BOONIN, *supra* note 60; Stretton, *Fallacy, supra* note 60; TOOLEY, *supra* note 60.

62 *See supra* note 57, 60.

63 For example, the number of organizations and individuals that own websites that advance a secular worldview while supporting church-state separation and the abortion-choice position are nearly limitless. *See, e.g.,* Internet Infidels Discussion Forum, *at* http://www.iidb.org/vbb/archive/index.php/t-79887 (last visited Mar. 1, 2005) ("Delaware Valley Chapter of Americans United for Separation of Church and State President Janice Rael has details on carpools and buses to the March for Women's Lives from everywhere."); Debra Arias, *A Close Encounter With the Religious Right*, Separation of Church and State Home Page, *at* http://candst.tripod.com/tnppage/debbie.htm (last visited Mar. 1, 2005) ("I did what I could to support pro-choice . . . because this was the only area of my life that I felt the radical right threatened. I was wrong."); *AU Joins 'March for Women's Lives' - Sunday, April 25* , The Wall of Separation: Official Weblog of Au.org, *at* http://blog.au.org/2004/04/march_for_women.html (Apr. 20, 2004) ("We encourage all AU activists to join us in marching behind our church-state separation banner. AU Executive Director Barry Lynn will be one of the featured speakers at the rally."); *The Affirmations*

Thus, both the pro-lifer and the abortion-choice advocate present divergent answers to the same question: Who and what are we? Yet, according to the separationist, only the pro-lifer is forbidden from shaping public policy because her point of view is "[a]bstract metaphysical speculation [that] has its rightful place in theology; but it must finally be rejected as inappropriate to the logic necessary for democratic rule."[64] But the abortion-choice advocate attempts to justify his position by offering what is essentially a different metaphysical account, e.g. one that picks out certain presently exercisable abilities or functions that a being must have in order to be afforded the protections of our laws. There seems to be no good reason, except a type of crass philosophical apartheid, which would justify the latter account having a rightful place in politics and law, while its pro-life alternative is relegated to "its rightful place in theology."[65]

The interpretation of anti-establishment as the equivalent of a total separation of religion from our political and legal institutions has resulted in this unjustified public marginalization of citizens who have a religious understanding of certain political and moral issues. As Hamburger and others point out, traditional dissenters such as the Danbury Baptists, did not understand anti-establishment in this way, and neither should we.[66] The courts should not be in the business of siding with a militant secularism that seeks to have its metaphysics and morals firmly embedded in our laws while suggesting that the metaphysics and morals of its religious opponents, regardless of the quality of the arguments offered, should not even be considered by the citizenry simply because they flow from a religious worldview. If liberal democracy means anything, it should at least mean that all citizens – regardless of the religious or non-religious source of their policy proposals – should be allowed to offer their best arguments without first being required by the courts or mischievous secularists to undergo a metaphysical litmus test.[67]

of Humanism: A Statement of Principles, Council for Secular Humanism, *at* http://www.secularhumanism.org/intro/affirmations.html (last visited Mar. 1, 2005) ("Mature adults should be allowed to fulfill their aspirations, to express their sexual preferences, to exercise reproductive freedom . . . .").

64 Simmons, *Religious Liberty and Abortion Policy*, *supra* note 55, at 75.

65 *Id.*

66 *See* HAMBURGER, *supra* note 11, at 163-80.

67 For an extended defense of a similar point of view, see Nicholas Wolterstorff's contribution to ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE (1997).

IV. CONCLUSION

Hamburger's book is an important work of compelling scholarship, and its content is much richer than I can possibly begin to convey in this brief review essay. Although it is difficult to predict the Court's future trajectory in religion-clause jurisprudence, there is little doubt that Hamburger's book and its conclusions, will, and ought to, play a major part in directing that trajectory. In his conclusion, Hamburger writes that "Americans . . . gradually forgot the character of their older, antiestablishment religious liberty and eventually came to understand their religious freedom as a separation of church and state."[68] Thus, despite this view's widespread acceptance, it lacks constitutional authority. For this reason and because of its roots in prejudice, "the idea of separation should, at best, be viewed with suspicion."[69]

Separation of Church and State has, of course, ruffled some feathers, as do all great books that seek to critically assess beliefs that once seemed like permanent fixtures of the canon of conventional wisdom.[70] Although it is a hard pill for some to

---

68 HAMBURGER, *supra* note 11, at 492.

69 *Id.* at 483.

