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SHEPARD BROAD LAW CENTER

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EDITOR'S NOTE

For International Law Weekend (ILW) many of the foremost international legal scholars and practitioners gathered to lecture on and debate a variety of current international law issues. For a budding—albeit hopeful—international law practitioner like myself, it was nothing short of a remarkable weekend. Having listened to their presentations and debates, and then subsequently worked on many of their articles covering the topics presented at ILW, I have come to respect and appreciate the knowledge, experience, and know-how that each author uniquely brings to the table. I would like to thank each of our distinguished authors for taking the time to submit an article despite their sometimes hectic schedules. And I would like to thank each author for their patience with the *Journal* staff during the editing process.

This volume speaks for itself. So rather than elaborate on what you are about to read, I would like to make some acknowledgments. I would like to acknowledge, first, those who made ILW, and therefore this volume, possible through their hard work and thoughtfulness—the International Law Student Association (ILSA) and the American Branch of the International Law Association (ABILA). Specifically, I would like to mention Jill Hereau, Vivian Shen and the entire ILSA and ABILA staff, who put in long, countless hours to make ILW happen. I also would like to acknowledge Alana Faintuch, Rayna Karadbil and Alicia Zweig, Jany Martinez, Rafaela Vianna and Cristina Cossio. Your hard work, persistence, and attention to detail have made this volume a world-class publication of which we should all be proud. Thank you, too, to the *Journal* staff for persevering through the editing process while balancing your school and life commitments. Your dedication and efforts have made my term as Editor-in-Chief a relatively painless process, so thank you.

Alana, I would like to thank you, personally, for your unyielding support, understanding, and humor through this process. And I extend my gratitude to Professors Douglas Donoho and Eloisa Rodriguez-Dod for their advice, support and their approachableness. And thank you, Sean, for tolerating and supporting me despite the stress. I appreciate it.

It was an honor to work with some of the sharpest and most knowledgeable minds in the international legal community, as well as

the *Journal* staff. I hope you enjoy reading this edition as much as I enjoyed facilitating its production. Cheers!

Christopher M. Brown
Editor-in-Chief, 2011-2012
May 6, 2012

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THURSDAY, OCTOBER 20
6:30pm-8:00pm
The Death of Sovereignty?
"Sovereignty" is a cornerstone of modern international law. Article 2(1) of the United Nations Charter declares "the Organization is based on the principle of sovereign equality." But, in an era of covert military operations in allied nations, S&P debt downgrades throwing countries into turmoil, secessionist conflicts in Europe, Africa, and elsewhere, and the increasing importance of supranational entities such as the EU, does the term "sovereignty" mean what it had previously? Is it transforming? Or dying?
Moderator:

Itzchak Kornfeld, Giordano Scholar, Faculty of Law, The Hebrew University of Jerusalem

Panelists:

José Enrique Alvarez, Herbert and Rose Rubin Professor of International Law, New York University School of Law; Christopher J. Borgen, Professor of Law and Co-Director, Center for International and Comparative Law, St. John's University School of Law; Member, Committee on Recognition/Nonrecognition in International Law, International Law Association; Katherine M. Gorove, Office of the Legal Adviser, Office of United Nations Affairs, United States Department of State; Sean D. Murphy, Patricia Roberts Harris Research Professor of Law, The GeorgeWashington University Law School; Member, Committee on Use of Force, International Law Association

FRIDAY, OCTOBER 21
9:00am — 10:30am
The Proper Place of International Law in the U.S. Grand Strategy
Historian Paul Kennedy defines grand strategy as "the capacity of the nation's leaders to bring together all of the elements [of power], both military and nonmilitary, for the preservation and enhancement of the nation's long-term (that is, in wartime and peacetime) best interests." This roundtable panel asks how the U.S. government does and should view the instruments of international law as an element of power. Should treaty law be honed and wielded tactically? What are the systemic effects of a robust international legal system that benefit or harm U.S. interests? How could they be improved or better utilized? Does "lawfare" merely describe an enemy's use of international legal instruments? Does international law have a democratic essence? How does accountability for violations fit into the picture?
Panelists:

Mark R. Shulman, Dean for Graduate Programs & International Affairs, Pace Law School; Chair of the New York City Bar Council on International Affairs; Gabor Rona, International Legal Director, Human Rights First; Scott Horton, Contributing Editor, Harper's Magazine; Member, ABILA Executive Committee; Chair, ABILA International Human Rights Committee; Ruth Wedgwood, Edward B. Burling

Professor of International Law and Diplomacy, Johns Hopkins School of Advanced International Studies; President, ABILA; Member, Committee on Use of Force, International Law Association

FRIDAY, OCTOBER 21
9:00am — 10:30am
Beyond All Boundaries: The Extraterritorial Grasp of Anti-Bribery Legislation
This panel will discuss an increasingly troublesome area of the law: the expansion of the extraterritorial application of domestic laws in the fight against international bribery. The Justice Department's hyper-aggressive extension of the Foreign Corrupt Practices Act has occurred almost entirely without reference to Congressional intent and certainly without any judicial scrutiny. The recently enacted United Kingdom Bribery Act 2010 adopts the aggressive U.S. position on extraterritoriality and stretches it even further. This panel will explore all aspects of this rapidly developing area.
Moderator:

Bruce W. Bean, Professor of Law, Michigan State University College of Law

Panelists:

Philip Urofsky, Partner, Shearman & Sterling LLP; former Department of Justice FCPA Prosecutor; Kimberly D. Reed, Managing Director, Reed International Law & Consulting; Professor and Assistant Dean, Duke University School of Law; Jeremy Carver, President, British Branch of the International Law Association; Board Member, Transparency International UK; Alexander Domrin, Head of International Programs, Pepeliaev Group, Moscow; Visiting Professor, University of Oklahoma School of Law

FRIDAY, OCTOBER 21
9:00am — 10:30am
U.S. Ratification of International Conventions in the 21st Century: Is the Ratification Process Broken?
This panel will examine the prospects for U.S. commitment to global conventions and treaties from four perspectives: the executive branch

negotiators, the Senate, NGOs with substantive interests in a convention and organizers of grassroots opposition. The panelists will draw from their experiences in current and past ratification efforts on conventions addressing weapons, outer space, oceans and the environment, some of which have been successful, some of which failed, and some that are still under consideration.

Moderator:

John E. Noyes, Roger J. Traynor Professor of Law, California Western School of Law;
Chair, ABILA Executive Committee; Member Committee on Baselines Under the International Law of the Sea, International Law Association

Panelists: John Bellinger, Partner, Arnold & Porter LLP; former Legal Adviser, Department of
State; Leigh Ratiner, Lead Negotiator, UN Conference on the Law of the Sea and Counsel to the L-5 Society in opposition to the "Moon Treaty"; Alexandra Toma, Executive Director, Connect U.S. Fund

FRIDAY, OCTOBER 21
9:00am — 10:30am

The Anti-Shari'a Movement – Unconstitutional Discrimination or Homeland Security?

Legislation by statute and constitutional amendment has passed or is in the process in over 20 States prohibiting the application in State courts of an ill-defined "Shariah Law" and/or "international law." The expressed purpose is to oppose the infiltration of terrorist Islamic groups bent upon creating a world-wide Caliphate in the United States through the imposition of Islamic law. Is this unconstitutional racism cloaked as national security or a proper response to modern asymmetric warfare?

Panelists:

Robert E. Michael, Chair, ABILA Islamic Law Committee; Chair, Subcommittee on Islamic Law of the Council on International Affairs of the New York City Bar Association (NYCBA); Adjunct Professor of Law, Pace University Law School; Managing Member Robert E. Michael & Associates PLLC; attorney for the NYCBA and ABILA in filing amicus curiae brief

in the Tenth Circuit Court of Appeals supporting the injunction issued in Awad v. Ziriax concerning the "Save Our State" amendment to the Oklahoma State Constitution; Abed Awad, Attorney and Consultant; recognized expert in Islamic Law and the laws of Arab countries; Heather Weaver, Staff Attorney, ACLU Program on Freedom of Religion and Belief; Bernard K. Freamon, Professor of Law, Seton Hall University Law School; Bernard J. Apperson, Assistant Attorney, U.S. Department of Justice; Visiting Professor of Law, United States Military Academy, West Point

FRIDAY, OCTOBER 21
9:00am — 10:30am
International Surrogacy
Many industrialized states prohibit or restrict surrogacy on the grounds that it exploits women and puts children at risk. But surrogacy has not been barred everywhere. It is unregulated in many poor countries and a thriving business in others. As recently noted by the Permanent Bureau at the Hague, these differences among national policies have produced "a booming, global business" in surrogacy. "Reproductive tourism" in India, for example, generates roughly $400 million annually. This panel will examine international surrogacy, including its human rights implications.
Panel Chair:

Barbara Stark, Chair, Family Law Committee, International Law Association; Professor of Law and Research Fellow, Hofstra Law School

Panelists:

Nadia de Araujo, Associate Professor, Catholic University of Rio de Janeiro of Justice; Dr. Ayelet Blecher-Prigat, Lecturer, Sha`arei Mishpat Law College; Adjunct Lecturer, The Hebrew University; Dr. Nina Dethloff, Professor, Universität Bonn, Germany; Dr. Gaia Bernstein, Professor of Law and Margaret Gilhooley Research Fellow, Seton Hall University Law School

FRIDAY, OCTOBER 21
10:45am — 12:15pm
Libya and Lawfulness
What does the course of events in Libya mean for the international law governing humanitarian interventions? Is a UN Security Council resolution a necessary and/or sufficient condition for future lawful interventions? What does it mean for the evolving international norm concerning the responsibility to protect civilians? The recognition of sovereign governments is a domestic political act, but what do the actions of different leading states with respect to Libya tell us about international norms governing state recognition and participation in civil wars? And, with specific respect to the United States, how do the international law issues interact with the constitutional separation-of-powers, particularly with respect to the President's authority to engage in military actions?
Panelists:

Sarah H. Cleveland, Louis Henkin Professor in Human and Constitutional Rights, Columbia Law School; Former Counselor to the Legal Adviser, U.S. Department of State; J. Andrew Kent, Associate Professor, Fordham Law School; Martin S. Lederman, Associate Professor of Law, Georgetown Law School; Former Deputy Assistant Attorney General, U.S. Department of Justice's Office of Legal Counsel; Thomas H. Lee, Leitner Family Professor of International Law, Fordham Law School

FRIDAY, OCTOBER 21
10:45am — 12:15pm
Libel Tourism
Electronic communications have changed defamation laws in ways few would have anticipated. A defamatory statement posted on the internet may be read anywhere in the world. The legal consequences of that statement depend not on where the statement was made, but where it was downloaded or viewed. This panel will review international developments under the defamation laws of the United States, the United Kingdom, Canada, and other countries. The panel is sponsored by the ABILA Committee on Teaching International Law.
Panelists:

Dr. Rachel Ehrenfeld, Director, American Center for Democracy, New York, New York; Daniel J. Kornstein, Partner, Kornstein, Veisz, Wexler & Pollard LLP; Steven M. Richman, Partner, Duane Morris LLP; Mark E. Wojcik, Professor of Law, The John Marshall Law School; Chair, ABILA Committee on Teaching of International Law; Member, ILSA Board of Directors

FRIDAY, OCTOBER 21
10:45am — 12:15pm
The European Union's Treaty of Lisbon and its Impact on National Politics and Policies
The Treaty of Lisbon, effective now for two years, has changed relations between the European Union and its Member States. The current economic crisis is putting serious strains on these relations and has had an impact on national politics and policy. EU policies, such as those relating to state aid, must be resolved in conjunction with local and regional units and the competition policy of the EU is increasingly emphasized by national authorities. A question to be addressed is whether the adoption of the Charter of Fundamental Rights and Freedoms by the EU is responsive to state concerns and whether the democratic deficit has been sufficiently addressed. In addition, the increased recognition of the role of the European Council, particularly with regard to the status of key political and monetary offices within the EU accorded by the Treaty of Lisbon, will be examined.
Panel Chair:

Elizabeth F. Defeis, Professor of Law, Seton Hall University Law School

Panelists:

Eleanor Fox, Walter J. Derenberg Professor of Trade Regulation, New York University School of Law; Roger Goebel, Alpin J. Cameron Professor of Law and Director, Fordham Center on European Union Law, Fordham Law School; Hugo Kaufmann, Director, European Union Studies Center, CUNY Graduate Center; Fernanda Nicola, Associate Professor, American University Washington College of Law

FRIDAY, OCTOBER 21
10:45am — 12:15pm
Fair and Balanced: The Ethics of International Human Rights Fact Finding

The controversy surrounding the UN Human Rights Council Report on Israel's Military Actions in Gaza in 2009 (the "Goldstone Report") has shined a spotlight on challenges facing the process of human rights fact-finding. International organizations and governments face increasing scrutiny to ensure that investigations are fair, impartial, and accurate. No global consensus has yet emerged about the ethical standards or formal rules that apply to members of fact-finding teams or the scope of their reporting. This issue is increasingly important as official fact-finding reports are invoked by administrative, adjudicative, and political bodies to make determinations of the lawfulness of particular conduct. This panel will address the challenges to regulating fact-finding processes, including: codes of conduct and ethical duties that apply to fact-finding missions; the potential applicability of domestic recusal and conflict-of-interest rules to lawyers engaging in fact-finding; the feasibility of formal due process protections for the subjects of fact-finding missions; the obligation of UN Member States and non-state actors to cooperate with fact-finding missions; and the challenges of fact-finding during times of war.

Moderator:

Peggy McGuinness, Co-Director, St. John's Law School Center for International and Comparative Law; Member, Committee on Recognition/Nonrecognition in International Law, International Law Association

Panelists:

Philip G. Alston, John Norton Pomeroy Professor of Law, New York University School of Law; UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; Marianne Mollmann, Senior Policy Advisor, International Secretariat, Amnesty International; Elizabeth Cassidy, Deputy Director of Policy and Research, U.S. Commission on International Religious Freedom; Trevor Norwitz, Partner, Wachtell, Lipton, Rosen & Katz

FRIDAY, OCTOBER 21
10:45am — 12:15pm
UN Disabilities Convention: Intersecting Dimensions of National Human Rights Implementation
This panel will assess developments in the national implementation of the recently entered into force UN Convention on the Rights of Persons with Disabilities. The panel will focus on the intersections and interactions between implementation of international disability law norms enshrined in the Convention and already existing (or evolving) human rights frameworks at the national level. Can implementation of the Convention act as a catalyst for better human rights implementation not only for persons with disabilities but for others as well? What kinds of intersections are there between international disability rights and other fields of human rights law? How do national politics come into play?
Panelists:

Steven Hill, Deputy Legal Adviser, U.S. Mission to the United Nations; Chair, ABILA International Disability Law Committee; Stephanie Ortoleva, Senior Human Rights Legal Advisor, BlueLaw International, LLP; Co-Chair, International Disability Law Interest Group, ASIL; Charles D. Siegal, Munger Tolles & Olson LLP; Honorary Vice President, ABILA; Member, Human Rights Committee, International Law Association; Member, Committee on Nuclear Weapons, Non-Proliferation and Contemporary International Law, International Law Association; Janet Lord, BlueLaw International LLP

FRIDAY, OCTOBER 21
1:30pm — 2:45pm
"International Lawyering for the U.S. in an Age of Smart Power"
Keynote Address: Harold Hongju Koh, Legal Adviser of the U.S. Department of State

FRIDAY, OCTOBER 21
3:00pm — 4:30pm
Pathways to Employment in International Law

A unique forum that brings law students and new lawyers together with experienced practitioners to explore opportunities for employment in international law. Learn about international internship opportunities, how to network with legal experts from around the world, practice in other legal systems and cultures, become active in international organizations and societies, and develop legal and interpersonal skills. Sponsored by the ABA Section of International Law and ILSA.

Moderator:

Will Patterson, Executive Director, International Law Students Association

Panelists:

Mark E. Wojcik, Professor of Law, The John Marshall Law School; Chair, ABILA Teaching of International Law Committee; Member, ILSA Board of Directors; Richard E. Charlton III, Counsel, Federal Reserve Bank of New York

FRIDAY, OCTOBER 21

3:00pm — 4:30pm

Private International Law in Action: The Impact of Recent Private International Law Developments on Domestic Law and Policy

The development of new norms and mechanisms of private international law continues to accelerate. Conventions, model laws and other instruments adopted in the EU, the Hague Conference on Private International Law, UNCITRAL, UNIDROIT and the OAS contribute directly to the rule of law, good governance and economic development. They also stand at the intersection of domestic and international law. This panel will explore the most significant recent developments and approaches in the field.

Moderator:

Ronald A. Brand, Professor of Law, University of Pittsburgh School of Law; Member, ABILA Executive Committee

Panelists:

Louise Ellen Teitz, Professor of Law, Roger Williams University School of Law; First Secretary, The Hague Conference on Private International Law; Member, ABILA Executive Committee; Co-Chair, ABILA Commercial Dispute Resolution Committee; Member,

Committee on International Protection of Consumers, International Law Association; John M. Wilson, Senior Legal Officer, Department of International Law, Organization of American States; John A. Sebert, Executive Director, Uniform Law Commission; Keith Loken, Assistant Legal Adviser for Private International Law, U.S. Department of State; Catherine Amirfar, Partner, Debevoise & Plimpton LLP; Member, ABILA Executive Committee

FRIDAY, OCTOBER 21
3:00pm — 4:30pm
R2P Comes of Age?
The extent to which the "Responsibility to Protect" principle has supplanted "Humanitarian Intervention" in international law will be analyzed in light of the UN Security Council's resolutions on Libya and Cote d'Ivoire as well as subsequent Council action or non-action in other situations where governments oppress their own citizens. The August 2011 Presidential statement on Syria will be contrasted with any Council decision under Charter Article VII that might have been possible.
Chair:

John Carey, former Vice President, ABILA; Chair, ABILA United Nations Law Committee and Member, ABILA Executive Committee

Panelists:

David P. Stewart, Visiting Professor of Law and Director, Global Law Scholars Program,Georgetown University Law Center; Vice President, ABILA and Co-Chair, ABILA Commercial Dispute Resolution Committee; Member, Committee on International Protection of Consumers, International Law Association; Thomas G. Weiss, Presidential Professor of Political Science and Director of the Ralph Bunche Institute for International Studies, The CUNY Graduate Center; John F. Murphy, Professor of Law, Villanova University School of Law; Honorary Vice President, ABILA

FRIDAY, OCTOBER 21
3:00pm — 4:30pm
Whither the Regulation of Private Military and Security Companies?
Private Military and Security Companies (PMSCs), today ever-present in conflict situations such as Iraq, Afghanistan, and more lately Somalia and Libya, have long been said to escape effective national or international legal regulation. A series of diplomatic initiatives have sought to clarify matters, promote effective regulation and ensure accountability. September 2008 saw the arrival of the Swiss-ICRC sponsored Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of PMSCs during Armed Conflict, and in November 2010, close to sixty PMSCs themselves volunteered to commit to an International Code of Conduct for Private Security Service Providers, aimed at bringing companies directly into the fold of human rights and international humanitarian law obligations. An independent governance and oversight mechanism for the Code is currently in the making through a multi-stakeholder process. In the meantime, the Human Rights Council has begun to consider the possibility of elaborating an international framework on the regulation, monitoring, and oversight of the activities of PMSCs. This panel will trace theses latest developments in PMSC regulation, discuss continuing challenges, and ponder the question in which direction regulation most likely will and should evolve.
Panelists:

Paul Seger, Ambassador, Permanent Representative of Switzerland to the United Nations in New York; Chris Albin-Lackey, Senior Researcher for Business and Human Rights, Human Rights Watch, and Civil Society Representative in the Temporary Steering Committee of the International Code of Conduct for Private Security Providers; Faiza Patel, Co-Director of the Liberty and National Security Program, Brennan Center for Justice at New York University School of Law and Member, United Nations Human Rights Council's Working Group on the Use of Mercenaries

FRIDAY, OCTOBER 21
3:00pm — 4:30pm
Habits of Compliance? International Law and the Executive
This panel will explore how the structure of the executive branch affects compliance with international law. Does the disaggregated nature of international legal decision making promote state compliance with international law, or does executive agency competition encourage officials to take advantage of the "softness" of international law? The panel brings together former officials from different administrations to consider how coordination and decision making in the executive branch has important implications for the applicability and enforcement of international law.
Panelists:

Martin S. Lederman, Associate Professor of Law, Georgetown University Law Center; Neomi Rao, Assistant Professor of Law, George Mason University School of Law; Brett McGurk, International Affairs Fellow, Council on Foreign Relations; Nathan Sales, Assistant Professor of Law, George Mason University School of Law; Gabor Rona, International Legal Director, Human Rights First; Trevor Morrison, Professor of Law, Columbia Law School

FRIDAY, OCTOBER 21
4:45pm — 6:15pm
Recent Developments in International Commercial Arbitration—The User, the Institutional, and the Lawyer's Perspective
Is 28 USC 1782 discovery available in commercial arbitrations?
What are the best places to arbitrate? Can the parties modify by agreement the grounds to challenge arbitral awards? Are investment and commercial arbitration really worlds apart? Are there commercial disputes that it would not make sense to arbitrate? Can arbitration become more efficient? The panel shall address these and other related questions as arbitration continues to grow as one of the world's most popular mechanisms to resolve commercial disputes.
Panel Chair and Moderator:

Aníbal M. Sabater, Partner, Fulbright & Jaworski LLP; Member, ABILA Executive Committee and Chair, ABILA Extraterritorial Jurisdiction Committee

Panelists:

Justin R. Marlles, Counsel, Petrohawk Energy Corporation; Dietmar W. Prager, Counsel, Debevoise & Plimpton LLP; Luis M. Martinez, Vice President, International Centre for Dispute Resolution – A Division of the American Arbitration Association; President, Inter-American Commercial Arbitration Commission

FRIDAY, OCTOBER 21
4:45pm — 6:15pm
International Financial Reform and the Domestic Response
In the wake of the last financial crisis, international political institutions like the G20, soft-law creators like the Basel Committee and the Financial Stability Board, and international organizations like the IMF have all turned their attention to remaking the architecture of oversight of international finance. This panel will assess American engagement with the international reforms and the relationship between domestic and international regulation of finance.
Panelists:

Eric Pan, Associate Professor of Law, Cardozo Law School; Claire Kelly, Professor of Law, Brooklyn Law School; Pierre Verdier, Associate Professor, University of Virginia School of Law; David Zaring, Assistant Professor, Legal Studies Department, The Wharton School

FRIDAY, OCTOBER 21
4:45pm — 6:15pm
The Law of the International Civil Service and National Employment Law
The law of the international civil service occupies an unusual place within the annals of international law. International law regulates the relationships between states, and might not ordinarily be considered to have much to say about employment relationships. In practice, the law of the international civil service has been developed through the jurisprudence of a handful of administrative tribunals, but it lacks the statutory sophistication of domestic employment law. Moreover

administrative tribunals have declined to apply international legal instruments or human rights treaties in describing employees' rights. Should administrative tribunals draw greater inspiration from domestic employment law and international human rights law? Are the gaps in the law of the international civil service of concern? Is the approach demonstrated in the case law of these tribunals too formalistic? Are remedies granted by the tribunals adequate? Are reforms desirable and if so how might they be effected? These and other issues will be addressed in the course of the speakers' presentations.

Panel Chair and Moderator:

Dr. Matthew Parish, Partner, Holman Fenwick Willan LLP, Geneva, lawyer specializing in public and private international law; formerly Chief Legal Adviser to the International Supervisor of Brcko, Bosnia and Herzegovina; Co-Chair, ABILA Accountability of International Organizations Committee

Panelists:

Phil Bocking, Member, Central Committee, Staff Union of the European Patent Organization, Berlin, Germany; Edward Flaherty, Senior Partner, Schwab Flaherty & Associates, Geneva; David Lewis, Professor of Employment Law, Middlesex University, England; Daniel Premont, Professor of Human Rights Law, University of Strasbourg, France; former head of UN human rights missions in Cambodia and the Democratic Republic of Congo

FRIDAY, OCTOBER 21

4:45pm — 6:15pm

Many Roads to Justice: Prospects for Strengthening Access to Justice in the Middle East-North Africa (MENA) Region

This post-Arab spring analysis of access to justice in the MENA region goes beyond access to courts and legal representation and considers notions of rights and justice, including for historically disadvantaged populations, such as women and youth; suggests solutions for removing barriers to enjoyment of rights and justice; addresses the effect of access to justice on economic development;

and assesses lessons learned and upcoming challenges. Morocco, which in June 2011 passed constitutional reforms to strengthen its formal and informal justice systems, will be a case study.

Panelists:

Norman L. Greene, Schoeman, Updike & Kaufman, LLP; Leila Hanafi, Staff Attorney and Programs Manager, The World Justice Project; Adnan Zulfiqar, Law & Public Policy Fellow, Center for Global Communication Studies; Yasmeen Hassan, Global Director, Equality Now; Yüksel Sezgin, Assistant Professor of Political Science, City University of New York; Luce Fellow at Princeton University

FRIDAY, OCTOBER 21

4:45pm — 6:15pm

LGBT Rights in Africa: International Human Rights and Cultural Relativism at a Crossroad

Almost all African countries criminalize consensual homosexual acts. In the few countries where this is not the case, LGBT people nonetheless face extreme discrimination or are otherwise frowned upon. Discrimination forces most LGBT individuals to live secret lives on the continent and the fight for acceptance is left to a few heroic individuals trying to make their voices heard. Religious beliefs and reference to traditional African values are often invoked to justify the discriminatory treatment of LGBT people. Supporters for equal rights for LGBT people argue that equality for all is enshrined in universal human rights instruments that African countries have ratified. In an increasingly globalized, yet also localized, world many international rules face challenges when implemented in the local context, perhaps none more so than those related to the rights of LGBT people. This panel will explore the complex relationship between African traditional beliefs, religion and the international human rights regime, with a focus on the struggle of LGBT people on the continent.

Moderator:

Chi Mgbako, Associate Clinical Professor of Law & Director, Walter Leitner Human Rights Clinic, Leitner Center for International Law and Justice at Fordham Law School

Panelists:

Nicole Fritz, Executive Director, Southern Africa Litigation Centre, South Africa; Cheikh Traore, Senior Advisor, Sexual Diversity, United Nations Development Programme, New York; Ernest Kofi Abotsi, Lecturer in Law, Faculty of Law, KNUST, Ghana; Executive Director, African Center for Development Law and Policy, Accra, Ghana

SATURDAY, OCTOBER 22
9:00am — 10:30am
International Law as Enhancer and Reducer of Domestic Rights and Powers
This panel explores how international law expands or contracts domestic rights and powers across a range of hot topics: how theories of attribution, including the "effective control" test, can expand or reduce domestic powers; how principles of foreign official immunity and plenary territorial jurisdiction have interacted historically; how individuals can hold international organizations accountable via standing mechanisms in the UN and ICC; and how international law affects the United States' ability to exercise extraterritorial jurisdiction.
Moderator:

Lori Fisler Damrosch, Henry L. Moses Professor of Law and International Organization, Hamilton Fish Professor of International Law and Diplomacy, Columbia Law School

Panelists:

Kristen E. Boon, Associate Professor of Law, Seton Hall University Law School; Anthony J. Colangelo, Assistant Professor of Law, SMU Dedman School of Law; Chimène Keitner, Associate Professor of Law, UC Hastings College of the Law; Cora True-Frost, Assistant Professor of Law, Syracuse University College of Law

SATURDAY, OCTOBER 22
9:00am — 10:30am
Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule

In modern warfare, civilian deaths and injuries far outweigh military casualties and yet the collateral damage rule continues to insist that that civilian destruction is only permitted when incidental to an attack on a legitimate military target and only when civilian casualties are not excessive in relation to concrete and direct military advantage anticipated. The panel will examine whether this rule can expect continued validity in light of the conditions and casualty statistics of modern warfare. It will also examine the impact of instant and ubiquitous media on the application of the collateral damage rule including recent US Rules of Engagement (ROEs) bearing on this rule.

Panelists:

Lt. Col. George Cadwalader, Military Professor, U.S. Naval War College; John Cerone, Professor and Director of the Center for International Law and Policy, New England School of Law Boston; Member, Human Rights Committee, International Law Association; Valerie Epps, Professor and Co-Director of the International Law Concentration, Suffolk University Law School; Vice President, ABILA; Jordan Paust, Mike and Teresa Baker Law Center Professor, University of Houston Law Center

SATURDAY, OCTOBER 22

9:00am — 10:30am

Climate Change Geoengineering: Panacea or Pox in the 21st Century?

The tepid response of the world community to arresting the rise of greenhouse gas emissions has led some scientists and policymakers to consider a potential response to climate change heretofore considered taboo, geoengineering, defined as "the deliberate large-scale manipulation of the planetary environment to counteract anthropogenic climate change." This panel examines a host of legal issues that would arise from geoengineering research and potential deployment, including governance architecture, compensatory mechanisms for those that might be adversely affected by side effects associated with deployment, and the implications of intergenerational equity principles.

Panelists:

Wil Burns, Director, Energy Policy & Climate Program, Johns Hopkins University; Co-Chair, ABILA International Environmental Law Committee Member, Committee on Legal Principles Relating to Climate Change, International Law Association; William Pentland, Senior Energy Systems Analyst, Pace Energy & Climate Center, Pace Law School; Martin Bunzl, Professor, Department of Philosophy and Director, Rutgers Initiative on Climate Change and Social Policy, Rutgers University; Edward A. Parson, Joseph L. Sax Collegiate Professor of Law, University of Michigan Law School

SATURDAY, OCTOBER 22
9:00am — 10:30am
Africa: The Application of International Criminal Law in a Shifting Political Environment
Over the past twelve months, the international community witnessed the implementation of international criminal law against a backdrop of dramatic political environments. The tectonic shift in the political environments in countries such as Libya, Ivory Coast, and Sudan, to name a few has brought the realm of international law, and in particular international criminal law, to the forefront of the political realm in Africa. This panel would propose to bring together four experts in the political and legal fields to discuss the implications of political decisions to the development of international criminal law in Africa, paying particular attention to the role of the Security Council, the African Union and its Peace and Security Council, and other decision-makers in the international community.
Moderator:

Wambui Mwangi, Legal Officer, United Nations Office of Legal Affairs

Panelists:

Ambassador Jean-Francis R. Zinsou, Permanent Representative of Benin to the United Nations; Mahmood Mamdani, Herbert Lehman Professor of Government and Professor of Anthropology Columbia University; Cecile Aptel, Jennings Randolph Senior Fellow, United States Institute of Peace; Roland

Adjovi, Academic Director, Arcadia University, Arusha, Tanzania

SATURDAY, OCTOBER 22
9:00am — 10:30am
International Perspectives on Indigent Defense
In January 2011, the Department of Justice's Access to Justice Initiative and the National Institute of Justice's International Center jointly sponsored a workshop on International Perspectives on Indigent Defense. The purpose of the workshop was to identify domestic and international best practices for representing low-income criminal defendants and to devise a robust research agenda on criminal indigent defense in the United States. The 40-person group from nine countries consisted of leading experts drawn from multidisciplinary communities, including domestic and international practitioners, researchers, advocates and government officials. This panel will examine the benefits and limitations of approaching the problems surrounding criminal legal aid in an international, multi-disciplinary way.
Moderator:

Maha Jweied, Senior Counsel, Access to Justice Initiative, U.S. Department of Justice

Panelists:

Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law-Indianapolis; Jo-Ann Wallace, President & CEO, National Legal Aid and Defender Association; Miranda Jolicoeur, Crisis Stabilization & Governance Officer, U.S. Agency for International Development

SATURDAY, OCTOBER 22
10:45am — 12:15pm
CSR & Human Rights – Emerging Risks for Corporate Counsel
Human rights law is a growing area of concern for corporate lawyers advising global clients, structuring international transactions, and participating in transnational litigation. This roundtable focuses on the professional role of corporate counsel in identifying and managing the legal, political, regulatory, and reputational risks arising out of human rights claims. Panelists include a moderator, in-house counsel, a

lawyer from the U.S. State Department, and a risk management expert. This session will be of interest not only to corporate lawyers, but also to other in-house counsel, human rights lawyers, and academics working in related areas.

Panelists:

Dr. David Nersessian, Visiting Assistant Professor of Law, Boston University School of Law; Greg Maggio, Office of the Legal Adviser, U.S. Department of State; seconded to the State Department's Economic and Energy Bureau from 2011-2012 to focus on the OECD Guidelines for Multinational Enterprises; John Hall, Partner, Covington & Burling LLP; William K. Austin, Austin & Stanovich Risk Managers LLC; former Vice President and Corporate Risk Manager for FleetBoston

SATURDAY, OCTOBER 22

10:45am — 12:15pm

The Future of U.S. Trade Negotiations—What is a 21st Century Trade Agreement?

This panel will focus on the latest developments in U.S. trade negotiations, emphasizing recent bilateral and regional free trade agreements. In light of the struggles faced in the WTO multilateral negotiations, more attention has been focused on regional and bilateral agreements as a means to achieve national political goals for trade liberalization. This panel will explore those efforts, whether they are likely to be effective, and what they may mean for national and multilateral goals.

Moderator:

Claire Kelly, Professor of Law, Brooklyn Law School

Panelists:

Jagdish N. Bhagwati, Professor, Columbia University; Sungjoon Cho, Visiting Professor of Law, Fordham Law School and Professor of Law and Norman and Edna Freehling Scholar, Chicago-Kent College of Law; Ben King, New Zealand Embassy, Counsellor (Trade); Catherine Mellor, U.S. Chamber of Commerce, Associate Director, Southeast Asia International Division

SATURDAY, OCTOBER 22
10:45am — 12:15pm
Private Litigation Against Alleged Terrorist Sponsors
The Antiterrorism Act provides a private civil cause of action against persons and organizations providing material support for international terrorism. In amicus briefs, the U.S. Justice Department has stated that such private cases can be an effective weapon against international terrorism. Cases have been brought against entities who demonstrably support terrorism, but also against some whose alleged connections with terrorist organizations are more tenuous. This panel will address the theory and practice of these cases.
Moderator:

Captain Glenn M. Sulmasy, Chair of the Humanities Department, U.S. Coast Guard Academy

Panelists:

Daniel L. Cantor, Partner, O'Melveny and Meyers LLP; Gavriel Mairone, Founder, MM Law LLC; Andrew Kent, Associate Professor, Fordham Law School; Vincent J. Vitkowsky, Partner, Edwards Angell Palmer & Dodge LLP and Adjunct Fellow, Center for Law and Counterterrorism

SATURDAY, OCTOBER 22
10:45am — 12:15pm
The Challenge of Nuclear Abolition: Closing the Gap between International Law and National Politics
The United States announced a new nuclear weapons policy in 2010. Does it comply with the ICJ opinion on the legality of nuclear weapons? This panel will examine the current nuclear weapons policy of nuclear powers, new developments in international law on nuclear weapons, and a winning strategy to achieve a safe world without nuclear weapons.
Moderator:

John H. Kim, Co-Chair, ABILA Control and Disarmament Committee

Panelists:

Charles J. Moxley Jr., Adjunct Professor, Fordham Law School; Author of Nuclear Weapons and International Law in the Post-Cold War World (2000); Alicia Godsberg, Executive Director, Peace Action-

NYS; former Research Associate for the Strategic Security Program and UN Affairs at the Federation of American Scientists; Tad Daley, J.D., Ph.D., Author of Apocalypse Never: Forging the Path to a Nuclear Weapon-Free World (2010)

SATURDAY, OCTOBER 22
10:45am — 12:15pm
Intellectual Property Law in National Politics and International Relations Roundtable
This roundtable will explore how national political and economic policies drive and shape efforts to promote or resist the international harmonization of intellectual property laws. The main topic of discussion will be the roles of national political constituencies and forces in IP treaty negotiations, interpretation, and dispute resolution. Politically influential constituencies to be considered will include both public interest NGOs and special interest groups, such as broadcasters, content providers, ISPs, the disabled, universities, regional trade associations, and indigenous communities. The role of economic policy in shaping IP negotiating positions will also be discussed.
Panelists:

Aaron Fellmeth, Professor of Law and Faculty Fellow, Center for Law, Science & Innovation, Arizona State University Sandra Day O'Connor College of Law; Char, ABILA International Intellectual Property Committee; Member, Committee on Intellectual Property and Private International Law, International Law Association; Rochelle Cooper Dreyfuss, Pauline Newman Professor of Law, New York University School of Law; Member, Committee on Intellectual Property and Private International Law, International Law Association; Daniel J. Gervais, FedEx Research Professor of Law and Co-Director, Vanderbilt Intellectual Property Program, Vanderbilt Law School; Patricia Judd, Associate Professor of Law Washburn University School of Law; Molly Beutz Land, Associate Professor of Law and Associate Director, Center for International Law, New York Law School; Peter K. Yu, Kern Family Chair in Intellectual

Property Law and Director, Intellectual Property Law Center, Drake University Law School; Member, ABILA Executive Committee; J. Janewa OseiTutu, Visiting Scholar, University of Pittsburgh School of Law; Legal Counsel, Department of Justice, Canada.

SATURDAY, OCTOBER 22
12:30pm — 1:00pm
Tribunal Procedure and Ethical Dilemmas for Guantanamo Bay Military Tribunals
The Response is a 30-minute courtroom drama based on the actual transcripts of the Guantanamo Bay military tribunals (the Combatant Status Review Tribunals). In the vein of Twelve Angry Men, the film revolves around the tribunal of a suspected enemy combatant and the three military officers who must decide his fate. The Response was shortlisted for the 2010 Academy Awards, one of only ten films selected worldwide for this honor, and named the ABA Silver Gavel Award winner as best of the year in Drama & Literature. The panelists will discuss how the procedure affects the proceedings and the ethical issues raised.
Panelists:

Sig Libowitz, Writer & Producer, The Response; Attorney, Venable, LLP; John Harrington, Law Office of John H. Harrington, New York; Houston Putnam Lowry, Brown & Welsh, PC; Honorary Secretary, ABILA; Chair, ABILA International Commercial Law Committee; Peter Riegert, Actor; Animal House, Local Hero, Crossing Delancey, The Sopranos; Judge Evan Wallach, Court of International Trade; Adjunct Professor in Law of War, New York Law School

SATURDAY, OCTOBER 22
12:30pm — 2:00pm
The New International Investment Arbitration Lawyer: How Should Lawyers Prepare for the New Generation of Bilateral Investment and Trade Treaties?
The increase in BITs and Trade Agreements during the 1980s and 1990s resulted in an explosion of the number of investment arbitrations in the last decade. At the same time, this wave of

investment cases and the new challenges exposed since the 2008 economic downturn caused a number of countries to modify their FDI policies, including important changes to their BIT and Trade model agreements. The United States, China, countries of the EU, and others have updated their FDI policies, in many cases increasing their discretionary powers and reducing investors' protections. What should lawyers involved in investment arbitration expect from these new policies? How should they prepare for the next decade in light of these new policies? What other changes to FDI policies can be expected in the coming years? These questions will be the focus of this panel's discussion.

Moderators:

Norman Gregory Young, Professor, California State Polytechnic University; Co-Chair, ABILA Bilateral Investment Treaty and Development Committee; Roberto Aguirre Luzi, Partner, King and Spalding; Co-Chair, ABILA Bilateral Investment Treaty and Development Committee

Panelists:

Anna Joubin-Bret, Senior Legal Adviser, Division on Investment, Technology and Enterprise of the United Nations Conference on Trade and Development (UNCTAD), Geneva; Fernando Cantuarias Salaverry, Professor, Universidad Peruana de Ciencias Aplicadas; Dr. Huiping Chen, Professor of Law, Xiamen Law School; and Secretary-General, Xiamen Academy of International Law; Jeswald W. Salacuse, Henry J. Braker Professor of Law, The Fletcher School, Tufts University

SATURDAY, OCTOBER 22

12:30pm — 2:00pm

"Material Support of Terrorism" and Exclusion from Refugee Status: U.S. Supreme Court v. European Court of Justice

In recent years, states have adopted numerous anti-terrorism laws based on concerns for national security, aimed at preventing the admission or immigration of persons with connections to terrorist networks, but often also negatively affecting persons in need of protection. As a result of 'material support' bars in anti-terrorism provisions, even legitimate refugees have been prevented from

receiving asylum or protection from refoulement. This session, designed in a moot court style, debates recent US Supreme Court and European Court of Justice Decisions on exclusion.

Moderator:

Guy Goodwin-Gill, Professor of Public International Law, Oxford University

Panelists:

Geoffrey Corn, Professor of Law, South Texas College of Law; Steven M. Schneebaum, Shareholder, Greenberg Traurig, LLP; Member, ILSA Board of Directors; Susan M. Akram, Clinical Professor of Law, Boston University School of Law; Tom Syring, Legal Adviser, UNE / Norwegian Immigration Appeals Board

SATURDAY, OCTOBER 22

12:30pm — 2:00pm

Current Challenges for the International Criminal Court

With the recent Security Council referral of the situation in Libya to the ICC, as well as the current cases and investigations, there are high expectations placed on the ICC, but it must operate as an effective institution. The panel will focus on current challenges to the Court's work, including the Court's capacity to handle cases; challenges in finding a new Prosecutor and judges, ensuring that election procedures produce credible and qualified candidates; and the proper role of oversight by the Assembly of States Parties.

Panel Chair and Moderator:

Jennifer Trahan, Assistant Clinical Professor, NYU Global Affairs Program; Chair, ABILA ICC Committee

Panelists:

Judge Sang-Hyun Song, President, International Criminal Court; William Pace, Convenor, Coalition for an International Criminal Court; Fatou Bensouda, Deputy Prosecutor, International Criminal Court

SATURDAY, OCTOBER 22
12:30pm — 2:00pm
Promoting Independence for Human Rights Lawyers Worldwide: The Role of American Lawyers and Law Firms
Lawyers, and especially human rights lawyers, play a fundamental role with respect to human rights promotion and protection by other civic actors, vulnerable citizens, and activists. Because of this special role, however, they also become easy targets of abuse and are frequently harassed, intimidated, and themselves arrested and detained. This attempt to prevent lawyers from doing their jobs, and particularly to prevent them from representing clients that are unpopular with governments and other powerful actors threatens not only the development of human rights but also the rule of law. This panel will explore current and recent examples from countries including China, Argentina, Vietnam, and Northern Ireland. Panelists will explore what responses the U.S. legal community can make to support the professional independence of lawyers.
Moderator:

Elisabeth Wickeri, Executive Director, Leitner Center for International Law and Justice

Panelists:

Jerome A. Cohen, Professor of Law, New York University School of Law; Adjunct Senior Fellow, Council on Foreign Relations; Scott Greathead, Partner, Wiggin and Dana LLP; Sharon Hom, Executive Director, Human Rights in China

SATURDAY, OCTOBER 22
4:15pm — 5:30pm
"The Future of International Criminal Justice: The Crucial Role of the United States"
Keynote Address—Judge Richard Goldstone, Bacon-Kilkenny Distinguished Visiting Professor of Law, Fordham Law School

IS NEWS OF "SOVEREIGNTY'S DEATH" EXAGGERATED?

By Itzchak Kornfeld[*]

> *"[T]he proposition that a certain disorientation in American foreign policy derived from our having abandoned, for practical purposes, the concept that international relations can and should be governed by a regime of public international law."*[1]

I. INTRODUCTION

Whether sovereignty is alive or dead may not be the appropriate question. Without a doubt, it is universally agreed that the long-standing "Westphalian"[2] notion of sovereignty *vis a vis* a State's "right" to monopolize specific incidences of power, regarding its territory and citizens has in many ways been at least somewhat discredited.[3] Nevertheless, as John Jackson has observed "[a]lthough much criticized, the concept of 'sovereignty' is still central to most thinking about international relations

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* The author extends his thanks to José Enrique Alvarez, Christopher Borgen, Katherine Gorove, Sean D. Murphy, and Ruth Wedgwood for their enlightening discussions regarding the subject matter of this article. Of course, all errors and omissions are to be attributed solely to the author. The author may be contacted at kornfeld.itzchak@mail.huji.ac.il.

1. DANIEL PATRICK MOYNIHAN, ON THE LAW OF NATIONS 1 (1991).

2. The concept of sovereignty changed in its definition, paradigm, and application throughout history, especially during the Age of Enlightenment. The current notion of state sovereignty is often traced back to the Peace of Westphalia (1648), which, in relation to states, codified the basic principles:

1) territorial integrity;
2) border inviolability; and
3) supremacy of the state (rather than the Church).

See generally, Malcolm N. Shaw, INTERNATIONAL LAW 276 (3rd ed. 1991); Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L L.J. 120, n. 1, n. 25 (1992). A *sovereign* or government is the supreme lawmaking authority within its jurisdiction. *See generally* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 17–18 (7th ed. 1987); F. H. HINSLEY, SOVEREIGNTY (2nd ed. 1986).

3. John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 782 (2003).

and particularly international law."[4] Indeed, "realists" still prize and harbor strong beliefs about sovereignty—and at times seek to prevent foreign or international powers from meddling "in a national government's decisions and activities."[5]

Surveying sovereignty across the four-corners of the globe, one is struck by the particular preoccupation with the concept in the United States (U.S.)—particularly calls that the American government is giving away its sovereignty and American exceptionalism. But what is truly striking is that in the post World War II period U.S. behavior has been to the contrary. Indeed, America has taken liberties with other States' sovereignty. Grenada, Nicaragua, and Panama[6] come to mind. Additionally, during the course of the Iraq war international lawyers[7] and anti-war campaigners asserted that America's invasion was illegal. More astonishing, however, is the fact that Richard Perle, one of the architects of that war, and one of the major proponents of American exceptionalism and preemptive war, has backtracked and called the 2003 attack on Iraq illegal.[8]

Furthermore, questions have been raised concerning the legality of the United State's and NATO's 2011 attacks on Libya in aid of bringing down

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4. *Id*.

5. *Id*. On the realist proposition, *see generally* John Bolton, *The Coming War on Sovereignty*, COMMENTARY (Mar. 2009), http://www.commentarymagazine.com/article/the-coming-war-on-sovereignty (last visited Mar. 18, 2012). (While the term "sovereignty" has acquired many, often inconsistent, definitions, Americans have historically understood it to mean our collective right to govern ourselves within our Constitutional framework.).

6. *See generally* John Quigley, *The Legality of the United States Invasion of Panama*, 15 YALE. J. INT'L. L. 276 (1990); Louis Henkin, *The Invasion of Panama under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293 (1991).

7. *See*, *e.g*., Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 173, 173 (2004).

8. *See*, *e.g*., Oliver Burkeman & Julian Borger, *War Critics Astonished as U.S. Hawk Admits Invasion was Illegal*, GUARDIAN (U.K.) (Nov. 20, 2003, 03:29 EST), http://www.guardian.co.uk/uk/2003/nov/20/usa.iraq1 (last visited Mar. 18, 2012).

> [T]he influential Pentagon hawk Richard Perle conceded that the invasion of Iraq had been illegal. In a startling break with the official White House and Downing Street lines, Mr. Perle told an audience in London: 'I think in this case international law stood in the way of doing the right thing.'

Id.; *see also* John McTernan, *Nick Clegg and the "Illegal Invasion of Iraq:" the Coalition Shows Arrogant Disregard for Parliament*, TELEGRAPH (U.K.) (July 22, 2010), http://blogs.telegraph.co.uk/news/johnmcternan1/100048225/nick-clegg-and-the-illegal-invasion-of-iraq-the-coalition-shows-arrogant-disregard-for-parliament/ (last visited Mar. 18, 2012) (The United Kingdoms' Deputy Prime Minister, "Nick Clegg described the Iraq War as '*an illegal invasion*'.").

Libyan strongman Muhamar Gaddafi,[9] while the brutality of Syria's Assad have only seen hand ringing.[10] These exercises in the use of force, once again, raise the issue of the sanctity of sovereignty.

II. DECLINE, RISE, OR STATUS QUO

Over a decade ago Oscar Schachter observed that "the decline of the nation-State, goes to the heart of international law—its character as a system of discrete autonomous entities based on their defined territories, each exercising plenary authority over persons and things in that territory."[11] Schachter's point bears repeating: sovereignty and international law are entwined. A more recent view which adopts Schachter's theory is that both sovereignty and international law are in their "death throes, and with [them] an outdated order will become extinct,

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9. *See e.g.*, [Congressman] Dennis Kucinich, *The U.S. Must End its Illegal war in Libya Now*, GUARDIAN (U.K.) (July 6, 2011, 09:00 ETD), http://www.guardian.co.uk/commentisfree/cifamerica/2011/jul/06/libya-nato1?INTCMP=SRCH (last visited Mar. 18, 2012). Congressman Dennis Kucinich states that:

> This week, I am sponsoring legislation in the United States Congress that will end U.S. military involvement in Libya for the following reasons: First, the war is illegal under the United States Constitution and our War Powers Act, because only the U.S. Congress has the authority to declare war and the president has been unable to show that the US faced an imminent threat from Libya.

Id.; Patrick Wintour & Ewen MacAskill, *Gaddafi May Become Target of Air Strikes, Liam Fox Admits*, GUARDIAN (U.K.) (Mar. 20, 2011, 17:07 ETD), http://www.guardian.co.uk/world/2011/mar/20/coalition-criticism-arab-league-libya?INTCMP=SRCH (last visited Mar. 18, 2012).

> America, France and Britain—the leaders of the coalition's air attacks on Libya—were struggling to maintain international support for their actions, as they faced stinging criticism about mission creep from the leader of the Arab League, as well as from China and Russia. Critics claimed that the coalition of the willing may have been acting disproportionately and had come perilously close to making Gaddafi's departure an explicit goal of U.N. policy.

Id.; *see also*, Scott Bobb, *Several African Leaders Criticize Air Attacks in Libya*, VOICE OF AMERICA (Mar. 22, 2011), http://www.voanews.com/english/news/Several-African-Leaders-Criticize-Air-Attacks-in-Libya-118435599.html (last visited Mar. 18, 2012) ("South African President Jacob Zuma has warned that the Western-led bombings of Libyan military installations must not target civilians. Zuma was one of several African leaders who criticized the bombings, which were conducted as part of the effort to establish a no-fly zone in Libyan air space.").

10. On the legitimate use of force, *see generally* Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CH. L. REV. 113 (1986); MOYNIHAN, *supra* note 1, at 25; Phillip R. Trimble, *Daniel Patrick Moynihan's On the Law of Nations*, 85 NW. U. L. REV. 1041 (1991) (book review).

11. Oscar Schachter, *Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 7 (1997).

giving way to a new paradigm—globalization. This much is certain."[12] But, in today's world this model appears much less certain than it was in Shachter's day.

Nevertheless, what is clear is that the notion that nation-States are akin to separate islands, each standing guard over its internal affairs, has for the most part evaporated in the age of human rights and international trade. Indeed, although a somewhat imperfect analogy, modern sovereignty is akin to corporal punishment of children. Just as parents can no longer "do what they want" with or to their children, as public welfare officials keep a watchful eye on their actions and may remove a child from an abusive home, today, as a consequence of the United Nation's Declaration on Human Rights[13] and its progeny,[14] governments are checked to some extent from *always* abusing their citizens. Regulation and the interactions of an increasingly extended, and in some ways closer human community, has provided new legal relationships, as well as questions of what is just and humane.

We—the members of the developed world—are trending, as I see it, towards an ethos of being our brother's and sister's keepers, *e.g.*, protecting the Dar and the Fur peoples from rape, hunger and other privation,[15] and

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12. Rafael Domingo, *The Crisis of International Law*, 42 VAND. J. TRANSNAT'L L. 1543, 1544 (2009).

13. United Nations Universal Declaration of Human Rights (Dec. 10, 1948) UN.ORG, http://www.un.org/en/documents/udhr/ (last visited Mar. 18, 2012). *See*, *e.g.* Preamble providing:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people. . . .

Id. at pmbl.

14. *See e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (hereinafter the European Convention on Human Rights); International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/ser. K/XVI/1.1, doc. 65 rev. 1 corr. 1 (entered into force July 18, 1978), 9 I.L.M. 673 (1970); Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 297, U.N. Doc. A/43/49 (1988).

15. *Darfur Liberation Front*, GLOBALSECURITY.ORG (July 11, 2011), http://www.globalsecurity.org/ military/world/para/darfur.htm (last visited Mar. 18, 2012).

> Human rights groups describe the situation in Darfur as a genocide. The United Nations says up to 300,000 people have died over six years of fighting between rebel groups and government forces. . . . The International Criminal Court has

assisting those afflicted by earthquakes[16] and droughts.[17] Although these efforts impinge on sovereignty, they are calculated towards helping people within their sovereign States, or in camps in other sovereign States. Protecting artificial borders has in some cases become anathema to civilized States.[18]

As one surveys the face of the globe, globalization is insecurely anchored. Nations, like South Sudan continue to form and flourish. Indeed, the Arab Spring demonstrates that leaders are being toppled, not the State entity. Tunisians, Egyptians, Libyans and now possibly Syrians are

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> issued an arrest warrant for Sudanese President Omar al-Bashir, whom it accuses of masterminding a campaign of rape, murder, and other crimes against Darfur civilians.

Id.

16. *See*, *e.g*., *Haiti*, N.Y. TIMES, Jan. 19, 2012, *available at* http://topics.nytimes.com/top/news/international/countriesandterritories/haiti/index.html?scp=1&sq=The%20quake%20that%20struck%20on%20%22Jan.%2012,%202010%22,%20reduced%20much%20of%20the%20capital,%20Port-au-Prince,%20to%20rubble&st=cse (last visited Mar. 18, 2012) ("The quake that struck on Jan. 12, 2010, reduced much of the capital, Port-au-Prince, to rubble. . . . An estimated 634,000 people live in displacement camps, according to the International Organization for Migration. International donors promised Haiti $5.3 billion at a March 2010 donor's conference.").

17. Mike Pflanz, *East Africa Drought: Africa Must Do More to Help Itself*, TELEGRAPH (U.K.) (July 4, 2011, 10:11 PM), *available at* http://www.telegraph.co.uk/news/worldnews/africaandindianocean/8616965/East-Africa-drought-Africa-must-do-more-to-help-itself.html (last visited Mar. 18, 2012)

> The drought now blighting the vast, arid basin of land that stretches from northern Kenya through central Somalia and into eastern Ethiopia is among the worst anyone has seen . . . in some areas of northern Kenya, 37% of the population need emergency feeding. Across the Horn of Africa, levels of 20%, 25%, and 30% are being recorded regularly—double the 15% emergency threshold.

Id.

18. *See*, *e.g*., S.C. Res.1973,¶ 1, U.N. Doc. S/RES/1973 (Mar. 17, 2011), which provides in pertinent part,

> *[. . .]Expressing* grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian casualties. . . . *Further condemning* acts of violence and intimidation committed by the Libyan authorities against journalists, media professionals and associated personnel and *urging* these authorities to comply with their obligations under international humanitarian law as outlined in resolution 1738 (2006). . . .

Id.; *see also* S.C. Res. 1244, ¶ 3, U.N. Doc. S/RES/1244 (June 10, 1999), which declares, that the U.N. Security Council:

> Demands in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized. . . .

Id.

definite about maintaining their countries' sovereignty and borders, and their previous international obligations.[19] However, how does one reconcile the two competing views—the one that maintains that sovereignty remains muscular,[20] or the one that claims that it is in its "throes of death."

One view of sovereignty expressed by Christopher Borgen, with which I agree, is that it may be likened to a deck of cards.[21] A nation-State gives and takes cards as it needs them. If one accepts this analogy, it should be clear that sovereignty has not changed much over the millennia that States have existed. For example, in order to forge alliances, or to avoid wars, the rulers of nation-States from the dark ages through the Victorian era would marry members of the ruling class from other nation-States.[22] Thus, cards were given by one State or taken by the other, as the case may be, to avert war and forge alliances in order to gain greater strength and to protect each State's sovereignty. In today's world, as opposed to the one during that earlier age, the alliances that States form are multilateral rather than bilateral, *e.g.*, the World Trade Organization, the European Community, or the North Atlantic Treaty Organization. Similarly, the exponential growth of Bilateral Investment Treaties (BITs)—there are currently some 3000 BITs[23]—demonstrates that States continue to agree to "give up" sovereignty in order to gain benefits. This swapping is an incidence of sovereignty, and not an abrogation of it.

Consequently, under Borgen's theory, sovereignty is neither in the throes of death or omnipotent. Indeed, the complexity of today's globalized world means that States must give and/or take the "cards" of sovereignty more often. Where one State seeks to trade with others it must give up

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19. *Egypt Islamists to Honour Peace Deal with Israel: Carter*, CONSULATE GEN. OF THE ARAB REPUBLIC OF EGYPT IN N.Y. (Jan. 13, 2012), http://nyegyptionconsulate.com /en/?p=1830 (last visited Mar. 18, 2012) ("Former US president Jimmy Carter said on Friday that Islamist parties, who have taken political centre stage in Egypt's first post-revolution legislative polls, have vowed to honour the peace treaty with Israel.").

20. On the muscular sovereignty, *see generally* Ruth Wedgwood, *Unilateral action in a Multilateral World*, in MULTILATERALISM AND U.S. FOREIGN POLICY: AMBIVALENT ENGAGEMENT 167 (Stewart Patrick & Shepard Forman eds., 2001).

21. Personal communication on October 20, 2011.

22. *See*, *e.g.*, the marriage of King Henry VI of England to Margaret of Anjou on April 23, 1455, when she just fifteen years old. Margaret's uncle, Charles VII, of France, agreed to the marriage of his niece to his rival Henry VI. Indeed, when the English nobility made the match between Margaret and Henry VI they perceived that the union between the two would yield a lasting solution to the Hundred Years war. *See generally*, Betty King, *Margaret of Anjou* (2000), *available at* http://books.google.com/books?id=6ZgHAAAACAAJ&dq=margaret +of+anjou&hl=en&ei=O3ZsT6GSJsfv0gHws8i-Bg&sa=X&oi=book_result&ct=book-thumbnail&resnum=4&ved=0CEkQ6wEwAw (last visited April 25, 2012).

23. Personal communication on October 20, 2011.

sovereignty, because it may need to allow in goods that its trading partner's workers produce, which will lead to loss of jobs in the importing State. Indeed, what would people in Australia or Canada do without their Chinese manufactured iPads or iPhones if there were no trade agreements, foreign exchange agreements, or international maritime treaties? We would probably have a mess on our hands. Nevertheless, the States that import these items do not give up their territorial integrity.

Moreover, in entering into those treaties, and others, States undertake a cost-benefit analysis of whether the agreement benefits their short or long-term interest, however the case may be. "[T]reaties, as opposed to customary law, are increasingly important as the embodiment of international legal norms."[24] For example, the European Community is one such example. In order to join the EU, States must give up certain incidences of sovereignty. These include being hailed into the European Court of Human Rights for their governments' human rights abuses.

Similarly, the States that rim the Mediterranean Sea, signed the 1976 Barcelona Convention for Protection against Pollution in the Mediterranean Sea, because in their estimation, entering into that convention had a higher benefit than the cost to their sovereignty.[25] Likewise, the analysis was the same for treaties such as the Law of the Sea, environmental treaties, including the Espoo Convention,[26] the Aarhus Convention,[27] and the Montreal Protocol on the Depletion of Ozone.[28] Unsurprisingly, States, like people, weigh both the upside and downside potential when they are confronted by a choice to enter into an agreement with another or multiple States, or to decline to do so. Governments then horse trade and/or compromise—or they do not.

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24. Trimble, *supra* note 10, at 1044.

25. Convention for the Protection of the Mediterranean Sea Against Pollution, Feb. 16, 1976, 15 I.L.M. 285.

26. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309, *available at* http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/conventiontextenglish.pdf (last visited Mar. 18, 2012).

27. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447, *available at* http://treaties.un.org/doc/publication/UNTS/Volume%202161/v2161.pdf (last visited Mar. 18, 2012) (advocating the accessibility of public information with respect to projects potentially affecting the environment).

28. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1989 U.N.T.S. 28 (a protocol to the Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, 1988 U.N.T.S. 323).

III. CONCLUSION

How does one square the incongruence in the views of sovereignty with Article 2 of the United Nations Charter, which provides: "The Organization is *based on the principle of the sovereign equality of all its Members*."[29] A careful reading of the foregoing provision clearly demonstrates that the operative term is "*sovereign equality*" of all member States. That is, sovereigns are on equal footing, suggesting that the notion of sovereignty is not the "holy grail" of international law. Accordingly, it is certainly alive and far from dead. Paraphrasing Mark Twain, "News of Sovereignty's Death are Greatly Exaggerated."

29. U.N. Charter art. 2.

EXPANSIVE REACH—USELESS GUIDANCE: AN INTRODUCTION TO THE U.K. BRIBERY ACT 2010

Bruce W. Bean[*] *and Emma H. MacGuidwin*[**]

Following two decades of incessant pressure from American diplomats, in 1997, the international Organization for Economic Cooperation and Development (OECD) completed negotiation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[1] The Convention, which became effective on February 15, 1999, obligates signatories to enact domestic

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** Emma H. MacGuidwin is a 2008 summa cum laude graduate of Michigan State University College of Law, where she served as Senior Articles Editor of the Law Review. She is a former law clerk to the Honorable Russell G. Vineyard, United States Magistrate Judge for the Northern District of Georgia.

1. *See generally* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Feb. 15, 1999, 37 I.L.M. 1, *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf (last visited Mar. 7, 2011) [hereinafter Convention on Combating Bribery].

legislation criminalizing bribery of foreign government officials.[2] Five other anti-bribery conventions have since come into force.[3] However, the nearly universal formal acceptance of the principle that overseas bribery should be criminalized, as demonstrated by the broad acceptance of these conventions, has done little to reduce corruption. This is likely based in part on a similarly universal lack of interest in seriously enforcing the laws implementing these conventions. The U.K. Bribery Act 2010 [note the formal name of U.K. acts include the year, with no "of." I do not think we should change the name of their Act], enacted after more than a decade of debate, delay, and deliberation by Parliament, is the culmination of the United Kingdom's (U.K.) effort to finally comply with the OECD Convention.[4] Because the Act is a complete revision to all U.K. bribery-related statutes, it applies to both domestic and foreign bribery.[5]

This Article will provide an overview of the Bribery Act offenses of bribing another person, requesting or agreeing to receive a bribe, bribery of a foreign public official, and, most importantly, the corporate offense of failure to prevent bribery. As mandated by section 9 of the Bribery Act, the U.K. Ministry of Justice has published "Guidance about procedures which relevant commercial organisations can put into place to prevent persons

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2. *Id.*

3. These are the United Nations Convention Against Corruption, Council of Europe Civil Law Convention on Corruption, Council of Europe Criminal Law Convention and Protocol on Corruption, Inter-American Convention Against Corruption, and the African Union Convention on Preventing and Combating Corruption. *See Anti-Corruption Conventions and Instruments*, TRANSPARENCY INT'L, http://www.transparency.org/global_priorities/international_conventions/conventions _instruments (last visited Feb. 12, 2012). The most important of these is the United Nations Convention Against Corruption, which currently binds 140 states, with eleven others dealing with ratification. *See United Nations Convention Against Corruption*, UNODC.ORG, http://www.unodc.org/unodc/en/treaties/CAC/ signatories.html (last visited Feb. 12, 2012).

4. The United States' effort to eliminate bribery and corruption in international and business transactions began in 1997 with the enactment of the Foreign Corrupt Practices Act (FCPA), which is enforced by the U.S. Department of Justice and the Securities and Exchange Commission. Commercial organizations subject to the Bribery Act that have adopted anti-bribery procedures under the FCPA will already have satisfied some of the Bribery Act's requirements. However, certain of the substantive requirements of the Act go beyond those required by the FCPA, so companies adhering to the FCPA must still reevaluate their policies and procedures. *See* Richard Alderman, Dir., Serious Fraud Office, Managing Corruption Risk in the Real World (Apr. 7, 2011) *available at* http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/salans---bribery-act-2010.aspx (last visited Mar. 7, 2012). *See* Lista M. Cannon & Richard C. Smith, US Foreign Corrupt Practices Act versus the UK Bribery Act: a perspective from both sides of the Pond, *in* SERIOUS ECONOMIC CRIMES, ch. 11, at 92 (Serious Fraud Office, 2011) *available at* http://www.seriouseconomiccrime.com/ebooks/Serious-Economic-Crime.pdf (last visited Mar. 11, 2012).

5. *See* LAW COMMISSION NO. 313, REFORMING BRIBERY, 2008, H.C. 928, at 137 (U.K.) [hereinafter LAW COMMISSION NO. 313].

associated with them from bribing."[6] This Article will refer to the Guidance in addressing the various sections of the Act. We demonstrate that the overly broad and far-reaching effects of the Bribery Act go too far, particularly with respect to the corporate offense of failure to prevent bribery. We will also show that the Ministry of Justice's Guidance fails to provide useful guidance as to how the Act will be enforced and fails to reassure the public that such enforcement will not be overly aggressive.[7]

I. BRIBERY ACT: SECTION 1

A. Active Bribery Described

Section 1 sets forth the offense of bribing another person, or active bribery.[8]

Section 1 prohibits a person—either directly or through an agent—from offering, promising, or giving an advantage to another.[9] This is a

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6. *See generally* MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE (2010) [hereinafter GUIDANCE]. *See* Bribery Act, 2010, c. 23, § 9 (U.K.). *See* discussion *infra* Part V.B. Kenneth Clarke, Secretary of State for Justice, explained in the Foreword to the Guidance: "In line with the Act's statutory requirements, I am publishing this guidance to help organizations understand the legislation and deal with the risks of bribery. My aim is that it offers clarity on how the law will operate." Foreword to GUIDANCE, *supra* note 7, at 2.

7. The authors retain British spelling where the Bribery Act is quoted.

8. Bribery Act, 2010, c.23, § 1 (U.K.). This section provides as follows:

> (1) A person ("P") is guilty of an offence if either of the following cases applies.
> (2) Case 1 is where—
> (a) P offers, promises or gives a financial or other advantage to another person, and
> (b) P intends the advantage—
> (i) to induce a person to perform improperly a relevant function or activity, or
> (ii) to reward a person for the improper performance of such a function or activity.
> (3) Case 2 is where—
> (a) P offers, promises or gives a financial or other advantage to another person, and
> (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.
> (4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.
> (5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

Id.

9. *Id.*

general bribery offense, applicable within the United Kingdom and abroad. Section 1 thus covers domestic bribes, kickbacks, and the like between private parties, as well as bribes of government officials in international business.[10] An offense under section 1 is not limited to payments of money, but includes offers, promises, or gifts of financial or other advantage.[11] One commits this offense even without actually carrying through with the offer or promise of a payment or advantage; a simple offer or promise completes the offense.[12] A section 1 offense also includes indirect payments made through a third party.[13] However, the offense is limited to circumstances where the party making the payment intends the advantage so proffered to induce the recipient to improperly perform an act or to reward the recipient for having done so.[14] The offense is also completed where a party offers the advantage, knowing that acceptance of the advantage would constitute the improper performance of a relevant function or activity.[15]

The person to whom the advantage is offered is the key distinction between cases 1 and 2, the situations described in subsections (2) and (3).[16] In case 1, it does not matter whether the person to whom the advantage is offered is the same person who is to perform, or has performed, the activity; whereas in case 2, the person whose acceptance of the advantage constitutes an improper performance must be the same person to whom the advantage is offered.[17] Moreover, in case 1, the advantage must be intended to induce or reward the improper performance of a relevant function or activity, while in case 2, the acceptance of the advantage itself is the improper performance.[18] In summary, a person offering an advantage as described in section 1 is guilty if this was done with the intent to induce the recipient to improperly act, or reward the recipient for having done so, or where the recipient's acceptance or agreement is itself improper.[19]

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10. *Id.*
11. *Id.* § 1(2)(a).
12. Bribery Act, 2010, c.23, § 1(3) (U.K.).
13. *Id.* § 1(4)–(5).
14. *Id.* § 1(2)(b)(i).
15. *Id.* § 1(2)(b)(ii).
16. *Id.* § 1.
17. Bribery Act, 2010, c.23, § 1(2) (U.K.).
18. *Id.* § 1(3).
19. *Id.* § 1(2)(b).

B. Relevant Function or Activity and Improper Performance

Sections 3 and 4 of the Act set forth, respectively, the broad range of activities to which the Act applies and the meaning of improper performance as used in the Act.[20] As stated, the section 1 offense is where the advantage is intended:

> (i) to induce a person to perform improperly a relevant function or activity, or
> (ii) to reward a person for the improper performance of such a function or activity [or where]
> (a) P offers, promises or gives a financial or other advantage to another person, and
> (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.[21]

A relevant function or activity is defined in section 3 to include any public or business activity performed in the course of employment.[22] The activity must also meet one of three conditions: it is normally expected to be performed in good faith, is performed impartially, or is performed by a

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20. *Id.* §§ 1(4)–(5).

21. *Id.* §§ 1(2)(b), (3).

22. Bribery Act, 2010, c.23 § 3 (U.K.). Section 3 provides:

> (1) For the purposes of this Act a function or activity is a relevant function or activity if—
> (a) it falls within subsection (2), and
> (b) meets one or more of conditions A to C.
> (2) The following functions and activities fall within this subsection—
> (a) any function of a public nature,
> (b) any activity connected with a business,
> (c) any activity performed in the course of a person's employment,
> (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).
> (3) Condition A is that a person performing the function or activity is expected to perform it in good faith.
> (4) Condition B is that a person performing the function or activity is expected to perform it impartially.
> (5) Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.
> (6) A function or activity is a relevant function or activity even if it—
> (a) has no connection with the United Kingdom, and
> (b) is performed in a country or territory outside the United Kingdom.
> (7) In this section "business" includes trade or profession.

Id.

person in a position of trust by virtue of performing it.[23] Importantly, the relevant function or activity can be carried out abroad and need not have any connection to the United Kingdom.[24] However, the measure of what is improper is determined by U.K. standards, not by those of the foreign country where the bribing occurs.[25] Enforcement of this far-reaching language may well prove controversial as other sovereign nations begin to feel the effects of this measure.

Section 4 explains that a relevant function or activity is performed improperly if it is performed in breach of a relevant expectation, or if there is a failure to perform the function or activity, and that failure is a breach of a relevant expectation.[26] Section 5 of the Act elaborates on the term "expectation" as that term is used in sections 3 and 4.[27] This section clarifies that, for the purpose of sections 3 and 4, "the test of what is expected is a test of what a reasonable person in the United Kingdom would

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23. *Id*. § 3(3)–(5).

24. *Id*. § 3(6)(a)–(b).

25. *See id*. §§ 4, 5. This applicability of U.K. standards to transactions occurring in foreign nations with very different societies and cultures will doubtless trigger accusations of "cultural imperialism" comparable to those previously raised in connection with application of the FCPA. *See, e.g.*, Christopher Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism*, 1 ASIAN-PAC. L. & POL'Y J. 16:1 (2000); Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L, 155, 156 (2009); Padideh Ala'I, *Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade against Corruption,* 33 VAND. J. TRANSNAT'L L. 877, 881 (2000).

26. Bribery Act, 2010, c.23, § 4 (U.K.). Section 4 provides:

> (1) For the purposes of this Act a relevant function or activity—
> (a) is performed improperly if it is performed in breach of a relevant expectation, and
> (b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation.
> (2) In subsection (1) "relevant expectation"—
> (a) in relation to a function or activity which meets condition A or B, means the expectation mentioned in the condition concerned, and
> (b) in relation to a function or activity which meets condition C, means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.
> (3) Anything that a person does (or omits to do) arising from or in connection with that person's past performance of a relevant function or activity is to be treated for the purposes of this Act as being done (or omitted) by that person in the performance of that function or activity.

Id.

27. *Id*. § 5(1).

expect in relation to the performance of the type of function or activity concerned."[28] Section 5 further provides:

> In deciding what such a person would expect in relation to the performance of a function or activity *where the performance is not subject to the law of any part of the United Kingdom,* any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned.[29]

Thus, once again, the statute purports to apply U.K. standards to conduct that occurs in other nations.[30]

C. The Ministry of Justice's Guidance on Section 1

The Ministry of Justice's Guidance explains that the section 1 offense of active bribery applies to "bribery relating to any function of a public nature, connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body of persons."[31] While this explanation is broad in all respects, the situation most open to prosecutorial discretion—and thus prosecutorial abuse—is bribery performed "on behalf of a company or another body of persons."[32] However, the Guidance does not elaborate on this situation.

The Guidance also presents a scenario that would not, in all likelihood, implicate section 1:

> By way of illustration, in order to proceed with a case under section 1 based on an allegation that hospitality[33] was intended as a bribe, the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This would be judged by what a reasonable person in the UK thought. So, for example, an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance

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28. *Id*.

29. *Id*. § 5(2) (emphasis added).

30. *See* Bribery Act, 2010, c.23, § 5(2).

31. GUIDANCE, *supra* note 7, ¶ 18.

32. *Id*.

33. The term "hospitality" as used in the Guidance refers generally to business entertainment expenses that would include such items as meals, travel, and accommodation. *Id*. ¶¶ 26, 27.

> knowledge in the organisation's field is extremely unlikely to engage section 1 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function.[34]

It should be noted that the Ministry is careful to state only that such an invitation would be "extremely *unlikely* to engage section 1[,]" because there is "*unlikely* to be evidence of an intention to induce improper performance of a relevant function."[35] This opinion is certainly not conclusive, however, because the Guidance is not law, does not have the force of law, and thus, cannot offer much comfort to those seeking to determine how to comply with the Act.[36]

II. BRIBERY ACT: SECTION 2

Section 2 of the Act describes the offense of passive bribery, where the perpetrator requests or agrees to receive a bribe.[37] Under section 2, one

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34. *Id*. ¶ 20. Twickenham is the world's largest rugby stadium located close to London.

35. *Id*.

36. *See* GUIDANCE, *supra* note 7, ¶ 4.

37. Bribery Act, 2010, c.23, § 2 (U.K.). Section 2 of the Act provides:
(1) A person ("R") is guilty of an offence if any of the following cases applies.
(2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).
(3) Case 4 is where—
(a) R requests, agrees to receive or accepts a financial or other advantage, and
(b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.
(4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.
(5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—
(a) by R, or
(b) by another person at R's request or with R's assent or acquiescence.
(6) In cases 3 to 6 it does not matter—
(a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,
(b) whether the advantage is (or is to be) for the benefit of R or another person.
(7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.
(8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

does not need to receive a bribe, but merely ask for or agree to receive it, and the bribe need not be monetary.[38] The same definitions of relevant function or activity and improper performance found in sections 3 and 4 also apply to section 2.[39] As with active bribery, the action must be improper, i.e., the actor needs to do or intend to do something wrong.[40] Moreover, the improper conduct could be intended to be done by a third party, or a third party could be the source of the bribe.[41] As one might imagine, section 2 encompasses a wider range of possible conduct than does section 1 and may well be easier to prove from the prosecutor's standpoint. Moreover, the irony of labeling this offense as passive bribery, and yet defining the four cases constituting varieties of the offense with the term "requests," was apparently lost on Parliament.[42] As Professor Peter Alldridge, a U.K. authority in this area, has remarked: "Calling it passive bribery—as do some in international instruments—rather misses [the] point."[43]

III. BRIBERY OF FOREIGN PUBLIC OFFICIALS, FACILITATION PAYMENTS, AND HOSPITALITY EXPENDITURES

A. Section 6: Bribery of Foreign Public Officials

Section 6 of the Act outlines the offense of bribery of a foreign public official.[44] A foreign public official is defined as one who holds a

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Id.

38. *Id*. § 2(3)(a).

39. *Id*. §§ 3, 4.

40. *Id*. § 3(7).

41. Bribery Act, 2010, c.23, § 2(6) (U.K.).

42. *Id*. § 2.

43. Peter Alldridge, *Reforming Bribery: Law Commission Consultation Paper 185: (1) Bribery Reform and the Law—Again*, 2008 CRIM. L. R. 671, 681 (2008).

44. Bribery Act, 2010, c.23, § 6(1)–(4) (U.K.). Section 6 provides, in relevant part:

> (1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.
>
> (2) P must also intend to obtain or retain—
>
> (a) business, or
>
> (b) an advantage in the conduct of business.
>
> (3) P bribes F if, and only if—
>
> (a) directly or through a third party, P offers, promises or gives any financial or other advantage—
>
> (i) to F, or
>
> (ii) to another person at F's request or with F's assent or acquiescence, and

legislative, administrative, or judicial position of any kind of a country or territory outside the United Kingdom, exercises a public function, or is an official or agent of a public international organization.[45] This definition closely tracks the definition included in the OECD Convention.[46] A public international organization is defined as an organization whose members include countries or territories, governments of countries or territories, other public organizations, or a mixture of any of the above.[47]

The Guidance explains that this standalone offense is committed where a person offers, promises, or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions; the person must also intend to obtain or retain business or an advantage in the conduct of business by doing so.[48] The language "obtain or retain business or, an advantage in the conduct of business," likewise, carefully tracks the requirement of Article 1

> (b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.
> (4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—
> (a) any omission to exercise those functions, and
> (b) any use of F's position as such an official, even if not within F's authority.

Id.

45. *Id*. § 6(5). Specifically, section 6 provides, in relevant part:

> (5) "Foreign public official" means an individual who—
> (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),
> (b) exercises a public function—
> (i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or
> (ii) for any public agency or public enterprise of that country or territory (or subdivision), or
> (c) is an official or agent of a public international organisation.

Id.

46. Convention on Combating Bribery, *supra* note 1, art. 1, § 4(a). For the purpose of this Convention:

> a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.

Id.

47. Bribery Act, 2010, c.23, § 6(6) (U.K.).

48. GUIDANCE, *supra* note 7, ¶ 21.

of the OECD Convention.[49] For this separate offense, offering or paying a bribe to a foreign public official is criminalized, but as with the FCPA, receipt of the advantage by the foreign public official is not.[50]

The Ministry of Justice asserts in the Guidance that an offense under section 6 has no jurisdictional limit.[51] A foreign public official includes anyone, whether elected or appointed, who holds a legislative, administrative, or judicial position "of any kind of a country or territory outside the UK" and includes:

> [A]ny person who performs public functions in any branch of the national, local or municipal government of such a country or territory or who exercises a public function for any public agency or public enterprise of such a country or territory, such as professionals working for public health agencies and officers exercising public functions in state-owned enterprises.[52]

Such an official "can also be an official or agent of a public international organisation, such as the UN or World Bank."[53]

According to the Guidance, sections 1 and 6 "may capture the same conduct but will do so in different ways."[54] The policy underlying section 6 is "the need to prohibit the influencing of decision making in the context of

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49. Convention on Combating Bribery, *supra* note 1, art. 1, § 1. Article 1 provides, in relevant part:

> Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official. . . .

Id. For the unusual treatment of the phrase "or other advantage" by the United States, which amended the FCPA to incorporate this phrase following ratification of the OECD Convention, *see* United States v. Kay, 513 F. 3d 461 (5th Cir. 2008), one of just a handful of cases brought under the FCPA that have actually been resolved in the federal courts.

50. *Id*. art. 1.

51. GUIDANCE, *supra* note 7, ¶ 22.

52. *Id*. (emphasis added).

53. *Id*.

> This expands slightly on the text of the OECD Convention, which provides that a foreign public official means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.

Convention on Combating Bribery, *supra* note 1, art. 1, § 4(a).

54. GUIDANCE, *supra* note 7, ¶ 23.

publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to [sic] others at the official's request."[55] While such activity is likely to involve conduct amounting to improper performance of a relevant function or activity, to which section 1 applies, the Guidance explains that section 6 does not require proof of improper performance or an intention to induce such performance, because "the exact nature of the functions of the persons regarded as foreign public officials is often very difficult to ascertain with any accuracy, and the securing of evidence will often be reliant on the co-operation of the state any such officials serve."[56] Thus, Parliament felt the need to create the separate, standalone offense of bribing a foreign public official. While the Guidance states that it is "not the Government's intention to criminalise behavior where no such mischief occurs, but merely to formulate the offense to take account of the evidential difficulties referred to above," this is less than helpful, and in fact, provides no useful guidance at all.[57]

B. Facilitation Payments

The Bribery Act also outlawed facilitation payments, small bribes paid to facilitate or expedite routine government action.[58] The Guidance provides:

> As was the case under the old law, the Bribery Act does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 [OECD] Recommendation recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing "culture" of bribery and have the potential to be abused.[59]

The Guidance also states that these payments could trigger either the section 6 offense or, "where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offense and therefore potential liability under

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* ¶ 45.

59. GUIDANCE, *supra* note 7, ¶ 45.

section 7."[60] Thus, Parliament has purported to take a hard line by outlawing any use of facilitation payments.

The Ministry of Justice's Guidance and commentary from the U.K. Serious Fraud Office (SFO), the agency that investigates and prosecutes fraud and corruption,[61] state that facilitation or grease payments have always been prohibited by the OECD Convention.[62] While it is not within the scope of this Article to analyze in detail the accuracy of this contention, there is clear evidence that this statement is wrong. Commentary 9 to the OECD Convention, as originally published, provides:

> Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.[63]

Thus, as originally interpreted in 1997 by paragraph 9 of the Commentary to the Convention, facilitation payments did not constitute "payments made to obtain or retain business or other improper advantage," and, thus, were not considered an offense under the Convention.[64]

The SFO Senior Staff has "stated that a company's policies should address the possibility of such payments being made, incorporating the relevant AG and Ministry of Justice Guidance in this regard."[65] The Staff explained that:

> [T]he SFO takes a sympathetic approach toward "emergency facilitation payments," and offered an example: a visitor to a foreign country requires an inoculation and is offered the choice of paying $5 to be inoculated with a clean needle, or not paying

60. *Id*. ¶ 44.

61. *See generally* SERIOUS FRAUD OFFICE, http://www.sfo.gov.uk (last visited Feb. 17, 2012).

62. GUIDANCE, *supra* note 7, ¶ 45.

63. Convention on Combating Bribery, *supra* note 1, at 15.

64. *Id*. at 103.

65. *UK Serious Fraud Office Discusses Details of UK Bribery Act with Gibson Dunn* (Gibson, Dunn, & Crutcher, LLP) Sept. 7, 2010, at 3, *available at* http://www.gibsondunn.com/publications/pages/UKSeriousFraudOfficeDiscussion-RecentlyEnactedUKBriberyAct.aspx (last visited Mar. 10, 2012) [hereinafter *Gibson Dunn*].

> and being inoculated with a used needle. They stated that in this case, prosecution is unlikely if the payment is made.[66]

Likewise, the Ministry of Justice acknowledged that eradicating facilitation payments will be no small feat:

> The Government does, however, recognize the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent.[67]

Thus, even now, the Government's position on these payments is not black and white. It is illegal under the Act to make such payments, except in emergencies such as the $5 payment to avoid a contaminated needle.[68] But suppose the price is $100? Is prosecution still unlikely? Is unlikely comfort enough? And what about the case of a ship loaded with fresh food which cannot be unloaded without the approval of a local customs official or health inspector? Will the $5 paid to secure this essential permission, lest the entire shipment spoil, qualify as an emergency facilitation payment such that prosecution is unlikely? It is clear that the continued outlawing of facilitation payments under the Bribery Act will be one of the most difficult aspects of the new law to deal with.

C. Hospitality Expenditures

With regard to hospitality payments, the Ministry of Justice attempts to reassure that:

> [B]ona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour.[69]

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66. *Id.*

67. GUIDANCE, *supra* note 7, ¶ 46.

68. *See Gibson Dunn*, *supra* note 66.

69. GUIDANCE, *supra* note 7, ¶ 46.

However, it is worth noting that the Ministry's attempts to explain what will and will not be considered bribery in this context simply muddies the water and do not provide any meaningful, practical guidance. For example, the Guidance states that in order to amount to a bribe, there must be "an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage," but that "[i]n many cases . . . the question as to whether such a connection [between the advantage offered and the intention to secure a business advantage] will depend on the totality of the evidence which takes into account all of the surrounding circumstances."[70]

In the Parliamentary consideration of the Bribery Act, obvious questions were raised regarding hospitality. In a letter from Lord Tunnicliffe, speaking for the Ministry of Justice during Parliamentary consideration of the proposed Act, the Government's position was set forth:

> We recognise that corporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalize expenditure on corporate hospitality for legitimate commercial purposes. But lavish corporate hospitality can also be used as a bribe to secure advantages and the offences in the Bill must therefore be capable of penalising those who use it for such purposes.
>
> Corporate hospitality would . . . trigger the offence only where it was proved that the person offering the hospitality intended the recipient to be influenced to act improperly.[71]

One commentator also noted that "[f]ixing the appropriate borderline between generous hospitality . . . and the criminal giving and taking of unconscionable, material advantages on the other, is not easy to capture in language suitable for forensic use."[72] Thus, hospitality may demonstrate an intention to influence a guest, but not necessarily influence him or her to do anything improper. But is improper to be determined based upon British sensibilities? As the examples provided by the Guidance demonstrate, whether a hospitality payment would be found to be illegal depends heavily

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70. *Id*. ¶¶ 27, 28.

71. Letter from Lord Tunnicliffe, Opposition Deputy Chief Whip, to Lord Henley, Minister of State for Crime Prevention and Anti-Social Behaviour Reduction (Jan. 14, 2010), *available at* http://www.justice.gov.uk/publications/docs/letter-lord-henley-corporate-hospitality.pdf (last visited Mar. 10, 2012).

72. G.R. Sullivan, *Reforming Bribery: Law Commission Consultation Paper 185 (2) Reforming the Law of Bribery LCCP No. 185: Bribery Outside England and Wales; Corporate Liability; Defences; Consent to Prosecution*, 2008 CRIM. L. REV. 687, 687 (2008).

on context.[73] The Guidance thus proves itself to be virtually useless in this context. The public and company compliance officers will simply have to wait to see how prosecution of activity involving hospitality payments will be carried out.

IV. JURISDICTIONAL NEXUS TO THE UNITED KINGDOM

In the discussion of the offenses created by sections 1, 2, and 6 of the Act, the jurisdictional nexus to the United Kingdom is quite evident. The traditional territorial basis for jurisdiction is also explicitly set out in section 12, entitled "Offenses under this Act: territorial application."[74]

The SFO Senior Staff has explained that the test for jurisdiction is whether the company in question carries out business in the United Kingdom, and this is yet another fact-specific inquiry to be made on a case-

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73. *See, e.g.*, GUIDANCE, *supra* note 7, ¶¶ 30, 31.

74. Bribery Act, 2010, c.23, § 12 (U.K.). Section 12 provides:

(1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.
(2) Subsection (3) applies if—
(a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,
(b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and
(c) that person has a close connection with the United Kingdom.
(3) In such a case—
(a) the acts or omissions form part of the offence referred to in subsection (2)(a), and
(b) proceedings for the offence may be taken at any place in the United Kingdom.
(4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—
(a) a British citizen,
(b) a British overseas territories citizen,
(c) a British National (Overseas),
(d) a British Overseas citizen,
(e) a person who under the British Nationality Act 1981 was a British subject,
(f) a British protected person within the meaning of that Act,
(g) an individual ordinarily resident in the United Kingdom,
(h) a body incorporated under the law of any part of the United Kingdom,
(i) a Scottish partnership.
(5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.

Id.

by-case basis.[75] The SFO has made it quite clear, however, that it "intends to assert broad jurisdiction under the provisions of the Bribery Act."[76] The SFO has apparently already been approached by U.K. companies complaining about competitors in foreign countries that are paying bribes, so one of the SFO's objectives "is to prevent ethical companies from being competitively disadvantaged by the actions of other companies whether they are within or outside the UK."[77] Here, too, the prosecuting authorities' intent to assert the Bribery Act's vast extraterritorial reach is apparent.

V. SECTION 7: REESTABLISHING BRITISH DOMINION OVER THE PLANET

While the broad reach of the Act's treatment of facilitation payments and business hospitality is obvious, section 7 of the Bribery Act, Failure of Commercial Organizations to Prevent Bribery, is by far the most outrageously overreaching aspect of the Act.[78] This provision creates a separate strict liability criminal offense for a corporation or other entity subject to this section.[79]

A. Relevant Commercial Organization

To appreciate the broad extent of the operative provisions of section 7, which provides that "[a] relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person . . . ," it is necessary to determine what constitutes a relevant commercial organization and who is a person associated with the relevant commercial organization. Subsection (5) of section 7 begins its definition

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75. *Gibson Dunn*, *supra* note 66, at 4.

76. *Id.*

77. *Id.*

78. Bribery Act, 2010, c.23, § 7 (U.K.).

79. *Id.* Section 7 provides, in relevant part:

> (1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
> (a) to obtain or retain business for C, or
> (b) to obtain or retain an advantage in the conduct of business for C.
> (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
> (3) For the purposes of this section, A bribes another person if, and only if, A—
> (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
> (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.
> (4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

Id. § 7(1)–(4).

of a relevant commercial organization, non-exceptionally, to include "a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere)," or "a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere)."[80] As with the jurisdictional applicability of sections 1, 2, and 6, this is traditional territorial jurisdiction. U.K. domiciled entities are subject to the strict criminal liability of section 7 with only the defense set out in section 7(2).[81]

The unique aspect of the jurisdictional reach of section 7 appears in subsection 7(5)(b) and (d).[82] In these provisions, Parliament has abandoned any thought of either territorial jurisdiction or traditional notions of due process by aiming this strict criminal liability statute at the entire world. This subsection makes section 7 equally applicable to: "(b) any other body corporate (*wherever incorporated*) which carries on a business, *or part of a business*, in any part of the United Kingdom, [or] (d) any other partnership (*wherever formed*) which carries on a business*, or part of a business*, in any part of the United Kingdom."[83]

To understand how the relevant commercial organization definition applies in practice, we must consider what these provisions mean. Certainly, if a commercial organization of any kind carries on a business in any part of the U.K. Parliamentary power to legislate is well within traditionally accepted limits so long as "the United Kingdom" has a reasonable meaning.[84] That term is defined in section 12 of the Act as England, Wales, Scotland, or Northern Ireland[85] and does not include British overseas territories, such as Bermuda, the Falkland Islands, or the exotic South Atlantic islands;[86] each still maintaining their pink tinge on detailed world maps. Rather, the potentially overreaching aspect of the parallel provisions is found in the phrase "*which carries on a business, or part of a business, in any part of the United Kingdom.*"[87]

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80. *Id*. § 7(5).

81. *See* discussion *infra* Part V.B.

82. Bribery Act, 2010, c.23, §§ 7(5)(b), 7(5)(d) (U.K.).

83. *Id*. (emphasis added).

84. *See id*. § 7(5).

85. *Id*. § 12(1).

86. *See List of Crown Dependencies and Overseas Territories,* FOREIGN AND COMMONWEALTH OFFICE (Nov. 3, 2009, 10:28 AM), http://www.fco.gov.uk/en/publications-and-documents/treaties/uk-overseas-territories/list-crown-dependencies-overseas (last visited Mar. 10, 2012).

87. Bribery Act, 2010, c.23, §7(5) (U.K.) (emphasis added).

Within the Bribery Act, there is no further explanation of what a part of a business might entail. In the official Guidance, the Ministry simply restates the incredibly broad language of the statute:

> A "relevant commercial organization" is defined at section 7(5) as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation.[88]

Likewise, in speeches by various current and former officials of the SFO we find discussion, but no helpful resolution, of this question.[89] The Ministry of Justice did seek to ease concerns by stating:

> The Government would not expect . . . the mere fact that a company's securities have been . . . admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a 'relevant commercial organisation' for the purposes of section 7.[90]

However, Richard Alderman, as head of the SFO—the agency currently taking the lead on Bribery Act prosecutions—countered with his own view of the expansive jurisdiction the SFO could have:[91]

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88. GUIDANCE, *supra* note 7, ¶ 34.

89. *See*, *e.g.,* Richard Alderman, Dir., Serious Fraud Office, Address at the Financial Crime Conference (Nov. 29. 2011), *available at* http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/british-bankers-association.aspx (last visited Mar. 10, 2012); GUIDANCE, *supra* note 7, at 2–3.

90. GUIDANCE, *supra* note 7, ¶ 36.

91. *See*, *e.g.,* Caroline Binham, *SFO Chief Warns of New Global Reach*, FIN. TIMES, May 24, 2011, at 4.

> Foreign companies with any kind of business link with the UK have been put on notice by the head of the Serious Fraud Office that they will be fair game once the biggest overhaul of the nation's bribery laws in a generation comes into force. Richard Alderman, the agency's director, is charging his investigators with rooting out bribery anywhere in the world when the legislation is introduced on July 1. The Bribery Act's sweeping powers mean that companies based overseas come under the SFO's jurisdiction if they have any business link with the UK, such as being listed here.

Id.

> Asked whether all companies listed in the UK potentially fall under the remit of the Bribery Act, [Alderman] said: "Exactly. You bet we will go after foreign companies. This has been misunderstood. If there is an economic engagement with the UK then in my view they are carrying on business in the UK."[92]

As noted, it is clear that only the English courts can definitively resolve this uncertainty.[93] But where prosecutorial discretion is so important, it is extremely unsettling to see government spokesmen expounding inconsistent views on this crucial provision of a broadly overreaching statute. If a listing on the London Stock Exchange is economic engagement, what about a credit facility that includes London banks? What about the occasional sale of a product? These are just some of the questions prompted by the language of section 7, which have not been settled by the statutorily mandated Guidance.

B. Adequate Procedures Defense

In an unsuccessful attempt to soften the blow that section 7 levels against businesses, Parliament spelled out in section 7(2) of the Act the sole possible defense to the imposition of wholesale corporate liability. The adequate procedures defense is as follows: "But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct."[94]

With the establishment of the strict liability section 7 offense, the prosecutor and the courts of England no longer need to search for and attempt to prove the controlling mind of a legal entity.[95] Indeed, no intent

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92. Jonathan Russell, *Serious Fraud Office Risks Clash with Ministry of Justice over Bribery Act*, TELEGRAPH (U.K.) (July 1, 2011), http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8609486/Serious-Fraud-Office-risks-clash-with-Ministry-of-Justice-over-Bribery-Act.html (last visited Mar. 10, 2012).

93. *See, e.g.*, GUIDANCE, *supra* note 7, ¶ 46. ("The courts will be the final arbiter as to whether an organization 'carries on a business' in the UK taking into account the particular facts in individual cases."). *Gibson Dunn*, *supra* note 66, at 4.

> However, they made clear that the test for jurisdiction is simply whether the company in question carries out business in the UK. They noted that case law relating to this question will not necessarily be relevant to determining jurisdiction, and this will be a matter of fact in each case, clarifying that the SFO intends to assert broad jurisdiction under the provisions of the Bribery Act.

Id.

94. Bribery Act, 2010, c.23, §7(2) (U.K.).

95. The "controlling mind" element of a corporate prosecution under prior U.K. law required proof that a very senior executive of the defendant corporation actively and knowingly affected the

or knowledge is required at all for this crime. If a bribe within the very broad meaning of that term in the Bribery Act has occurred, the corporate or other commercial entity is guilty.[96] To establish this defense the company must prove that it "had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct."[97] However, the term "adequate" is a curious choice here, since the procedures in place were clearly not entirely adequate, or the bribery would not have occurred in the first place.[98]

In its Summary of its Recommendations, the U.K. Law Commission, after considering prior bribery laws and the proposed wholesale revision thereof which the Commission was endorsing, described the section 7 defense and the guidance required to understand it in the following terms:

> In that regard, it will generally be sufficient guidance to those in a position to make payments to say:
> "Do not make payments to someone (or favour them in any other way) if you know that this will involve someone in misuse of their position."[99]

Kenneth Clarke, then Justice Minister, likewise noted in his introduction to the Guidance:

> The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case.[100]

The Guidance characterizes section 7(2) as a full defense to a violation of the strict liability crime of failing to prevent bribery.[101] The Guidance explains that "[i]n accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of

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bribe. *See*, *e.g.*, Tesco Supermarkets Ltd. v. Nattrass, [1972] A.C. 153 (H.L.) 170–71 (appeal taken from Eng.).

96. *See*, *supra* Part III.C.

97. GUIDANCE, *supra* note 7, ¶ 4.

98. *See generally* JOSEPH HELLER, CATCH 22 (1961).

99. LAW COMMISSION NO. 313, *supra* note 6, at xvii (U.K.).

100. GUIDANCE, *supra* note 7, ¶ 4.

101. *Id.* ¶ 11.

probabilities."[102] However, these hints are of no help in deciphering what constitutes adequate procedures.

The Guidance also sets forth six principles that are the criteria to be used by companies formulating anti-bribery procedures.[103] These include proportionate procedures, top-level commitment, risk assessment, due diligence, communication, and monitoring and review.[104] While it is not within the scope of this Article to address each of these principles, it should be noted again that the Guidance, although mandated by section 9,[105] is not law, does not have the force of law, and merely expresses what the current Government thinks, hopes, believes, or intends.[106] It cannot be relied upon. The Courts may find it interesting that the Guidance provides that a common sense approach should prevail.[107] Once a prosecutor has made the decision to proceed under a particular set of facts, however, stale statements of the intentions of a prior government will provide little protection for the accused.

C. Person Associated with a Relevant Commercial Organization

Section 8 of the Act defines associated person for the purposes of section 7:

> (1) For the purposes of section 7, a person ("A") is associated with C if (disregarding any bribe under consideration) A is a person *who performs services for or on behalf of C.*
> (2) The capacity in which A performs services for or on behalf of C does not matter.
> (3) Accordingly A may (for example) be C's employee, agent or subsidiary.
> (4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.

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102. *Id.* ¶ 33.

103. *Id.* ¶ 4.

104. *See generally id.*

105. Section 9 provides, in relevant part, "(1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1)." Bribery Act, 2010, c.23, § 9(1) (U.K.).

106. *See generally* GUIDANCE, *supra* note 7.

107. *Id.* ¶¶ 35, 36.

> (5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.[108]

The potential for expansive use of this definition by SFO prosecutors is clear. Subsection (4) elaborates by stating that "all the relevant circumstances" are more significant than the nature of the relationship.[109] Yet this makes the term "associated person" even more ambiguous and significantly expands the egregious overreach of this strict criminal law. Does associated person include the local FedEx driver who routinely pays off a policeman at a rural checkpoint in a Central American nation and who is delivering a package for a company that has recently made a sale in London? There is no doubt the driver is performing a service for the company as required by subsection (1).[110] Since the capacity in which the person operates is not determinative, subsection (2) does not aid the analysis.[111] Subsection (3) seems satisfied if it can be found that the FedEx driver is an agent of the company. But this term is not defined in the Act, and there are no clues explaining how one might be found to be an agent.[112] It seems undeniable that under subsection (4), under all the relevant circumstances, the driver was performing a service for the company.[113] Thus, might a nominal bribe to a local policeman or other small facilitation payment trigger strict corporate criminal liability under section 7?

In sum, it appears to be a wholesale violation of due process to allow the automatic imposition of criminal liability on a legal entity, particularly one with no significant connection to the United Kingdom and the entity's officers. At the time the Government asked the Law Commission to once again review the laws on bribery, the Commission was specifically requested to draft a bill that would include recommendations that "are fair and non-discriminatory in accordance with the European Convention on Human Rights and the Human Rights Act of 1998."[114] Moreover, Article 6(2) of the European Convention provides that "[e]veryone charged with a criminal offense shall be presumed innocent until proved guilty according

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108. Bribery Act, 2010, c.23, § 8 (U.K.). (emphasis added).

109. *Id*. § 8(4).

110. *Id*. § 8(1).

111. *Id*. § 8(2).

112. *Id*. § 8(3).

113. Bribery Act, 2010, c.23, § 8(4) (U.K.).

114. *See* LAW COMMISSION NO. 313, *supra* note 6, at 14 (U.K.).

to law."[115] However, the Act as written obviously contravenes this mandate.

VI. CONCLUSION

The Bribery Act of 2010, the U.K.'s attempt to finally comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, goes too far in addressing the United Kingdom's perceived lack of commitment to outlaw bribery by U.K. companies at home and abroad. The Bribery Act is a draconian measure that will prove extremely difficult to enforce, particularly in the areas of bribery of foreign public officials and failure of organizations to prevent bribery. Moreover, numerous provisions will be difficult to interpret, and the Ministry of Justice's Guidance utterly fails to explain how one can comply with the Act and avoid liability. While it is clear that Parliament was attempting to craft a zero-tolerance approach to bribery, the current problems with the Act overshadow this attempt. It remains to be seen how other nations will respond once they begin to fully comprehend the far-reaching effects of this law.

115. European Convention on Human Rights art. 6(2), Sept. 3, 1950, 213 U.N.T.S. 221, available at http://www.hri.org/docs/ECHR50.html#Convention (last visited Mar. 10, 2012).

THE ANTI-SHARI'A MOVEMENT AND OKLAHOMA'S SAVE OUR STATE AMENDMENT—UNCONSTITUTIONAL DISCRIMINATION OR HOMELAND SECURITY?

*Robert E. Michael**

I. INTRODUCTION

Legislation by statute or state constitutional amendment prohibiting the application in state courts of an ill defined "Shariah Law" and/or "international law" has passed or is in the process in over twenty states.[1]

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Mr. Michael thanks the NYCBA for permitting the extended use of *The Unconstitutionality of Oklahoma Referendum 755 – The "Save Our State Amendment,"* Report of its Committee on Foreign and Comparative Law (December 2010), *http://www2.nycbar.org/Publications/reports/reportsbycom.php?com=62*, of which he was the principal author.

1. *See*, *e.g.*, Aaron Fellmeth, *International Law and Foreign Laws in the U.S. State Legislatures*, AM. SOC'Y OF INT'L L. INSIGHTS (Vol. 15, Iss. 13, May 26, 2011) ("Beginning in 2010, legislators in half of the U.S. states proposed—and in two states adopted—a series of bills or state constitutional amendments designed to restrict the use of international law and foreign laws by state (and sometimes federal) courts.").

The expressed purpose is usually to oppose the infiltration of terrorist Islamic groups bent upon creating a worldwide Caliphate in the United States (U.S.) through the imposition of Islamic law.[2] Is this unconstitutional racism cloaked as national security or a proper response to modern asymmetric warfare?

On one side, there are those, and I admit to being in this camp, who believe this legislative effort is a misguided and uninformed, at best, movement of American domestic politics aimed at imposing an isolationist and harshly unconstitutional reactionary view of the Rule of Law; with the sheep's clothes here being homeland security.[3] There is, after all, a sweeping array of principles of common law, international law, natural law and U.S. Constitutional law, to name the most obvious, which permit, or even require, U.S. courts to consider whether, for example, a will is properly subject to admission to probate if it provides that all distributions should be made in accordance with the distribution rights provided for by the Maliki School of Law as followed in Morocco.[4] Equally importantly, as part of that judicial consideration it would be necessary for any such court to determine that the application of such choice of law would not result in the violation of any legal right of any party before it, or of any applicable Federal or National law or public policy.[5] In other words, that this application of a tenet of law derived from classical Islamic law would be in no way different from the application of any choice of foreign law, whether French, Russian or Botswanan; or Catholic Canonical, Protestant Ecclesiastical, Jewish, or Hindu law—with the possible exception of any law which the United States is bound to apply by treaty.[6] To do otherwise, simply because the underlying source is a religion some of whose practitioners are leading or pursuing a political and/or military opposition to this country—is hard to differentiate legally from the internment of

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2. Asma Uddin, *Caliphate on the Range? The Shariah Precedent in American Courts*, HUFFINGTON POST, Nov. 6, 2010, *available at* http://www.huffingtonpost.com/asma-uddin/caliphate-on-the-range_b_778207.html (last visited Feb. 29, 2012).

3. Bill Gertz, *Shariah a Danger to U.S., Security Pros Say*, WASH. TIMES, Sept. 14, 2010, *available at* http://www.washingtontimes.com/news/2010/sep/14/shariah-a-danger-to-us-security-pros-say/?page=all (last visited Feb. 29, 2012).

4. *See, e.g.,* FLA. STAT. § 734.104 (2011) for a statute that requires admission of a will that is valid in another jurisdiction. ((2) A petition to admit a foreign will to record may be filed by any person and shall be accompanied by authenticated copies of the foreign will, the petition for probate, and the order admitting the will to probate. . . . (4) When admitted to record, the foreign will shall be as valid and effectual to pass title to real property and any right, title, or interest therein as if the will had been admitted to probate in this state.)

5. See discussion *infra* of the Due Process Clause.

6. See discussion *infra* of the Supremacy Clause.

Japanese-Americans during World War II because the country of their forebears was at war with us.

The other view is perhaps most cogently expressed in a very thoughtful and well-researched jeremiad from the Center for Security Policy, an organization whose members include at least one former Director of the CIA, and forthrightly entitled "Shariah—The Threat to America."[7] As stated in a key portion of its opening section:

> Those who today support shariah and the establishment of a global Islamic state (caliphate) are perforce supporting objectives that are incompatible with the U.S. Constitution, the civil rights the Constitution guarantees and the representative, accountable government it authorizes. In fact, shariah's pursuit in the United States is tantamount to sedition.[8]
>
> Whether pursued through the violent form of jihad (holy war) or stealthier practices that shariah Islamists often refer to as "dawa" (the "call to Islam"), shariah rejects fundamental premises of American society and values:
>
> a) The bedrock proposition that the governed have a right to make law for themselves;
> b) The republican democracy governed by the Constitution;
> c) Freedom of conscience; individual liberty (including in matters of personal privacy and sexual preference);
> d) Freedom of expression (including the liberty to analyze and criticize shariah);
> e) Economic liberty (including private property);
> f) Equal treatment under the law (including that of men and women, and of Muslims and non-Muslims);
> g) Freedom from cruel and unusual punishments; an unequivocal condemnation of terrorism (i.e., one that is based on a common sense meaning of the term and does not rationalize barbarity as legitimate "resistance"); and
> h) An abiding commitment to deflate and resolve political controversies by the ordinary mechanisms of federalism and democracy, not wanton violence.[9]
>
> The subversion campaign known as "civilization jihad" must not be confused with, or tolerated as, a constitutionally protected form of religious practice. Its ambitions transcend what American law recognizes as the sacrosanct realm of private

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7. WILLIAM G. "JERRY" BROYKIN ET AL., SHARIA THE THREAT TO AMERICA 6 (Center for Security Policy Press, 2010) [hereinafter THE THREAT].

8. *Id*.

9. *Id*. at 6–7

> conscience and belief. It seeks to supplant our Constitution with its own totalitarian framework.[10]

However, if you read the above passage from The Threat closely, you see that this is in a critical way classic advocacy legerdemain, since the introductory major premise of the syllogism is a logical duality: "those who today support shariah ***and*** *the establishment of a global Islamic state* (caliphate). . . ."[11]

In other words, simply supporting the occasional, and by all accounts extremely infrequent,[12] use of Islamic law precepts in American court cases by itself is not enough to be culpable of undermining the Constitution. However, the two are conflated into sedition—a theme that then runs throughout the remainder of The Threat.[13]

The explanation is simple. Whether it is the condemnation of business transactions that are designed to not violate rules based upon Islamic religious beliefs—notably the prohibitions of interest (*riba*) and unquantified risk and speculation (*gharar*), as described in the Appendix attached to The Threat[14]—or the application of any aspect of law that conforms to the system developed in the Islamic world from the early Seventh Century through about the year 1400, as prohibited by Oklahoma's "Save Our State" Amendment,[15] it is the unwarranted joining of unequivocally benign financial and legal principles with practices that are equally unequivocally medieval (and much older), and in many ways reprehensible by Western Post-Enlightenment standards, that is the manifest error of The Threat and the many much less well-presented arguments of the proponents of the Anti-Shari'a movement. As the old law school maxim says, your freedom to swing your arms around wildly ends when they approach my nose.[16] So it is with fundamentalist Islam. The rights and freedoms of believers of *any* religion, lodge, social club, cult or New Age ersatz philosopher in the United States is as absolute and

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10. *Id*. at 7.

11. *Id*.

12. *See generally* AMERICAN CIVIL LIBERTIES UNION, NOTHING TO FEAR: DEBUNKING THE MYTHICAL "SHARIA THREAT" TO OUR JUDICIAL SYSTEM (2011), *available at* http://www.aclu.org/religion-belief/nothing-fear-debunking-mythical-sharia-threat-our-judicial-system (last visited Feb. 29, 2012).

13. THE THREAT, *supra* note 7, at 8.

14. *E.g*. SHARIAH FINANCE WATCH | EXPOSING THE RISKS OF SHARIAH FINANCE *available at http://www.shariahfinancewatch.org/blog/* (last visited Feb. 29, 2012).

15. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

16. Zechariah Chafee, *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 957 (1919).

unfettered as any other citizen's—as long as not exercised to violate the very same laws that apply to everyone else.

However, this nuance seems to have escaped the draftspersons of the more than twenty proposed statutes and constitutional amendments that seek to prohibit the use of "Shariah Law" throughout the United States.[17] At present, the most important such omission is in the Oklahoma "Save Our State" Amendment to its Constitution, that was approved in a referendum last November by over a 70% vote (would you vote AGAINST Saving Your State?).[18]

Technically, the voters approved a Referendum Question[19] (Question 755) to add the "Save Our State Amendment."[20] Once certified by the Oklahoma Board of Elections, the Amendment would prohibit Oklahoma courts from considering or using both "international law" and "Sharia Law." The U.S. District Court for the Western District of Oklahoma, per Vicki Miles-LaGrange, Chief Judge, issued a preliminary injunction barring certification of the referendum, based on its finding of the likelihood of success on the merits of the argument that allowing such certification would necessarily lead to violations of the Establishment and Free Exercise Clauses of the First Amendment of the U.S. Constitution.[21] As of this

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17. Jamilah King, *13 States Introduces Useless Bills to Ban Sharia Law*, COLORLINES, Feb. 9 2011, *available at* http://colorlines.com/archives/2011/02/13_states_introduce_bills_to_ban_sharia_law.html (last visited March 7, 2012).

18. *Oklahoma Ban On Islamic Law Unconstitutional*, HUFFINGTON POST, Jan. 1, 2012, *available at* http://www.huffingtonpost.com/2012/01/10/court-ban-on-islamic-law-oklahoma_n_1197193.html (last visited Feb. 19, 2012).

19. State Question No. 755, Enrolled H.R.J. 1056, 52nd Leg. (Okla. 2010):

> Courts to rely on federal and state laws when deciding cases forbidding courts from looking at international law or Sharia Law. This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law. International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons. The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties. Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.

Available at https://www.sos.ok.gov/gov/questions.aspx (last visited Feb. 19, 2012).

20. *Id*.

21. *Awad v. Ziriax*, 754 F.Supp.2d 1298 (W.D. Okla 2010).

writing, the appeal thereof by the State of Oklahoma is pending before the United States Court of Appeals for the Tenth Circuit.[22]

While not addressed in the arguments or the decision with respect to the preliminary injunction proceedings, it also seems clear beyond doubt that the implementation of Question 755 would violate not only the Establishment and Free Exercise Clauses, but also the Supremacy Clause of Article VI, the Full Faith and Credit Clause of Article IV, the Contracts Clause of Article I, and the Due Process Clause of the Fourteenth Amendment. Furthermore, it seems unquestionable that the Save Our State Amendment is discriminatory, counterproductive, and will make conducting business and personal affairs more difficult for not only people who may choose to observe rules or principles based upon Shari'a,[23] but for all who have personal or business relationships with those people, including the more than 1.6 billion Muslims worldwide.[24] As drafted, Question 755 will also needlessly reject the use of the law of other states by Oklahoma courts even in cases with no relation to "Sharia law."[25] Finally, Question 755's prohibition against consideration of "international law" will confuse and complicate legal matters in Oklahoma for all those whose personal and business affairs relate to international trade or other private or commercial dealings with entities in other countries. After all, in our globally connected world, many of us have foreign and international involvements we may even be entirely unaware of, including the entity that may indirectly control our own business or hold our mortgage. No state should so disadvantage its entire population, and denigrate a segment of its population that is entitled to the full protection of U.S. and state law.

II. THE FIRST AMENDMENT'S ESTABLISHMENT AND FREE EXERCISE CLAUSES

The District Court's decision to issue a preliminary injunction was based on a First Amendment challenge to Question 755. The First Amendment of the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free

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22. Subsequently, the Tenth Circuit upheld the preliminary injunction, relying exclusively, as did the lower court, on First Amendment grounds. *Awad v. Ziriax*, No. 10-6273, 2012 WL 50636 (10th Cir. Jan. 10, 2012).

23. As discussed below, the term "Sharia Law" is either inaccurate or a tautology. The Shari'a or Shariah, the preferred transliterations from Arabic, includes both law (*fiqh*, in Arabic), jurisprudence (*usul al-fiqh*), and moral and religious tenets that are generally not part of civil or criminal codes in either the common law or civil law jurisdictions that are not theocracies.

24. PEW RESEARCH CENTER, THE FUTURE OF THE GLOBAL MUSLIM POPULATION 13 (2011).

25. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

exercise thereof."[26] The District Court found that the plaintiff made a "strong showing of a substantial likelihood of success" in demonstrating that Question 755 violates both the Establishment and Free Exercise Clauses of the First Amendment.[27] The Court held that Question 755's language singles out Sharia Law, "conveying a message of disapproval of the plaintiff's faith."[28] Question 755 would not only bar Oklahoma courts from considering "Sharia Law," but would allow Oklahoma courts to use or consider the law of any other state only if "the other state does not include Sharia Law."[29]

The Court correctly noted that "Sharia Law" to a substantial extent "lacks a legal character" and rather comprises religious traditions that "provide guidance to plaintiff and other Muslims regarding the exercise of their faith."[30] The Court therefore found that a prohibition on "Sharia Law" has the effect of inhibiting plaintiff's religion.[31]

The singling out of the law of one religion for prohibition similarly violates the Free Exercise Clause.[32] The plaintiff's will could not be fully probated in Oklahoma if Question 755 were to become law, the Court noted, because the will "incorporates by reference specific elements of Islamic prophetic traditions."[33] The court also said that Muslims would "be unable to bring actions in Oklahoma state courts for violations of the Oklahoma Religious Freedom Act and for violations of their rights under the United States Constitution if those violations are based upon their religion."[34]

Question 755 is clearly designed to inhibit, and would have the effect of inhibiting, members of a particular religion from utilizing or relying on any aspect of the religious law and tradition that underpins their faith if there is a possibility that such an action would eventually be a part of a case

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26. While the First Amendment speaks only about Federal law, it is well-established that the Fourteenth Amendment extends its prohibition to State Governments. *See*, *e.g.*, *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Elrod, Sheriff v. Burns*, 427 U.S. 347 (1976).

27. *Awad v. Ziriax*, at 1306, 1307.

28. *Id*. at 1306.

29. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

30. *Awad*, 754 Fed. Supp. 2d at 1306.

31. U.S. CONST. amend. I.

32. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

33. Robert Boczkiewicz, *Oklahoma seeks to reinstate anti-Sharia measure*, HUFFINGTON POST (Sept. 12, 2011), *available at* http://www.huffingtonpost.com/2011/09/12/oklahoma-seeks-to-reinsta_n_960707.html (last visited Feb. 29, 2012).

34. *Awad*, 745 Fed. Supp. 2d at 1307.

in the Oklahoma courts.[35] No other religion would be subject to this stricture,[36] and I am not aware of any other religion having been (successfully legally) so burdened since the founding of this country. Question 755 clearly tramples on the religious freedom of individuals who have the full right to conduct their lives in Oklahoma free from that interference.

Though the District Court case was brought on First Amendment grounds and focused on the prohibition relating to "Sharia Law," as noted above, there are other grounds upon which to find Question 755 unconstitutional both with regard to its treatment of Islamic law and international law. These are the issues that were addressed by the *Amicus Curiae Brief in Support of Plaintiff-Appellee Submitted by the Association of the Bar of the City of New York and the Islamic Law Committee of the American Branch of the International Law Association* filed in the 10th Circuit Appeal.[37]

III. THE SUPREMACY CLAUSE

While there is an ongoing dispute in the highest levels of judicial and academic thought as to the proper use of non-U.S. law in U.S. courts, as exemplified in the conflicting opinions in *Roper v. Simmons*,[38] Question 755 is not framed to reflect the bona fide issues of such dispute. The critical distinction it ignores is that between "foreign law" and "international law." Question 755 expressly prohibits the use or

35. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

36. *Id*.

37. Brief for the Assn'n of the Bar of the City of New York et al. as Amici Curiae Supporting Plaintiff-Appelle, Awad v. Ziriax, No. 10-6273, 2012 WL 50636 (10th Cir. Jan. 10, 2012) [hereinafter New York City Bar Brief].

38. *Roper v. Simmons*, 543 U.S. 551 (2005). In *Roper*, the Court, per Justice Kennedy, over a strong dissent by Justice Scalia, held it was a violation of the Eighth Amendment to execute an offender who was under eighteen years old at the time he committed a capital crime. Justice Kennedy reasoned that the Court had, at least since its decision in *Trop v. Dulles*, 356 U.S. 86 (1958), referred to the law of other countries and international authorities as "instructive" for its interpretation of the Eighth Amendment's prohibition on cruel and unusual punishment. Justice Kennedy also looked to Article 37 of the United Nations Convention on the Rights of the Child, and the fact that only seven countries in the world, other than the United States, executed juvenile offenders. However, Justice Scalia accused the majority of asserting that American law should conform to the laws of the rest of the world. He pointed out that many fundamental principles of Constitutional law, such as the Exclusionary Rule, have, in fact, been rejected by courts of other countries. He also pointedly accused the majority of the "sophistry" of relying on foreign law when it suits it, but rejecting it in other instances when it does not. *Roper*, 543 U.S. at 627.

consideration of "international law" and "Sharia Law."[39] In addition, the full Amendment language precedes that with a more general prohibition that "[t]he courts shall not look to the legal precepts of other nations or cultures."[40] Notwithstanding this language, the official pronouncements by the Attorney General and Governor of Oklahoma that explain Question 755 ignore the general statement and focus exclusively on "international law" and "Sharia Law."[41] The Attorney General's letter to the Oklahoma Legislature claimed to have corrected the inadequacies of the Enrolled House Joint Resolution and produced the final language used in the official referendum Ballot:[42]

> International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons. . . . The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.[43]

This exposition seems to ignore the explicit reference to "legal precepts of other nations," which must be understood to be foreign law. Foreign law is simply the law in effect in non-U.S. jurisdictions, including:

> a) Foreign legislation;
> b) Jurisprudential law of the highest courts of the country concerned, and/or lower courts, if lower court decisions are considered significant or there is an absence of jurisprudential law from the court of last resort of the country concerned;
> c) Law as interpreted by the multinational tribunals of which the United States is NOT a party, such as the European Court of Justice; and
> d) International conventions to which the United States is NOT a party to the extent those conventions are

39. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

40. ATTORNEY GENERAL OF OKLAHOMA, LETTER APPROVING QUESTION 755 (June 24, 2010).

41. *Id*.

42. *Id*.

43. GOVERNOR OF OKLAHOMA, EXECUTIVE PROCLAMATION APPROVING QUESTION 755 (Aug. 10, 2010).

> incorporated into domestic law of a foreign nation or interpreted or construed by the courts of foreign nations.[44]

If the Question 755 prohibition only covered the general statement in the Amendment about "legal precepts of other nations" and did not refer to "international law," it could arguably be construed to apply only to foreign law. In that event, its repugnance to the Constitution might be limited to 1) the issue of the ambit of the Contracts Clause to choice of foreign law provisions, as discussed below; and 2) finite Supremacy Clause[45] issues with respect to those relatively few treaties that require U.S. courts to give effect to foreign law judgments and arbitral awards.[46] Since there is a wide and longstanding body of law that imposes limits on exactly those foreign law obligations, primarily over due process and other public policy concerns,[47] by itself it *might not* be patently unconstitutional. However, neither the proposed Amendment nor, *a fortiori*, Question 755 permit any such interpretation. As noted above, the official explanatory text unambiguously defines "international law" explicitly as the "law of nations" and expressly identifies "treaties" as a principal source thereof.[48]

Thus, Question 755 expressly includes treaties within the scope of "international law" that Oklahoma courts are barred from considering or

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44. Notable among these would be the European Union treaties that are interwoven throughout the legal systems of the Member States of the European Union, in particular the Consolidated Version of the Treaty on European Union (a.k.a. Treaty of Maastricht), 2010 O.J. (C 83) 13 and Consolidated Version of the Treaty on the Functioning of the European Union, 2010 O.J. (C 83) 47, *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF [Hereinafter EU Treaties] (last visited Feb. 29, 2012).

45. U.S. CONST. art. VI, §1, cl. 2.

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

(emphasis added).

46. Carlos Manuel Velazquez, *Treaties as the Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 601 (2008).

47. *See*, *e.g.*, *Small v. U.S.*, 544 U.S. 385 (2005) (Court refused to consider conviction by Japanese court as within the phrase "convicted in any court" in a Congressional Statute); *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958) (failure of company to produce records for fear of violating foreign law was insufficient basis for non-production as such a result would undermine the policy behind the Trading with the Enemy Act).

48. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

using.[49] However, treaties are expressly made "the supreme Law of the Land" by Article VI, Section 1, Clause 2 of the Federal Constitution.

The United States is party to many treaties that have impact domestically.[50] A strong example of the immediate conflict between a treaty and Oklahoma law, should Question 755 become law, is the United Nations Convention on Contracts for the International Sale of Goods (CISG).[51] CISG, art. 1 differentiates it from all other treaties establishing obligations between or among states:

> 1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
> a) When the States are Contracting States; or
> b) When the rules of private international law lead to the application of the law of a Contracting State.[52]

Therefore, by its terms, the CISG applies directly to all of the citizens and residents of Oklahoma who enter into contracts for the sale or purchase of goods with a party in another Contracting State—which includes such likely trading partners as Canada, Mexico, and China.[53] In addition, the CISG's application is *mandatory* unless the parties expressly opt out of it.[54]

Accordingly, any and all disputes between, for example, an Oklahoma purchaser of goods and a supplier from Mexico, brought in an Oklahoma Court, would be required by the Supremacy Clause to apply the CISG—a quintessential part of "international law."

Therefore, it is inescapable that Question 755, if it becomes law in Oklahoma, would constitute a violation and direct affront to the Supremacy Clause.

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49. GOVERNOR OF OKLAHOMA, EXECUTIVE PROCLAMATION APPROVING QUESTION 755 (Aug. 10, 2010).

50. See generally the U.S. Department of State website listing all the treaties to which the United States is a member, *available at* http://www.state.gov/s/l/treaty/ (last visited Feb. 29, 2012).

51. *See* Convention on Contracts for the International Sale of Goods (CISG), Apr. 11, 1980, 1489 U.N.T.S. 3, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (last visited Feb. 29, 2012).

52. *Id.* art. I.

53. *See* Convention on Contracts for the International Sale of Goods (CISG) list of partners, Apr. 11, 1980, 1489 U.N.T.S. 3, *available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html* (last visited Feb. 29, 2012).

54. CISG, *supra* note 53, art. IV.

IV. THE FULL FAITH AND CREDIT CLAUSE

Article IV, §1 of the U.S. Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[55] It is unquestionably one of the cornerstones of the U.S. Constitution.[56]

The Full Faith and Credit Clause, *inter alia*, requires that "[a] judgment entered in one State *must be respected* in another provided that the first State had jurisdiction over the parties and the subject matter."[57]

Accordingly, Question 755 unconstitutionally limits Oklahoma's duty to give full faith and credit to the judicial decisions of the other states.

Question 755's direction to "uphold and adhere to . . . the law of another state of the United States" applies *only as long as* "the law of the other state does not include Sharia Law."[58] The Full Faith and Credit Clause does not allow state courts to pick and choose which decisions they will "uphold" and "adhere to."[59] As the Supreme Court held:

> Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. . . . [O]ur decisions support no roving "public policy exception" to the full faith and credit due *judgments*. . . . "[The] Full Faith and Credit Clause ordered submission . . . even to hostile policies reflected in the judgment

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55. U.S. CONST. art. VI, § 1.

56. *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322 (1981) (Stevens, J., concurring) ("The Full Faith and Credit Clause is one of the several provisions in the Federal Constitution designed to transform the several states from independent sovereignties into a single unified nation."); *see also Baker v. Gen. Motors Corp.*, 522 U.S. 222, 234 (1998) ("The Full Faith and Credit Clause is one of the provisions incorporated into the Constitution by the framers for the purpose of transforming an aggregation of independent, sovereign states into a nation." (quoting *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948))).

57. *Nevada v. Hall*, 440 U.S. 410, 421 (1979); Case law does differentiate between the credit owed to laws (legislative measures and common law) and to judgments. As the **Supreme Court** said in *Baker*, 522 U.S. at 232:

> "In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded." The Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."

58. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

59. U.S. CONST. art. VI, § 1.

> of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."[60]

The Tenth Circuit Court of Appeals, which is hearing the appeal of *Awad v. Ziriax*, has been equally clear and firm. In a case with striking similarities to the case under appeal, *Finstuen v. Crutcher*,[61] the Tenth Circuit applied the Full Faith and Credit Clause to hold unconstitutional an Oklahoma statute that prohibited Oklahoma courts from enforcing out-of-state adoption decrees in favor of same sex couples.[62] The Court noted that the statute at issue in *Finstuen* "is a state statute *providing for categorical non-recognition* of a class of adoption decrees from other states."[63] "Categorical non-recognition" is also a perfect description of the offending clause of Question 755.

Question 755's plain text brooks only two possible interpretations, both clearly unconstitutional. The literal reading compels the conclusion that Oklahoma courts may never "uphold" or "adhere" to the law of another state, if that state *has ever* used "Sharia Law" either in a judicial decision or explicitly or implicitly in legislation (*e.g.*, requiring public schools or prisons to provide for religious dietary rules in their cafeterias).[64] However, even the more restrictive interpretation of Question 755 would be that Oklahoma courts are not empowered to enforce a judgment duly entered in another state if the decision in question is based in any way on an application or inspection of the rules or requirements of a Muslim's religious beliefs. Even the latter is unquestionably within the purview of the holdings in *Baker* and *Finstuen*.

Question 755 therefore is a patent violation of the mandatory provisions of the Full Faith and Credit Clause of the U.S. Constitution.

V. THE CONTRACTS CLAUSE

Article I, §10 of the U.S. Constitution states: "No State shall . . . pass any . . . [l]aw impairing the Obligation of Contracts."[65] This elevation of the freedom of private parties to contract to a constitutionally protected right obviously includes the right to choose what law governs the

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60. *Baker*, 522 U.S. at 233.

61. *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

62. *Id*. at 1141.

63. *Id*. at 1156.

64. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

65. US Const. Art. I, §10, Cl. 1.

contract.[66] This raises two issues under Question 755: 1) whether contracts, which choose to apply "Sharia," are valid, and 2) the impact on choice of law clauses that choose the law of foreign nations whose law includes international law.[67]

It is indisputable that a substantial portion of contracts entered into in the United States, and presumably also in Oklahoma, contain choice-of-law clauses that provide that interpretation of the contract will be governed by the law of a particular state, foreign country or international convention.[68] It is also indisputable that it is customary for contracts to contain choice-of-forum or mandatory arbitration clauses in which parties agree to submit disputes under the contracts to a particular federal, state or foreign forum or to arbitration.[69]

Furthermore, it is not uncommon in religiously observant communities for its members to wish to have their internal disputes, primarily but not exclusively familial and matrimonial, governed by religious law and adjudicated by a religious tribunal.[70] While on its face Question 755 does not apply to religious courts, since they are not enumerated in the Oklahoma Constitution as Courts of the State,[71] it

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66. *See, e.g.*, *Educ. Emp. Credit Union v. Mut. Guaranty Corp.*, 50 F.3d 1432, 1438 (8th Cir. 1995).

67. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

68. *E.g.*, Restatement (Second) of Conflict of Laws §187 (1971). In pertinent part:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

69. *E.g.*, SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 15:15 (4th ed. 1993).

70. New York City Bar Brief, *supra* note 38, at 7.

71. OKLA. CONST. art. VII, § 1. "Courts in which judicial power vested:"

> The judicial power of this State shall be vested in the Senate, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, the Court on the Judiciary, the State Industrial Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate courts as may be provided by statute District Courts, and such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings. Provided that the Court of Criminal Appeals, the State Industrial Court, the Court of Bank Review and the Court of Tax Review and such Boards, Agencies and Commissions as have been established by statute shall continue in effect, subject to the power of the Legislature to change or abolish said Courts, Boards, Agencies, or Commissions Municipal Courts in cities or incorporated towns shall continue in

certainly would appear to apply to any such dispute brought into a state court, or any arbitral award sought to be enforced in such a court.[72] This certainly raises freedom of religion issues, but also Contract Clause concerns.

However, under Question 755 if parties choose the law of any state that might in some fashion "include Sharia Law," the law of "other nations or cultures" or "international law or Sharia Law," Oklahoma courts will be forbidden from interpreting or enforcing the contract in the manner to which the parties agreed.[73] Similarly, if parties have agreed to a particular forum that, in its determination of the dispute under the contract, refers to or enforces the prohibited areas of law, Oklahoma courts will have to decline to enforce the adjudications of those forums.[74]

Thus, by singling out certain types of law or forums, Question 755 substantially impairs the constitutionally protected freedom parties would otherwise have to contract as they choose. As the United States Supreme Court has noted, American courts have allowed substantial intrusion on that right only when "the State, in justification, [has] a significant and legitimate public purpose behind the [law] . . . such as the remedying of a broad and general social or economic problem."[75] In its opposition to the Order, the State has made absolutely no showing to support the proposition that

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> effect and shall be subject to creation, abolition or alteration by the Legislature by general laws, but shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances.

72. N.Y. CITY BAR, *supra* note 72, at 7.

73. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

74. Oklahoma follows the Restatement rule. Courts there normally enforce the parties' choice of law or forum, unless the results of application of the law are repugnant to Oklahoma's public policy, a determination that must be made on a case-by-case basis. *See, e.g.*, *Oliver v. Omnicare, Inc.*, 103 P.3d 626, 628 (Okla. Civ. App. Div. 1 2004): The general rule is that a contract will be governed by the laws of the state where the contract was entered into unless otherwise agreed *and* unless contrary to the law or public policy of the state where enforcement of the contract is sought. *Telex Corporation v. Hamilton,* 1978 OK 32, 576 P.2d 767; *Williams v. Shearson Lehman Brothers, Inc.,* 1995 OK CIV APP 154, 917 P.2d 998. Because the parties "otherwise agreed" to being governed by Ohio law, the issue becomes whether its application to the Employment Agreement's non-competition provision would violate the law or public policy of Oklahoma. As to the general treatment of choice of forum clauses in Oklahoma courts, *see, e.g.*, *Adams v. Bay, Ltd.*, 60 P.3d 509, 510 (Okla. Civ. App. Div. 3 2002): A forum selection clause acts as a stipulation wherein the parties ask the court to give effect to their agreement by declining to exercise its jurisdiction. Absent compelling reasons otherwise, forum selection clauses are enforceable. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991). *See also The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, (1972) (party resisting the forum selection clause must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching").

75. *Energy Res. Grp. Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983).

Oklahoma is dealing with any "general social or economic problem."[76] In *Energy Reserves,* the Supreme Court found that the Kansas Act at issue qualified, in large part because it was promulgated "in direct response to" the passage by Congress of the Natural Gas Policy Act of 1978.[77] This result was the opposite of that reached in the case it relied on, *Allied Structural Steel Co. v. Spannaus*.[78]

The *Spannaus* decision includes a detailed analysis of the historical precedents and the essential elements of a Contracts Clause violation. Most significantly:

> [A]lthough the absolute language of the Clause must leave room for "the 'essential attributes of sovereign power,' . . . necessarily reserved by the States to safeguard the welfare of their citizens," . . . that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, "[legislation] adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."[79]

It is important to note that any valid concerns reflected in Question 755 as to the importation into Oklahoma jurisprudence by private contracting parties of precepts accepted in classical Islamic law, assuming, *arguendo*, that they were still valid in some Islamic societies, *are unquestionably clearly and fully protected by existing law*. A marriage contract that, for example, allows for polygamy, is no less valid today in Oklahoma than it would be were Question 755 to become law.[80] In other words, any valid, i.e., constitutional, application of Question 755 would be meaningless.

On the other hand, the adverse impact on constitutional rights of Question 755 is evident. For example, a hypothetical Oklahoma company specializing in curing meats may be eager to hire a French marketing company to market its products to high-end specialty retailers throughout Europe. After lengthy negotiations, the parties might well agree that French law will govern their contract but that claims against the Oklahoma company must be brought in Oklahoma state courts. Under Question 755,

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76. New York City Bar Brief*, supra* note 38.

77. *Energy Res. Grp. Inc.*, 459 U.S. 407, 413.

78. *Allied Structural Steel Co. v. Spannaus, Att'y Gen. of Minn.*, 438 U.S. 234 (1978).

79. *Id*. at 244.

80. Brief for the Ass'n, *supra* note 78, at 22.

the Oklahoma courts apparently cannot apply French law since it constitutes both "the legal precepts of [another] nation" and, based on the EU Treaties, "international law," thus impairing the obligation of a key contractual term.[81] Further, suppose that the meat curing company is also eager to sell domestically to members of religious communities that have special dietary laws. Under Question 755, an Oklahoma court could not enforce a provision in sales contracts providing that the meat will conform to all Islamic halal and Jewish kosher restrictions, since the restrictions would require an Oklahoma court to not only "look to the legal precepts of other . . . cultures" but also look to "Sharia Law," once again impairing the contractual obligations of the parties.[82] Nor could an Oklahoma court adjudicate a dispute between that company and an employee it fired over the employee's alleged breach of an employment agreement that required him or her to comply with Muslim dietary rules in handling their products.[83]

It is precisely this kind of unreasonable interference with parties' contractual expectations that the U.S. Constitution prohibits. It is also the reason that all of the similar proposed laws are nonsensical—if they are severe enough to have an impact that exceeds present Constitutional and other legal protections, they would be UN-constitutional.

VI. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Question 755 is patently too vague to be the basis of governmental action that qualifies as due process of law.[84] This is because it would deprive the citizens, residents and any others with personal and property rights subject to enforcement in Oklahoma courts with any ability to have their rights adjudicated in a fair and consistent manner. Due process requires that a statute "provide a person of ordinary intelligence fair notice of what is prohibited."[85] However, Question 755 provides no meaningful guidance to judges or the public as to what "Sharia Law" is. Due process mandates that a statute not be "so standardless that it authorizes or encourages seriously discriminatory enforcement."[86] As the District Court duly pointed out, this issue is not only a matter of contract and personal property law, as in the probate of a will distributing property, but enters the

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81. Hannes Hofmeister, *Goodbye Euro: Legal Aspects of Withdrawal From the Eurozone*, 18 COLUM. J. EUR. L. 111, 122 (2010).

82. Enrolled H.R.J. 1056, 52d Leg. (Okla. 2010).

83. New York City Bar Brief ,*Supra* note 38.

84. U.S. CONST. amend. XIV, § 1. In pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

85. *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).

86. *Id*.

realm of criminal law when such matters as the violation of the Oklahoma Religious Freedom Act arise.[87]

As discussed in the District Court decision,[88] there is no judicially cognizable body of law that is Shari'a. Shari'a literally means the "way" or the "path," and is a process of ascertaining divine will so as to provide guidance to Muslims as to conduct that will comply with the divine will.[89] Shari'a applies in all aspects of life—whether a commercial transaction, a divorce settlement or one's relationship with parents and children.[90] It is the compendium of multiple sources accumulated in various societies and polities over nearly 1400 years, from at least seven different Islamic legal subdivisions.[91] In practice, it was overlaid with different national laws in each country in which Muslims lived for the majority of the past 600 years.[92] Accordingly, the law under which even a wholly observant Muslim lives in any country may have some aspect of some version of classical Islamic law, or Shari'a, but with very few exceptions like the Kingdom of Saudi Arabia,[93] most, if not all, of the law, that governs his or her life will be the law of the geographical polity based on some mix of English common law or French or German civil law.[94] In that regard, it is comparable to Protestant Ecclesiastical, Catholic Canonical, and Jewish Halakhic law.[95] However, unlike Jewish and Christian law, there is not now, nor has there ever been, either a single authoritative compilation (no Justinian Code, for example, of Roman law) of Shari'a; nor any judicial or legislative body with jurisdiction over a majority of Muslims—no Supreme Court, *Cour de Cassation*, Privy Council, Papal *Curia,* or *Sanhedrin;* nor any Parliament, Congress, Politburo, College of Cardinals or Synod of Bishops.[96]

As a legal matter, therefore, there is no such body of law as "Sharia Law," nor has there been since there has been a United States of America.[97] In fact, what is properly referred to as Shari'a has not been a true body of

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87. *Awad*, 745 Fed. Supp. 2d at 1307.

88. *Id*. 1306.

89. *See*, *e.g.*, N. Calder & M.P. Hooker, *Shari'a*, *in* THE ENCYCLOPEDIA OF ISLAM VOL. IX, at 321–28 (C.E. Bosworth, E. van Donzel, W.P. Heinrichs and G. Lecompte, eds., Leiden: Brill 1997).

90. WAEL B. HALLAQ, SHARĪ'A: THEORY, PRACTICE, TRANSFORMATIONS ? (2009)

91. New York City Bar Brief*, supra* note 38.

92. *Id*.

93. N. Calder & M.P. Hooker, *supra* note 91, at 321–28.

94. *Id*.

95. *Id*.

96. *Id*.

97. New York City Bar Brief *,supra* note 38.

law for over six centuries.[98] The official explanatory text of the Referendum Question describes it as: "Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed." That is analogous to saying that American law is based on the Constitution, the Federalist Papers and the Judiciary Act of 1789—true, but sufficiently incomplete to be of no use in determining how to conduct oneself consistent with law today.

While no U.S. court has addressed this precise issue in any reported opinion, the Court of Appeal in the United Kingdom has ruled on this exact question in *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd.*[99] As that court held:

> Finally, so far as the "principles of . . . Sharia" are concerned, it was the evidence of both experts that there are indeed areas of considerable controversy and difficulty arising not only from the need to translate into propositions of modern law texts which centuries ago were set out as religious and moral codes, but [also] because of the existence of a variety of schools of thought with which the court may have to concern itself in any given case before reaching a conclusion upon the principle or rule in dispute. . . . [I]f the Sharia law proviso were sufficient to incorporate the principles of Sharia law into the parties' agreements, the defendants would have been likely to succeed. However, since I would hold that the proviso is plainly inadequate for that purpose, the validity of the contract and the defendants' obligations thereunder fall to be decided according to English law.[100]

In the United States, an unpublished opinion in a case involving hundreds of millions of dollars, and two of the leading experts on Islamic finance and law in the West, *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co., Inc.*,[101] did discuss the difficulties of determining a provision of Saudi law because of the undefined nature of Islamic law. Thus, even without controlling precedent in this country, any governmental prohibition of "Sharia Law" *per se* should be found to be too vague to be of any valid application as a matter of due process.

An additional vagueness concern emanates from Question 755's provision that Oklahoma courts may use or consider the law of another of

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98. *Id.*

99. *Beximco Pharm., Ltd. v. Shamil Bank of Bahrain EC*, [2004] EWCA (Civ) 19 (Eng.).

100. *Id.* at [55].

101. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 2003 WL 22016864 (Del. 2003).

the United States "provided the law of the other state does not include Sharia Law."[102] How can an Oklahoma court, faced with a question involving the law of a sister state, determine that another state's law "does not include Sharia Law," barring that state's passage of a constitutional amendment similar to Question 755? As all states' law includes statutes, regulations and judicial decisions and administrative determinations, some aspect of Shari'a—including as it does traditions Muslims are required to use to guide the conduct of their entire lives—may well have become incorporated or suggested in a law, rule, case or administrative action, and often might not have been labeled Shari'a, or Islamic, at all. In other words, the necessary and direct conclusion from the clear and express language of the "Save Our State Amendment" to be added to the Oklahoma State Constitution by Question 755 is that once any American state adopts any law that recognizes a Muslim's rights (separately or as part of the rights of all religious groups) to follow any part of his or her religious obligations under Shari'a, or arguably even issues a divorce decree which incorporates a settlement involving a Shari'a tradition, thenceforth and forever more and for *any purpose whatsoever*, regardless of whether the Oklahoma case in point has anything to do with "Sharia Law," all of the Oklahoma courts would be precluded from looking to the law of that state.[103] As noted above, this is clearly a violation of the Full Faith and Credit Clause, but it also adds to the violation of the Due Process Clause of the Fourteenth Amendment.

VII. PUBLIC POLICY COMMERCIAL CONCERNS

In addition to these constitutional law issues, we must also consider as a matter of public policy the potentially enormous impact on our international trade caused by a widespread adoption, or the adoption by only a single commercially important state, of laws like the Save Our State Amendment.

As the Supreme Court has warned: "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements."[104] Question 755 would seriously damage the health of international commerce for parties doing business in Oklahoma and of Oklahomans engaged in international commerce.

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102. New York City Bar Brief, *supra* note 38, at 9.

103. *Id*.

104. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

Question 755's turn-away from consideration of other forums' laws violates the long-recognized principle of international comity and reciprocity. "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[105] As the Supreme Court observed more than a century ago: "The general comity, utility, and convenience of nations have . . . established a usage among most civilized states, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution."[106] This principle is also part of the supreme law of the land.[107]

Consequently, when Oklahoma (and any other state that passes a similar law) throws comity aside, it risks its residents' international business partners reciprocating by disregarding choice of law and forum agreements that select Oklahoma (or such other state's) law. This stalemate could cause confusion over legal rights, increased multi-forum litigation, and even decreased international trade as actors no longer have the certainty needed to conduct cross-border transactions. Many of our trading partners have a reciprocity requirement for honoring foreign judgments, including countries in the Middle East.[108] Customarily, these countries, including some of the largest exporters of oil to the United States, accept the choice of U.S. law and U.S. courts in all major contracts.[109] Since these countries generally incorporate at least some elements of Shari'a in their law,[110] they could reasonably refuse to accept U.S. law and courts going forward. This would result in a costly breakdown of the existing mechanism for the resolution of cross-border trade disputes.

The courts have encouraged respect for choice-of-law and choice-of-forum clauses as a way to lend certainty to commercial dealings, including among international parties. As the United States Supreme Court has stated, the alternative is chaos and, potentially, the breakdown of international commerce:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore,

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105. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972); *see also Vimar Seguros y Reaseguros,* 515 U.S. at 538.

106. *Hilton v. Guyot*, 159 U.S. 113, 166 (1895).

107. 11 U.S.C. § 1508 (2006).

108. *See*, *e.g.*, MOHAMMED HASSOUNA, EGYPT—THE ENFORCEMENT OF MONEY JUDGMENTS? (Juris Publishing 2008).

109. *Id*.

110. *Id*.

> an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction . . . . A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate [orderliness and predictability], but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [T]he dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.[111]

The Supreme Court is also our supreme arbiter of public policy. Therefore, it is clear that Question 755 and its copies, clones and counterparts in other states would violate both the United States Constitution and essential public policy.

VIII. CONCLUSION

An analysis of the overwhelming legal flaws of Question 755 and the Anti-Shari'a Movement it represents leads to an inescapable conclusion. At the heart of American patriotism is support for the Rule of Law. Laws like this are so patently unconstitutional, and so worthless if framed to be constitutional, that they simply cannot be justified by any actual, perceived, or illusory concern for homeland security. Unfortunately, that means they are not only unconstitutionally discriminatory, but downright un-American as well.

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111. Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974). *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985); *Zapata Off-Shore*, 407 U.S. at 13 n.15.

TRANSNATIONAL SURROGACY AND INTERNATIONAL HUMAN RIGHTS LAW

Barbara Stark[*]

I. INTRODUCTION

Surrogacy refers to the process through which a woman intentionally becomes pregnant with a baby that she does not intend to keep.[1] Rather, she is carrying the baby for its intended parent or parents, usually because the parent is unable to do so without her.[2] In traditional surrogacy, the surrogate contributes her own egg, which is artificially inseminated with the donor's sperm.[3] In gestational surrogacy, a fertilized egg is implanted in the surrogate.[4] Because the overwhelming majority of surrogates no longer use their own eggs, in this Article, "surrogacy" will refer to gestational surrogacy.[5] Surrogacy may be altruistic, in which the surrogate is not paid for her labor,[6] or commercial, in which she is.[7] Surrogacy may also use

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1. In the Matter of Baby M, 537 N.J. 396, 410 (1988).

2. *Id*.

3. *Id*.

4. JANET L. DOLGIN & LOIS L. SHEPHERD, BIOETHICS AND THE LAW 69 (2nd ed. 2009).

5. J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 355 (2011) (noting that in 2011, "95% of surrogates carry embryos created by genetic materials other than their own."); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 912 (2000) (noting that "there is no sexual analog to this particular form of technological conception.").

6. An altruistic surrogate may be the sister of an intended parent who would otherwise be unable to have a biologically related child, for example. *See*, *e.g*., DOLGIN & SHEPHERD, *supra* note 4, at 172.

donor sperm, in which case the intended parents have no biological relationship to the baby or babies.[8] There may be multiple surrogates, fathers, mothers, donors, and babies. It can get very complicated. Surrogacy exposes parenthood, not as a biological fact, but as a legally and socially constructed status with responsibilities and obligations as well as benefits.

As set out in a recent report by the Permanent Bureau at the Hague Conference on Private International Law, commercial surrogacy has been banned in many nation states.[9] In a minority of states, it is allowed and regulated, and in some states, it is completely unregulated. As the *Hague Report* notes, this has produced a booming business in transnational surrogacy.[10] In India alone, reproductive tourism is a $400 to $500 million per year business.[11] In addition to the monetary costs, there are human costs. Transnational surrogacy results in complex, and often conflicting, rules regarding basic family law issues of maternity, paternity, custody, visitation, and children's rights.[12]

A similarly unsettled situation exists among the states in the United States (U.S.). While the U.S. Constitution requires states to give full faith and credit to the judgments of sister states, there has always been a public

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7. Medical expenses are generally covered in commercial surrogacy. MAGDALINA GUGUCHEVA, SURROGACY IN AMERICA 3 (Council for Responsible Genetics 2010), *available at* http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf (last visited Mar. 13, 2012) (describing commercial surrogacy arrangements); Melanie Thernstrom, *My Futuristic Insta-Family*, N.Y. TIMES, Jan. 2, 2011, at 34, *available at* http://www.nytimes.com/2011/01/02/magazine/02babymaking-t.html?pagewanted=all (last visited Mar. 13, 2012) (describing financial arrangements in a commercial surrogacy arrangement). While it seems likely that they are also covered in altruistic surrogacy; only anecdotal evidence is available.

8. For a detailed account of some of the major procedures available, *see* Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQ. 277, 283 (2009).

9. Surrogacy has been banned in much of Europe, for example, usually on the ground that it commodifies women. *See* Arlie Hochschild, *Childbirth at the Global Crossroads*, 20 AMERICAN PROSPECT, Sept. 19, 2009, at 25, 27 (stating that surrogacy is banned in China, New York and much of Europe), *available at* http://prospect.org/article/childbirth-global-crossroads-0 (last visited Mar. 13, 2012); Hague Conference on Private Int'l Law, Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements, at 3, Prel. Doc. No. 11 (Mar. 2011), *available at* http://www.hcch.net/upload/wop/genaff2011pd11e.pdf (last visited Mar. 13, 2012) [hereinafter Hague Conf. on Private Int'l Law].

10. Hague Conf. on Private Int'l Law, *supra* note 9, at 6. Transnational surrogacy, as used in this Article, refers to surrogacy arrangements in which one or more of the parties are nationals of different nation states.

11. *Id.*; Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 225 (2009).

12. Hague Conf. on Private Int'l Law, *supra* note 9, at 3–4.

policy exception in family law.[13] That is, states have refused to give full faith and credit to judgments of sister states that offended their own public policy, such as marriage between first cousins. The federal Defense of Marriage Act, along with the similar acts passed in many states, extend this to recognition of same-sex marriages[14].

Like international surrogacy, surrogacy in America encompasses a broad range of approaches, from supportive states, such as California,[15] to states in which all surrogacy contracts are barred and criminal sanctions may be imposed, as in Michigan.[16] Unlike surrogates in much of the rest of the world, surrogates in the United States are unlikely to be trafficked, enslaved, or held to onerous contracts.[17] Indeed, surrogacy in America seems to be increasingly open.[18] Transnational surrogacy, in contrast, seems to be increasingly corporate, drawing on a wide range of domestic laws, including some notably lax domestic laws and dramatically disparate economic circumstances, to create new families.[19]

Part I of this Article introduces the subject and explains why the domestic family laws of the participating states are inadequate to address it. Part II explains how international human rights law provides some useful guidelines, especially three major human rights treaties:[20]

1) The International Covenant on Economic, Social and Cultural Rights;[21]
2) The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[22] and

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13. IRA M. ELLMAN & PAUL M. KURTZ, FAMILY LAW: CASES, TEXT, PROBLEMS 175 (5th ed. 2010).

14. Defense of Marriage Act, 28 U.S.C. § 1738C (1996).

15. Johnson v. Calvert, 851 P.2d 776, 778 (1993); CAL. FAM. CODE § 7606 (2012).

16. MICH. COMP. LAWS § 722.857 (1988).

17. This is not to suggest that such practices are unknown in this country. They are not, however, appealing to middle class Americans seeking surrogates. *See*, *e.g.*, Melanie Thernstrom, *supra* note 7, at 28.

18. *Id*.

19. For an insightful exploration, *see* Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 327 (2005).

20. For some of the reasons for this refusal, *see* Catherine Powell, *Lifting our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 375 (2005); Barbara Stark, *At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 107, 108 (2011).

21. G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, at 49 (Jan. 3, 1976), *available at* http://www1.umn.edu/humanrts/instree/b2esc.htm (last visited Mar. 18, 2012) [hereinafter International Covenant].

22. Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res 34/180, art. 1, U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46, at 193 (Sept. 3, 1981) [hereinafter CEDAW].

3) The Convention on the Rights of the Child (CRC).[23]

While none of these treaties explicitly address surrogacy, they each address rights crucial in this context, including the right to health,[24] the right to support,[25] the right to know one's origins,[26] and the right to a family.[27] The argument here is that, at the very least, where surrogacy is allowed, the protections of well-established human rights norms should be assured. In some cases, this may be accomplished through regulations[28] or contractual provisions, such as the assurance for the gestational mother of free pre-natal care. In other cases, this may be more difficult, such as treatment for as yet unknown conditions that may result from the hormonal treatments necessary for surrogacy. If, for any reason, such assurances are impossible, surrogacy should be barred as a violation of human rights.

Because there is no human "right to a child,"[29] even those who can *only* have a genetically-related child with the help of a surrogate, including single gay men and gay couples, have no basis for a claim. Once a child has been born, however–assuming the child is not the result of a coerced pregnancy or a similarly egregious violation of human rights–a growing international jurisprudence supports the right of that child's gay father, or fathers, to raise her.[30]

The usefulness of private international law to resolve disputes arising out of surrogacy is similarly problematic. Fundamental considerations of judicial comity, in which the courts of one state defer to the judgment of

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23. *See generally* Convention on the Rights of the Child, G.A. Res. 44/25, 61st plen. mtg., U.N. Doc. A/Res/44/25 (Nov. 20, 1980) (entered into force Sept. 2, 1990) [hereinafter CRC].

24. International Covenant, *supra* note 21, art. 12.

25. *Id*. art. 10.

26. CRC, *supra* note 23, art. 7.

27. *Id*.

28. Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 146 (2009) (noting that, "well-designed regulation can greatly mitigate most of the potential tangible harms of surrogacy.").

29. Those instruments that contemplate parenthood focus instead on limiting state interference with reproductive rights. *See*, *e.g*., CEDAW, *supra* note 22, art. 11.2 (measures to be taken by states to "prevent discrimination . . . on the grounds of marriage or maternity and to ensure [women's] effective right to work."); *id*. art. 11(2) (requiring the state to "ensure access to healthcare services, including those related to family planning" and, more specifically, to "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation."); *id*. art. 12 (reiterating the right to family planning services for rural women in particular.). *But see Part II.A. Reproductive Rights* (suggesting support for an argument against state interference with intending parents' efforts to "achieve their reproductive goals.").

30. Barbara Stark, *The Women's Convention, Reproductive Rights, and the Reproduction of Gender*, 18 DUKE J. GENDER L. & POL'Y 261, 274–78 (2011).

another, are trumped by public policy in this context.[31] Thus, notwithstanding the virtually universal concern for the children produced through surrogacy, some states prohibiting surrogacy refuse to grant such children citizenship, because they fear that doing so would only encourage the prohibited practice.[32] As the Permanent Bureau notes, this plainly calls for further study.[33] While the range of applicable laws regarding surrogacy complicates—and may even preclude—harmonization, it should be noted that the legality of surrogacy does not necessarily correspond to its prevalence in a particular state. Roughly 5% of gestational surrogacy in vitro fertilization (IVF) procedures in the United States take place in New York, for example, where surrogacy contracts are void.[34]

II. WHY SURROGACY IS DIFFERENT

Pre-existing family law is inadequate to address surrogacy, in part because of the multiple parents, and in part because of the breakdown in traditional parenting functions.[35] State laws governing parentage, for example, generally provide that a woman giving birth is the child's legal mother.[36] The birth mother does not lose her status as legal mother until and unless she voluntarily surrenders the baby.[37] As a matter of law, a child cannot be surrendered for adoption before birth.[38] The premise is that a mother cannot be certain that she wants to surrender the baby until he or she

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31. Hague Conf. on Private Int'l Law, *supra* note 9, at 10.

32. *Id*.

33. *Id*. at 22.

34. GUGUCHEVA, *supra* note 7, at 15.

35. *Id*. at 26 (noting that, commercial surrogates are generally paid from $12,000 to $25,000 for their services. This averages out to roughly $.50 per hour). *Fertility Law*, AM. BAR ASSOC., http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/erickson.html (last visited Mar. 18, 2012) (The payment is for the surrogate's services; if it were for the baby it would amount to baby-selling, which is illegal everywhere.).

36. ARK. CODE ANN. § 9-10-201(c)(2)(2008) (West 2011) (stating that the surrogate mother is presumed to be the natural mother of the child and this information is listed on the birth certificate); KAN. STAT. ANN. § 11-38-1113 (West 2011) (stating that the mother of the child is the one who gives birth to the child).

37. Or is determined by an appropriate court to be so unfit, and so incapable of becoming fit that her parental rights are legally terminated. *See*, *e.g*., Santosky II v. Kramer, 102 S. Ct. 1388, 1390 (1982) ("[T]he State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is permanently neglected.").

38. Hague Conf. on Private Int'l Law, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, Convention 29, art. 4 (May 1993), *available at* http://www.hcch.net/upload/conventions/txt33en.pdf (last visited Mar. 13, 2012). *See also* MONT. CODE ANN. § 42-2-408 (West 2011) (stating that the relinquishment and the consent to adoption of a child can only occur 72 hours after the child has been born); NEB. REV. STAT. § 127.070 (West 2010) (stating that release and consent for adoption that occur before the birth of a child are invalid).

arrives.[39] For this reason, several states have decided that traditional surrogacy contracts are unenforceable.[40] Rather, the surrogate cannot be required to surrender a baby on the ground that she agreed to do so before it was born.

These laws assume that the woman giving birth is also the baby's biological mother—that is, that the baby developed from her egg.[41] When the baby is not the biological offspring of the surrogate, but rather biologically related to a separate egg donor, the law—and the arguments—change.[42] Legislators have often left these sensitive issues to the courts.

There has been considerable commentary since the *Baby M*[43] case almost twenty-five years ago.[44] Those who have addressed surrogacy have generally focused on the most vulnerable, starting with the infant.[45] While at least one commentator[46] rejects the "best interest of the child test" itself as inapplicable in this context, most raise more concrete, specific questions. Who is legally responsible? What if the intending parents split up? What if

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39. Surrogate Parenting Assoc. v. Commonwealth of KY *ex rel.* Armstrong, 704 S.W.2d 209, 213 (1986) ("The policy . . . is to preserve to the mother her right of choice regardless of decisions made before the birth of the child.").

40. D.C. CODE § 16-402 (West 2011) ("Surrogate parenting contracts are prohibited and rendered unenforceable."); MICH. COMP. LAWS ANN. § 722.855 (West 2011) ("A surrogate parentage contract is void and unenforceable as contrary to public policy."); NEB. REV. STAT. § 21.200 (West 2011) ("A surrogate parenthood contract entered into shall be void and unenforceable."); N.D. CENT. CODE ANN. § 14-18-05 (West 2011) ("Any agreement in which a woman agrees to become a surrogate . . . through assisted conception is void.").

41. Adoptive Parents of M.L.V. & A.L.V. v. Wilkens, 598 N.E.2d 1054, 1059 (1992) (stating that "[b]ecause it is generally not difficult to determine the biological mother of a child, a mother's legal obligations to her child arise when she gives birth."); A.L.A. v. E.A.G, No. A10-443, 2011 N.W.2d WL 4181449, at *2 (D. Minn. Ct. App. Jan. 18, 2011) ("The parent and child relationship between a child and the child's biological mother 'may be established by proof of her having given birth to the child.'").

42. *Cf.* MARY L. SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME SEX AND UNWED PARENTS 111 (2001) (assuming traditional surrogacy); DEBORA L. SPAR, THE BABY BUSINESS, HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 85 (2006).

43. In the Matter of Baby M, *supra* note 1.

44. DiFonzo & Stern, *supra* note 5, at 347 (noting "the revolution in reproductive demographics that had occurred since *Baby M*.").

45. Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, *in* THE REPRODUCTIVE RIGHTS READER, LAW MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 299, 302 (Nancy Ehrenreich ed., 2008) (Ertman identifies four negative implications of the alternative insemination (AI) market: eugenics, lack of access for poor women, depriving children of relationship or support from biological father, and treating children like chattel. She defends AI, arguing that these concerns "are not unique to the AI market, or because addressing the concern would itself trigger other negative effects."); I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 437–42 (2011) (explaining the problem with the best interest test in this context).

46. Cohen, *supra* note 45, at 437.

they change their minds or die? What if the baby is premature or has health problems? What if the baby has health problems resulting from the surrogate's drug use or alcohol intake during pregnancy? How will the child deal with her unusual origins?

Commentators are also concerned about protecting presumably poorer, less educated surrogates from exploitation. Dorothy Roberts has pointed out the risks, especially high once gestational surrogacy allows a black surrogate to carry a white egg, of exploiting women of color.[47] In *Johnson v. Calvert*, the California court held that the black gestational surrogate had no right to the white baby she carried.[48] What about the surrogate mother's reproductive rights? Like Mary Beth Whitehead in *Baby M*, she might not appreciate how attached she is to the baby until it is born. On the other hand, what if the surrogate changes her mind before birth and decides to have an abortion?

Commentators have further noted that surrogates incur even greater risks and burdens than those usually associated with pregnancy and childbirth.[49] A gestational surrogate must have her menstrual cycles precisely matched to that of the egg donor, so that her womb is receptive to the fertilized egg just when it is ready to be implanted.[50] This requires surrogates to ingest large doses of hormones, the long-term effects of which are unknown.[51]

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47. Dorothy Roberts, *Race and the New Reproduction, in* THE REPRODUCTIVE RIGHTS READER, LAW MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 308 (Nancy Ehrenreich, ed., 2008) (while noting that surrogacy is not the same as slavery's "dehumanization," makes a powerful case that "it is the enslavement of Blacks that enables us to imagine the commodification of human beings, and that makes the vision of fungible breeder women so real.").

48. *Johnson*, 851 P.2d at 782.

49. GUGUCHEVA, *supra* note 7, at 21.

50. Amrita Pande, *Not an 'Angel,' not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIA J. GEND. STUD. 141, 147 (2009). As Pande explains:

> Gestational surrogacy is a much more complex medical process than traditional surrogacy, since the surrogate is not genetically related to the baby and her body has to be 'prepared' for artificial pregnancy. The transfer of the embryo itself is not very difficult by the process of getting the surrogate ready for that transfer and the weeks after that require heavy medical intervention. First, birth-control pills and shots of hormones are required to control and suppress the surrogate's own ovulatory cycle and then injections of estrogen are given to build her uterine lining. After the transfer, daily injections of progesterone are administered until her body understands that it is pregnant and can sustain the pregnancy on its own. The side effects of these medications can include hot flashes, mood swings, headaches, bloating, vaginal spotting, uterine cramping, breast fullness, light headedness and vaginal irritation.

Id.; DiFonzo & Stern, *supra* note 5, at 363–64 (noting risks of "hormonally stimulated egg production.").

51. GUGUCHEVA, *supra* note 7, at 21; Pande, *supra* note 50, at 147.

Early empirical studies provide little support for some of these arguments, at least in Canada, the United Kingdom, and the United States. This research suggests that surrogates are not necessarily poor.[52] Nor are they pressured into surrogacy[53] or unable to separate from the babies that they have carried.[54] The surrogates in these studies are white, married, Christian,[55] and not especially poor. They do not feel exploited. They are glad to have the $20,000 to $25,000 average fee,[56] but they are surrogates for other reasons. Many report that they enjoy being pregnant. They are proud of their accomplishment, and glad that they could make such a difference in the lives of otherwise childless couples.[57] Finally, the expense of surrogacy is also a concern. As Professor Roberts asks, "[b]ut can we justify devoting such exorbitant sums to a risky, non-therapeutic procedure

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52. Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale*: *Feminist Theory Meets Empirical Research on Surrogate Mothers,* 26 CAN. J. FAM. L. 13, 44 (2009) ("Importantly, no empirical study reviewed for this paper indicates that any surrogate mothers become involved with surrogacy because they were experiencing financial distress.").

53. *Id*. at 50 ("One consistent finding in the empirical research is that the idea of becoming a surrogate mother started with the women themselves; there was no evidence in any study indicating that women were being pressured or coerced into becoming surrogate mothers.").

54. *Id*. at 68.

> The empirical research does not support the concerns about pre-natal maternal bonding or emotional instability during pregnancy. Van den Akker's 2007 study of 61 British surrogate mothers reported that anxiety was not high during the pregnancy among surrogate mothers and detachment is reported early and maintained throughout the pregnancy, with little post-variation post-delivery.

Id. at 48.

> This may be due, in part, to agency preferences for women who are already mothers. Clinics and agencies report that they will only agree to work with women who have given birth because this status increases the chances of a successful pregnancy and delivery and means that the women have a more realistic perception of what it would mean for them to surrender a child.

Id. at 48.

55. Busby & Vun, *supra* note 52, at 42 ("[S]tudies on surrogate mothers consistently show that most women who agree to become either gratuitous or commercial surrogates are Caucasian, Christian, and in their late 20—early 30s.").

56. DiFonzo & Stern, *supra* note 5, at 357. S*ee also* GUGUCHEVA, *supra* note 7, at 26.

57. Busby & Vun, *supra* 52, at 71.

> Other longitudinal studies also showed that positive attitudes remained stable over time. Teman concluded, following a review of the research, that "almost all of the studies . . . find, in the end, that the overwhelming majority of surrogates do not regret their decision and they even express feelings of pride and accomplishment.

Id.

with an 80 percent failure rate when so many basic health needs go unmet?"[58]

As Professor Garrison notes, surrogacy can easily be banned since, in contrast to "ordinary surrogacy, gestational surrogacy invariably involves IVF, which requires the participation of licensed medical personnel who will rarely be willing to risk their licenses by performing illegal procedures."[59]

III. SURROGACY AND HUMAN RIGHTS

A. Reproductive Rights

Reproductive rights are relatively new in international law. The basic concept first appeared in the final document approved by the Teheran Conference on Human Rights in 1968, which recognized the "rights to decide freely and responsibly on the number and spacing of children and to have the access to the information, education and means to enable them to exercise these rights."[60] It was not until the World Conference on Population in 1994 (Cairo Conference) that reproductive rights were clearly articulated.[61] Although convened to address population issues, the participants in the Cairo Conference recognized that:

1) Family-planning programs should not involve any form of coercion;
2) Governmentally-sponsored economic incentives and disincentives were only marginally effective; and

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58. *See*, *e.g.*, Roberts, *supra* note 47, at 317.

59. Garrison, *supra* note 5, at 916.

60. Proc. of Teheran, Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf. 32/41, at 3 (1968), *available at* http:// 1.umn.edu/humanrts/instree/l2ptichr.htm (last visited Mar. 13, 2012). *See* Reed Boland, *The Environment, Population, and Women's Human Rights*, 27 ENVTL. L. 1137, 1158 (1997). Reproductive rights encompass a wide range of activities. These include surrogacy, other forms of assisted conception, female genital surgeries, and the health needs of women with HIV/AIDS. For a comprehensive overview, *see* REBECCA J. COOK, BERNARD M. DICKENS, & MAHMOUD E. FATHALLA, REPRODUCTIVE HEALTH AND HUMAN RIGHTS, INTEGRATING MEDICINE, ETHICS, AND LAW, at v (2003). *See generally* Malcolm L. Goggin, Deborah A. Orth, Ivar Bleiklie, & Christine Rothmayr, *The Comparative Policy Design Perspective, in* COMPARATIVE BIOMEDICAL POLICY 1 (Ivar Bleiklie, Malcolm L. Goggin, & Christine Rothmayr eds., 2004); Protocol to the African charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003 African Charter on Human and Peoples' Rights, art. 66, *available at* http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf (last visited Mar. 13, 2012). *See* CEDAW, *supra* note 22, arts. 4, 6 (CEDAW does not necessarily include a right to assisted conception, nor does CEDAW necessarily bar surrogacy—on the basis that it perpetuates gender stereotypes, for example).

61. U.N. Population Information Network, *Report of the ICPD*, ¶ 1.12, U.N. Doc. A/Conf.171/13 (Oct. 18, 1994), *available at* http://www.un.org/popin/icpd/conference/offeng/poa.html (last visited Mar. 13, 2012) [hereinafter *Rep. of the ICPD*].

3) Governmental goals "should be defined in terms of unmet needs for information and services," rather than quotas or targets imposed on service providers.[62]

"The aim should be to assist couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice."[63] The Cairo Conference recognized that reproductive rights include both "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health."[64] This broad formulation reflects the participating states' disparate approaches to reproductive rights as well as the failure of many states to address these rights at all.[65]

Reproductive rights are increasingly recognized in international human rights law.[66] These rights, including education about family planning and access to contraception, are now widely recognized throughout the world, often in connection with the right to health. Almost every state allows access to contraception, and several states provide contraceptives as a free public health benefit.[67]

Surrogacy was not on the agenda at Cairo; it was neither supported nor condemned. To the extent surrogacy enables those otherwise unable to "achieve their reproductive goals and . . . have children by choice,"[68] Cairo arguably supports surrogacy. At the very least, it would weigh against an outright government ban of the practice.[69]

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62. *Id*. ¶ 7.12.

63. *Id*. ¶ 7.16 (A number of countries entered reservations, specifically objecting to the word "individuals" in ¶ 7.16).

64. *Id*. ¶ 7.3. These goals were reiterated at the United Nations, Fourth World Conference on Women. As set out in the Beijing Platform, the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Report of the Fourth World Conference on Women, Beijing, China, Sept. 4, 1995, ¶ 96, U.N. Doc. A/Conf.177/20/Rev.1 (1996), *available at* http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf (last visited Mar. 13, 2012).

65. D. MARIANNE BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY 819–20 (2009) (describing the absence of reproductive rights in Lebanon).

66. RUTH DIXON-MUELLER, POPULATION POLICY & WOMEN'S RIGHTS, TRANSFORMING REPRODUCTIVE CHOICE 128 (1993) (describing customs in the Sahel); Abd-el Kader Boye et al., Population Council, *Marriage Law and Practice in the Sahel*, *in* STUDIES IN FAMILY PLANNING 347 (John Bongaarts & Gary Bologh, eds., 1991).

67. *See* BLAIR ET AL., *supra* note 65, at 794.

68. *Rep. of the ICPD*, *supra* note 61, at ¶ 7.16.