70 *See, e.g.*, J. Brent Walker, *Hamburger wrong about founders' early Baptists' view of separation*, Baptist Joint Committee on Public Affairs, *at* http://www.bjcpa.org/Pages/Views/2002/08.07reflections.html (Aug. 7, 2002) [hereinafter Walker, *Hamburger Wrong*]. Walker concludes his review by charging Hamburger with historical revisionism. *Id.* Yet, in his attempt to rebut Hamburger's claim that church-state separation harms religious liberty, Walker offers an argument that is terribly misleading:

> Moreover, the separation of church and state serves both religion clauses in the First Amendment. It operates not only to insist upon non-establishment, but also to ensure the free exercise of religion. In fact, the Supreme Court's first use of the words "separation of church and state" came in a free exercise case in 1879.

Id. But what Walker does not tell his readers is that the 1879 case to which he refers, *Reynolds v. United States*, involved a federal statute that prohibited Mormon polygamy and that the Court ruled in favor of the government and *rejected* the Mormon Free *Exercise* claim. 98 U.S. 145, 166-8. The Mormons were free to *believe* in polygamy, but they could not exercise it (which, I suspect, is the point of the practice). The *Reynolds* Court writes:

> In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not

swallow, especially those who have linked the veracity of their theological tradition to separationism,[71] integrity demands that those individuals begin to rethink and re-adjust their understanding of First Amendment jurisprudence to fit the facts. Perhaps it is time to take the advice of Jefferson's predecessor, John Adams: "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence[.]"[72]

> interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

Id. at 166.

The *Reynolds* opinion, which Walker cites as supporting his position, does not seem to square well with his embracing of the peculiar Baptist doctrine of "soul freedom." Walker, *Hamburger Wrong*, *supra.* Elsewhere on the same website where Walker's article appears, Walter B. Shurden hashes out a meaning of "soul freedom" that would seem to *require* that the Court permit polygamy between three or more consenting "souls." Walter B. Shurden, *How We Got That Way Baptists on Religious Liberty and the Separation of Church and State*, Baptist Joint Committee on Public Affairs, *at* http://www.bjcpa.org/Pages/ Resources/Pubs/shurden.html (last visited Mar. 1, 2005).

71 For example, the Baptist scholar James Dunn writes:

> I contend that there is a Baptist identity. There are Baptist spots on our herd and you can tell them from the others. . . So, without those spots you may be a wonderful person, maybe a devout and dedicated Christian, far closer to the Jesus model than I may ever be, but frankly, my dear, you are not a Baptist. I personally and passionately believe that Baptist Christians are an identifiable breed. One of our marks is separation of church and state. There is no doubt that there is an unbroken chain in our "baptist bonafides" from soul freedom to religious liberty to the separation of church and state, all part of the package.
>
> Thank God Texas Baptists are not among those so-called, semi, pseudo anti-Baptists who have turned away from our blood-bought heritage.

James Dunn, *Religious Liberty as a Baptist Distinctive*, 7 JOURNAL OF CHRISTIAN ETHICS (Apr. 2001), *at* http://www.christianethicstoday.com/Issue/033/Religious%20Liberty%20as%20a%20Bapti st%20Distinctive%20By%20James%20Dunn_033_3_.htm. Although Dunn's account of Baptist doctrine may sound like the description of an essential belief or something that one would find in a creed, elsewhere Dunn denies that Baptists embrace creeds. Ken Woodward quotes Dunn as saying: "The only Baptist creedis 'Ain't nobody but Jesus goin' to tell me what to believe.'" Ken Woodward, *Sex, Sin, and Salvation,* NEWSWEEK, Nov. 2, 1998, at 37.

72 John Adams, 3 LEGAL PAPERS OF JOHN ADAMS 98, 269 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).