69. For a rigorous analysis of the concerns about commodification in this contest, *see* MARGARET J. RADIN, CONTESTED COMMODITIES 140 (1996) (Radin's analysis assumes traditional

The counterweight, of course, would be the impact on the gestational surrogate and the resulting baby. CEDAW assures the rights of pregnant women.[70] Article 11.2, for example, sets out the measures to be taken by states to "prevent discrimination . . . on the grounds of marriage or maternity and to ensure [women's] effective right to work."[71] These measures include the prohibition of dismissal for pregnancy or maternity leave,[72] maternity leave with pay or "comparable social benefits,"[73] and the "necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through the establishment . . . of childcare facilities."[74] Article 12 requires the state to "ensure access to healthcare services, including those related to family planning" and, more specifically, to "ensure to women appropriate services in connection with pregnancy, confinement in the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation."[75] Article 14 reiterates the right to family planning services for rural women in particular.[76] Finally, Article 16 requires states to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations."[77] In addition to these specific guarantees, Article 5 more broadly

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surrogacy. She notes that cases in which both would-be-parents contribute their genetic material [may] become more prevalent in the future.).

70. CEDAW, *supra* note 22, art. 1.

71. *Id*. art. 11.

72. *Id*.

73. *Id*.

74. CEDAW, *supra* note 22, art. 11.

75. General Comment by Convention on the Elimination of All Forms of Discrimination against Women art. 12, Sept. 3, 1981, U.N. A/54/38/Rev.1, ch. I, *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article12 (last visited Mar. 13, 2012). The Committee's General Recommendation No. 24 elaborates on Article 12.1, addressing women's access to health care, including family planning services. The Committee recommends that "[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion." *Id*. at 12(2). For a more detailed formulation of these rights, *see* CTR. FOR REPRODUCTIVE RTS., THE PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA: AN INSTRUMENT FOR ADVANCING REPRODUCTIVE AND SEXUAL RIGHTS 1 (2003), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_africa.pdf (last visited Mar. 13, 2012).

76. CEDAW, *supra* note 22, art. 14.

77. CEDAW, *supra* note 22, art. 16 (Article 16 has received an unprecedented number of reservations); Luisa Blanchfield, The U.N. Convention on the Elimination of All Forms of Discrimination Against Women: Issues in the U.S. Ratification Debate, Cong. Res. Serv. 7-5700, at 2 (2010) (two States Parties to the Convention—Malta and Monaco—stated in their reservations to CEDAW that they do not interpret Article 16(1)(e) as imposing or forcing the legalization of abortion in their respective countries); Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L 643, 702 (1990).

demands recognition of maternity as "a social function," rather than a commercial function.[78]

To the extent CEDAW focuses on the health of the pregnant woman, it is not inconsistent with gestational surrogacy.[79] Rather, it confirms safeguards that, by protecting the health of the surrogate, reduce objections to the practice. To the extent CEDAW focuses on maternity as a "social function," however, it is difficult to reconcile with commercial surrogacy, or at least those forms of commercial surrogacy in which the intending parents and the surrogate remain strangers.[80]

B. A "Right to Parent" for Gay Men?

For gay men who want to parent a genetically–related child, surrogacy may be their only hope.[81] Just as surrogacy was not on the agenda at Cairo, neither was parenting by same-sex couples or gay or lesbian individuals. But LGBT&Q—Lesbian, Gay, Bisexual, Transsexual and Queer or Lesbian, Gay, Bisexual, Transsexual and Questioning—rights have achieved widespread recognition since 1994. Since reproductive rights, including the right to parent, are human rights, like other human rights, they should be universally assured.[82]

As Justice Albie Sachs explained in *Minister of Home Affairs v. Fourie*, extending the benefits of marriage to same-sex partners is fundamentally a matter of equality:

> [O]ur Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. [. . .] A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. [. . .] The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. . . . [A]t issue

78. CEDAW, *supra* note 22, art. 5.

79. *See*, *e.g.*, Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9; *See generally* Scott, *supra* note 28.

80. CEDAW, *supra* note 22, art. 5.

81. Anne R. Dana, *The State of Surrogacy Laws*: *Determining Legal parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 363 (2011).

82. *See*, *e.g.*, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (Dec. 10, 1948) (stating that,"[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.").

> is a need to affirm the very character of our society as one based on tolerance and mutual respect.[83]

Like racial discrimination, discrimination on the basis of sexual orientation is grounded in intolerance and exclusion. In validating same-sex marriage, courts and legislatures throughout the world have rejected the notion of a "natural" sexual division of labor requiring marriage to be restricted to a union between a man and a woman. Rather, there is growing recognition that a state committed to democratic values, especially the equality of its citizens, can no longer endorse laws that discriminate against some of those citizens.

The European Union, with its twenty-seven member states, has been a leader in recognizing the equal rights of same-sex couples.[84] The European Court of Human Rights, for example, has interpreted the European Convention on Human Rights to require contracting nations to recognize family rights of same-sex couples.[85] The Court relied on Article 14, which provides that the rights set forth in the Convention are to be secured "without discrimination on any ground" to allow the surviving member of a gay couple to remain in his flat.[86] Under the 1997 Treaty of Amsterdam, similarly, the European Council passed Council Directive 2000/78/EC, which prohibits "any direct or indirect discrimination based on . . . sexual

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83. Minister of Home Affairs v. Fourie, 2005 (1) SA 19 (CC) at 37 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2005/19.html (last visited Mar. 13, 2012) (finding a right to same-sex marriage in the South African Constitution). *See also* Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (finding a right to same-sex marriage in the Massachusetts' constitution's right to equality). For a thoughtful comparison of *Goodridge* and *Fourie*, *see* Lisa Newstrom, *The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage*, 40 CORNELL INT'L L.J. 781, 803 (2007). For a discussion of developments in the United States, *see* Anita Bernstein, *Subverting the Marriage-Amendment Crusade with Law and Policy Reform*, 24 WASH. U. J. L. & POL'Y 79, 83 (2007) (finding a right to same-sex marriage in the Massachusetts' constitution's right to equality). For a survey, *see* Harvard Law Review Assoc., *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2087–2091 (2003).

84. Katharina Boel-Woelki, *The Legal recognition of Same-Sex Relationships within the European Union*, 82 TUL. L. REV. 1949, 1951 (2008).

85. *See*, *e.g.*, Karner v. Austria, App. No. 40016/98, Eur. Ct. H.R. 41 (2003) (while welcoming measures taken by the State party to eliminate gender segregation in the labor market, including through training programs in the area of equal opportunities, the Committee is concerned about the persistence of traditional stereotypes regarding the roles and tasks of women and men in the family and in society at large . . . [and] recommends that policies be developed and programs implemented to ensure the eradication of traditional sex role stereotypes in the family, labor market, the health sector, academia, politics and society at large).

86. *Id*. at 29 (the *Karner* Court also cited Article 8, which guarantees each individual "the right to respect for his private and family life.").

orientation."[87] In 2008, the European Court of Justice relied on this Directive to hold that the surviving partner of a German same-sex partner might be able to claim a pension.[88] The Treaty of Lisbon,[89] which entered into force on December 1, 2009, assures the right to marriage without any language limiting such right to "men and women" and expressly prohibits discrimination on the basis of sexual orientation.[90]

Same-sex couples in other regions have also drawn on human rights law to challenge discrimination. In South America, for example, same sex-couples have sought assistance from the Inter-American Commission on Human Rights. In the case of *Marta Lucia Alvarez Giraldo*, the Commission reviewed a complaint brought by the applicant against Colombia, alleging that the director of the prison in which the applicant was incarcerated had refused her request for intimate visits from her female life partner on the basis of her sexual orientation.[91] Finding that Colombian law afforded prisoners a right to intimate visits, the Commission determined that the applicant had stated a colorable claim of arbitrary and abusive interference with her private life, in violation of Article 11(2) of the American Convention on Human Rights.[92]

On June 3, 2008, the General Assembly of the Organization of American States (OAS), with the support of thirty-four OAS member countries, adopted the Resolution on Human Rights, Sexual Orientation, and Gender Identity.[93] The resolution takes note of the importance of the adoption of the Yogyakarta Principles and affirms the core principles of non-discrimination and universality in international law.[94] States also agreed to hold a special meeting "to discuss the application of the principles

87. Council Directive 2000/78, art. 16, 2000 O.J. (L 303) 12 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:en:PDF (last visited Mar. 13, 2012) (establishing a general framework for equal treatment in employment and occupation).

88. Case C-267/06, Maruko v. Versorgungsanstal Der Deutschen Buhnen, 2008 E.C.R. 1-1757.

89. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, O.J. (C 306) 1 (the Treaty of Lisbon is also called the "Treaty on the Functioning of the European Union.").

90. *Id*. art. 1.3; Elizabeth F. Defeis, *The Treaty of Lisbon and Human Rights*, 16 ILSA J. INT'L & COMP. L. 413, 419 (2010).

91. Giraldo v. Colombia, Case 11,656, Inter-Am. Comm'n H.R., Report No. 71/99, OEA/Ser.L/V/II.106 Doc. 3 rev., at 211 (1999) (Colom.).

92. *Id*. (following unsuccessful attempts to resolve the matter by friendly settlement, the Commission declared the case admissible, and agreed to publish the decision, to continue analyzing the merits of the case, and to renew its efforts to conclude a friendly settlement).

93. Rex Wockner, *Norway Legalizes Marriage*, BAY TIMES, June 19, 2008, http://www.sfbaytimes.com/index.php?sec=article&article_*Id*=8382 (last visited Mar. 13, 2012).

94. *Id*.

and norms of the Inter-American system on abuses based on sexual orientation and gender identity."[95]

In North America, Canada passed the Civil Marriage Act in 2005, which recognizes same-sex marriage.[96] In the United States, six states currently allow same-sex marriage.[97] Forty-three states have laws explicitly prohibiting such marriages, including twenty-nine with constitutional amendments restricting marriage to one man and one woman.[98] In *Perry v. Schwarzenegger*, Judge Vaughn Walker relied on the Fourteenth Amendment to strike down California's Proposition 8, which barred same-sex marriage.[99] In doing so, Judge Walker raised the question of same-sex marriage in the United States to the constitutional level for the first time.[100]

On the international level, too, the trend is clearly toward the recognition of rights for same-sex couples. In *Toonen v. Australia*, for example, the Human Rights Committee determined that the provisions of the Tasmanian Criminal Code, which criminalized private same-gender sexual conduct between consenting adults, constituted an arbitrary interference with the author's privacy, in violation of Article 17 of the International Covenant on Civil and Political Rights.[101] Nor could the provisions be upheld for the purpose of preventing the spread of AIDS.[102] The Committee also held, however, that the rights of same-sex couples to

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95. *Id*.

96. Civil Marriage Act, 2005, SC, c.33 (Can.); *see generally* Peter Bowal & Carlee Campbell, *The Legalization of Same-Sex Marriage in Canada*, 21 AM. J. FAM. L. 37 (2007).

97. They are: Massachusetts, *see Goodridge*, *supra* note 83; Connecticut, *see* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Iowa, *see* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Vermont, *see* VT. STAT. ANN. CIVIL MARRIAGE TIT. 15 § 8 (West 2009); New Hampshire, *see* N.H. REV. STATE. ANN. § 45:1 (2010); and New York, *see* N.Y. DOM. REL. Law § 10(a) (McKinney 2011). *See generally* Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195 (2005). *See* J. Thomas Oldham, *Developments in the US-The Struggle over the Creation of a Status for Same-Sex Partners, in* THE INT'L SURVEY OF FAMILY LAW 485 (Andrew Bainham ed., 2006).

98. BLAIR ET AL., *supra* note 65, at 234. *See also* Maria Godoy, *State by State: The Legal Battle Over Gay Marriage*, NAT'L PUBLIC RADIO (Feb. 7, 2012, 11:37 AM), http://www.npr.org/2009/12/15/112448663/state-by-state-the-legal-battle-over-gay-marriage (last visited Mar. 18, 2012).

99. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (2010).

100. Editorial, *Marriage is a Constitutional Right*, N.Y TIMES, Aug. 4, 2010, at A26. On February 23, 2011, the Obama Administration advised the Speaker of the House that it would no longer defend the constitutionality of Sec. 3 of DOMA. Marc Ambinder, *Obama Won't Go to Court Over Defense of Marraige Act*, NAT'L J. (Feb. 24, 2011), http://www.nationaljournal.com/obama-won-t-go-to-court-over-defense-of-marriage-act-20110223 (last visited Mar. 18, 2012).

101. Toonen v. Australia, [1994] 6.1 Comm'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Austl.), *available at* http://www1.umn.edu/humanrts/undocs/html/vws488.htm (last visited Mar. 18, 2012).

102. *Id*. at 6.5.

marry cannot be grounded in the Civil Covenant because of its specific language.[103]

In part because of such limitations in existing human rights law,[104] in 2006, the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, convened a meeting in Indonesia to develop a set of international principles regarding sexual orientation and gender identity. Twenty-nine distinguished experts in human rights law from twenty-five countries unanimously adopted the Yogyakarta Principles,[105] which they agreed reflect the existing state of international human rights law in relation to issues of "sexual orientation and gender identity."[106] As set out in the Statute of the International Court of Justice, the views of such experts may be relied upon in determining rules of law.[107] The Yogyakarta Principles, rigorously supported by sixty-six pages of jurisprudential annotations,[108] affirm a broad range of rights, including "the core human rights principles of equality, universality and non-discrimination . . . it is unthinkable to exclude persons from these protections because of their . . . sexual

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103. As the Committee explained in *Joslin v. New Zealand*:

> Article 23, paragraph 2 of the Covenant is the only substantive provision . . . which defines a right by using the term "men and women," rather than "every human being," "everyone" and "all persons." Use of the term "men and women," rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and woman. . . .

Joslin v. New Zealand, [2002] Comm'n No. 902/1999 U.N. Doc. CCPR/C/75/D/902/1999 (N.Z.), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e44ccf85efc1669ac1256c37002b96c9?Opendocument (last visited Mar. 18, 2012) (upholding New Zealand's refusal to permit same-gender couples to marry); Quilter v. Attorney-General, [1998] 1 NZLR 523 (N.Z.). For a provocative discussion, *see generally* Vincent J. Samar, *Throwing Down the International Gauntlet: Same-Sex Marriage as a Human Right*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2007).

104. Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Priciples*, 8 HUM. RTS. L. REV. 207, 232 (2008) (noting that "[t]he High Commissioner for Human Rights, Louise Arbour, has expressed concern about the inconsistency of approach in law and practice . . . [regarding] . . . sexual orientation and gender identity.").

105. *Id*. at 233.

106. *Id*. at 247.

107. Int'l Court of Justice, *Statute of the International Court of Justice*, art. 38, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II (last visited Mar. 18, 2012) ("The court . . . shall apply . . . the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

108. Michael O'Flaherty, Annotation, Jurisprudential Annotations to the Yogyakarta Principles, 8 UNIV. OF NOTTINGHAM HUM. RTS. LAW CTR 1 (2007), *available at* http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf (last visited Mar. 13, 2012).

orientation or gender identity."[109] The Principles also set out concrete measures states must take to assure these rights.[110]

On December 12, 2008, sixty-six nations at the U.N. General Assembly supported a groundbreaking Statement confirming that international human rights protections apply to sexual orientation and gender identity.[111] The Statement was read by Argentina, and a Counterstatement, signed by fifty-nine states, was read by the Syrian Arab Republic.[112] The states opposing human rights for same-sex couples do not seek to ground their arguments in international law, however. Rather, they claim that the Statement endorsing these rights "lack[ed] . . . legal grounds [and] delves into matters which fall essentially within the domestic jurisdiction of States."[113] This is belied by the exhaustive research supporting the Yogyakarta Principles.[114] While there is no state consensus on the issue, there is a clear trend toward recognizing the rights of same-sex couples. Thus, although homosexuality remains a crime in seventy-six countries and is still punishable by death in five, a growing body of international equality jurisprudence increasingly supports these rights.[115]

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109. Michael O'Flaherty & John Fisher, *supra* note 104, at 241.

110. *Id*.

111. U.N. GAOR, 63rd Sess., 70th plen. mtg. at 30, U.N. Doc. A/63/PV.70 (Dec. 18, 2008).

112. *Id*. The Counterstatement, signed by 59 states, condemned the Statement, arguing further that:

> More important, it depends on the ominous usage of two notions. The notion of orientation spans a wide range of personal choices that expand far beyond the individual sexual interest in a copulatory behavior between normal consenting adult human beings, thereby ushering in the social normalization and possibly the legitimization of many deplorable acts, including pedophilia. The second notion is often suggested to attribute particular sexual interests or behaviours to genetic factors, a matter that has repeatedly been scientifically rebuffed.

Id. at 31.

113. *Id.; see also* O'Flaherty & Fisher, *supra* note 104, at 238–43 (describing the "Reaction by States and other Actors within United Nations Fora.").

114. *See* O'Flaherty & Fisher, *supra* note 104, at 238.

115. DANIEL OTTOSSON, INT'L LESBIAN & GAY ASSOC., STATE-SPONSORED HOMOPHOBIA, A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 4, 45 (2011), *available at* http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf (last visited Mar. 13, 2012) (This jurisprudence includes the recent decision of the High Court of Delhi, which ruled in 2009 that section 377 of the Indian Penal Code could not be applied to sexual activities between consenting adults. The ruling affects all of India, except Jammu and Kashmir, where a different penal code applies, and affects approximately one sixth of the human population); Anjuli W. McReynolds, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. REV. 1073, 1076 (2006) (the absence of consensus only matters in ascertaining customary international law, which is not in issue. It could be argued, however, that there is *regional* customary international law with respect to same-sex relationships in Europe).

C. The Child's Rights

Surrogacy implicates several rights of the child under the CRC. First, the child's rights are to be "respect[ed] and ensure[d] . . . without discrimination *of any kind* . . . [including] birth or other status."[116] While this provision was originally intended to protect illegitimate children, its inclusiveness suggests a generous and expansive application, including children born of surrogacy[117].

Article 7 is the most problematic here. Article 7.1 provides in pertinent part that "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents."[118] There are two difficulties with this provision, both grounded in its presumptive incorporation of national law. If that law provides that a mother is the person giving birth, the child's status is unclear. If that law provides that a child born of surrogacy cannot acquire the nationality of her intending parties, similarly, the child may be in a precarious situation. Either problem can be rectified by reforming domestic law or as proposed in the pending Indian legislation on surrogacy, by requiring the intending parents to prove, before entering into a surrogacy arrangement, that the resulting child will be granted citizenship in the state where her intending parents live, and that they, in fact, will be legally recognized as her parents in that state.[119]

IV. CONCLUSION

This Article has described transnational surrogacy and indicated a few of the many issues the subject raises under international human rights law. It has not addressed many other troublesome issues, including donor anonymity, the right of the child to "social," as opposed to "biological," information, and issues of exploitation, especially when what is contemplated is not rare, altruistic surrogacy, but a $400 to $500 million per year business.[120]

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116. CRC, *supra* note 26, art. 2(1).

117. CRC, *supra* note 26, art. 1.

118. CRC, *supra* note 26, art. 7(1).

119. Courtney G. Joslin, *Protecting Children: Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1228 (2010).

120. Hague Conf. on Private Int'l Law, *supra* note 9, at 6; Krawiec, *supra* note 11, at 225.

THE TREATY OF LISBON AND ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Elizabeth F. Defeis[*]

The Treaty of Lisbon, adopted in December 2009, constitutes a major step in the development of the protection of Human Rights in Europe. It requires the accession of the European Union (EU) to the European Convention of Human Rights and Fundamental Freedoms (ECHRFF) and raises fundamental questions concerning the autonomy and primacy of EU Law and the relationship between the European Court of Justice (ECJ) in Luxembourg and the European Court of Human Rights (ECHR) in Strasbourg.[1] Through accession, the EU would be subject to external controls through the Strasbourg process for the first time, just as the Member States are.

Further, through the Lisbon Treaty, also called the Reform Treaty or the Constitutional Treaty, the Charter of Fundamental Rights of the EU, which was proclaimed in Nice in 2000, now has legal force.[2] Although the Lisbon Treaty provides that "[t]he provisions of the Charter shall not extend in anyway the competences of the Union as defined in the Treaties," its new status has not been accepted by all Member States who fear encroaching supervision from Brussels. Three Member States have "opted out" of the Charter: the United Kingdom, Poland, and the Czech Republic.[3] This

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1. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty].

2. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 20, *available at* http://www.unhcr.org/refworld/docid/3ae6b3b70.html [accessed 21 December 2011] [hereinafter Charter of Fundamental Rights].

3. CONSTITUTION COMMITTEE, EUROPEAN UNION (AMENDMENT) BILL AND THE LISBON TREATY: IMPLICATIONS FOR THE UK CONSTITUTION, 2008-6, H.L. 84, at 61 (U.K.) (noting that this "opt out" provides that the Charter does not extend the ability of the ECJ to strike down the laws of the United Kingdom and Poland). Additionally, the Protocol provides that no greater social or economic rights shall be created in the United Kingdom and Poland as a result of the Charter. There has been some debate in Europe as to whether the Protocol should be considered an "opt out." On November 3, 2009 the Czech Republic became the last country to sign the Treaty of Lisbon. The Czech Republic conditioned ratification on being able to accede to Protocol 30 along with the United Kingdom and Poland. The protocol will apply to the Czech Republic upon the adoption of the next European Union Treaty in the same way as it currently applies to the U.K. and Poland. Thérèse Blanchet, *The Treaty of Lisbon: A Story in History or the Making of a Treaty*, 34 FORDHAM INT'L L.J. 1217, 1246–47 (2011).

article will discuss the issues raised by accession by the EU to the European Convention on Human Rights and assess its impact and potential application.

The European Convention on Human Rights and Fundamental Freedoms was drafted under the auspices of the Council of Europe, a regional intergovernmental organization created in 1949 by Western European nations committed to the preservation of democracy and individual freedom.[4] The Universal Declaration of Human Rights was adopted by the United Nation's General Assembly in 1948,[5] but it soon became clear that a lengthy process would be required to translate the guarantees of the Declaration into legally binding obligations through treaties on an international basis. With the havoc wrought in Europe by World War II still apparent, it was decided to draft a regional human rights convention for Europe.[6] The European Convention on Human Rights was adopted in 1950 and entered into force in 1953.[7] Thus, the Preamble to the Convention states: "Being resolved, as the governments of European countries are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration."[8]

As originally adopted, the European Human Rights Convention guarantees the core civil and political rights, such as the right to life, freedom from torture, inhuman or degrading treatment, freedom from slavery, freedom of religion, expression and peaceful assembly, and the right to marry and found a family.[9] It also guarantees equality and freedom from nondiscrimination on the basis of "sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[10] Additional Protocols have expanded the catalogue of rights to include rights to property, an

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4. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

5. Antônio Augusto Cançado Trindade, Universal Declaration of Human Rights (2008), http://untreaty.un.org/cod/avl/ha/udhr.html (last visited Feb. 13, 2012).

6. J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS, FOREWORD viii (Manchester University Press, 1993).

7. *The European Human Rights System,* HUM. RTS. EDUC. ASS'N, *available at* http://www.hrea.org/index.php?doc_id=365 (last visited Feb. 14, 2012).

8. European Convention, *supra* note 4, at pmbl.

9. *Id*. art. 2–4, art. 9–12.

10. *Id*. art. 14.

education, and the abolition of the death penalty.[11] States that become parties to the Convention agree to accept and be bound by decisions of the European Court of Human Rights, sometimes called the Strasbourg Court, which has substantive responsibility for rendering decisions concerning rights guaranteed by the Convention.[12] Most Member States of the Council of Europe, including all EU Member States, have incorporated the Convention into their domestic legal systems.[13]

The Treaty of Rome, establishing what has come to be known as the European Union, was silent on the protection of fundamental rights.[14] Although it did contain a provision requiring equal pay for equal work based on gender, that provision was inserted as an economic measure rather than a human rights measure, because some states required equal pay by their domestic law and would be at an economic disadvantage without such a provision.[15] In order to ensure application of Community Law throughout the community, in 1964, the ECJ established the principle of supremacy of Community Law over the domestic law of Member States.[16] In part, because of concern about rights, the supremacy doctrine was met with resistance, particularly in the area of human rights.[17] It was unacceptable to some Member States to implement community legislation without reference to their own constitutional guarantees of fundamental rights. And indeed, the German Constitutional Court, in 1967, held that since the Community legal order lacked specific protection of human rights, the transfer of powers from the German legal system to the Community had to be measured against domestic constitutional provisions.[18]

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11. *Id*. Protocol 1, art. 1–2, Protocol 6, art. 1.

12. *The European Human Rights System*, *supra* note 7.

13. Francis G. Jacobs, *The European Convention on Human Rights, the EU Charter on Fundamental Rights and the European Court of Justice: The Impact of European Union accession to the European Convention on Human Rights, in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 291—92 (Ingolf Pernice, Juliane Kokott, & Cheryl Saunders eds., 2006) [hereinafter Jacobs].

14. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1957).

15. Elizabeth Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the ECHR*, 19 DICK. J. INT'L L. 301, 301–02, 309 (2001).

16. Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 588.

17. Wayne Ives, *European Union Law*, CIVITAS INSTIT. FOR THE STUDY OF CIV. SOC'Y (2006), http://www.civitas.org.uk/eufacts/download/OS.6.EU%20Law.pdf (last visited Feb. 13, 2010).

18. Elizabeth F. Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 FORDHAM INT'L L.J. 1104, 1110 (2008).

In response to this challenge, the Court developed a robust jurisprudence with respect to human rights protection in a series of cases, and declared that human rights were enshrined in the general principles of Community Law and would be protected by the Court.[19] In 1975, the ECJ ruled that the ECHRFF had special significance when identifying the fundamental rights applicable under EU Law.[20] To reflect the developing human rights policy of the EU, the Preamble to the Single European Act of 1986 stated that Member States should "work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."[21]

Yet, there were still no treaty provisions that specifically dealt with the general matter of fundamental rights protection. In 1992, however, the Maastricht Treaty, also called the Treaty of the European Union (TEU), in effect codified the case law and provided that the EU must respect fundamental rights in accordance with the protections afforded by the ECHRFF, as they arise from the constitutional traditions common to Member States and as general principles of Community Law.[22] The Maastricht Treaty states, "[c]ommunity policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms."[23]

Each of the founding members of the EU were signatories to the European Convention on Human Rights, and today, all forty-seven members of the Council of Europe are members.[24] Thus, all Member States of the EU are bound to the provisions of the ECHRFF, and for over thirty years, the accession of the EU itself to the European Convention has been discussed.[25] The Council of Europe requested an opinion from the ECJ concerning the legality of accession by the EU, and in 1996, the ECJ

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19. Philip Alston & J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy*, 9 EUR. J. INT'L. L. 658, 688–89 (1998).

20. Case 36/75, Rutili v. Minister of the Interior, 1975 E.C.R. 1219.

21. Single European Act, 1987 O.J. (L 169/1), 2 C.M.L.R. 741 (EC).

22. Treaty on European Union, Feb. 7, 1992, O.J. (C 191) 4, tit. I, art. F(2). In 1992, the TEU, also known as the Treaty of Maastricht or TEU, amended the EC Treaty and created what is now known as the EU. The Amsterdam Treaty, signed in 1997, amends the TEU.

23. *Id*. tit. XVII, art. 130u(2).

24. *See* European Convention, *supra* note 4.

25. *See generally* Elizabeth F. Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 FORDHAM INT'L LJ 1104, 1117 (2008).

advised that the then European Community lacked the competence to accede to the Convention without specific treaty amendment.[26] Even though the subsequent Amsterdam Treaty contained several provisions pertaining to human rights and expanded the scope of human rights to enable the EU to take measures aimed to integrate human rights into the formal structure of the EU, it did not provide for such accession.[27] Another difficulty was that the European Convention itself was not open to international organizations but only to state parties.[28] The original text, prior to subsequent amendments, stated "[t]his Convention shall be open to the signature of the members of the Council of Europe."[29] With the entry into force of the Lisbon Treaty and Protocol 14 of the European Convention on Human Rights, which entered into force on June 1, 2010 and allows for accession by non-state parties, these two hurdles have been overcome.[30] Article 6(2) of the Lisbon Treaty not only gives the EU the competence to conclude an accession agreement, but also puts it under an obligation to do so.[31] The Treaty states that the "Union shall accede" to the European Convention.[32]

The European Parliament has outlined the main arguments for accession as follows:

1) Accession constitutes a move forward in the process of Europe's integration and political union.
2) It enhances the credibility of the EU in the area of human rights.
3) It affords citizens' protection against actions of the EU as well as Member States.
4) It contributes to the harmonious development of law in the field of human rights between the ECJ and the ECHR.[33]

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26. Case 2/94, Re: The Accession of the Cmty. to the Euro. Hum. Rts. Convention, 1996 E.C.R. I–1788.

27. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Nov. 10, 1997, 1997 O.J. (C 340) 1.

28. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, E.T.S. 5, *available at* http://www.unhcr.org/refworld/docid/3ae6b3b04.html (last visited Feb. 28, 2012).

29. *Id*.

30. European Convention, *supra* note 4, Protocol 14.

31. Lisbon Treaty, *supra* note 1, art. 6(2).

32. *Id*.

33. European Convention, *supra* note 4, at pmbl.

In the summer of 2011, a draft agreement on the accession was published.[34] This draft was negotiated by the Steering Committee for Human Rights of the Council of Europe and the European Commission of the EU.[35] Questions concerning the difficulties and impact of the accession have been raised by legal scholars and commentators.[36] To a large extent, the draft agreement answers many questions and sheds some light on the rationale and substantive provisions of EU accession.[37]

According to the draft, the main rationale for accession "is to enforce coherence in human rights protection in Europe" and to offer individuals the right to access the ECHR in Strasbourg.[38] The draft provides that the EU will not accede to all substantive protocols of the Convention.[39] Instead, accession will be limited to the ECHRFF itself.[40] Its first Protocol includes the protection of possessions and the right to education, and Protocol 6 discusses abolition of the death penalty.[41] Abolition of the death penalty on an international basis continues to be a high profile issue and priority within the EU.[42]

With respect to representation on the ECHR, the draft accession agreement provides that a judge elected in respect of the EU will have the same duties and status as the other judges, will participate equally in the work of the Court, and will not be limited to cases related to the EU.[43] Both EU Member States and the EU can, when they so wish, ask to be involved in cases as a co-respondent party, rather than as mere third-party intervener.[44] Whenever the EU is co-respondent, and the ECJ has not yet

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34. Council of Europe, *8th Working Meeting Of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) With the European Commission*, CDDH-UE (2011) 15 (July 19, 2011) [hereinafter Council of Europe Report].

35. Antoine Buyse, *Draft Agreement on EU Accession to ECHR*, *available at* http://echrblog.blogspot.com/2011/09/draft-agreement-on-eu-acceession-to-echr.html (last visited Feb. 12, 2010).

36. Jacobs, *supra* note 13, at 294–95.

37. *See generally* Council of Europe Report, *supra* note 34.

38. *Id*. at pmbl.

39. Buyse, *supra* note 35.

40. *Id*.

41. European Convention, *supra* note 4, Protocol 1, art. 1–2, Protocol 6, art 1.

42. *See id*. at Protocol 6; *see also* ALAN W. CLARKE & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY, INTRODUCTION 7 (Northeastern University Press 2007) (noting that the death penalty is all but abolished for Member States of the Council of Europe and for war criminals in international tribunals).

43. Council of Europe Report, *supra* note 34, art. 6.

44. *Id*. art. 3.

had the opportunity to assess the compatibility of EU law with the ECHRFF in a particular situation, the Agreement provides that the ECJ may make an assessment "quickly," that is, under the accelerated procedure of the ECJ.[45] Thus, it appears that the ECJ can decide a case involving a challenged practice or rule prior to the ECHR should it choose to do so.[46] Finally, and very important in practice, the EU will fund part of the budget of the Council of Europe's human rights machinery.[47] The agreement will enter into force three months after ratification by all Council of Europe Member States and by the EU.[48] This unique agreement involves many states on two sides of the negotiating table. As experience with the ratification of other ECHRFF protocols shows, this whole process may take years.[49]

The draft accession agreement has been transmitted to the Committee of Ministers of the Council of Europe for further negotiation.[50] The Parliamentary Assembly of the Council of Europe, as well as the two European courts, will comment on the draft.[51] It must then be adopted by the Council of Ministers.[52]

However, even if the draft accession agreement is adopted as proposed, some difficult issues remain to be resolved.[53] For example, to what extent will the ECHR continue to defer to the judgment of the ECJ? In the *Bosphorus* case, the impoundment of an airplane pursuant to EU regulations implementing the U.N. Security Council's sanctions regime, was challenged in the ECJ.[54] The applicant alleged that the impounding of

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45. *Id*.

46. *Id*.

47. *Id*. art. 8.

48. Council of Europe Report, *supra* note 34, art. 10.

49. Buyse, *supra* note 35.

50. Council of Europe, *8th Working Meeting Of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) With the European Commission, Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, CDDH-UE (2011) 14 (July 19, 2011).

51. *Id*.

52. *Id*.

53. *See* Jacobs, *supra* note 13, at 294.

54. Case C-84/95, Bosphorus Hava Yollari Turizm v. Ireland, 1996 E.C.R. I–3953 ¶ 4 [hereinafter Case C-84/95].

its leased aircraft by the respondent state breached its rights of respect for property.[55]

The ECJ determined that because of the importance of the security interest furthered by the regulation, the impoundment did not violate fundamental human rights, including the right to quiet enjoyment of property as set forth in the Convention.[56] When the impoundment was challenged in the ECHR as violating Protocol 1 to the Convention, the ECHR surveyed the human rights system for protection of human rights in the EU and determined that the system in the EU was equivalent to the Convention system both substantively and procedurally.[57] Although not identical to the Convention, the EU protections were comparable or equivalent to the Convention system, and the Court, in effect, deferred to the decision of the ECJ without further scrutiny.[58] The question of whether or not the ECHR will continue to defer to the decisions of the ECJ after accession is an open one.

A further and possibly divisive issue is raised by the need, as set forth in the Lisbon Treaty, to respect "the specific characteristics of the Union and Union Law" in connection with accession to the European Convention.[59] Since the ECJ has always maintained the position that it is the sole interpreter of EU law, the provision raises interesting questions regarding the interpretive autonomy of the ECJ.

Despite the fact that accession is a political priority for the EU, clearly the process will not be a swift one. Sufficient time and reflection will be directed towards these issues prior to final accession, and the dialog among all interested parties will continue.

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55. Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, App. No. 45036/98, Eur. Ct. H.R. 17 ¶ 3 (2005), *available at* https://www.suepo.org/rights/public/archive/bosphorus.pdf (last visited Mar. 10, 2012) [hereinafter App. No. 45036/98].

56. Case C-84/95, *supra* note 54, ¶ 26.

57. App. No. 45036/98 *supra* note 55, at ¶ 155, ¶ 165.

58. *Id*.

59. Lisbon Treaty, *supra* note 1, at Protocol 8, art. 1.

WHO'S MISSING? WOMEN WITH DISABILITIES IN U.N. SECURITY COUNCIL RESOLUTION 1325 NATIONAL ACTION PLANS

By Stephanie Ortoleva, Esq.,[*] with research assistance from Alec Knight[**]

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I. INTRODUCTION

Despite progress made through a series of United Nations Security Council Resolutions (UNSCR), beginning with the groundbreaking UNSCR 1325 in 2000,[1] to give women a place at the table in post-conflict peace building and reconciliation, women with disabilities are missing and ignored and have not had a role in these processes. Women with disabilities are excluded both in practice and formally, through the various United Nations (U.N.) resolutions and policy documents, including the UNSCR 1325 Indicators[2] and the UNSCR 1325 National Action Plans[3], each country is to prepare.

Women with disabilities face unique challenges and offer unique perspectives, which enable them to make important contributions to the peace-building process. Moreover, their participation ensures that their needs and concerns are addressed and effectively represented. Emancipatory gender politics require the consideration and recognition of the intersectionality and multiple dimensions of women's lives. The 2011 Report of the United Nations Special Rapporteur on Violence Against Women focuses on the multiple and intersecting forms of discrimination

1. S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

2. U.N. Secretary-General, *Women and Peace and Security: Report of the Secretary-General*, ¶¶ 12–20, U.N. Doc. S/2010/173 (Apr. 6, 2010) [hereinafter *Women and Peace and Security*].

3. U.N. President of the S.C., Statement dated Oct. 28, 2004 by the President of the Security Council, U.N. Doc. S/PRST/2004/40 (Oct. 28, 2004) [hereinafter 2004 Statement]; U.N. President of the S.C., Statement dated Oct. 27, 2005 by the President of the Security Council, U.N. Doc. S/PRST/2005/52 (Oct. 27, 2005) [hereinafter 2005 Statement]; U.N. Women, Securing Equality, Engendering Peace: A Guide to Policy and Planning on Women, Peace, and Security (2006), *available at* http://www.un-instraw.org/download-document/376-securing-equality-engendering-peace-a-guide-to-policy-and-planning-on-women-peace-and-security.html (last visited May 21, 2012).

that contribute to and exacerbate violence against women.[4] According to the report, disability is a factor, along with age, access to resources, race/ethnicity, language, religion, sexual orientation, and class, which can exacerbate the discrimination against and marginalization of women.[5]

Furthermore, pursuant to the U.N. Convention on the Rights of Persons with Disabilities (CRPD), especially Article 6 on Women,[6] and the U.N. Interagency Support Group for the U.N. Convention on the Rights of Persons with Disabilities,[7] both the concerns of and the participation of women with disabilities must be incorporated into these efforts. Additionally, the parallel provisions in the CRPD and the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on conflict and post-conflict situations brings into focus the synergy between the two treaties.[8]

II. WHAT ARE UNSCR 1325 NATIONAL ACTION PLANS?

In 2010, the United Nations Secretary General submitted to the Security Council, for consideration, a set of indicators[9] for use at the global level to track implementation of UNSCR 1325. These indicators could serve as a common basis for reporting by relevant United Nations entities, other international and regional organizations, and Member States on the implementation of UNSCR 1325 and beyond. In monitoring the implementation of UNSCR 1325, "[i]ndicators are signposts of change; a means for determining the status quo and the progress towards intended results. Indicators are critical for effective monitoring and evaluation," and serve as mechanisms for accountability to all stakeholders by demonstrating

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4. Special Rapporteur on Violence Against Women, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ¶¶ 22, 40, 47, 58, 67, 73 Human Rights Council, U.N. Doc. A/HRC/17/26 (May 2, 2011).

5. *Id.*¶ 73.

6. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities art. 6, G.A. res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (Dec. 13, 2006), 46 I.L.M. 443 [hereinafter CRPD] ("1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. 2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.").

7. *See Inter-Agency Support Group*, U.N. ENABLE, *available at* http://www.un.org/disabilities/default.asp?navid=43&pid=323 (last visited Jan. 14, 2012).

8. *See* Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980).

9. *Women and Peace and Security*, *supra* note 4.

progress.[10] Regrettably, however, these indicators lack factors to measure both the inclusion of women and girls with disabilities and the issues concerning them.[11]

Assessment of the progress of UNSCR 1325 implementation with respect to women with disabilities "is constrained by an absence of baseline data and specific, measurable, achievable, relevant and time-bound indicators."[12] Without such indicators, the different experiences of women with disabilities will not be reflected in reporting. A review of current UNSCR 1325 National Action Plans and other reports show this to be the case.

In two important Statements of the President of the U.N. Security Council, issued in 2004[13] and 2005,[14] the Security Council called on Member States to apply UNSCR 1325 domestically by developing National Action Plans (NAPs) or other national level strategies encompassing the goals of the Resolution.[15] In these statements, the Security Council called on Member States to continue to implement UNSCR 1325 through the development of NAPs or other national level strategies.[16] The creation of a national action plan provides an opportunity to initiate strategic actions, outline priorities, identify the levels and sources of fiscal and other resources necessary to implement the plan, determine and assign the responsibilities for implementation, and establish realistic benchmarks and timeframes.[17] The process of developing a plan is also one of capacity building in government and civil society, which helps to overcome gaps and challenges to the full implementation of UNSCR 1325.[18] There are currently thirty-four countries that have adopted such policy plans at the national level, and others are forthcoming.[19]

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10. *Id*. ¶ 4.

11. *Women and Peace and Security*, *supra* note 4.

12. *Id*. ¶ 53.

13. 2004 Statement, *supra* note 5.

14. 2005 Statement, *supra* note 5.

15. *Id*. at 2; 2004 Statement, *supra* note 5, at 2.

16. *Id*.; 2005 Statement, *supra* note 5, at 3.

17. Women's International League for Peace and Freedom, *About 1325 National Action Plans (NAPS)*, PEACEWOMEN, *available at* http://peacewomen.org/pages/about-1325/national-action-plans-naps (last visited Jan. 14, 2012).

18. *Id*.

19. *Id*.

III. COMMON PITFALLS IN COVERAGE OF WOMEN WITH DISABILITIES IN UNSCR 1325 NATIONAL ACTION PLANS

Few UNSCR 1325 NAPs include any references to the issues of concern to women with disabilities, whether issued by developing and occupied countries[20] or developed and occupier nations. Furthermore, based on the limited references to women with disabilities in the UNSCRs on Women, Peace, and Security and in the UNSCR 1325 Indicators, the scant coverage of women and girls with disabilities in a few NAPs tends to focus merely on protection, rehabilitation, and victimization, rather than on the participation of women with disabilities in peace building and post-conflict national institution and societal development. Some of the problematic points of discussion and deficits are as follows:

1) Despite substantial documentation that war increases the number of women with disabilities[21] and exacerbates the situation of women with existing disabilities,[22] the impact of war and conflict on women with disabilities is generally absent from NAPs.
2) Neither organizations of women with disabilities nor experts on issues of concern to women with disabilities

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20. This category includes countries either actively facing armed conflict or in post-conflict reconstruction.

21. *See* WORLD BANK, ET AL., SOCIAL ANALYSIS AND DISABILITY: A GUIDANCE NOTE, 32 (2007), *available at* http://hpod.pmhclients.com/pdf/SAnalysisDis.pdf (last visited May 21, 2012) (stating that girls and women are more likely to become disabled as a result of violence and armed conflict); RANGITA DE SILVA DE ALWIS, DISABILITY RIGHTS, GENDER, AND DEVELOPMENT: A RESOURCE TOOL FOR ACTION, 126 (2008), http://www.un.org/disabilities/documents/Publication/UNWCW%20MANUAL.pdf (finding that conflicts increase the number of persons with disabilities); WORLD HEALTH ORGANIZATION & WORLD BANK, WORLD REPORT ON DISABILITY, 108 (2011), http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf (finding that armed conflicts "cause injuries and disabilities and make people with disabilities even more vulnerable"); *Id*. at 34 (citing the conflict in 2009 in Gaza as an example in which people with disabilities experienced "delays in obtaining emergency health care and longer-term rehabilitation.").

22. *See* INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, WORLD DISASTERS REPORT: FOCUS ON DISCRIMINATION, 88 (2008), *available at* http://www.ifrc.org/Global/Publications/disasters/WDR/WDR2007-English.pdf (last visited May 21, 2012) (Finding that those living in areas affected by the conflict who are already disabled "may then become further marginalized and excluded on the basis of their disability in the aftermath"); DE SILVA DE ALWIS, *supra* note 23, at 126 (finding that, in conflict situations, "women with disabilities face greater vulnerability than their male or non-disabled counterparts."). The CRPD recognizes the special vulnerability of people with disabilities in times of conflict. Article 11 of the CRPD mandates that states parties must take "all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict. . . ." CRPD, *supra* note 8, at art. 11.

appear to be involved in the drafting of the NAPs civil society consultative processes, if any were utilized.[23]

3) Victimization and vulnerability are too often the focus of the discussion of women with disabilities in strategies and policies concerning conflict and post-conflict situations.[24]
4) Failure to see women with disabilities as leaders and engaged actors for their own rights and for the rights of all women, who therefore can contribute to peace processes.[25]
5) Absence of baseline data and specific, measurable, achievable, relevant, and time-bound indicators are benchmarks for measuring progress and ensuring accountability, even when the NAP has its own indicators,

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23. Inclusion is one of the eight central principles of the CRPD. Article 3(c) identifies the principle of inclusion as "full and effective participation and inclusion in society." The CRPD requires states parties to ensure that people with disabilities can "effectively and fully participate in political and public life. . . ." CRPD, *supra* note 8, at art. 3. In addition, Article 33, which deals with domestic implementation of the Convention, requires states parties to involve "persons with disabilities and their representative organizations" in the monitoring process. . . ." *Id.* at art. 33.

24. The cultural narrative in which women and disabled persons are seen as "vulnerable" produces an ideology that renders women and disabled persons as "redundant and expendable." Rosemarie Garland-Thomson, *Re-shaping, Re-thinking, Re-defining: Feminist Disability Studies* (Barbara Faye Waxman Fiduccia Paper on Women and Girls with Disabilities, Center for Women Policy Studies) (2001), *available at* http://www.centerwomenpolicy.org/pdfs/DIS2.pdf (last visited May 21, 2012). The CRPD also incorporates a transformative view of disability, moving away from the "medical model" of disability toward a "social model" of disability. As noted disability human rights scholars, Michael Stein and Janet Lord, emphasize, "[t]he Convention categorically affirms the social model of disability in relation to persons with disabilities by describing it as a condition arising from 'interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others' instead of condition arising from inherent limitations." Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 WASH. L. REV. 449, 460 (2008) (quoting CRPD, supra note 8, art. 1). Moreover, the CRPD reflects the international community's recognition that persons with disabilities "have equal dignity, autonomy, and worth." *Id.* at 476. In this spirit, Article 8 of the CRPD tasks states with altering social norms with respect to persons with disabilities, including "the responsibility to eviscerate harmful stigmas and stereotypes and promote positive imagery." *Id.* at 475. Early on in the CRPD negotiation process, a delegate from South Africa called on the delegates from all states to refrain from using "charity-model terminology" and to instead utilize a "rights-based taxonomy" when referring to persons with disabilities. *Id.* at 476. A rights-based taxonomy treats persons with disabilities as rights-bearers with equal dignity and worth, rather than victims in need of charity.

25. The CRPD emphasizes empowerment over vulnerability. Article 6, which addresses women with disabilities, requires states parties to ensure the "empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention." CRPD, *supra* note 8, at art. 6. State parties must empower women to demand their own rights under the CRPD.

which may reflect the absence of references to women with disabilities in the current UNSCR 1325 Indicators.[26]

6) Over-emphasis on social protection to the exclusion of other economic, social, and cultural or civil and political rights.[27]
7) Failure to recognize that during and after conflict, women with disabilities, like all women, care for their families and need access to food and health care that is accessible and sensitive to their needs.[28]

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26. *See infra*, Part IV.A (describing the absence of references to women with disabilities in two countries that have both 1325 NAPs and strong advocacy groups of women with disabilities). There is a dearth of data on persons with disability, such that they remain excluded from humanitarian responses. *See* INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, *supra* note 24, at 95. In particular, baseline data on women with disabilities can be either scant or non-existent. *See* Shantha Rau Barriga, *'As If We Weren't Human': Discrimination and Violence against Women with Disabilities in Northern Uganda,* 6 HUMAN RIGHTS WATCH, Aug. 26, 2010, *available at* http://www.hrw.org/sites/default/files/reports/uganda0810webwcover_0.pdf (last visited May 21, 2012) (commenting on the lack of data on the number of women with disabilities in Uganda). In the face of these data scarcities, the CRPD requires states parties to collect data on persons with disabilities. *See* CRPD, *supra* note 8, at art. 31 (requiring states parties to "undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.").

27. The CRPD enumerates a comprehensive list of human rights of persons with disabilities. This list includes a wide variety of civil and political rights. *See, e.g.*, CRPD, *supra* note 8, at art. 13(1) (requiring states parties to provide "effective access to justice for persons with disabilities on an equal basis with others"); *id*. at art. 14(1) (requiring states parties to ensure persons with disabilities the right to liberty and security of person on an equal basis with others); *id.* at art. 15(2) (tasking states parties to take measures to prevent persons with disabilities from being subjected to "torture or cruel, inhuman or degrading treatment or punishment."); *id*. at art. 16(1) (requiring states parties to take measures to protect persons with disabilities from "all forms of exploitation, violence and abuse, including their gender-based aspects."); *id*. at art. 22(2) (tasking states parties to protect the privacy of "personal, health and rehabilitation information" of persons with disabilities). In addition, the Convention guarantees a broad array of economic, social, and cultural rights. *See, e.g.*, CRPD, *supra* note 8, at art. 24(1) (recognizing the right of persons with disabilities to education); *id*. at 26 (requiring states parties to "promote the availability, knowledge and use of assistive devices and technologies" for persons with disabilities as they relate to habilitation and rehabilitation); *id*. at 27 (recognizing the right to work for people with disabilities); *id*. at 28(1) (recognizing the right of persons with disabilities to "an adequate standard of living" both for themselves and their families).

28. Article 23 of the CRPD requires states parties to "ensure the rights and responsibilities" of persons with disabilities regarding family care and to render "appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities." CRPD, *supra* note 8, at art. 23. Article 25 of the CRPD enshrines the right to the enjoyment of the "highest attainable standard of health without discrimination on the basis of disability." CRPD, *supra* note 8, at art. 25. *See also* Special Rapporteur on Econ., Soc. & Political Rights, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Special Rapporteur, Paul Hunt, Submitted in Accordance with Commission Resolution 2002/31*, Commission on Human Rights, ¶ 67,

8) Fiscal, personnel, and other resources allocated to peacebuilding and humanitarian efforts in conflict and post-conflict situations do not consider possible ramifications of the need for reasonable accommodation, accessibility, nor personnel who are experts on working with women with disabilities,[29] which must be considered in state budgets.[30]

U.N. Doc. E/CD.4/2003/58 (Feb. 13, 2003) (stating that women with disabilities are more likely to face denials of health care services "due to stigmas associated with both disability and gender. . . .").

29. Article 9 of the CRPD ensures the right of accessibility for people with disabilities. The provision requires states parties to take measures to ensure that people with disabilities have equal access to "the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and rural areas." CRPD, *supra* note 8, at art. 9(1). The provision specifically requires states parties to "provide training for stakeholders" regarding accessibility issues that people with disabilities face. *Id*. at art. 9(2)(c). Article 5 of the CRPD ensures the right of reasonable accommodation for people with disabilities. *Id*. at art. 5(3) (requiring states parties to "take all appropriate steps to ensure that reasonable accommodation is provided.").

30. Budget analysis refers to a process through which state allocation of resources is scrutinized and assessed. In the human rights context, civil society organizations use budget analysis to determine whether the state is meeting its human rights obligations. *See* Gillian MacNaughton, *Human Rights Frameworks, Strategies, and Tools for the Poverty Lawyer's Toolbox*, 44 CLEARINGHOUSE REV. 437, 446. In order to determine whether the needs of women with disabilities are met in post-conflict programs and policies, budgetary analysis is crucial. *See* Lord & Stein, *supra* note 26, at 459 (stating that budget analysis is an "essential component" of any effective disability rights campaign). Human rights practice tends to overemphasize legal intervention over other forms of rights oriented work, including budgetary analysis. *See id*. at 453. Human rights advocates have only recently stressed the importance of budgetary analysis. *See* Stephanie Farrior, *Human Rights Advocacy on Gender Issues: Challenges and Opportunities*, 1 J. HUM. RTS. PRAC. 83, 95; Gillian MacNaughton & Paul Hunt, *A Human rights-Based Approach to Social Impact Assessment*, *in* NEW DIRECTIONS IN SOCIAL IMPACT ASSESSMENT: CONCEPTUAL AND METHODOLOGICAL ADVANCES 355, 360 (Frank Vanclay & Ana Maria Esteves, eds., 2012Budget analysis "reveals human rights problems and affords means to tackle them." *Id*. It can be used to identify the sufficiency of resource allocation in an attempt to secure the rights of a particularly disadvantaged group. *See* MARIA SOCORRO I. DIOKNO, A RIGHTS-BASED APPROACH TO BUDGET ANALYSIS, 8 (1999), http://www.crin.org/docs/resources/publications/hrbap/RBABudgetAnalysis.pdf (last visited Feb. 22, 2012); HELENA HOFBAUER, ET AL., DIGNITY COUNTS: A GUIDE TO USING BUDGET ANALYSIS O ADVANCE HUMAN RIGHTS (2004), *available at* http://www.iie.org/en/Programs/IHRIP/~/media/Files/Programs/IHRIP/Dignity_Counts.ashx (last visited Feb. 22, 2012). Budget analysis can also serve an important role in the realm of women's rights. *See, e.g.*, DEBBIE BUDLENDER & RHONDA SHARP, HOW TO DO A GENDER-SENSITIVE BUDGET ANALYSIS: CONTRMPORARY RESEARCH AND PRACTICE, (1998), *available at* http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B1171EF87-2C5C-4624-9D76-B03CF35F4E65%7D_AusAIDTr.pdf (last visited Feb. 22, 2012). Budget analysis has also been emphasized in the context of state reporting obligations on the implementation of economic, social, and cultural rights. *See* United Nations, Econ. & Soc. Council, Limburg Principles on the Implementation of Economic, Social and Cultural Rights, ¶ 79, U.N. Doc.E/CN.4/1987/17 (Jan. 8, 1987) ("Quantitative information should be included in the reports of States parties in order to indicate the extent to which the rights are protected in fact. Statistical information and information on budgetary allocations and expenditures should be presented in such a way as to facilitate the assessment of the compliance with

9) Women with disabilities may be ignored in NAPs because it is assumed that their issues will be covered in a Disability National Action Plan, resulting in their isolation, segregation, and exclusion within women, peace, and security strategies, which are under inclusive.[31]
10) NAPs reflect limited understanding of international disability rights, standards enumerated in the United Nations Convention on the Rights of Persons with Disabilities (CRPD): accessibility,[32] reasonable accommodation,[33] non-discrimination and equality,[34] economic, social and cultural rights, and civil and political rights.[35]
11) NAPs focus on disability prevention as a public health issue rather than viewing disability through a human rights lens.[36]

IV. SURVEY OF INCLUSION IN SELECTED UN SECURITY COUNCIL RESOLUTION 1325 NATIONAL ACTION PLANS

Few UNSCR 1325 National Action Plans include or refer to women with disabilities. Only nine of the thirty-four currently issued UNSCR 1325

Covenant obligations. States parties should, where possible, adopt clearly defined targets and indicators in implementing the Covenant.").

31. Women, peace, and security strategies directly implicate many provisions of the CRPD, most notably Article 6's protection of the rights of women with disabilities and Article 11's provisions on the rights of persons with disabilities during times of armed conflict. CRPD*, supra* note 8, at arts. 6, 11. As such, Article 33(3), which requires states parties to involve persons with disabilities in the monitoring process, calls for the inclusion of women with disabilities in the development of women, peace, and security strategies.

32. *See supra*, note 30 (describing the duties of states parties to ensure accessibility under the CRPD).

33. *See id*. (describing the duties of states parties to provide reasonable accommodation under the CRPD).

34. *See supra*, note 8, at art. 5 (requiring states parties to "prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.").

35. *See supra*, note 29 (describing several civil and political rights as well as several economic, social, and cultural rights enshrined in the CRPD). *See also supra*, note 31 (describing the provisions in the CRPD that require states parties to ensure the rights of accessibility and reasonable accommodation).

36. Notably, the CRPD does not mention disabilities prevention. As an international human rights instrument, the purpose of the CRPD is to promote and protect the human rights of persons with disabilities. *See supra*, note 8, at art. 1 ("The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.").

National Action Plans include any references to women with disabilities. These are the NAPs of Austria,[37] Finland,[38] Italy,[39] Liberia,[40] Nepal,[41] Rwanda,[42] the United States,[43] and Uganda,[44] and, most recently, Georgia.[45] The remaining twenty-five UNSCR 1325 National Action Plans lack references to women with disabilities. These are the National Action Plans of: Belgium, Bosnia-Herzegovina, Canada, Chile, Cote d'Ivoire, Croatia, the Democratic Republic of the Congo, Denmark, Estonia, France, Guinea, Guinea-Bissau, Iceland, The Netherlands, Norway, Philippines, Portugal, Senegal, Serbia, Sierra-Leone, Slovenia, Spain, Sweden, Switzerland, and

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37. Federal Ministry for European and International Affairs, *Austrian Action Plan on Implementing UN Security Council Resolution 1325 (2000)*, PEACEWOMEN, 5, 12 (Aug. 8, 2007), *available at* http://www.peacewomen.org/assets/file/NationalActionPlans/austria_nationalactionplan_august2007.pdf (last visited May 21, 2012).

38. Ministry for Foreign Affairs of Finland, *UN Security Council Resolution 1325 (2000) "Women, Peace, and Security": Finland's National Action Plan 2008-2011*, PEACEWOMEN, 12, (Sept. 19, 2008), *available at* http://www.peacewomen.org/assets/file/NationalActionPlans/finland_nationalactionplan_september2008.pdf (last visited May 21, 2012).

39. Inter-ministerial Committee on Human Rights, *National Action Plan of Italy on "Women, Peace and Security" 2010-2013*, PEACEWOMEN, 15, (Dec. 23, 2010), *available at* http://www.peacewomen.org/assets/file/NationalActionPlans/italy_nationaactionplan_2010.pdf (last visited May 21, 2012).

40. Ministry of Gender and Development, *The Liberian Action Plan for the Implementation of United Nations Resolution 1325*, PEACEWOMEN, 27, (Mar. 8, 2009), *available at* http://www.peacewomen.org/assets/file/NationalActionPlans/liberia_nationalactionplanmarch2009.pdf (last visited May 21, 2012).

41. Ministry of Peace and Reconstruction of Nepal, *National Action Plan on Implementation of the United Nations Security Council Resolution 1325 & 1820*, PEACEWOMEN, 6, 9, (Oct. 2010), *available at* http://www.peacewomen.org/assets/file/nepal_-_nap.pdf (last visited May 21, 2012).

42. Republic of Rwanda, *National Action Plan 2009-2012: The United Nations Security Council Resolution 1325/2000 on Women, Peace, and Security*, PEACEWOMEN, 16 (May 2010), *available at* http://www.peacewomen.org/assets/file/NationalActionPlans/rwandan_national_action_plan_1325.pdf (last visited May 21, 2012).

43. White House, *United States National Action Plan on Women, Peace, and Security*, PEACEWOMEN, 1, 9, 14, 17, 22 (Dec. 19, 2011), *available at* http://www.peacewomen.org/assets/file/NationalActionPlans/us_nationalactionplan_2011.pdf (last visited May 21, 2012).

44. Ministry of Gender, Labour, and Social Development, *The Uganda Action Plan on UN Security Council Resolutions 1325 & 1820 and the Goma Declaration*, PEACEWOMEN, 46, 55, 63, 69 (Dec. 2008), *available at* http://www.peacewomen.org/assets/file/NationalActionPlans/uganda_nationalactionplan_december2008.pdf (last visited May 21, 2012).

45. Parliament of Georgia, *2012-2015 National Action Plan for Implementation of the UN Security Council Resolutions ## 1325, 1820, 1888, 1889 and 1960 on "Women, Peace and Security"*, NATIONAL SECURITY COUNCIL OF GEORGIA, 7 (Dec. 27, 2011), *available at* http://www.nsc.gov.ge/files/files/NAP%201325_Georgia_Adopted%20Dec%2027_2011_%20Eng.pdf (last visited May 21, 2012).

the United Kingdom.[46] Several countries are also in various phases of the process of drafting an UNSCR 1325 National Action Plan. These countries include Australia,[47] Ireland,[48] Bulgaria,[49] Greece,[50] and Slovenia.[51]

Interestingly, some of the countries that were supportive of the drafting of the CRPD, including countries that ratified the CRPD prior to issuing their UNSCR 1325 NAPs, failed to make any references to women with disabilities in their NAPs. In contrast, other countries that were not vigorously engaged in the ratification process of the CRPD made references to women with disabilities in their NAPs.

The NAPs that reference women with disabilities provide scant and often superficial coverage of issues of concern to women with disabilities. Of course, the minimal coverage of women with disabilities in NAPs may well reflect the absence of references to women with disabilities in the UNSCR 1325 Indicators. Most countries draw on these Indicators when formulating their UNSCR 1325 National Action Plans. To illustrate these points, a few countries and their inclusion (or lack thereof) of women with disabilities in their UNSCR 1325 NAPs are discussed below.

A. Countries that fail to mention women and girls with Disabilities in their UNSCR 1325 National Action Plans

Canada's UNSCR 1325 NAP, which was issued in October 2010, contains no references to women and girls with disabilities.[52] Canada ratified the CRPD in March 2010, several months prior.[53] Canada was

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46. Women's International League for Peace and Freedom, *supra* note 19.

47. Department of Families, Housing, Community Services and Indigenous Affairs, *Consultation Draft: Australian National Action Plan on Women, Peace, and Security*, (Aug. 18, 2011), *available at* http://www.fahcsia.gov.au/sa/women/pubs/govtint/action_plan_women_peace/Documents/action_plan_women_peace.pdf (last visited May 21, 2012).

48. European Peacebuilding Liaison Office, *Implementation of UNSCR 1325 in Europe*, *available at* http://www.eplo.org/implementation-of-unscr-1325-in-europe (last updated Aug. 1, 2011) (last visited May 21, 2012).

49. *Id*.

50. *Id*.

51. *Id*.

52. Foreign Affairs and International Trade Canada, *Building Peace and Security for All: Canada's Action Plan for the Implementation of United Nations Security Council Resolutions on Women, Peace, and Security*, PEACEWOMEN, (Oct. 2010), *available at* http://www.peacewomen.org/assets/file/Resources/Government/canada_nationalactionplan_october2010.pdf (last visited May 21, 2012).

53. Council of Canadians with Disabilities, *Canada Ratifies United Nations Convention on the Rights of Persons with Disabilities*, (Mar. 11, 2010), *available at* http://www.ccdonline.ca/en/international/un/canada/crpd-pressrelease-11March2010 (last visited May 21, 2012).

engaged in the drafting of the CRPD[54] and has a vigorous community of women with disabilities.

In addition to the nationwide Disabled Women's Network Canada,[55] the country has several provincial organizations run by and for women with disabilities, including Disabled Women's Network Ontario,[56] Disabled Women's Network Manitoba,[57] Disabled Women's Network British Columbia,[58] and Disabled Women's Network Saskatchewan.[59] This strong community of women's disability rights organizations could have contributed effectively to the development of Canada's UNSCR 1325 NAP.

Although the NAP notes that input from civil society was welcomed, there is no indication of which civil society organizations were engaged.[60] As such, it could not be determined if women with disabilities were involved. Given that Canada leads the group of U.N. member states that are "Friends of Women, Peace and Security,"[61] it is regrettable that the country's NAP does not reference women with disabilities.

The UNSCR 1325 NAP of the Philippines, issued in March 2010, contains no references to women and girls with disabilities.[62] The Philippines ratified the CRPD on April 15, 2008, almost two years earlier.[63] As in Canada, the lack of references to women with disabilities in the NAP

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54. Council of Canadians with Disabilities, *UN Convention on the Rights of Persons with Disabilities*, *available at* http://www.ccdonline.ca/en/international/un (last visited Nov. 11, 2011).

55. *See, e.g.,* Disabled Women's Network Canada, *Our National Network*, *available at* http://www.dawncanada.net/ENG/ENGnational.htm (last visited Jan. 17, 2011).

56. Disabled Women's Network Ontario, *Who We Are*, *available at* http://dawn.thot.net/who.html (last visited Jan. 17, 2012).

57. Disabled Women's Network Manitoba, *Community Pages–DAWN Manitoba*, *available at* http://www.dawncanada.net/ENG/ENGmb.html (last visited Jan. 17, 2012).

58. Disabled Women's Network British Columbia, *Community Pages–DAWN British Columbia, available at* http://www.dawncanada.net/ENG/ENGbc.html (last visited Jan. 17, 2012).

59. Disabled Women's Network Saskatchewan, *Community Pages – DAWN Saskatchewan*, *available at* http://www.dawncanada.net/ENG/ENGsk.html (last visited Jan. 17, 2012).

60. Foreign Affairs and International Trade Canada, *supra* note 54, at 4 ("[M]embers of Canadian civil society . . . have all contributed to the development of the Action Plan.").

61. Foreign Affairs and International Trade Canada, *Women, Peace, and Security*, *available at* http://www.international.gc.ca/rights-droits/women-femmes/ps.aspx?lang=eng&view=d (last visited Nov. 4, 2011).

62. Office of the Presidential Adviser on the Peace Process, *The Philippine National Action Plan on UNSCRs 1325 & 1820: 2010-2016*, PEACEWOMEN, (Mar. 2010), *available at* http://www.peacewomen.org/assets/file/NationalActionPlans/philippines_nap.pdf (last visited May 21, 2012).

63. United Nations Treaty Collection, *Convention on the Rights of Persons with Disabilities* 2, *available at* http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15.en.pdf (last visited Jan. 3, 2012).

of the Philippines is surprising due to the strong support for women's rights and people with disabilities within the country. While the Human Rights Commission of the Philippines (CHRP) was deficient in its engagement with the disability community during its first two decades of existence,[64] the CHRP has recently become actively engaged with the disability community.[65] In addition, the Philippines more general Human Rights NAP has strong coverage of disability issues.[66] The Philippines also utilizes its National Council on Disability Affairs, a national government agency, to formulate policies concerning disability issues.[67] Furthermore, the Government of the Philippines was a strong positive force during the negotiations of the CRPD.[68]

Moreover, there are advocates for the rights of women with disabilities in the Philippines who could have been invited to contribute to the UNSCR 1325 NAP. For example, Venus M. Ilagan, a highly accomplished Filipina, is the Chairperson of Rehabilitation International.[69] Ms. Ilagan, along with the leaders of organizations such as Women with Disabilities LEAP to

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64. *See* Commission on Human Rights Government Linkages Office, *Rights of Persons with Disabilities in Accessing the Justice System* 9 (CHRP, Working Paper Sept. 2007), *available at* http://www.chr.gov.ph/MAIN%20PAGES/about%20hr/advisories/pdf_files/FINAL%20fullPWDreport.pdf (last visited May 21, 2012) (finding that, as of 2007, there has been "very minimal 'positioning' of the CHRP which could enable [persons with disabilities] to come to the Commission for assistance").

65. *See* Human Rights Online Philippines, *Coalition of Persons with Disabilities on the Move!*, *available at* http://hronlineph.com/2011/08/29/statement-coalition-of-persons-with-disabilities-on-the-move (last visited Aug. 29, 2011) (finding that, since the establishment of the Philippine Coalition on the U.N. Convention on the Rights of Persons with Disabilities in December, 2010, interactions between the disability community and the CHRP have emerged). *See also Ordinance on Persons with Disabilities Gains Support*, SUNSTAR (Aug. 31, 2011), *available at* http://www.sunstar.com.ph/tacloban/local-news/2011/08/31/ordinance-persons-disabilities-gains support-176473 (last visited May 21, 2012) (stating that the CHRP endorsed an ordinance declaring July "Persons with Disabilities Month" in Leyte Province).

66. *See* The Philippines Commission on Human Rights, *The Philippines Human Rights Plan 1996-2000*, 7 (1996), *available at* http://www2.ohchr.org/english/issues/plan_actions/philippines.htm (last visited May 21, 2012) (addressing problems of unequal employment opportunities, unequal access to quality education, and accessibility).

67. National Council on Disability Affairs, *About Us*, *available at* http://www.ncda.gov.ph/about/ (last visited Nov. 11, 2011).

68. *See* Commission on Human Rights Government Linkages Office, *supra* note 66, at 10 ("The Commission on Human Rights of the Philippines has . . . participated in efforts in the drafting of the Convention on the Rights of Persons with Disabilities through its submissions to the Department of Foreign Affairs and the Asia Pacific Forum of National Human Rights Institutions of which CHRP is a member.").

69. Rehabilitation International, *Secretariat*, *available at* http://www.riglobal.org/about/government-structure/secretariat/ (last visited Nov. 11, 2011).

Social and Economic Progress Inc. (WOWLEAP)[70] could have enhanced the Philippines' NAP.

B. Countries that Mention Women and Girls with Disabilities in Their UNSCR 1325 National Action Plans

The United States signed the CRPD on July 30, 2009, but has not yet ratified it.[71] The United States was engaged in the negotiations of the CRPD in 2003, but at that time the U.S. Department of Justice stated that it had no intention to ratify the treaty.[72] Attorneys under the Bush Administration argued that national legislation, rather than international law, is the best method to ensure non-discrimination.[73] However, since 2009, the Obama Administration has supported ratification of the CRPD.[74]

Despite the fact that the CRPD has not yet been sent to the U.S. Senate for ratification, the U.S. National Action Plan includes many references to women with disabilities.[75] The U.S. National Action Plan discusses the interaction between conflict and the incidence of disability and the particular risks that women with disabilities face in conflict situations.[76] The Plan also tasks the U.S. Government with promoting "equitable access" to medical, social, and legal services for women and girls with disabilities.[77] Perhaps more significantly, the Plan tasks the U.S. Government with supporting the participation of women with disabilities in peace building efforts.[78]

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70. WOWLEAP, *About Us*, *available at* http://wowleap2000.tripod.com/ (last visited Nov. 11, 2011).

71. United Nations Treaty Collection, *supra* note 65, at 3.

72. Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People Under International Law*, 25 GA. ST. U. L. REV. 527, 567 (2009).

73. *Id*.

74. *Id*. at 570.

75. White House, *supra* note 45.

76. *Id*. at 9–10 ("Conflict also increases the incidence of disability, and women with disabilities can face particular risks including social stigma and isolation, difficulty accessing humanitarian assistance, unmet health care needs, and higher rates of SGBV and other forms of violence during and after conflict.").

77. *Id*. at 17.

78. *Id*. at 14 ("Support the participation and leadership roles of women from all backgrounds, including minorities and women with disabilities, in peace negotiations, donor conferences, security sector reform efforts, transitional justice and accountability processes, and other related decision-making forums including those led by the UN and other international and regional organizations, and including capacity building for such actors as female candidates, female members of government, women in the security sector, and women in civil society.").

Interestingly, in spite of these references to women with disabilities in the U.S. National Action Plan, women with disabilities were not "fully represented" in the U.S. Government's formal consultations with civil society representatives.[79] While NGO representatives brought forward "relevant issues" regarding disabled women during the final stages of the development of the NAP,[80] the U.S. National Action Plan would undoubtedly have been even more sensitive to the concerns of women with disabilities if they had been more deeply involved at earlier stages and throughout the consultation process.

Liberia, which signed the CRPD on March 30, 2007, has yet to ratify the CRPD.[81] Nonetheless, Liberia's UNSCR 1325 NAP, issued on March 8, 2009, references women with disabilities.[82] However, the references to women with disabilities focus on preventing gender-based violence, including statements concerning outcomes.[83] It is not clear to what extent women with disabilities participated in the development of this NAP or whether organizations such as the Association of Women with Disabilities in Liberia were involved.

Uganda ratified the CRPD on September 25, 2008,[84] three months before the country issued its UNSCR 1325 NAP.[85] As a country that endured a long and destructive conflict, it is encouraging to see that Uganda developed a UNSCR 1325 NAP at all. Uganda's NAP notwithstanding, Human Rights Watch reports that the situation for women with disabilities in Uganda remains dire.[86] For example, despite the Ugandan NAP's provision of "[m]easures undertaken to increase women's access to justice, particularly for women with disabilities,"[87] the Human Rights Watch report documents exclusion from the justice system experienced by women with disabilities.[88] Post hoc human rights reports produced by organizations like

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79. Women's International League for Peace and Freedom, *Report of the Civil Society Consultations on the Development of the United States National Action Plan on Women, Peace and Security (UN SCR 1325)*, 9 PEACEWOMEN, *available at* http://wilpf.org/files/Report_of_Women_Peace_Security_Consults_(2011).pdf (last visited Jan. 14, 2012).

80. *Id*.

81. United Nations Treaty Collection, *supra* note 65, at 2.

82. Ministry of Gender and Development, *supra* note 42, at 27.

83. *Id*. ("Outreach programmes targeting women, girls and men, including those with disabilities and special needs, are designed, developed and delivered to protect them against GBV.").

84. United Nations Treaty Collection, *supra* note 65, at 3.

85. Ministry of Gender, Labour, and Social Development, *supra* note 46.

86. *See generally* Barriga, *supra* note 28.

87. Ministry of Gender, Labour, and Social Development, *supra* note 46, at 46.

88. Barriga, *supra* note 28.

Human Rights Watch, while useful, can only provide a broad depiction of the situation of women with disabilities. Measurable and specific tracking mechanisms are needed to assess progress or the lack thereof.

C. Countries that have not Developed, Have Draft Plans or Are Developing UNSCR 1325 National Action Plans

Australia's UNSCR 1325 NAP Consultation Draft, circulated on August 18, 2011, contains no references to women and girls with disabilities.[89] Australia ratified the CRPD on 17 July 2008,[90] three years before the issuance of the draft NAP. Furthermore, Australia has an active and engaged community of women with disabilities. In addition to Women With Disabilities Australia (WWDA),[91] a countrywide organization, Australia has several regional organizations run by and for women with disabilities, including Women With Disabilities Australian Capital Territory (WWDACT),[92] Women With Disabilities Victoria (WDV),[93] Women With Disabilities Western Australia Inc. (WWDWA INC),[94] and Women With Disabilities South Australia (WWDSA).[95] Australia has both a disability strategy[96] and a national human rights action plan that pays due attention to the specific inclusion of disability rights issues, but without discussion of disability rights issues in the context of conflict and post-conflict situations.[97]

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89. Department of Families, Housing, Community Services and Indigenous Affairs, *supra* note 49.

90. United Nations Treaty Collection, *supra* note 65.

91. *See* Women With Disabilities Australia, *Information About Women with Disabilities Australia (WWDA)*, *available at* http://www.wwda.org.au/about.htm (last visited Jan. 14, 2012).

92. *See* Women With Disabilities Australian Capital Territory, *About WWDACT*, *available at* http://wwdact09.blogspot.com (last visited Jan. 17, 2012).

93. *See* Women With Disabilities Victoria, *About Us*, *available at* http://www.wdv.org.au/about_us.htm (last visited Jan. 17, 2012).

94. *See* Women With Disabilities Western Australia Inc., *Women With Disabilities WA INC*, *available at* http://womenwithdisabilitieswainc.blogspot.com (last visited Jan. 17, 2012).

95. *See* Women With Disabilities Southern Australia, *Women With Disabilities South Australia*, *available at* http://www.facebook.com/pages/Women-With-Disabilities-South-Australia/190331824319014 (last visited Jan. 17, 2012).

96. Council of Australian Governments, *2010-2020 National Disability Strategy*, *available at* http://www.facs.gov.au/sa/disability/progserv/govtint/nds_2010_2020/Documents/National_Disability_Strategy_2010_2020.pdf (last visited Nov. 11, 2011).

97. Australian Attorney General's Department, *Australia's Human Rights Framework* 4, *available at* http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(689F2CCBD6DC263C912FB74B15BE8285)~HumanRightsFramework[1]PDF.pdf/$file/HumanRightsFramework[1]PDF.pdf (last visited Nov. 11, 2011).

The Australian draft UNSCR 1325 NAP sought civil society comments on the plan by October 18, 2011.[98] It is not clear as to what extent women's disability rights organizations participated in or were informed of this process. Among ten organizations that signed on to a response to the Consultation Draft, no women's disability rights organizations were included.[99] However, the strong community of women's disability rights organizations could contribute effectively to the development of the NAP. Hopefully, the omission of coverage of women with disabilities will be corrected when the government issues the final NAP, which may occur by mid-2012.[100]

V. BASIS FOR INCLUSION

Women and girls with disabilities are a part of all societies. They need to be an active part of the advancement of the human rights of all and shaping how societies affect their lives. The justifications for inclusion are numerous. Representation and fairness are the most obvious: women account for more than half of the population of the world. There are approximately one billion persons with disabilities in the world, which constitutes 15% of the global population.[101] This number is increasing due to many factors,[102] including war and conflict.[103] In June 2011, the World Health Organization (WHO) and the World Bank (WB) released a groundbreaking report, which notes a dramatic increase in estimates of the number of persons with disabilities worldwide. According to the report:

> About 15% of the world's population lives with some form of disability, of whom 2-4% experience significant difficulties in functioning. The global disability prevalence is higher than previous WHO estimates, which date from the 1970s and suggested a figure of around 10%. There are significant differences in the prevalence of disability (defined as "significant

98. Ministry of Gender, Labour, and Social Development, *Australian National Action Plan on Women, Peace and Security: Consultation Draft*, *available at* http://www.fahcsia.gov.au/sa/women/pubs/govtint/action_plan_women_peace/Pages/default.aspx (last visited Nov. 11, 2011).

99. *See* Letter from Julie McKay, Exec. Director, Australian National Committee for UN Women, to Kate Ellis, Member of Parliament (Oct. 18, 2011), *available at* http://awava.org.au/wp-content/uploads/2011/10/FINAL-1325-NAP-NGO-Submission.pdf (last visited May 21, 2012).

100. Women's International League for Peace and Freedom, 48 PEACE & FREEDOM 1, 4 (2011), *available at* http://www.wilpf.org.au/journal/PandF_2011_Dec.pdf (last visited May 21, 2012) ("[Office of Women] have indicated that they want the final document to be launched by mid-2012.").

101. WORLD HEALTH ORGANIZATION & WORLD BANK, *supra* note 23, at xi.

102. *Id*.

103. *Id*. at 34.

> difficulties in their everyday lives") between men and women in both developing and more developed countries: male disability prevalence rate is 12% and female disability prevalence rate is 19.2%.[104]

With such a dramatic increase in the number and percentage of persons with disabilities, the urgent need to include women and girls with disabilities is even more significant.

Traditionally excluded groups, such as women with disabilities, deserve special attention. It is important to bring their varied backgrounds, perspectives, and skills to the negotiating table and to ensure that they play an important role in formulating and implementing policies that will affect society as a whole after conflict. This approach also strengthens democracy and fosters inclusive political participation. Therefore, existing programs, institutions, and mechanisms at all levels (international, regional, national and local, non-governmental, academic, corporate, etc.) must strive to include the voices of women with disabilities as resolutions, recommendations, and guidelines are drafted, as programs are designed and implemented on the ground, as peace processes proceed, and as the UNSCR 1325 Indicators are utilized and UNSCR 1325 National Action Plans are drafted, implemented and monitored.[105]

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104. *Id*. at 261.

105. *See generally*, Stephanie Ortoleva, *Women with Disabilities: The Forgotten Peace Builders*, 33 LOY. L.A. INT'L & COMP. L. REV. 83 (2010) (finding that the United Nation's 'Women, Peace and Security' framework has not included women with disabilities and arguing that they must be included); Stephanie Ortoleva, *Right Now!—Women with Disabilities Build Peace Post-Conflict* (Barbara Faye Waxman Fiduccia Paper on Women and Girls with Disabilities, Center for Women Policy Studies) (April 2011), *available at* http://www.peacewomen.org/assets/file/Resources/NGO/bfwfp_rightnow_womenwithdisabilitiesbuildpeacepost-conflict_stephanieortoleva.pdf (last visited Jan. 19, 2012) (Providing a more detailed discussion of the history and urgency for including women and girls with disabilities in the United Nations' 'Women, Peace and Security' framework).

RESPONSIBILITY TO PROTECT (R2P) COMES OF AGE? A SCEPTIC'S VIEW

John F. Murphy[*]

I. INTRODUCTION AND BACKGROUND

As a young attorney in the Office of the Legal Adviser of the United States (U.S.) Department of State during the 1960s, I had the privilege and the pleasure of working with Don McHenry, then a young foreign service reserve officer and later U.S. Ambassador and Permanent Representative to the United Nations (U.N.). His work dealt with legal issues arising from the actions of a white minority government in Southern Rhodesia—about six percent of the population—that exhibited little willingness to share power with the black majority and that imposed a number of restraints on their economic, social, educational, and legal rights. In particular, on November 11, 1965, Southern Rhodesia issued a Unilateral Declaration of Independence (UDI) from the United Kingdom, which had residual administrative responsibility over Southern Rhodesia, which was classified under the U.N. Charter as a non-self-governing territory rather than a British colony.[1] The United Nations Security Council, after taking a variety of preliminary steps, ultimately determined that the situation in Southern Rhodesia had become a threat to the peace and authorized the United Kingdom to use force, if necessary, to prevent oil from reaching Rhodesia.[2] The Council next decided to adopt limited economic sanctions under

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1. For detailed discussion, *see* JOHN F. MURPHY, THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE 139–42 (1982).

2. S.C. Res. 217, ¶ 5, U.N. Doc. S/RES/217 (Nov. 20, 1965).

Article 41 of the U.N. Charter,[3] and then, in its Resolution 253 of May 29, 1968, the Council adopted more detailed and specific sanctions.[4]

Criticism of the Security Council's resolutions was intense. No less a personage than Dean Acheson, Secretary of State under President Harry Truman and head of a leading Washington, D.C. law firm, focused his primary attack on the Council's finding that the situation in Southern Rhodesia constituted a threat to international peace and security.[5] In his view, actions taken by the Southern Rhodesian regime entirely within its own territory could not constitute a threat to international peace and security. Rather, the threat to international peace and security, if any, came from black African states that threatened to intervene militarily. Hence, Acheson argued, if any sanctions were called for, they should be directed against these black African states and not against Southern Rhodesia. He also argued strenuously that the Security Council's action constituted a clear violation of Article 2(7) of the U.N. Charter, which prohibits the United Nations from intervening in "matters which are essentially within the domestic jurisdiction of any state. . . ."[6] In response, defenders of the Council's sanctions, including the U.S. Government, contended that, under Chapter VII of the U.N. Charter, a threat to the peace could consist of a situation, as well as "the threat or use of force against the territorial integrity or political independence of any state" prohibited by Article 2(4) of the U.N. Charter.[7] The situation in Southern Rhodesia, the argument continued, threatened the peace in two ways. First, the threat of internal violence in Southern Rhodesia was so great that any outbreak of violence

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3. U.N. Charter art. 41 provides that:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

4. S.C. Res. 253, ¶ 3, U.N. Doc. S/RES/253 (May 29, 1968).

5. Dean Acheson, *The Arrogance of International Lawyers*, 2 INT'L LAWYER 591, 591–99 (1968).

6. U.N. Charter art. 2, para. 7.provides:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.

7. *Id*. ¶ 4; Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, 1–19 (1968) (discussing this point and several other arguments in support of the sanctions).

was likely to be of such intensity and magnitude that it would spill over to the territory of adjoining states. Second, the "racist" actions of the white minority had so inflamed passions in neighboring black African states that indirect support of guerrillas and even direct military intervention was likely. It was also noted that the UDI represented an illegal rebellion against British authority and that nearly all member states of the United Nations regarded the regime as illegal and in flagrant violation of fundamental international human rights norms.[8] Finally, the defenders of the sanctions pointed out that Southern Rhodesia was not a state but a territory, and thus Article 2(7) was inapplicable by its terms.

It is worth noting that, in sharp contrast to the cases of Libya and the Ivory Coast, the use of armed force against Southern Rhodesia was never contemplated by the Security Council. It is also worth noting, however, that although the proposition is debatable, it appears that on the whole, economic sanctions had relatively little effect on Southern Rhodesia and that guerrilla activity played a much more substantial role in inducing the Southern Rhodesian regime to agree ultimately to a peaceful transition of power—despite the claim of Ian Smith, the leader of the Southern Rhodesian regime, that "not in a thousand years would blacks govern Rhodesia."[9]

Despicable as apartheid was, the Security Council, consistently with its actions regarding Southern Rhodesia, never seriously contemplated authorizing the use of armed force. Indeed, western powers, including the United States, resisted efforts in the Council to impose a Rhodesia-style embargo against South Africa, only agreeing in 1977 to the Council imposing a mandatory embargo on arm sales to South Africa.[10]

During the cold war years, there were a number of horrific human rights atrocities that exceeded in significant measure those committed under apartheid. But as noted by Gareth Evans, in his superb study, "[t]he dynamics of the cold war constituted a third factor [standing in the way of

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8. The United States Government especially emphasized Southern Rhodesia's illegal rebellion against British authority in order to distinguish the situation in Southern Rhodesia from that in South Africa, whose apartheid policy was an even more severe example of discrimination on the basis of race than were Southern Rhodesia's racially based policies. At the time of the UDI the United States Government was unwilling to apply mandatory economic sanctions under Chapter VII against South Africa.

9. *See* MURPHY, *supra* note 1, at 142 (stating that on February 27, 1980, an election supervised by the British government with observers from the Commonwealth countries was held and resulted in a landside victory for the party of Robert Mugabe, who along with Joshua Nkomo, had been the leader of the Patriotic Front, the guerrilla movement. Six months later, on August 25, Rhodesia, newly named Zimbabwe, became a member of the United Nations).

10. *See generally* S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

effective action to prevent or bring to an end such atrocities], dominating the U.N. system almost from the start and hamstringing the organization when it came to dealing with mass atrocities."[11] Both the United States and the Soviet Union focused their attention on ensuring that their respective alliance blocs were functioning and resisted placing any sanctions on misbehaving partners.[12] As a result, "although in the immediate aftermath of the Holocaust the world had started to institutionalize its collective conscience, during the cold war decades that followed cynicism trumped conscience every time the major powers faced a serious choice."[13]

The end of the cold war brought its own challenges. In particular, the military interventions in the 1990s in Somalia, Rwanda, Bosnia, and Kosovo posed major problems and together, as Evans suggested, threw "into stark relief every one of the conceptual, operational, and political will issues with which this book wrestles."[14]

For its part, Somalia broke out into clan based civil war when President Siad Barre was overthrown in January 1991 after losing, with the end of the cold war, the protection he had enjoyed first from the Soviet Union and then from the United States.[15] Initially, a small United Nations' peacekeeping force was dispatched to Somalia in April 1992 to support relief operations. But six months later, the U.N. Secretary-General was telling the Security Council that 1.5 million Somalis were immediately at risk of death and many more threatened by starvation and disease and that a fully empowered peace enforcement operation was required. The Council responded promptly and effectively to the Secretary-General's request, and

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11. GARETH EVANS, THE RESPONSIBILITY TO PROTECT 21 (2008).

12. *Id*. at 21–22 (noting in this connection the "he-may-be-a-son-of-a-bitch-but -he's-*our*-son-of-a-bitch" syndrome).

13. *Id*. at 22. Among the situations where cynicism trumped conscience were the following noted by Evans:

> [T]he Indonesian massacres of up to 500,000 or more Communist Party members, suspected sympathizers, and others caught up in the mayhem from 1965 to 1966; the hunting down and killing of more than 100,000 Hutu in Burundi between April and September 1972; tens of thousands of forced "disappearances" of political dissenters during the 'Dirty War' in Argentina of 1976-83 and Pinochet's Operation Candor during the mid-1970s; the massacre in Guatemala from 1981 to 1983 of some 150,000 Mayans and the destruction of over 400 villages in government counterinsurgency operations; the series of mass murders perpetrated in Zimbabwe's Matabeleland from 1982 from 1987 (sic), believed to have killed over 10,000 and as many as 30,000; and the poison gas attack by Saddam Hussein's Iraqi air force on the Kurdish town of Halabja in March 1988, in which some 5,000 perished.

14. *Id*. at 26.

15. *Id*. at 27 (giving a summary of the situation in Somalia).

"[b]y the end of the year, 28,000 U.S.-led troops were on the ground."[16] The Non-Aligned Movement fully supported the creation of this force and, surprisingly, even China cast its first affirmative vote for an enforcement resolution.[17] The mission was basically successful in that assistance in one form or another did reach the entire population of five million, and less than 100,000 of those threatened actually died. Tragically, however, this successful endeavor was completely undermined by subsequent events. As summarized by Evans, these included:

> [T]he misconceived attempt to wage war against militia leaders, followed by the "Black Hawk Down" debacle in Mogadishu in October 1993, in which 18 Americans died. Subsequently, U.S. troops were pulled out, and the U.N. mission was finally withdrawn in April 1995, with most of its objectives unachieved and a nasty taste in the mouths of a number of troop contributors about their humanitarian intervention experience.[18]

The so-called "Mogadishu effect" caused the major powers, including especially the United States, to be reluctant to respond effectively to events unfolding in Rwanda in 1994.[19]

Shortly after a plane carrying Rwandan president Juvenal Habyarimana was shot down on April 6, reports were received in United Nations' headquarters and in Washington, D.C. about massive ethnic-based violence in Rwanda and the desperate need to mount a fully employed military enforcement operation to stop it.[20] But no such enforcement operation was created. To the contrary, "Belgium withdrew its contingent entirely, and the Security Council actually drew down troops already on the ground."[21] As a result, "some 800,000 Tutsis and moderate Hutus were slaughtered in less than four months, an unequivocal case of genocide in

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16. EVANS, *supra* note 11, at 27.

17. *Id*.

18. *Id*.

19. *Id*. at 27–28 (giving a summary of the situation in Rwanda).

20. *Id*.

> Canadian general Romeo Dallaire, who commanded the light peacekeeping mission established a year earlier to monitor recently signed peace accords, made heroic efforts to save those he could and argued strenuously that just 5,000 well-armed and trained troops—together with measures such as the external jamming of hate-radio frequencies—could stop hundreds of thousands of murders. But he was ignored. . . .

21. EVANS, *supra* note 11, at 28.

any lawyer's language and by far the worst since the Holocaust."[22] President Bill Clinton later apologized for the United States' inaction.[23]

Difficulties associated with the dissolution of the former Yugoslavia in 1991 have posed challenges to the international community that continue to this day. As I have previously noted in a different forum:

> [. . .] In the wake of "the shock waves of a collapsed Soviet Union that reverberated throughout Central and Eastern Europe," on June 25, 1991, Slovenia and Croatia declared their independence. On June 27, armed forces controlled by Serbia attacked the provisional Slovenia militia, and by July had initiated hostilities in Croatia. The response of the Security Council, on September 25, was the unanimous adoption of a resolution that expressed support for the collective efforts of the European Community and the Conference on Security and Cooperation in Europe to resolve the conflict. By the same resolution, the Council decided under Chapter VII of the Charter to impose an embargo on all deliveries of weapons and military equipment. There was no suggestion in the resolution that an international act of aggression had taken place. By early 1992, however, most of the former Yugoslavian republics had attained international recognition, thus turning what had begun as an internal conflict into an international conflict.
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> In January 1992, special U.N. envoys had managed to secure a cease-fire in Croatia. The result, however, was to shift the locus of the fighting to the republic of Bosnia-Herzegovina, which contained a majority of Muslims in its population, but which also contained substantial Serbian and Croatian minorities. In 1992, those minorities were supplied with extensive military assistance for use against the Bosnian army. Serbia in particular was actively involved in providing the Bosnian Serbs with significant firepower. Perversely, the arms embargo imposed against the former Yugoslavia, as a whole, greatly undermined Bosnia's ability to obtain arms to defend itself. In April 1992, Serb forces launched an attack against Bosnia-Herzegovina from Serbia and commenced the "ethnic cleansing" and other atrocities that ultimately caused the Security Council to create the International Tribunal for the former Yugoslavia to prosecute the people responsible.

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22. *Id*.

23. Chido Nwangwu, *Rwanda's Anti-Genocide Activist Speaks in the U.S. This Week; Clinton Apologizes, Again*, USAFRICA ONLINE, (Nov. 1, 2009), *available at* http://www.usafricaonline.com/2009/11/01/rwandan-anti-genocide-activist-paul-speaks-in-us-nov4/#print (last visited Feb. 10, 2012).

In February 1992, the Security Council had authorized the creation of a U.N. Protection Force (UNPROFOR). Initially, it was envisioned that this force would be interposed, in classic peacekeeping fashion, between the Serbian and Croatian forces that had been fighting in Croatia, as one step to an overall settlement. UNPROFOR's mandate was later extended to Bosnia-Herzegovina. On December 11, 1992, the Security Council approved a deployment of 700 U.N. personnel to Macedonia, another former Yugoslavian republic—the first time U.N. peacekeepers had been deployed as an exercise of "preventive diplomacy."

In March 1993, the United States, in coordination with the United Nations, began supplying food and medicine by air to Muslim enclaves in Bosnia-Herzegovina that could not be reached by land. In April and May 1993, the Security Council established six of these enclaves as "safe areas" for Bosnian civilians. UNPROFOR was given a mandate to use force "to enable it to deter attacks against those areas, to occupy certain key points on the ground to this end, and to reply to bombardments against the safe areas." This mandate envisaged a use of force that went beyond that traditionally utilized by UN peacekeeping forces. To carry out this mandate, the Secretary-General estimated that UNPROFOR would need an additional 34,000 troops at a cost of $20 million for the first six months and $26 million per month thereafter. But no such additional troops were forthcoming. As a result, UNPROFOR was simply incapable of protecting the so-called safe areas in Bosnia. This was most tragically demonstrated on July 11, 1995, when Bosnian Serb forces overran the U.N.-designated safe area of Srebrenica, captured 430 Dutch members of UNPROFOR, and massacred Muslim civilians in such numbers that it was "said to be the worst atrocity in Europe since World War II."

It was only after the (NATO) finally decided to bomb heavily [. . .] Serb positions, coupled with the use of Croatian ground troops, that it became possible to enforce a peaceful settlement. The peacekeeping force was established to implement the peace agreement for Bosnia and Herzegovina, which was negotiated in Dayton, Ohio and signed on December 14, 1995 in Paris. The force operates under NATO auspices. By resolution, the Security Council authorized the NATO peacekeeping force to replace United Nations' peacekeepers in Bosnia and to take "such enforcement action . . . as may be necessary to ensure implementation" of the peace agreements. This new peacekeeping group, or Implementation Force IFOR, unlike the

> hapless UNPROFOR, had the wherewithal (in the form of, *e.g.*, 60,000 troops) to serve as an enforcement force.[24]

NATO soon was faced with another challenge in the former Yugoslavia. In 1998, Serbian president Slobodan Milosevic began a campaign using police units to crush ethnic Albanian separatist sentiment in the Serbian province of Kosovo once and for all.[25] There were many months of allegations and counter-allegations about Serb and Kosovo Liberation Army behavior, but Russia and China would not accept any Security Council resolution authorizing the use of force. After efforts to solve the problem through diplomatic means, the United States and its NATO allies decided to act on their own and commenced a campaign of air strikes against Serbia. As nicely noted by Evans, "[t]he seventy-eight days of destructive bombing produced a flood of refugees and internal displacements, and a surge of further killings—some thousands in all—by the Serbs, but a settlement was reached only when NATO finally threatened the insertion of ground troops."[26]

II. EMERGENCE OF THE RESPONSIBILITY TO PROTECT

"The debate over the legality and morality of U.S. and NATO actions with respect to Kosovo has been fierce. Moreover, the writings on this subject have been legion."[27] This is not the time nor the place to review these writings.[28] For present purposes, it suffices that one of the issues raised by NATO actions with respect to Kosovo, and indeed by developments with respect to Somalia, Rwanda, and Bosnia, is the validity, or lack thereof, of the doctrine of humanitarian intervention. As he so often does with various issues, Evans highlights this issue in sharp perspective:

> The 1990s was the decade in which every one of the central questions surrounding humanitarian intervention was, for the first time, exposed with real clarity. But it ended with absolutely no consensus on any of the answers. Every general discussion in the General Assembly and other international forums, and nearly every difficult individual case that arose, became a political

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24. JOHN F. MURPHY, THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY 124–26 (2010).

25. EVANS, *supra* note 11, at 29 (giving a summary of the situation in Kosovo).

26. *Id*.

27. *See* JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 154 (2004).

28. *See id*. at 154–61 (providing my own highly negative view on United States and NATO actions with respect to Kosovo).

> battlefield with two warring armies. On the one side were those, mostly from the global North, who, in situations of catastrophic human rights violations, could not see beyond humanitarian intervention, "the right to intervene" with military force. On the other side were those, mostly from the global South, who were often prepared to concede that grave human rights violations were occurring but were resolutely determined to maintain the continued resonance, and indeed primacy, of the traditional nonintervention concept of national sovereignty. Battle lines were drawn, trenches were dug, and verbal missiles flew. The debate was intense and very bitter, and the twentieth century ended with it utterly unresolved in the U.N. or anywhere else.[29]

By way to transition to the concept of the R2P, Evans quotes a statement by Kofi Annan, in his 2000 *Millennium Report of the Secretary-General of the United Nations*: "If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"[30] Annan's challenge stimulated the Canadian government to take action.[31] On the initiative of Foreign Minister Lloyd Axworthy, it appointed an international commission titled The International Commission on Intervention and State Sovereignty (ICISS), which began its work in September 2000 and published its report just over a year later, in December 2001.[32] The Commission was co-chaired by Evans and the Algerian diplomat Mohamed Sahnoun.[33]

It is important to note that the R2P, as developed in great detail in the ICISS report, is different from the doctrine of humanitarian intervention. As José Alvarez has explained:

> The Responsibility to protect concept was borne out of frustration with the international community's repeated failure to intervene in cases of on-going mass atrocity, in particular in Rwanda and Kosovo. The concept sought to deflect attention from the controverted "right" of some states to intervene, to the

29. *See* EVANS, *supra* note 11, at 30.

30. *Id*. at 31.

31. *Id*. at 38.

32. *See id*. *See generally* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) [hereinafter ICISS].

33. ICISS, *supra* note 32, at III.

> duties of all states to protect their own citizens from avoidable catastrophes and for third parties to come to the rescue.[34]

Recognizing the pivotal role of the ICISS report, Alvarez further explains:

> As that Commission conceived it, the virtue of R2P was that it would entice states to engage in humanitarian relief by shifting the emphasis from the politically unattractive right of state interveners to the less threatening idea of "responsibility." R2P put the focus on the peoples at grave risk of harm rather than on the rights of states. It also stressed that responsibility was shared—as between the primary duty of states to protect their own populations and the secondary duty of the wider community.[35]

According to the ICISS report, the R2P "embraces three specific responsibilities."[36] These include:

> A) *The responsibility to prevent*: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
> B) *The responsibility to react*: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
> C) *The responsibility to rebuild*: to provide, particularly after a military intervention, full assistance with recovery, reconstruction, and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.[37]

The ICISS report emphasizes that "[p]revention is the single most important dimension of the responsibility to protect . . . " and "[t]he exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied."[38] Evans gives examples of means

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34. *See* JOSÉ E. ALVAREZ, THE SCHIZOPHRENIAS OF R2P, HUMAN RIGHTS, INTERVENTION AND THE USE OF FORCE (Philip Alston & E. MacDonald eds., 2008).

35. *Id.*

36. ICISS, *supra* note 32, at XI.

37. *Id.*

38. *Id.*

to carry out the responsibility to prevent: "building state capacity, remedying grievances, and ensuring the rule of law."[39]

Most of the scholarly literature on R2P has focused on the dimension of responsibility to protect, which involves military intervention in order to stop the commission of atrocities. In contrast, there has been relatively little consideration in the academy of the responsibility to prevent element of the R2P.[40] At the same time, it is worth noting that there have been encouraging recent developments in sub-Saharan Africa that give hope in many African countries that violence and resulting atrocities will be less likely to break out. Such developments include, among others, positive economic growth rates—in per capita terms—since the late 1990s, a majority of African countries holding multi-party elections for the first time, an unprecedented improvement in the extent of civic and media freedom, and significant improvements in education.[41]

But the focus of the panel on "R2P Comes of Age?," at International Law Weekend on October 21, 2011, was not on the responsibility to prevent. Rather, the panel addressed the issue of whether R2P had come of age as result of the use of armed force authorized by the U.N. Security Council to bring to an end atrocities in Libya and in the Ivory Coast. My answer on the panel and in this essay was and is an emphatic "No!"

To begin a consideration of this issue, one should first take note of R2P as it was adopted by the U.N. General Assembly in its 2005 World Summit Outcome document.[42] R2P appears in paragraphs 138 and 139 of the Outcome document, two relatively short paragraphs set forth in full below. Heads of state and government attending the 60th session of the U.N. General Assembly14-6 September 2005 agreed as follows:

> Responsibility To Protect Populations From Genocide, War Crimes, Ethnic Cleansing, And Crimes Against Humanity
> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the

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39. *See* EVANS, *supra* note 11, at 43.

40. It should be noted that Kish Vinayagamoorthy, who is serving as a Visiting Assistant Professor at the Villanova University School of Law, is working on a paper that seeks to fill this gap, with particular emphasis on the situation in Asia.

41. *See* Edward Miguel, *Africa Unleashed*, FOREIGN AFFAIRS, (Nov./Dec. 2011), *available at* http://www.foreignaffairs.com/articles/136547/edward-miguel/africa-unleashed (last visited Feb. 17, 2012); *See also* Oliver August, *A Sub-Saharan Spring?*, ECONOMIST, Nov. 17, 2011, at 76.

42. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) [hereinafter G.A. Res. 60/1]; *See also* Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007).

> prevention of such crimes, including their incitement, through appropriate and necessary means. We accept the responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
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> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.[43]

The World Summit Outcome document was adopted unanimously by the U.N. General Assembly, but the strength of support for R2P was not as substantial as this vote would seem to indicate. Evans reports that "a fierce rearguard action was fought almost to the last by a small group of developing countries, joined by Russia, who basically refused to concede any kind of limitation on the full and untrammeled exercise of state sovereignty, however irresponsible that exercise might be."[44] Evans further suggests that U.S. and British support for R2P "was not particularly helpful in allaying the familiar sovereignty concerns of the South, against the background of the deeply unpopular coalition invasion of Iraq in 2003."[45]

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43. G.A. Res. 60/1, *supra* note 42, ¶¶ 138–39.

44. EVANS, *supra* note 11, at 49.

45. *Id*. at 50.

For his part, Alvarez refers to the "strange bedfellows," namely, the controversial John Bolton, the U.S. Permanent Representative to the United Nations and the Non-Aligned Movement that endorsed the idea of R2P.[46] He also suggests that:

> [T]here must be something wrong as well as right with an idea that can be endorsed by such strange bedfellows, and there is. R2P's normative "legs" result from its not always consistent, various iterations[47] as well as from the lack of clarity as to whether it is a legal or merely political concept. It means too many things to too many people.[48]

Perhaps the most significant issue arising from the various iterations of R2P is whether, in the absence of Security Council authorization, individual states may invoke the doctrine of humanitarian intervention to protect populations in other states from the enumerated crimes. The report of the High-level Panel on Threats, Challenges and Change appears, although it is not absolutely clear, to require Security Council authorization for the use of armed force to protect persons from the enumerated crimes.[49] There is little doubt that the International Commission on Intervention and State

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46. ALVAREZ, *supra* note 34, at 49.

47. U.N. Secretary-General, *Report of the High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, ¶¶ 201–03, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *Report of the High-Level Panel*] (referring to an "emerging norm of collective responsibility to protect"); U.N. Secretary-General, *In Larger Freedom, Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005).

48. ALVAREZ, *supra* note 34, at 49; *See also* Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469 (2010) for an excellent and extensive Student Note that concludes that the responsibility to protect is not a legal concept but rather a political concept that nonetheless may have a significant impact on international legal processes. In the conclusion to his Note Payandeh states:

> From a legal perspective, the normative content of the responsibility is . . . evolutionary rather than revolutionary. The responsibility to protect is construed primarily as a nonlegal concept. It is an attempt to establish a more concrete set of criteria and procedures to determine when the responsibility of the international community to intervene is triggered. Responsibility in this sense cannot be equated with a legal obligation or duty, but has to be understood as a political or moral responsibility. This assessment is not meant to diminish the significance of the concept. Political and moral implications may have a much greater impact on the conduct of international actors than legal norms. The responsibility to protect may encourage governments to act in the face of blatant violations of human rights.

Id. at 515.

49. *See Report of the High-Level Panel*, *supra* note 47; *See also* Stahn, *supra* note 42.

Sovereignty viewed the Security Council "as the only legal source of authority (self-defense aside) for the use of force. . . ."[50]

It is unclear, however, whether the World Summit Outcome document requires Security Council authorization for the use of armed force under R2P. Paragraph 79 of the Outcome document states "that the relevant provisions of the [U.N.] Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security."[51] Interpreting this language, Frederic L. Kirgis has suggested that the:

> [L]eaders appear to be saying that no Charter amendments are needed in order to enable the U.N. to deal with threats to the peace . . . that were not contemplated when the Charter was drawn up. Possibly, but not clearly, they were also saying that apart from uses of armed force expressly recognized in the Charter (Security Council authorization under Chapter VII or self-defense in case of an armed attack), coercive action to deal with a threat to the peace could not be justified under the Charter.[52]

Similarly, elsewhere in his American Society of International Law (ASIL) Insight, Kirgis quotes paragraph 139 of the Outcome document, where the world leaders stated that they:

> [A]re prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the U.N. Charter, including Chapter VII, on case by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law.[53]

He then notes that "[t]he legitimacy of humanitarian intervention without Security Council approval is controversial. Whether the world

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50. EVANS, *supra* note 11, at 64.

51. G.A. Res. 60/1, *supra* note 42, ¶¶ 138–39.

52. Frederic L. Kirgis, *International Law Aspects of the 2005 World Summit Outcome Document*, AM. SOC'Y OF INT'L LAW, (Oct. 4, 2005), *available at* http://www.asil.org/insights051004.cfm (last visited Feb. 17, 2012).

53. G.A. Res. 60/1, *supra* note 42, ¶¶ 138–39.

leaders intended to address it in Paragraph 139 (or in Paragraph 79, discussed above) is unclear."[54]

At the time of this writing, the issue addressed by Kirgis has not come up in practice, although the deteriorating situation in Syria may bring it to the fore.[55] As we shall see below, in the cases of both Libya and the Ivory Coast, the Security Council authorized the use of force, although the extent of this authorization, especially in the case of Libya, was an issue.

A. R2P, Libya, and the Ivory Coast

Although it is by no means the first example of a revolution sparked by such social media as Facebook and texting by cell phones,[56] the eruption of demonstrations and revolutionary fervor in early 2011 in the Middle East set off by a street vendor in Tunisia setting himself on fire in protest of harassment by Tunisian police is surely the most spectacular.[57] In this so-called Arab Spring, text messages about and pictures of the street vendor's self-immolation spread rapidly throughout the Middle East and were part of several developments that led to the early removal of the leaders of Egypt and Tunisia, the outbreak of armed conflict in Libya, Yemen, and Syria, and demonstrations in Bahrain, Jordan, and elsewhere.[58] They also led to the Security Council taking action with respect to Libya and the Ivory Coast

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54. Kirgis, *supra* note 52, at 4.

55. *See*, *e.g.*, Nada Bakri, *Arab League Warns Syria to Admit Foreign Monitors or Risk Sanctions*, N.Y. TIMES, Nov. 25, 2011, at A10. In this article, the N.Y. Times reports that the Arab League called on Syria to agree by November 25, 2011 to admit a mission of 500 civilian and military observers to monitor the human rights situation and oversee efforts to carry out a peace plan that Syria agreed to on November 2 or face economic sanctions. Syrian state television reportedly stated that the government would reject the demands as an infringement on its sovereignty. In contrast to their stance on Libya, the Arab League has so far opposed any military intervention in Syria.

56. Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, FOREIGN AFFAIRS, (Jan./Feb. 2011), *available at* http://www.gpia.info/files/u1392/Shirky_Political_Poewr_of_Social_Media.pdf (last visited Feb. 17, 2012). According to Clay Shirky, the first time that social media had helped to force out a national leader was when Philippine President Joseph Estrada was removed from office in 2001. In response to a vote by the Philippine Congress during the impeachment trial of Estrada to set aside evidence against him, within two hours after the vote, thousands of Filipinos took to the streets in protest. Encouraged in part by close to seven million text messages during the week, the crowd grew in several days to over a million people, choking traffic in downtown Manila. The Philippine Congress reversed its vote and Estrada was gone.

57. *See generally* Rania Abouzied, *Bouazizi: The Man Who Set Himself and Tunisia on Fire*, TIME, (Jan. 21, 2011), *available at* http://www.time.com/time/magazine/article/0,9171,2044723,00.html (last visited Feb. 17, 2012).

58. *See* Shirky, *supra* note 56.

that constituted the first exercises of the R2P that involved the use of armed force.[59]

B. Libya and R2P

Reacting quickly to the outbreak of armed conflict in Libya and reports of the use of force by the Libyan government against civilians, on February 26, 2011, the Security Council unanimously adopted Resolution 1970.[60] In its preamble, Resolution 1970 expressed grave concern at the situation in Libya, condemned the violence and use of force against civilians, considered that these attacks might amount to crimes against humanity, and recalled the Libyan authorities' responsibility to protect their population.[61] Then, acting under Chapter VII of the U.N. Charter, and taking measures under Article 41 of the Charter,[62] the Council, among other things, expressed the hope that those responsible for these crimes would be brought before the International Criminal Court (ICC) and referred to the ICC's Prosecutor.[63] It imposed sanctions against Colonel Al Gaddafi, members of his family and his accomplices.[64] Lastly, it imposed an embargo on arms destined for Libya.[65]

It is perhaps surprising that the Security Council unanimously decided to refer the situation in Libya to the Prosecutor of the International Criminal Court, in light of the brouhaha that broke out in reaction to the Court's issuance of arrest warrants against Omar Hassan Al-Bashir, the president of the Sudan.[66] Indeed, Resolution 1970 is a bit schizophrenic on the referral because in its preamble the resolution recalls, "article 16 of the Rome Statute [the charter of the ICC] under which no investigation or prosecution

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59. *See generally* S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011) [hereinafter S.C. Res. 1970].

60. *Id*.

61. *Id*.

62. U.N. Charter art. 41 provides:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

63. S.C. Res. 1970, *supra* note 59.

64. *Id*.

65. *Id*.

66. *See* John F. Murphy, *Gulliver No Longer Quivers: U.S. Views on and the Future of the International Criminal Court*, 44 INT'L L. 1123, 1136–37 (2010).

may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect."[67] There was an effort after the ICC issued its arrest warrants against Al-Bashir to get the Security Council to take action under Article 16 of the Rome Statute, but the threat of a U.S. and British veto blocked the adoption of any such action.[68] Despite the ICC's difficulties with respect to the arrest warrants it issued against Al-Bashir, on June 27, 2011, the ICC's Pre-Trial Chamber I issued three arrest warrants for crimes against humanity—murder and persecution—allegedly committed in Libya, from February 15, 2011 until at least February 28, 2011, against Muammar Gaddafi, Seif al-Slam Gaddafi, his son, and Abdullah Senussi, the chief of military intelligence and Muammar Gaddafi's brother-in-law.[69]

The sanctions against the Libyan government and the threat of prosecution by the ICC failed to halt its attacks on its population and led the Security Council to adopt, on March 17, 2011, Resolution 1973.[70] In that resolution, the Council authorized the use of armed force against the Libyan government and thereby raised an issue regarding the operational viability of the responsibility to protect.[71]

Before considering Resolution 1973 in more detail, it is important to note that prior to consideration of the resolution in draft form, the League of Arab States called on the Security Council in a resolution of its own on March 12, 2011 to establish a no-fly zone.[72] It is also important to note that despite this unanimous request by the League of Arab States, Resolution 1973 was adopted by the narrowest of margins, with five members of the Council—Brazil, China, India, and the Russian Federation—abstaining in

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67. S.C. Res. 1970, *supra* note 59.

68. Murphy, *supra* note 66, at 1137.

69. *See* Brue Zagaris, *ICC Issues Three Arrest Warrants for Gaddafi and Two Others*, 27 INT'L ENFORCEMENT L. REP. 888 (Sept. 2011).

70. *See generally* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) [hereinafter S.C. Res. 1973].

71. *Id.* ¶ 4.

72. As noted by Alain Juppe', the Foreign Minister of France, in a statement to the Security Council before the vote on Resolution 1973 *See* U.N. SCOR, 66th Sess., 6498th mtg. at 2, U.N. Doc. S/PV.6498 (Mar. 17, 2011) [hereinafter U.N. Doc. S/PV.6498]. Also, in its preamble, Resolution 1973 takes note of

> [T]he decision of the Council of the League of Arab States of 12 March 2011 to call for the imposition of a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in the Libyan Arab Jamahiriya.

the vote.[73] In his statement before the vote, Alain Juppé, the French Minister of Foreign Affairs, highlighted the most important provisions of the then draft resolution:

> The draft resolution provides the Council with the means to protect the civilian populations in Libya, first by establishing a no-fly zone and by authorizing the members of the Arab League and those Member States [of the United Nations] that so wish to take the measures necessary to implement its provisions. Furthermore, it authorized these same States to take all measures necessary, over and above the no-fly zone, to protect civilians and territories, including Benghazi, which are under the threat of attack by Colonel Al-Qadhafi's forces. Lastly, it strengthens the sanctions that have been adopted against the regime, including implementing the arms embargo, freezing the assets of authorities in Tripoli and prohibiting flights by Libyan airlines.[74]

All five of the member states of the Security Council who abstained in the vote on Resolution 1973 made statements in explanation of their abstentions.[75] All of their statements indicated that the abstainers had problems with Resolution 1973's authorization of the use of armed force to implement the no-fly zone and especially, perhaps, with the resolution's authorization of "all measures necessary, over and above the no-fly zone, to protect civilians. . . ."[76]

The representative of the Russian Federation made an especially strong statement against the use of force. Favoring a peaceful settlement of the situation in Libya, the Russian representative noted that "the passion of some Council members for methods involving force prevailed. This is most unfortunate and regrettable. Responsibility for the inevitable humanitarian consequences of the excessive use of outside force in Libya will fall fair and square on the shoulders of those who might undertake such action."[77]

There was no peaceful settlement of the situation in Libya. On the contrary, it was a fight to the death, and with the death of Colonel Gaddafi

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73. *See id*. at 3. The ten votes in favor of the resolution were one more than the nine votes, including the concurring votes of all the permanent members, required by Article 27 (3) of the U.N. Charter. Member states voting in favor were Bosnia and Herzegovina, Colombia, France, Gabon, Lebanon, Nigeria, Portugal, South Africa, United Kingdom, and the United States.

74. *See id*. at 3 (Statement of Alain Juppé).

75. *See id*. at 4–10.

76. *See id*.

77. U.N. Doc. S/PV.6498, *supra* note 72, at 8.

on October 20, 2011, the fighting finally came to an end.[78] The reports of how he was killed, however, indicate that he was beaten, tortured and then shot in the head and in both legs, after he was found hiding in a drain outside the Libyan city of Sirte, his home town, where he and others had taken shelter after their convoy was hit by a NATO airstrike as it attempted to escape.[79] Gaddafi had the status of a prisoner of war when he was captured. His murder therefore constituted a war crime, but there is no evidence that those who committed this crime will ever be brought to justice. Moreover, the circumstances of Gaddafi's death illustrate "the challenges that lie ahead: the balancing of vengeance against justice, impatience for jobs against the slow pace of economic recovery, fidelity to Islam against tolerance for minorities, and the need for stability against the drive to tear down of (sic) the pillars of old governments."[80]

It is impossible to predict at this point future developments in Libya, much less the fate of the so-called "Arab Spring," but it is worthwhile to ponder how well or poorly the international community's actions with respect to Libya have fared as an exercise of the responsibility to protect. In my view, not well. First, it is debatable whether the primary motivation behind the Security Council's adoption of Resolution 1973 was to protect the citizens of Libya. As noted above, the five states who abstained on the resolution, especially China and the Russian Federation, both permanent members of the Security Council, were extremely uncomfortable with Resolution 1973's authorization of a no-fly zone and of measures going beyond a no-fly zone if they were necessary to protect civilians and civilian-populated areas under threat of attack. It seems highly likely that China and the Russian Federation refrained from blocking the resolution only because the Arab League had unanimously called for a no-fly zone and neither state wished to offend the Arab states because of various important interests they have in the Middle East. At the same time, it should be noted that Resolution 1973 explicitly excludes "a foreign occupation force of any form on any part of Libyan territory,"[81] and all agreed that no foreign ground troops would be put into Libya.[82] The result was that NATO

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78. Adam Gabbatt, *Gaddafi Killed as Sirte Falls*, GUARDIAN MIDDLEEASTLIVE BLOG, (Oct. 20, 2011, 5:13 PM), http://www.guardian.co.uk/world/middle-east-live/2011/oct/20/gaddafi-killed-sirte-falls-live (last visited Feb. 28, 2012).

79. *Id*.

80. David Kirkpatrick, *Fate of Dictator Places Focus on Arab Springs "Hard Road,"* N.Y. TIMES, Oct. 21, 2011, at A1.

81. S.C. Res. 1973, *supra* note 70, ¶ 4.

82. President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011).

engaged in seven months of bombing in heavily urban areas,[83] and one may doubt that the effort to protect the civilians of Libya from attacks by Gaddafi's forces was successful. Indeed, there were numerous reports that NATO bombing itself resulted in excessive civilian casualties, and since NATO did not have any troops on the ground in Libya, there was no reliable method to verify the civilian casualty allegations.[84] Noteworthy also is that nothing was done to protect civilians from rebel attacks, and there were reports of rebel forces committing numerous atrocities against civilians in areas they had taken that were previously under the control of Gaddafi forces.[85]

Developments after the Security Council's action with respect to Libya regarding the situation in Syria may also cause one to question whether R2P has "come of age." There, in March 2011, an uprising in Syria against the government of President Bashar al-Assad began and resulted in more than 2700 people, as of early October, being killed by Assad's armed forces. In response, France, Germany, Portugal, and the United Kingdom introduced a draft resolution,[86] which would have condemned Syria's crackdown of the uprising. The draft resolution received nine votes in favor, two votes against—China and the Russian Federation—and four abstentions—Brazil, India, Lebanon, and South Africa.[87] The resolution therefore failed to be adopted because of the double veto by China and the Russian Federation.[88] The double veto took place even though the resolution had been modified to eliminate "all but the most vague reference to sanctions as a future possibility."[89]

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83. *See* Jonathan Beale, *Counting the Cost of NATO's Mission in Libya*, BBC NEWS, (Oct. 31, 2011), *available at* http://www.bbc.co.uk/news/world-africa-15528984 (last visited Feb. 28, 2012).

84. *See* John Glaser, *NATO Refuses to Investigate Libyan Civilian Deaths*, ANTIWAR.COM, (Oct. 4, 2011), http://news.antiwar.com/2011/10/04/nato-refuses-to-investigate-libyan-civilian-deaths/ (last visited Feb. 28, 2012).

85. Human Rights Watch reportedly claimed that rebels in the mountains in Libya's west looted and damaged four towns seized from the forces of Colonel Gaddafi, as part of a series of abuses and apparent reprisals against suspected loyalists that chased residents of these towns away. *See* C.J. Shivers, *Libyan Rebels Accused of Pillage and Beatings*, N.Y. TIMES, (July 12, 2011), *available at* http://www.nytimes.com/2011/07/13/world/africa/13Libya.html?ref=libya (last visited Feb. 28, 2012).

86. *See* S.C. Res. Draft, U.N. Doc. S/2011/612 (Oct. 4, 2011).

87. *See* U.N. SCOR, 66th Sess., 6627th mtg. at 2, U.N. Doc. S/PV.6627 (Oct. 4, 2011) [hereinafter U.N. Doc. S/PV.6627].

88. *Id*. at 2. The states voting in favor were Bosnia and Herzegovina, Colombia, France, Gabon, Germany, Nigeria, Portugal, United Kingdom, and the United States.

89. *See* Neil MacFarquhar, *With Rare Double U.N. Veto on Syria, Russia and China Try to Shield Friend Syria*, N.Y. TIMES, Oct. 6, 2011, at A6.

In her statement following the vote, Susan Rice, the U.S. Permanent Representative to the United Nations, stated that the United States "is outraged that this Council has utterly failed to address an urgent moral challenge and a growing threat to regional peace and security. . . . Today two members have vetoed a vastly watered-down text that does not even mention sanctions."[90] For his part the representative of the Russian Federation was equally emphatic in his statement:

> Of vital importance is the fact that at the heart of the Russian and Chinese draft was the logic of respect for the national sovereignty and territorial integrity of Syria as well as the principle of non-intervention, including military, in its affairs; the principle of the unity of the Syrian people; refraining from confrontation; and inviting all to an even-handed and comprehensive dialogue aimed at achieving civil peace and national agreement by reforming the socio-economic and political life of the country.
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> Today's draft was based on a very different philosophy– the philosophy of confrontation. . . . Our proposals for wording on the non-acceptability of foreign military intervention were not taken into account, and based on the well known events in North Africa, that can only put us on our guard. Equally alarming is the weak wording in connection with the opposition and the lack of an appeal to them to distance themselves from extremists. . . . The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect. . . . The demand for a quick ceasefire [in Libya] turned into a full-fledged civil war, the humanitarian, social, economic and military consequences of which transcend Libyan borders. The situation in connection with the no-fly zone has morphed into the bombing of oil refineries, television stations and other civilian sites. The arms embargo has morphed into a naval blockade in western Libya, including a blockade of humanitarian goods. Today the tragedy of Benghazi has spread to other western Libyan towns—Sirte and Bani Walid. These types of models should be excluded from global practices once and for all.[91]

The representative from China urged "respect for the sovereignty of Syria and resolving the crisis there through political dialogue" and stated

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90. *See* U.N. Doc. S/PV.6627, *supra* note 87, at 8.

91. *Id*. at 3–4.

China's belief that "under the current circumstances, sanctions or the threat thereof does not help to resolve the question of Syria. . . ."[92] Equally significant were the statements by the representatives of the states that abstained on the resolution—Brazil, India, Lebanon, and South Africa.[93] The representative of India, for example, stated that the opposition forces in Syria should:

> [G]ive up the path of armed insurrection and engage constructively with the authorities. We firmly believe that the actions of the international community should facilitate engagement of the Syrian Government and the opposition in a Syrian-led inclusive political process, and not complicate the situation by threats of sanctions, regime change, et cetera.[94]

Similar sentiments were expressed by the representatives of Lebanon,[95] South Africa,[96] and Brazil.[97]

In short, with respect to the situation in Syria, not only China and Russia, but also the emerging powers of Brazil, India, and South Africa do not support the Security Council's action against Libya as a precedent to be followed in future crises. Lebanon, to be sure, is a special case because of the heavy influence Syria has on its domestic and international policies.

The situation in the Ivory Coast was, of course, not part of the Arab Spring. It is, however, arguably the only other situation in which the Security Council took action as an exercise of the R2P.

C. The Ivory Coast and R2P

The background to the situation in the Ivory Coast is complex and multifaceted and has been set forth elsewhere.[98] For present purposes, it suffices to highlight a few key developments. In particular, it should be noted that in an effort to end internal armed conflict, Ivorian political forces signed an agreement to that end on January 24, 2003. For its part, the Security Council created an international peacekeeping force to oversee the implementation of the agreement, the United Nations Operation in Cote

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92. *Id*. at 5.

93. *See generally* U.N. Doc. S/PV.6627, *supra* note 87.

94. *Id*. at 6.

95. *Id*. at 9.

96. *Id*. at 10.

97. *Id*. at 11.

98. *See* Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Cote d'Iviore, Libya and the Responsibility to Protect*, 87.4 INT'L AFF. 825 (2011).

d'Ivoire (UNOCI).[99] The mandate of UNOCI included the protection of "civilians under imminent threat of physical violence," [100] and it was authorized to use "all necessary means to carry out its mandate, within its capabilities and its areas of deployment."[101] Unfortunately, "UNOCI proved to have insufficient capabilities to protect civilians, even though it was supported by several thousand French soldiers stationed in the Ivory Coast prior to the outbreak of armed conflict."[102] The crucial phase of the conflict, however, arose after the principal parties disputed the results of the long-postponed presidential election of November 28, 2010.[103] This resulted in renewed armed conflict between the supporters of the incumbent President Laurent Gbagbo and his challenger Alassane Ouattara. When "early election returns suggest[ed] [an] Ouattara victory, Gbagbo's representatives prevented dissemination of the result. In the meantime, the Constitutional Council of the Ivory Coast declared that there had been massive vote-rigging in the north and cancelled 660,000 votes for Ouattara, thereby handing the election to Gbagbo."[104] Based on a briefing from the Secretary-General's Special Representative on the Ivory Coast, however, who insisted that Ouattara had won, the Security Council adopted a resolution formally supporting this view and urging the parties to accept this result.[105]

The parties did not accept this result, however, and the situation deteriorated further with an increase in violence. In response, on March 30, 2011, the Security Council unanimously adopted Resolution 1975.[106] The resolution recognized Ouattara as president, condemned Gbagbo's refusal to negotiate a settlement, and authorized UNOCI to "use all necessary means" to protect civilians, in**c**luding by "prevent[ing] the use of heavy weapons against the civilian population."[107]

Although Resolution 1975 was adopted unanimously, in statements following the voting, Council members presented sharply different interpretations of the text.[108] For example, the representative of the United

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99. S.C. Res. 1528, ¶ 1, U.N. Doc. S/RES/1528 (Feb. 27, 2004).

100. *Id*. ¶ 6.

101. *Id*. ¶ 8.

102. *See* Bellamy & Williams, *supra* note 98, at 829.

103. *Id*.

104. *Id*. at 832.

105. S.C. Res. 1962, ¶ 1, U.N. Doc. S/RES/1962 (Dec. 20, 2010).

106. S.C. Res. 1975, ¶ 1, U.N. Doc. S/RES/1975 (Mar. 30, 2011).

107. *See id*. ¶ 6.

108. *See generally* U.N. SCOR, 66th Sess., 6508th mtg., U.N. Doc. S/PV.6508 (Mar. 30, 2011).

Kingdom noted that the resolution reaffirmed the "robust mandate" of UNOCI to use "all necessary means" to protect civilians and recognized the need to prevent "the use of heavy weapons against civilians."[109] By contrast, the representative of China stated that:

> China always believes that United Nations peacekeeping operations should strictly abide by the principle of neutrality. We hope that the United Nations Operation in Cote d'Ivoire will fulfill its mandate in a strict and comprehensive manner, help to peacefully settle the crisis in Cote d'Ivoire and avoid becoming a party to the conflict.[110]

India, for its part, contended that United Nations peacekeepers "cannot be made instruments of regime change."[111]

Despite these interpretations of Resolution 1975 by the Chinese and Indian representatives, UNOCI, aided by French forces, used military force to engage in regime change. In April 2011, the Gbagbo forces were defeated, and he was arrested by U.N. peacekeepers, no French forces having participated in the arrest.[112]

As noted by Bellamy and Williams:

> [The] use of force by U.N. peacekeepers and French troops blurred the lines between human protection and regime change and raised questions about the role of the U.N. in overriding Cote d'Ivoire's Constitutional Council, about the proper interpretation of Resolution 1975, and about the place of neutrality and impartiality in U.N. peacekeeping.[113]

The UNOCI and French operations were sharply criticized by Thabo Mbeki, the former president of South Africa, and by the Russian Federation.[114]

There have been some interesting developments since the arrest of Gbagbo. In particular, on November 30, 2011, Gbagbo was unexpectedly handed over to international custody and flown overnight to The Hague,

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109. *See id*. at 6.

110. *Id*. at 7.

111. *Id*. at 3.

112. *See* Steven Erlanger, *French Colonial Past Cast Long Shadow Over Policy in Africa*, N.Y. TIMES, Apr. 18, 2011, at A10.

113. *See* Bellamy & Williams, *supra* note 98, at 835.

114. *Id*.

where the prosecutor of the ICC accused him of crimes against humanity.[115] Gbagbo was served with an arrest warrant from the court in the small northern town of Korogho, where he had been under house arrest for seven months.[116] Additional arrest warrants are expected in connection with post-election violence in the Ivory Coast. The prosecutor of the ICC has opened investigations into the actions of other members of the Gbagbo government, as well as figures from Mr. Ouattara's government.[117] Forces supporting Mr. Ouattara also committed atrocities, according to prosecution evidence and reports from human rights groups.[118]

By contrast, the National Transitional Council (NTC), which is currently ruling Libya, is reportedly resisting efforts by the prosecutor of the ICC to have Saif al-Islam Gaddafi, one of Colonel Gaddafi's sons, and Abdullan Senussi, the intelligence chief for Colonel Gaddafi, handed over for trial before the ICC.[119] Gaddafi and Senussi are both charged with crimes against humanity, and the NTC had promised to hand them over to the ICC to face trial in The Hague.[120] The NTC now reportedly wants to try the two men in Libyan courts.[121] A major stumbling block to such a trial is that the NTC wishes to preserve the death penalty for the trial, which is not available in a trial before the ICC and which is strongly opposed by many members of the international community.[122] Another major problem is that Libya does not currently have the legal infrastructure and knowledge necessary to conduct a fair trial.[123]

III. A FEW CONCLUDING OBSERVATIONS

As suggested earlier in this essay, much more attention needs to be addressed to fulfillment of the responsibility to prevent, which both ICISS and Evans have emphasized as the most important component of the R2P. For its part, the World Summit Outcome document shifts the focus from the prosecution of genocide, war crimes, ethnic cleansing, and crimes against

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115. *See* Marlise Simons, *Ex-President Of Ivory Coast to Face Court in the Hague*, N.Y. TIMES, Nov. 30, 2011, at A12.

116. *Id*.

117. *Id*.

118. *Id*.

119. *See* Andrew Baskin & Bruce Zagaris, *Libyan Government, ICC, Discuss Gaddafi Trial*, 28 INT'L ENFORCEMENT L. REP. 24 (Jan. 2012).

120. *Id*.

121. *Id*.

122. *Id*.

123. *Id*.

humanity to their prevention.[124] Sadly, however, most interventions come too late to prevent these crimes and end up being a reaction to an outbreak of violence.[125] What is needed are more effective efforts to build state capacity, remedy grievances, and ensure the rule of law, especially efforts to build a rule of law perspective into local cultures.

Notably, the World Summit Outcome document contains no reference to the responsibility to rebuild. But this is the responsibility facing the international community in both Libya and the Ivory Coast. As Evans has cautioned, however, this is a difficult responsibility to fulfill.[126]

As noted previously, one may be skeptical, especially with respect to Libya, but perhaps with respect to the Ivory Coast as well, about how successful the international community was in protecting civilians in these conflicts. At this juncture, prospects with respect to protection of civilians in Syria seem especially grim. One hopes that the situation in Syria can be resolved short of the bloody civil war that took place in Libya, but it is difficult to be optimistic.

The R2P, as developed by the ICISS and Evans in his treatise, has much to commend it. Sadly, however, when I think of the R2P, I am reminded of Mahatma Gandhi, who, when asked what he thought of western civilization, reportedly replied, "I think it would be a good idea."[127]

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124. *See* William W. Burke-White, *Adoption of the Responsibility to Protect* (on file with the Univ. of Penn. Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 11-40, 2011). The paper will be a chapter in the forthcoming book, THE RESPONSIBILITY TO PROTECT (Jared Genser & Irwin Cotler eds., Oxford University Press).

125. See Mark L. Schneider, Senior Vice President, Int'l Crisis Grp., Address to the World Affairs Council of Oregon at Portland State University (Mar. 5, 2010) (stating that after the December 2007 elections in Kenya, violence broke out across the country. The violence resulted in the estimated death of 1300 individuals and the displacement of another 350–600,000 persons. The international community, including the African Union, the United Nations, the European Union, and supporting nations, including the United States, reacted effectively to mediate the crisis and prevent escalation of the violence into a mass atrocity. It failed, however, to prevent the death of 1300 persons and the displacement of thousands more). I am grateful to Kish Vinayagamoorthy for bringing this incident to my attention.

126. *See* EVANS, *supra* note 11, at 148–74.

127. Mahatma Gandhi, Indian political and spiritual leader, when asked what he thought of Western civilization.

MR. BAN—TEAR DOWN THE U.N.'S WALL OF IMMUNITY/IMPUNITY (BEFORE A NATIONAL COURT DOES)!!

Greta L. Ríos[*] *and Edward P. Flaherty*[**]

I. BACKGROUND

Immunity has been proven to be not only a living anachronism, but one which often leads to impunity for the worst kinds of rights violations. It was precisely real and feared impunity that led to changes in the way in which state immunity was understood and applied, therefore, creating the very welcomed distinction between the different qualities under which the acts of a state could be catalogued.[1] Although it is not the purpose of this article to revise the history and development of the several theories regarding immunity, the authors believe it necessary to start by briefly recalling from where immunities come—a sovereign act of comity—to where they should be redirected to—that is, a world in which international actors are accountable for their acts.

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1. Acts *de jure imperii*—where the State is acting on its sovereign capacity—and acts *de jure gestionis*—where the State engages in administrative affairs, such as commercial contracts.

In other words, immunity should promote the existence of a legal framework where every actor can be held responsible for their actions, whether they are acting on their own, on instructions from a third party, as part of an international operation, on behalf of someone else, or under any other circumstances. Ideal as this may sound, this is actually what marks the difference between the rule of law and the rule of man and the very thing which lies precisely at the base of every legal system, thus providing its subjects with a system that grants them judicial protection as well as resources for claiming their rights.[2]

Let us keep in mind that the regime under which absolute immunity of states prevailed was one that existed several decades ago, i.e., before World

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2. This includes the access that every person must be granted to effective remedies against violations to their rights. As such, this principle has been codified in several core Human Rights instruments. For instance, Article 2.3 of the International Covenant on Civil and Political Rights reads:

> Each State Party to the present Covenant undertakes:
>
> a) To 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;
>
> b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> c) To ensure that the competent authorities shall enforce such remedies when granted.

International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171. ¶ 3.

Another instrument codifying this principle is Article 8 of the Universal Declaration of Human Rights, which states that "(e)veryone 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." Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, at 71, art. 12 (1948). Perhaps the clearest example lies within the Interamerican Convention on Human Rights, which actually calls it "the Right to Judicial Protection" and codifies it in its Article 25, as follows:

> Article 25. Right to Judicial Protection
>
> 1) 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 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.
>
> 2) The States Parties undertake:
>
> a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
>
> b) to develop the possibilities of judicial remedy; and
>
> c) to ensure that the competent authorities shall enforce such remedies when granted.

Organization of American States, American Convention on Human Rights art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

War II.[3] The international scenario was governed and decided by the actions of the states, and the only subjects of International Law were thus States. As such, each sovereign state was free to do as it saw fit.

The notion of absolute immunity was inherited by this system of states from the previous one—a system where sovereign rulers had the power to impose their will upon their subjects and were not able to be brought before any other sovereign's court.[4] In other words, absolute sovereign immunity came into being as a privilege that sovereigns recognized with regards to each other, thus enabling them to perform any kind of act with no repercussions whatsoever. It is important to recall that sovereigns granted such immunities on the basis of comity and correctly considered them to be privileges, not rights of any kind.[5]

When the international system stopped being one of relations among sovereigns, but among sovereign states, many of the rules that applied to the previous setting were automatically inherited by the new system.[6] Sadly, this was the case for the rules regarding immunity.

This is how states became absolutely immune from prosecution of any kind, presumably because very little thought was given to the matter. Nevertheless, with the passing of time, it became evident that if the system was to work properly—especially regarding commercial deals between states and private individuals that could be reliable, and, therefore, good for business-making—absolute immunity would have to make way for judicial protection.

This was how the preconceived and never-before-questioned rules regarding immunity underwent a deep transformation over the last half century that resulted in a new scheme, where states could retain some of the privileges that were afforded to them, just by the mere fact of being sovereign nations, while they renounced other such privileges for the sake of protecting the international business environment.[7]

Thus came into being the distinction between the different kinds of actions a state could undergo, as a fundamental pillar in the theory of State immunities. States could, from then on, engage in acts that only their capacities of states could afford them, such as conducting an armed invasion in order to protect their own interests, and still be immune from prosecution in foreign jurisdictions: on the other hand, they were no longer

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3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See generally* Edward Patrick Flaherty & Greta L. Ríos, *International Organization reform or impunity? Immunity is the problem,* 16 ILSA J. INT'L & COMP. L. 433 (2010).

capable of incurring breaches of commercial contracts and avoiding the legal consequences for such actions.[8]

As International Organizations (IOs) came onto scene, they just adopted the rules of the then existing geo-political system.[9] That is, they entered into the game and played it applying the absolute immunity rule, simply because at the moment there was no alternative. This was also justified by a functional theory, according to which, IOs needed to be afforded immunity, so as to ensure that they would be able to duly perform their duties without any external interference from sovereign states with their mandates.[10] The reason behind this functional immunity theory was to grant IOs enough range of action so they could get to perform their mandates—as usually, but not always, delegated to them by sovereign states collectively—without obstacles, such as political or financial issues that would distract them from their greater goals.[11] Immunity of IOs was also supposed to guarantee their impartiality and thus, their proper functioning.[12]

In 1945, absolute immunity of the United Nations Organization was codified by its Treaty on Privileges and Immunities.[13] Since then, many aspects of the international arena have shifted, including the ways in which international relations are conducted. Even the notions of who the subjects of international law are have changed.

IOs have expanded and are no longer feeble and in need of protection of any kind.[14] As such, there is no further need for the "functional necessity" doctrine of immunities.[15] Even more, the continuation of such a model is nowadays acting, not as a guarantee that IOs will be able to comply with their mandates of peace and the protection of human rights, but as an obstacle to them attaining these lofty goals.

II. THE SCENARIO TODAY

As the United Nations (U.N.) and its affiliated and specialized agencies take on more and more of the international community's sovereign dirty work—peace-keeping, protection of refugees, disaster relief,

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8. *Id*. at 437.

9. *Id*. 436–38.

10. *Id*. at 437.

11. *Id*.

12. Flaherty & Ríos, *supra* note 7, at 436.

13. *Id.* at 438.

14. *Id*. at 454.

15. *Id*.

etc.—and as the size of their staff, who generally enjoy immunity from national or municipal laws, grows apace, the number of incidents where IOs or their officials have caused serious harm or injury to third parties has also grown.[16] A mere small sample of the harm that the IOs, such as the U.N. and its officials inflict on innocent third parties around the world today, many of which victims are those very people such organisations exist to protect and serve, are:

> 1) The introduction of cholera in Haiti, after its devastating January 2010 earthquake by U.N. peacekeepers from Nepal, that killed nearly 6,500 Haitians to-date—and counting with no likely abatement in sight—and sickened almost another half million;
> 2) The siting of a Roma refugee camp in Kosovo by UNHCR on the lead tailings of an abandoned mine that has not surprisingly resulted in the acute lead poisoning and permanent neurological impairment of many of the refugee children;
> 3) The on-going sexual abuse of refugee girls and women by U.N. staff and peacekeepers, despite the U.N.'s professed "zero tolerance" policy;
> 4) The inability or failure of U.N. peacekeepers to stop the mass systematic rape of more than 500 women and girls in Eastern Congo by Rwandan and Congolese rebels in August 2010, through either gross misfeasance or simple cowardice;
> 5) The recent claim of diplomatic immunity by the former head of the International Monetary Fund to try to block a civil suit brought against him by his alleged hotel maid, rape victim.

The on-going tolerance in deed, if not word, of wide-spread sexual harassment within IOs among their staff is another example of this sad state of affairs.[17] In most national societies, criminal and civil tort systems have developed first to compensate innocent victims of wrongful injuries or acts inflicted upon them by others, and also to serve as an incentive for those in a position of trust or responsibility to such innocent victims to discharge their obligations with reasonable care, in the future, lest they be exposed to substantial financial liability for their failure to exercise such care.[18]

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16. *Id*. at 439.

17. Flaherty & Ríos, *supra* note 7, at 443.

18. *Id*. at 454.

In recent years, a whole theory on state responsibility and accountability towards victims of great violations has also developed. At this point, even some of the most heinous state crimes against victims of violent regimes, often vigorously denied, have been investigated by their governments and truth commissions. Most modern states now grant proper judicial remedies and have provided proper legal recourse in the cases of thousands of victims whose victimizers were, in many cases, agents of the state.[19] It is important to point out that in many cases, the perpetrators of such violations had enjoyed immunity from prosecution at the time the atrocities occurred. Many of these immunities were lifted later on for the sake of guaranteeing the victims' access to justice.

Unfortunately, contrary to the overriding trend in international law today to limit and restrict immunities of sovereign states—and their representatives—to those absolutely necessary for a state to carry out its fundamental sovereign functions, carving out express exceptions to such immunities in cases of commercial activity or civil—tort—wrongs, IOs and their officials, until recently, have enjoyed near total immunity for their criminal, contractual, or tortious acts carried out in the context of their duties.[20]

It may be necessary at this point to explain that several of the activities that IOs carry out today on a regular basis, were never envisioned by their founders, and as such, the legal framework governing actions of great contemporary importance, such as Peacekeeping Operations and missions where civil police forces and international observers are deployed, is in its infancy or completely lacking.[21]

However, as history has shown us, changes usually occur before legal frameworks are fully developed, through practice and out of necessity. As such, it is of particular relevance that recent developments in the United States and Europe suggest that this shameful trend of absolute immunity may finally be changing as well for IOs, forcing them into line with the best state practice. Below are some examples of the cases that may be leading the way into the beginning of the end of IO impunity.

A. The Swarna v. Al-Awadi case (2010)

The Second Circuit Court of Appeals issued a very promising decision regarding the *Swarna v. Al-Awadi* case in 2010 regarding the invocation of diplomatic immunities and how this defence on admissibility may lead to

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19. *Id.* at 454.

20. For the most senior officials of such organisations, their immunities extended even to criminal or tortious acts that were in no way related to the function of their organisation.

21. Flaherty & Ríos, *supra* note 7, at 454.

impunity regarding violations of human rights, including those asserted in the context of a labour relationship.

Swarna, an Indian national, was offered to serve as a domestic employee in the household of Al-Awadi, a Kuwaiti diplomat serving at his country's Mission to the United Nations in New York.[22] She accepted the offer and moved to New York City in 1996.[23]

The complainant was allegedly abused on several occasions by her employers, including the diplomat's wife.[24] They retained her travel documents, refused to pay her the agreed salary, prevented her from leaving their household, not even to attend church on Sundays, and denied her communications with her family in India.[25] Al-Awadi raped Swarna several times during the four years she remained in his household, before she managed to recover her passport and visa and seek help. [26]

Swarna filed an action against the defendants in U.S. Federal Court in 2002.[27] Neither of them responded to her complaint, and the District Court ruled that it had no jurisdiction over Swarna's case due to the fact that by 2002, Al-Awadi was still employed as a diplomat by the Kuwaiti Mission, and therefore, could not be brought before any national court, according to the rules governing diplomatic immunity.[28] The District Court even went so far as to state that the complainant could institute new proceedings when the defendant was no longer employed by his Mission.[29]

In 2006, Swarna filed action against the complainants again, this time including the State of Kuwait as one of her defendants.[30] Once more, none of them answered the complaint, so Swarna filed a motion for default judgement.[31] Both the individual defendants and the State of Kuwait replied to Swarna's motion for default judgment in 2008.[32]

The District Court made some interesting findings in Swarna's case. First of all, it held that her claim against the individual defendants was not barred by immunity under the Vienna Convention on Diplomatic

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22. *See* Swarna v. Al-Awadi, 622 F.3d 123, 130 (2nd Cir. 2010).
23. *Id*. at 128.
24. *Id*. at 128–30.
25. *Id*.
26. *Swarna*, 622 F.3d at 130.
27. *Id*.
28. *Id*.
29. *Id*.
30. *Id*. at 130–31.
31. *Swarna*, 622 F.3d at 130–31.
32. *Id*.

Relations.[33] Regarding Swarna's claims on the State of Kuwait, the Court held that under the Foreign Sovereign Immunities Act (FSIA),[34] her request for default judgment could not be granted.[35] Both Swarna and the individual defendants moved for reconsideration of the District Court's decision.[36] Both motions were rejected, and the previous decision was held by the Court.[37]

Swarna and the individual defendants appealed the District Court's decision for different reasons to the U.S. Second Circuit Court of Appeal.[38] The Al-Awadi family argued that Article 39(2) of the Vienna Convention on Diplomatic Relations[39] granted them "residual immunity" for acts performed while serving as diplomats, and further, that the employment of Swarna as a domestic worker was protected under the same Convention as part of a diplomat's mission-related functions.[40] On her part, Swarna argued that the District Court erred in dismissing her claims against the State of Kuwait, because they fell within the FSIA's exception to immunity regarding tort and commercial activities.[41]

1. The Federal Court of Appeals' decision

While the Court agreed that under Article 39(2) of the Vienna Convention on Diplomatic Relations, former diplomats retain residual immunity for some kinds of acts performed while serving in the diplomatic station, it held that in the case under discussion, no such legal provision

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33. *Id*. at 131.

34. Foreign Sovereign Immunity Act, 28 U.S.C. § 1330 (1976).

35. *See generally* Swarna v. Al-Awadi, 607 F. Supp. 2d 509 (S.D.N.Y. 2009).

36. *Id*.

37. *See generally* Swarna v. Al-Awadi, No. 06 Civ. 4880, 2009 WL 1562811 (S.D.N.Y. 2009).

38. *Id*.

39. Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331. Article 39.2 of the Vienna Convention reads:

> When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Id. ¶ 2 (emphasis added).

40. *Id*.

41. *See generally* Swarna v. Al-Awadi, 607 F. Supp. 2d 509 (S.D.N.Y. 2009).

could be applied.[42] To begin with, defendant Al-Shaitan, Al-Awadi's wife, never served as a diplomat, and thus, this argument was moot in relation to her.[43] With regards to Al-Awadi, the test used to determine whether he possessed residual immunity, as established by the Vienna Convention, consisted of determining if the acts he performed in relation to Swarna's employment and alleged treatment were done in the exercise of his functions as a member of the mission.[44] On this point, the Court recalls that the Vienna Convention does not immunize those acts that result "incidental" to the performance of a diplomat's functions as a member of the mission.[45]

According to the Court, acts that deserve immunization are those "directly imputable to the state or inextricably tied to a diplomat's professional activities."[46] Since Swarna was employed by the defendants to meet their private needs, as opposed to performing mission-related functions, the Court concluded that in this case, the argument of residual immunity could not be sustained.[47] The Court went further to state that in relation to Swarna's alleged rape, "[i]f Swarna's work for the family may not be considered part of any mission-related functions, surely enduring rape would not be part of those functions either."[48]

On this topic, the Court was particularly emphatic and went on to say:

> Moreover, assuming arguendo that Swarna's employment constituted an official act, it does not follow that Al-Awadi is accorded immunity for any and all acts committed against her. For example, while Al-Awadi could claim diplomatic immunity for common crimes directed at Swarna while he was serving as a member of the mission, he could not commit these crimes and claim residual immunity merely because his initial hiring of Swarna constituted an official act. Only if the commission of such crimes could be considered an official act would residual immunity apply.[49]

The Court's reasoning in Swarna is of particular relevance to the development of case law regarding the changing application of immunities

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42. *See* Swarna v. Al-Awadi, 622 F.3d 123, 130 (2nd Cir. 2010).

43. *Id*. at 134.

44. *Id*. at 134–38.

45. *Id*. at 135.

46. *Id*.

47. *See* Swarna v. Al-Awadi, 622 F.3d 123, 135 (2nd Cir. 2010).

48. *Id*. at 138.

49. *Id*. at 139–40.

of IOs for several reasons. In the first place, it endorses the idea that even if immunity were to be applied to Al-Awadi with respect to the alleged acts, it would, under no circumstance, be absolute, since the "official acts" defense cannot possibly include actions that would otherwise be classified as crimes.[50] Under this logic, even if the Court had ruled that hiring Swarna had been an official act performed as part of Al-Awadi's functions as a diplomat, the constant abuse and inhumane conditions to which she was submitted could not have been catalogued as official acts.[51] This reasoning would have also led the Court to the conclusion that denying a defense based on immunity with regards to such acts was the only available course of action.

Therefore, the distinction made by the Second Circuit Court of Appeal on whether the crimes allegedly committed by the defendant in the Swarna case where "official" or not becomes a good starting point on the way to piercing immunities effectively, especially with regards to IOs and bringing them in line with the accepted restrictive immunities practice of sovereign states.[52]

B. The OSS Nokalva Inc. v. European Space Agency Case (2010)

OSS Nokalva (OSSN) and the European Space Agency (ESA) were working under a series of four commercial contracts, each of them including a dispute settlement clause.[53] The first contract referred the parties to arbitration, while the other three granted jurisdiction to the Courts of the State of New Jersey over disputes arising between the parties.[54] Following these clauses, OSSN filed suit against ESA before the Superior Court of New Jersey, Somerset County.[55] ESA moved to dismiss the claim, alleging immunity from prosecution under the International Organizations Immunity Act (IOIA).[56] This motion to dismiss was denied by the District Court.[57]

Although the District Court stated that ESA, as an IO, enjoyed immunity from prosecution, it held that such immunity could be expressly

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50. *Id*. at 134–38.

51. *See Swarna*, 622 F.3d at 134–38.

52. *Id*.

53. *See generally* OSS Nokalva Inc. v. Eur. Space Agency, No. 08-3169, 2009 WL 2424702, at *1 (D.N.J. Aug. 6, 2009).

54. *Id*. at *1.

55. *Id*.

56. *Id*. at *3.

57. *Id*. at *8.

waived by the IO.[58] It went further to conclude that by engaging in commercial activity and due to the dispute resolution clauses included in the contracts, ESA had expressly waived its immunity and therefore, could not bring this argument before the Court as a defense on admissibility.[59] Both ESA and OSSN appealed the District Court's decision for different reasons.[60]

1. The Decision of the Court of Appeals

The Federal Third Circuit Court of Appeals deemed it unnecessary to determine whether ESA had actually waived its immunity, because according to its interpretation of the laws regarding immunity, ESA was not immune from civil suit in the first place.[61]

The Court started with an analysis of IOIA, which states that IOs "shall enjoy the same immunity from suit and every other form of judicial process as is enjoyed by foreign governments."[62] In relation to this wording, the Court discussed if such phrasing was intended to mean that IOs would always be entitled to absolute immunity—as was the case of foreign governments when IOIA was enacted—or on the contrary, whether it meant that since the approach towards absolute immunity of foreign sovereigns had shifted since the enactment of IOIA to a more restricted practice, the new restrictive provisions of FSIA[63] would automatically be incorporated into IOIA by analogy.[64] FSIA became binding US law in 1976 and codified then accepted restrictive immunities practice on the part of sovereign states, setting out an express set of exceptions to the defense of immunity in the case of commercial dealings and tort claims.[65]

According to the Court, the correct approach consists of incorporating the contents of the new provisions of the FSIA, codifying the laws of immunities to the wording of the IOIA.[66] In other words, the Court held that the absolute immunity theory is no longer justified and is not

58. *See generally OSS Nokalva* Inc., 2009 WL 2424702, at *3.

59. *Id*. at 7–8.

60. *See generally* OSS Nokalva Inc. v. Eur. Space Agency, 617 F.3d 756, 760–61(3rd Cir. 2010).

61. *Id*. at 760–61.

62. International Organizations Immunities Act, 22 U.S.C. § 288a(b) (1945).

63. Foreign Sovereign Immunity Act § 1330.

64. *Compare* International Organizations Immunities Act § 288a(b) *with* Foreign Sovereign Immunity Act § 1330.

65. Foreign Sovereign Immunity Act § 1330.

66. OSS Nokalva Inc. v. Eur. Space Agency, 617 F.3d 756, 763 (3rd Cir. 2010).

compatible with the IOIA, nor does it make any sense in today's globally recognized climate of restricted sovereign immunity.[67] The Court also said that:

> ESA's contrary position leads to an anomalous result. If a foreign government, such as Germany, had contracted with OSSN, it would not be immune from suit because the FSIA provides that a foreign government involved in a commercial arrangement such as that in this case may be sued, as ESA acknowledged at oral argument. We find no compelling reason why a group of states acting through an international organization is entitled to broader immunity than its member states enjoy when acting alone. Indeed, such a policy may create an incentive for foreign governments to evade legal obligations by acting through international organizations.[68]

The Court, therefore, concludes that ESA is not entitled to immunity as it existed for sovereigns in 1945. Furthermore, the Court also upheld the District Court's findings that by not being immune from civil prosecution, ESA would benefit from being able to access the market and perform commercial transactions with other actors in it.[69] The Court concluded by saying that the same reasoning applied for drafting the FSIA's commercial exception to immunity and is equally applicable to IOs through the IOIA.[70]

The OSSN case is relevant to the discussion of the validity and applicability of immunities to IOs in that it circles back to the debate that actually originated the distinction between the absolute and functional theories of immunity.[71] In a very straightforward decision, the Court went on to conclude that, were absolute immunity to apply indiscriminately, there would be no guarantees of judicial protection when conducting business at the international level and therefore, this would greatly and adversely affect the business environment.[72] Since this reasoning cannot follow the needs and desires of an ever more globalized society, it is just logical that IOs would be willing to either waive or permanently restrict their immunity, at least with regards to commercial activity.

In the best case scenario, IOs would voluntarily adopt and incorporate the restrictive immunity theory, asserting its full immunity only for those

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67. *Id*. at 765.

68. *Id*. at 763.

69. *Id*. at 765.

70. *Id*. at 764.

71. *See generally OSS Nokalva* Inc., 617 F.3d at 756.

72. *Id*. at 765.

cases where the IOs' acts were being performed in pursuit of a sovereign purpose or when their functionality would be otherwise significantly compromised.

C. Case of Sabeh El Leil v. France (European Court of Human Rights)

This is the case of a French national who was employed by the Embassy of Kuwait in Paris as an accountant and then chief accountant.[73] He was wrongfully terminated after more than twenty years in service.[74] He filed suit before national courts, which determined that absolute immunity applied to his case, and, therefore, dismissed his claims without granting any redress.[75] Mr. Sabeh El Leil brought his case before the European Court of Human Rights, alleging that by finding that the State of Kuwait was immune from prosecution, the French State denied him his fundamental right of access to justice, as stipulated by Article 6 of the European Convention on Human Rights.[76]

The ECHR ruled in favor of the applicant, finding that since his daily tasks were purely administrative and not sovereign in nature, the Embassy could not raise an absolute immunity claim as a defense on admissibility, because in doing so, it had the adverse effect of violating Article 6 of the European Convention, causing gross prejudice to the claimant.[77] Therefore, the ECHR decided that, by recognizing the immunity, France had violated its international obligations under Article 6 of the ECHR to the claimant.

III. CONCLUSIONS

The results in the foregoing cases, when taken as a whole, suggest that the ability to assert absolute immunity on the part of IOs, may be finally coming to an end, and with it, the possibility to act towards its employees and its innocent third party victims with impunity. By being forced into line with the more restrictive immunities enjoyed by sovereign states in most national or municipal courts where they find themselves the target of a lawsuit, regardless of the violations claimed, the depth and breadth of IO immunity seems to be on the wane.

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73. Case of Sabeh El Leil v. France, No. 34869/05, Eur. Ct. H.R. (June 29, 2011), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Sabeh%20%7C%20El%20%7C%20Leil%20%7C%20v.%20%7C%20France&sessionid=88471910&skin=hudoc-en (last visited Mar. 18, 2012).

74. *Id*. at 1–6.

75. *Id*. at 13.

76. *Id*. at 35.

77. *Id*. at 67.

It has long since been evident that the theory of "functional necessity"[78] ceased to play a fundamental role in the way international relations were conducted over the course of the second half of the 20th century. Further, the current trends at the international level have been more focused on the protection and promotion of human rights of individuals vis-à-vis the prerogatives of states or their rulers. It is about time this same approach was applied to IOs, treating them as just another group of actors that can be held accountable for their acts and omissions in the international scenario—especially those violations that have to do with gross violations of International Human Rights Law, International Humanitarian Law, and *jus cogens*.[79] Let us keep in mind that protecting these rights was the main goal for creating most IOs in the first place.

It is just logical that in this case, change should come from within. Any IO that is truly complying with its mandate of serving humanity should, by now, have started the process of reform to adjust the legal framework in order to provide a wider protection for individuals to whom it causes injury.

The U.N., for instance, has the necessary instruments within to be able to start this process on its own at any moment. It is no secret that the International Law Commission (ILC) has drafted, in recent times, several pieces of proposed international legislation that strive for the enhancement of human rights protection. Such is the case of the widely known *ILC Articles on State Responsibility*—which can be clearly said to counter the former theory of absolute State immunity—and the *Draft Articles on the Responsibility of International Organizations*.[80] Whether the ILC is the right forum to change the state of play regarding the immunity of IOs is yet to be seen, but debating it within seems to be a good starting point. Mr. Ban himself could bring this topic to the ILC's agenda.

Rather than waiting for a national court to deliver the *coup de grâce* to such immunity in a piece-mail fashion—a current contract dispute case against the United Nations Development Programme pending in the U.S. District Court for the Southern District of New York may well do just

78. Flaherty & Ríos, *supra* note 7, at 454.

79. *Id*. at 444–48.

80. *See generally* Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, [2001] 2 Y.B. Int'l L. Comm'n 2, U.N. Doc. A/56/10, *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited Mar. 14, 2012); Draft articles on the responsibility of international organizations, [2011] 2 Y.B. Int'l L. Comm'n 2, U.N. Doc. A/66/10, *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf (last visited Mar. 14, 2012).

that[81]—Secretary-General Ban Ki Moon should begin the process to greatly restrict the immunity of the U.N. and its specialized agencies for contracts and tortious acts of its officials without delay, along the lines of the FSIA. The U.N. Charter and the goals for which the U.N. is supposed to stand demand no less. And once the immunity is fundamentally pierced by a national court, it will be difficult to maintain those aspects of it which still make sense today—such as the immunity of U.N. peace-keepers in war-torn regions—although of course, not for their *ultra vires* acts, such as rape or spreading a pandemic among a helpless civilian population.

81. Sadikoglu v. U.N. Dev. Programme, No. 11 Civ. 0294, 2011 WL 4953994, at *1 (S.D.N.Y. Oct. 14, 2011).

RULE OF LAW IN MOROCCO: A JOURNEY TOWARDS A BETTER JUDICIARY THROUGH THE IMPLEMENTATION OF THE 2011 CONSTITUTIONAL REFORMS

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Note to reader: Although in an English language journal, this article contains direct quotations from the Moroccan 2011 Constitution from its official French version, some of which are lengthy. No official English language version of the Moroccan Constitution has been located. Although full understanding of the quoted French sections is not essential for readers to understand this article, the author considered it important to present this material to all readers for reference purposes. In addition, although an English speaker may find some of the quotations in French difficult, other quotations appear so close to English as to be readily understandable. Also, the editors have elected to provide informal English translations, which may be helpful, although they cannot be viewed as authoritative, much less official. Such translations provided by the editors—some of which have been modified by the author as well—shall be referenced as "Editors' translation."

> *Elevate the judiciary to the status of an independent power and reinforce the prerogatives of the Constitutional Council to enhance the primacy of the Constitution, of the rule of law and of equality before the law. . . .*[1] (King Mohammed VI, March 9, 2011)

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1. His Majesty King Mohammed VI, Speech at Rabat, Morocco, MAP (Mar. 9, 2011), http://www.map.ma/eng/sections/speeches/hm_the_king_addresse_6/view (last visited Mar. 6, 2012) (noting on the official website that the King's speech received international acclaim). *See*, *e.g.*, *Constitutional Reforms Announced by HM the King, "Model in the Region," Hillary Clinton*, MAROC.MA, http://www.maroc.ma/PortailInstAn/Templates/Actualites.aspx?NRMODE=Published&NRNODEGUID=%7bD48287A2-CCBF-4020-ACBE-9D7C55551ABA%7d&NRORIGINALURL=%2fPortailInst%2fAn%2flogoevenementiel%2fReforms%2bannounced%2bby%2bHM%2bthe%2bKing%2bmake%2bMorocco%2bstronger%2ehtm&NRCACHEHINT=NoModifyGuest (last visited Mar. 6, 2012).

In light of the fast moving changes in Morocco after the Arab Spring, the author acknowledges that pre-Arab Spring sources need to be used with caution because of the potential change in context. In

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> *[I]t is necessary to boost the citizen's trust in the rule of law and provide legal safeguards for his judicial security. This is why we are determined to carry on with our effort to upgrade the judiciary and preserve its independence and ethical standards. The aim is not only to uphold rights and to right wrongs, but also to foster a climate of trust and legal security, which will act as a catalyst for boosting development and investment flows. I must therefore stress again the need to put the overhauling of justice on top of the reform agenda. This is why I urge the government to work out a well-defined plan to revamp the judiciary.*[2] (King Mohammed VI, July 30, 2008)

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> *In general, justice in Morocco is perceived by the public to be more of a matter of access to power [rather] than the function of an independent and impartial rule of law system. The 2005 Public Perception of the Moroccan Judiciary described the system as ". . . a mix of complex, disabling and crippling proceedings that set the system against the citizen" and as "an intimidating jungle." [T]he judiciary still suffers from persistent complaints that it is plagued with corruption, is not independent or accountable, does not have effective mechanisms for enforcement, and is encumbered by delays. The public in general lack confidence in and respect for the judicial system.*[3] (2010 USAID-sponsored report on Morocco)

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addition, this article might be complemented by a close site assessment and diagnostic of conditions in the Moroccan judiciary which may be adjusted over time. Given the wide sweep of this article, ranging from judicial independence to anti-corruption to illiteracy, however, even such a review of the justice system would have its limits as a tool for assessing the problems and proposing solutions regarding judicial reform and access to justice.

2. Full Text of HM King Mohammed VI Speech on 9th Anniversary of Throne Day, MAP (July 30, 2008), http://www.map.ma/en/print/3563 (last visited Mar. 6, 2012). *See also Morocco: Justice Lacks Independence & Public Confidence, Wikileaks*, MOROCCOBOARD.COM (Dec. 21, 2010), http://www.moroccoboard.com/news/34/5005 (last visited Mar. 6, 2012) ("The dispatch pointed [out] that the king considers judicial reform to be a priority, and listed the need of professional training of judges in both law and ethics and concluded that without serious steps to eliminate meddling by officials in the justice system, reform would not succeed.").

3. USAID, MOROCCO RULE OF LAW ASSESSMENT 12 (2010), *available at* http://pdf.usaid.gov/pdf_docs/PNADT305.pdf (last visited Mar. 6, 2012) [hereinafter MOROCCO RULE OF LAW ASSESSMENT]. Although this article refers to the author of the report as USAID, the author is stated in the report to be DPK Consulting, a contractor, for review by USAID. The sponsoring USAID

I. OVERVIEW AND INTRODUCTION

A. Rule of Law and Judicial Reform

Judicial reform has historically been an important (but not the sole) component of rule of law reform, a decades old movement affecting the developing world, emerging (or not so emerging) democracies and post-conflict nations, and equally applicable to countries commonly identified as Western, including the United States. This article addresses recent reform efforts in Morocco, particularly through the 2011 constitutional reforms,[4] initially proposed in outline by the King during the Arab Spring and drafted by a "blue-ribbon commission,"[5] to improve the Moroccan judicial system. It also reflects on key issues underlying judicial reform, particularly judicial independence (and impartiality); structural and behavior changes; anti-corruption; and access to justice.

Sophisticated rule of law analysts raise the question whether programs for improving the rule of law are effective if political will to change is lacking; the local environment is misunderstood; and resources are inadequate.[6] (Extensive literature on the rule of law and its definitions is

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office is listed as Rule of Law Division, Office of Democracy and Governance, USAID (DCHA/DG/ROL).

4. Although the constitutional reform process itself is beyond the scope of this article, for further information on the consultative process leading to the reforms, *see* Marina Ottaway, *The New Moroccan Constitution: Real Change or More of the Same?*, CARNEGIEENDOWMENT.ORG (June 20, 2011), http://carnegieendowment.org/2011/06/20/new-moroccanconstitution-real-change-or-more-of-same/51 (last visited Mar. 6, 2012); and Bruce Maddy-Weitzman, *Is Morocco Immune to Upheaval*, MIDDLE E. Q., at 87–93 (Winter 2012), *available at* http://www.meforum.org/meq/pdfs/3114.pdf (last visited Mar. 6, 2012*). See also id*. at 92–93 (noting the short time between dissemination of the proposed constitution on June 17, 2011, and its submission to voters for approval on July 1, 2011 for a referendum; at the referendum, 98.5% voted "yes" in favor of the constitution, representing about 73% of the eligible voters).

5. See with respect to the drafting and redrafting process of the constitution, especially non-public drafts of the constitution, Sarah Feuer, *Self-Immolations Mar Year of Reforms in Morocco*, WASH. INST. FOR NEAR E. POL. (Jan. 23, 2012), http://www.washingtoninstitute.org/templateC05.php?CID=3445 (last visited Mar. 6, 2012) ("[D]raft constitution proposed by the blue-ribbon commission was altered by the time it reached the public. For example, the original version reduced the king's powers more substantially, insisted on the 'unitary' rather than 'Muslim' nature of the state, and explicitly guaranteed individual liberties such as 'freedom of conscience'—all provisions that were ultimately dropped."); and Bruce Maddy-Weitzman, *supra* note 4 (noting difference between the constitutional drafting commission's draft and final constitution).

6. *See*, *e.g.*, Wade Channell, *Grammar Lessons Learned: Dependent Clauses, False Cognates, and Other Problems in Rule of Law Programming*, 72 U. PITT. L. REV. 171, 171 (2010) ("[P]ositive gains, such as improved constitutions, are often offset by implementation and enforcement failures."). *See also generally* CUSTOMARY JUSTICE AND RULE OF LAW IN WAR-TORN SOCIETIES (Deborah H. Isser ed., 2011) [hereinafter CUSTOMARY JUSTICE AND RULE OF LAW]; WILLIAM

either available elsewhere or is referenced in this article). These considerations are only partly relevant to Morocco. The constitutional reform efforts in Morocco that are the subject of this article are a key indicator of political will (especially when taken together with recent or ongoing protests); and the efforts are internally generated, not externally sponsored. Also, Morocco's familiarity with its "local environment" may be presumed; and, to the extent that resources are required, the issue will depend on their availability and how Morocco prioritizes its budgets.

The article will begin with the fundamentals of a good judicial system, analyze how the constitutional reforms move Morocco closer along that path, address the complex concept of judicial independence, and consider various challenges faced by Morocco on the way to achieving judicial reform.

B. What Is a Good Judicial System: Basic Principles

Consistent with established international principles, including the *Bangalore Principles of Judicial Conduct* (2002)[7] and the *United Nations*

EASTERLY, THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD (2007).

Assessing the utility or efficacy of rule of law programming in general or in particular, although important, is beyond the scope of this article. *Cf.* Wade Channell, *supra* note 6 at 172 ("The need for rule of law is a foregone conclusion among development practitioners. ROL is recognized as the foundation for establishing and protecting fundamental human rights, and is increasingly understood as an essential component for long-term, stable economic growth. Yet consistent underperformance—and outright failure—of many programs calls into question whether external programs can positively influence the development of rule of law. The answer is not immediately clear.") (citation omitted).

7. *See* Judicial Group on Strengthening Judicial Integrity, *Bangalore Principles of Judicial Conduct,* ¶ 1.1 (2002), *available at* http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (last visited Mar. 12, 2012) [hereinafter *Bangalore Principles of Judicial Conduct*]. The *Bangalore Principles of Judicial Conduct* are intended to be adaptable to various jurisdictions and provide a "framework for regulating judicial conduct." *See* UNITED NATIONS OFFICE ON DRUGS AND CRIME, COMMENTARY ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT 36 (2007), *available at* http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf (last visited Mar. 6, 2012):

> The statement of principles which follows, and which is based on six fundamental and universal values, together with the statements on the application of each principle, are intended to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct, whether through a national code of conduct or other mechanism. The statements on the application of each principle have been designed not to be of so general a nature as to be of little guidance, nor so specific as to be irrelevant to the numerous and varied issues which a judge faces in his or her daily life. They may, however, need to be adapted to suit the circumstances of each jurisdiction.

Basic Principles on the Independence of the Judiciary (1985),[8] this article shall assume that a good judicial system involves an impartial, fair and timely means for resolving controversies, presided over by a stranger to the dispute (an uninvolved person),[9] who is educated in, working with and fairly applying commonly accepted rules of deciding disputes.[10] The parties are represented by lawyers (or not) to help them understand the system and present and advocate positions which may be (but need not be) beyond their understanding. Following the decision, the parties either accept the decision or if appeal is available, appeal to like impartial arbiters or a commission of arbiters, and after that decision or even a subsequent decision on appeal, they agree to accept the decision (whether it is favorable or not), and then "go about their business" (a concept often referenced as "legitimacy" since the parties accept a negative decision as "legitimate").[11]

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8. *See U.N. Basic Principles on the Independence of the Judiciary,* 1985, hereinafter, "*U.N. Basic Principles*," cited at CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE JUDICIAL REFORM PROGRAM, COMPILATION OF INTERNATIONAL STANDARDS ON JUDICIAL REFORM AND JUDICIAL INDEPENDENCE 1–4 (CEELI 2004), *available at* http://apps.americanbar.org/rol/docs/judicial_reform_compilation_international_standards_2004.pdf (last visited Aug. 25, 2012) [hereinafter COMPILATION OF INT'L STANDARDS] (Adopted by the 7th U.N. Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from August 26 through September 6, 1985 and endorsed by General Assembly resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985).; also cited at *U.N. Basic Principles on the Independence of the Judiciary*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., *available at* http://www2.ohchr.org/english/law/indjudiciary.htm (last visited Aug. 25, 2012). *See also Bangalore Principles of Judicial Conduct*, *supra* note 7, ¶ 2.5.1.

9. *See Bangalore Principles of Judicial Conduct*, *supra* note 7, ¶ 2.5.1 (noting that a judge shall disqualify himself where he has personal knowledge of evidentiary facts).

10. This article assumes that the substantive law complies with modern rule of law values and is not discriminatory, unreasonable, confiscatory or otherwise facially unjust. Whether one can have a good judicial system in a legal system infused with substantive injustice is beyond the scope of this article. *See*, *e.g.*, Norman L. Greene et al., *A Perspective on Nazis in the Courtroom, Lessons From the Conduct of Lawyers and Judges under the Laws of the Third Reich and Vichy, France*, 61 BROOK. L. REV. 1122 (1996) [hereinafter *A Perspective on Nazis in the Courtroom*]; Norman L. Greene et al., *Executioners, Jailers, Slave-trappers, and the Law: What Role Should Morality Play in Judging?*, 19 CARDOZO L. REV. 963 (1997) [hereinafter *Executioners, Jailers, Slave-trappers, and the Law*].

11. *See generally* COMPILATION OF INT'L STANDARDS, *supra* note 8; *U.N. Basic Principles*, *supra* note 8. In a democratic system, such as in the United States, judicial decision-making is subject to limits from other branches of government. Precedents established in certain decisions interpreting legislation may be neutralized through the passage of new legislation or amendment of the legislation interpreted, and precedents established in constitutional matters may be changed through constitutional amendment, although the process for change may be slow or difficult. Whether a "democratic system" can be theorized with one or more of the elements missing or modified, and whether such a system may be deemed "democratic," is beyond the scope of this article.

The focus here will be on so-called "formal" justice systems, and the article takes no position on a good justice (judicial) system in a context in which no "formal" system is practicable. Customary, informal, non-traditional or non-state justice systems[12] play a valuable role in many societies and need to be fully understood since such systems may be the best that may be achieved because of lack of capacity (including infrastructure and other resources); lack of political or cultural will; or the legitimacy accorded to it by the population.[13]

The use of the abstraction "judicial system" should not obscure its specific elements. In addition to physical structures, technology and records, these include businesses and individuals who have suffered losses and need redress. The justice system can be personal, powerful, and integrally involved with people's lives, their liberty, their property and their family; and sometimes it is even literally or figuratively "violent."[14] Yet when working well, it can be an engine for economic stability, growth, development, and, of course, justice.

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12. The best term for describing non-formal systems is the subject of debate, and each term used alone has been the subject of criticism. *See* CUSTOMARY JUSTICE AND RULE OF LAW, *supra* note 6, at 9.

13. *See*, *e.g.*, Thomas Barfield et al., *The Clash of Two Goods: State and Nonstate Dispute Resolution in Afghanistan*, U.S. INST. OF PEACE, at 22 (2006), *available at* http://www.usip.org/files/file/clash_two_goods.pdf (last visited Mar. 6, 2012) ("There is an inherent tension between the goals of state-building according to international norms on one hand, and respect for local customs and practices combined with practical requirements of sustainable development."); CUSTOMARY JUSTICE AND RULE OF LAW, *supra* note 6, at 159, 185. *See also* Norman L. Greene, *Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States?*, 86 DENV. U. L. REV. 53, 80–81 (2008) [hereinafter *Perspectives from the Rule of Law*]. Informal justice systems sometimes provide access to justice in ways not possible through traditional justice systems because they do not require transportation to distant courts and provide more rapid resolution at a lower cost. Some countries may not have the capacity to establish a formal justice system or the time to do so, and the informal system sometimes provides a means to fill what would otherwise be a justice sector vacuum where there is no functioning dispute resolution process at all. *See generally* CUSTOMARY JUSTICE AND RULE OF LAW, *supra* note 6.

14. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986), *available at* http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3687&context=fss_papers (last visited Mar. 6, 2012):

> Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.

C. The Key Elements: Independent Structure, Behavior and Education, and Access

Improving the judicial system is partly a structural problem of creating an independent judiciary as a separate branch of government, partly one of civic education about what the courts are and what they are supposed to do, partly one of establishing good governance or rules, and partly one of addressing access to the system.

The issue of separateness is easy. If the judiciary just does the bidding of the legislative branch or the executive branch, why have it? It would only be redundant of the other branches of government and an expensive and useless redundancy at that. Civic education on the role of the courts is essential to stress the importance of impartial decision-making to enhance the legitimacy of the courts, to adjust citizen expectations (so citizens seek and accept impartiality rather than victory at any cost), and to ensure that the judges understand their role as impartial arbiters.

As for the issue of governance (rules and structure), there are many sub-issues. Which should be the rules governing the system? Are the rules fair? Are they fairly applied by the impartial stranger? What makes and keeps the stranger impartial and what does not? What should be done if the stranger is not (or does not appear to be) impartial, and who makes that final decision? What shall the code of ethics for professional conduct say? How will breaches be detected? How will the code be enforced?

In the area of rules, progress appears to be measurable, sometimes by the mere passage of rules, some of which are already "international standards." But rules (even constitutional ones) are also subject to the observation that they are only "top-down" reforms when more is needed or just insufficient "constitutional engineering" (in essence, "word games").[15] Therefore, even when rules are in place (such as the constitutional reforms in Morocco), the question of implementing the rules or enforcement—moving from "paper rules" to actual change—remains.

Setting up a fair and impartial judicial system is of limited utility, however, unless there is access to justice so that citizens may use the system. Relevant questions bearing on access include, for example, a mix of educational, structural and resource issues. Among other things, these questions include: do citizens know their rights so they know when they can and should take their cases to court or otherwise assert their rights (a matter

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15. *But see* John Mukum Mbaku, *Constitutional Engineering and the Transition to Democracy in Post-Cold War Africa*, INDEPENDENT REVIEW, at 501, 502 (Vol. II, No. 4, Spring 1998), *available at* http://www.independent.org/pdf/tir/tir_02_4_mbaku.pdf (last visited Mar. 17, 2012) ("[A] constitution is the critical factor in any properly effected transition to more effective governance structures.").

of particular concern where there is lack of literacy); how and in what types of cases should legal services be expanded to make representation more available where litigants are unable to afford it; is the court system adequately funded so that it can handle its business efficiently and are there sufficient and well-qualified judges to handle the cases; are there inordinate court delays which prevent people from obtaining access; and are the courts geographically accessible.[16]

This article will focus on progress to date in Morocco, principally on its 2011 constitutional reforms, a number of which fully comply with international best practices; identify some of the work remaining to be done; provide context and perspective; and suggest some possible priorities and approaches. Some of these suggestions will not involve more rules (or enforcement of rules), but rather, educational or socio-economic change, and as such, will have longer time horizons for achievement.

II. MOROCCO: BACKGROUND

Before analyzing the Moroccan judiciary, particularly in light of the constitutional reforms, a brief sketch of Morocco is needed to understand the context. What and where, in short, is Morocco?

A country with a diverse legal and cultural history, Morocco has a population over 32 million and is located in close proximity to Spain on the north (Tangier in Morocco is about twenty miles south of the Spanish border) in the northwestern part of North Africa, bordering Algeria to the east, with coasts on the Atlantic Ocean and Mediterranean Sea.[17] Islam is the state religion (and that of the vast majority of the population), but freedom of religion is constitutionally guaranteed.[18] Morocco has a constitutional, parliamentary, and hereditary monarchy[19] and is a pluralistic,

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16. For an excellent discussion of access to justice and its various elements, *see* Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 3 (2010). The question of access to justice is more than that of access to legal services. Moreover, legal services are not interchangeable and are subject to variation in quality, including the extent of effort devoted to the matter and overall competence.

17. Morocco is often referred to as being strategically located because of its geographic positioning. *See Morocco's Economic Strengths Highlighted in Washington*, MOROCCO WORLD NEWS (Oct. 11, 2011), http://moroccoworldnews.com/2011/10/moroccos-economic-strengths-highlighted-in-washington/11423 (last visited Mar. 6, 2012) [hereinafter *Morocco's Economic Strengths*] (referencing event at American University sponsored by the Washington Moroccan American Club).

18. *See* MOROCCO CONST. art. 3 (2011) ("L'Islam est la religion de l'Etat, qui garantit à tous le libre exercice des cultes."). [Editors' translation: "*Islam is the State religion, which guarantees everyone the freedom to worship"*].

19. *See* MOROCCO CONST. art. 1:

multilingual society, with many cultural strains, including with French, Arabic, Berber (Amazigh), Andalusian, sub-Saharan, and Jewish roots, with Jews at one time comprising hundreds of thousands in Morocco.[20]

The diversity of Morocco's culture is expressly recognized in its constitution,[21] which, among other things, acknowledges Arabic and Berber (*l'amazighe*) as the country's two official languages, although French is widely spoken, taught in schools and used in commerce and government;

> Le Maroc est une monarchie constitutionnelle, démocratique, parlementaire et sociale. Le régime constitutionnel du Royaume est fondé sur la séparation, l'équilibre et la collaboration des pouvoirs, ainsi que sur la démocratie citoyenne et participative, et les principes de bonne gouvernance et de la corrélation entre la responsabilité et la reddition des comptes. [Editor's translation: *Morocco is a constitutional, democratic, parliamentary and social monarchy. The constitutional system of the Kingdom is based on the separation, balance and collaboration of powers, as well as citizenship and participatory democracy, the principles of good governance and the correlation [or balance] between responsibility and accountability*.]

See also id. art. 42 (hereditary monarchy).

20. Among other recent celebrations of Moroccan history and culture was a symposium in New York on 2000 years of Jewish life in Morocco, including various discussions and events, such as a museum exhibit in New York. The event was presented by the American Sephardi Federation under the patronage of the Kingdom of Morocco. *See* Norman L. Greene, *Journey into Morocco's Past Through the New York Center for Jewish History*, MOROCCOBOARD NEWS SERVICE (Jan. 2, 2011), http://www.moroccoboard.com/news/5012-journey-into-moroccan-history-a-visit-to-the-jews-of-morocco-exhibition-at-nys-center-for-jewish-history (last visited Mar. 6, 2012) (reviewing museum exhibit and citing extensive sources on Jewish life in Morocco); and American Sephardi Federation, *International Symposium, 2,000 Years of Jewish Life in Morocco: An Epic Journey, available at* http://www.americansephardifederation.org/morocco-symposium.html (last visited May 30, 2012) (describing symposium, with audio recordings of sessions). *See also* Jessica Marglin, *Modernizing Moroccan Jews: The AIU Alumni Association in Tangier, 1893-1913*, THE JEWISH QUARTERLY REVIEW, Vol. 101, No. 4 (Fall 2011) 574–603 (Jessica Marglin, the author of the article, was a participant in the symposium).

21. *See* MOROCCO CONST. pmbl.:

> Etat musulman souverain, attaché à son unité nationale et à son intégrité territoriale, le Royaume du Maroc entend préserver, dans sa plénitude et sa diversité, son identité nationale une et indivisible. Son unité, forgée par la convergence de ses composantes arabo-islamique, amazighe et saharo-hassanie, s'est nourrie et enrichie de ses affluents africain, andalou, hébraïque et méditerranéen. [Editors' translation: A *sovereign Muslim state, committed to national unity and territorial integrity, the Kingdom of Morocco intends to preserve, in its fullness and diversity, its national identity, one and indivisible. Its unity, forged by the convergence of its Arab-Islamic, Amazigh [Berber] and sub-Saharan components is nourished and enriched by its African, Andalusian, Jewish and Mediterranean tributaries*].

and Spanish is widely used in the northern parts of the country.[22] Morocco's specific form of spoken Arabic is known as Darija. Morocco's cultural history is also reflected, among other things, in its celebrated architecture and interior designs[23] and skilled weaving of prized carpets.[24]

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22. *See* MOROCCO CONST. art. *5 ("L'arabe demeure la langue officielle de l'Etat. . . . De même, l'amazighe constitue une langue officielle de l'Etat, en tant que patrimoine commun à tous les Marocains sans exception."*). [Editors' translation: "*Arabic remains the official language of the State. . . . Similarly, the Amazigh language is an official State language, as a common heritage to all Moroccans without exception."*].

Cf. U.S. DEPT. OF STATE, BACKGROUND NOTE: MOROCCO 1 (Apr. 20, 2011), *available at* http://www.state.gov/r/pa/ei/bgn/5431.htm (last visited Mar. 12, 2012), issued before the 2011 Moroccan Constitution and mentioning Arabic alone as Morocco's official language:

> Arabic is Morocco's official language, but French is widely taught and serves as the primary language of commerce and government. Moroccan colloquial Arabic, Darija, is composed of a unique combination of Arabic, Berber, and French dialects. Along with Arabic, about 10 million Moroccans, predominantly in rural areas, also speak one of the three Moroccan Berber dialects (Tarifit, Tashelhit, and Tamazight). Spanish is also used in the northern part of the country. English is increasingly becoming the foreign language of choice among educated youth and is offered in many public schools from the fourth year on.

23. The Metropolitan Museum of Art in 2011, as part of its re-modeling of its Islamic Galleries, centrally featured Moroccan art and architecture. *See* Randy Kennedy, *History's Hands*, N.Y. TIMES, Mar. 17, 2011, at AR1:

> Almost 30 years later the museum was embarking on the most ambitious rethinking and rebuilding of its Islamic art galleries in its history, a $50 million endeavor. At the heart of those galleries, which will open in the fall [of 2011] after being closed six years, it dreamed of showcasing the defining feature of Moroccan and southern Spanish Islamic architecture: a medieval Maghrebi-Andalusian-style courtyard, which would function in much the same way such courtyards still do in the traditional houses and mosques of Marrakesh or Casablanca, as their physical and spiritual center.

The Andalusian courtyard was designed and built by Arabesque, Inc., whose president and CEO, Adil Naji, is quoted extensively in the article. *See also http://www.moresque.com/ceo.htm* (last visited Mar. 21, 2012).

24. Ronnie Reich, *"Untangling Threads: Female Artisans in Morocco's Rug Industry" review: Exhibit Highlights the Hidden World of Morocco's Female Rug Weavers*, STAR LEDGER, Dec. 13, 2010, *available at* http://www.nj.com/entertainment/arts/index.ssf/2010/12/untangling_threads_female_arti.html (last visited Mar. 12, 2012) (describing rug weaving industry, including work of Kantara Rugs (www.kantararugs.com): "[I]ntricately woven rugs — full of jewel-toned zigzags and diamond patterns — cover the ground. These carpets have been at the center of life in Moroccan villages for thousands of years. But it isn't only their aesthetic or practical value that makes them such a unique part of their society. In a country where men preside over leatherwork, metalwork, sewing, knitting, embroidery and almost all artisan crafts, weaving is a woman's world."); Alia Kate, *Untangling Threads: Women Artisans in Morocco's Rug Weaving Industry*, MOROCCOBOARD NEWS SERVICE, Nov. 4, 2010, *available at* http://www.moroccoboard.com/viewpoint/64-author/4898-untangling-threads-women-artisans-in-moroccos-rug-weaving-industry (the author, Alia Kate, is the founder of Kantara Rugs) (last visited Mar. 21, 2012).

Morocco has long been a subject of intense interest for scholars of many disciplines, including novelists,[25] travel writers,[26] anthropologists and more.[27]

Principal sources of revenue in Morocco include tourism and remittances from Moroccans living abroad,[28] who, as a group, maintain Moroccan citizenship rights.[29] Morocco also has extensive agricultural and fishing industries[30] and holds 85% of the world's wealth in phosphates, a primary ingredient in fertilizers with many other industrial, agricultural and consumer uses.[31] Morocco has numerous trade agreements with various countries, including a fair trade agreement with the United States.[32] There is an ongoing effort to promote entrepreneurship in Morocco along with the rest of the Maghreb through, among others, the North African Partnership for Economic Opportunity.[33]

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25. *See e.g.,* PAUL BOWLES, THE SHELTERING SKY (1949); LAILA LALAMI, SECRET SON (2009).

26. *See* EDITH WHARTON, IN MOROCCO (1920) (often an orientalist period piece, written by a famed American writer about her travels in Morocco). Significantly, the book is dedicated by the author to then French Resident General in Morocco Hubert Lyautey "to whose kindness the journey I had so long dreamed of surpassed what I had dreamed." *Id*. at 9.

27. See generally the special edition of Susan Slyomovics, *Clifford Geertz in Morocco*, 16 J. N. AFR. STUD. (2009); RACHEL NEWCOMB, WOMEN OF FES: AMBIGUITIES OF URBAN LIFE IN MOROCCO (2009) (including excellent bibliography of anthropologists and others writing on Morocco). *See also id*. at 192:

> Morocco is a country of multiple contexts, often extremes – between rural and urban, poor and wealthy, religious and secular, provincial and cosmopolitan, Berber and Arab – and there are just as many identities between those ranges. . . .

28. Paul Silverstein, *Weighing Morocco's New Constitution*, MIDDLE E. RES. AND INFO. PROJ. (July 5, 2011), http://www.merip.org/mero/mero070511 (last visited Mar. 10, 2012).

29. *See* MOROCCO CONST. art. 17 ("Les Marocains résidant à l'étranger jouissent des droits de pleine citoyenneté, y compris le droit d'être électeurs et éligibles.") [Editors' translation: "*Moroccans residing abroad enjoy full citizenship rights, including the right and eligibility to vote*."]

30. *Agriculture and Fishery*, MOROKKO-INFO, http://www.marokko-info.nl/english/agriculture-and-fishery/ (last visited Mar. 6, 2012).

31. Brendan Borrell & Daniel Grushkin, *Morocco Plans 800 Acre Resort Hotel Funded by Fertilizer Cash*, BLOOMBERG (Nov. 5, 2010), http://www.bloomberg.com/news/2010-11-05/morocco-plans-800-acre-resort-hotel-funded-by-fertilizer-cash.html (last visited Mar. 11, 2011).

32. *See Morocco's Economic Strengths*, *supra* note 17. *See also Morocco*, PEACE CORPS, http://www.peacecorps.gov/index.cfm?shell=learn.wherepc.northafr&cntry=morocco (last visited Mar. 6, 2012).

33. *See* Jose W. Fernandez, *Cultivating Arab Spring Entrepreneurs: The U.S. Culture of Private Innovation is a Vital, Easy Export to Sell*, WALL ST. J., Feb. 3, 2012, at A15 (referencing North African Partnership for Economic Opportunity, including a major entrepreneurship conference in Morocco in January 2012).

Moroccans living abroad have formed diverse civil society and news organizations[34] for education and information regarding Morocco as well as many activities to preserve their cultural heritage. Morocco has specifically sought to strengthen the ties between Moroccans and Moroccans living abroad through, among other things, the creation of the Ministry of the Moroccan Community Abroad (CCME[35]); and the Ministry is recognized in the Moroccan Constitution.[36]

Without attempting to be inclusive, current challenges in Morocco include on the legal side, implementing the 2011 constitutional reforms and the advances in women's rights established in the 2004 Moudawana revisions to Morocco's personal status code, and improving access to justice; and on the socio-economic side, eradicating poverty, unemployment (particularly youth, including among the best educated, some of whom have

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34. Such news organizations include MoroccoBoard News Service and Morocco World News. *See, e.g.,* http://www.moroccoboard.com/ and http://moroccoworldnews.com/ (last visited May 30, 2012). For civil society organizations, *see* http://www.washingtonmoroccanclub.org/ , http://www.amp-usa.org/ and more (last visited May 30, 2012). Other organizations providing intercultural exchange include Friends of Morocco. *See Friends of Morocco: Who We Are, available at* http://friendsofmorocco.org/who.html ("Friends of Morocco is a[n] organization of Americans, mostly returned Peace Corps volunteers, with experience in Morocco and Moroccans in America united with an interest in promoting educational, cultural, charitable, social, literary and scientific exchange between Morocco and the United States of America.") (last visited May, 29, 2012).

35. *See generally* COUNCIL FOR THE MOROCCAN COMMUNITY ABROAD, http://www.ccme.org.ma/en/ (last visited Mar. 6, 2012).

36. *See* MOROCCO CONST. art. 163:

> Le Conseil de la communauté marocaine à l'étranger est chargé notamment d'émettre des avis sur les orientations des politiques publiques permettant d'assurer aux Marocains résidant à l'étranger le maintien de liens étroits avec leur identité marocaine, les mesures ayant pour but de garantir leurs droits et préserver leurs intérêts, ainsi qu'à contribuer au développement humain et durable de leur pays d'origine et à son progrès. [Editors' translation: The Council of the Moroccan community abroad is particularly responsible for issuing opinions on the direction of public policies to ensure that Moroccans residing abroad maintain close ties with their Moroccan identity, which measures are aimed to guarantee their rights and safeguard their interests, and contribute to sustainable human development and progress of their country of origin.].

Connections to Morocco have also been furthered among Americans and Moroccan-Americans in various ways including cultural exchanges, such as the Fulbright program and Peace Corps and technical legal assistance programs. *See, e.g.*,, FRIENDS OF MOROCCO, *History of the Start of Peace Corps in Morocco*, http://friendsofmorocco.org/starthistory.htm (last visited Mar. 6, 2012).

For recent observations on Moroccan history, both political and social, including support for the propositions in the text, *see generally* Léon Buskens, *Sharia and National Law in Morocco*, *in* SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 89, 89–138 (Jan Michiel Otto ed., 2010) [hereinafter sometimes referred to as *Sharia and National Law in Morocco*]; Silverstein, *supra* note 28.

engaged in dramatic and violent protests),[37] illiteracy, and corruption, many of which were the subject of the Arab Spring and ongoing protests and the ensuing constitutional reforms. Following the approval of the constitutional reforms, parliamentary elections were held on November 25, 2011.

Established as a French protectorate in 1912, Morocco secured full independence from France in 1956. Mohammed V served as its first King after independence, followed by his son Hassan II, in 1961, and then by his son Mohammed VI, in 1999, who is serving presently.[38]

III. THE 2011 CONSTITUTIONAL REFORMS ON THE JUDICIARY—CIRCUMSTANCES AND TIMING

> *Taken together with the King's speeches, the 2011 Moroccan Constitution demonstrates a will to reform, and the government may be held accountable to its own words.*

The constitutional reforms were adopted by a referendum held in Morocco on July 1, 2011, following their presentation on June 17, 2011. The referendum followed a long history of stated commitment to judicial reform in Morocco, particularly as set forth in several major speeches by King Mohammed VI. In a speech on March 9, 2011 (which is partly quoted above), the King stressed the importance of an independent judiciary to enhance the rule of law and equality before the law.[39] The timing of the speech was perfect—in the midst of the Moroccan manifestation of the

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37. *See* Paul Schemm, *5 Unemployed Moroccans Set Selves on Fire*, ASSOCIATED PRESS, ABC NEWS (Jan. 19, 2012), *available at* http://abcnews.go.com/m/story?id=15392114 (last visited Mar. 7, 2012); Feuer, *supra* note 5; RACHEL NEWCOMB, *supra note* 27, p. 48 ("The future is often bleak for young men, even for university graduates who find they still need connections to get a job."). *See also* MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 23 (noting "Many young people lack education or job opportunities, putting them at-risk for crime and possible involvement in religious extremism, similar to the recent experience of other Islamic countries."). *See also* World Bank, *Morocco at a Glance*, Feb. 25, 2011, *available at* http://devdata.worldbank.org/AAG/mar_aag.pdf (last visited Mar. 6, 2012); World Bank, *Morocco: Country Brief*, Nov. 2011, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/MOROCCOEXTN/0,,contentMDK:20149674~menuPK:294547~pagePK:141137~piPK:141127~theSitePK:294540~isCURL:Y,00.html (last visited Mar. 12, 2012) ("Unemployment, especially among the youth, remains a critical concern. Urban unemployment increased to 13.5% in the second quarter 2011 from 12.7% a year earlier. In particular, youth joblessness in the urban areas deteriorated by almost 2.5 percentage points to reach 33.4% while that of the educated jobless increased by 1 percentage point to 18.2%.").

38. The French protectorate encompassed most but not all of Morocco. *See* Buskens, *supra* note 36, at 95. ("The Spanish gained control of the Northern part and an enclave in the South; the rest of the country was placed under the authority of France, with the city of Tangier functioning as an international zone under the joint administration of several foreign nations.")

39. *See* His Majesty King Mohammed VI, Speech at Rabat, *supra* note 1.

Arab Spring, known as the February 20 protests, which were limited in scope and intensity compared to the region for reasons fully explored elsewhere.[40] Although the constitutional reforms are widely attributed to have softened the protests, it is unclear and perhaps controversial to what extent the reforms satisfied the protesters' various demands.[41]

Yet judicial reform was on the Moroccan agenda even before that time. In a 2008 Throne Day speech, the King underscored the importance of upgrading and revamping the judiciary to foster economic development in Morocco and made important observations on judicial reform between the two speeches as well, particularly in a speech on judicial reform in August 2009.[42] There he observed, among other things:

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40. Norman L. Greene, *International Law Weekend Panel Examines Access to Justice in the Middle East and North Africa Before and After the Arab Spring*, 20 ILSA Q. 22–24 (2011) [hereinafter *Access to Justice*] (citing many sources, including on Morocco and the Arab Spring). *See also* Feuer, *supra* note 5:

> A group of Moroccan youths calling themselves the "February 20 Movement for Change" organized nationwide protests demanding an end to corruption, greater limits on the king's power, and more government attention to poverty and unemployment. Like its counterparts elsewhere, the movement remained largely leaderless and attracted a broad swath of the Moroccan population. At the same time, however, it retained a firm commitment to the monarchy, allowing the Moroccan regime to avoid the crisis of legitimacy that accompanied uprisings in other Arab states.

More intense demonstrations and dramatic outcomes, however, need not result in more democratic outcomes. *See* David D. Kirkpatrick, *Revolt Leaders Cite Failure to Uproot Old Order in Egypt,* N.Y. TIMES (June 14 2012), *available at* http://www.nytimes.com/2012/06/15/world/middleeast/egyptian-revolts-leaders-count-their-mistakes.html?hp (last visited June 15, 2012) ("They toppled a pharaoh, but now the small circle of liberals, leftists and Islamists who orchestrated Egypt's revolution say they realize they failed to uproot the networks of power that Hosni Mubarak nurtured for nearly three decades.")

41. Maati Monjib, *The "Democratization" Process in Morocco: Progress, Obstacles, and the Impact of the Islamist-Secularist Divide*, at 10 (Saban Ctr. for Middle E. Pol. at the Brookings Inst., Working Paper, No. 5, Aug. 2011):

> Furthermore, the draft Constitution presented by the king in his June 17, 2011 speech disappointed many of those who had initiated the youth movement. The new Constitution, despite the progress it represents, leaves a bulk of power in the hands of the monarch. The youth activists had fought, with the support of small leftist parties like the Socialist Unified Party (PSU), for a true constitutional monarchy where the king would have a role, but not govern.

See also, Paul Schemm, *Morocco's King Lays Out Constitutional Reforms,* ARAB AWAKENING, June 17, 2011, *available at* http://arabawakenings.thestar.com/article/1011068-morocco-s-king-lays-out-constitutional-reforms (last visited April 12, 2012).

42. MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at iii. With respect to the same August 2009 speech by the King, *see also id*. at 7:

> The judiciary is not only an essential prerequisite to ensure citizens are equal before the law, but it is also a mainstay of justice and of social stability. In fact, the legitimacy of the state itself and the inviolability of its institutions derive their strength from the power of justice, which is the cornerstone of governance systems. . . . We seek to make justice more trustworthy, credible, effective and equitable, because it serves as a strong shield to protect the rule of law. It is a pillar of judicial security and good governance, and acts as a booster for development.[43]

The author's prior article on this subject—preceding the constitutional reforms, but focusing on the King's speeches presaging those reforms, observed, "[a] first order question is how to get from A (the King's words [relating to judicial reform] to B (an improved judiciary)."[44] Now that the *de jure* constitutional reforms are here and approved, the first order question changes to "how to get from the constitutional reforms to judicial reforms," or, as otherwise stated, "how to get from *de jure* (constitutional) reform to *de facto* (actual) reform?"

This article will address the key elements of judicial reform, beginning with judicial independence, in the Moroccan context.

> In a speech in August 2009 (marking the 56th anniversary of the 1953 Revolution), King Mohammed VI laid out a six-part strategy for judicial reform, focusing on strengthening guarantees of judicial independence, modernizing the regulatory framework, overhauling structure and staffing, increasing efficiency, enforcing rules to prevent corruption and abuse of office, and ensuring optimal implementation of reforms.

The USAID-sponsored publication further observed that the 2009 speech "was unprecedented because it was solely dedicated to judicial reform." *Id*. at 1. *See also* with respect to the 2009 speech, Siham Ali, *King Mohammed VI Calls for Overhaul of Judicial System*, MAGHAREBIA.COM, (Aug. 24, 2009), http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2009/08/24/feature-01 (last visited Mar. 6, 2012).

See also Aziz Mekouar, *Judicial Reform in Morocco*, N.Y. TIMES (Sept. 3, 2009), *available at* http://query.nytimes.com/gst/fullpage.html?res=9D06E6DE173FF930A3575AC0A96F9C8B63 (last visited Mar. 7, 2012) (King "called for a six-pronged approach to reforming the judiciary, including ethics training, reinforcing current safeguards, upgrading the quality of court officials and greater transparency of procedures.") (The letter-writer, Hon. Aziz Mekouar, was then Ambassador to the United States from Morocco; he retired from his post in 2011 after long service.).

43. *See Full Text of HM the King's Speech on 56th Anniversary of the Revolution of the King and the People*, MAP (Dec. 30, 2010), http://www.map.ma/en/discours-messages-sm-le-roi/full-text-hm-kings-speech-56th-anniversary-revolution-king-and-people (last visited Mar. 18, 2012).

44. Norman L. Greene, *Morocco: Beyond King's Speech & Constitutional Reform: An Introduction to Implementing a Vision of an Improved Judiciary in Morocco,* MOROCCOBOARD NEWS SERVICE (Apr. 5, 2011), *available at* http://www.moroccoboard.com/viewpoint/380-norman-greene/5484-morocco-beyond-kings-speech-a-constitutional-reform (last visited June 24, 2012).

IV. JUDICIAL INDEPENDENCE AND THE CONSTITUTIONAL REFORMS

> *What precisely needs to be done to secure judicial independence? Establish a system which structurally and through a course of incentives leads the judge to act impartially.*

A. Constitutional Reforms Bearing on Judicial Impartiality

Judicial independence is not an end in itself but rather is a means for achieving fair and impartial courts: in short, judicial impartiality.[45] It has both structural as well as behavioral aspects, and Morocco's 2011 constitutional reforms address both. The commitment to judicial independence is not limited to Morocco within the region; "[i]n recent years, Arab states have endorsed the idea of judicial independence in accordance with international standards; they have also proclaimed their acceptance of the principle of separation of powers."[46]

Structural independence considers the judiciary's relationship to other branches of government and is sometimes related to the phrase "separation of powers." It asks whether government, as constitutionally organized, lends itself to an independent judiciary, separate from the other branches of government.[47] In Morocco, under Article 107 of the Constitution, separation of powers is guaranteed, and thus the Constitution specifically addresses structural judicial independence: "*Le pouvoir judiciaire est indépendant du pouvoir législatif et du pouvoir exécutif. Le Roi est le garant de l'indépendance du pouvoir judiciaire*."[48]

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45. *See Judicial Reform in Developing Countries and the Role of the World Bank*, *in* THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES 147, 159 (Ibrahim F.I. Shihata et al. eds., 1993) ("While the independence of the judiciary is an important element of a judicial reform program, it should be recalled, however, that such independence is not an end in itself. Rather, it is a means to achieve the goal of the impartiality of the judge and the fairness of judicial procedures.").

46. Adel Omar Sherif & Nathan J. Brown, *Judicial Independence in the Arab World: A Study Presented to the Program of Arab Governance of the United Nations Development Program*, UNITED NATIONS DEVELOPMENT PROGRAM 6 (2002), *available at* http://www.pogar.org/publications/judiciary/sherif/jud-independence.pdf (last visited Mar. 7, 2012) (The authors reference Article 82 of Morocco's 1996 Constitution as embracing judicial independence). *See also* Alwaleed bin Talal, *The Lesson of the Arab Spring*, WALL ST. J., Feb 6, 2012, at A13 (reflecting on the Arab Spring and on "judicial institutions whose independence and integrity are vital to the safeguarding of rights" and observing that "[d]emocracy entails far more than elections and votes.").

47. KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 107 (Brookings Inst. 2006).

48. MOROCCO CONST. art. 107. (Editors' translation: *The judiciary is independent of the legislative and executive branches. The King is the guarantor of the independence of the judiciary.*).

The provision is strengthened from Article 82 of the Constitution of 1996 which covers the same subject matter.[49] Although the first sentence in both expresses a similar concept (except article 82 in the 1996 Constitution references "*L'autorite judiciare*," not "*Le pouvoir judiciare*" as does Article 107 in the 2011 Constitution), the 2011 Constitution adds the second sentence specifying the King's direct role in ensuring judicial independence. The use of the same word (*pouvoir, 2011*) rather than a different word (*L'autorite, 1996)* to describe the judiciary as to describe the legislative and executive branches also tends to suggest the equality of the judicial branch with the others.

Behavioral independence, however, relates to not just whether judges are "dispassionate and free from bias, but [whether they are] willing to take difficult positions, to resist corruption, and to make truly independent decisions."[50] "Part of behavioral independence resides in the judge as a person" and depends on the judge's place in society and education.[51] Nor is behavioral independence an unalloyed virtue, since there is no social benefit in judges acting regardless of law and issuing mischievous, if not pernicious, decisions.[52]

Those using the phrase "judicial independence" need to be precise as to its meaning and limits. "To say that [behavioral] judicial independence is desirable or undesirable is to say little unless there is agreement on what judicial independence means."[53] However, "[j]udicial independence certainly means that judges are not coerced to decide cases,"[54] let alone

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49. MOROCCO CONST. art. 82 (1996) ("ARTICLE 82 ("L'autorité judiciaire est indépendante du pouvoir législatif et du pouvoir exécutif."), *available at* http://www.maroc.ma/NR/rdonlyres/B6B37F23-9F5D-4B46-B679-B43DDA6DD125/0/Constitution.pdf (last visited Mar. 7, 2012).

50. DAM, *supra* note 47, at 107.

51. *Id*. at 112 ("Part of behavioral independence resides in the judge as a person: is a judge able to be dispassionate and free from bias, able to resist political pressures and the temptations of corruption, and so forth?"), 115 ("The place in society that a judge enjoys, and feels he has, depends very much on the quality of judges and how the public views them.").

52. *See* Norman L. Greene, *Appointive Selection of Judges, Limited Jurisdiction Courts with Non-Lawyer Judiciaries, and Judicial Independence*, 43 COURT REVIEW 80, 98–99 (2007) [hereinafter *Appointive Selection of Judges*] (Court Review is a publication of the American Judges Association).

53. *Id*. at 98.

54. *Id*. In the Moroccan context, *see* Aida Alami, *Trial Puts Morocco's New Charter Under Spotlight*, N.Y. TIMES (Jan. 18, 2012), *available at* http://www.nytimes.com/2012/01/19/world/africa/trial-puts-moroccos-new-charter-under-spotlight.html?pagewanted=1&_r=1&ref=middleeast (last visited Mar. 7, 2012) (quoting Moroccan businessman who attended recent trial: "'I voted yes at the referendum for this new Constitution,' he said during an interview this month in his office. But 'an independent justice is not one that gets orders on the phone.'"). For further discussion of so-called telephone justice, *see infra.*

induced to decide them by corrupt means. Such coercion and inducement, according to published reports (some of which are quoted above), are too much a part of Moroccan judicial life. "The impact of the executive's authority over the administration of justice [in Morocco] is not always obvious in daily life. When the justice system has to deal with an affair involving the illegal fortunes of leading members of society, however, it rapidly becomes visible."[55]

Article 109 of the Moroccan Constitution expressly prohibits conduct tending to corrupt the judiciary or impair judicial impartiality, noting as follows:

> Est proscrite toute intervention dans les affaires soumises à la justice. Dans sa fonction judiciaire, le juge ne saurait recevoir d'injonction ou instruction, ni être soumis à une quelconque pression. Chaque fois qu'il estime que son indépendance est menacée, le juge doit en saisir le Conseil Supérieur du Pouvoir Judiciaire. Tout manquement de la part du juge à ses devoirs d'indépendance et d'impartialité, constitue une faute professionnelle grave, sans préjudice des conséquences judiciaires éventuelles. La loi sanctionne toute personne qui tente d'influencer le juge de manière illicite.[56] [Editors' translation in footnote]

Specifically, Article 109 bars unlawfully attempting to influence the judge (*La loi sanctionne toute personne qui tente d'influencer le juge de manière illicit*); a judge who considers his judicial independence threatened must so inform the Supreme Judicial Council *(Chaque fois qu'il estime que son indépendance est menacée, le juge doit en saisir le Conseil Superieur*

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55. Transparency Maroc, Casablanca, *Royal Power and Judicial Independence in Morocco*, *in* GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 233 (Transparency Int'l 2007), *available at* http://www.transparency.org/publications/gcr/gcr_2007#download (last visited Mar. 12, 2012). The voluminous Transparency International, GLOBAL CORRUPTION REPORT 2007, which contains contributions from various authors on many countries (including Morocco), provides an interesting overview on international judicial reform from many perspectives.

The quote in the text from the GLOBAL CORRUPTION REPORT 2007 also recognizes the notion that judicial independence is not an "all or nothing" proposition: *e.g.,* courts may function independently in some cases, such as routine commercial or family law cases, but not in other cases, such as political ones.

56. *See* MOROCCO CONST. art. 109. [Editors' translation: *Any intervention in cases brought to justice is prohibited. In his judicial function, the judge should not receive orders or instructions or be subjected to any pressure. Whenever he considers that his independence is threatened, the judge must advise the Supreme Judicial Council. Any failure by the judge in his duties of independence and impartiality is serious professional misconduct, without prejudice to possible legal consequences. The law prohibits anyone from improperly attempting to influence the judge*.].

du Pouvoir Judiciaire); and a judge who compromises the judge's independence and impartiality is subject to professional and potential legal sanctions (*Tout manquement de la part du juge à ses devoirs d'indépendance et d'impartialité, constitue une faute professionnelle grave, sans préjudice des conséquences judiciaires éventuelles*). As the King has elaborated, "[t]o preserve the inviolability of the judiciary, the draft [and now final] Constitution criminalizes any interference, corruption or influence peddling with regard to the judiciary."[57] Similarly, Article 110 of the Moroccan Constitution requires judicial impartiality (*de l'application impartiale de la loi*), as follows:

> Les magistrats du siège ne sont astreints qu'à la seule application du droit. Les décisions de justice sont rendues sur le seul fondement de l'application impartiale de la loi. Les magistrats du parquet sont tenus à l'application du droit et doivent se conformer aux instructions écrites émanant de l'autorité hiérarchique.[58]

The standards in Articles 109 and 110 of the Moroccan Constitution – understood in light of the King's speech—are fully consistent with international standards such as those set forth in the *Bangalore Principles of Judicial Conduct* (in Value 1.1): "A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason."[59] But as discussed below, there are inherent limits to this proposition as it presumes that the law the judge is called upon to apply meets a standard of justice and

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57. HM King Mohammed VI, Speech to the Nation (June 17, 2011), *available at* http://www.lavieeco.com/actualite/morocco-new-constitution-hm-king-mohammed-vi-addressed-a-speech-to-the-nation-5886.html (last visited Mar. 12, 2012).

58. *See* MOROCCO CONST. art. 110. [Editors' translation: *The judges are required to enforce the law. Judicial decisions are made solely on the basis of the impartial application of the law. Prosecuting authorities are bound to enforce the law and must comply with written instruction from their superiors*.].

59. *See Bangalore Principles of Judicial Conduct*, *supra* note 7, ¶ 1.1. *See also* THE UNIVERSAL CHARTER OF THE JUDGE (1999), *available at* American Bar Association, Rule of Law Initiative (initially published under Central European and Eurasian Law Initiative Judicial Reform Program) in COMPILATION OF INTERNATIONAL STANDARDS ON JUDICIAL REFORM AND JUDICIAL INDEPENDENCE, pp. 15, 16 (Central European and Eurasian Law Initiative 2004), *available at* http://apps.americanbar.org/rol/docs/judicial_reform_compilation_international_standards_2004.pdf (last visited June 24, 2012) ("Article 4. Personal autonomy. "No one must give or attempt to give the judge orders or instructions of any kind, that may influence the judicial decisions of the judge, except, where applicable, the opinion in a particular case given on appeal by the higher courts.").

fairness. Consider the appropriate rule when the law is odious or otherwise unjust, and pressure comes from quarters calling on the judge to be just and fair.[60]

Moroccan Foreign Minister Taieb Fassi Fihri once observed that improper influence on judges has taken place in Morocco, including through "telephone justice,"[61] where political figures dictate case outcomes. As the Associated Press reported, "Foreign Minister Taieb Fassi-Fihri acknowledged 'phone call justice' exists, in a speech before the Brookings Institute in March [2011]. Judicial independence 'is not the reality today, because [there are] some calls from time to time, from the Justice Department to some judge. But now we want to assure this total

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60. The *U.N. Basic Principles* are to the same effect under Principle 2. *See U.N. Basic Principles*, *supra* note 8, princ. 2 ("The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."). To suggest that the principle requiring impartial application of the law depends on context – including the fairness and justice of the law – is not intended to suggest that any particular Moroccan law is unfair and unjust. *See*, *e.g.*, *A Perspective on Nazis in the Courtroom*, *supra* note 10 (citing sources); *Executioners, Jailers, Slave-trappers, and the Law*, *supra* note 10 (citing sources).

61. *See* Foreign Minister Taieb Fassi Fihri, *Embracing Reform: A Message from King Mohammed VI of Morocco* (March 23, 2011), *available at* http://www.brookings.edu/~/media/Files/events/2011/0323_morocco/032311_morocco_transcript.pdf (last visited Mar. 12, 2012). See in particular page 15 of the transcript of the Foreign Minister ("First, [Morocco is seeking] total [judicial] independence. It's not the reality today. And because some calls [come] from time to time, from the Justice Department to some judge. But now we want to assure this total independence."). *See also* Carolyn A. Dubay, *Morocco's "Arab Spring" and Judicial Independence,* INTERNATIONAL JUDICIAL MONITOR, American Society of International Law (2011), *available at* http://www.judicialmonitor.org/archive_spring2011/sectorassessment.html (last visited June 10, 2012) ("[I]t is the behind the scenes exchanges between politicians and judges that must be addressed through a change in legal culture and a true understanding of the role of an independent judiciary in a constitutional democracy or monarchy. Certain trappings of a modern judicial system may be necessary to attract foreign investment and serve commercial interests, but improving the legitimacy and independence of the judiciary will require far more of a cultural shift. . . .")

U.S. Supreme Court Justice Stephen Breyer has also extensively discussed what is commonly referred to as "telephone justice." *See* Norman L. Greene, *Appointive Selection of Judges, Limited Jurisdiction Courts with Non-Lawyer Judiciaries, and Judicial Independence*, 43 CT. REV. 80, 98 (2007). *See also* Kathryn Hendley, *'Telephone Law' and the 'Rule of Law': The Russian Case*, HAGUE JOURNAL ON THE RULE OF LAW, 1:241-262 (2009), *available at* http://law.wisc.edu/m/nmytc/telephone_law_and_rol.pdf.

Nor is the issue of judicial independence fully resolved in the United States. *See*, *e.g.*, *Perspectives from the Rule of Law*, *supra* note 13 (among other things, addressing the rule of law, judicial independence, and judicial elections in the United States); Norman L. Greene, *How Great is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in Caperton and Citizens United, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W.VA. L. REV. 873 (2010) [hereinafter *America's Tolerance for Judicial Bias*].

independence,' he [i.e., the Foreign Minister] said."[62] This is not an issue of whether judicial impartiality is required as a matter of Moroccan law (which it is and has been even before the 2011 constitutional reforms),[63] but rather whether it exists as a matter of fact, and if it does not, how to achieve it.[64] Prohibiting such practices as telephone justice and other coercion, including under the authority of Articles 109 and 110 of the Constitution, is essential to protect judicial impartiality, not to mention judicial independence.[65]

Lack of impartiality (or judicial bias) also implicates the question of the rules governing recusal (or disqualification): that is, when should a particular judge be removed, or voluntarily step down from, a particular case because the judge has a conflict of interest or it appears that the judge cannot be fair.[66] The *Bangalore Principles of Judicial Conduct* thus provide that a "judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially."[67] Thus the appearance of bias is enough to disqualify:

> While personal corruption is certainly a problem, the appearance of judicial bias—or what could be called "perceived corruption"—is also a problem. Many legal systems view this latter type of corruption as equally dangerous, particularly

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62. *See* Paul Schemm, *Moroccan Justice: sold to highest bidder*, ASSOCIATED PRESS (December 8, 2011), *available at* http://www.guardian.co.uk/world/feedarticle/9985284 (last visited Mar. 7, 2012) (also quoting author); *see also* Foreign Minister Taieb Fassi Fihri *, supra* note 61.

63. NATHAN J. BROWN, ARAB JUDICIAL STRUCTURES: A STUDY PRESENTED TO THE UNITED NATIONS DEVELOPMENT PROGRAM (2001), *available at* http://www.undp-pogar.org/publications/judiciary/nbrown/morocco.html (last visited Mar. 7, 2012) (citing "Article 82 [of the pre-2011 reformed [i.e., 1996] Moroccan Constitution]. The Judiciary shall be independent from the legislative and executive branches."). The pre-reformed Moroccan Constitution's Judiciary Articles also appear at MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 12.

64. *Morocco: Justice Lacks Independence & Public Confidence, Wikileaks*, MOROCCOBOARD (Dec. 21, 2010), *available at* http://www.moroccoboard.com/news/34/5005 ("A cable, recently released by wikileaks, and written a year ago by the US Embassy in Rabat, noted that the Moroccan judicial system lacks independence and public confidence, and it represents an impediment to Morocco's development and reform. . . . The Judges are not independent of the Ministry of Justice, political pressure to influence outcomes is used by officials and palace insiders").

65. *See*, *e.g.*, *America's Tolerance for Judicial Bias*, *supra* note 61; *Perspectives from the Rule of Law*, *supra* note 13 (among other things, addressing the rule of law, judicial independence, and judicial elections in the United States).

66. *See*, *e.g.*, *America's Tolerance for Judicial Bias*, *supra* note 61.

67. *Bangalore Principles of Judicial Conduct*, *supra* note 7, ¶ 2.5.

> because it causes public distrust in the judiciary. Public confidence is vital to a well-functioning judiciary, so regardless of whether actual bias exists, the appearance can be sufficient to remove a judge from a particular case.[68]

In addition to covering (in Articles 109 and 110 of the Moroccan Constitution) the importance of impartiality and the consequences of its absence, Moroccan law should provide details on when and how judges should be disqualified from handling cases. Preserving impartiality is not only an issue of designing the right system, but also an issue of having the appropriate procedures in place for use, case by case, judge by judge.

In addition to formal law, this may also involve professional codes, ethics and standards and many of the ideas set forth in the *Bangalore Principles of Judicial Conduct,* the *U.N. Basic Principles*, and like models.[69]

B. Implementing Reform Through Structural Changes in Judicial Oversight

Maximizing independence requires insuring that judges' careers do not depend on their making decisions favoring a particular group of persons with the power to enhance their careers.[70] Among other things, this is necessary to ensure that judges are not put into a position of deciding between their professional judgment and their career advancement.[71] (In

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68. Kevin J. Mitchell, *Neither Purse Nor Sword: Lessons Europe Can Learn From American Courts' Struggle For Democratic Legitimacy*, 38 CASE W. RES. J. INT'L L. 653, 656–57 (2006–2007) (footnote omitted).

69. The author is informed of at least one ethical code for Moroccan judges, which does not have the force of law, prepared recently by an association of judges in Morocco (amicale hassanienne des magistrats). Source: Moroccan judge, anonymous. *See* Charte D'Ethique Judiciaire (on file with the author and the law review). Rules must fix not only when a judge should be disqualified but how the disqualification procedure should operate. For example, is the decision to disqualify the judge's alone or may it be reviewed and enforced by other authorities where the judge refuses disqualification himself or herself? *See generally*, *e.g.*, *America's Tolerance for Judicial Bias*, *supra* note 61.

70. *See* Schemm, *Moroccan Justice: sold to highest bidder, supra* note 62 ("Morocco's courts have historically been weak and under the control of the king and his Justice Ministry, which determines judges' salaries and appointments so that they will often rule as instructed for the sake of their careers."). However, even the statement in the text may be over-inclusive. Assume such persons with economic or political power over judges prize even-handed and impartial justice and the efficient handling of cases. In that situation, there might be nothing wrong with pleasing them. The problem, more narrowly conceived, is judges who slant the law to help the rich and powerful because they are rich and powerful in order to maintain their position or get ahead, and the rich and powerful request outcomes for personal or political gain, not for impartiality or efficiency.

71. Susan Rose-Ackerman, *Judicial Independence and Corruption*, *in* GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 16 (Transparency Int'l 2007), *available at* http://www.transparency.org/publications/gcr/gcr_2007#download (last visited Mar. 12, 2012) (the

the United States, a different problem occurs where judges are elected: namely, judges appearing to make certain decisions to please the electorate—or campaign contributors—in particular cases, rather than making impartial decisions according to the law.).[72]

Achieving this independence requires more than attention to a constitution but also to judicial selection and promotional processes. According to a 2010 USAID-sponsored report on Morocco, "[t]he current judicial system [in Morocco] is permeable to political influence, and the mechanisms through which judges are appointed, promoted, sanctioned, and dismissed leave them vulnerable to political retribution."[73] The hope of career enhancement needs to be removed as one incentive for becoming less independent. As the U.N.'s *Basic Principles on the Independence of the Judiciary* provides, "promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience."[74]

Thus it is necessary to design independent committees to select, nominate or promote judges, without over-involvement of other branches of government, such as the Ministry of Justice, to help ensure that they act

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article makes general observations but is not specific to Morocco). Judicial independence may be threatened by other branches of government, of course. But, as previously noted, it may also be threatened by the judicial election system in place in a number of states in the United States. Any observations in this paper about other countries are not intended to suggest that there are no judicial independence problems or issues in the United States.

72. *See*, *e.g.*, *Perspectives from the Rule of Law*, *supra* note 13 (among other things, addressing the rule of law, judicial independence, and judicial elections in the United States); *see also* Valerie Wigglesworth, *Former Judge Suzanne Wooten Maintains Innocence Despite Bribery Conviction in Challenge to Subpoena,* DALLAS MORNING NEWS, June 21, 2012, *available at* http://crimeblog.dallasnews.com/2012/06/former-judge-suzanne-wooten-maintains-innocence-despite-bribery-conviction-in-challenge-to-subpoena.html/ (last visited May 12, 2012) ("Suzanne Wooten acknowledged the jury's nine guilty verdicts on felony charges last year that forced her to resign from the 380th Judicial District Court bench. But she maintains her innocence in a scheme that prosecutors say funded her 2008 judicial campaign in Collin County in exchange for future favorable rulings in court."). Of course, judges are not bound to issue decisions which displease the electorate or campaign contributors. The problem arises when pleasing them is the principal motivating factor for decisions as opposed to the impartial application of the law.

73. MOROCCO RULE OF LAW ASSESSEMENT, *supra* note 3, at 12. *See also Moroccan Judges, Lawyers Demand Judicial Reform,* May 17, 2012, *available at* http://www.iranian.com/main/blog/darius-kadivar/check-balances-moroccan-king-receives-judges-calling-legal-reform-and-justice-0 (last visited June 10, 2012) ("The Moroccan government and the Royal family are seen to have inordinate power over the judiciary through their control of salaries and promotions and it is believed that many verdicts follow the will of the executive branch.")

74. *See U.N. Basic Principles*, *supra* note 8.

independently.[75] In a leading text not involving Morocco (but applicable to it), the author observed that "[i]f promotion is handled by a government agency—the ministry of justice—independence may be compromised. . . . One outcome may be judges who are reluctant to stand up to the government."[76] "The rule of law is not secure when the body for its enforcement is composed of judges who either fear challenging the government or are already predisposed toward declaring its deeds legal."[77]

The constitutional reform removes any leadership role of the Ministry of Justice from the newly established judicial regulatory council (*Le Conseil Supérieur du Pouvoir Judiciaire*) unlike what had been the case with the predecessor council, but it remains unclear whether other influences on the judicial evaluation or regulatory processes will unduly affect judicial independence.[78] (For example, the King chairs the council as

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75. *See* Siham Ali, *King Mohammed VI Calls for Overhaul of Judicial System*, MAGHAREBIA (August 24, 2009), *available at* http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2009/08/24/feature-01 (last visited Mar. 7, 2012), noting:

> It is high time that Morocco change the poor domestic and international perception of its justice system, said Habib Choubani of the judiciary committee in parliament. Also important is the independence of the judiciary from the government, "for as long as the Minister of Justice has . . . a role in the appointment of judges, it will be impossible to speak of an independent judiciary."

See also MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 13, which observed before the 2011 constitutional reforms:

> [The Ministry of Justice] exercises significant influence over the appointment, discipline, transfer, and promotion of judges. The exercise of these powers makes judges beholden to the [Ministry] not only for their initial appointment but for their continued job security as well, with obvious negative implications for judicial independence.

Although, as noted above, the 2011 constitutional reforms reduced the involvement of the Ministry of Justice, the above sources may be read as cautioning against any other branch involvement with judicial opportunities for similar reasons.

76. DAM, *supra* note 47 at 117.

77. Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 608 (1996).

78. *See* HM King Mohammed VI, Speech to the Nation (June 17, 2011), *available at* http://www.lavieeco.com/actualite/morocco-new-constitution-hm-king-mohammed-vi-addressed-a-speech-to-the-nation-5886.html (last visited Mar. 12, 2012):

> Similarly, the draft Constitution sets up the "Higher Council of the Judicial Branch," as a constitutional institution headed by the King, in replacement of the Higher Council of the Judiciary, with a view to giving administrative and financial autonomy to the new Higher Council. It also makes the President of the Court of Cassation Executive President of the Council—instead of the Minister of Justice in the current Constitution—the aim being to bolster the separation of powers.

well as nominates judges).[79] This is not a question of whether separation of powers among the executive, legislative and judicial branches is required by law (which it is), as the constitutional reform confirms. Rather, it is a question of whether it is required (or exists) as a matter of fact and that the systems in place ensure that.[80]

C. The Limits of Judicial Independence—A Philosophical Perspective

There are limits to judicial independence. "Fixing the meaning of behavioral independence, for example, requires attention to key questions, including independence from what and to do what. No one wants judges to be free to do whatever they like."[81] Moreover, "[w]hile adequate institutions might enhance judicial independence and minimize the problems of a politicized judiciary, increasing the powers and independence enjoyed by judges risks creating the opposite problem of over-judicializing public policy."[82]

In the United States, it is common to observe that judges, absent special circumstances, such as constitutional review which the new Moroccan constitutional court is empowered to conduct,[83] should not be

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(The "Higher Council of the Judicial Branch" mentioned in the King's speech is referred to elsewhere in this article as the Supreme Judicial Council.)

79. *See* MOROCCO CONST. art. 56 (Le Roi préside le Conseil Supérieur du Pouvoir Judiciaire) [Editors' translation: "*The King chairs the Supreme Judicial Council.*"]; art. 57 (Le Roi approuve par dahir la nomination des magistrats par le Conseil Supérieur du Pouvoir Judiciaire) [Editors' translation: "*The King approves by decree the appointment of judges by (or for) the Supreme Judicial Council*."].

80. *See* BROWN, *supra* note 63, ¶ 5 (prior to the 2011 Moroccan Constitution) ("The Moroccan Constitution clearly endorses the principle of separation of powers, but the Ministry of Justice still plays a significant role in judicial affairs.").

81. *Appointive Selection of Judges*, *supra* note 52, at 97 (article extensively analyzes judicial independence). This section does not lessen the importance of judicial independence; however, in exploring its meaning and highlighting its ambiguities, it seeks to sharpen the dialogue.

82. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 201, 215 (2009).

83. *See* HM King Mohammed VI, Speech to the Nation (June 17, 2011), *available at* http://www.lavieeco.com/actualite/morocco-new-constitution-hm-king-mohammed-vi-addressed-a-speech-to-the-nation-5886.html (last visited Mar. 12, 2012):

> To confirm the principle of the supremacy of the Constitution and the law, the Constitutional Council has been elevated to the rank of a "Constitutional Court" with extensive powers which, in addition to existing prerogatives, include checking the constitutionality of international conventions and ruling on disputes between the State and the regions. In order to promote democratic citizenship, this Court has been authorized to look into litigants' claims regarding the unconstitutionality of a law which the Judiciary may deem detrimental to constitutional rights and freedoms.

rejecting legislation; and judges certainly should not be doing so solely because of their own personal preferences. This is the issue of deference to legislation, which has arisen in Morocco, notably in connection with judicial enforcement of the acclaimed Moroccan family code (or Moudawana) reforms in 2004. (Such reforms are discussed below and in many referenced sources.[84])

As the U.S. State Department has observed in 2011, for instance, "Implementation of the controversial family law remained a concern because it is largely dependent on the judiciary's willingness to enforce it, and many judges rooted in conservative attitudes did not agree with its intent."[85] The difficulty in such implementation has been the subject of extensive commentary, including on whether such judges should be asserting their patriarchal preferences in opposition to the law.[86]

How far the general proposition may be extended—that judges should enforce, not thwart constitutional legislation—of course, is beyond the scope of this article. Some legislation may be so odious (yet constitutional

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See MOROCCO CONST. arts. 129–34 (establishing Constitutional Court).

84. *See Access to Justice*, *supra* note 40, 22–24 (citing many sources). For a view of the old family law, *see Sharia and National Law in Morocco*, *supra* note 35, at 89–138. *See also id*. at 113:

> Until the reforms of 2004 the patriarchal model of family relations formed the basis for Moroccan family law. Marriage and regulations concerning divorce, descent, custody over children, and inheritance law were structured by intrinsically unequal relations of exchange between a husband and wife. . . . This patriarchal model is rooted in classical Islamic law and the related world view, as well as in conceptions shared by many Moroccans. In family law this resulted in institutions criticised by reformers, such as obedience of a wife to her husband, polygamy, male marriage guardianship over daughters, and repudiation as a male privilege.

85. U.S. DEPT. OF STATE, 2010 HUMAN RIGHTS PRACTICES: MOROCCO (Apr. 8, 2011), *available at* http://www.state.gov/j/drl/rls/hrrpt/2010/nea/154468.htm (last visited Mar. 8, 2012) [hereinafter 2010 HUMAN RIGHTS PRACTICES: MOROCCO]. For a more detailed discussion citing excellent sources, *see generally Access to Justice*, *supra* note 40, at 20–24. *Cf. Sharia and National Law in Morocco*, *supra* note 36, at 109–110 ("Until now, our knowledge about actual practice is scant; progressive Moroccan scholars and activists have been very critical of the judges' interpretations of the new law (*e.g.*, Benradi et al. 2007). Research on judicial practice and everyday understandings of the law is still required.").

86. *See generally Access to Justice*, *supra* note 40 (especially the cited references). Further research might be conducted concerning whether opposition to the implementation of the law has been spearheaded by judges appointed before the time the law went into effect or judges appointed since that time, and what, if any, lessons may be drawn from such analysis.

In some contexts where there is a contest between certain customs and traditions and a planned formal justice system (perhaps embodying modern human rights principles), such customs and traditions may prevail since nothing else may be practicable. Where various forms of law exist simultaneously like this, the environment is termed legally pluralistic. *See*, *e.g.*, CUSTOMARY JUSTICE AND RULE OF LAW, *supra* note 6.

under the laws of a particular country at a particular time) that conventional wisdom and theory fail.[87] In that context (presumably not applicable to Morocco), it may be impossible to serve as a judge in the ordinary sense, if the judge has a conscience. That situation aside, a few other observations are in order.

If a judge is typically unwilling to apply a nation's existing rules and makes her own, whenever she does so she is acting not like a judge but a legislature or perhaps something else.[88] Although the results in particular cases might be good (or bad, depending on the judge and the context), it is unclear why a nation would wish to have a single official (like a judge) legislate on behalf of everyone, following personal rules. (Judges are typically trained to apply the law, regardless of their personal agreement or disagreement).

Indeed, if several judges disagreed with each other, one might have conflicting "judicial legislation," and predictability in the law (to the extent it is a virtue) would vanish (unless a higher court resolved conflicts between individual judges).[89] So would equal treatment under the law, since results in like cases would vary depending on the assigned judge. Of course, even

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87. Although this is a common statement in the United States—that American judges should not be applying their own personal preferences as opposed to the law—one might argue that it might not be universally applicable. For example, justice in some countries might be better served from an international human rights perspective by a judge personally opposing an anti-human rights law, even though the law technically required the opposite result. Of course, where judges impose their own personal preferences to avoid odious laws, the judiciary would be a very different type of judiciary than is commonly understood by American lawyers. In addition, if a legislative process lacked legitimacy derived from popular election or other indicia of popular support (for example, a corrupt legislature or one which merely did the bidding of a despot), there is scant basis for insisting that judges adhere to the laws as presented by the legislature.

There is ample literature regarding whether and when judges may follow their conscience rather than law, how they should do so, and what are the implications of their doing so. *See*, *e.g.*, *A Perspective on Nazis in the Courtroom*, *supra* note 10 (citing sources); *Executioners, Jailers, Slave-trappers, and the Law*, *supra* note 10 (citing sources). Of course, were each judge in a particular country to apply her own personal preferences regardless of law, a chaotic and whimsical judicial system would result.

This problem, like many, may not be conducive to neat solutions, and the resolution may depend on circumstances and trade-offs, such as trading lack of certainty or predictability for more humane outcomes.

88. It has become an American convention to use the feminine personal pronoun rather than the masculine wherever possible when gender is unknown. However, the extent to which this fits this situation involving the Moroccan judiciary may depend on the number of women in the Moroccan judiciary.

89. Extreme examples of deference to legislation include the post-revolutionary French judiciary, which played a "very minor role of merely interpreting in a narrow, almost mechanical way, the meaning of legislation passed by the Assembly." DAM, *supra* note 47, at 107.

while applying the law with which she disagrees, a judge need not silently accept it: rather, she may signal to the public how she recommends that the law should be changed.

But predictability is not an absolute virtue, particularly where there is no structural independence. Predictability in that context might mean that the judicial power always follows the rule of the legislative or executive power. Nor is predictability a virtue where the laws are unjust, since that would lead to predictable injustice.[90]

Yet in other situations, predictability is considered a positive attribute since it allows people and businesses to plan their affairs and reasonably anticipate that their wishes will be respected. Among other things, this plays an important role in commerce and personal succession (*e.g.,* inheritance). Predictability is also important for civil wrongs and crimes, since a person needs to know what is permitted or not so that compliance is possible.

If a judge disagrees with a few of the nation's laws (yet the laws are permissible under the nation's constitution), the law may provide that the judge may decline to serve or step aside in particular cases, depending on the applicable law. If a judge disagreed with many, it is unclear why the judge would wish to serve, except to subvert or ameliorate them. Although that approach may make things better (or worse), the judge would not be acting as a judge under the common understanding of that term, perhaps "something else" instead, such as an insurgent or movement leader. Again, even though that might be appropriate in certain times, places and circumstances, such a judge would not satisfy the common understanding of what a judge is.[91]

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90. *See Perspectives from the Rule of Law*, *supra* note 13 at 62 (the rule of law should not be the rule of any law even if that enhances predictability; the goal of rule of law reform is not to strengthen the efficiency of authoritarian regimes).

91. *A Perspective on Nazis in the Courtroom*, *supra* note 10, at 1122. *See also*, Stephen Ellmann, *To Resign or Not to Resign,* 19 CARDOZO L. REV. 1047, 1048 (1997) (reflecting, among other things, on anti-apartheid judges in apartheid-era South Africa, who chose to remain on the bench). The article was part of a symposium entitled *Executioners, Jailers, Slave-trappers and the Law: What Role Should Morality Play in Judging?* The symposium is published beginning at 19 CARDOZO L. REV. 963 (1997), commencing with Norman L. Greene, *Preface. Id*. at 963. *See supra* note 10.

V. THE NEED FOR ANTI-CORRUPTION ENFORCEMENT AS A TOOL FOR JUDICIAL REFORM

> *Though common in every society, whether democratic or authoritarian, corruption is the great curse of developing countries, and Morocco is no exception."*[92]

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> *For an "agent of corruption," the Moroccan courts are a cornucopia of opportunity. The country's judges are notoriously susceptible to pressure from the executive branch of government and business interests as well as from more humble petitioners with handshakes full of cash.*[93]

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> *ARTICLE 36 of the Moroccan Constitution [Anti-corruption provision]*
>
> *Les infractions relatives aux conflits d'intérêts, aux délits d'initié et toutes infractions d'ordre financier sont sanctionnées par la loi. Les pouvoirs publics sont tenus de prévenir et réprimer, conformément à la loi, toutes formes de délinquance liées à l'activité des administrations et des organismes publics, à l'usage des fonds dont ils disposent, à la passation et à la gestion des marchés publics. Le trafic d'influence et de privilèges, l'abus de position dominante et de monopole, et toutes les autres pratiques contraires aux principes de la concurrence libre et loyale dans les relations économiques, sont sanctionnés par la loi. Il est créé une Instance nationale de la probité et de lutte contre la corruption.*[94] *[Editors' translation in footnote.]*

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92. JOSEPH BRAUDE, THE HONORED DEAD 188 (2011).

93. *Id*. at 190. *See also* MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 18: Corruption in Morocco – both financial and misuse of authority and power – is one of the most significant challenges confronting the transition to democracy and results in lack of procedural fairness for citizens. While there have been some campaigns against corruption and impunity, they are short-lived and perceived by the community as a show for the outside world.

94. MOROCCO CONST. art. 36. [Editors' translation: *Offenses relating to conflicts of interest, insider trading and all financial offenses are punishable by law. Public authorities are obliged to prevent and punish, according to law, all forms of crime related to the activity of government and public bodies and the use of the funds they have available for the award and management of public contracts.*

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> *ARTICLE 167 of the Moroccan Constitution [Anti-corruption provision]*
>
> *L'Instance nationale de probité et de lutte contre la corruption, créée en vertu de l'article 36, a pour mission notamment de coordonner, de superviser et d'assurer le suivi de la mise en Œuvre des politiques de prévention et de lutte contre la corruption, de recueillir et de diffuser les informations dans ce domaine, de contribuer à la moralisation de la vie publique et de consolider les principes de bonne gouvernance, la culture du service public et les valeurs de citoyenneté responsible.*[95] *[Editors' translation in footnote.]*

A. Corruption and the Judiciary

Given the extensive attention to corruption in Morocco and the close ties between anti-corruption efforts and judicial reform, the subject of corruption warrants a separate section. Articles 36 and 167 of the Moroccan Constitution are the principal anti-corruption provisions of the constitution, both broadly banning corrupt activities (including influence-peddling and conflicts of interest), and establishing as a constitutional matter an anti-corruption commission (to oversee the policies to fight corruption and more). Also relevant are Article 158 of the Moroccan Constitution (which requires, as a constitutional matter, public disclosure of the assets of public officials[96]) and Article 109, which prohibits forms of judicial corruption.

Trading in influence and privileges, abuse of a position of dominance and monopoly power, and all other practices contrary to the principles of free and fair competition in economic relations, are sanctioned [i.e. punishable] by law. There shall be a national authority for integrity and for the fight against corruption [i.e. an anti-corruption commission].]

95. MOROCCO CONST. art. 167. [Editors' translation: The particular mission of the [anti-corruption commission] established under Article 36 [of the Moroccan Constitution] includes to coordinate efforts to supervise and monitor the implementation of policies to prevent and fight corruption, to collect and disseminate information in this area, to contribute to the moralization of public life and to strengthen the principles of good governance, a culture of public service, and values of responsible citizenship.]

96. *See* MOROCCO CONST. art. 158:

> Toute personne, élue ou désignée, exerçant une charge publique doit établir, conformément aux modalités fixées par la loi, une déclaration écrite des biens et actifs détenus par elle, directement ou indirectement, dès la prise de fonctions, en cours d'activité et à la cessation de celle-ci.
>
> [Editors' translation: Any person, elected or designated, having a public office must set forth, in accordance with the terms laid down by law, a written declaration of property and assets such person holds, directly or indirectly, as of

The ills of corruption, as commonly defined,[97] are well-documented and need not be reiterated here, except to note that a corrupt judge is decidedly not an independent judge or impartial one. The corrupt judge—beyond committing a crime—puts the judge's own interest over the judge's commitment to law and makes law generally irrelevant. In the case of bribery, corrupt judges sell judicial decisions, and the most relevant consideration is not legal reasoning or persuasive facts (or simply what is right or wrong) but rather price.

Not only are bribes prohibited, but according to the *Bangalore Principles of Judicial Conduct*, so should be other types of private gain, including gifts, loans, and favors, as the *Bangalore Principles* state: "A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties."[98] To the same effect are the United Nations' *Basic Principles on the Independence of the Judiciary*.[99]

Finally, judicial corruption undermines impartial justice, and the lack of such justice (according to much commentary, including the King's[100]), impedes economic development and investment.[101] Ensuring judicial impartiality requires targeting and eliminating judicial corruption.

> the time such person took office, while engaged in such office, and when such person's term of office ends.].

97. For a definition of corruption, *see* BERTRAM I. SPECTOR ET AL., USAID: CORRUPTION ASSESSMENT HANDBOOK Sect. 2 (Mgmt. Systems Int'l May 8, 2006) (Draft Final Report), *available at* http://www1.worldbank.org/publicsector/anticorrupt/USAIDCorAsmtHandbook.pdf (last visited March 7, 2012):

> Corruption is often defined as *the misuse of entrusted authority for private gain*. It occurs any time that public officials or employees misuse the trust placed in them as public servants for either monetary or non-monetary gain that accrues to them, their friends, their relatives or their personal or political interests.

(emphasis in original).

98. *Bangalore Principles of Judicial Conduct*, *supra* note 7, ¶ 4.14.

99. *See U.N Basic Principles*, *supra* note 8, ¶ 2 ("The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.").

100. HM King Mohammed VI, Speech on 9th Anniversary of Throne Day (July 30, 2008), *available at* http://www.map.ma/eng/sections/speeches/full_text_of_ hm_king_1/view (last visited March 7, 2012).

101. *See e.g.,* DAM, *supra* note 47, at 127 ("Simply put, the absence of a reliable contracting law and independent judicial enforcement system is a barrier to economic development."). *See generally Perspectives from the Rule of Law*, *supra* note 13, at 71 (citing Brad Smith, Senior Vice President, Legal & Corporate Affairs, General Counsel and Corporate Secretary, Microsoft Corporation, American Society of International Law Second Century Dinner, Text of Prepared Remarks,

B. Judicial Corruption in Morocco

Examples of judicial corruption in Morocco, based on a variety of sources, including academics,[102] journalists,[103] U.S. government,[104] and Moroccan government (witness the royal speeches),[105] have been extensively reported. The World Bank has also observed in a 2003 report that the private sector believes that judicial corruption is prevalent in Morocco and the Moroccan public has an expectation of judicial corruption.[106] The report observed that progress is being made but more is needed.[107] Of course, once the public becomes aware of prevalent corruption (even if it is not 100% or is improving), suspicion and wariness of the court system abounds. Imagine how an American lawyer (or even a business) would respond to the news that many, if not all, of the courts in a particular city or state are corrupt. Who would take the chance of using the courts there?

A U.S. State Department publication on Morocco issued in 2011 noted, "[c]orruption and impunity reduced police effectiveness and respect

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Washington, D.C. (Nov. 3, 2006)), *available at* http://www.microsoft.com/presspass/exec/bradsmith/11-03-06InternationalLaw.mspx (last visited Mar. 7, 2012) (relationship between economic growth and judicial independence).

102. Monjib, *supra* note 41, at vi ("The judiciary should be reformed to end corruption and a lack of independence from the executive."). *See also id*. at 25:

> A reform of the judiciary is needed. The judiciary suffers from corruption and a lack of independence from the executive, and fails to enforce many rulings. Reforming the judiciary would enhance the population's sense of security and rule-of-law, and thus boost entrepreneurial initiatives while attracting more foreign investment.

103. *See* Schemm, *Moroccan justice: sold to highest bidder, supra* note 62; *see also A*bderrahim El Ouali, *Morocco Clamours for Justice,* IPSNEWS, NORTH AFRICA UNITED, Apr. 23, 2012, *available at* http://www.northafrica united.com/Morocco-Clamours-for-Justice_a1268.html ("Huge swathes of the population have long called for sweeping reforms of Morocco's corrupt justice system. . . . Just last month, police arrested a judge in Tangier, 300 kilometres north of Casablanca, for corruption. According to the Justice Minister, the judge in question was caught red-handed receiving a sum of 70,000 dirham (approximately 663 euros) from a citizen.").

104. *See*, *e.g*., 2010 HUMAN RIGHTS PRACTICES: MOROCCO, *supra* note 85, at 25 ("In July 2009 the High Judiciary Council sanctioned 70 judges on corruption-related charges, according to NGOs.").

105. *Id*. at 24–25 ("The judiciary's lack of independence and susceptibility to influence were widely acknowledged, including by the king. In August 2009 the king called for judicial system reform, including greater judicial independence and corruption prevention. Since 2007 the law has required judges, ministers, and members of parliament to submit financial disclosures.").

106. LEGAL VICE PRESIDENCY, WORLD BANK, MOROCCO, LEGAL AND JUDICIAL SECTOR ASSESSMENT 32 (June 2003), *available at* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/MoroccoSA.pdf (last visited Mar. 7, 2012).

107. *Id*.

for the rule of law. Petty corruption was widespread among the police and gendarmes, and broader, systemic corruption undermined law enforcement and the effectiveness of the judicial system."[108] Wikileaks cables are to the same effect, reflecting allegations of extensive corruption through the highest levels of government, affecting the real estate sector.[109] According to another report, "[d]uring the last decade, successive national and international reports have shown that corruption in Morocco has reached 'endemic' proportions, i.e., that it permeates every aspect of life: politics, business, the central administration, local government, public services, and the judicial system. Even before WikiLeaks revealed American worries about the royal circle's encroachment on the economic sphere, Transparency International's *Global Corruption Report* (2007) highlighted the connection between royal powers and corruption in the Moroccan justice system."[110]

In an Associated Press article published in December 2011, a reporter observed that results in cases in Morocco have been sold for $5000 and provided examples of bribery.[111] Others have reported that judicial corruption includes "the use of intermediaries, or 'samsara,' [a practice which] is [allegedly] widespread in the Moroccan court system. In exchange for a commission these middlemen go between the litigant and lawyers, police officers or judges in order to influence the judgment, or even prevent the case from being taken to court."[112] The Associated Press's

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108. 2010 HUMAN RIGHTS PRACTICES: MOROCCO, *supra* note 85..

109. Ian Black, *WikiLeaks Cables Accuse Moroccan Royals of Corruption*, GUARDIAN.CO.UK (Dec. 6, 2010), *available at* http://www.guardian.co.uk/world/2010/dec/06/wikileaks-cables-morocco-royals-corruption (last visited Mar. 7, 2012).

110. Abdeslam Maghraoui, *Ducking the Arab Spring in Morocco*, IMMANENT FRAME (May 23, 2011), *available at* http://blogs.ssrc.org/tif/2011/05/23/ducking-the-arab-spring-in-MOROCCO/ (last visited Mar. 7, 2012).

111. Schemm, *Morocccan justice: sold to highest bidder, supra* note 62 ("Justice is one of the most sensitive issues in this tourist-friendly North African country of 32 million, where there is widespread distrust of a court system that most Moroccans believe serves the highest bidder. 'Justice' can be bought in civil trials for just $5,000. In sensitive trials against terror suspects or feisty journalists, a call from a powerful official is enough to seal a guilty verdict.").

112. Business Anti-Corruption Portal, Morocco Country Profile (2011), *available at* http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/morocco/corruption-levels/judicial-system/ (last visited Mar. 7, 2012) (citing March 2009 article by LA VIE ÉCO). The Moroccan Country Profile further observed that "[t]he use of intermediaries testifies to a lack of trust in the judiciary system, which is also observed [by the Morocco Country Profile] in Transparency International's (TI's) Global Corruption Barometer 2010, according to which, less than a fifth of the surveyed households states that the judicial system is 'extremely corrupt,' while in TI's Global Corruption Barometer 2009, more than one-third reports to have paid a bribe to the judiciary within the precedent year." *Id*. The Business Anti-Corruption Portal does not cite to any particular pages of the

observations are essentially in line with the introductory quotation to this section referencing handshakes of cash and the courts being a cornucopia of opportunity for graft. A USAID-sponsored publication likewise references judicial demands for bribes in exchange for procedural advantage.[113]

But where courts issue corrupt decisions, they make the judicial system a mockery, one which renders decisions for the sake of decisions regardless of law.[114] No reasonable government would abandon the state to such corruption,[115] and as noted below, anti-corruption activities in Morocco are underway.

C. What to Do: Improved Regulation and Enforcement

To strengthen the effort against corruption, governments as a general matter must encourage and protect reporting of corruption and provide confidential ways to report (*e.g.,* whistleblower protection). If people are too intimidated to report, nothing will be reported except by the boldest.[116] There should be no retaliation by or on behalf of judges or other authorities permitted against persons who fairly report. Without whistleblower protections of this nature, far from those who report being protected, some

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Barometers or state whether it is relying on Moroccan or regional specific sources or other data within the Barometers. (The Barometers are annual multi-regional and multi-country public opinion surveys.) Interpreting Transparency's Global Corruption Barometers either in general or as to Morocco in particular is beyond the scope of this article. Nonetheless, the implications of both Barometers, taken together with other sources cited in this article, are that there is much work to do in addressing corruption in Morocco.

113. MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 18–19 ("Attorneys and human rights activists reported that judges have been known to phone parties before their hearing in order to explain that the hearing could be cancelled if they pay a fee.").

114. Nigel Rodley, *A Symposium on Constitutional Rights and International Human Rights Honoring Professor David Kretzmer: The Singarasa Case: Quis Custodie. . . ? A Test for the Bangalore Principles of Judicial Conduct*, 41 ISR. L. REV. 500, 512 (2008). *See also* Benjamin Weiser, *Ex-Senator Receives 7-Year Term in Bribery Case,* N.Y. TIMES, April 27, 2012, A-21, *available at http://www.nytimes.com/2012/04/27/nyregion/carl-kruger-sentenced-to-seven-years-in-corruption-case.html* (sentencing an American legislator for bribery, U.S. District Judge Jed Rakoff stated that "it was difficult to overstate the evils that are wrought when government officials succumb to bribery. . . . 'We have only to look at other countries . . . to see that once corruption takes hold, democracy itself becomes a charade, justice becomes a mere slogan camouflaging a cesspool of self-interest.'")

115. The question may not come to actual abandonment of the state to corruption but rather how effectively the state fights the battle against corruption, including which and how many resources it devotes to the effort of eradicating it.

116. 2010 HUMAN RIGHTS PRACTICES: MOROCCO, *supra* note 85, at 25. ("Officials attributed the low number of complaints in part to the lack of legislation protecting plaintiffs and witnesses in corruption cases."). As noted below, since the date of the cited article, such protective legislation has been enacted.

may end up as targets for inquiry or other retaliation.[117] Prosecution will help deter and remove the sense of impunity from those who would corrupt the judiciary. It may also lead other witnesses, who see that complaints are being taken seriously by the authorities, to come forward.

Having absorbed this message, in addition to adopting the anti-corruption constitutional reforms, Morocco enacted new anti-corruption legislation in 2011, which, among other things, protects against retaliation and provides safe measures for reporting,[118] although the future success of the law (including enforcement) will need to be assessed.[119] Some details of the law, which focuses on whistleblower, victim and witness protection, and which already have been the subject of some enthusiastic news coverage in Morocco,[120] follow:

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117. Schemm, *Moroccan justice: sold to highest bidder, supra* note 62. *See also* JOSEPH BRAUDE, THE HONORED DEAD 190 (2011) ("A broader scandal came to light a year earlier [in 2006] in the northern city of Tetouan, where seven lawyers published an open letter slamming the city's courts for dealing in graft every day. They complained of rampant complicity between area drug lords, judges, and city magistrates. Rather than earn accolades for coming forth, the lawyers faced legal proceedings initiated against them by magistrates in Tetouan that led to their disbarment."). *The Honored Dead* further reported a person who "reputedly makes his living greasing palms in the city's judiciary." *Id*. "This specialization would not altogether surprise me," the book's author observed. *Id*.

118. *See* Siham Ali, *New Moroccan Law Protects Graft Trial Witnesses: Just-passed Legislation Will Enable Moroccan Citizens to Speak Out Against Corruption Without Fear of Retaliation*, MAGHAREBIA (Oct. 18, 2011), *available at* http://magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2011/10/18/feature-02 (last visited Mar. 7, 2012) [hereinafter Ali, *A New Moroccan Law*].

119. *See id*. ("Earlier this month [of October 2011], Parliament passed a law protecting the victims of corruption as well as whistleblowers who speak out to expose it. The new law also provides for a special hotline on which people can tip off the police about corruption."). The Full Title of the Law is "Loi no. 37-10 modifiant et completant la loi no. 22-101 relative a la procedure penale en matiere de protection des victims, des temoins, des experts et des denonciateurs en ce qui concerne les infractions de corruption, de detournement, de traffic d'influence et autres." (A copy of the law, in French, is on file with the author and law review). Article 82-7 of the law, among other things, indicates the types of crimes for which protection is provided.

120. Mustapha Safar, *Arrest of Land Registrar of Ain Achok is an Execution of Witness Protection Bill*, ASSABAH, Dec. 1, 2011. This article was written subsequent to the date of the anti-corruption legislation, which is referenced as Bill 10-37 [sic] related to the protection of witnesses and whistleblowers published in the official journal n 5988 on 23 October 2011, and modifying and completing the provisions of the Bill of Criminal Procedures regarding the protection of victims, witnesses, experts and whistle-blowers of crimes of corruption, embezzlement, abuse of power, etc. The article points out how the arrest it describes was made possible by the law protecting witnesses and whistleblowers from harassment and observes that previous whistleblowers and witnesses were indeed harassed and subject to retaliation. The article, which appeared in a daily newspaper in Casablanca, is in Arabic and on file along with its translation with the author and law review. It was translated into English by Professor Brahim El Guabli, Swarthmore College.

> The [anti-corruption] law envisages a raft of measures, including ways to protect the families of graft trial witnesses and guarantees to prevent any material or moral harm to witnesses. The legislation also provides for the protection of the property and interests of those involved in such cases. A special telephone number will be made available to notify the police should trial witnesses receive threats or have any concerns about their safety or that of their family. The witness, expert or whistle-blower will be granted anonymity during the trial and will not be named in case documentation. Measures have also been set out to prevent intimidation or violence towards the person concerned and members of their family, such as the provision of protection officers. In addition, the law will also prosecute anyone reporting a supposed crime with malicious intent or making unfounded allegations.[121]

Morocco's anti-corruption commission, called The Central Authority for the Prevention of Corruption (ICPC), has the following "main objectives [which] are to propose strategic directions for a corruption prevention policy, build a database on all information related to corruption, inform the judiciary of corruption cases and organise [sic] corruption awareness campaigns."[122] (It is further noteworthy that "Morocco [has

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121. Ali, *New Moroccan Law*, *supra* note 118. *See also* American Bar Association, Rule of Law Initiative, *Morocco Approves Landmark Witness and Whistle Blower Protection Law,* Nov. 21, 2011, *available at* http://www.americanbar.org/advocacy/rule_of_law/where_we_work/middle_east/morocco/news/news_morocco_witness_whistleblower_protection_law_approved_1111.html (last visited May 22, 2012):

> The law offers significant protection to witnesses and experts, allowing judges and prosecutors to ensure their safety (and the safety of their families) through a number of mechanisms, including new identities and safe houses. While these are common practices in many countries, they are new to Morocco. Moreover, a witness or expert may demand these protections if they are not offered by the judge or prosecutor, and whistleblowers are now protected from administrative or criminal sanctions if corruption is revealed to them in the course of their duties. Oversight mechanisms will be established to ensure that neither individuals nor agencies can engage in reprisal.

For the importance of protecting whistleblowers from retaliation as part of an effective anti-corruption program, *see* David Banisar, *Whistleblowing: International Standards and Developments* (Instituto de Investigaciones Sociales, UNAM, Mar. 2006), *available at* http://www.corrupcion.unam.mx/documentos/investigaciones/banisar_paper.pdf (last visited Mar. 7, 2012).

122. OECD, *Fostering Integrity in the Public Sector: Morocco*, OECD Middle East and North Africa Initiative on Governance and Investment for Development, *available at* http://www.oecd.org/document/27/0,3746,en_34645207_34645555_45699803_1_1_1_1,00.html (last visited Mar. 7, 2012). Prior to the recent anti-corruption whistleblower legislation and the passage of

held] as of December 2011, the presidency of the Arab Anti-Corruption and Integrity Network (ACINET).").[123] Anti-corruption agencies are one of the devices used by governments as a tool against corruption, with varying results depending on their structure, relationship to other branches of government, resources, and government commitment to the task.[124]

There were also existing anti-corruption provisions in the laws in Morocco governing judges, yet the problems do not appear to have abated before the adoption of the 2011 Moroccan Constitution. Existing law, for example, includes the *dahir portant loi formant statut de la magistrature,*[125]

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the constitutional reforms, the Moroccan corruption agency was criticized for ineffectiveness. *See* JOSEPH BRAUDE, THE HONORED DEAD 190 (2011) (noting criticism of ICPC for lacking "independence, a clear mandate, or any significant authority."). For a critical view of anti-corruption commissions generally, *see* John R. Heilbrunn, *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?*, WORLD BANK INST. (2004), *available at* http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf (last visited Mar. 7, 2012). The official website for Morocco's ICPC is available at: http://www.icpc.ma/wps/portal (last visited Mar. 7, 2012).

123. *Morocco to be President of Arab Anti-Corruption Network as of December 2011*, YACOUT INFO (Oct. 27, 2011), *available at* http://www.yacout.info/Morocco-to-be-president-of-Arab-Anti-Corruption-Network-as-of-December-2011_a3991.html (last visited Mar. 7, 2012).

124. *See* John R. Heilbrunn, *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?*, *supra* note 122. For a cynical view of certain anti-corruption commissions, s*ee*, *e.g.*, *id*. at 1:

> [G]overnments in poor countries need international investments and donors require that they reduce corruption and improve their management of the economy. An anti-corruption commission may therefore represent an effort to satisfy international donors and placate domestic calls for reform, if only for a short while. Anti-corruption commissions are especially problematic when political leaders are only responding to demands from international donors. In such countries, policymakers can ignore domestic demands for reform and enact minimal reforms to satisfy external agents. This minimum may be nothing more than the establishment of an anti-corruption commission, an office of the ombudsman, or an anti-fraud unit without enabling legislation, competent staff, or a budget.

125. Dahir portant loi n° 1-74-467 du 26 chaoual 1394 (11 novembre 1974) (*dahir portant loi formant statut de la magistrature*) (copy on file with author and law review), noting at Article 20:

> *Les magistrats sont protégés, conformément aux dispositions du code pénal et des lois spéciales en vigueur, contre les menaces, attaques, outrages, injures ou diffamations dont ils peuvent être l'objet.* [Editors' translation: *"Judges are protected under the provisions of the Penal Code and special laws in force, against threats, attacks, insulting or defamatory acts to which they may be subjected."*].

The law also includes, among other things, a description of the types of judges, qualifications for employment, retirement provisions, some disciplinary procedures, assorted other regulatory procedures, and various provisions reminiscent of the "terms and conditions" of employment for judges. *Id*. A

which, among other things, bars threats, insults and attacks against judges. But the sweep of the law (the *dahir*) is not comparable to the broad anti-corruption provisions in the constitutional reforms: *e.g.,* barring coercion and inducements of judges. Existing law on judges—whether by its amendment or by passage of separate law—may need to be expanded to comport with the constitution's anti-corruption themes in Articles 36, 109 and 167, cited above.

Anti-corruption constitutional reforms and legislation need to be combined with judicial, prosecutorial, and investigatory resources to develop the evidence (in addition to the whistleblower evidence) in order successfully to prosecute corruption cases. Anti-corruption efforts should be a budgeting and financial priority.

D. Education or Cultural Changes as Strategic Solutions

Corruption is partly a legal issue susceptible to legal solutions such as those above: *e.g.,* are there adequate laws against corruption, and if so, are they enforced with sufficient resources allotted to the enforcement and investigative authorities.[126] Allowing people to "get away with it" (impunity) may lead to more of the same, with some even seeing this as a way to earn a living.[127] Improved and enforceable (and enforced) laws may help.

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complete analysis of Moroccan criminal law available to prosecute judicial corruption is beyond the scope of this article. *But see* 2010 HUMAN RIGHTS PRACTICES: MOROCCO, *supra* note 85, at 11:

> The law provides criminal penalties for official corruption, but the government did not implement the law effectively, and officials often engaged in corrupt practices with impunity. It was common knowledge that corruption was a serious problem in the executive, including the police, legislative, and judicial branches of government. There were reports of government corruption during the year, and the World Bank's Worldwide Governance Indicators indicated that corruption was a problem.

126. *See* MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 8:

> In December 2008, the King appointed the members of the Corruption Prevention Instance [i.e. the anti-corruption commission], in part to comply with the UN Convention against Corruption which entered into force for Morocco in 2007, but also in reaction to Morocco's low score on several key corruption indices, such as that of Transparency International. The mission of the Instance is the prevention of corruption although it has neither powers of investigation nor prosecution.

127. JOSEPH BRAUDE, THE HONORED DEAD 190 (2011). *Cf.* Benjamin Weiser, *Ex-Senator Receives 7-Year Term in Bribery Case,* N.Y. TIMES, April 27, 2012, A-21, *available at http://www.nytimes.com/2012/04/27/nyregion/carl-kruger-sentenced-to-seven-years-in-corruption-case.html* (U.S. District Judge Jed Rakoff, when sentencing a defendant in a government corruption scandal to jail, observed, "The message must always go out that if you help corrupt our government in any of its parts, prison is the consequence.")

Corruption is also an educational or public awareness concern, a message which has resonated in Morocco. "[A Moroccan teacher observed that] '[t]he culture of blackmailing must be stamped out from an early age and children must be steeped in positive values based on integrity and honesty. . . . [A]dults must give a concrete demonstration of corruption's negative repercussions on the country's development.'"[128] To that end, the "Moroccan education ministry and the kingdom's main corruption watchdog body are working together on plans to integrate ethics into school curricula. The Central Authority for the Prevention of Corruption (ICPC) and the education ministry signed an agreement on July 11th [2011] that establishes a framework for co-operation to drive home the issue through education."[129] Indeed, public awareness is part of the stated mission of the anti-corruption commission. Moreover, as noted at a recent conference in Morocco, judicial reform requires additional educational efforts overall.[130] Civil society also may play a role.

As a further safeguard against judicial corruption, judges should be adequately compensated.[131] Although it is unclear whether judges who are underpaid are more corrupt than adequately paid ones, and a poorly paid judge is capable of being an excellent judge, low pay (in the case of some individuals) may provide an incentive to do the wrong thing (*e.g.*, to supplement one's income through bribes).[132] Of course, raising salaries

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128. Siham Ali, *Morocco Fights Corruption Through Education: Schools Are the New Battleground in Morocco's Anti-corruption Strategy*, MAGHAREBIA (July 17, 2011), *available at* http://magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2011/07/17/feature-01 (last visited Mar. 7, 2012).

129. *Id*.

130. Euro-Mediterranean Hum. Rts. Network, *Seminar on Judicial Reform in Morocco* (Sept. 2, 2010), *available at* http://www.euromedrights.org/en/news-en/emhrn-releases/emhrn-statements-2010/4124.html (last visited Mar. 7, 2012) (reporting on conference held on January 22–23, 2010) ("Such change will require great efforts in terms of adult education for all actors in the judicial field because they will need to absorb and integrate the precepts of a human rights culture founded upon the universal principles of dignity, equality and equity.").

131. BROWN, *supra* note 63, ¶ 6 ("There have been some complaints in recent years that salaries are low and the Ministry of Justice has worked to improve the situation in order to combat opportunities for corruption."). *Accord* MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 19 (relating low judicial salaries to potential for corruption). The word "adequate,' of course, is imprecise; and it is unclear how high salaries need to be to have an effect in warding off corruption.

132. Schemm, *Moroccan justice: sold to highest bidder, supra* note 62. *See also id.*:

> Judges are often poorly trained and badly paid. Worse, they see it as their job to help to police, said Rachid Filali Meknassi, the Moroccan representative for global anti-corruption group Transparency International.
>
> "In the face of the police, the judges are scared, in the face of politics, the judges are scared, but when they have power, they sell it," he said.

does not constitute a guarantee against corruption,[133] yet there are other reasons to provide judges adequate compensation, including enabling them adequately to support their families and enhancing the prestige of the judiciary so as to attract and retain qualified persons to a judicial career.[134]

Judicial corruption is a multilayered problem. Without seeking to be comprehensive, it is a "perception problem" since it may lead some to avoid the courts or even to engage further in corruption "as less expensive and more certain than litigation."[135] It is a political stability problem; among other things, an end to corruption was one of the demands of the February 20 movement. As an obstacle to development and investment, it is also an economic problem. In the final analysis, it is indeed an injustice problem, since corrupt judiciaries yield results for a price (or something else of value) regardless of law.

With the constitutional and other reforms, an improved legal framework against corruption is in place. But with widespread adverse publicity about dishonesty and lack of public confidence in the courts, it may be a while before the poor (or mixed) reputation ends.[136]

VI. JUDICIAL DISCIPLINE AND JUDICIAL REFORM

> *Independence is necessary but not sufficient. An independent judiciary might itself be irresponsible or corrupt. If judges operate with inadequate outside checks, they may become slothful, arbitrary or venal. Thus, the state must insulate judicial*

133. *See* USAID OFFICE OF DEMOCRACY AND GOVERNANCE, GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY 32 (U.S. Agency for Int'l Dev. Jan. 2002), *available at* http://apps.americanbar.org/rol/docs/judicial_reform_usaid_guidance_judicial_independence_2002_english.pdf (last visited Mar. 7, 2012) ("However, it is unclear whether increased salaries decrease the temptation to accept bribes, especially among judges who are already steeped in a culture of corruption and who may have taken the job in the first place because of its potential for exploitation.").

134. DAM, *supra* note 47, at 116. Addressing Ukraine, the author observes that there is little judicial independence, low judicial pay, and "law students continue to consider a judgeship 'the lowest position available in the legal profession.'" *Id*.

135. *Id*. at 55.

136. *See also* ABDELAZIZ NOUYADI, MOROCCO, THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY 29 (Euro-Mediterranean Hum. Rts. Network 2008) (The legal profession in Morocco needs to "enjoy a certain number of safeguards and immunities allowing them to exercise their duties and perform their mission dedicated to justice and litigants" for there to be independent and impartial justice.).

> *institutions from improper influence at the same time as it maintains checks for competence and honesty.*[137]

Improvement of the judiciary not only requires judicial independence, but also judicial accountability. In Morocco, the mechanisms for holding judges accountable for their compliance with professional and legal standards should be reviewed, and if necessary, reformed. Even if they are working well, a good approach may still be improved.

Judicial promotion and discipline are among the matters entrusted to the Supreme Judicial Council (*Le Conseil Supérieur du Pouvoir Judiciaire)*, a body whose membership (including many judges, but which is presided over by the king) and purpose are set forth in Article 113 of the Moroccan Constitution.[138] The adequacy of the functioning of the Council, a common form of judicial regulatory body,[139] is beyond the scope of this article, and the author expresses no opinion as to its effectiveness. Moreover, the Council is replacing a prior judicial council[140] in a stated effort to enhance judicial independence, and assessment of the Council's work (which was yet to begin at the time of the passage of the Constitution) appears to be

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137. Rose-Ackerman, *supra* note 71, at 16. *See also id*. *at* 24 ("Corruption in the judiciary can occur even when the courts are independent of the rest of the state. In fact, their very independence may facilitate corruption because no one has the authority to oversee them.").

138. *See also* MOROCCAN CONST. art. 113:

> Le Conseil Supérieur du Pouvoir Judiciaire veille à l'application des garanties accordées aux magistrats, notamment quant à leur indépendance, leur nomination, leur avancement, leur mise à la retraite et leur discipline. A son initiative, il élabore des rapports sur l'état de la justice et du système judiciaire, et présente des recommandations appropriées en la matière. A la demande du Roi, du Gouvernement ou du Parlement, le Conseil émet des avis circonstanciés sur toute question se rapportant à la justice, sous réserve du principe de la séparation des pouvoirs.
>
> [Editors' translation: *The Supreme Judicial Council enforces the guarantees accorded to the judges, especially regarding their independence, appointment, advancement, retirement and discipline. On its own initiative, the Council produces reports on the state of justice in the judiciary system, as well as makes appropriate recommendations on that subject. At the request of the King, the Government, or the Parliament, the Council issues opinions on matters relating to justice, consistent with the principle of separation of powers.*]

For promotional and disciplinary practices for judges, *see also* NOUYADI, *supra* note 136, at 17–20.

139. *See* Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 201 (2009).

140. For Morocco's previous system of judicial evaluation, *see* BROWN, *supra* note 63 ("Judicial supervision and inspection is generally the responsibility of the Ministry of Justice, although judicial personnel are used extensively in the task. Each level of courts carries some responsibility as well and sanctions are meted out by the Supreme Judicial Council.").

premature.[141] (The heavy involvement in the prior council of the Minister of Justice has been criticized for impairing judicial independence.[142])

As a general matter, councils of this sort "are bodies that are designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process while ensuring some level of accountability. Judicial councils lie somewhere in between the polar extremes of letting judges manage their own affairs and the alternative of complete political control of appointments, promotion, and discipline. The first model of judicial self-management arguably errs too far on the side of

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141. *See Morocco New Constitution: HM King Mohammed VI Addressed a Speech to the Nation*, LA VIE ÉCO (June 20, 2011), *available at* http://www.lavieeco.com/actualite/morocco-new-constitution-hm-king-mohammed-vi-addressed-a-speech-to-the-nation-5886.html (last visited Mar. 7, 2012) [hereinafter *Morocco New Constitution*]:

> Similarly, the draft Constitution sets up the "Higher Council of the Judicial Branch" [Author's note: the name of the Council has been translated into English in various ways, including the Supreme Judicial Council], as a constitutional institution headed by the King, in replacement of the Higher Council of the Judiciary, with a view to giving administrative and financial autonomy to the new Higher Council. It also makes the President of the Court of Cassation Executive President of the Council – instead of the Minister of Justice in the current Constitution – the aim being to bolster the separation of powers.
>
> Similarly, the composition of the new Council has been enhanced by increasing the number of elected representatives of judges, as well as the representation of women judges, making sure Council membership is open to personalities and institutions operating in the area of human rights and the defense of judicial independence.
>
> Council powers have also been expanded to include, in addition to the judges' career issues, the functions of inspection as well as the expression of opinions on legislative and regulatory texts relating to the judiciary, and assessment of the judicial system.

The prior council remains in place until the installation of the new one. *See* MOROCCO CONST. art. 178, which so provides ("Le Conseil supérieur de la magistrature, actuellement en fonction continuera d'exercer ses attributions jusqu'à l'installation du Conseil Supérieur du Pouvoir Judiciaire prévu par la présente Constitution.")

142. *See* MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 13:

> In addition, the MOJ [Minister of Justice] exercises significant influence over the appointment, discipline, transfer, and promotion of judges. The exercise of these powers makes judges beholden to the MOJ not only for their initial appointment but for their continued job security as well, with obvious negative implications for judicial independence.

See also Associated Press, *Morocco's judges demand greater* independence, AL ARABIYA NEWS, May 15, 2012, *available at* http://www.alarabiya.net/articles/2012/05/15/214343.html (last visited May 27. 2012):

> Morocco's courts have historically been weak and under the control of the king and his Justice Ministry, which determines judges' salaries and appointments so that they will often rule as instructed for the sake of their careers.

independence, while pure political control may make judges too accountable in the sense that they will consider the preferences of their 'political principals' in the course of deciding specific cases."[143]

However, international experience suggests the standards and functioning of any judicial council warrant further research, including in the following areas: *viz.,* confidential reporting of disciplinary matters, the development and implementation of codes of judicial conduct, and effective enforcement of such codes, including the fairness of judicial discipline. (The *U.N Basic Principles* note, for example, that fairness to judges in disciplinary procedures needs to be assured).[144]

Codes of conduct should regulate and reinforce common rules of judicial behavior, such as those governing fairness and good temperament in the courtroom and conflicts of interest: *e.g.,* including when a judge should not sit on a case because of conflicts of interest or other reasons raising a question as to the judge's impartiality. They should also prohibit improper secret communications involving judges and parties (ex parte communications), whether they implicate bribe-taking or other matters. Confidential reporting of judicial misconduct to the Council is essential to ensure that proper Council action may result, with reporters of misconduct protected in order to ensure safety from judicial retaliation. (A model to follow might be the Moroccan 2011 whistleblower legislation referenced above). Court monitors may also be sent to observe courtroom proceedings and report back to disciplinary authorities. Adequate resources should be budgeted for investigation of misconduct and enforcement of codes of conduct.

Judicial conduct codes should become part of the culture among judges, lawyers and the public. Ethics training for judges has already been called for by the King as well.[145] International principles such as the *Bangalore Principles of Judicial Conduct* and the *U.N. Basic Principles* provide a good start. So does *Charte D'Ethique Judicaire,* prepared by *Amicale Hassania des Magisrats* (a Moroccan association of judges).[146]

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143. Garoupa & Ginsburg, *supra* note 139, at 204.

144. *See U.N. Basic Principles*, *supra* note 8, ¶ 17 ("A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.").

145. *See* Aziz Mekouar, *Judicial Reform in Morocco*, N.Y. TIMES (Sept. 3, 2009), *available at* http://query.nytimes.com/gst/fullpage.html?res=9D06E6DE173FF930A3575AC0A96F9C8B63 (last visited Mar. 7, 2012).

146. A copy of Amicale Hassania des Magistrats, *Charte D'Ethique Judiciare*, is on file with the author and the law review. The document consists of ten principles or goals sought to be achieved and multiple sub-principles, recommending certain behaviors in order to achieve those goals. The

Presentations or seminars may be given on the subjects and articles written on them at law schools and bar associations and elsewhere. (To the extent that legal education and bar associations need development, doing so is another task to address).[147] As previously observed, however, passing rules is different from enforcing rules and changing behavior; and attention needs to be paid to all aspects of the problem and potential solutions.

VII. RESPONSIBLE FREEDOM OF THE PRESS AS AN AID TO JUDICIAL REFORM

> *ARTICLE 28 of the Moroccan Constitution [Freedom of the press]*
>
> *La liberté de la presse est garantie et ne peut être limitée par aucune forme de censure préalable. Tous ont le droit d'exprimer et de diffuser librement et dans les seules limites expressément prévues par la loi, les informations, les idées et les opinions. Les pouvoirs publics favorisent l'organisation du secteur de la presse de manière indépendante et sur des bases démocratiques, ainsi que la détermination des règles juridiques et déontologiques le concernant. La loi fixe les règles d'organisation et de contrôle des moyens publics de communication. Elle garantit l'accès à ces moyens en respectant le pluralisme linguistique, culturel et politique de la société marocaine. Conformément aux dispositions de l'article 165 de la présente Constitution, la Haute Autorité de la Communication Audiovisuelle veille au respect de ce pluralisme.*[148] *[Editors' translation in footnote.]*

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principles include: *l'independance, l'integrite, l'impartialite and la neutralite, l'egalite, le courage moral, la dignite et la reserve, la competence, le comportement judiciare, la decence, and la solidarite*. *See also* MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 32 (likewise recommending code of professional ethics); NOUYADI, *supra* note 136, at 28 (referencing efforts of the "Moroccan civil society, the Hassanian Association of Judges"). These documents obviously predated the Moroccan constitutional reforms. The adequacy of judicial conduct codes and proposed codes in Morocco is beyond the scope of this article.

147. See with respect to judicial education in Morocco, BROWN, *supra* note 63, ¶ 8 ("Morocco has established the National Institute of Judicial Studies which has a mandatory three-year training period for new judges. The Institute is working to expand its offerings for continuing education for judicial personnel. All judges trained in recent years are graduates of the National Institute for Judicial Studies, where they undergo three years of study heavily focused on human rights and the rule of law.").

148. MOROCCO CONST. art. 28. (Editors' translation: *Freedom of the press is guaranteed and cannot be limited by any form of prior censorship. All have the right to express and disseminate information, ideas and opinions freely, within the limits provided by law, Public authorities shall support the organization of an independent press on a democratic basis, and also the determination of legal and ethical rules relating to it. The law sets the rules of organization and controls the means of*

Freedom of the press (including from censorship) is generally guaranteed by Article 28 of the Moroccan Constitution (*La liberté de la presse est garantie et ne peut être limitée par aucune forme de censure préalable*). For the steps toward judicial independence and accountability to be most meaningful, the press should be encouraged to investigate and report abuses. Not only should problems, where appropriate, be reported to deter others, but successes should be reported as positive models for others.

Although allegations of constraints on press freedom as have been reported in particular instances in Morocco are a matter of concern[149] (the new constitutional reforms aside), the press should be especially aggressive in the area of judicial reform. This may be particularly important when reporting on corruption.

However, the press should also be certain to play a responsible role, including in civic education. This may entail explaining that the role of the judge is to decide according to law and not attacking judges for unpopular but lawful decisions in pending cases. There is a delicate balance or tension between judicial independence and excessive public pressure on the judiciary.[150]

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public communication. It guarantees access to these means, respecting linguistic pluralism and the cultural and political pluralism of Moroccan society. Pursuant to section 165 of this Constitution, the High Authority of Audiovisual Communication oversees this pluralism.)

149. 2010 HUMAN RIGHTS PRACTICES: MOROCCO, *supra* note 85, at 15.

> The law generally provides for freedom of speech and of the press; however, the government continued to restrict freedom of the press through the legal system. Government-provided figures for this year showed that six journalists or media outlets faced criminal or civil charges, down from 56 such cases in 2009 and 42 in 2008. These numbers included cases the government initiated as well as private citizens' libel complaints. Numerous human rights groups criticized the steady stream of criminal prosecutions, newspaper closings, and libel suits.
>
> The law prohibits citizens from criticizing Islam or the institution of the monarchy. It is also illegal to voice opposition to the government's official position regarding territorial integrity and Western Sahara. The press, however, reported on controversial and culturally sensitive topics involving the military, national security, and sexuality.

Id.; *see also* Loubna Flah, *Perils of Journalism in Morocco: Nini Behind Bars, Jamai Out of the Country and Hafiani Abusively Dismissed*, MOROCCO WORLD NEWS, (Jan. 9, 2012), *available at* http://moroccoworldnews.com/2012/01/perils-of-journalism-in-morocco-nini-behind-bars-jamai-out-of-the-country-and-hafiani-abusively-suspended/22207 (last visited Mar. 7, 2012) ("The recurrence of different abuses against journalists remains inimical to the consolidation of democracy in Morocco. . . . The journalist community adds to the crowd of dissatisfied protesters rejecting cosmetic reforms and proclaiming its desire for real change.").

150. COMPILATION OF INT'L STANDARDS, *supra* note 8, at 11, 14 ¶ ¶ 33, 34, citing IBA *Minimum Standards of Judicial Independence* (adopted 1982) (observing that judges are not free from public accountability, but cautions that press needs to be aware of the potential conflict between judicial

Nonetheless, judicial decisions should not be free from criticism, and the press should be vigilant in reporting on areas where law reform is appropriate, both as to the nature of the law and to the implementation or enforcement of the law.

VIII. ENHANCING ACCESS TO JUSTICE AS A PREDICATE TO MEANINGFUL JUDICIAL REFORM

> *ARTICLE 118 of the Moroccan Constitution [Access to justice]*
> *L'accès à la justice est garanti à toute personne pour la défense de ses droits et de ses intérêts protégés par la loi.*[151]

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> *ARTICLE 121 of the Moroccan Constitution [Access to justice]*
> *Dans les cas où la loi le prévoit, la justice est gratuite pour ceux qui ne disposent pas de ressources suffisantes pour ester en justice.*[152]

Moving toward a fair and impartial judiciary is a benefit in and of itself, but one must also consider who is left out or lacks access and who has it. To those who are left out, to what extent does judicial reform create meaningful change?

The issue of access to justice may be addressed through a case study, such as through the 2004 Moroccan Personal Status Code reforms, even though the problems of access and the perception of lack of access in addition to overall unfairness are more pervasive.[153] Although the

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independence and excessive pressure on judges; and especially recommends restraint in publishing on pending cases).

The United States has particular experience with excessive external pressure on judges, including by politicians. *See*, *e.g.*, Norman L. Greene, *Introduction, "Politicians on Judges: Fair Criticism or Intimidation,"* 72 N.Y.U. L. REV. 294 (1997).

151. MOROCCO CONST. art. 118 (Editors' translation: *Access to justice is guaranteed to all for the defense of their rights and legally protected interests.*). A broad statement like this raises obvious questions concerning how it will be implemented, in which cases and with what resources.

152. MOROCCO CONST. art. 121 (Editors' translation: *In cases where required by law, justice is free for those who do not have sufficient resources to litigate*.) This general statement likewise raises the question of implementation, including the amount of resources to be allocated to provide "free justice," the overall quality of justice to be provided, and the definition of resources in the text of the law (*pas de resources suffisantes*), which appears to apply a "means" test. That is, how, by whom and using what criteria is it determined that sufficient resources are absent?

153. This section is heavily drafted from Norman L. Greene, *International Law Weekend Panel Examines Access to Justice in the Middle East and North Africa Before and After the Arab Spring*, 20

combination of political forces leading to the passage of the reforms is beyond the scope of this article, scholars have pointed out the involvement of the monarchy, political parties, parliament, human rights non-governmental organizations (NGOs), backlash arising from the terrorist attack in Casablanca in 2003, and the feminist movement, with different scholars weighting the effect of some of the principal factors differently.[154]

These reforms affected, among other things, rights involving marriage (including polygamy), divorce, child custody, and inheritance. The reforms, which have been "[h]ailed as one of the most progressive legal reforms in the Islamic world, . . . elevates the status of women, limits some rights men had over women, and grants women more affirmative rights in their affairs."[155] It includes a restriction on, but not abolition of, polygamy[156] under certain circumstances (including when a wife inserts a

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ILSA Q. 20–24 (2011). For the reported low public opinion of access to justice and the judiciary generally in Morocco based on a 2005 report, *see* Katie Zoglin, *Morocco's Family Code: Improving Equality for Women*, 31 HUM. RTS. Q. 964 (2009).

> The public lacks confidence in and expresses ambivalence toward the justice system as a whole. Litigants see the justice system as failing to regulate social inequalities; the poor view the wealthy and those with connections as receiving preferential treatment. Young women feel particularly vulnerable and do not believe that they are treated fairly. Citizens do not have a high opinion of the judiciary as a general matter. The judiciary is criticized as corrupt, lacking independence, and inaccessible. Lawyers are often described as motivated by money.

Id. at 975–76 (footnotes omitted) (citing, among other things, *Public Perception of the Moroccan Judiciary: Findings from Qualitative Research Conducted in July and August 2005*, at 11–12 (2005)) (reported as on file with author Katie Zoglin).

154. Extensive literature addresses the political forces leading to the reform of the Moudawana. *See*, *e.g*., Fatima Sadiqi, *The Central Role of the Family Law in the Moroccan Feminist Movement*, 35(3) BRIT. J. OF MIDDLE E. STUD., 325–37 (Dec. 2008). *But see* Francesco Cavatorta & Emanuela Dalmasso, *Liberal Outcomes Through Undemocratic Means: The Reform of the Code de Statut Personnel in Morocco*, 47(4) J. OF MODERN AFR. STUD. 487, 500–01 (2009) (noting both the predominant role of the king in bypassing other political forces—through what amounted to a "top-down reform"—in order to secure passage of the legislation as well as the positive aspects of the legislation).

155. Amna Arshad, *Ijtihad as a Tool for Islamic Legal Reform, Advancing Women's Rights in Morocco*, 16 KAN. J. L. PUB. POL'Y 129, 137–38 (2006–2007). Under the 1958 version of the Moudawana, by way of contrast, "women were dependent on their fathers and husbands throughout their lives." *Id*. at 135.

156. *See* Buskens, *Sharia and National Law in Morocco*, *supra* note 36, at 115:

> Polygamy has been an important symbol in the struggle for reform of the family law. For progressives, it has been seen as a sign of inequality, for conservatives and part of the islamists, a God-given privilege for the man. It is remarkable that the Moroccan legislator, like legislators in other Arab countries, did not dare to abolish this practice completely, even though it seldom occurs in practice.

monogamy clause in her marriage contract) and an increase in the minimum age for women to marry to eighteen (same as for men), up from the minimum age of 15, although judges retain discretion to reduce the age under certain circumstances, and additional reforms as documented in the literature.[157]

Access to justice faces substantial obstacles even in the context of these reforms. These obstacles include lack of knowledge of such rights, as many women are not trained in or otherwise informed of them, particularly in rural areas;[158] and patriarchal attitudes among men, including among some judges (limiting their impartiality), which have led to illiberal interpretation and enforcement of the law.[159] Government and civil society efforts (including various NGO's) are ongoing to improve acceptance of the law.[160] In addition, in light of the new anti-discriminatory constitutional provisions recognizing the equality of men and women, judicial patriarchal attitudes may well need to be revisited and addressed. See Article 19 of the

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See also RACHEL NEWCOMB, *supra* note 27, at 52-78 (chapter entitled "*Mudawana* Reform and the Persistence of Patriarchy," exploring attitudes both for and against continuation of polygamy; book is based on anthropological fieldwork primarily conducted pre-Moudawana reform). The author observes inconsistent spellings of Moudawana, although there is no confusion over what is intended.

157. For a detailed description of the reforms to the Moroccan Personal Status Code, s*ee generally* Katja Zvan Elliott, *Reforming the Moroccan Personal Status Code: A Revolution for Whom?*, 14 MEDITERRANEAN POL. 213 (No. 2, July 2009); Katie Zoglin, *Morocco's Family Code: Improving Equality for Women*, *supra* note 153.

158. *See* Leila Hanafi, *Promoting a Rule of Law Culture in the Middle East and North Africa Region: Reflections from the MENA Rule of Law Conference 2010* (Al Akhawayn Univ., Ifrane, Morocco, June 25–26, 2010), *available at* http://www.mena2010wjp.org/conference/reflections-from-the-mena-conference (last visited March 7, 2012) ("[L]egal education should also be about raising legal literacy and reaching out to the underserved groups, to educate them about the system and to help make it inclusive and accessible, not only financially, but also procedurally.").

159. *See* Buskens, *supra* note 36, at 121 ("Not all Moroccans endorse the new vision according to which women and children have increased rights, while men are forced to accept stricter obligations. In fact, the significance of the reforms largely depends on the way in which judges and '*udul* apply the law in practice. . . . Likewise, it appears that not all judges of the old guard are prepared to apply the new visions espoused by the most recent version of the Mudawwana."). *See also* MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 21 ("Some judges and citizens view the law as inconsistent with Islamic principles or cultural practice, making application of the law problematic.")

160. *Id*. at 121 ("The Moroccan government has started a widespread campaign to clarify the vision of the legislator to the judiciary and to thereby promote the application of the law. The Ministry of Justice organizes courses and meetings all over the country. It has also published an official manual for the application of the law in practice, which provides for the proper interpretation of articles and further legitimises their existence in Islamic terms. A French version of this guide has also been published, and is available on the website of the ministry as well.").

Moroccan Constitution (establishing equal rights for men and women and opposing all forms of discrimination).[161]

The situation limiting full enjoyment of the rights granted by the Moudawana is exacerbated by high levels of illiteracy among women (hampering awareness of such rights, especially in rural areas); a lack of infrastructure (such as roads), making travel to and from remote rural areas difficult, including by "legal aid and non-profit organizations;"[162] and once again, the effect of patriarchal approaches to the law. The status of implementation remains fluid as efforts continue by the government and civil society to overcome long-standing problems.[163]

In addition, because of the high cost of representation combined with widespread poverty and insufficient legal services, the right to counsel and (therefore to justice) has been limited. Extensive court delays have also been the result of overburdened courts.[164] Delays or backlogs also "lead to a lack of public confidence in a country's judiciary and to hesitancy to rely on the judiciary in business planning."[165] Poverty and illiteracy are not necessarily linked in Morocco as there is widespread unemployment among

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161. MOROCCO CONST. art. 19 ("L'homme et la femme jouissent, à égalité, des droits et libertés à caractère civil, politique, économique, social, culturel et environnemental, énoncés dans le présent titre. . . . L'Etat marocain Œuvre à la réalisation de la parité entre les hommes et les femmes. Il est créé, à cet effet, une Autorité pour la parité et la lutte contre toutes formes de discrimination.") [Editors' translation: "Men and women enjoy equal rights and freedoms of a civil, political, economic, social, cultural and environmental nature as stated in this title. . . . The Moroccan State works to achieve parity between men and women. It has created for this purpose a commission to achieve equality and combat all forms of discrimination."].

162. Leila Hanafi & Christine S. Pratt, *Morocco's 2004 Family Code Moudawana: Improving Access to Justice for Women* 18 (publication forthcoming as part of a volume entitled *Women and Knowledge in the Mediterranean Region*, Sept. 2010) (placing 2004 reform in historical context). The authors identify literature written in Arabic and French on women's rights as another problem where the languages of some women are solely Moroccan Arabic and Berber [Amazigh]. *Id*. Still other problems not restricted to the Moudawana reform but affecting its implementation are delays in the courts and corruption. *Id*. at 17, 20. *See also* Norman L. Greene, *Morocco: Beyond King's Speech & Constitutional Reform: An Introduction to Implementing a Vision of an Improved Judiciary in Morocco*, MOROCCO BOARD NEWS SERV. (Apr. 5, 2011), *available at* http://www.moroccoboard.com/news/5176-morocco-beyond-kings-speech-a-constitutional-reform (last visited Mar. 7, 2012).

163. *See* Fatima Sadiqi, *Morocco: Gender at Heart of New Constitution*, COMMON GROUND NEWS SERV. (Sept. 6, 2011), *available at* http://www.commongroundnews.org/article.php?id=30326&lan=en&sp=0 (last visited Mar. 7, 2012).

164. *See* Schemm, *Moroccan justice: sold to highest bidder, supra* note 62. *See also id*. ("To make matters worse, Morocco's 3,000 judges are inundated by cases they say they barely have time to handle. In 2007 there were 2.57 million new cases filed and 3.25 million ongoing, according to a 2010 USAID report on the rule of law in Morocco.").

165. DAM, *supra* note 47, at 104.

university graduates which has been the subject of ongoing demonstrations through 2012 by what has been termed an "unemployed graduates" movement.[166]

A loss in confidence may also lead some to seek alternatives to courts. Disputes will need to be resolved one way or another, and even invoking customary law (or an informal justice system) is another approach to a traditional judicial system. Such informal and customary systems have historically played some role in Morocco.[167] Alternative dispute resolution,

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166. *See* Paul Silverstein, *Weighing Morocco's New Constitution*, MIDDLE E. RES. & INFO. PROJECT (July 5, 2011), *available at* http://www.merip.org/mero/mero070511 (last visited Mar. 7, 2012):

> Ironically, the more educated Moroccans are, the more likely they are to be jobless. Over the last decade, unemployed university graduates (*les diplomés chômeurs*) have staged weekly demonstrations in front of Parliament calling for an open job market that does not simply benefit those with family connections. The graduates' organizational structure, non-violent tactics and militant experience laid the groundwork for the February 20 movement.

See also Paul Schemm, *5 Unemployed Moroccans Set Selves on Fire*, ASSOCIATED PRESS, ABC NEWS, (Jan. 19, 2012), *available at* http://abcnews.go.com/m/story?id=15392114 (last visited Mar. 7, 2012):

> Five unemployed Moroccan men set themselves on fire in the capital Rabat as part of widespread demonstrations in the country over the lack of jobs, especially for university graduates, a rights activist said Thursday. Three were burned badly enough to be hospitalized.
>
> Once rare, self-immolation became a tactic of protest in the Middle East and North Africa ever since a vegetable seller in Tunisia set himself on fire in December 2010 to protest police harassment, setting off an uprising that toppled the government and sparked similar movements elsewhere in the region.
>
> The Moroccans were part of the "unemployed graduates" movement, a loose collection of associations across the country filled with millions of university graduates demanding jobs. The demonstrations are often violently dispersed by police and in some towns and cities have resulted in sustained clashes. While the official unemployment rate is only 9.1 percent nationally, it rises to around 16 percent for graduates.

See also Paul Schemm, *Jobless Moroccan Dies After Setting Himself Afire*, ASSOCIATED PRESS, MIAMI HERALD (Jan. 25, 2012), *available at* http://thechronicleherald.ca/world/55439-jobless-moroccan-dies-after-setting-himself-afire (last visited Mar. 7, 2012).

167. *See*, *e.g.*, MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 12:

> As a response to these inequalities in the formal justice sector, Moroccans have historically used various alternative dispute resolution (ADR) methods, including traditional forms of reconciliation performed by tribal chiefs, arbitration carried out by arbiters selected by parties to the dispute (called *amghar* or *anachram*), and the use of Muslim religious leaders (*imams*) in civil or family disputes. Another form of traditional mediation, largely associated with businesses, involves specially designated individuals from the business community (*amine*). These forms of ADR preceded the current judicial system, and even though dispute referrals to the courts have become more frequent, traditional and local

such as mediation and arbitration, is another option,[168] but the reason for selecting such resolution should not be that the courts are dysfunctional, but rather that it is preferred because of its inherent advantages.

Thus improving access to justice includes diverse subjects, such as alleviating poverty (more in the domain of development economics);[169] improving transportation (including to courts); addressing illiteracy (a major challenge itself for professional educators); and in some cases, changing culture as well as expanding legal services. Obviously, these are some of the most troublesome social and economic problems; and although they may neatly be identified, they are not simple items to resolve. The combined multi-disciplinary efforts of government, civil society, and individuals are required, and with respect to government, a commitment to budget resources for this purpose.

In addition, improving access to justice is of limited benefit if there is no justice because of corruption or of a lack of fair and impartial courts for other reasons, in whole or in part. Under those circumstances, efforts may be spent on improving access, but the purpose of achieving such access—access to a fair and impartial justice system—is lost.

Finally, it is conceded that it would be neater if top-down legal reforms handed down by the national government would fix things, if declaring the importance of judicial independence and impartiality would bring change about, if anti-corruption laws were self-executing, and if problems otherwise fit into neat categories susceptible to ready solutions. Some solutions are long-term, and reasonable patience and persistence are

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customary forms of resolution still play a role. ADR is provided for in the law and while some efforts are being made to try to explore what role it can play, it is being underutilized.

Cf. Buskens, *supra* note 36, at 130 ("Under the influence of French and Spanish protectorate rule, state law gained primacy, while Islamic norms and customary law were restricted to a subordinate position within state law. . . . After independence the government further limited the influence of Islamic law and virtually denied the existence of customary law by largely excluding it from the official state system.") (citation omitted).

168. *See* Leila Hanafi, *Improving the Legal Infrastructure in the Middle East and North Africa through Alternative Dispute Resolution* 509–10 (Conf. Paper, UAE Univ., Apr. 23 –25, 2012), *available at* http://slconf.uaeu.ac.ae/images/ورمتؤم%2019%20%20الرامثتس/part%204%20E/19.pdf (last visited Mar. 7, 2012) ("Historically, numerous forms of alternative dispute resolution have been in use in Morocco. . . . While recourse to the courts has become increasingly common and frequent in modern day Morocco, informal networks and local commercial customs continue to play an important role in commercial dispute resolution."). *Id.* at 509 ("Morocco showcases how arbitration and mediation are being used as positive means of resolving disputes and seeking justice remedies."). *See also* Electronic Transactions, Research Conference (2012), *available at* http://slconf.uaeu.ac.ae/19/english_research.asp (last visited Mar. 7, 2012) (listing all conference papers, including Ms. Hanafi's and others).

169. *See* WILLIAM EASTERLY, *supra* note 6; WILLIAM EASTERLY, THE ELUSIVE QUEST FOR GROWTH (2002).

required. Nonetheless, given the reported scope of the problems, impatience in Morocco is understandable.

IX. THE ROLE OF CONSTITUTIONAL REFORM IN ENHANCING PUBLIC CONFIDENCE IN THE JUDICIARY

> *We all know there are other countries where, for various reasons, the public lacks confidence in the judiciary. . . . And where those things have happened, I think there have been bad results for the people who live in the country, not just for the judges, not just for the lawyers, but for the ordinary man and woman who lives in the country.*[170] (U.S. Supreme Court Justice Stephen Breyer)

An important purpose of reform is not only to improve the reality of impartial justice, but also to enhance the public perception of justice. Public confidence that judges will act impartially so as to preserve the dignity of all participants in the Moroccan legal system is essential to the perception of justice. Even small lapses in isolated cases may jolt public confidence, and given the widespread news reports, do so for a judicial system already under severe criticism. It is axiomatic that if the courts are viewed as corrupt or biased, their use will be avoided, with many attendant negative consequences, including, as the King has observed, on economic development;[171] and it "feeds into" public "anger and desperation."[172]

For example, a number of Moroccan and Moroccan-American colleagues have stressed how concern that the courts will not treat them fairly keeps them from using them. In some cases, the author was informed, people are afraid that, because of corruption and other failures by the courts, they "could go to the police station as a plaintiff and emerge as the defendant." In other words, one's complaint against another for a crime may get distorted into retaliation against oneself. People also fear a lack of fair treatment where their adversary is rich or powerful.[173] Under these circumstances, some ask, why bother with the courts?

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170. Television Interview by PBS of U.S. Supreme Court Justices Stephen Breyer and Anthony Kennedy (1999), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html (last visited Mar. 7, 2012) (quoting United States Supreme Court Justice Stephen Breyer).

171. *Accord* DAM, *supra* note 47, at 93–94; *see also Perspectives from the Rule of Law*, *supra* note 13, at 69 (U.S. domestic context).

172. JOSEPH BRAUDE, THE HONORED DEAD 190 (2011) (also observing that such anger and desperation fuels extremism).

173. *See* MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 12 ("In general, justice in Morocco is perceived by the public to be more of a matter of access to power rather [than] the function

The constitutional reforms are a significant national statement in favor of a good judicial system for Morocco. The government needs to follow through on its promises in all their aspects, among other things, through establishing impartiality, eliminating corruption, and increasing access to justice, including addressing court delay.[174] Initial measures to be taken might include enhanced corruption investigations and prosecutions of those who would corrupt the judiciary, and for lesser offenses, judicial disciplinary and disqualification procedures, all with appropriate protections for witnesses. Particular targets might be telephone justice and other improper efforts to influence the judge, such as those referenced in Article 109 of the Moroccan Constitution.

The success of the new reforms in the establishment of fair and impartial courts, and if so, how long it will take, is unclear.[175] But implementation of the reforms must become a priority (including a budgetary priority), combining enforcement, education, and more.

X. CONCLUSION

> *[N]o degree of improvement in substantive law—even world "best practice' substantive law—will bring the rule of law to a country that does not have effective enforcement. A sound judiciary is key to enforcement. . . . One conclusion widely agreed upon, not just in the economic literature but also among lawyers and legal scholars, is therefore that the judiciary is a vital factor in the rule of law and more broadly in economic development.*[176]

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of an independent and impartial rule of law system. . . . The public in general lack confidence in and respect for the judicial system.").

174. Of course, increasing access may have the incidental effect of increased court delays under certain circumstances. *See* DAM, *supra* note 47, at 105 (referencing Brazil, where "unfettered access for everyone had produced, not surprisingly, access for no one.").

175. By way of comparison, past international proposals for Morocco have projected relatively long-range proposals for judicial reform, with time horizons varying for some measures of from one to three years and for others four to ten years; and some past proposals in Morocco have apparently been inadequate in addressing the problems. Whether those reforms are appropriate are beyond the scope of this article. *See* MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 30 *et seq*. (targeting certain aspects of justice system reform.) Also, the "Ministry of Justice reportedly initiated a reform effort in 2000" whose objectives included "increasing the number of corruption cases" and assuring "ethical conduct of the judiciary." *Id*. at 44. Yet now in 2012, despite the 2000 reform effort and whatever (if any) effects it had, the issues of corruption and unethical judicial conduct have still merited constitutional reform and widespread concern over the lack of honest and impartial justice.

176. Dam, *supra* note 47 at 93.

King Mohammed VI stated a plan to implement his March 2011 speech, well aware that one does not achieve the ideals set forth by speeches alone. The King's speech mentioned a "comprehensive package" of constitutional amendments to be proposed and added, "[c]onsistent with a standard practice of resorting to a participatory approach in all the major reforms we have introduced so far, I have decided to set up an ad hoc committee for the revision of the Constitution."[177] In subsequent months, this in fact occurred, and the constitutional reforms were overwhelmingly approved by the July 1, 2011 Moroccan referendum, thus avoiding much of the unrest embroiling other parts of the region during the Arab Spring.[178]

Although the author's earlier article on this subject observed that the King's speech focused on a level of detail unlikely to be the subject of constitutional provisions, those constitutional provisions ultimately were quite specific in many instances. Such measures and legislation that follows may help improve Moroccan justice, so long as the government and the public are committed to their implementation. As the King has conceded, constitutional reform is only a beginning:

> As perfect as it may be, a constitution is never an end in itself, but rather a means for the establishment of democratic institutions. The latter require reforms and political overhauling in which all stakeholders should take part, so as to achieve our shared ambition, namely to promote development and enable all our citizens to lead a dignified life.[179]

Current questions thus include—now that the constitutional reform implemented the king's speech—what will implement the constitutional reform? The reform is promising, but not self-executing.[180]

Judicial reform requires a multi-level approach, from increasing independence to ensuring accountability and freedom from interference. The goal, if people are so inclined, is to establish an impartial judicial system, and whether that goal will be obtained or retained in Morocco or anywhere else, including in the United States, is an ongoing struggle. Judicial reform is ambitious, but reform sometimes must be bold. To quote

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177. His Majesty King Mohammed VI, Speech at Rabat, Morocco, MAP (Mar. 9, 2011), http://www.map.ma/eng/sections/speeches/hm_the_king_addresse_6/view (last visited Mar. 6, 2012).

178. The adequacy of the procedures for developing the constitutional reforms is beyond the scope of this article.

179. *Morocco New Constitution*, *supra* note 141.

180. Silverstein, *supra* note 28 ("But such a new Morocco does not simply come into being because 98.5 percent of a possible majority of the electorate votes 'yes' to an eloquent governing document promulgated by the 'commander of the faithful.'").

Stephen Sondheim from the commencement speech in his musical *Merrily We Roll Along*—although the differences between commencement speeches in Broadway musicals and governing are conceded—boldness is sometimes the best way: "My final thought is a simple but mighty one: it is the obligation we have been given. It is to not turn out the same. It is to grow, to accomplish, to change the world."[181]

Finally, protecting and enhancing the judicial branch of government is well worth the effort on many levels, including because a strong judiciary also may serve to protect against tyranny, to safeguard human rights, and otherwise to enhance the rule of law. The *Bangalore Principles of Judicial Conduct* thus observes that "the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice."[182]

A new federal district court judge in the United States set the tone for how much judges can do to protect liberty in his induction speech (just after being sworn in as judge) in November 2011, a speech which bears further study and repetition. As the judge stated, referencing the famous Federalist papers[183] leading up to the U.S. Constitution, which observed that "the judiciary" was "the least dangerous branch [of government]":

> [E]nemies of the rule of law have and will continue to find the judges of this court more than dangerous enough after the horrors of nineteenth century slavery and twentieth century holocausts. All civilized men and women of the law now declare that when it comes to confronting evil, from Auschwitz and Dachau to Darfur

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181. Stephen Sondheim, Commencement Speech to the Hills of Tomorrow (Finale) Lyrics, ALL MUSICALS (2012), *available at* http://www.allmusicals.com/lyrics/merrilywerollalong/hillsoftomorrowfinale.htm (last visited Mar. 7, 2012).

182. *Bangalore Principles of Judicial Conduct*, *supra* note 7, ¶ 2.

183. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *available at* http://www.constitution.org/fed/federa78.htm (last visited Mar. 7, 2012):

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

> and Rwanda, never again will the law stand aside in a shameful silence. And so I have a word of friendly advice for those who might be tempted to challenge the rule of law: not in this court, not in our house, not on my watch.[184]

The judge's speech naturally leads to a question and a challenge to all countries, including Morocco: If you do not have a fair and impartial judicial system, who will protect you in difficult times?[185] Who, if anyone, has done so in the past?[186] And if no one does, what happens *then*?

The new Moroccan constitutional reforms are an important start—and an opportunity to do more. Additional steps might include more extensive assessments in Morocco by the Moroccan government, civil society or others to come up with even more specific recommendations in light of the reforms. For example, Morocco's Minister of Justice has committed to organizing a national dialogue working with various stakeholders to develop judicial reform proposals and presumably seek their implementation, a commission has been appointed to address the effort, and

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184. William F. Kuntz, United States District Judge, Induction Speech for the United States District Court for the Eastern District of New York, Brooklyn, N.Y. (Nov. 9, 2011) (copy on file with the author and the law review). The speech is also available at RUTHFULLY YOURS: THE RIGHT NEWS FRONT AND CENTER, (Nov. 15, 2011), http://www.ruthfullyyours.com/ 2011/11/15/william-kuntz-ii-united-states-district-court-judge-please-read-this-inspiring-speech-by-a-great-american/ (last visited Mar. 7, 2012).

185. *See*, *e.g.*, Alison L. McManus, JADALIYYA, April 26, 2012, http://www.jadaliyya.com/pages/index/5252/el-haqed_examining-moroccos-judicial-reform-in-201 ("Until the monarch's power is diminished and authority is given to an independent judiciary, political dissent in Morocco remains a risky undertaking."); Edward Wong, *Missing Chinese Lawyer Said to Be in Remote Prison*, N.Y. TIMES, Jan. 2, 2012, at A9 ("Scholars of China's legal system say security forces are acting with growing impunity and increasingly do not feel constrained by the law. . . . [S]ecurity forces have regularly detained intellectuals, lawyers, and rights defenders without giving any legal cause for doing so. The government is now considering revising its criminal procedure law to effectively legalize secret detentions, the scholars say."). *See also* Norman L. Greene, *International Law Weekend Panel Examines Access to Justice in the Middle East and North Africa Before and After the Arab Spring*, 20 ILSA Q. 22, 22–24 (2011) (referencing, among other things, Morocco's own history of human rights abuses, leading to the establishment of the 2004–2005 Equity and Reconciliation Commission in Morocco); Buskens, *supra* note 36, at 102 ("The first twenty-five years of King Hassan's rule are known as 'the years of lead'. They were characterized by serious violations of human rights and elimination of political adversaries.").

186. *See* James N. Sater, *Reforming the Rule of Law in Morocco: Multiple Meanings and Problematic Realities*, 14 MEDITERRANEAN POL. 181, 182 (No. 2, July 2009) ('First, since independence, the system of justice has been an instrument of state power. The large number of serious human rights abuses that were committed by police and other auxiliary forces especially under Hassan II remained unchecked by the system of justice.").

the work is underway.[187] There is reason to believe from past and present unfolding events that the reform opportunity will be taken, and if not, that the Moroccan population will be watching closely.[188]

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187. *See*, *e.g.*, Souhail Karam, *Interview—Morocco Government to Seek Royal Pardon for Jailed Activists*, TRUSTMEDIA (Jan. 5, 2012), *available at* http://www.trust.org/trustmedia/news/interview-morocco-govt-to-seek-royal-pardon-for-jailed-activists (last visited Mar. 7, 2012), *and* http://www.canada.com/entertainment/Jailed+activists+Morocco+royal+pardons/5952290/story.html (last visited Mar. 7, 2012) ("Mustafa Ramid, minister of justice and public freedoms, also said in an interview he planned to organise a national debate involving judges, the bar and civil society groups to help draft proposals for the reform of the judiciary."). *See also id*.:

> The judiciary should gain independence, especially from the security apparatus, under charter reforms crafted last year by the Arab world's longest-serving monarchy to pre-empt a popular revolt like those that have ended the rule of four Arab leaders. . . . As well as being accused of widespread corruption, Morocco's justice system has a reputation for taking its cue from the authorities, especially when it comes to verdicts in cases of graft or Islamic militancy. "We should seek to grant judges all the means . . . to ensure the highest level of integrity," Ramid said.

With respect to the national debate on the judiciary, *see National dialogue on judiciary reform to last two weeks with visits to courts in 21 cities-Minister,* MOROCCO WORLD NEWS, April 6. 2012, *available at* http://moroccoworldnews.com/2012/04/34122/national-dialogue-on-judiciary-reform-to-last-two-weeks-with-visits-to-courts-in-21-cities-minister/ :

> Ramid told the weekly government council that the national dialogue on the judiciary reform will proceed through gathering proposals and paying visits to courts in 21 cities.
>
> Ramid added that the dialogue also includes the holding of workshops and meetings to examine issues pertaining to the independence of the judiciary, the facilitation of access to justice, the modernization of the justice administration and the reinforcement of courts' infrastructure.

See also L'Instance chargée de la réforme de la justice entame ses travaux avec la bénédiction royale [Editors' translation: *The Commission responsible for justice reform begins its work with the royal blessing*], PANORAMAROC, May 9, 2012, *available at* http://www.panoramaroc.ma/fr/linstance-chargee-de-la-reforme-de-la-justice-entame-ses-travaux-avec-la-benediction-royale/ (last visited June 4, 2012) (describing justice reform commission members and their affiliations). *But see* Associated Press, *Morocco's judges demand greater* independence, AL ARABIYA NEWS, May 15, 2012, *available at* http://www.alarabiya.net/articles/2012/05/15/214343.html (last visited May 27. 2012) (demonstration by Judges' Club in favor of judicial independence; none of the members is appointed to justice reform commission):

> On May 8 [, 2012], the king nominated a 40-person commission to begin the dialogue on judicial reform. No member of the Judges' Club was named to the commission.
>
> "It is very good that a discussion has been opened on this difficult question. But I ask why no one from our association was included in this commission," Aziz said to The Associated Press.

See also Youssef Jalili, *Dernière chance pour la réforme de la justice*, May 11, 2012, PANORAMAROC, *available at http://www.panoramaroc.ma/fr/derniere-chance-pour-la-reforme-de-la-*

Even with the reforms set forth in this article, Morocco may not magically have a model internationally-renowned judicial system. The goal is not to use nationally specific models to make the Moroccan judicial system resemble another's.[189] However, with the implementation of the reforms in its constitution and otherwise, Morocco may and should advance towards achieving a better and steadily improving version of its own.[190]

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justice-par-youssef-jajili/ [Editors' translation of title: *Last chance to reform justice.*] (last visited June 4, 2012].

188. With respect to citizen interest in judicial reform, *see* Siham Ali, *Justice Reform Begins in Morocco: A new government panel aims to protect judicial independence and modernise the courts*, MAGHREBIA, May 20, 2012, *available* at http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2012/05/20/feature-01 (last visited June 10, 2012):

> Citizens are eager to see the government implement its promises. "For years, we've been hearing about reforms, but no change has taken place," social worker Chabli Mounia told Magharebia.
>
> "Hopefully this project will work, because people really suffer if they have to deal with the courts," she said.
>
> "There must be safeguards in place to ensure that the citizen can have confidence in justice," Mounia added.

With respect to the importance for business of implementing the judicial reforms in the constitution, *see also* Interview, Author and Adil Naji, Moroccan-American businessman, who has businesses in both the United States and Morocco, June 21, 2012 (quoting Mr. Naji):

> The struggle for judicial improvement through the constitutional reforms—and undoubtedly from the coming recommendations to implement them—is essential for business development in Morocco. For the country to thrive commercially and prosper financially in the MENA region, many things must change, and some will take some time to address. But an improved judicial system, such as the reforms now require, should certainly be one of the first.

189. *See also* Carolyn A. Dubay, *supra* note 61 ("This is not to suggest that movement towards judicial independence in Morocco must resemble the structure of judicial independence adopted in western democracies.").

190. For a discussion of the need for implementation in addition to general support for the constitutional reforms among public officials, *see* Larbi Arbaoui, *Mr. Benkirane's Coalition Government: Intentions Versus Reality*, MOROCCO WORLD NEWS, May 4, 2012, *available at* http://moroccoworldnews.com/2012/05/38058/mr-benkiranes-coalition-government-intentions-versus-reality/ (last visited May 4, 2012).

> All the ministers of the new government have expressed more than once through different public media outlets that they are ready to do all that it takes to put the statements of the new constitution into practice and to abide by its guidelines. But unfortunately, press releases and good intentions don't make politics. In the absence of a strategic program and a clear future vision, all that remains is just talk. Politics is not manufactured by an aura of hopes as it is not based on aspirations. One swallow doesn't make spring.

See also Moha Ennaji, *The Arab Spring in Morocco: Reform Without Regime Change,* QUANTARA DE, Nov. 16, 2011, *available at* http://en.qantara.de/Reform-without-Regime-Change/17793c39/index.html (last visited Mar. 12, 2012):

Morocco's various political parties, civil society organisations and media believe that the new constitution will have far-reaching results, but will take much work to ensure constitutional changes be implemented effectively and widely. They have faith that the King will embrace this challenge in consonance with the February 20 movement's call for the rule of law, the values of citizenship, freedom, social justice and democracy.

MOUDAWANA AND WOMEN'S RIGHTS IN MOROCCO: BALANCING NATIONAL AND INTERNATIONAL LAW

Leila Hanafi

I. INTRODUCTION

Morocco's 2004 *Moudawana* (family code) is undoubtedly a progressive piece of legislation for women in Morocco. Two aspects of the family law make it novel. First, it admits the principle of equality in marriage, and does this by redefining the notion of authority in the family within an Islamic framework. Secondly, the reforms were achieved after decades of Moroccan women's activism for better access to justice. These two features distinguish the 2004 Moroccan Family Code from its predecessors in Middle East and North African countries. Previous reforms either were not so comprehensive (as in Egypt and elsewhere) or they were granted from above (as in Tunisia), or accomplished by putting the Islamic framework aside (as in Turkey).[1]

1. Ziba Mir-Hosseini, *Islam and Gender Justice*, *in* 5 VOICES OF ISLAM 85–113 (Vincent Cornell & Omid Safi eds., 2007).

This paper seeks to assess women's access to justice in Morocco through the lens of family law since the *Moudawana* was passed in 2004, as well as provide recommendations to increase women's benefits from it through improving the current mechanisms that provide access to justice to women. The paper examines whether some women experience access to justice differently than other women because of how the reforms are written and/or executed in practice, with a main objective focusing on discrepancies of women's access to justice between urban and rural areas where Berber indigenous populations are highly concentrated. The paper's legal framework will analyze national and international laws that apply to the right of women to access adequate and effective remedies related to family law since the 2004 reforms were passed, while also drawing comparisons to the past amendments of the *Moudawana*. This is, particularly, timely as Morocco reformed its Constitution in summer, 2011, and for the first time the new Constitution declares in its preamble the country's adherence to human rights as recognized universally, as well as recognizes the preeminence of international law over national legislation, as clearly laid out in Article 11 of the new text.[2]

The paper's legal framework is focused on international human rights law standards that apply to women's right to access justice through effective remedies as well under Morocco's national law, especially the *Moudawana*. In terms of analyzing international commitments, I will refer to notable international and regional instruments, namely the United Nations (U.N.) conventions on human rights: the two International Covenants on Civil and Political Rights (ICCPR), on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified respectively in 1979 and 1993. The Moudawana aspects that I will address in this paper are, mainly, related to: celebration of marriage and its dissolution (divorce) as these are the two key areas where reforms were introduced.

My paper is divided into four sections. Section I provides a historical overview of the pre–reform era of family law that existed in Morocco. Section II analyzes women's right of access to justice under national and international law instruments. Section III examines barriers to access to justice for women in Morocco, through the lens of discrimination. Section IV presents my key recommendations and conclusions to advance women's access to justice under the *Moudawana*.

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2. *See generally* MOROCCO CONST., July 2011, ch. IV, art. 11 (stipulating that the primacy of the international conventions duly ratified by the Kingdom over domestic laws).

II. PRE-REFORM ERA OF FAMILY LAW IN MOROCCO

Before analyzing the 2004 *Moudawana*, the following section outlines a historical overview of the pre-reform of the family law that existed in Morocco. The selection of historical events is by no means extensive, but nonetheless, represents events that are deemed important to the understanding of how the current *Moudawana* surfaced to being.

The *Moudawana* is "a legal document that governs the rights and obligations of families in Morocco,"[3] and "regulates the rights and duties pertaining to marriage, divorce, the custody of children, alimony and inheritance."[4] The *Moudawana* was modeled after the Tunisian family law code. However, it was much more conservative than the Tunisian family law code, and "followed the prescriptions of classical Maliki jurisprudence on most points."[5]

The history of the calls for reform to the *Moudawana* stem back to the date of its codification. As early as 1965, the government recognized the "shortcomings in the family law, such as in its rules concerning marriage guardianship and maintenance,"[6] and subsequently, established an official commission in attempt to find ways to amend family law. The first strong wave of calls for reforms occurred in 1982, although it was not until the 1990s that calls for reform became a heated debate.[7]

The 1993 reforms, however, were not substantial and did not diverge much from the classical Islamic *Maliki* tradition. Under the 1993 Moroccan personal status laws, the husband enjoyed a unilateral and unconditional right to divorce (repudiate) his wife. Men were granted sole right to repudiation, and the right to revoke the repudiation at will within three months. A husband could exercise repudiation three times and revoke it two times. If a wife is summoned to court and does not attend, and her husband insists on the repudiation, her presence is immaterial.[8] Women, in

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3. Jacqueline Powers, *Working Women: An Examination of Family Dynamics and the Law on Financial Maintenance in Morocco*, U.S. FULBRIGHT COMM'N, Dec. 14, 2009, at 18.

4. Katja Zvan Elliott, *Reforming the Moroccan Personal Status Code: A Revolution for Whom*? 14 MEDITERRANEAN POL. 213, 213 (2009).

5. Leon Buskens, *Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere*, 10 ISLAMIC L. & SOCIETY 73, 73 (2003).

6. *Id*. at 77.

7. Telephone Interview by Leila Hanafi with Nadia Serhani, Women's Rights Activist (Oct. 15, 2011).

8. Law No. 1-57-343 of Nov. 22, 1957, Bulletin Officiel [Official Bulletin], May 23, 1958 (Morocco), *amended by* Law No. 1-93-347 of Sept. 10, 1993, Bulletin Officiel [Official Bulletin], Dec. 1, 1993 (Morocco). For a French translation, *see* FRANCOIS-PAUL BLANC & RABHA ZEIDGUY,

contrast, had much more limited ability to initiate divorce. Unlike men, women could not divorce their husbands without specific grounds: her husband's lack of financial support, his unjustifiable prolonged absence, his suffering from an incurable disease, and his abstinence from sexual relations for more than four months, or his doing her harm.[9] In 2001, Morocco's new King, Mohamed VI, formed a women's rights commission to discuss the 1993 *Moudawana*. Shortly afterwards, revisions were underway.[10]

III. ANALYSIS OF WOMEN'S' RIGHT TO ACCESS TO JUSTICE UNDER NATIONAL AND INTERNATIONAL LAW

This section examines the legal framework that applies to women's right to access justice through the following: Morocco's national laws pronounced in the 2004 *Moudawana* and the 2011 Constitution. Relevant international and regional human rights law standards contained in the Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, as well as regional human rights charters through the Arab Charter on Human Rights. These texts give principal importance to women's right to participate in society and stress the commitment of States to this right without discrimination.

A. 2004 Moudawana and Other National Laws

Several important rights were secured for Moroccan women via the 2004 *Moudawana,* including the right to self-guardianship, the right to divorce, and the right to child custody.[11] Additionally, sexual harassment was made punishable by law under the revised *Moudawana*. The age of marriage for girls was raised from fifteen to eighteen years of age, and girls were no longer required to have a *male guardian* approve their marriage. The reforms also abolished the legal requirement of a wife's obedience to her husband, and stipulated that both the husband and the wife are joint

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MOUDAWANA: CODE DE STATUT PERSONEL ET DES SUCCESSIONS [CODE OF PERSONAL STATUS AND SUCCESSIONS] (1994).

9. Michel Faucompré, *L'Islam et les Femmes au Maroc*? [*Islam and Women in Morrocco*], PARIS: REVUE DU MAGHREB [REVIEW MAGHREB] 80 (2004) (Fr.).

10. *See generally* Beau Nicolas et Graciet Catherine, *Quand le Maroc SeraIislamiste* [*When Morocco Will be Islamist*], LA DÉCOUVERTE [THE DISCOVERY] (2006) (Fr.).

11. Fatima Sadiqi, *Five Years After the New Morccan Family Law*, 590 UNIV. OF FEZ GENDER STUD. J. 2, 2 (2010).

heads of the household, however, the husband is still legally required to financially support his wife in accordance with Islamic Fiqh (teachings).[12]

While the revised personal status code did not completely abolish polygamy, women could stipulate clauses into their marriage contracts, such as a "monogamy clause," which can legally forbid their husbands from taking another wife. Men must obtain judicial authorization to take a second wife, and they must prove to the judge that they can financially care for all their wives and children. Importantly, "the first wife must be present when the husband appears before the judge to seek authorization."[13] The revised personal status code also did not completely abolish unilateral repudiation of a wife by her husband, but the practice of repudiation was placed under judicial oversight.

In the area of gender-based violence, notable progress has been made. In urban areas, the *Moudawana* has created a system for dealing effectively and efficiently with domestic violence and increased the number of women filing domestic violence complaints in the court systems.[14] Also, the reform of the Code of Criminal Procedure (CCP) helped in this regard. Article 336 of the CCP, which previously only allowed women to take civil action against their husbands with prior authorization from the court, was changed, enabling women equal access to the courts.[15] In 2003, certain articles within the penal code were also altered to impose heavier penalties on a spouse who injures the other spouse. Article 446 of the penal code was also redrafted to authorize health care workers to waive professional confidentiality rules in cases of suspected violence between spouses or gender-based violence, and to report such incidents to judicial or administrative authorities.[16]

Gradually, the response to these domestic violence claims has proven to be satisfactory. In urban areas, a significant increase was cited in

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12. *See generally* FAMILY CODE (Morocco), *translated in The Moroccan Family Code* (Moudawana), GLOBAL RTS. (Feb. 5, 2004), http://www.globalrights.org/site/DocServer/ Moudawana-English_Translation.pdf (last visited Mar. 14, 2012).

13. Beth Malchiodi, *Assessing the Impact of the 2004 Moudawana on Women's Rights in Morocco*, 2008 FULBRIGHT-HAYS SUMMER SEMINARS ABROAD MOROCCO (2008), http://www.outreachworld.org/Files/u_texas/Women_and_family_law_Morocco_curriculum.pdf. (last visited Mar. 14, 2012).

14. *See generally* Benradi Khachani Malika, *Les Nouvelles Révisions du Code de Statut Personnel, La Permanence de La Tradition Juridique Islamique* [*New Revisions of the Code of Personal Status, the Permanence of the Islamic Legal Tradition*] Malékite, APPROCHES (2008) (Fr.).

15. MOROCCO CRIM. CODE OF PROC., art. 336 (Fr.), June 5, 1963, *available at* http://adala.justice.gov.ma/production/legislation/fr/penal/Code%20Penal.htm (last visited Mar. 14, 2012).

16. *Id*. art. 446.

immediate response to domestic violence issues due to provisions in the *Moudawana* that were never an option prior to 2004. For example, the *Moudawana* has created what would be the equivalent to a restraining order in the American court system. In 2007, the Ministry of Social Development, Family, and Solidarity began publishing information and official data on violence against women.[17] *The Ending Violence against Women: From Words to Action*[18] which was released by the United Nations in 2006 illustrated an important fact about violence against women that sparked States attention to this issue—that violence stops women from fulfilling their potential, restricts economic growth and undermines development. In Morocco, the Government had pressing obligations to address violence against women, especially given its consequences on economic welfare of communities where violence occurs. As rightly articulated by international women's rights expert Susan Ross Deller, "Where women thrive, communities thrive."[19]

B. Constitutional Equality

Even though all of Morocco's post independence constitutions have stressed the principle of equality between men and women, it was not implemented in reality.[20] In the concluding observations of CEDAW's 2003 Report to Morocco, there was a clear indication that the Constitution does not "explicitly" define the principle of equality between women and men or of gender discrimination.[21] However, in Morocco's recently introduced Constitution, women's rights catapulted to the top of the agenda. The Constitution institutionalizes gender equality by encouraging the creation of women's rights organizations and giving women more legal rights including the right to maintain custody over their children even if they remarry.[22]

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17. Sadiqi, *supra* note 11, at 7.

18. U.N. Secretary-General, Ending Violence against Women: From Words to Action (Oct. 9, 2006), http://www.un.org/womenwatch/daw/vaw/launch/english/v.a.w-exeE-use.pdf (last visited Mar. 14, 2012).

19. *See generally* SUSAN DELLER ROSS, WOMEN'S HUMAN RIGHTS: THE INTERNATIONAL AND COMPARATIVE LAW CASEBOOK (2008).

20. MORROCO CONST. 1962, § 2, art. 3.

21. Convention on the Elimination of All Forms of Discrimination against Women's Committee, June. 3–July 18, 2003, 58 U.N.T.S. 101, 109–117.

22. MOROCCO CONST. 2011, § 5, art. 2 (stating that "primacy of the international conventions duly ratified by the Kingdom over domestic laws.").

IV. INTERNATIONAL LAW INSTRUMENTS

In 2000, gender equality and women's empowerment were adopted by the United Nations as the third of eight Millennium Development Goals (MDGs)[23] aimed at combating poverty and enhancing human development. This is especially important in Morocco where women comprise more than 50% of the population, redefine their roles, and forge new pathways of participation and leadership.[24] Morocco's low ranking on the United Nations Development Program (UNDP) Human Development Index in 2003 (124th position) came as a wake-up call to many in the country.[25] As a result, social and human development catapulted to the center of the Government's development agenda. Today, the advances Morocco has achieved since the millennium have contributed largely to improving many human development indicators, especially for women.[26]

Even though Morocco is a party to several international law conventions and acknowledges the precedence of international instruments over national legislation, the CEDAW Committee registered several obstacles in its evaluation of Morocco's family law progress in 2003 because of discriminatory provisions in the Family Code. These reservations related to legal and constitutional equality between men and women, equality within the family, the right of women to pass on their nationality to their foreign-born spouses and children, and women's right to freedom of movement.

As such, a decision to formally lift the reservations to CEDAW was considered to be an immensely important part of Morocco's efforts to improve and strengthen women's rights. A few years later, King Mohammed VI announced during a speech on December 10th, 2008, the sixtieth anniversary of the Universal Declaration of Human Rights, that Morocco retracts its reservations on the Convention. The King expressed that the reservations become "obsolete due to the advanced legislation that has been adopted by our country."[27] The United Nations and the international human rights community expressed satisfaction with the

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23. U.N. Millennium Developmental Goals, UN.ORG, http://www.un.org/millenniumgoals/ (last visited Mar. 14, 2012).

24. *See generally* U.N. Dev. Programme [UNPD], Regional Bureau for Arab States, Arab Human Development Report 2004: Towards Freedom in the Arab World (2004).

25. U.N. Stat. Div., Millennium Developmental Indicators Database, http://millenniumindicators.un.org (last visited Mar. 14, 2012).

26. World Bank, *Gender and Development in the Middle East and North Africa* [*MENA*]*: Women in the Public Sphere*, at xii–xiii, MENA Doc. 28115 (2004).

27. WOMEN'S LEARNING P'SHIP, *Morocco Lifts CEDAW Reservations* (2011), www.learningpartnership.org (last visited Mar. 14, 2012).

King's move which signaled Morocco's desire to be forward-looking in upholding women's rights.

For example, one of the CEDAW reservations, Article 9 dealing with the right of a mother to transmit her citizenship to her children, was abandoned in 2007.[28] However, there are still apparent delays in lifting all reservations and arrangements need to be put in place to enforce these changes, at the domestic level. Today, some of the reservations still find their parallels in laws and traditional practices, which reinforce gender discrimination, with respect to matters of marriage and divorce.

For instance, Article 2 of CEDAW urges States to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.[29] But in Morocco today, even though the law sets the minimum age for marriage at eighteen for males and females, it gives judge's discretion to waive the minimum age and allow minors to be married. Because girls tend to be married to far older men and often are married when they are minors, this discretion given to judges has a disproportionate impact on young girls.[30] Lifting this reservation and others will provide a legal framework for starting to address discriminatory laws and practices such as this one. It is important to note that ratifying CEDAW does not have a concrete impact on the situation of women when it has not been accompanied by the harmonization of national legislation with the spirit of CEDAW provisions.

Regarding the CEDAW Optional Protocol, Morocco expects to ratify it before the end of 2011 in its efforts to curtail gender discrimination.[31] The decision of ratification was welcomed by human rights and women's rights organizations in Morocco who consider the protocol to be an essential instrument for the implementation of CEDAW and the fight against women's rights violations.[32] By announcing its decision to ratify the Optional Protocol to CEDAW, Morocco is also expected to set a great example in the Arab region for countries which have yet to ratify it.

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28. *See generally* FAM. CODE (Morocco).

29. Convention on the Elimination of All Forms of Discrimination against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

30. *See generally* FAM.CODE (Morocco).

31. Convention on the Elimination of All Forms of Discrimination against Women Optional Protocol, UN.ORG, http://www.un.org /womenwatch/daw/cedaw/protocol/ (last visited March 14, 2012).

32. The author's personal knowledge and experiences seminar on Women and Democratic Transitions in the MENA region where Moroccan Minister of Women's Affairs, Nouzha Skalli announced Morocco's expected ratification of CEDAW's Optional Protocol, May 20, 2011.

In concert with its obligations under the ICESCR, Morocco has also sought to reform its labor laws, and in 2003 the principle of non-discrimination between men and women was codified in Morocco's new Labor Code, including such measures as equality in pay, access to employment, and promotions.[33]

V. REGIONAL CHARTERS

The Arab League has espoused a set of basic principles and obligations pertaining to the right of access to adequate judicial protection. The Arab Charter on Human Rights was adopted by the Council of the League of Arab States on May 22, 2004, and entered into force in 2008 after receiving seven ratifications. The Charter claims to affirm the principles contained in the U.N. Charter, the Universal Declaration of Human Rights, and the International Covenants on Human Rights.[34]

The Charter ostensibly condemns discrimination against women, as pronounced in Article 2:

> Each State Party to the present Charter undertakes to ensure to all individuals within its territory and subject to its Jurisdiction the right to enjoy all the rights and freedoms recognized herein, without any distinction on grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status and without any discrimination between men and women, [and ensures] the right of all persons to be equal before the law.[35]

However, the protection of these rights is not reinforced by the States' obligation to respect the rights and obligations recognized in the Charter, since it is not binding. Indeed, the Charter is far from becoming a binding treaty since nearly half of the members of the Arab League have yet to ratify the Charter, as it does not recognize many important rights that are consistent with international human rights law as reflected in treaties, jurisprudence, and opinions of U.N. expert bodies.[36]

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33. Law No. 65-99 of Sept. 11, 2003 (Morocco) Bulletin Officiel [Official Bulletin], *available at* http://www.justice.gov.ma/ar/legislation/legislation_.aspx?ty=2&id_l=57 (last visited Mar. 14, 2012).

34. Arab League [AL], *Charter on Human Rights, unofficial translation* (Mohamed Midari trans., Arab Center for International Humanitarian Law and Human Rights Education) (2012), *available at* http://www.arableagueonline.org/wps/portal/las_ar/inner/!ut/p/c5/vZLLkoIwEEW (last visited Mar. 14, 2012).

35. *Id.*

36. *Id.*

VI. BARRIERS TO ACCESS TO JUSTICE FOR WOMEN IN MOROCCO: ANALYSIS OF DISCRIMINATION

A. The Notion of Access to Justice

The United Nations Development Program (UNDP), a key international player in the field of access to justice and the rule of law, defines access to justice to include the entire machinery of law making, law interpretation and application, and law enforcement.[37] "Access to justice entails much more than improving an individual's access to courts or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable."[38] According to the UNDP, one of the most prevalent obstacles to access to justice is gender bias and discrimination in the legal systems through: inadequacies in existing laws which fail to protect women (*de jure*), or through limitations in judicial remedies provided in practice (*de facto*).[39]

B. Cost of Discrimination: De Jure and De Facto Application of the Moudawana

Morocco has taken unprecedented steps in the country's history to help eradicate discrimination against women and to improve gender equality. The decision to lift formally the reservations to CEDAW was an important part of Morocco's efforts to improve and strengthen women's rights. It has also the potential to serve as an example for many countries in the MENA region that still have reservations to core articles to the Convention. By ratifying the following international instruments, Morocco has committed to the obligation not to discriminate and to provide equal protection of the law for the purpose of achieving women's equality with men in the enjoyment of their human rights. For instance, Article 26 of the ICCPR features a poignant equality clause pertaining to women.[40] Also, Article 1 of CEDAW has an express definition of discrimination against women.[41] However, despite this international commitment, blatant shortcomings in improving the situation of women's access to justice in Morocco still prevail. These shortcomings are both *de jure* and *de facto*. Adopting

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37. U.N. Dev. Programme [UNPD], *Access to Justice: Practice Note*, at 3, (Aug. 3, 2004).

38. *Id*.

39. *See generally* Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, 41 CARNEGIE ENDOWMENT FOR INT'L PEACE R. L. SER. (2003).

40. International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

41. *Id*. at 21.

revisions to the *Moudawana* and passing this revised text into legislation in 2004 should be viewed as a stepping stone towards achieving women's access to justice because there are still many areas in which the text of the *Moudawana* fails women in their quest towards equality.

There is what might better be termed deficiencies in the wording of the Code itself. For example, the Code does not specify a threshold age below which special permission to marry before the lawful age of eighteen years may not be granted.[42] Another weakness is that the Code's provisions on the joint administration of property acquired during marriage do not include standards for evaluating the wife's contribution in the form of domestic duties where there is no contract between the spouses.[43] Furthermore, while women possess equal testimony rights in most civil and criminal cases, "the court gives their testimony half the weight of a man's when it comes to family matters."[44]

By law, as outlined in the *Moudawana*, there is no differentiation of access to justice among women. However, in practice, women in rural areas have much less access to justice than women in urban areas, as the *Moudawana* is limited mainly to urban areas. This is alarming since more than 80% of women in rural Morocco are illiterate and are in dire need of legal information about the *Moudawana*.[45] A 2003 report to the CEDAW Committee emphasized that despite the progress of the Moudawana,

> [A] number of constraints and difficulties have emerged, including in particular difficulties attributable to inadequate infrastructure and logistic resources, a lack of awareness and training among officials responsible for enforcing the Code, and the persons in charge of publicizing it and propagating an understanding of it throughout Morocco's social fabric.[46]

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42. *See generally* FAM. CODE (Morocco).

43. Arab Women Law Database: http://www.arabwomenlaw.com/Tash_V_Country.aspx?ID=1088&Country=13 (last visited March 23, 2012).

44. Angles Ramirez, *Le long processus de changement de la Moudawwana au Maro L'Année du Maghreb* [*The Long Process of Change of the Moudawwana in Morocco in the Year of the Maghreb*], *in* DOSSIER FEMMES, FAMILLE ET DROIT (CNRS Editions 2007) (Fr.).

45. U.N. Dev. Fund for Women [UNIFEM], Arab States Regional Office, *Progress of Arab Women 2009*, at 3 (2009), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/563/69/PDF/N0656369.pdf?OpenElement (last visited Mar. 14, 2012).

46. *Id.*

Cook and Cusack rightly define State obligations to address discrimination through wrongful gender stereotyping[47] based on a tripartite framework (obligation to respect, obligation to protect, obligation to fulfill). Despite the fact that Article 2(f) of the Convention[48] obligates State Parties "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women," this obligation has not been fulfilled in the case of Morocco as barriers for women's access to justice are prevalent in social and cultural norms. For example, Moroccan Ministry of Justice 2010 research data indicates that women do not want to insult their husbands by asking for certain provisions in their marriage contracts due to long existing social practices.[49]

In the current context, the real challenge is to ensure that all the legal procedures in the *Moudawana* are reinforced through family courts to maintain the notions of justice, equity, and objectivity, and at the same time, the quick flow of justice. In adopting CEDAW's definition of discrimination against women in CEDAW General Comment No.16 on equality, the Committee on Economic, Social, and Cultural Rights has on Economic has affirmed that "discrimination on the basis of sex may be based on the differential treatment of women because of their biology."[50] In *The Lenses of Gender,* Sandra Bem offers an excellent description of the dynamics that propagate gender discrimination. Bem's main arguments is that: "[W]hat is ultimately responsible for every aspect of it, is not male-female difference but a social world so organized from a male perspective that men's special needs are automatically taken care of while women's special needs are either treated as special case or left unmet."[51] In Morocco, often administrators of justice, especially in remote rural areas,

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47. *See generally* Rebecca J. Cook & Simone Cusack, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (2010).

48. U.N. Comm. on the Elimination of Discrimination against Women, General Recommendation on Special Temporary Measures, U.N. Doc./CEDAW/C/2004/I/WP.1/Rev.1 (Jan. 30, 2004), *available at* http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf (last visited Mar. 14, 2012).

49. *See generally* Royaume du Maroc, *Justice de la Famille* [*Justice of the Family*], 15 DU MINISTERE DE LA JUSTICE (2010) (Fr.).

50. U.N. Comm. on Economic, Social and Cultural Rights, General Comment No. 16, *The Equal Rights of Men and Women to the Enjoyment of All Economic, Social, and Cultural Rights*, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005), *available at* http://www.unhcr.org/refworld/docid/43f3067ae.html (last visited Mar. 14, 2012).

51. *See generally* Sandra Lipsitz Bern, *The Lenses of Gender*, 5 PSYCHOL. INQUIRY 97 (1994), *available at http://www.jstor.org/stable/pdfplus/1449094.pdf?acceptTC=true* (last visited Mar. 15, 2012).

tie women's rights and benefits to their being the wife or daughter of a male citizen, thus rendering them dependent, second-class members of society.[52] Consequently, the notion of access to justice has remained gendered due in part to Morocco's patriarchal society that reinforces a man's ability to assert authority and control over women within the context of the family.

VII. RECOMMENDATIONS AND CONCLUSIONS TO OVERCOME BARRIERS TO ACCESS TO JUSTICE FOR WOMEN

There is no doubt that the enactment of the 2004 *Moudawana* marked a significant step forward in improving the legal status of women in Morocco, yet its application is still not in full effect. The judiciary in particular plays a critical role in enforcing the provisions of the *Moudawana*, as it has the ability to make the legal reforms a reality, or alternatively, to disregard the changes. At the same time, efforts at the grassroots level to educate citizens about their rights and responsibilities under the Family Code are still needed. While women's rights groups and civil society actors work freely and effectively to promote gender equality and equal access to justice, and have gained momentum in recent years, their efforts are often challenged by cultural conservatism.[53] In rural areas, particularly, there is scarce information on civil society groups in general, and limited research has been carried out on the human, material and financial resources of the NGOs working with rural women. This requires a collaborative approach of a variety of actors (the government, media, educational institutions and civil society groups).

Successful access to justice efforts are founded upon a strong partnership among the bar, the judiciary, and legal aid providers. Law schools can also be key partners, while representatives from outside the legal community can bring new perspectives and help broaden support.[54] Each of the key institutional partners—the bar, the courts, and legal aid providers— brings a particular set of strengths to the table. Law schools, for example, can become key access to justice partners, as with law faculty and students serving as valuable civil legal assistance providers, through

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52. Barkalli Nadira, *Le rôle de l'État dans l'évolution des systèmes de genre au Maroc, contribution au colloque Genre, population et développement en Afrique* [*The Role of the State in the Evolution of Systems of Kind in Morocco, Contribution to the Symposium Kind, Population and Development in Africa*], ABIDIGJAN, at 2–10 (2010) (Fr.).

53. Jean-Philippe Bras, *La réforme du code de la famille au Maroc et en Algérie: quelles avancées pour la démocratie?* [*The Reform of the Family Code in the Morocco and Algeria: What Progress for Democracy?*], *in* 37 CRITQUE INTERNATIONALE 93, 125 (2007) (Fr.).

54. World Justice Forum [WJF], *World Justice Project's Annual Forum*, at 20–23 (June 2011).

clinical programs. Building support for equal justice in the next generation of attorneys should be at the forefront of access to justice efforts throughout Morocco. Also, the following recommendations encompass my personal suggestions to improve access to justice for women in Morocco.

VIII. INFORMAL JUSTICE REMEDIES IN RURAL MOROCCO

Usually, in rural areas where illiteracy rates are high among the women population, they tend to not have recourse to the formal system for many reasons, such as misunderstanding of the law, fear and intimidation, lack of resources, language issues, and unfamiliarity of formal procedures.[55] As such, these women perceive themselves as divorced from the formal legal framework of public institutions. Such a divorce also reflects a gap between the law in the books and the law in action. Informal justice systems, therefore, are the cornerstone of access to justice and dispute resolution for the majority of these women. Nevertheless, the support of informal justice systems is very limited.

In Morocco, the traditional justice system is home-grown, culturally appropriate, and embraced by the communities it serves for its potential to provide quick, cheap, and adequate remedies.[56] Government assistance should be more focused on strengthening the integrity the informal justice systems and its integration with the formal one, to become more responsive and more effective in meeting the needs of justice for rural populations—especially women.

IX. LEGAL PROCESSES

While due process of law is one of the great achievements of our time, legal processes have become unduly complicated, drawn out and technical. Not only does this lead to immense delays and expense, but the litigants also feel disempowered because they do not understand what is going on. There should be a strong move towards simplifying procedures in all family law matters, as well as promoting systems of alternative dispute resolution that are not only swifter and cheaper, but more effective in getting practical resolution to the problem. This step has been initiated in Morocco through the institutionalization of mediation in family courts in 2007, and recruitment of social assistants that make the link between the judges and the women seeking justice services. These attempts to accelerate

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55. *See generally Access to Justice: Promotion of Legal Outreach in the Arab World*, BIBLOTHECA ALEXANDRINA (2009).

56. Kandiyoti Deniz, *Malaise identitaire: les femmes et la nation* [Malaise Identity: Women and the Nation] FEMMES SOUS LOIS MUSULMANES 450 (2010) (Fr.).

implementation of the Family Code through alternative dispute resolution methods have proven successful and, in my view, should be promulgated throughout the country.

X. TRANSFORMING THE ROLE OF THE LEGAL PROFESSION

Local Bar Associations and faculties of law have a pivotal role to play in advancing women's access to adequate and effective family law remedies. For example, law students and paralegals can play a significant role in helping women with their legal problems, especially in rural areas.

Today, the Moroccan family law is just one of the many examples of how societies grapple with balancing the ideals of tradition, national and international law with the imperative of making society more just for women.

EXPANDING THE R2P TOOL-KIT: NEW POLITICAL POSSIBILITIES AND ATTENDANT LEGAL UNCERTAINTIES

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The international community has begun to live up to its name. Dramatic legal and political developments of the past fifty years have greatly expanded the array of tools available for responding to grave human rights situations internal to members of the community, and have manifested an increased willingness to deploy those tools to further the human rights values of the community. The results of these legal and political developments were demonstrated in the international community's response to the situation in Libya.

In mid-February 2011, in the wake of popular uprisings in Tunisia and Egypt, members of the Libyan public began protesting against the decades-old regime of Libyan leader Muammar Gaddafi.[1] The situation rapidly escalated as the government sought to forcibly suppress the demonstrations. By early March the situation had deteriorated into an armed conflict.[2]

A number of international organizations responded to the crisis in Libya as it evolved. They utilized a variety of different tools, ranging from official statements and press communiqués to the adoption of sanctions and other legal measures. On March 19, 2011, a coalition of states initiated a bombing campaign in Libya.[3] The United Nations (U.N.) Security Council authorized this enforcement action in response to reports of serious violations of international human rights law and the international law of armed conflict committed in Libya by persons acting on behalf of the Gaddafi regime.[4]

This article provides an overview of applicable rules of international law through different phases of the situation in Libya and sketches out various modes of enforcement action employed by international organizations to respond to the crisis, analyzing several of the controversial legal issues that arise in that context. The article concludes with an analysis of the unresolved legal issues implicated by the evolving situation in Libya and by the international community's responses to it.

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1. Middle East and North Africa in turmoil, The Washington Post, July 13, 2011; Ian Black & Owen Bowcott, *Libya Protests: Massacres Reported as Gaddafi Imposes Nes Blackout*, THE GUARDIAN, Feb. 18, 2011, *available at* http://www.guardian.co.uk/world/2011/feb/18/libya-protests-massacres-reported (last visited Mar. 18, 2012).

2. *Libya crisis: Rebellion or civil war?*, BBC NEWS, March 10, 201; McGreal, Chris et al., *Allied Strikes Sweep Libya as West Intervenes in Conflict*, THE GUARDIAN, Mar. 19, 2011, *available at* http://www.guardian.co.uk/world/2011/mar/19/libya-air-strikes-gaddafi-france (last visited Mar. 18, 2011).

3. *Id.*

4. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). *See also* Jordana Horn, *U.N. Security Council Authorizes Military Strikes on Libya*, THE JERUSALEM POST, Mar. 18, 2011, *available at* http://www.jpost.com/VideoArticles/Video/Article.aspx?id=212699 (last visited Mar. 18, 2011).

I. APPLICABLE LAW

A. Non-intervention

One of the founding principles of the international legal order, and a corollary to the equally fundamental principle of the sovereign equality of states, the principle of non-intervention requires all states to refrain from interfering in the internal affairs of other states, or, in the words of the U.N. Charter, in "matters which are essentially within the domestic jurisdiction" of other states.[5] While the scope of this principle was traditionally understood to preclude international regulation of the way in which a state treated its own people, that understanding has evolved considerably since, at the latest, the advent of the U.N. Charter system.

In light of the human rights provisions of the U.N. Charter and the practice of Charter bodies, it is now generally accepted that serious human rights abuses, even if committed purely internally (i.e. not involving aliens, foreign territory, or any other material interests of other states), are no longer regarded as internal matters shielded by the principle of non-intervention. Most states are also parties to specific human rights treaties, further internationalizing the issue of how they treat their own people, and correspondingly diminishing the scope of the principle of non-intervention. Nonetheless, mere political wrangling within a state, even if it involves the failure to meet international expectations of good governance, remains a purely internal matter so long as it does not entail violations of international legal obligations.

B. The Use of Force/Jus ad Bellum

Another fundamental rule of international law is the prohibition on the use of force. Article 2(4) of the U.N. Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[6] The two established exceptions to this prohibition are valid exercises of the right of self-defense and enforcement action taken in accordance with U.N. Security Council authorization.[7] These international rules on the use of

5. U.N. Charter art. 2, para. 7.

6. *Id*.

7. *Id*. art. 42 & 51.

force apply only between states.[8] Thus, the prohibition on the use of force does not apply internally to a state.[9]

C. The Law of State Responsibility for Injury to Aliens

The Law of State Responsibility for Injury to Aliens regulates the way states treat foreigners. It provides for a baseline of humane treatment, essentially protecting foreigners against serious human rights abuses, denials of justice, and other unjustified deprivations of liberty or property. Embedded in the traditional state-centric international legal system, the responsibility of the wrongdoing state, in general, may be invoked only by the state of nationality of the victim.[10]

D. The Law of Armed Conflict/Jus in Bello/International Humanitarian Law (IHL)

The international law of armed conflict regulates the conduct of hostilities and provides legal protections for individuals not, or no longer, taking part in the hostilities. As such, the vast majority of its provisions apply only in times of armed conflict or occupation.[11] Prior to World War II the *jus in bello*, in general, applied only to interstate armed conflicts.[12] Starting with the Geneva Conventions of 1949 it also began to regulate non-international armed conflicts, including purely internal armed conflicts.[13] With the advent of international legal regulation of non-international armed conflict came the direct applicability of IHL to non-state, organized, and armed groups.[14] While international law still provides more extensive regulation of interstate armed conflicts than of non-interstate armed conflicts, the extent of difference has diminished.[15]

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8. *Id.*

9. *Id.* The way in which force is employed within a state is regulated by other rules of international law that have evolved in the post-World War II era, including international human rights law and the law of non-international armed conflict.

10. See the International Law Commission's Articles on Diplomatic Protection, commended to the attention of governments by the U.N. General Assembly in its resolution 65/27 of 6 December 2010.

11. *See, e.g.,* art. 2 of the Fourth Hague Convention of 1907; common article 2 of the Geneva Conventions of 1949.

12. *See* art.2 of the Fourth Hague Convention of 1907.

13. *See* common art. 3 of the Geneva Conventions of 1949.

14. J. Cerone, *Much Ado About Non-State Actors: The Vanishing Relevance of State Affiliation in International Criminal Law,* 10 San Diego Int'l L.J. 335 (2009).

15. J. Cerone, *Holding Military and Paramilitary Forces Accountable*, *Human Rights and Conflict*, US Institute of Peace (2006) at 226.

E. International Criminal Law in the Strict Sense[16]

International criminal law, in the strict sense, refers to those rules of international law, the breach of which gives rise to individual criminal responsibility in international law. These rules of international law directly bind individuals, as opposed to operating through the vehicle of domestic law (*e.g*. suppression treaties). The core crimes in international criminal law are war crimes, genocide, crimes against humanity, and aggression.[17] As Libya is not a party to the Statute of the International Criminal Court (ICC), Libyan nationals committing acts entirely within Libya are bound only by those international criminal prohibitions that have acquired the status of customary international law. Most, but not all, of the crimes prohibited by the ICC Statute were prohibited by customary international law during the relevant period.[18]

F. International Human Rights Law

International human rights law, in general,[19] regulates the way a state treats individuals under its control by requiring states to respect and ensure certain fundamental rights of the human person. As noted above, the evolution of this relatively modern body of international law has greatly reduced the scope of the non-intervention principle in relation to a state's conduct toward its own people.

Unlike the areas of international law identified above, human rights law is principally treaty-based. Libya has been a party to several universal and regional human rights treaties since well before the 2011 unrest. Libya is a party to, *inter alia*, the International Covenant on Civil and Political

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16. International Criminal Law in the strict sense refers to rules of international law, the breach of which gives rise to individual criminal responsibility. The qualifier "in the strict sense" is used to distinguish this body of law from the rules of international law regulating interstate cooperation in criminal justice matters generally, such as suppression conventions and extradition treaties. Certain prohibitions, for example the prohibition of genocide, bind both the individual and the state, and also give rise to suppression obligations.

17. Article 5, ICC Statute.

18. Genocide and most war crimes and crimes against humanity are prohibited by customary international law. *See generally* ICTY, *Tadic Appeal Decision,* 2 October 1995, and subsequent ICTY jurisprudence.

19. The scope of application of human rights treaties varies. Article 2 of the International Covenant on Civil and Political Rights requires states parties to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. . . ." International Covenant on Civil and Political Rights, Dec.16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

Rights (ICCPR)[20] and its first optional protocol; the International Covenant on Economic, Social, & Cultural Rights;[21] the Convention on the Rights of the Child;[22] the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women;[23] and the African Charter on Human and Peoples' Rights (ACHPR or "African Charter").[24]

The ICCPR is subject to derogtation. Under Article 4 of the ICCPR, States' may take measures derogating from certain obligations under the Covenant to the extent strictly necessary to respond to a "public emergency which threatens the life of the nation." Among the derogable rights are the rights to freedom of expression, freedom of movement, freedom from arbitrary detention, and the right to a fair trial.[25] States must officially proclaim a state of emergency and must notify other States through the intermediary of the U.N. Secretary General.[26] According to available U.N. records, at no time during the 2011 unrest did Libya lodge a notice of derogation with the Secretary General.

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20. Libya did not enter any substantive reservations upon acceding to the ICCPR. It did, however, state that "[t]he acceptance and the accession to this Covenant by the Libyan Arab Republic shall in no way signify a recognition of Israel or be conducive to entry by the Libyan Arab Republic into such dealings with Israel as are regulated by the Covenant." Comment by Libyan Arab Jamahiriya to the U.N. Committee on Economic, Social and Cultural Rights, deposited with the U.N. Secretary-General at n.22, ch. IV.3, in multilateral treaties (1976), *available at* http://www.bayefsky.com/pdf/libya_t2_cescr.pdf (last visited Mar. 7, 2012).

21. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), (Dec. 16, 1966), *available at* http://www2.ohchr.org/english/law/pdf/cescr.pdf (last visited Mar. 12, 2012).

22. Convention on the Rights of the Child, G.A. Res. 44/25 (Sept. 2, 1980) *available at* http://www2.ohchr.org/english/law/pdf/crc.pdf (last visited Mar. 12, 2012).

23. Convention on the Elimination of All Forms of Discrimination Against Women, G.A.Res. A/RES/54/4 (Oct. 15, 1999), *available at* http://daccess-dds-ny.UN.org/doc/UNDOC/GEN/N99/774/73/PDF/N9977473.pdf?OpenElement (last visited Mar. 12, 2012).

24. African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (Oct. 21, 1986), *available at* http://www1.umn.edu/humanrts/instree/z1afchar.htm (last visited Mar. 12, 2012).

25. The Human Rights Committee has opined that certain of these rights may become non-derogable when linked to a non-derogable right, such as the right to life. *See* U.N. Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), *available at* http://www.UNhcr.org/refworld/docid/453883fd1f.html (last visited Mar. 12, 2012) [hereinafter HRC General Comment No. 29].

26. ICCPR, art. 4(3).

II. PHASES OF THE CONFLICT, AND MODES OF INTERNATIONAL ENFORCEMENT

A. Prior to the February Unrest

Prior to the unrest, the applicable law included all of the above bodies of international law, except for the law of armed conflict and those rules of international criminal law derived from the law of armed conflict. Libya was fully bound by its obligations under all of the human rights treaties to which it was a party and also by norms of customary human rights law.[27] Similarly, Libya was bound by the requirements of the Law of State Responsibility for Injury to Aliens in its relations with foreigners (particularly those within its territory).[28] Libya and individuals within Libya were also under an obligation to refrain from committing the international crimes of genocide and crimes against humanity.[29] Other states, in their relations with Libya, were bound by the prohibition on the use of force and the principle of non-intervention.[30] States were obliged to refrain from interfering in the internal functioning of the Libyan political system, at least to the extent that its functioning did not contravene Libya's international obligations owed to those states.[31]

B. February Unrest

By mid-February a series of protests broke out across Libya.[32] Once the unrest in Libya reached the point of a "public emergency which threaten[ed] the life of the nation," Libya was permitted to derogate from some of its obligations under the ICCPR to the extent "strictly required by the exigencies of the situation."[33] This would permit the Libyan government a freer hand in arrest and detention matters, as well as in

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27. Libya entered very few reservations when expressing consent to be bound by the human rights treaties to which it is a party.

28. *See generally*, *supra*, notes 24–27.

29. *See* supra note 18.

30. U.N. Charter, art. 2.

31. In this context, it is important to recall the *erga omnes* nature of at least the most fundamental obligations under international human rights law. *See* Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain), Judgment, I.C.J. Reports 1964 (July 24, 1964). *See also* the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts, Int'l Law Comm'n, art. 48, *adopted in* G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

32. *Middle East and North Africa in Turmoil*, WASHINGTON POST WORLD (updated July 13, 2011) *available at* http://www.washingtonpost.com/wp-srv/special/world/middle-east-protests/ (last visited Mar. 12, 2012).

33. ICCPR, *supra* note 32, art. 4.

restricting the freedom of expression, the freedom of movement, and the freedom of association. As noted above, Libya did not provide notice of derogation to the treaty depositary.[34] Nonetheless, there is some authority to suggest that the failure to notify does not of itself preclude the lawfulness of derogation.[35] While in principle most of the rights in the ICCPR are derogable, the burden would be on Libya to demonstrate the necessity for each restriction imposed.[36]

In any event, reports soon emerged of violations of even non-derogable rights, such as the right to life and freedom from torture.[37] The gravity of the reported violations brought the matter beyond the internal sphere, and gave standing to other states and international organizations to invoke the international responsibility of Libya.[38] Notwithstanding these violations, at this stage, recognition of any entity other than the Gaddafi regime as the government of Libya would likely still constitute a prohibited intervention in the internal affairs of Libya. The use of force against Libya remained prohibited. Notwithstanding the emerging notion of the responsibility to protect, which may provide enhanced standing to take diplomatic measures or economic sanctions, the use of force remains precluded absent Security Council authorization.[39] The use of force could not be justified on the basis of collective self-defense since the protesters, as non-state actors, have no international legal right of self-defense under the *jus ad bellum*.

C. February 25

U.N. Human Rights Council Special Session: One of the first organizations to adopt operative measures was the United Nations Human

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34. *See* Status of Multilateral Treaties Deposited with the United Nations.

35. *See* Consuelo Salgar de Montejo v. Colombia, Commc'n No. R.15/64, ICCPR, U.N. Doc. Supp. No. 40 (A/37/40) at 168, ¶ 10.3 (Mar. 24, 1982).

36. *See generally* HRC General Comment No. 29, *supra* note 39.

37. *See e.g. U.N. Investigator Opens Libya Torture Probe*, CBCNEWS, Mar. 9, 2011, *available at* http://www.cbc.ca/news/world/story/2011/03/09/libya-torture-030911.html (last visited March 12, 2011).

38. *See* Hum. Rts.Council Res. S-15/1, ¶ 14; *see also* Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, June 1, 2011, *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf (last visited May 14, 2012).

39. In 2005, the U.N. General Assembly affirmed the responsibility of states to protect their populations from core international crimes, and asserted that the international commity shares in this responsibility. The General Assembly declared its readiness to take collective action where states fail in their responsibilities. *See* McCaffrey, Shelton, and Cerone, *Public International Law: Cases, Problems, and Texts*, Lexis-Nexis (2010) at 1294.

Rights Council. On February 25, 2011, the Council convened a Special Session on the "[s]ituation of human rights in the Libyan Arab Jamahiriya."[40] This was the 15th Special Session of the Council since its creation in 2006. One of the advances of the Council over its predecessor, the U.N. Commission on Human Rights, is the relative ease of convening Special Sessions. While the Commission required the support of a majority of Members, the Council can convene a Special Session with the support of only one-third of its Members.[41]

Several others factors contributed to the convening of this Special Session. Libya was at the time a member of the Human Rights Council.[42] Furthermore, as noted above, Libya is a party to a number of international human rights treaties.[43] There was, thus, a clear legal basis for invoking Libya's international responsibility. In addition, the Ambassador of Libya to the U.N. Human Rights Council had by this time ceased to support the Gaddafi government and supported the convening of the Special Session.[44]

In its Resolution S-15/1, of February 25, 2011, the Human Rights Council decided to establish an international commission of inquiry and to recommend that Libya be suspended from the Council.[45]

After recalling official statements on the situation made by other U.N. bodies, the Arab League, the Organization of the Islamic Conference, the African Union, and the European Union, the Human Rights Council strongly condemned the "gross and systematic" human rights violations being committed in Libya, and suggested that some of the abuses might rise to the level of crimes against humanity.[46] It also "strongly call[ed] upon"

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40. Report of the Human Rights Council on its Fifteenth Special Session, Doc. No. A/HRC/S-15/1 (Feb. 25, 2011), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/HRC-S-15-1_AUV.pdf (last visited Mar. 12, 2011) [hereinafter *Report of the Human Rights Council*].

41. G.A. Res. 60/251, ¶ 10, U.N. Doc. A/RES/60/251 (Mar. 15, 2006).

42. *See generally* U.N. Human Rights Council, Membership of the Human Rights Council, *available at* http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm (last visited Mar. 12, 2011).

43. *See generally*, *supra*, notes 24–27.

44. "Human Rights Council passes resolution on Libya in Special Session—Delegation of Libya addresses the Council, saying the will of the people is invincible," U.N. Human Rights Council Press Meeting Summary, February 25, 2011.

45. Report of the Human Rights Council, *supra* note 42, at 3.

46. S.C. Res. 1973, U.N. Doc. S/RES/1973, at 1 (Mar. 17, 2011) [hereinafter *Resolution 1973*]. Press Release, U.N. Security Council, Security Council Approves "No-Fly Zone" over Libya, Authorizing "All Necessary Measures" to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200, ¶ 1 (Mar. 17, 2011), *available at* http://www.UN.org/News/Press/docs/2011/sc10200.doc.htm (last visited Mar. 6, 2012) [hereinafter U.N. Press Release]. Under the Rome Statute of the International Criminal Court, a crimes against humanity is defined as one of a list of enumerated inhumane acts "committed as part of a widespread or

the government of Libya to fulfill its responsibility to protect its population, to comply with its human rights obligations, placing particular emphasis on the freedoms of expression, assembly, and information,[47] and to stop any attacks against civilians.[48]

The Human Rights Council urged the Libyan government to "respect the popular will, aspirations and demands of its people and to do their utmost efforts to prevent further deterioration of the crisis."[49] The Council also stressed the need to hold accountable "those responsible for attacks in Libya, including by forces under government control, on civilians."[50] In addition, it reminded Libya of its commitment, as a Member of the Council, "to uphold the highest standards in the promotion and protection of human rights and to cooperate fully with the Council and its Special Procedures."[51]

The Council then decided to "urgently dispatch an independent, international commission of inquiry . . . to investigate all alleged violations of international human rights law in Libya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and, where possible identify those responsible."[52] Its express purpose was to ensure "that those individuals responsible are held accountable."[53]

Finally, the Council recommended to its parent body, the U.N. General Assembly, that Libya's "rights of membership" in the Council be suspended, "in view of the gross and systematic violations of human rights by the Libyan authorities."[54]

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systematic attack directed against any civilian population," where the attack is "pursuant to or in furtherance of a State or organizational policy to commit such attackjol art. 7, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter ICC Statute].

47. As noted above, under the ICCPR the obligation to respect these rights is derogable. At the same time, the Council points out that abuses are being committed against "peaceful" demonstrators. *See* U.N. Press Release, *supra* note 71, at 6.

48. *Id.*

49. G.A. Res. S-15/1, U.N. Doc. A/HRC/RES/S-15/1, ¶ 6 (Feb. 25, 2011) [hereinafter *Human Rights Council Resolution*].

50. *Id.* ¶ 7.

51. *Id.* ¶ 9.

52. *Id.* ¶ 11.

53. *Id.*

54. Human Rights Council Resolution, *supra* note 74, ¶ 14 (referencing OP 8 of the General Assembly resolution that created the Human Rights Council, G.A. Res. 60/251, ¶ 8, U.N. Doc. A/RES/60/251 (Mar. 15, 2006)). This OP 8 provides that "the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights."

D. February 26

U.N. Security Council Emergency Meeting: On February 26, the day after the Special Session of the Human Rights Council, the U.N. Security Council convened an emergency meeting. The Security Council unanimously adopted Resolution 1970[55] under Chapter VII of the U.N. Charter and took binding measures under Article 41 of the Charter, including the imposition of an arms embargo, a travel ban, and an asset freeze.[56] It also referred the situation in Libya to the International Criminal Court.[57] As with the Libyan ambassador to the Human Rights Council, the Ambassador of Libya to the U.N. in New York had ceased to support the Gaddafi government and spoke in support of the Security Council resolution.[58]

The preambular paragraphs of the Security Council resolution refer to the "gross and systematic violations of human rights" taking place,[59] as well as serious violations of "international humanitarian law."[60] The reference to "international humanitarian law" may indicate a perception that the situation in Libya had by this time evolved into an armed conflict.[61] Mirroring language employed by the Human Rights Council, the Security Council also recalled "the Libyan authorities' responsibility to protect its population," evoking the "responsibility to protect" concept, and perhaps implying further consequences for continued failure to fulfill that responsibility.[62]

The Security Council welcomed the work of the Human Rights Council and reiterated its call for accountability, emphasizing the

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55. *See generally* S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011) [hereinafter Resolution 1970].

56. *Id*.

57. As Libya is not a state party to the ICC Statute and has not otherwise consented to ICC jurisdiction, the Security Council referral was necessary to satisfy the legal preconditions to the exercise of the Court's jurisdiction over the situation in Libya.

58. Swaine, Jon, *Libya's U.N. Ambassador Denounces Gaddafi*, THE TELEGRAPH U.K., Feb. 25, 2011, *available at* http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8349048/Libyas-UN-ambassador-denoUNces-Gaddafi.html (last visited Mar. 12, 2011).

59. Resolution 1970, *supra* note 57, at 1.

60. *Id*.

61. International humanitarian law is the international law of armed conflict. However, it is possible that "international humanitarian law" is being used in a broader sense. This phrase is sometimes used to include the prohibitions of genocide and crimes against humanity, both of which may be committed in peace time (or in situations otherwise not reaching the threshold of armed conflict).

62. Resolution 1970, *supra* note 57, at 2.

responsibility of superiors.[63] It then recalled the Security Council's own power to defer ICC prosecutions, perhaps telegraphing an incentive to cooperate.[64] Article 16 of the ICC Statute provides that the Security Council may defer an ICC prosecution for up to 12 months, with the possibility of renewal.[65]

The resolution's operative language begins with the Council's demand for an immediate end to the violence and its call for steps to fulfill the "legitimate demands" of the population.[66] It urges the Libyan authorities to comply with international human rights and humanitarian law,[67] to ensure the safety of foreign nationals, to ensure the safe passage of humanitarian supplies and workers, and to immediately lift restrictions on all forms of media.[68]

The Security Council's referral of the situation to the ICC marks the first time that the referral power has been used with the unanimous support of Council members. The only other Security Council referral to date, that of the situation in Darfur, was not unanimously supported. Both China and the United States had abstained in that vote.[69] China had also been a hold out for the Libya resolution, but was ultimately persuaded to vote in favor of the resolution.[70] The Chinese delegation indicated that it supported the resolution "taking into account the special circumstances in Libya."[71]

The ICC referral is followed by a jurisdictional exclusion similar to that included in the Darfur referral. It provides that nationals, current or former officials or personnel from a State outside the Libyan Arab

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63. *Id*. at 1.

64. *Id*. at 2. Security Council deferral of an ICC prosecution could be stopped by the veto of any permanent member. A continuing deferral would require the continued support of all five permanent members.

65. *Id*.

66. U.N. Press Release, *supra* note 71, ¶ 1.

67. The reference to both international human rights law and international humanitarian law may indicate the Security Council's position that these two bodies of law apply simultaneously to situations of internal armed conflict. *But see supra*, note 61.

68. *See generally* U.N. Press Release, *supra* note 71.

69. *See* voting record for S/RES/1593 (2005), available at http://UNbisnet.UN.org:8080/ipac20/ipac.jsp?session=1D3670EJ33535.64569&profile=voting&uri=link=3100028~!165528~!3100029~!3100070&aspect=alpha&menu=search&ri=1&source=~!horizon&term=S%2FRES%2F1593%282805%29&index=Z791AZ (last visited May 14, 2012).

70. Resolution 1973, *supra* note 48.

71. *See generally* Press Release, U.N. Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters (Feb. 26, 2011), *available at* http://www.UN.org/News/Press/docs/2011/sc10187.doc.htm (last visited Mar. 7, 2012).

Jamahiriya, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.[72]

By its terms this provision would seem to exclude not only ICC jurisdiction, but any jurisdiction other than that of the non-state party. Some delegations expressed reservations about this provision.[73]

The Resolution also provides that the ICC's expenses in this matter shall be borne by the ICC States and those states that wish to contribute voluntarily.[74] The Resolution also creates a new Sanctions Committee to, *inter alia*, monitor implementation of the sanctions, designate individuals subject to the measures, consider requests for exemptions, and report back to the Council.[75]

E. March 1

U.N. General Assembly suspends Libya's rights of membership in the Human Rights Council: Acting on the recommendation of the Human Rights Council, the U.N. General Assembly on March 1, 2011, in Resolution 65/265, suspended Libya's "rights of membership" in the Human Rights Council.[76] This was the first time the General Assembly had used its authority to do so.

F. March 3

ICC Prosecutor opens investigation: On March 3, 2011, the ICC Prosecutor announced his decision to open an investigation into alleged crimes against humanity committed in Libya since February 15.[77] In his

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72. In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protestors-Situation Referred to International Criminal Court: Security-General Expresses Hope Message 'Heard and Heeded' in Libya, U.N. Security Council (Feb. 26, 2011), http://www.UN.org/News/Press/docs/2011/sc10187.doc.htm.

73. "In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters," U.N. DPI, February 26, 2011, SC/10187; *see also* "Chief Prosecutor of International Criminal Court Tells Security Council He Will Seek Arrest Warrants Soon against Three Individuals in First Libya Case," U.N. DPI, May 4, 2011, SC/10241.

74. Resolution 1970, *supra* note 57.

75. *Id*.

76. *Id*.

77. *See generally* International Criminal Court, Statement of the Prosecutor on the Opening of the Investigation into the Situation in Libya (Mar. 3, 2011), *available at* http://www.icc-

March 3 Statement, he also identified certain individuals with "formal or de facto authority, who commanded and had control over the forces that allegedly committed the crimes," and thus "put them on notice" that they could be held criminally responsible if forces under their command commit crimes.[78] In particular, he singled out Muammar Gaddafi, the Minister of Foreign Affairs, the Head of Regime Security and Military Intelligence, the Head of Gaddafi's Personal Security, and the Head of the Libyan External Security Organization.[79] He also indicated that members of opposition groups would also be subject to investigation if they commit crimes.[80]

He concludes by stating, "It is important to avoid an armed conflict in Libya."[81] One could read this statement to mean that the ICC prosecutor's position at that time was that the situation in Libya had not yet reached the necessary levels of violence, organization, and duration to constitute an armed conflict.[82] There is no mention of war crimes in the March 3 Statement.[83]

G. Early March

The emergence of armed conflict: By early March, at the latest, at least some of the forces opposing the Gaddafi regime had constituted themselves as organized, armed groups. In addition, the violence between the government and these groups became sufficiently protracted and intense to constitute armed conflict, leading to the application of the law of non-international armed conflict.[84] The application of the *jus in bello* also brings about the application of the relevant war crimes provisions of international criminal law.

H. March 12

Arab League calls for the use of force: At its meeting in Cairo on March 12, 2011, the Council of the Arab League issued a statement on the

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cpi.int/NR/rdonlyres/035C3801-5C8D-4ABC-876B-C7D946B51F22/283045/StatementLibya_03032011.pdf (last visited Mar. 7, 2012) [hereinafter *Statement of the Prosecutor*].

78. *Id*. at 2.

79. *Id*.

80. *See generally* Statement of the Prosecutor, *supra* note 106.

81. *Id*. at 3.

82. *Id*.

83. *See generally* Statement of the Prosecutor, *supra* note 106.

84. ICTY, *Tadic Appeal Decision,* 2 October 1995, paragraph 70.

implications of the events in Libya and the Arab position.[85] Most significantly, the Arab League called upon the U.N. Security Council to impose a no-fly zone and to create "safe areas."[86] The Members of the Security Council had already been discussing the possibility of the use of armed force.[87] In this context, the political support of the Arab League was seen as a key factor.[88]

In the preamble of the outcome document, the League called for compliance with international law and an end to the fighting.[89] It also called on the Libyan authorities to withdraw from the areas they "entered forcibly" and to ensure "the right of the Libyan people to fulfill their demands and build their own future and institutions in a democratic framework."[90]

The Council then recalled its commitment "to reject all forms of foreign intervention in Libya," but emphasized "that the failure to take necessary actions to end this crisis will lead to foreign intervention in internal Libyan affairs."[91] It then decided to call upon the Security Council "to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya. . . ."[92]

I. March 17

Security Council authorizes the use of force: On March 17, 2011, the U.N. Security Council, again using its enforcement power under Chapter

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85. Arab League, Res. No. 7360, The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level on the Implications of the Current Events in Libya and the Arab Position (Mar. 12, 2011), *available at* http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%202011%20-%20english.pdf (last visited Mar. 7, 2012) [hereinafter Arab League Resolution].

86. *Id.*

87. *Libya Revolt: The West's Options*, BBC NEWS. March 9, 2011.

88. Christopher Blanchard, Libya: Unrest and U.S. Policy, Congressional Research Service (Mar. 29, 2011), http://fpc.state.gov/documents/organization/159788.pdf.

89. Arab League Resolution, *supra* note 116.

90. Arab League Resolution, *supra* note 116, ¶ 6.

91. *Id*.

92. The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level in its Extraordinary Session on the Implications of the Current Events in Libya and the Arab Position (Mar. 12, 2011), *available at* http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%202011%20-%20english%281%29.pdf (last visited Mar. 17, 2012).

VII of the U.N. Charter, responded to the call by imposing a no-fly zone and authorizing the use of armed force to protect civilians and "civilian populated areas under threat of attack."[93] Resolution 1973 also expanded the existing sanctions and established a panel of experts to assist the Sanctions Committee.[94]

The resolution was adopted with a vote of ten in favor and five abstentions.[95] The abstentions came from the BRIC countries (Brazil, Russia, India, and China) and Germany.[96] The two permanent members that abstained—Russia and China—have traditionally espoused robust interpretations of the non-intervention principle.[97] The abstaining delegations cited a lack of information, the failure to exhaust diplomatic means, ambiguity as to how force would be used and by whom, and doubts as to whether the use of force would effectively achieve the Council's purposes.[98]

The operative text of the resolution begins with the Council's demand for the immediate establishment of a ceasefire and a "complete end to violence and all attacks against, and abuses of, civilians."[99] The Council also demanded that Libya comply with its obligations under international human rights law, humanitarian law, and refugee law, and to "take all measures to protect civilians and meet their basic needs," as well as to ensure the delivery of humanitarian aid.[100]

In operative paragraph 4, the Council authorized the use of armed force to protect civilians and civilian populated areas, while excluding military occupation. Specifically, it authorized Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements—and acting in cooperation with the Secretary-General, to take all necessary measures to protect civilians and civilian populated areas under threat of attack in the Libyan Arab

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93. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

94. Resolution 1973, *supra* note 48.

95. *Id*.

96. *Id*.

97. This attitude is further reflected in the votes of China and Russia during the subsequent Special Session of the Human Rights Council ("HRC") on Syria. Both of these HRC Members voted against the Resolution adopted at that Special Session. In October 2011, they vetoed a draft Security Council resolution that would have contemplated measures being taken against Syria if it continued its heavy-handed response to protest movements.

98. *See generally* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

99. *Id*. ¶ 1.

100. *Id*. ¶ 3.

Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.[101]

This broad grant of authority was narrowed by the requirements of "acting in cooperation with the Secretary-General," the limitation to protection of "civilians"[102] and areas "under threat of attack," and the exclusion of occupation.[103]

The resolution also established a no-fly zone in Libyan airspace "in order to protect civilians," providing exemptions for humanitarian flights and authorizing Member States to use armed force to enforce it.[104]

In addition to strengthening enforcement of the arms embargo, the resolution also expanded the asset freeze.[105] Mindful that a new Libyan government will need these assets, the Council "[a]ffirm[ed] its determination to ensure that assets frozen . . . shall, at a later stage, as soon as possible be made available to and for the benefit of the people of the Libyan Arab Jamahiriya."[106]

Finally, the Security Council used its power to bind states to deprive the Libyan government, and those acting on its behalf, of legal remedies that might otherwise be available for breach of contract under domestic law.[107] Operative paragraph 27 requires "all States"[108] to take "the necessary measures to ensure that no claim shall lie at the instance of the Libyan authorities . . . in connection with any contract or other transaction where its performance was affected by reason of the measures taken by the Security Council . . ."[109]

J. March 19

Coalition airstrikes begin: On March 19, armed forces of France, the United States, the United Kingdom, and others initiated military strikes in

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101. *Id.* ¶ 4.

102. Again, there is some ambiguity in the use of the term "civilian" and "civilian populated area." Would this, for example, include civilians who directly participate in the hostilities? To what extent would individuals cease to become "civilians" for this purpose if they had a continuous combat function?

103. This exclusion of military occupation, however, would not preclude the use of ground troops. It would preclude their establishment of authority over territory.

104. Resolution 1973, *supra* note 48.

105. *Id.*

106. Resolution 1973, *supra* note 71, ¶ 20. This issue has become acute as states have become divided over whether to recognize the rebel authorities as the legitimate government of Libya.

107. Resolution 1973, *supra* note 48.

108. Note that this provision is not limited to U.N. Member States.

109. Resolution 1973, *supra* note 48.

Libya pursuant to Security Council Resolution 1973.[110] The intervention of other states' armed forces brought into application the law of international armed conflict.[111]

On March 27, the North Atlantic Council decided that NATO would undertake enforcement action in Libya.[112] Control of the enforcement action in Libya was subsequently transferred to NATO under unified command.[113]

K. March 25

African Court of Human and Peoples' Rights orders provisional measures: On March 25, 2011, the African Court of Human and Peoples' Rights unanimously ordered provisional measures against Libya.[114] The proceedings were instituted by the African Commission on Human and Peoples' Rights, which lodged an application with the Court after receiving a number of complaints alleging violations of the African Charter on Human and Peoples' Rights by Libya, a state party.[115]

The Commission did not request the Court to order provisional measures.[116] Nonetheless, the Court recalled that it is "empowered to order provisional measures *proprio motu* 'in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons' and 'which it deems necessary to adopt in the interest of the parties or of justice.'"[117]

After satisfying itself, *prima facie*, that it had jurisdiction, the Court reviewed statements and resolutions of relevant international organizations.[118] In light of the condemnations of abuses contained therein,

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110. Crisis in Libya: U.S. Bombs Qaddafi's Airfields, World Watch (Mar. 19, 2011), http://www.cbsnews.com/8301-503543_162-20044969-503543.html.

111. While some have suggested that the *jus in bello* does not apply to U.N.-authorized uses of armed force, this would contravene the basic principle that application of the *jus in bello* is independent of the *jus ad bellum* and does not reflect the majority position.

112. Letter Dated 29 March 2011 from the Secretary-General to the President of the Security Council, U.N. Security Council (Mar. 30, 2011), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Libya%20S%202011%20203.pdf.

113. *Id*.

114. *See generally* In the Matter of Afr. Comm'n on Hum. and Peoples' Rts. v. Great Socialist Peoples' Libyan Arab Jamahiriya, App. No. 004/2011, Order for Provisional Measures (Afr. Ct. H.R. Mar. 25, 2011) [hereinafter African Commission].

115. *Id*.

116. *Id*.

117. *Id*. ¶ 10.

118. *See generally* African Commission, *supra* note 145.

the Court concluded that "there is therefore a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the application, in particular, in relation to the rights to life and to physical integrity of persons as guaranteed in the [African] Charter."[119]

The Court then found that the circumstances required it to order, "as a matter of great urgency and without any proceedings,"[120] the following provisional measures: 1) that Libya refrain from "any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party;" and 2) that Libya report to the Court within fifteen days on measures taken to implement the Order.[121]

The first provisional measure ordered is somewhat unclear. Use of the term "could" introduces a degree of ambiguity. Further, it is unclear whether the dependent clause beginning with "which" describes or qualifies the preceding clause. It is likely that it qualifies the preceding clause, so that only those actions that constitute a breach (or "could" constitute a breach) of human rights law are encompassed by the Order.[122]

L. Mid-April

Concern at NATO interpretation of mandate: By mid-April, some states, including Security Council permanent members Russia and China, began to claim that the multinational force was exceeding the scope of its mandate.[123] In particular, they recalled that regime change was not authorized by Security Council Resolution 1973.[124]

M. May 4

ICC Prosecutor presents report to the Security Council: Pursuant to operative paragraph 7 of U.N. Security Council Resolution 1970, the ICC Prosecutor on May 4 reported to the Security Council on actions taken

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119. African Commission, *supra* note 145, ¶ 22.

120. *Id*. ¶ 23.

121. *Id*. ¶ 25.

122. *Id*.

123. Stephen Flanagan, Libya Managing a Fragile Coalition, Center for Strategic & International Studies (Mar. 24, 2011), *available at* http://csis.org/publication/libya-managing-fragile-coalition. *See also Fighting words between European allies overshadow Libyan mission*" CNN, March 22, 2011.

124. *Id*.

pursuant to the referral of the situation in Libya to the ICC.[125] In his Report, the Prosecutor provided an overview of the preliminary examination of jurisdictional issues conducted by his office, the ongoing investigation, and anticipated judicial activities.[126]

The Prosecutor found that available information provided "reasonable grounds to believe that crimes against humanity have been committed and continue being committed in Libya," and he noted that there is also "relevant information concerning" war crimes "once the situation developed into an armed conflict."[127]

As to admissibility, the Prosecutor indicated that his office had "not found any genuine national investigation or prosecution of the persons or conduct that would form the subject matter of the cases it will investigate."[128] He also found that the situation "clearly meets the threshold of gravity required by the ICC Statute, taking into account all relevant criteria."[129] He noted that there were no countervailing "reasons to believe that the investigation would not serve the interests of justice," and thus opened an investigation on March 3.[130]

In describing the ongoing investigation, he stated that his office was pursuing those who bore the greatest responsibility.[131] He also referred to cooperation activities and reported receiving "outstanding support from States Parties and non-States Parties alike."[132]

After enumerating the type and quantity of evidence collected, he indicated that this evidence revealed two main types of "incidents": 1) "[s]ecurity forces allegedly attacking unarmed civilians constituting crimes against humanity," and 2) "[t]he existence of an armed conflict with alleged war crimes as well as other crimes against humanity that appear to have been committed by different parties."[133] He then surveyed specific factual allegations supporting the existence of these types of crimes, including

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125. *See generally* International Criminal Court, *First Report of the Prosecutor of the International Criminal Court to the U.N. Security Council Pursuant to UNSCR 1970 (2011)* (May 4, 2011), *available at* http://www.icc-cpi.int/NR/rdonlyres/A077E5F8-29B6-4A78-9EAB-A179A105738E/0/UNSCLibyaReportEng04052011.pdf (last visited Mar. 7, 2012) [hereinafter *Report of the Prosecutor*].

126. *Id*.

127. *Id*. at 2–3.

128. *Id*. at 3.

129. *Id*.

130. *See generally Report of the Prosecutor*, *supra* note 157.

131. *See generally id*.

132. *Id*. at 5.

133. *Id*. at 5–6.

excessive use of force by security forces; "systematic arrests, torture, killings, deportations, enforced disappearances and destruction of mosques"; rape; and "unlawful arrest, mistreatment and killings of sub-Saharan Africans perceived to be mercenaries."[134]

As to the anticipated judicial proceedings, the Prosecutor indicated that his office would soon be submitting its first application for an arrest warrant.[135] On May 16, the ICC Prosecutor requested a Pre-Trial Chamber to issue arrest warrants for three individuals, including Muammar Gaddafi.[136]

N. June 1

Commission of Inquiry issues report: On June 1, 2011, the Commission of Inquiry, established pursuant to Human Rights Council Resolution S-15/1 issued its report.[137] The Commission opined that "a significant number of international human rights law violations have occurred, as well as war crimes and crimes against humanity."[138] According to the Commission, the large majority of violations were committed by those acting on behalf of the Gaddafi regime "in the pursuit of a systematic and widespread policy of repression against opponents to his regime and his leadership."[139] In addition, the Report noted that "[t]here have also been violations by opponents to the regime."[140]

As to methodology, the Commission "opted for a cautious approach in the present report by consistently referring to the information obtained as being distinguishable from evidence that could be used in criminal

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134. *Id*. at 6. The Report also refers to abuses committed against "prisoners of war." To the extent this refers to Libyan detainees, or nationals of states not parties to the armed conflict in Libya, in the hands of the then Libyan government or rebels, the term "prisoners of war" is presumably used in a non-technical sense (*e.g.,* as a way to refer to detained individuals who had been engaged in the hostilities), as this status does not exist in non-international armed conflict.

135. *See generally Report of the Prosecutor*, *supra* note 157.

136. Statement ICC Prosecutor Press Conference on Libya 16 May 2011, International Criminal Court (May 16, 2011), http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/statement%20icc%20prosecutor%20press%20conference%20on%20libya%2016%20may%202011 (last visited Mar. 7, 2012).

137. *See generally* Human Rights Council, 17th Sess., *Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya*, U.N. Doc. A/HRC/17/44 (June 1, 2011), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf (last visited Mar. 7, 2012) [hereinafter *Report of the International Commission*].

138. *Id*. at 8.

139. *Id*.

140. *Id*.

proceedings, whether national or international."[141] Despite its findings of numerous violations of human rights, humanitarian, and international criminal law, the "commission feels that, at this stage, it is not in a position to identify those responsible, as requested by the Human Rights Council in the resolution establishing its mandate."[142]

O. June 27

ICC Pre-Trial Chamber issues arrest warrants: On June 27, ICC Pre-Trial Chamber I issued arrest warrants for three senior Libyan officials, including Muammar Gaddafi.[143] This is the second time that the ICC has issued an arrest warrant for a sitting Head of State. The first was for Omar Al Bashir, the President of Sudan.[144] As with the situation in Sudan, Libya is not a State Party to the ICC Statute.

III. UNRESOLVED LEGAL ISSUES

The international community employed a broad range of tools in responding to the situation in Libya—arms embargos, economic sanctions, recognition/de-recognition, suspension of rights of membership, regional human rights mechanisms, a commission of inquiry, an ICC referral, and, ultimately, the use of force.[145] The unprecedented combination of these tools and the intersections of the various bodies of international law identified above have given rise to a number of unresolved legal issues.

A. Derogation Under the ICCPR

The Human Rights Council and the Security Council both condemned Libya for violations of provisions of human rights law and humanitarian law.[146] Among the rights invoked by both bodies were the rights to freedom of expression and freedom of assembly, both of which are subject to limitation and derogation.

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141. *Id*. at 2.

142. *Report of the International Commission*, *supra* note 169, at 8.

143. *ICC Issues Arrest Warrants Against Muammar Gaddafi, Safi Al-Islam Gaddafi, and Abdullah Al-Senussi: ICC and Coalition Press Statements*, Coalition for the International Criminal Court (June 27, 2011), http://www.iccnow.org/?mod=newsdetail&news=4640 (last visited Mar. 18, 2012) [hereinafter *ICC Issues Warrants*].

144. *Id*.

145. *The Crisis in Libya*, International Coalition for the Responsibility to Protect, *available at* http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya (last visited Mar. 18, 2012).

146. Report of the Human Rights Council, *supra* note 42.

As noted above, States a part of the ICCPR may take measures derogating from some of their obligations in the event of a "public emergency which threatens the life of the nation."[147] While no clear threshold has been established for determining when this standard has been met, the jurisprudence of the Human Rights Committee indicates that the possibility of derogation arises only in situations of the utmost gravity.[148] In any event, this standard was clearly met by the time the situation in Libya erupted into armed conflict.

In this context, two derogation related issues arise. The first is the significance of Libya's failure to notify the other States a part of the ICCPR via the U.N. Secretary General of any derogation. The second is whether Libya's legal ability to derogate is impeded by the Libyan government's role in creating the emergency situation.

As noted above, the failure to notify the Secretary General does not necessarily preclude the lawfulness of derogation.[149] The notification nonetheless serves important purposes. It serves as an important procedural safeguard by putting other States on notice of the derogation, presenting them with an opportunity to assess the situation. More significantly, it also requires the State derogating from its obligations to specify "the provisions from which it has derogated and . . . the reasons by which it was actuated."[150]

Apart from its failure to notify the Secretary General, Libya also failed to provide any public statement concerning derogation. There was, thus, no indication that Libya intended to avail itself of the capacity to derogate. Nor was there any indication of what measures would be taken in derogation of its obligations, the degree of derogation, or the extent to which such measures were necessary. More recent jurisprudence of the Human Rights Committee supports the view that the complete failure to provide this information in any form may be fatal to the lawfulness of such measures.[151]

The second derogation related issue is whether and to what extent a state's participation in creating a situation of public emergency might undercut its ability to derogate. There are at least two conceptual models

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147. ICCPR, *supra* note 32, art. 4, ¶ 1.

148. Hum. Rts. Com. General Comment 29, CCPR/C/21/Rev.1/Add.11, August 31, 2011.

149. *See* Consuelo Salgar de Montejo v. Colombia, Commc'n No. R.15/64, ICCPR, U.N. Doc. Supp. No. 40 (A/37/40) at 168, ¶ 10.3 (Mar. 24, 1982).

150. ICCPR, *supra* note 32, art. 4, ¶ 3.

151. *See* Adrien Mundyo Buyso, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo, Commc'n No. 933/2000, ICCPR, U.N. Doc. No. CCPR/C/78/D/933/2000 (A/58/40 vol. II) at 224, ¶ 5.2 (July 31, 2003).

for thinking about this issue. The first is by analogy to the relationship between the *jus ad bellum* and the *jus in bello*.

It is a basic principle of the *jus in bello* that its application is independent of the *jus ad bellum*. The issue of which state violated the *jus ad bellum* in bringing about a situation of armed conflict is generally irrelevant to the application of the *jus in bello*.[152] Once an international armed conflict has begun, the law of armed conflict applies equally to all parties, regulating the conduct of hostilities and providing protections for individuals not, or no longer, taking part in the hostilities.[153] Nonetheless, a state that violates the *jus ad bellum* would still bear international responsibility for that violation, and would be obliged to make reparation for all of its harmful consequences.[154]

Applying this model to the issue of derogation, one could argue that the cause of an emergency situation should not affect the ability to derogate once that situation has arisen. Thus, once the threshold of "public emergency[,] which threatens the life of the nation[,]" has been met and the state has announced measures derogating from its obligations in conformity with Article 4, the applicable legal framework has been altered.[155] Under this approach, international law would not look "behind" the then prevailing facts on the ground. The issue of who caused the state of emergency would be irrelevant to the issue of derogation. At the same time, the State would still bear responsibility for any human rights violations, including those in violation of derogable obligations, committed in the lead-up to the emergency situation.[156]

Another approach would be to proceed from the principle of "unclean hands." This equitable principle, whereby actors are precluded from benefitting from their own wrongdoing, is arguably a general principle of law within the meaning of Article 38 of the Statute of the International Court of Justice.[157] Variations of it are reflected in several fields of international law, including the law of state responsibility and the law of treaties. Under this approach, a State Party should not be able to avail itself of the possibility of derogation if the government of that State Party created

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152. McCaffrey, Shelton, and Cerone, *Public International Law: Cases, Problems, and Texts*, Lexis-Nexis (2010) at 1457.

153. *Id*.

154. ILC Articles on Responsibility of States for Internationally Wrongful Acts, International Law Comm'n, art. 31, *adopted in* G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

155. ICCPR, *supra* note 32, art. 4, ¶ 1.

156. ILC Articles on Responsibility of States for Internationally Wrongful Acts, International Law Comm'n, art. 1, *adopted in* G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

157. Statute of the International Court of Justice, July 17, 1998, 2187 U.N.T.S. 90.

the emergency situation by committing serious violations of human rights law (*e.g.* in the context of a brutal crackdown against protesters).[158]

There are strong arguments in favor of both approaches. The advantage of employing the former approach is that it avoids having to determine who was at fault in bringing about the new state of affairs. The importance of this principle in the context of the *jus ad bellum-jus in bello* dichotomy is particularly clear. States generally claim that their uses of force are lawful, and there is no standing judicial body with jurisdiction to determine otherwise. One could argue that the wisdom of remaining agnostic as to which party wrongfully caused a conflict would apply a fortiori in an internal context.

Moreover, states have agreed that irrespective of who started the armed conflict, certain rules must be followed by all parties in order to mitigate some of its effects.[159] This raises, however, an important distinction with respect to the issue of derogation. In international law, the principle of the independence of the *jus ad bellum* and *jus in bello* ensures that the restrictions of the *jus in bello* will apply to any armed conflict. Derogation is, in a sense, the inverse. The consequence of a valid derogation is the removal of restrictions that would otherwise apply to the conduct of the state party. Another basis of distinction may be found in the nature and function of international human rights law. This body of law principally regulates the way a state treats its own people, formerly regarded as a purely internal matter. International human rights treaties also establish compliance bodies to monitor implementation of the obligations under those treaties, including in times of public emergency.[160]

B. Application of International Human Rights Law during Armed Conflict

The issue of whether and to what extent international human rights law applies in situations of international armed conflict and occupation remains controversial. While international judicial bodies have found that international human rights law continues to apply in times of armed conflict, some states consistently reject this position and instead argue that international human rights law ceases to apply or is otherwise entirely abrogated by the application of the *lex specialis* of the *jus in bello*.[161]

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158. *Id.*

159. *See supra* note 153.

160. *See e.g.,* ICCPR, art. 28.

161. *See* J. Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in a Transnational Context*, 40 ISRAEL LAW REVIEW, 399 (2007); *see also* Second and Third Periodic Report of the United States of America to the U.N. Committee on

Despite this continuing controversy over the application of human rights law to international armed conflict, there now appears to be consensus that human rights law *does apply* in *internal* armed conflicts.[162] Even the United States, which has been vocal in its rejection of the application of human rights treaties to international armed conflicts and to transnational, non-international armed conflicts, has never objected to the application of human rights law to internal armed conflicts.[163] Indeed, the United States consistently exerts pressure bilaterally on states dealing with situations of internal armed conflict to comply with their obligations under international human rights law.[164]

Thus, to the extent the conflict in Libya remained internal, the application of international human rights law to it was uncontroversial. This does not mean, however, that there is not a continuing controversy over the inter-operability of particular rules of human rights law and humanitarian law in this context. There are still divergent views on this subject.

As noted above, once other states began to use armed force against Libya, the law of international armed conflict began to apply to the conflict between those states and Libya. The applicability of international human rights law to international armed conflicts remains unsettled, though a consensus appears to be emerging in favor of application at least where the relevant party to the conflict is exercising a degree of control over territory or individuals.[165] In any event, if the role of the intervening states is limited to aerial bombing campaigns (i.e. in the absence of any direct control of individuals or territory), then most questions arising under international human rights law, even if applicable, would likely be resolved by reference to the rules of the *jus in bello* as *lex specialis*.

Human Rights Concerning the International Covenant on Civil and Political Rights, October 21, 2005, at para. 130.

162. *Id.*

163. It may be that this position simply reduces to rejection of extraterritorial application of human rights treaties, though the United States maintains that that is a separate and independent ground for non-application of human rights treaties.

164. *See e.g.*, the many reports of the US State Department applying international human rights law to situations of armed conflict, such as the 2003 report on Colombia. Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor, February 25, 2004, *available at* http://www.state.gov/j/drl/rls/hrrpt/2003/27891.htm.

165. *See Jurisdiction and Power*, *supra*, note 162 at 446.

C. Use of Force Issues

A number of controversial legal issues are implicated by the Security Council's authorization to use force in this context.

Some have suggested that the Security Council's authorization to use force to protect civilians was a manifestation of the Responsibility to Protect doctrine. To the extent this assessment is accurate, it underscores the political nature of the doctrine. The use of force was authorized by a vote of the Security Council—a vote that was enabled through a careful alignment of political factors, including Gaddafi's lack of allies in the Arab world. There is little indication that the response by the international community gave legal content to the Responsibility to Protect concept, except perhaps as a conceptual umbrella for independently existing obligations under human rights and humanitarian law.[166]

More controversial has been the way in which force was used by the intervening states and regional organizations. In particular, the international community's support for the mandate began to erode in the wake of concerns that NATO was exceeding the authorization granted by the Security Council in Resolution 1973.

The Security Council's grant of authority to use force to "protect civilians and civilian populated areas" seemed to sweep more broadly than the more limited establishment of "safe areas" called for by the Arab League.[167] Presumably, the United Kingdom, France, and the United States preferred not to have to go back to the Security Council again if an initial grant of authority proved inadequate. Nonetheless, the Security Council imposed limits on the authorization to use force, clearly envisioning a protective use of force.[168] Thus, despite the breadth of the mandate, it would not seem to encompass regime change.[169]

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166. While Security Council Resolutions 1970 and 1973 both refer to the "responsibility to protect," this phrase is used to refer to Libya's responsibility to protect its own population. This obligation clearly exists under the very broad spectrum of obligations under human rights and humanitarian law applicable to Libya.

167. North Atlantic Treaty Organization, *Operation UNIFIED PROTECTOR Protection of Civilians and Civilian-Populated Areas*, ¶ 1 (June 2011), *available at* http://www.nato.int/nato_static/assets/pdf/pdf_2011_06/20110608_Factsheet-UP_Protection_Civilians.pdf (last visited Mar. 7, 2012) [hereinafter NATO Fact Sheet].

168. *See generally id*.

169. *See generally* Memorandum Opinion for Attorney General, *Authority to Use Military Force in Libya*, OPS. OF THE OFF. OF LEGAL COUNS. VOL. 35 (Apr. 1, 2011), *available at* http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf (last visited Mar. 7, 2012). In a footnote, the memo states, "Although President Obama has expressed opposition to Qadhafi's continued leadership of Libya, we understand that regime change is not an objective of the coalition's military operations." It then quotes President Obama's March 28, 2011 public address: "Of course, there is no

Key to assessing the scope of the mandate is the interpretation of the term "civilian."[170] To interpret this term in light of existing rules of international law,[171] one would naturally turn to the law of armed conflict. As the mandate was formulated against the backdrop of the internal armed conflict in Libya, the relevant body of law would be the law of non-international armed conflict.

There are divergent opinions as to the meaning of the term "civilian" in non-international armed conflict. Some authorities take the position that as civilians are traditionally defined as those who are not combatants, and as there are, strictly speaking, no combatants in non-international armed conflict, then all individuals in a non-international armed conflict are civilians.[172] This would arguably even include Gaddafi himself, as well as the members of his security forces. On this interpretation, only purely defensive uses of force would be permissible, as any offensive use of force would necessarily target those who are to be protected.

Others reject such a broad application of the term civilian, contending that those who take part in the hostilities are effectively combatants, styling them as unlawful combatants or unprivileged belligerents.[173] This would include Gaddafi's security forces, rebel soldiers, and depending upon the breadth of interpretation, any other individual taking part in the hostilities. On this interpretation, protection of these individuals would fall outside the mandate. Noteworthy in this context is that the United States government over the past decade has advanced a relatively narrow conception of civilian status, excluding those taking part in the hostilities, or even providing material support to the belligerents. In the present context, such interpretations narrow its authority to use force.

A further wrinkle is introduced by use of the term "civilian populated areas under threat of attack."[174] Use of this phrase could expand the mandate to include protection of all places where civilians reside. In particular, it could be read to include within the mandate the use of force to protect all parts of Libya. Of course it would also then apply to towns where Gaddafi loyalists resided.

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question that Libya—and the world—would be better off with Qaddafi out of power. I . . . will actively pursue [that goal] through non-military means. But broadening our military mission to include regime change would be a mistake."

170. NATO Fact Sheet, *supra* note 227, ¶ 1.

171. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

172. *See* ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, May 2009, at 27.

173. *Id*.

174. NATO Fact Sheet, *supra* note 227, ¶ 1.

Once the tide turned against Gaddafi and the rebels began to launch offensives against loyalist strongholds, the legality of continued NATO bombing in support of the rebels is questionable. Particularly difficult to justify under the mandate would be the continuing NATO attacks after the Gaddafi regime was in full retreat.[175] While some have reasoned that protection of civilians in Libya necessitated regime change, and that dislodging Gaddafi from power was a justified means of fulfilling the mandate, such reasoning renders the limitations expressly set forth in Resolution 1973 almost meaningless.

If NATO's use of force exceeded the scope of the 1973 authorization, would that then constitute the crime of aggression within the definition for that crime adopted at the 2010 Review Conference of the ICC? The aggression amendment adopted at the Review Conference defines aggression as the

> [P]lanning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[176]

The phrase "act of aggression" is then defined by reference to U.N. General Assembly Resolution 3314.[177] That resolution does not expressly refer to uses of force in excess of Security Council authorization.[178] Nonetheless, it does provide an analogous category of conduct.[179] It includes as an act of aggression "[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement."[180] Thus, to the extent the definition of aggression includes *ultra vires* uses of force, it could be argued that certain

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175. *Libya conflict: Nato jets hit Gaddafi Sirte bunker*, BBC NEWS, August 26, 2011; *Libya's NTC troops renew assault on pro-Gaddafi Sirte*, BBC NEWS, September 25, 2011; *NATO: It didn't know Gadhafi was in bombed convoy*, ASSOCIATED PRESS, October 21, 2011.

176. Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, R.C. Res. 13/4, 13th Sess., Annex I, art. 8, ¶ 1, at 2 (June 11, 2010).

177. G.A. Res. 29/3314 (XXIX), at 142–143, U.N. Doc. A/RES/29/3314 (Dec. 14, 1974) [hereinafter G.A. Res. 29/3314, Definition of Aggression].

178. *See generally id*.

179. *Id*.

180. G.A. Res. 29/3314, Definition of Aggression, *supra* note 251, Annex art. 3(e).

offensive aspects of the NATO bombing campaign qualify as acts of aggression.[181]

The definition of the *crime* of aggression, however, is somewhat narrower. In particular, the act of aggression would have to "by its character, gravity and scale, constitute[] a manifest violation of the Charter of the United Nations."[182] Given the divergent interpretations of the mandate, it would be difficult to conclude that any violation was "manifest," or objectively evident.[183]

In any event, NATO's broad interpretation of the mandate seems to have set back the Responsibility to Protect doctrine as a political matter.[184] Russia and China, states that have traditionally advocated robust interpretations of the non-intervention principle but were persuaded to acquiesce in the 1973 mandate, have since voted against even the mildest measures in relation to the situation in Syria.[185]

D. ICC Referral Issues

The ICC referral also raises a number of significant legal issues, including the applicability of Head of State immunity and the principle of non-retroactive application of criminal law (or *nullem crimen sine lege*).[186]

The Security Council referral was a necessary pre-condition to the exercise of ICC jurisdiction in this case, because Libya is not a party to the ICC Statute.[187] Libya's non-party status is also relevant to the issues of Head of State immunity and the application of *nullem crimen*.

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181. *Id.*

182. *See generally* Definition of Aggression, *supra* note 251.

183. Vienna Convention, *supra* note 231, art. 46(2).

184. See Article 46(2) of the Vienna Convention on the Law of Treaties for an indication of the meaning of the term "manifest." Vienna Convention, *supra* note 231, art. 46(2).

185. Neil MacFarquhar, *U.N. Resolution on Syria Blocked by Russia and China*, THE NEW YORK TIMES (Oct. 4, 2011), *available at* http://www.nytimes.com/2011/10/05/world/middleeast/russia-and-china-block-united-nations-resolution-on-syria.html?_r=1&pagewanted=all (last visited Apr. 5, 2012).

186. Russia and China voted against the resolutions at both of the Human Rights Council's Special Sessions on Syria. They also vetoed a draft Security Council resolution that merely suggested the possibility of future sanctions.

187. ICC Statute, *supra* note 71, art. 12, ¶ 3. The Court may also exercise jurisdiction over a case if it has the consent of the state of nationality of the alleged perpetrator or of the territory in which the crime occurred, even if these states are not parties to the Rome Statute. As the crimes concerned were allegedly perpetrated by Libyans on Libyan territory, and as the consent of the Libyan government was not forthcoming at the relevant time, Security Council referral was only the means by which the Court could exercise its jurisdiction.

As noted above, an ICC Pre-Trial Chamber issued an arrest warrant for Gaddafi in June 2011.[188] As an incumbent Head of State, Gaddafi was entitled to absolute immunity from foreign legal process under customary international law. Although Gaddafi's death has rendered the issue moot, the question remains whether the issuance of the arrest warrant was a violation of international law, and if so, which entity, if any, bore responsibility for the violation.

The ICC has satisfied for itself the lawfulness of issuing arrest warrants for sitting Heads of State by reference to its own Statute. The Statute provides that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[189] Thus, those states that are parties to the treaty have effectively waived immunity claims. This is not true for states that are not parties to the treaty.[190] Nonetheless, in its decision authorizing the issuance of an arrest warrant for Sudanese President Omar Al Bashir, an ICC Pre-Trial Chamber found that the abrogation of immunity provided in the ICC Statute applied equally *vis-à-vis* the territorial states of situations referred to the Court by the Security Council irrespective of whether or not that state is a party to the ICC Statute.[191] It remains unresolved whether this decision is consistent with customary international law.

It may be argued that Security Council Resolution 1970, in deciding that "the Libyan authorities shall cooperate fully" with the Court, effectively abrogated any immunities.[192] However, it is also arguable that any derogation of existing customary international law would have to be expressly stipulated.

In any event, even if the issuance of the arrest warrant conflicted with international law, it is unclear who would bear responsibility for the violation. Is the ICC a legal person bound by customary international law? Even if it is a legal person, and even if it violated customary international law, it remains unclear what remedy would be available to injured states or individuals.

Another issue related to Libya's status as a non-State Party to the Rome Statute revolves around the principle *nullem crimen sine lege*.

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188. ICC Issues Warrants, *supra* note 146.

189. ICC Statute, *supra* note 71, art. 27, ¶ 2.

190. Vienna Convention, *supra* note 231, art. 34.

191. *See generally* Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009).

192. Resolution 1970, *supra* note 57.

According to this principle, an individual may not be prosecuted for conduct that was not proscribed by applicable law at the time the conduct took place.[193] As Libya is not a party to the Rome Statute, the criminal prohibitions set forth therein did not form part of the law applicable to Libyan nationals acting on the territory of Libya. Nonetheless, many of those prohibitions were applicable as customary international law.

At the time the Rome Statute was adopted, there was broad agreement that most of the crimes included in the Court's subject matter jurisdiction had already acquired the status of customary law.[194] It was also understood, however, that there was an element of progressive development in the Statute, particularly in relation to the war crimes provisions applicable in situations of non-international armed conflict.[195]

Hardly a decade earlier, it was far from clear whether even the most serious violations of the law of non-international armed conflict would give rise to the individual criminal responsibility of the perpetrator in international law. By the mid-1990s, the International Criminal Tribunal for the former Yugoslavia had determined that serious violations of Common Article 3 of the 1949 Geneva Conventions were war crimes giving rise to individual criminal responsibility.[196] The Tribunal's pronouncements were not met with any significant opposition from states. By the time of the Rome Statute's adoption in the summer of 1998, it was already well accepted among states that serious violations of Common Article 3 constituted war crimes. The Rome Statute, however, provides a much more extensive elaboration of war crimes in non-international armed conflict, going well beyond the provisions of Common Article 3. Thus, in considering war crimes charges against the suspects, the Court will have to carefully examine whether the crimes were well-established in customary international law in early 2011.[197]

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193. ICC Statute, *supra* note 71, art. 22, ¶ 1. The ICC Statute incorporates a variation of this principle in its Article 22, which states "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."

194. *See supra* note 18.

195. It was for this reason that Article 124 of the Statute was included as a transitional measure.

196. ICTY, *Tadic Appeal Decision,* 2 October 1995, paragraph 129.

197. Crimes Against Humanity charges are less controversial. Crimes Against Humanity have been established rules of customary international law at least since 1946, when the Nuremberg principles were unanimously affirmed by the U.N. General Assembly. *See* G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (Dec. 11, 1946). In addition, the ICC Statute sets a higher bar from crimes against humanity than customary international law, at least as formulated by the ad hoc Tribunals. The ICC Statute requires as a contextual element for Crimes Against Humanity that the attack be "pursuant to or in furtherance of a State or organizational policy to commit such attack."

IV. CONCLUSION

In responding to the situation in Libya, the international community employed virtually every legal tool at its disposal. In so doing, it demonstrated the expanding reach of international law and institutions with respect to materially internal situations, and reflected the growing political will that has enabled this expansion. However, as the contrasting response to the situation in Syria demonstrates, the selection of tools, and indeed whether to respond at all, remains a political choice.

The combination of these tools in the Libyan context also reveals the extent to which a number of important legal issues of human rights law, the *jus in bello*, the *jus ad bellum*, and international criminal law are unresolved. At the same time, the political, *ad hoc* nature of the international community's response to the situation in Libya portends that many of these issues will likely remain unresolved for the foreseeable future.

ICC Statute, *supra* note 71, art. 7(2)(a). The Appeals Chamber of the International Criminal Tribunals for the former Yugoslavia and Rwanda has held that there is no such policy requirement under customary law. As the Rome Statute definition sets a higher bar than customary law, thus capturing a narrower category of conduct, the *nullem crimen* principle is not offended, at least with respect to these contextual elements.

PROPRIETY OF SELF-DEFENSE TARGETINGS OF MEMBERS OF AL QAEDA AND APPLICABLE PRINCIPLES OF DISTINCTION AND PROPORTIONALITY

Jordan J. Paust[*]

I. INTRODUCTION

The United States has engaged in the targeted killing of certain members of al Qaeda both within the theatre of an actual war in Afghanistan and parts of Pakistan, and outside the theatre of war as a matter of self-defense in areas such as Yemen, including the killing of United States national Anwar al-Awlaki in Yemen on September 30, 2011.[1] It has been reported that the United States (U.S.) Executive had a secret June 2010 memorandum that sanctified the killing of al-Awlaki as a law of war measure because he allegedly played a direct part in an alleged war between the United States and al Qaeda and its affiliates.[2] Under international law,

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1. Martin Chulov, *Al-Qaida Cleric Anwar al-Awlaki is Dead, says Yemen*, THE GUARDIAN, Sept. 30, 2011, *available at* http://www.guardian.co.uk/world/2011/sep/30/anwar-al-awlaki-dead (last visited Mar. 15, 2012).

2. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1, *available at* http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all (last visited Mar. 13, 2012).

is it possible for the United States to be at war with al Qaeda as such? In any event, are laws of war and self-defense targetings of certain members of al Qaeda in the theatre of the actual war in Afghanistan and parts of Pakistan generally permissible? Outside the theatre of a real war, are the targetings of some members of al Qaeda permissible as measures of self-defense under Article 51 of the United Nations Charter? During self-defense targetings, is there a need to attempt to comply with general principles of distinction among persons, reasonable necessity, and proportionality and what others call the collateral damage rule? These and related questions are explored below.

II. THE UNITED STATES CANNOT BE AT WAR WITH AL QAEDA

A. Traditional Customary International Legal Criteria Regarding the Existence of War

Despite claims of the Obama Administration that the United States campaign against al Qaeda is an armed conflict,[3] under traditional international law the United States cannot be at war or involved in any form of armed conflict with al Qaeda as such, although, the United States is involved in a real war in Afghanistan and parts of Pakistan within which certain members of al Qaeda are lawfully targetable either because they are direct participants in hostilities (DPH) or are direct participants in armed attacks against United States military personnel and other United States nationals that allow the United States to respond with military force in self-

3. Barack Obama, President, United States of America, Obama's Mideast Speech (May 19, 2011), *available at* http://www.nytimes.com/2011/05/20/world/middleeast/20prexy-text.html (last visited Mar. 13, 2012); Barack Obama, President, United States of America, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (last visited Mar. 13, 2012); Harold HongjuKoh, Legal Advisor, U.S. Dep't of State, The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm (last visited Mar. 13, 2012) (claiming that "the United States is in an armed conflict with al-Qaeda, . . . they continue to attack us" during "this ongoing armed conflict" . . . Harold Koh also rightly noted that certain targetings of members of al Qaeda can be lawful measures of self-defense.); Savage, *supra* note 2 (If the U.S. has been at war with al Qaeda, under the laws of war attacks on the Pentagon, the U.S.S. Cole, and U.S. military and CIA personnel in Afghanistan would have been permissible if engaged in by privileged fighters and were not otherwise impermissible under international law.); *See also* Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 270–72, 275 (2010), *available at* http://ssrn.com/abstract=1520717 (last visited Mar. 13, 2012) [hereinafter *Self-Defense Targetings*]. As explained in Part II, *infra*, in the theatre of a real war both the law of war and the law of self-defense provide a competence to engage civilians who are directly participating in hostilities and/or armed attacks. Both paradigms (i.e., the law of war and self-defense paradigms) are operative in a theatre of war.

defense against those who are directly participating in the armed attacks (i.e., those who are DPAA).[4] It is evident, therefore, that the laws of war are not applicable with respect to United States targetings of members of al Qaeda outside the context of an actual war and where they are not directly participating in hostilities, for example, by issuing or transferring orders or authorizations by cell phone or computer flash drives to others who are within the theatre of an actual war and engaged in violence.

Under traditional international law, it is obvious that al Qaeda is not a state, nation, belligerent, or insurgent group. Indeed, al Qaeda is not known to have even purported to have the characteristics of a state, nation, belligerent, or insurgent. Under customary international law, an insurgency is the lowest level of warfare or armed conflict, otherwise known as an armed conflict not of an international character.[5] Under traditional legal criteria used to determine whether an insurgency exists, the putative insurgent group would need to:

a) Represent an identifiable group of people or to have a relatively stable base of support within a given population;
b) Have the semblance of a government;
c) Have an organized military force and be able to field its military units in sustained hostilities; and
d) Control significant portions of territory as its own.[6]

The next highest level of warfare or armed conflict is a belligerency. A belligerent must meet each of the four criteria noted with respect to an insurgency as well as a fifth criterion—it must have recognition as a belligerent, nation, or state, by a state that it is engaged in an armed conflict with or by other states in the international community.[7] A well-known example of a belligerent engaged in an armed conflict to which all of the customary laws of war applied was the CSA or the Confederate States of America during the United States Civil War. It met the four customary

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4. *See*, *e.g.*, *Self-Defense Targetings*, *supra* note 3, at 270–72, 275.

5. *See*, *e.g.*, JORDAN J. PAUST, M. CHERIF BASSIOUNI, ET AL., INTERNATIONAL CRIMINAL LAW 646–48, 651, 654 (3 ed., 2007) [hereinafter ICL]; Jordan J. Paust, *Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1341 (2004) [hereinafter *Overreaction*].

6. *See*, *e.g.*, Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326 (2003) [hereinafter *War and Enemy*]; *Overreaction*, *supra* note 5; ICL, *supra* note 5.

7. *See*, *e.g.*, *id*. at 326, n.6. There is no magic number or percentage of states that must recognize such a status.

legal criteria and also had recognition as a "belligerent" by the United States as well as by a few European states.[8]

In contrast, al Qaeda has never met the legal criteria for insurgent status and has certainly lacked any outside recognition as a belligerent, nation, or state. In particular, al Qaeda does not have the semblance of a government; does not have an organized military force; does not field military units in sustained hostilities; and does not control significant portions of territory as its own.[9] In view of the above, any fighting between the United States and al Qaeda as such cannot amount to war or an armed conflict, and therefore, cannot trigger application of the laws of war for such purposes as targeting, capture, status, detention, treatment, prosecution, and application of a law of war collateral damage rule.[10] For

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8. *See*, *e.g.*, The Prize Cases, 67 U.S. 635, 666–67, 669 (1862) (addressing criteria for belligerency status which include the need to "occupy and hold in a hostile manner a certain portion of territory; have declared their independence; . . . have organized armies; have commenced hostilities . . . [and] the world acknowledges them as belligerents."); NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 248–49 (2008) [hereinafter TARGETED KILLING]; ICL, *supra* note 5, at 645, 651, 657, 661; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 13 §1.11(a) (1956) ("The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents.") [hereinafter FM 27-10]; *Overreaction*, *supra* note 5, at 1341 n.24. The Civil War between the United States and the Confederate States of America is an example of a classic civil war between a state and a "belligerent" which also has the status of an armed conflict of an international character to which all of the customary laws of war apply.

9. *See*, *e.g.*, *War and Enemy*, *supra* note 6 at 326–27; *Overreaction*, *supra* note 5, at 1340–42.

10. Most writers agree that the U.S. cannot be at "war" or in "armed conflict" or "combat" with al Qaeda as such, much less a mere tactic of "terrorism." *See*, *e.g.*, ANTONIO CASSESE, INTERNATIONAL LAW 410 (2 ed. 2005) ("As for Al Qaeda members, they must be regarded as civilians engaging in criminal activities"); Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1872–73 (2004); Lawrence Azubuike, *Status of Taliban and al Qaeda Soldiers: Another View*, 19 CONN. J. INT'L L. 127, 152 (2003); Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2503, 2511 (2008); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"*, 87 INT'L REV. RED CROSS 39, 45 (2005); Michael Byers, *Terrorism, the Use of Force, and International Law After 11 September*, 51 INT'L & COMP. L.Q. 401, 408 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 958 (2002); Chad DeVeaux, *Rationalizing the Constitution: The Military Commissions Act and the Dubious Legacy of Ex Parte Quirin*, 42 AKRON L. REV. 13, 16 n.11 (2009); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 347–48 (2002); Matthew Fleischman, *A Functional Distribution of War Powers*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 137, 159 (2010); Christopher Greenwood, *War, Terrorism, and International Law*, 56 CURRENT L. PROBS. 505, 529 (2004); Daryl L. Hecht, *Controlling the Executive's Power to Detain Aliens Offshore: What Process is Due the Guantanamo Detainees?*, 50 S.D. L. REV. 78, 94 (2005); Berta E. Hernandez Truyol, *Globalizing Terror*, 81 OR. L. REV. 941, 972, n.140 (2002); Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69, 70, n.6 (2005); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33, 36 (2006); Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349, 349–

57 (2005); Mary Ellen O'Connell, *When Is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT'L & COMP. L. 535, 538 (2005); *War and Enemy*, *supra* note 6, at 327; Michael Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, 16 J. CONFLICT & SEC. L. 385, 390 (absurd claim of a "global NIAC between the USA and Al-Qaeda, and such view finds little support outside of the USA"); Gabor Rona, *International Law Under Fire: Interesting Times for International Humanitarian Law: Challenges from the "War on Terror",* 27 FLETCHER F. WORLD AFF., at 55, 61 (Summer/Fall 2003); Kenneth Roth, *The Law of War in the War on Terror*, 83 FOREIGN AFF., at 2, 7 (Jan./Feb. 2004); Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 140 (2004); Marco Sassoli, *Use and Abuse of the Laws of War in the "War on Terrorism"*, 22 LAW & INEQ. 195, 195–196 (2004); Scott Silliman, Testimony before the United States Senate Committee on the Judiciary on DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism (Nov. 28, 2001) (U.S. not at war with al Qaeda and the 9/11 attacks could not be violations of the laws of war); Detlev F. Vagts, *"War" in the American Legal System*, 12 ILSA J. INT'L & COMP. L. 541, 543–45 (2006); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 4 n.18 (2004); INT'L COMM. RED CROSS, THE RELEVANCE OF IHL IN THE CONTEXT OF TERRORISM (July 21, 2005), *available at* http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm (last visited Mar. 13, 2012); Warren Richey, *Tribunals on Trial*, CHRISTIAN SCIENCE MONITOR, at 1 (Dec. 14, 2001) (quoting Professor Leila Sadat, "actions of Sept. 11 aren't war crimes . . . "), *available at* http://www.publicbroadcasting.net/wvmr/news.newsmain/article/0/0/314920/Opinion/Tribunals.on.Trial (last visited on Mar. 13, 2012). *See also* Mark A. Drumbl, *Guantanamo*, *Rasul*, *and the Twilight of Law*, 53 DRAKE L. REV. 897, 908 (2005) (Bush policy had the unwanted consequence of "absurdly glorifying terrorism as armed conflict and terrorists as 'warriors. . . .'"); Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with al-Qaeda, and It's a Good Thing, Too: A Response to Chang*, 47 TEX. INT'L L.J. 1, 3 n.10 (2011) (stating that "[t]he idea that there is a global NIAC between the U.S. and al-Qaeda is both legally questionable . . . and has been consistently rejected by states other than the U.S.," citing Kress, *infra* note 19 at 266); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2500 (2006) (quoting Lord Hoffman in A (FC) & Others (FC) v. Sec'y of State for the Home Dep't, [2004] UKHL 56, 96 "Terrorist violence, serious as it is, [is not a] war or other public emergency threatening the life of the nation"); Interview by Wolf Blitzer of CNN with Zbigniew Brzezinski, Former National Security Adviser (May 14, 2006) ("I don't buy the proposition we are at war. . . . [T]his is really a distortion of reality. We have a serious security problem with terrorism. . . . But to create an atmosphere of fear, almost of paranoia, claiming that we're a nation at war, opens the door to a lot of legal shenanigans." Without compliance with FISA, "[w]e slide into a pattern of illegality"); Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (O'Connor, J.) (rightly classifying the war in Afghanistan as "[a]ctive combat operations against Taliban fighters" and declaring that detention can last "for the duration of these hostilities Pan American Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1013–15 (2d Cir. 1974) (United States could not have been at war with the Popular Front for the Liberation of Palestine (PFLP), which had engaged in terrorist acts as a non-state, non-belligerent, non-insurgent actor). *Cf.* Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 337 n.6 (2005); Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149,189–90 (2005) ("important to distinguish the rhetoric of the 'war on terrorism' from the congressional authorization," "the current war on terrorism"). *But see* JOHN YOO, WAR BY OTHER MEANS 12–13 (2006) (recognizing that we cannot be at war with terrorism, but claiming without consideration of even the customary legal criteria that must be met even for the existence of an insurgency that we are "in an international armed conflict with al Qaeda"). *See generally*, Jane Gilliland Dalton, *What is War? Terrorism as War After 9/11*, 12 ILSA J. INT'L & COMP. L. 523 (2006); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003);

this reason, outside the context of an actual war to which the laws of war apply, members of al Qaeda who were not otherwise attached to the armed forces of a belligerent, nation, or state cannot be "combatants," much less, "enemy," or so-called "unlawful" combatants or prisoners of war as those terms and phrases are widely known in international law.[11]

B. Newer Criteria in Geneva Protocol II

One set of legal criteria for application of certain laws of war to an insurgency is slightly different than that reflected in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.[12] Article 1(1) of the Geneva Protocol requires that there be an "armed conflict" between a state's armed forces and at least an "organized armed group" that is "under responsible command" and that "exercise[s] such control over a part of . . . [a state's] territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol."[13] It is evident that outside the theatre of an actual war in Afghanistan and parts of Pakistan, al Qaeda does not engage in an "armed conflict" with military forces of the United States; is not more generally an "organized armed group;" is not under a "responsible" command;[14] does not "exercise such control over a part" of territory of a state as to enable al Qaeda "to carry out sustained and concerted military operations;" and certainly does not intend to implement the Geneva Protocol. In fact, al Qaeda does not carry out "sustained and concerted military operations" anywhere around the globe. The Geneva Protocol also recognizes that "isolated and sporadic acts of violence" are not "armed conflicts" of any sort.[15]

Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006) (stating that Hamdan "was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban," but citing nothing for such a notion of "conflict" and paying no attention to traditional law of war criteria for an insurgency or legal criteria set forth in Geneva Protocol II noted *infra*).

11. *See*, *e.g.*, *War and Enemy*, *supra* note 6, at 327–33.

12. *See* Geneva Convention Additional Protocol Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II].

13. *Id*. art. 1(1).

14. *See*, *e.g.*, Aaron M. Drake, *Current U.S. Air Force Drone Operations and Their Conduct in Compliance with International Humanitarian Law—An Overview*, 39 DENV. J. INT'L L. & POL'Y 629, 654–55 (2011) (regarding general attributes of responsible command); Michael A. Newton, *Flying into the Future: Drone Warfare and the Changing Face of Humanitarian Law*, 39 DENV. J. INT'L L. & POL'Y 601, 606–07 (2011).

15. Geneva Protocol II, *supra* note 12, art. 1(2).

C. An ICTY Preference for Lower Levels of Warfare

In 1995, an opinion of the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia (ICTY) chose a much lower threshold, preferring that "an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between a governmental authority and organized armed groups or between such groups within a state."[16] This preference has been shared by some writers, but is generally without support in continual practice and generally shared patterns of legal expectation or *opinio juris*— two elements needed for the formation of a norm of customary international law[17]—and has no direct support in treaty law. Even under this preference, however, it is evident that al Qaeda is not an "organized armed group" and that outside the theatre of the real Afghan war, al Qaeda does not engage in "protracted" armed violence or "armed force" as opposed to sporadic or isolated acts of violence, especially as such phrases have been further clarified in subsequent cases.[18] Responding to such a preference, other textwriters, including those who participated in a report for the International Law Association, underscore that protracted armed violence exists only where

16. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995); Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. For the Former Yugoslavia, Trial Chamber II, May 7, 1997) ("terrorist activities . . . are not subject to international humanitarian law."); Prosecutor v. Boskoski & Tareulovski, Case No. IT-04-82-T, Judgment, ¶¶ 175, 177–78 (Int'l Crim. Trib. For the Former Yugoslavia, July 10, 2008) ("the Trial Chamber in *Tadic* interpreted this test . . . as consisting of two criteria, namely (i) the intensity of the conflict, and (ii) the organization of the parties to the conflict" and "care is needed not to lose sight of the requirement for protracted armed violence...when assessing the intensity of the conflict. The criteria are closely related. . . ."); *id*. ¶ 185 (regarding "protracted" violence, what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities," and quoting The Prosecutor v. Kordic: "[t]he requirement of protracted fighting is significant."); *id*. ¶¶ 199–203 (identifying various other factors); Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶ 248(Jan. 27, 2000) ("The expression 'armed conflicts' introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. . . ."); Rome Statute of the International Criminal Court, art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90, ("isolated and sporadic acts of violence" are not "armed conflict"). Al Qaeda does not engage in a "protracted campaign that entails engagement of . . . [other] parties in hostilities," "open hostilities," or use "armed forces" in "protracted fighting." It should be noted that Professor Cassese, as Judge in the Appeals Chamber of the ICTY, wrote the opinion noted above in *Tadic*, and he later recognized that members of al Qaeda are mere civilians engaged in criminal activities. CASSESE, *supra* note 10, at 410.

17. *See*, *e.g*., ICL, *supra* note 5, at 6–9.

18. *See*, *e.g*., *supra* note 16.

there is intense fighting.[19] Clearly, al Qaeda does not engage in intense fighting outside the theatre of the Afghan war and it is doubtful that al Qaeda, as such, has ever done so in the theatre of war.

The International Committee of the Red Cross (ICRC) has defined "organized armed groups" for a different purpose, i.e., for the purpose of deciding whether particular persons can be targeted during an actual armed conflict. In my opinion, the ICRC description of organized armed groups should be useful for interpretation of the same phrase that was used in ICTY decisions as well as their use of related phrases such as "armed force" and "protracted armed violence." The ICRC has declared that members of "organized armed groups" are members of "fighting forces" composed "of individuals whose continuous function is to take a direct part in hostilities—continuous combat function."[20] Using the ICRC's approach, it is quite obvious that al Qaeda does not meet such a test for an "organized armed group," since it does not have a "fighting force" composed of individuals who have a "continuous combat function."[21]

II. TARGETINGS OF MEMBERS OF AL QAEDA IN THE THEATRE OF A REAL WAR

Even though the United States cannot be at war with al Qaeda as such, some members of al Qaeda have been directly involved in ongoing hostilities during the real war in Afghanistan and parts of Pakistan. As noted in another writing, members of al Qaeda within the theatre of such a war who directly participate in hostilities, and those outside the general theatre of war who directly participate in such a war, are targetable under

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19. *See*, *e.g.*, Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SEC. L. 245, 261 (2010) (the threshold "requires the insistence on a degree of quasi-military organization of the non-State party that enables it to carry out large-scale armed violence in a coordinated manner" and such does not pertain at least after "Al Qaeda's subsequent transformation into a rather loosely connected network of terrorist cells"); Mary Ellen O'Connell, *Remarks: The Resort to Drones Under International Law*, 39 DENV. J. INT'L L. & POL'Y 585, 596–97 (2011), citing Use of Force Comm. of the Int'l L. Ass'n, Final Report on the Meaning of Armed Conflict in International Law 1 (2010), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1022 (last visited Mar. 12, 2012) [hereinafter O'Connel, *Remarks*]; Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y 343, 355–57 (2010). *See also supra* note 16.

20. *See*, *e.g.*, Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC, 16, 27, 36, 70–73 (May 2009), *available at* http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf (last visited Feb. 20, 2012) [hereinafter Melzer, *Interpretive Guidance*].

21. *See id*.

the laws of war as civilians who directly participate in hostilities (DPH).[22] As noted, whenever the United States uses armed force outside its territory against an actual insurgent military force—and therefore, not in the case of force used merely against al Qaeda as such—the armed conflict:

> should be recognized as an international armed conflict to which all of the customary laws of war apply. It is in the interest of the United States and other countries to recognize the international character of such an armed conflict so that members of their armed forces have "combatant" status, prisoner of war status if captured, and "combatant immunity" for lawful acts of warfare engaged in during an international armed conflict. . . . The armed conflict between U.S. military forces and those of the Taliban inside and outside of Afghanistan since October 7, 2001 is an international armed conflict.[23]

III. TARGETINGS OF MEMBERS OF AL QAEDA CAN BE PERMISSIBLE AS MEASURES OF SELF-DEFENSE

Both within and outside the theatre of an actual war, some members of al Qaeda can be targeted or captured as part of lawful United States responses in self-defense under Article 51 of the United Nations Charter against ongoing non-state actor armed attacks on the United States, its embassies abroad, and its military personnel and other nationals abroad.[24] There are no geographic limits to permissible self-defense targetings and they can occur outside an actual theatre of war and in time of relative

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22. *See*, *e.g.*, *Self-Defense Targetings*, *supra* note 3, at 270–72, 275; Jordan J. Paust, *Permissible Self-Defense Targetings and the Death of bin Laden*, 39 DENV. J. INT'L L. & POL'Y569, 571–72, 579 (2011) [hereinafter, *Permissible Self-Defense Targetings*]. As noted, one wants to consider participation over a period of time or the process of participation over time, for example, by using a movie camera instead of a rigid snap shot approach to inquiry and by noting whether there exists a relatively continuous participation over time (with short interruptions). If so, it is appropriate to conclude that there is a process of direct participation and one does not have to inquire merely whether the next form of direct participation is imminent (which would involve a rigid snap shot approach) and one can note that the process of participation realistically did not stop. *See*, *e.g.*, *Self-Defense Targetings*, *supra* note 3, at 271 n.90. This is somewhat different from the ICRC's notion of a continuous combat function (CCF), which is also process-oriented. *See*, *e.g.*, Melzer, *Interpretive Guidance*, *supra* note 20, at 16–17, 27, 34, 36, 65–68, 70–73 (discussing the ICRC's CCF-type of inquiry); *Self-Defense Targetings*, *supra* note 3, at 271–72 n.90.

23. *Self-Defense Targetings*, *supra* note 3, at 261.

24. *See also Self-Defense Targetings*, *supra* note 3; *Permissible Self-Defense Targetings*, *supra* note 22. It should be noted that most self-defense responses to prior armed attacks will involve the motive to prevent such attacks from continuing, but the existence of mixed motives will not limit the permissibility of otherwise lawful measures of self-defense against an ongoing process of self-defense.

peace.[25] It is evident, therefore, that with respect to permissible targetings the self-defense paradigm is different in some respects from the law of war paradigm. In fact, the international law of self-defense allows the targeting of persons who directly participate in armed attacks (DPAA)[26] wherever such forms of direct participation occur. For example, as noted in another writing, "significant armed attacks or attempted armed attacks have emanated from parts of Yemen, thereby permitting self-defense targetings of direct participants located in Yemen."[27]

More recently, the United States targeted a United States national in Yemen. The targeting of al-Awlaki was recognizably permissible under the law of self-defense, if the Executive is correct that he had migrated from being an al Qaeda propagandist and effective recruiter for al Qaeda to a person who engaged in direct incitement to armed violence and a leader or member of an operational team of al Qaeda in the Arabian Peninsula that continued to engage in planning armed attacks initiated in Yemen to take place in the United States or on board a U.S. aircraft—such as the failed Christmas underwear bomber attack in 2009 and the failed Fed-Ex and UPS cargo bomb attacks in 2010.[28] In such a case, he would have become a

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25. *See*, *e.g.*, *Self-Defense Targetings*, *supra* note 3, at 250–52, 255, 258, 260, 279–80.

26. If there is direct participation in armed attacks over time with occasional interruption, one wants to use a process approach and note whether direct participation occurs over a period of time, for example, by using a movie camera instead of a rigid snap shot approach to inquiry that would merely focus on whether the next attack is imminent instead of focusing on the fact that a process of direct participation in attacks realistically never stopped. *See also Self-Defense Targetings*, *supra* note 3; *Permissible Self-Defense Targetings*, *supra* note 22. One might even consider that those who directly participate in armed attacks over time are those who demonstrate a continual armed attack function (CAAF).

27. *Permissible Self-Defense Targetings*, *supra* note 22, at 572 n.18, 575.

28. Concerning such failed armed attacks, see for example, *Permissible Self-Defense Targetings*, *supra* note 22, at 572 n.18, 575; Concerning Al-Awlaki's participation in armed attacks, *see*, *e.g.*, President Barack Obama, *Remarks at the Change of Command Ceremony for the Chairman of the Joint Chiefs of Staff at Fort Myer, Virginia*, Daily Comp. Pres. Docs., DCPD-201100695, Sept. 30, 2011, at 1, *available at* http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony (last visited Feb. 20, 2012) (He was "a leader of al Qaeda in the Arabian Peninsula . . . the leader of external operations for al Qaeda in the Arabian Peninsula. In that role, he took the lead in planning and directing efforts to murder innocent Americans," including the failed Christmas day 2009 aircraft bombing and the failed U.S. cargo plane bombings in 2010.); Attorney General Eric Holder, Remarks As Prepared For Delivery By Attorney General Eric Holder At Northwestern University School Of Law (Mar. 5, 2012) (The Christmas Day bomber received "specific instructions [from al-Awlaki] to wait until the airplane was over the United States before detonating his bomb."), *available at* http://opiniojuris.org/2012/03/05/ag-holders-national-security-speech-text (last visited Mar. 12, 2012) [hereinafter Holder]; Ramsden, *supra* note 9, at 398–400; Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, Oct. 1, 2011, at A9.

direct participant in ongoing armed attacks (DPAA) against the United States and its nationals and he would have been lawfully targetable under the law of self-defense. Because the United States cannot be at war with al Qaeda or its affiliates, the laws of war were not applicable in order to permit the targeting of al-Awlaki as a civilian who was a direct participant in hostilities. Moreover, there was no indication that al-Awlaki had been directly participating in the real war in Afghanistan and parts of Pakistan, which would have made him targetable as a DPH under the laws of war wherever he had been directly participating in such a war.

With respect to human rights and the human rights paradigm, human rights law applies globally and in all social contexts. Yet, those who are entitled to human rights *vis-á-vis* the United States must either be within the territorial jurisdiction of the United States or within its actual power or "effective control."[29] Al-Awlaki was not within such jurisdiction or control at the time of his death. Moreover, if he had been, his human right to life would have attached, but would have been a freedom from "arbitrary" deprivation of life and, because he was lawfully targetable as a DPAA, his death was recognizably not arbitrary.[30]

With respect to the nationality of the person being targeted, in the context of a real war, it is irrelevant under the laws of war whether the targetable direct participant in hostilities is a United States national.[31] Similarly, it is irrelevant under the international law of self-defense whether a direct participant in armed attacks is a United States national. Therefore,

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29. *See*, *e.g.*, *Permissible Self-Defense Targetings*, *supra* note 22, at 573, 581; *Self-Defense Targetings*, *supra* note 3, at 264–66. It has been suggested that the test requiring that a person be within the actual power or effective control of a state engaged in targeting should be interpreted in an expanded fashion to include the "targeting or killing [of] an individual . . . as a form of exercise of control" and that "the act of targeting" involves "some degree of effective control." Meagan S. Wong, *Targeted Killings and the International Legal Framework: With Particular Reference to the US Operation against Osama bin Laden*, 11 CHINESE J. INT'L L. 127, 159–60 (2012). In my opinion, this is an unacceptable use of the word "control," much less "effective" control, because if a person has not been captured, in certain contexts at least, the person can raise a weapon and shoot, run away to continue attacks in the near future, quickly hide in a manner that prevents capture or killing. The fact that killing is an outcome does not necessarily mean that the person killed was in the "effective control" of the person engaged in the targeting. This is especially true if a drone used for targeting is at 40,000 feet above the person killed. Also consider the circumstance in war where soldier X has aim at enemy soldier Y who is about 20 meters away, but soldier Y does not indicate the she wishes to surrender and falls to the ground rolling to her right and pulls out a pistol and kills soldier X (who had shot at soldier Y but missed). Soldier X obviously did not have actual power or effective control over soldier Y.

30. *See Self-Defense Targetings*, *supra* note 3, at 263–64 n.65, 269. Similarly, in the context of a real war, the lawful killing of a DPH would not be "arbitrary."

31. *See*, *e.g.*, *id.* at 262 n.60; Holder, *supra* note 28 ("[I]t's clear that United States citizenship alone does not make such individuals immune from targeting" either under the laws of war of the law of self-defense.).

under both the law of war and self-defense paradigms, there is no room for an American exceptionalism with respect to the legality of targetings.[32]

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32. With respect to "due process" under the U.S. Constitution, it should be evident that if a U.S. national is lawfully targetable abroad under the international laws of war or the international law of self-defense the process that is due such a national is met by compliance with international legal standards. *See* Hamdi v. Rumsfeld, 542 U.S. at 519 (2004) ("We held that '[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction . . . [are] bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war. . . .' A citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States' . . . and 'engaged in an armed conflict against the United States. . . .'" quoting *Ex parte* Quirin, 317 U.S. 1, 20, 37–38 (1942)); Holder, *supra* note 28 (addressing law of war principles to be considered with regard to Fifth Amendment due process requirements). More generally, international law has been used as an aid for interpreting provisions of the Constitution. *See*, *e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (Human rights precepts used as an aid for interpreting the Eighth Amendment); Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring); Cunard S.S. Co. v. Mellon, 262 U.S. 100, 132–33 (1923) (Sutherland, J., dissenting) (Use of international law to interpret the Eighteenth Amendment); Fong Yue Ting v. United States, 149 U.S. 698, 705 *et seq*. (1893) (International legal principles support interpretation of congressional power regarding exclusion and deportation of aliens); United States v. Tinoco, 304 F.3d 1088, 1110 n.21 (11th Cir. 2002); United States v. Caicedo, 47 F.3d 370 (9th Cir. 1995) ("Principles of international law are 'useful as a rough guide' in determining . . . due process") (quoting United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990)); Finzer v. Barry, 798 F.2d 1450, 1463 (D.C. Cir. 1986); United States v. Gonzalez, 776 F.2d 931, 938–41 (11th Cir. 1985); United States v. Usama bin Laden, *et al*., 92 F.Supp.2d 189, 220 (S.D.N.Y. 2000) ("[I]f the extraterritorial application of a statute is justified by the protective principle [of customary international law regarding jurisdiction] such application accords with due process."). *See also* Brown v. United States, 12 U.S. 110, 125 (1814) ("In expounding . . . [the] Constitution, a construction ought not lightly to be admitted which would" not be in conformity with or "fetter" discretion under customary international laws of war "which may enable the government to apply to the enemy the rule that he applies to us."); United States v. Toscanino, 500 F.2d 267, 275–76 (2d Cir. 1974) (due process inquiry "guided by" government's "illegal conduct," which included violations of two treaties); Daliberti v. Republic of Iraq, 97 F.Supp.2d 38, 52–54 (D.D.C. 2000) (rejecting a due process-minimum contacts claim by Iraq with respect to alleged acts of state sponsored terrorism "condemned by the international community," and implicating universal jurisdiction, especially since international law provides "adequate warning of possible U.S. sanctions" (quoting Flatow v. Islamic Republic of Iran, 999 F.Supp. 1, 23 (D.D.C. 1998))); *Ex parte* Toscano, 208 F. 938, 942–44 (S.D. Cal. 1913) (Executive detention of persons from Mexico was appropriate under a treaty and the treaty-based "duty devolves upon the President," "the President has full authority . . . and it was and is his duty to execute said treaty provisions."); JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 250–67 (West Group, 3d ed., 2009) (cases regarding international law's enhancement of congressional power), 272–73 (cases regarding international law's enhancement of presidential power); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 205, 212, 218–22, 275–76 nn.389–93 (Carolina Academic Press, 2d ed., 2003) (documenting judicial references to human rights in connection with the 1st, 4th, 5th, 6th, 8th, 9th, 13th, 14th, and 15th Amendments).

IV. APPLICABLE PRINCIPLES OF DISTINCTION, REASONABLE NECESSITY, AND PROPORTIONALITY

In her article, Professor Valerie Epps aptly demonstrates why it is necessary to attempt to comply with the principles of distinction among persons, reasonable necessity, and proportionality with respect to lawful targetings during an armed conflict, and she rightly demonstrates why there can be no automatic or programed applications of what she terms the "collateral damage rule" in terms of numbers of civilians killed in proportion to numbers of combatants killed.[33] In one of my writings, I have noted that these three principles also provide useful guidance with respect to methods and means of self-defense outside the context of war, because all measures of self-defense must comply with the same general principles.[34]

Articles 48 and 50–51 of Protocol I to the 1949 Geneva Conventions reflect treaty-based and customary international legal requirements concerning necessity and proportionality. These include:

a) The need to distinguish between civilians (who are protected from attack "unless and for such time as they take a direct part in hostilities") and lawful military targets (the so-called principle of distinction);
b) The prohibition of attacks directed at protected civilians or civilian objects as such; and
c) The prohibition of indiscriminate attacks.[35]

A customary prohibition related to the prohibition of "indiscriminate" attacks is the more general prohibition of unnecessary death, injury, or suffering during war,[36] one that is also partly reflected in the duty set forth in Geneva Protocol I to avoid attacks "expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and

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33. *See* Valerie Epps, *The Death of the Collateral Damage Rule in Modern Warfare,* Suffolk University Law School Research Paper No. 11–39, Sept. 16, 2011, at 3, *available at* http://papers.ssrn.com/sol3/paperscfm?abstract_id=1929029 (last visited Feb. 20, 2010).

34. *See*, *e.g.*, O'Connell, *Remarks*, *supra* note 19, at 591–92 nn. 40, 42; *Self-Defense Targetings*, *supra*, note 3, at 244, 245 n.19, 269 n.81, 270; *Permissible Self-Defense Targetings*, *supra* note 22, at 572, 574–76.

35. *See id*.

36. *See*, *e.g.*, ICL, *supra* note 5, at 639, 679–80, 697–99 (The International Committee of the Red Cross (ICRC) considers this customary principle to be reflected in what it terms the "principle of humanity."); Melzer, *Interpretive Guidance*, *supra* note 20, at 79–80.

direct military advantage anticipated."[37] Some "incidental" loss of civilian life might be foreseeable but still permissible if the requirements of reasonable necessity and proportionality are met. As explained in *United States v. List*[38] during the subsequent Nuremberg proceedings, "military necessity . . . permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable."[39]

As noted in another writing, with respect to a contextually attentive application of the principles in a given context:[40]

> [W]hen applying principles of reasonable necessity and proportionality with respect to use of drones for targeting, one should consider all relevant features of context. Among appropriate considerations are: (1) identification of the target (*e.g.*, as a DPAA, combatant, fighter with a continuous combat function, or DPH as opposed to a non-targetable civilian); (2) the importance of the target; (3) whether equally effective alternative methods of targeting or capture exist; (4) the presence, proximity, and number of civilians who are not targetable; (5) whether some civilians are voluntary or coerced human shields; (6) the precision in targeting that can obtain; and (7) foreseeable consequences with respect to civilian death, injury, or suffering.[41]

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37. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 41(5)(b), June 8, 1977, 1125 U.N.T.S. 3, *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf (last visited Feb. 20, 2012) [hereinafter Protocol I]; Epps, *supra* note 33, at 3 (directly related to what Professor Epps describes as the collateral damage rule).

38. United States v. List, et al. (The Southeast Hostages Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 757 (1950), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf (last visited Feb. 20, 2012).

39. *Id*. at 1253–54. *See also* Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, April 24, 1863 (the Lieber Code), art. 15 ("Military necessity admits of all direct destruction of life or limb of armed enemies and of other persons whose destruction is incidentally unavoidable in the armed contests of the war"); *id*. art. 22 (there must be a "distinction between the private individual . . . and the hostile country itself, with its men in arms" and "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit"); *id*. art. 155 ("noncombatants . . . [are] unarmed citizens. . . ."); Melzer, *Interpretive Guidance*, *supra* note 22, at 37 (noting that civilians might risk "incidental death or injury" because of "[t]heir activities or location."); TARGETED KILLING, *supra* note 8, at 278–86, 297–98.

40. *Permissible Self-Defense Targetings*, *supra* note 22, at 575–76.

41. *See*, *e.g.*, *Self-Defense Targetings*, *supra* note 3, at 275–77. *See also* Amos N. Guiora, *Responses to the Ten Questions*, 37 WM. MITCHELL L. REV. [J. NAT'L SEC. L.] 5034, 5042–5048 (2011); Amos N. Guiora, *Not "By All Means Necessary:" A Comparative Framework for Post-9/11 Approaches to Counterterrorism*, 42 CASE W. RES. J. INT'L L. 273, 278–82 (2009); Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing*, 2011

> As a legal expert with the ICRC avers, part of a nuanced contextual inquiry should involve consideration of "the actual level of control exercised over the situation by the operating State" and an appropriate consideration of "required intensity or urgency may" actually involve "a generous standard of 'reasonableness' in traditional battlefield confrontations."[42] For this reason and because of other features of context that can be relevant to nuanced application of the principle of reasonable necessity, there should be no rigid rule that would require ground verification of target selection and engagement when ordinary civilians are known to be nearby. As the ICRC expert added more generally, there should be inquiry into qualitative, quantitative, and temporal necessity and whether methods and means to be used "contribute effectively to the achievement of a concrete and direct military advantage . . . without unreasonably increasing the security risk of the operating forces or the civilian population."[43]

V. THE WAR IN LIBYA

It is evident that during future armed conflicts in which developed states participate one will see an increasing use of robots for various purposes, including use of weaponized drones for targeting. The recent war in Libya is an example of an international armed conflict that involved United States and NATO use of guided missiles, drone targetings, fighter aircraft targetings, and various other traditional weaponry. It would be interesting to identify the number of deaths and injuries of civilians who were not targetable as direct participants in hostilities with respect to each use of guided missiles, drone targetings, and fighter aircraft targetings.[44] Which weapon systems allowed greater compliance with principles of distinction, reasonable necessity, and proportionality? It may be that drone targetings were generally more precise and caused less incidental death, injury, and suffering. In any event, weaponized drones are capable of more precise targetings of lawful military targets.[45]

U. ILL. L. REV. 1201, 1222, 1228–38 (2011) (addressing a U.S. military six-step decisional and review process and suggesting relevant criteria and considerations with respect to targetings by CIA personnel).

42. *See* TARGETED KILLING, *supra* note 8, at 397–98.

43. *Id*.

44. Claims have been made regarding unspoken civilian casualties. *See*, *e.g.*, C.J. Chivers & Eric Schmitt, *Confronting NATO's Careful War*, INT'L HERALD TRIB., Dec. 17, 2011, at 1.

45. *See*, *e.g.*, Drake, *supra* note 14, at 637–40, 642–45; *Permissible Self-Defense Targetings*, *supra* note 22, at 572–73 n.20.

Quite clearly, during the war in Libya there were also direct attacks on civilians and civilian populated areas committed by other actors that were violations of the laws of war. One of the reasons why the United Nations Security Council authorized the use of armed force in Libya involved the fact that civilians had been targeted in violation of international law, especially by armed forces of the Qaddafi government, and a United Nations authorized use of force had become necessary in order "to protect civilians and civilian populated areas under threat of attack in" Libya.[46]

The Security Council's authorization is actually an important reaffirmation of the need to comply with the principles of distinction, reasonable necessity, and proportionality or, as some prefer, the collateral damage rule.

VI. CONCLUSION

This article has provided detailed disclosure why the United States cannot be at war with al Qaeda under international law. Attention has been paid to traditional customary international legal criteria concerning belligerent and insurgent status, newer criteria for an insurgency under Geneva Protocol II, and an ICTY preference for lower levels of armed conflict in order to demonstrate that the existence of an armed conflict with al Qaeda, as such, is not possible.

Nonetheless, targetings of members of al Qaeda in the theatre of a real war with the Taliban is lawful under the laws of war if members of al Qaeda directly participate in hostilities. Moreover, targeting of members of al Qaeda can be permissible under the law of self-defense if they are directly participating in armed attacks. As the article explains, the targeting of U.S. national Anwar al-Awalki in Yemen was permissible under the self-defense paradigm. Under either the law of war paradigm or the self-defense paradigm, general principles of distinction, reasonable necessity, and proportionality must be followed.

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46. U.N. S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement (last visited Feb. 20, 2012). In addition to the U.N. Security Council authorization to use all necessary measures of protective force, during later stages in the armed conflict there was a change in the international legal status of the Libyan rebel-insurgents to belligerents who consented to and welcomed U.S. and NATO uses of force. Still later, as the Libyan National Transitional Council gained recognition as the legitimate representative of the Libyan people, its consent provided additional independent legitimacy for use of force to support regime change, provide self-determination assistance to the Libyan people, and participate in collective self-defense against continuous armed attacks by remnants of the Qaddafi regime. With respect to the legitimacy of self-determination assistance in certain contexts, see, for exampl**Error! Main Document Only.**e, Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 547–48 (2002).

NUCLEAR DISARMAMENT AND THE UNITED NATIONS DISARMAMENT MACHINERY

Alicia Godsberg[*]

I. INTRODUCTION

The United Nations (U.N.) was formed as World War II was ending with the lofty goal of preventing the scourge of war from ever again engulfing the world in global conflict. Mechanisms were devised to enable the community of nations to work together by negotiating through their disputes instead of resorting to war. Just as the U.N. was coming into being, the United States dropped two atomic bombs on Japan, changing the future nature of warfare from devastation to annihilation. The very first General Assembly Resolution at the U.N. called for the "elimination from national armaments of atomic weapons and of all other major weapons

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adaptable to mass destruction."[1] Since then, the U.N. disarmament machinery has been running in place in pursuit of that goal.

Nuclear arsenals grew in strength and size to over 70,000 during the height of the Cold War.[2] Today, more than twenty years after the collapse of the Soviet Union, the world remains threatened by more than 20,000 nuclear weapons, still more than enough to carry out the Cold War doctrine of Mutually Assured Destruction.[3] The vast majority of the world has resolved not to pursue nuclear weapons for their security, in exchange for technical cooperation in the peaceful uses of nuclear energy and the pursuit of nuclear disarmament.[4] While some nuclear-armed states promote modest reductions in their deployed nuclear arsenals as progress toward nuclear disarmament, their policies and practices maintain the usefulness of nuclear weapons far into the future. For the rest of the world, it has become increasingly clear that there needs to be a new approach to nuclear disarmament in order to prevent more countries from pursuing the nuclear option.

II. NUCLEAR-ARMED STATES

Nine countries are known to possess nuclear weapons: United States, Russian Federation, United Kingdom, France, China, Israel, India, Pakistan, and the Democratic People's Republic of Korea (DPRK).[5] The first five listed are the so-called "recognized nuclear weapons states" (NWS) of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), because each had exploded a nuclear weapon prior to the negotiation of that Treaty.[6] All five are also state parties to the Treaty, and are thus required to fulfill all its

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1. Establishment of a Commission to Deal with the Problem Raised by the Discovery of Atomic Energy, G.A. Res. 1(I), U.N. GAOR, 1st Sess. (Jan. 24, 1946), http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/032/52/IMG/NR003252.pdf?OpenElement (last visited on Mar. 2, 2012).

2. *Nuclear weapons at a glance*, INT'L CAMPAIGN TO ABOLISH NUCLEAR WEAPONS, http://www.icanw.org/ataglance (last visited on Mar. 2, 2012).

3. *Id.*; Shannon N. Kile, Vitaly Fedchenko, Bharath Gopalaswamy & Hans M. Kristensen, *Armaments, Disarmament and International Security*, 2011 SIPRI YEARBOOK 7 (Stockholm International Peace Research Institute 2011) *available at* http://www.sipri.org/yearbook/2011/files/SIPRIYB1107-07A.pdf. (last visited May 9, 2012) [hereinafter SIPRI 2011].

4. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter Nuclear Weapons].

5. Toward a World Free of Nuclear Weapons: The Expansion of Nuclear Armaments, UN.ORG, http://www.un.org/disarmament/content/news/geneva_exhibit/Geneva_Disarmament_Exhibition_Panels3.pdf (last visited on Mar. 2, 2012).

6. Nuclear Weapons, *supra* note 4, art. IX (3).

legal obligations, including the obligation in Article VI to negotiate toward nuclear disarmament.[7] These five countries are the permanent five members of the United Nations Security Council, each of whom has the power to veto any legally binding decision made in that body.[8]

India, Pakistan, and Israel are the only three countries in the global community that have never signed the NPT.[9] All three also have nuclear weapons, although Israel has never publicly acknowledged its nuclear weapon program.[10] The DPRK withdrew from the NPT in 2003 and exploded its first nuclear device in 2006.[11]

III. UNITED NATIONS DISARMAMENT MACHINERY

The U.N. has an important role to play in the abolition of nuclear weapons, as the disarmament machinery of the U.N. is uniquely empowered to negotiate multilateral disarmament treaties. While there have been a few successes, the world remains under the threat of over 20,000 nuclear weapons.[12] More than 4800 of these nuclear weapons are operational, and nearly 2000 of these remain on high alert, ready to be launched within minutes of an order.[13]

The main disarmament machinery at the U.N. consists of the General Assembly's First Committee, the sixty-five nation Conference on Disarmament, and the all-inclusive Disarmament Commission.[14] Other international conferences impact the U.N.'s nuclear disarmament activities,

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7. *Id*. art. VI.

8. U.N. Security Counsel Members: Membership in 2012, UN.ORG, http://www.un.org/sc/members.asp (last visited on Mar. 2, 2012).

9. *See* NPT Signatories and States Parties (in alphabetical order), UN.ORG, http://unhq-appspub-01.un.org/UNODA/Treatystatus.nsf/NPT%20(in%20alphabetical%20order)?OpenView&Start=1&ExpandView (last visited on Mar. 14, 2012).

10. *Nuclear Weapons: Israel*, FAS.ORG (Jan. 8, 2007), http://www.fas.org/nuke/guide/israel/nuke/ (last visited on Mar. 2, 2012).

11. *Chronology of U.S.-North Korean Nuclear and Missile Diplomacy*, ARMSCONTROL.ORG, http://www.armscontrol.org/factsheets/dprkchron (last visited on Mar. 2, 2012).

12. SIPRI 2011, *supra* note 3.

13. *Status of World Nuclear Forces*, FAS.ORG, http://www.fas.org/programs/ssp/nukes/nuclearweapons/nukestatus.html (last visited on Mar. 2, 2012).

14. *United Nations Disarmament Machinery*, FOREIGN AFFAIRS & INTERNATIONAL TRADE CAN., *available at* http://www.international.gc.ca/arms-armes/nuclear-nucleaire/un-onu.aspx?lang=eng&view=d (last visited on Mar. 2, 2012); *Disarmament Machinery*, REACHINGCRITICALWILL.ORG, http://www.reachingcriticalwill.org/political/politicalindex.html (last visited on Mar. 2, 2012).

notably the Review Conferences of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons held every five years.[15]

The U.N.'s work toward nuclear disarmament can be described at best as slow and, at worst, as ineffective. Thus far, the U.N. has approached nuclear disarmament by working on several related issues, including the management of fissile material for nuclear weapons, entry into force of the Comprehensive Nuclear Test Ban Treaty, further reductions in the nuclear forces of the United States and Russia—who together have ninety-five percent of the world's nuclear weapons—preventing an arms race in outer space, and legally binding negative security assurances to non-nuclear weapon states (NNWS).[16] Verification and compliance issues remain obstacles that need to be overcome for all of the above.

The U.N.'s incremental approach to nuclear disarmament has been stalled for at least the past fifteen years, prompting calls from the non-nuclear armed states that make up the vast majority of the world for a legally binding nuclear weapon convention and the time-bound, internationally verifiable total elimination of nuclear weapons.[17] In 2008, U.N. Secretary General Ban Ki-moon proposed a five-point plan for nuclear disarmament echoing this call, which included working for nuclear disarmament either through a "framework of separate, mutually reinforcing instruments or through the negotiation of a nuclear weapon convention, such as the one already submitted in draft form to the U.N. by Costa Rica and Malaysia."[18]

IV. TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

The NPT is considered the cornerstone of the nuclear disarmament and non-proliferation regime. Treaty negotiations began within the U.N. system in 1965, after the Conference on Disarmament (CD) voted to honor the request of the then eighteen-nation Disarmament Committee to consider a

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15. Nuclear Weapons, *supra* note 4, art. VIII (3).

16. *The Core Issues*, REACHINGCRITICALWILL.ORG, http://www.reachingcriticalwill.org/political/cd/basicinfo/Coreissuesindex.htm (last visited on Mar. 2, 2012).

17. Review Conf. to the Treaty on the Non-Proliferation of Nuclear Weapons, N.Y., May 3–25, 2010, *2010 Review Conference to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document*, U.N. Doc. NPT/CONF. 2010/50 (Vol. I), pt. 1 (May 25, 2010) [hereinafter NPT Review Conference Final Document].

18. Ban Ki-Moon, Sec'y Gen., Address to the East-West Institute, "Nations and security in a nuclear-weapon-free world" UN.ORG, (Oct. 24, 2008), *available at* http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=351 (last visited on Mar. 2, 2012).

treaty on the non-proliferation of nuclear weapons.[19] China had just become the fifth country to explode a nuclear weapon, and with nuclear technology spreading unregulated around the world, it was clear that without some kind of multilateral treaty, nuclear weapons would spread to more states.[20]

The NPT is a three part bargain: NWS agree not to transfer nuclear weapons to any NNWS, and NNWS parties agree not to acquire nuclear weapons; NWS agree to negotiate a treaty on nuclear disarmament; and NNWS have the inalienable right to acquire nuclear technology for peaceful purposes.

The NPT's segregation of states into nuclear weapon "haves" and "have-nots" was meant to be only temporary, as Article VI obligates the negotiation "in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament."[21] However, while the NPT obligates NNWS to conclude safeguard agreements with the International Atomic Energy Agency to ensure compliance with the non-proliferation aspect of the Treaty's bargain, no comparable mechanism was put into the Treaty to enforce the obligation of NWS to negotiate toward nuclear disarmament.[22] This lacuna arguably figures as the key defect of the NPT. Moreover, while the five year NPT Review Conferences were meant to measure progress on all parts of the bargain, when the Treaty was indefinitely extended in 1995, even this modest monitoring mechanism of the nuclear disarmament obligation was eliminated.[23]

V. NUCLEAR DISARMAMENT STALLED AT THE U.N.

A. The Security Council

The most basic reason the U.N. system has failed to achieve nuclear disarmament is that the five veto-holding permanent members of the Security Council are also the five recognized NWS parties to the NPT. Despite annual General Assembly Resolutions calling for greater progress

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19. *See generally* B. Goldschmidt, *The Negotiation of the Non-Proliferation Treaty*, 22 IAEA BULL 73, *available at* http://www.iaea.org/Publications/Magazines/Bulletin/Bull223_4/223_403587380.pdf (last visited on Mar. 2, 2012).

20. Daryl Kimball, Arms Control Assoc., *Chronology of Key Events in the Effort to End Nuclear Testing: 1945–1999*, REACHINGCRITIALWILL.ORG, http://www.reachingcriticalwill.org/legal/ctbt/ctbtchrono.html (last visited on Mar. 2, 2012).

21. Nuclear Weapons, *supra* note 4, art. VI.

22. Nuclear Weapons, *supra* note 4, art. III.

23. Nuclear Weapons, *supra* note 4, art. X, VI.

toward achieving nuclear disarmament,[24] the Security Council will not exercise its power to write a legally binding Resolution mandating nuclear disarmament. There have been calls to reform the Security Council by expanding its permanent membership,[25] but without a change to the veto policy—which is not under consideration—the Security Council will not act to force greater progress toward achieving nuclear disarmament.

B. The Rule of Consensus in the Conference on Disarmament

The CD is the U.N.'s sole multilateral negotiating forum.[26] It meets three times each year in Geneva and has four core issues its members feel are ripe for negotiation: the prevention of an arms race in outer space, nuclear disarmament, a fissile material cutoff treaty (FMCT), and negative security assurances.[27] Votes are taken on the basis of consensus, meaning that each state holds a veto power over the group's decision-making capability.[28] Since the Comprehensive Test Ban Treaty was negotiated in 1996, the CD has made no progress on negotiating treaties on any of its four core issues.[29] The CD has been in a stalemate for so long, that its first session in 2009 was considered a success merely because the parties adopted a programme of work.[30] Sadly, the programme was not implemented before the end of the year, bringing the negotiating back to square one in 2011.[31] No agreement was reached in 2011, and the CD

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24. *See generally* U.N. General Assembly: Regular Sessions, UN.ORG, http://www.un.org/documents/resga.htm (last visited on Mar. 14, 2012).

25. U.N. GAOR, 45th & 46th Sess., 64th plen. mtg., U.N. Doc. GA/10887 (Nov. 13, 2009).

26. *The United Nations Office at Geneva: Disarmament, An Introduction to the Conference*, UNOG.CH, http://www.unog.ch/80256EE600585943/%28httpPages%29/BF18ABFEFE5D344DC1256F3100311CE9?OpenDocument (last visited on Mar. 2, 2012).

27. *See Disarmament, An Introduction to the Conference*, UNOG.CH, http://www.unog.ch/80256EE600585943/%28httpPages%29/BF18ABFEFE5D344DC1256F3100311CE9?OpenDocument (last visited on Mar. 2, 2012).

28. *Basic information about the CD*, REACHINGCRITIALWILL.ORG, http://www.reachingcriticalwill.org/political/cd/basicinfoindex.html (last visited on Mar. 2. 2012).

29. *Id*.

30. Ray Acheson, *The Conference on Disarmament in 2009: Could Do Better*, DISARMAMENT DIPLOMACY (U.K.), *available at* http://www.acronym.org.uk/dd/dd91/91cd.htm (last visited on Mar. 2, 2012); *CD adopts a programme of work!*, REACHINGCRITICALWILL.ORG (May 29, 2009), http://reachingcriticalwill.blogspot.com/2009/05/cd-adopts-programme-of-work.html (last visited Mar. 3, 2012).

31. *Guide to the Conference on Disarmament*, REACHINGCRITICALWILL.ORG (2011), http://www.reachingcriticalwill.org/political/cd/cdbook2011.pdf (last visited on Mar. 3, 2012).

again closed its final session without agreeing on what to work on, let alone beginning that important work.[32]

The consensus rule has prevented negotiations from starting in the CD on a FMCT.[33] Ending the production and managing stocks of fissile material is an important part of any nuclear disarmament regime, because fissile material makes up the nuclear explosive core of nuclear weapons. Pakistan has stalled negotiation of an FMCT in the CD over concern that such a treaty would not cover existing stocks of fissile material and would, therefore, freeze Pakistan in what it perceives to be a disadvantage vis-à-vis India, which has a larger stockpile of fissile material and would, therefore, be able to make more nuclear weapons under a production-only ban.[34]

Some states continue to suggest that an FMCT be negotiated outside of the CD to overcome this blockage caused by the consensus rule.[35] There is precedent for moving negotiations outside the CD—both the Land Mines and Cluster Munitions Conventions were negotiated this way, but both lack the support of certain key countries that continue to use these terrible weapons.[36] The nuclear powers have made it clear that they will not support discussions on key nuclear disarmament issues outside the CD, and therefore, progress remains blocked.[37]

C. The First Committee and Special Session on Disarmament IV

The General Assembly's First Committee meets in October at U.N. headquarters in New York to discuss matters of nuclear and conventional disarmament.[38] In 2011, many states renewed their expressions of concern about what they see as a lack of progress toward achieving nuclear

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32. Beatrice Fihn & Gabriella Irsten, *CD closes another failed session*, REACHINGCRITICALWILL.ORG (Sept. 15, 2011), http://www.reachingcriticalwill.org/political/cd/2011/reports.html#sept15 (last visited on Mar. 3, 2012).

33. Gary Quinlan, Ambassador & Permanent Rep. of Austl. to the U.N., Statement on behalf of the Non-Proliferation and Disarmament Initiative (July 27, 2011), *available at* http://www.reachingcriticalwill.org/political/cd/2011/statements/plenary/270711_Australia.pdf (last visited on Mar. 3, 2012).

34. *Fissile Materials Cut-off Treaty: Background to the FMCT*, REACHINGCRITICALWILL.ORG, http://www.reachingcriticalwill.org/legal/fmct.html (last visited on Mar. 3, 2012).

35. *Id*.

36. *Id*.

37. Tom Z. Collina, *P5 Struggles to Unblock FMCT Talks*, ARMS CONTROL ASS'N (Oct. 2011), http://www.armscontrol.org/act/2011_10/P5_Struggles_to_Unblock_FMCT_Talks (last visited on Mar. 3, 2012).

38. *See About the General Assembly*, GEN. ASSEMBLY OF THE UNITED NATIONS, http://www.un.org/en/ga/about/index.shtml (last visited on Mar. 3, 2012).

disarmament.[39] While numbers of deployed American and Russian nuclear weapons slowly come down, nuclear weapons and their delivery systems continue to be modernized, and security policies project nuclear weapons far into the future.[40] Since 1995, the General Assembly has called for the convening of a fourth Special Session on Disarmament to break the stalemated nuclear disarmament work within the entire U.N. system.[41] Despite creating open-ended working groups in 2003 and 2007, there has been no progress on establishing the objectives and agenda for the fourth Special Session on Disarmament, and no meetings have taken place.[42]

One subject that was raised by many states in the 2011 First Committee was the forward-looking action plan for nuclear disarmament contained in the Final Document of the NPT Review Conference in 2010.[43] The Final Document must be adopted by consensus, and therefore, all five NWS have obligated themselves to fulfill the action plan's commitments, including to "pursue policies that are fully compatible with the treaty and the objective of achieving a world without nuclear weapons," and to "apply the principles of irreversibility, verifiability and transparency in relation to the implementation of their treaty obligations."[44] The action plan covers deployed as well as non-deployed nuclear weapons and calls on all states to ratify the Comprehensive Nuclear Test Ban Treaty, which is awaiting ratification by eight countries mentioned in its Annex II, before it can enter into force.[45] The 2010 Review Conference Final Document's action plan was hailed as a great success, but the next Review Conference in 2015 will ultimately reveal whether these commitments were successfully carried out or if, as happened after 1995 and 2000, these commitments will remain unfulfilled.

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39. Ray Acheson, *First Committee Monitor 2011: Disarmament Machinery*, REACHINGCRITICALWILL.ORG, http://www.reachingcriticalwill.org/political/1com/FCM11/final.html (last visited on Mar. 14, 2012).

40. Candice DeNardi, *START/Russian Nuclear Policy*, NUCLEAR FILES (Jan. 27, 2010), http://nuclearfiles.org/menu/key-issues/nuclear-weapons/issues/policy/russian-nuclear-policy/PDFs/denardi_treaty_overview.pdf (last visited on Mar. 3, 2012); Hans M. Kristensen, *A New Defense Strategy: A New Nuclear Strategy?*, FAS STRATEGIC SEC. BLOG (Jan. 5, 2012), http://www.fas.org/blog/ssp/2012/01/a-new-defense-strategy.php (last visited on Mar. 3, 2012); Hans M. Kristensen, *Nuclear Plan Conflicts with New Budget Realities*, FAS STRATEGIC SEV. BLOG (Sept. 12, 2012), http://www.fas.org/blog/ssp/2011/09/stockpileplan2011.php (last visited on Mar. 3, 2012).

41. Special Sessions of the General Assembly devoted to Disarmament, UN.ORG, http://www.un.org/disarmament/HomePage/SSOD/index.shtml (last visited on Mar. 3, 2012).

42. *Id*.

43. *See* NPT Review Conference Final Document, *supra* note 17.

44. *Id*. at 20.

45. *Id*. at 22.

The progress that has been made toward nuclear disarmament has come from outside the U.N. system and the obligations of the NPT, through bilateral arms control treaties between the United States and the former Soviet Union, now the Russian Federation. Agreements such as the Strategic Arms Reduction Treaty and the Strategic Offensive Reductions Treaty reduced the number of deployed nuclear warheads and delivery systems, but deep, irreversible cuts in nuclear arsenals under international verification remain elusive.[46]

VI. CURRENT NUCLEAR DOCTRINES AND FORCE LEVELS OF NUCLEAR ARMED STATES

A. United States of America

The Obama administration initially brought hope that the United States would actively pursue nuclear disarmament and not only non-proliferation. In April 2009, President Obama gave a speech in Prague, pledging that the United States would seek the peace and security of a world without nuclear weapons.[47] In the Nuclear Posture Review (NPR), released just before the 2010 NPT Review Conference, the United States made some changes to its nuclear policy, while ultimately falling short of abandoning its Cold War mentality and achieving more far reaching change.[48]

One welcome change in the NPR is that the prevention of nuclear proliferation and nuclear terrorism has been elevated to the United State's top priority.[49] Previously the top U.S. nuclear policy priority was to maintain a strategic balance with Russia in order to protect the United States against a disarming first strike,[50] evolving in 2002 to a more

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46. Anatoli Diakov & Frank von Hippel, *Challenges and Opportunities for Russia-U.S. Nuclear Arms Control*, CENTURY FOUND., at 5–13 (2009), *available at* http://www.armscontrol.ru/pubs/en/Diakov-Hippel-Challenges.pdf (last visited on Mar. 4, 2012).

47. Barack Obama, President, United States of America, Remarks by President Barack Obama, Hradcany Square, Prague, Czech Republic (Apr. 5, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/ (last visited on Mar. 4, 2012).

48. *See generally* DEP'T OF DEF., NUCLEAR POSTURE REVIEW REPORT (2010), *available at* http://www.defense.gov/npr/docs/2010%20nuclear%20posture%20review%20report.pdf (last visited on Mar. 4, 2012) [hereinafter NPR 2010].

49. *Id*. at v.

50. *See* Alexei Fenenko, *Between MAD and Flexible Response: Russian and U.S. Nuclear Policies after the Cold War*, GLOBALAFFAIRS.RU (June 22, 2011), *available at* http://eng.globalaffairs.ru/print/number/Between-MAD-and-Flexible-Response-15242 (last visited on Mar. 4, 2012).

offensive approach toward an even broader set of potential adversaries.[51] Another change came in U.S. declaratory policy, which had been one of "calculated ambiguity," in that the United States would not say under what circumstances it would consider the use of nuclear weapons.[52] In the new NPR, the United States clarifies its policy in this regard for the first time: "The fundamental role of U.S. nuclear weapons, which will continue as long as nuclear weapons exist, is to deter nuclear attack on the United States, our allies, and partners."[53] This is an important change from previous NPRs that endorsed nuclear responses not only to nuclear, but also chemical, biological, or even conventional attack on the United States or its allies.[54] However, this new policy does not state that the sole purpose of the U.S. nuclear arsenal is for nuclear deterrence, and in that sense, the NPR leaves open the possibility of offensive use.

The NPR did little else to change U.S. nuclear policy. The United States did not issue an unqualified "no-first use" policy or change the alert status for nuclear weapons, leaving hundreds of nuclear-armed ballistic missiles ready to launch within fifteen minutes of an order to do so. The NPR also called for continuing to modernize the nuclear weapons complex and nuclear warheads and their delivery systems, and it reaffirmed the importance of the nuclear triad—delivery systems for nuclear weapons by air, land-based missiles, and sea-based missiles.[55] It remains to be seen if or how this new nuclear posture will change actual targeting. Overall, U.S. nuclear policy remains focused on Cold War thinking and maintaining a large nuclear arsenal into the indefinite future.

B. Russian Federation

Russia also announced a new military policy in 2010, which seemed to add some constraint in considering the use of nuclear weapons—from the previous "in situations critical to national security" to the new, "when the

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51. U.S. DEP'T OF DEF., ANNUAL REPORT TO THE PRESIDENT & THE CONGRESS chapters. 1, 7 (2002), *available at* http://www.dod.mil/execsec/adr2002/html_files/chap7.htm (last visited on Mar. 4, 2012).

52. Chair William J. Perry, Chair Brent Scowcroft & Project Dir. Charles D. Ferguson, *Council on Foreign Relations: Independent Task Force Report No. 62, U.S. Nuclear Weapons Policy*, at 16–17 (2009).

53. NPR 2010, *supra* note 48, at vii.

54. Philipp C. Bleek, *Nuclear Posture Review Leaks: Outlines Targets, Contingencies*, ARMSCONTROL.ORG (Apr. 2002), http://www.armscontrol.org/act/2011_10/P5_Struggles_to_Unblock_FMCT_Talks (last visited on Mar. 4, 2012).

55. *See* NPR 2010, *supra* note 48, at 20.

very existence of the state is threatened."[56] In either case, however, nuclear weapons are threatened in retaliation, not only for nuclear attack, but also for chemical, biological, and conventional attack.[57]

While the United States and Russia have agreed under the New Strategic Arms Reduction Treaty to modest reductions of deployed nuclear warheads and their delivery systems, Russia—like the United States—continues to modernize its nuclear arsenal.[58] Worried about the capabilities of future U.S. missile defense systems, Russia's newest nuclear policy seeks to ensure that nation's deterrent and second-strike capability. To that end, Russia continues to prioritize the deployment of road-mobile intercontinental ballistic missiles and a new type of submarine-launched ballistic missile.[59]

C. United Kingdom of Great Britain and Northern Ireland

Unlike the United States and Russia who have land, sea, and air-launching capability for their nuclear weapons, the United Kingdom has only a sea-based nuclear deterrent, comprised of four Vanguard Class Trident Submarines with approximately 160 operational warheads.[60] Each sub has sixteen Trident II D5 missiles that can carry up to forty-eight warheads, and one sub is at sea at all times.[61] Since the end of the Cold War, the nuclear-capable submarine on patrol has been kept at a level of reduced readiness, with its missiles de-targeted and a "notice to fire" measured in days, not minutes or hours.[62]

The U.K.'s submarines are aging, and will begin to be retired in 2024.[63] A debate has been underway for over seven years in the United

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56. Nikolai Sokov, *The New, 2010 Russian Military Doctrine: The Nuclear Angle*, CTR. FOR NONPROLIFERATION STUDIES (Feb. 5, 2010), http://cns.miis.edu/stories/100205_russian_nuclear_doctrine.htm (last visited on Mar. 4, 2012).

57. *Id*.

58. Pavel Podvig, *Russia's Nuclear Forces: Between Disarmament and Modernization*, IFRI SEC. STUDIES CTR., at 9 (2011), *available at* www.ifri.org/downloads/pp37podvig.pdf (last visited on Mar. 14, 2012).

59. Hans Kristensen, *Russian Nuclear Forces 2010*, FAS STRATEGIC SEC. BLOG (Jan. 12, 2011), http://www.fas.org/blog/ssp/2010/01/russia2010.php (last visited on Mar. 4, 2012).

60. Hans M. Kristensen & Robert S. Norris, *British nuclear forces, 2011*, 5 BULL. OF THE ATOMIC SCIENTISTS 67, 89–97 (Sept. 2011), *available at* http://bos.sagepub.com/content/67/5/89.full (last visited on Mar. 4, 2012).

61. *Id*.

62. *Id*.

63. Wade Boese, *UK Nuclear Submarine Plan Wins Vote*, ARMS CONTROL TODAY (Apr. 2007), http://www.armscontrol.org/act/2007_04/UKSubPlan (last visited on Mar. 4, 2012).

Kingdom about whether or how to fund the future of this program.[64] The latest Security Review of October 2010 stated that the United Kingdom is planning to replace their submarines with a new class of nuclear-capable subs equipped with a modified Trident missile supplied by the United States.[65] Only eight launch tubes will be operational in normal circumstances, and the maximum number of nuclear warheads carried on each submarine will decrease from forty-eight to forty.[66] Exact warhead and sub designs will likely be delayed until after the next general election in 2016, meaning the service lives of the current fleet will have to be extended.[67]

D. France

France's nuclear forces consist of aircraft and nuclear-capable submarines that carry about 300 warheads.[68] Nuclear policy was defined in a 2008 white paper that stated that France will continue relying on the "principle of strict sufficiency" or minimum deterrence to guarantee its security, provided by a permanent submarine patrol and airborne capability.[69]

France has a new nuclear-capable submarine and both sea and land-based nuclear capable aircraft.[70] France also remains committed to sustaining its nuclear weapon complex, including research and development capabilities. France signed a technical nuclear cooperation agreement with the United Kingdom in 2010 to exchange information on nuclear weapon safety and security and stockpile certification.[71]

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64. Ron Gurantz, *British Debate Replacement for Nuclear Force*, ARMS CONTROL TODAY (Dec. 2005), http://www.armscontrol.org/act/2005_12/DEC-Trident (last visited on Mar. 4, 2012).

65. *See* Prime Minister, *Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review*, HM GOV'T, at 37–39 (Oct. 2010), *available at* http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_191634.pdf?CID=PDF&PLA=furl&CRE=sdsr (last visited on Mar. 4, 2012).

66. *Id*. at 38.

67. *Id*.

68. SIPRI 2011, *supra* note 3.

69. MINISTRERE DES AFFAIRES ETRANGERES [MINISTRY OF FOREIGN AFFAIRS], NUCLEAR DISARMAMENT: FRANCE'S CONCRETE COMMITMENT (Oct. 25, 2011), http://www.diplomatie.gouv.fr/en/spip.php?page=rubrique_imprim&id_rubrique=7227 (last visited on Mar. 4, 2012).

70. *See generally id*.

71. SIPRI 2011, *supra* note 3.

E. People's Republic of China

Concern has been expressed by some nuclear-armed states about the buildup of Chinese nuclear forces and the potential challenge they may present to the current international order. However, China's nuclear arsenal remains relatively small, at approximately 200 nuclear weapons, and its build-up is mostly in land-based delivery systems.[72] China's nuclear weapons are also deliverable by air.[73]

As a way to make their nuclear forces more survivable, China has been increasing the number of its medium and long-range missile delivery systems.[74] Development of a sea-based deterrent has been ongoing, but has yet to become fully operational.[75] As of 2010, China has three submarines either in service or in various stages of construction and outfitting.[76]

China's latest nuclear policy was released in March 2011 in a white paper, which reiterated China's commitment to its "no first use" policy and to retaining its nuclear capabilities at the minimum required for national security.[77]

F. India, Pakistan, and Israel

Three states have never signed the NPT, and all three have nuclear weapons: India, Pakistan, and Israel. The nuclear arsenals of these three states are relatively small compared with those of the five NPT recognized nuclear powers, but contribute greatly to instability in their respective regions. As previously mentioned, the main issue between India and Pakistan relates to fissile material, as Pakistan is determined to maintain parity with India in the capability to manufacture nuclear weapons in the future. Israel's lack of transparency regarding its nuclear weapon program prevents in-depth analysis of their nuclear policy.

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72. *Id.*

73. *Id.*

74. *Id.*

75. SIPRI 2011, *supra* note 3.

76. *Id.*

77. *China Sticks to no-first-use of nuclear weapons: white paper*, XINHUANET (Mar. 31, 2011), http://news.xinhuanet.com/english2010/china/2011-03/31/c_13806909.htm (last visited on Mar. 4, 2012).

G. Democratic People's Republic of Korea

The DPRK is the only nation to have withdrawn from the NPT.[78] The first DPRK nuclear explosion took place underground in October 2006, and its second nuclear test was in May 2009.

The DPRK is believed to have separated between twenty-four—forty-two kilograms of plutonium, which would enable the construction of up to eight nuclear weapons.[79] The plutonium in the DPRK comes from their nuclear energy program, which was at least partly made possible through the technical cooperation received while a party to the NPT. Plutonium is a byproduct of the nuclear reaction in nuclear power reactors and can be separated out by a chemical process and used to create nuclear weapons. Six-party talks between DPRK, South Korea, Japan, China, Russia, and the United States resumed in 2003 in an attempt to achieve the denuclearization of the Korean Peninsula, but have been stalled since 2009.[80] It is unclear if the DPRK is pursuing a uranium enrichment program for nuclear weapons as well at the Yongbyon nuclear site.[81] The DPRK has made vague nuclear threats,[82] but without a credible means of delivery, the threat of nuclear attack by the DPRK is minimal.

VII. CONCLUSION

The policies of nuclear-armed states continue to rely on nuclear weapons into the foreseeable future. The U.N.'s incremental approach toward achieving nuclear disarmament has come to a standstill, leaving the world threatened by more than 20,000 nuclear weapons and enabling billions of dollars to continue to be invested in the modernization of nuclear warheads, delivery systems, and infrastructure. The five NPT nuclear weapon states, however, obligated themselves in that Treaty and in subsequent Review Conferences to pursue nuclear disarmament, and it is

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78. *N Korea withdraws from nuclear pact*, BBCNEWS.COM (Jan. 10, 2003), http://news.bbc.co.uk/2/hi/2644593.stm (last visited on Mar. 4, 2012).

79. SIPRI 2011, *supra* note 3.

80. Peter Crail, *Six-Party Talks Stall Over Sampling*, ARMS CONTROL ASS'N (Feb. 2009), http://www.armscontrol.org/act/2009_01-02/sixpartytalksstall (last visited on Mar. 4, 2012).

81. David Albright & Paul Brannan, *Disabling North Korea's Uranium Enrichment Program*, INST. FOR SCI. & INT'L SEC. (Jan. 20, 2011), http://isis-online.org/isis-reports/detail/disabling-north-koreas-uranium-enrichment-program/10 (last visited on Mar. 4, 2012).

82. David Batty & Justin McCurry, *North Korea threatens 'nuclear war' over troop exercises*, GUARDIAN.CO.UK (July 24, 2010), http://www.guardian.co.uk/world/2010/jul/24/north-korea-nuclear-war-threat (last visited on Mar. 4, 2012); *North Korea issues nuclear threat*, BBCNEWS.COM (Dec. 12, 2002), http://news.bbc.co.uk/2/hi/asia-pacific/2568543.stm (last visited on Mar. 4, 2012).

clear that the rest of the world is not willing to wait indefinitely for that obligation to be fulfilled.

If the NPT regime fails and its bargain falls apart, it is likely that several new states would acquire nuclear weapons for their own power and prestige, increasing the already dangerous possibility of accidental or intentional use, or even sale or theft of nuclear weapons or materials. This future is in no state's interest, which brings some hope that nuclear-armed states will eventually work with the rest of the world on an alternative approach to nuclear disarmament.

Nuclear weapons are not necessary for today's security threats, and the expense of maintaining them not only takes away from other legitimate military needs, but also cannot be defended in this financial climate. More NWS makes for an even more dangerous world, and while this is well known by all states at the U.N., it has not translated into concrete action. At present, the U.N. disarmament machinery remains paralyzed, but the 2010 NPT Review Conference's action plan may finally prompt NWS to make some progress toward nuclear disarmament before the next Review Conference in 2015. Before that benchmark is reached, civil society should continue to work with non-nuclear armed states to push for the negotiation of a nuclear weapon convention that provides a time-bound, irreversible, and verifiable framework for the total elimination of nuclear weapons, whether within the U.N. system or, if necessary, in some other forum.

PROTECTING THE PROTECTORS OR VICTIMIZING THE VICTIMS ANEW? "MATERIAL SUPPORT OF TERRORISM" AND EXCLUSION FROM REFUGEE STATUS IN U.S. AND EUROPEAN COURTS*

*Tom Syring***

I. INTRODUCTION

In recent years, the United States (U.S.) as well as European states have adopted numerous anti-terrorism laws based on concerns for national security, aimed at keeping persons with connections to terrorist networks

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out of the respective countries, or facilitating the forced return to their country of origin.[1]

While keeping the homeland safe represents a legitimate objective that would seem to justify a certain amount of hassle from airport security and various border checkpoints for visitors and other persons wanting to enter a country, the occasional stringent laws enacted have often had the side-effect of negatively affecting, if not intentionally targeting, persons in need of protection. As a result of anti-terrorism provisions such as the so-called material support bar included in the USA PATRIOT Act and similar legislative approaches in other countries, even refugees, defined by Article 1 A (2) of the 1951 Refugee Convention (Refugee Convention) as individuals with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," have been prevented from receiving asylum or protection from *refoulement*, often in direct contravention of the provisions of the Refugee Convention and other applicable international law.[2]

While some of the shortcomings of overly broad anti-terrorism legislation and some of the most extreme examples of judicial overreach have been rectified—for example, by Executive Branch officials issuing *ad hoc* waivers to the material support bar—such waivers only help a fraction of all persons with legitimate claims to refugee status, are usually a matter of discretion which cannot be appealed, and, thus, in general violate the Refugee Convention, which conveys on all individuals with a well-founded fear of persecution a non-discretionary right to refugee status.[3] According to Article 1 F of the Refugee Convention, such a right may only be denied if one of the Exclusion Grounds applies, that is, if the person concerned has committed a crime against peace, war crime, crime against humanity, a serious non-political crime, or has been guilty of acts contrary to the purposes and principles of the United Nations.[4]

Some acts of terrorism may reasonably be subsumed under those grounds for exclusion from refugee status. The trouble with anti-terror legislation, however, is that there neither seems to be a generally agreed-

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1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 [hereinafter PATRIOT ACT].

2. *See* PATRIOT ACT, *supra* note 3, and United Nations Convention Relating to the Status of Refugees, art. (1)(A)(2), July 28, 1951, 189 U.N.T.S. 150 (entered into force on Apr. 22, 1954) [hereinafter Refugee Convention].

3. The claim in regard to the non-discretionary right to refugee status, given the well-founded fear precondition, may be based on art. 1, Refugee Convention, which states that "the term 'refugee' shall apply to any person" who has a well-founded fear of persecution.

4. Refugee Convention, *supra* note 5, art. (1)(F).

upon definition of terrorism, nor of what constitutes "material support" to acts of terrorism. As a result, some legislation based on concerns for national security include language that excessively broadens the scope of what may constitute terrorism, thus, leading to exclusion from refugee status of numerous persons who otherwise would have a legitimate claim to protection under the Refugee Convention. Furthermore, in some jurisdictions, the legislative concept of "material support" has assumed an ever-expansive posture, as also exemplified by the 2010 U.S. Supreme Court decision in *Holder v. Humanitarian Law Project*.[5] Holder ruled ruling that training blacklisted organizations in peaceful dispute resolution techniques, or providing even minimal support to resistance movements, or support under duress, leaving no choice of action, constitutes material support to terrorism leading to exclusion from refugee status.[6]

This paper seeks to identify the core provisions contained in various European and U.S. national security and asylum laws leading to exclusion from refugee status, and compare the various approaches taken with a view to definitions of "being involved in terrorism" and "providing material support to terrorism," and the legal consequences attached to either finding, that is, the level at which the exclusion from refugee the status bar is set. This paper will also scrutinize leading cases before national European and U.S. courts as well as the European Court of Justice (ECJ) in that regard, and evaluate additional paths to relief (that is, other safeguards against *non-refoulement*, Executive Branch waivers etc.).

While the aim is to assess where legislative or judicial overreach may be discernible (or the lack of legislative precision—intended or unintended—may have led to executive overreach and judicial impotence) and arrive at a more generally acceptable and legitimate definition of what reasonably should qualify for exclusion, preliminary findings seem to indicate that the heart of the problem, at least in part, may lie elsewhere—in the lack of clear-cut and open procedures for designating persons or organizations as engaged in terrorism, leaving a significant "margin of appreciation" for politicized decisions as to whom to include in the so-called terror lists in the first place.

Thus, uncovering some of the underlying, unhealthy conjunctions of undisclosed procedures for drawing up terror lists with too vaguely defined reasons for exclusion that prevent legitimate refugees from receiving rightful protection under the Refugee Convention, and hence, leading to the re-victimization of victims, will be at the core of this project.

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5. Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010).

6. *Id*. at 2713.

For the purpose of this paper, the ensuing discussion will concentrate on highlighting some aspects of the above outlined opposing forces; that is—on juxtaposing recent U.S. Supreme Court and ECJ decisions pertaining to material support bars, and exclusion from refugee status, and elaborating on the underlying—more than just a spurious effect of the process of drawing up so-called "terror lists" as one essential part of this problematic conjunction.

A detailed depiction and comparative analysis of various national jurisdictional approaches (such as laws and judgments pertaining to national security and exclusion) will be left for ensuing chapters. Here, the most apparent contrast between U.S. and European approaches, broadly speaking, as well as discernible flaws common to both, will be at the center of the discussion.

II. ANTI-TERROR LEGISLATION IN THE UNITED STATES

Not much attention had been paid to anti-terror legislation until the Anti-terrorism and Effective Death Penalty Act (AEDPA) of 1996[7] authorized the Secretary of State to designate groups of "foreign terrorist organizations" and, in turn, freeze all their assets.[8] It was first in the wake of the attacks in New York City and Washington, DC, on September 11, 2001, and the passing of the USA PATRIOT Act [9] that same year that content and consequences of such legislative efforts received broader attention, and provoked growing criticism, in the public sphere. [10] That same year that content and consequences of such legislative efforts eventually received broader attention, and provoked growing criticism, in the public sphere. From then on, in line with an ever expanding reach of terrorism legislation, the tense relationship between national security concerns on the one hand, and civil liberties, basic human rights and the rights of refugees (exemplified by the perhaps weakest group of people affected by such legislation) on the other hand, has left the opposing points of view seemingly irreconcilable.

At the core of this dispute is the seemingly ever expanding reach of anti-terror legislation where the AEDPA of 1996 entailed a public designation of a certain organization as terrorist organization (with concomitant inclusion in a "terror list") prior to the potential freezing of

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7. *See* Anti-terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 [hereinafter AEDPA].

8. *Id.* § 219.

9. *See generally* PATRIOT ACT, *supra* note 3.

10. *See e.g.*, *Key Part of Patriot Act Ruled Unconstitutional*, WASHINGTON POST, Sep. 30, 2004, at A16.

that organization's funds.[11] It provided for an opportunity to challenge such designation, as well as for mandatory, periodic reviews of that status.[12] The USA PATRIOT Act, along with ensuing legislation further expanding the definition of what may constitute engagement in terrorism, incorporated few such safeguards against wrongful designations.[13]

The USA PATRIOT Act created three categories of "terrorist organization" with increasing levels of vagueness as to the reasons for inclusion.[14]

So-called Tier 1 designation pertained to groups officially designated as foreign terrorist organizations according to AEDPA, in line with the 1996 legislation that was still dependent on authorization of such designation by the Secretary of State.[15] Tier 1 designation included certain accountability, such as public designation; it also included, limited due process safeguards such as opportunity to challenge.[16]

Tier 2 expanded that definition to include groups of people that the Secretary of State, the Attorney General, and the Secretary of Homeland Security conclude *have* engaged in terrorist activity.[17] After reaching this conclusion, the officials still provided official notice by publishing the names of Tier 2 groups in the Federal Register.[18] Also, funds were not automatically frozen, however, members of the affected groups were automatically inadmissible to the United States.[19] Procedures for legal challenge were lacking, and the designation was based on acts of the past as well as projections into the future. It was sufficient for the organization to have been engaged in terrorist activities, or to be suspected of becoming engaged in terrorism in the future.[20]

The third type of terrorist group described in the USA PATRIOT Act, Tier 3, eventually opened the "flood gates" to potential arbitrariness by being breathtakingly wide.[21] It now included any "group of two or more individuals, whether organized or not, which engages in [terrorist

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11. *See* AEDPA, *supra* note 16, § 219(a)(1).
12. *Id*.
13. *See generally* PATRIOT ACT, *supra* note 3.
14. *Id*.
15. *See id*. § 411(a)(1)(A)(V)(aa).
16. *Id*. § 302(b)(8).
17. *Id*. § 411(a)(1)(F).
18. *See* PATRIOT ACT, *supra* note 3, § 411(a)(1)(G)(II).
19. *Id*. § 411(a)(1)(F).
20. *Id*. § 314(a)(1).
21. *Id*. § 411(a)(1)(F).

activity]."[22] This provision, for its exceeding vagueness mocked as "two guys and a gun,"[23] was problematic for various reasons.[24] Official notice was no longer required and the designation could not be challenged.[25] In addition, to be designated as engaged in terrorism, it was sufficient that even a sub-group of a nonviolent independence movement was (or had at some point in the past, or may be expected to be in the future) engaged in terrorism.[26] Furthermore, the definition appears to be circular, defining a "terrorist" as someone being "engaged in terrorism," and points to the potential flaws of the designation procedure.

"Terrorist activity" now included "any unlawful act involving explosives, firearms . . . or any other dangerous device with intent to endanger . . . the safety of one or more individuals *or*[27] to cause substantial damage to property."[28] The term "engaging in terrorist activity" henceforth entailed that those who provided "material support" to a terrorist organization, by this very act were deemed "to have themselves engaged" in terrorist activity, that is, membership of a terrorist organization was no longer a requirement. Finally, "material support" could consist of funds, transfer of funds, provision of food, shelter, training, even support of peaceful activities, as long as those trained were somehow connected with sub-groups that were, or have been, engaged in unlawful activities as described above.[29]

This exceedingly wide definition of "being engaged in terrorist activities," with ensuing punishment of perpetrators, both U.S. citizens (criminal offense) and refugees (denial of or exclusion from refugee status) was also the subject of a recent U.S. Supreme Court decision, which, in *Holder v. Humanitarian Law Project*,[30] essentially confirmed the current status quo in spite of a lack of exception for *de minimis* support or support under duress.[31]

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22. Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, § 212, 66 Stat. 163, 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2006) [hereinafter INA].

23. *See*, *e.g.*, Maryellen Fullerton, *Terrorism, Torture, and Refugee Protection in the United States*, 29(4) REFUGEE SURVEY Q. 4, 13 (2010).

24. *Id*.

25. *Id*.

26. *Id*. at 14.

27. Emphasis added.

28. *See* 8 U.S.C. § 1182(a)(3)(B)(iii)(V).

29. *Id*.

30. *See generally* Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010).

31. *Id*.

The case at hand, which had a complex 12-year prelude, involved two U.S. citizens and a number of domestic organizations who initiated a constitutional challenge to the material-support statute.[32] This statute makes it a federal crime to knowingly provide material support or resources to a foreign terrorist organization, punishable by a fine or imprisonment of up to fifteen years, or both.[33] If such support leads to the death of any person, the legal consequence shall be imprisonment for any term of years or for life.[34] The plaintiffs claimed that their wish to support non-violent activities of groups designated as foreign terrorist organizations by the Secretary of State (here, the Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), which aim to establish independent states for Kurds in Turkey and Tamils in Sri Lanka, respectively[35]) violated the Fifth Amendment's Due Process Clause on the ground that the statutory terms are impermissibly vague, and volative First Amendment rights to freedom of speech and association.[36] The plaintiffs asserted, in particular, that §2339B is invalid to the extent it prohibits them from engaging in certain specified activities, including training PKK members in the use of international law to achieve peaceful dispute resolution; teaching PKK members to petition the United Nations and other representative bodies for relief; and engaging in political advocacy on behalf of Tamils living in Sri Lanka, and Kurds living in Turkey.[37]

While the constitutional challenge, on the face, mainly pertained to the criminalization of certain conduct—even in the form of legal education and teaching, with a view to peaceful conflict resolution techniques offered by U.S. citizens, whenever the beneficiary of such support held some kind of ties to an organization placed on a terrorist-list—the implications might be even more serious to non-citizens, having fled their country of origin and applying, or having applied, for refugee status in the United States[38] Whereas U.S. citizens might risk imprisonment for knowingly supporting an organization designated by the Secretary of State as being engaged in terrorism, refugees risk not receiving protection from the persecution they tried to escape; even without the knowledge requirement contained in the

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32. *Id*. at 2712.

33. *See* 18 U.S.C. § 2339B(a)(1).

34. *Id*.

35. *See generally* Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010) (Although both groups engage in political and humanitarian activities, they have also committed numerous terrorist attacks, some of which have harmed American citizens).

36. *Id*.

37. *Id*. at 2714.

38. *Id*. at 2716.

penal statute—as the "terrorist" designation barring access to the United States does not depend on the person concerned actually and deliberately wanting to support a "terrorism designated" organization, or even knowing about such an affiliation.[39] Combined with the absence of exceptions for support provided under duress and *de minimis* support, the line demarking barriers to access seems to have been drawn far too broad. Based on 8 U.S.C. 1182, even an infant kidnapped for ransom by a designated terrorist organization, eventually freed (in exchange of money), fleeing her country of origin due to persecution according to a convention ground (1951 Refugee Convention), and now applying for refugee status, would, arguably, be an "inadmissible alien."[40]

To be sure, some remedies are available, including the option of *ad hoc* waivers being issued, or taking recourse to Article 3 of the Convention Against Torture.[41] However, such waiver may only be issued by the Department of Homeland Security.[42] In addition, it is regarded as a matter of discretion only, and may not be appealed.[43] The Convention against Torture[44] (CAT), on the other hand, may offer protection from *refoulement* in line with Article 33 of the 1951 Refugee Convention,[45] that is, it may prevent a refugee from being deported if he or she has a substantiated fear of being tortured upon return.[46] Such protection, however, would not prevent "exclusion" from refugee status, and, thus, would provide a much weaker and limited form of protection, even to legitimate refugees. Furthermore, it would generally not protect refugees whose fear of persecution does not rise to the level of torture required by the CAT. Finally, as the CAT provisions more often are activated in the case of people actually having actively engaged in terrorism, as opposed to people merely having been accused of providing "material support," taking

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39. *Id*. at 2714.

40. *See generally* 8 U.S.C. § 1182.

41. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51 (Dec. 10, 1984) (entered into force June 26, 1987) [hereinafter CAT].

42. *See* 8 U.S.C. § 1182(d)(3)(B)(1).

43. *Id*.

44. *See generally* CAT, *supra* note 52. The Convention against Torture (CAT), on the other hand, may offer protection from *refoulement* in line with Article thirty-three of the 1951 Refugee Convention, that is, it may prevent a refugee from being deported if he or she has a substantiated fear of being tortured upon return.

45. Refugee Convention, *supra* note 5.

46. *See* CAT, *supra* note 52, art. 3 ("[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture").

recourse to the CAT as the main source of relief against the threat of *refoulement* has, at times, the paradoxical consequences of favoring and giving "preferential treatment" to the least deserving, as may also be exemplified by the so-called Mullah Krekar case.[47] Newly proposed legislation, such as the Refugee Protection Act of 2010 would address some of those serious consequences, but currently it seems unlikely that a proposal would be passed anytime soon.[48]

III. ANTI-TERROR LEGISLATION AND EXCLUSION FROM REFUGEE STATUS DISCUSSION BEFORE THE EUROPEAN COURT OF JUSTICE

To be sure, anti-terror legislation in Europe neither started with 9/11 in the United States, nor with the Madrid train bombings in 2004, the London bombings in 2005, or the July 22, 2011 massacre in Norway—though all of these cruel attacks on civilians raised or renewed awareness of the potential weaknesses of an open society, if paired with ignorance and naïveté. Obviously, the concept of terror as a policy of political repression and violence had its genesis far earlier, and the term was first employed in connection with describing the reign (of terror) imposed by the Jacobins in the wake of the French Revolution.[49] But what really captured attention in the less distant past—and is at the core of the discussion here—was the link

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47. Mullah Krekar, a Kurdish Sunni Islamist leader who came to Norway as a refugee from Northern Iraq in 1991, had his refugee status revoked in 2003 due to terrorist acts carried out in Kurdistan by Ansar al-Islam, an Islamist group whose original leader Mullah Krekar was at the time. Since February 2003 Krekar has had an expulsion order against him which has been suspended pending Iraqi government guarantees that he will not face torture or execution. Norway is committed to international treaties which prohibit the expulsion of an individual without such a guarantee. The death penalty remains on the books in the Kurdistan region and while most death sentences have been changed into life sentences since the Kurdistan authorities took power in 1992, the exception pertains to the eleven alleged members of that very group (Ansar al-Islam), who were hanged in the regional capital of Arbil in October 2006. Since December 8, 2006 Mullah Krekar has been on the U.N. terror list, and on November 8, 2007, he had been judged by the Norwegian High Court as a "threat to national security." *See* Vilde Helljesen et al., *Høyesterett: Mulla Krekar fare fro rikets sikkerhet* [Norwegian High Court: Mullah Krekar a Threat to National Security], NRK (Nov. 8, 2011), http://www.nrk.no/nyheter/1.3987075 (last visited Mar. 11, 2012), *and* Norges Høyesterett [Supreme Court of Norway], Nov. 8, 2007, HR-2007-01869-A (case no. 2007/207) (Nor.). Despite repeated threats to the lives of various leading politicians in his country of refuge, he remains in Norway precisely because he might face the death penalty if deported to Iraq. *See*, *e.g.*, Paal Wergeland, *PST vurderer å pågripe Mulla Krekar* [PST Considers Arresting Mullah Krekar], NRK, June 11, 2010, http://www.nrk.no/nyheter/norge/1.7163982 (last visited Mar. 11, 2012).

48. S. 113, 111th Cong. § 2 (2010).

49. *Cf.*, *e.g.*, Geoffrey Nunberg, *Head Games It All Started with Robespierre "Terrorism": The History of a Very Frightening Word*, *in* SAN FRANCISCO CHRONICLE, Oct. 28, 2001, *available at* http://articles.sfgate.com/2001-10-28/opinion/17622543_1_terrorism-robespierre-la-terreur (last visited Mar. 7, 2012).

between anti-terror legislation and immigration control.[50] The use of laws aimed at national security, may, thus, also negatively affect refugees, i.e. individuals with a well-founded fear of persecution, which, in its ultimate consequences, may lead to exclusion from refugee status.

As the question of refugees in Europe, prior to the 1980s, still primarily pertained to people having fled from the horrors and repercussions of the Second World War,[51] mass influxes from other continents and the creation of comprehensive legal provisions aimed at regulating and limiting immigration represent a comparatively newer phenomenon.[52] As an example of early cases, the German Federal Constitutional Court grappled with the question of exclusion based on material support of terrorism and related issues in the late 1980s, regarding a constitutional complaint based on the right to asylum enshrined in Article 16 of the German Constitution (or "Basic Law") of May 23 1949.[53] In that case, decided on December 20 1989, the Court held that the international order supported by the Federal Republic of Germany generally did not accept the employment of terrorist means as a form of political struggle and hence, as a point of departure, denied claims to "refugee status relevant" political persecution, where such persecution could be regarded as (legitimate) defensive action on the part of the state.[54] Such state action would only be regarded as illegitimate, where, for example, the particular intensity of state persecution suggests that the level of persecution in the sense of the Refugee Convention had been reached. However, even in the face of "refugee status relevant" persecution, a refugee who continues to lend support to activities deemed terrorist in nature in his (new) host country, would fall outside the protection offered by the constitutional right to asylum and be subject to exclusion from refugee status.[55]

But a comprehensive evaluation of the consequences of previous "material support" rendered, not least in light of a, by now, much more

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50. *See generally* PATRIOT ACT, *supra* note 3; INA, *supra* note 32.

51. And in fact, Article 1A(2) of the 1951 Refugee Convention defined a refugee as a person who, "[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted" is outside the country of his nationality or former habitual residence. Refugee Convention, *supra* note 5, art. 1(A)(2).

52. Jack I. Garvey, *Toward a Reformation of International Refugee Law*, 26 HARV. INT'L L.J. 483, 483–84 (1985).

53. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law], May 23, 1949, Bundesgesetzblatt [BGBI], art. 16 (Ger.), *available at* http://www.iuscomp.org/gla/statutes/GG.htm#Preamble (last visited Mar. 7, 2012).

54. *Cf.* Bundesverfassungsgericht [BVerfG] [Fed. Const. Ct.], Dec. 20, 1989, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 958/86, at 81, 142, 152 (Ger.).

55. *Id.*

coordinated European immigration and asylum policy, took place at a much later point in time.[56]

While legislation in regard to national security and immigration varies to a certain extent within Europe, and also still within the EU, increasingly there have been attempts at policy and legal integration, at least among EU member states and associated countries,[57] to which also a number of recent EU Directives in that area bear witness. Thus, while the present case originated in Germany, it reflects similar debates in other European countries and eventually was decided on the highest European judicial level.[58]

A. European Court of Justice Judgment on Preconditions for Exclusion from Refugee Status: Federal Republic of Germany v. B&D[59]

On November 9, 2010, the Grand Chamber of the ECJ rendered its judgment in *Federal Republic of Germany v. B & D*.[60] This decision pertained to the interpretation and proper application of Council Directive 2004/83/EC[61] on the granting of and exclusion from refugee status of a

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56. The creation of a Common European Asylum System (CEAS) was first envisaged at a European Council summit in Tampere, Finland, in 1999. *See also* Council Directive 2003/9/EC, 2003 O.J. (L31) 18 of Jan. 27, 2003, ¶ 2 (laying down minimum standards for the reception of asylum seekers). *See also infra*, interpretation of Council Directive 2004/83/EC pertaining to minimum standards for the qualification as refugees.

57. Norway, for example, is not an EU member, yet bound by most EU Directives.

58. Indicative of the importance accorded to this question of law, the proceedings in *Germany v. B & D* (*cf.* below) included separate written observations submitted on behalf of the European Commission, and the Governments of France, Netherlands, Sweden, United Kingdom, in addition to submission by the parties to the dispute. *See* Joined Cases C-57/09 & C-101/09, Fed. Republic of Ger. v. B & D, 2010 ECJ EUR-Lex LEXIS 950 (Eur. Ct. Just. Nov. 9, 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0057:EN:HTML (last visited April 24, 2012).

59. The following section is an expanded version of Tom Syring, *Introductory Note to the Court of Justice of the European Union: Preconditions for Exclusion from Refugee Status (Fed. Republic of Ger. v. B & D)*, 50 I.L.M. 114 (2011). Relevant parts of the Introductory Note are reproduced with permission from the Volume 50 No. 1 issue of the International Legal Materials ©2011 American Society of International Law. [hereinafter *Introductory Note by Tom Syring*].

60. Joined Cases C-57/09 & C-101/09, Fed. Republic of Ger. v. B & D, 2010 ECJ EUR-Lex LEXIS 950 (Eur. Ct. Just. Nov. 9, 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0057:EN:HTML (last visited Mar. 7, 2012) [hereinafter Joined Cases C-57/09 & C-101/09].

61. Council Directive 2004/83/EC, 2004 O.J. (L 304) 12 [hereinafter Directive 2004/83/EC]. This Directive, on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, has its legal basis in Article 63(1)(c) of the Treaty Establishing the

person associated with a reputed terrorist organization.[62] The decision forms part of a growing body of case law, emanating from proceedings before the Court of Justice of the European Union and the European Court of Human Rights concerning EU Member States' rights and obligations under the Common European Asylum System (CEAS).

Other recent cases involving one or several aspects of the EU asylum *acquis* include *M.S.S. v. Belgium and Greece*[63] (violation of the prohibition of inhuman or degrading treatment or punishment, and violation of the right to an effective remedy based on Member States' neglect of their duty to adequately treat asylum applicants and process their applications); *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*[64] (exclusion from refugee status based on protection or assistance received from organizations or agencies of the United Nations other than the UNHCR); *Aydin Salahadin Abdulla et al. v. Federal Republic of Germany*[65] (exclusion from refugee status based on ceased circumstance in applicant's country of origin); and *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*[66] (standard of evidence needed for existence of a serious and individual threat to applicant's life or person).[67]

B. The Relevant Law

In *Federal Republic of Germany v. B&D*, the Court relied on various EU and international instruments pertaining to the rights of asylum seekers and refugees.[68] Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection

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European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, with subsequent amendments. Consolidated version located in 2006 O.J. (C 321) 67. *See also* Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 1.

62. *See generally* Joined Cases C-57/09 & C-101/09, *supra* note 77.

63. M.S.S. v. Belgium and Greece, App. No. 30696/09, [2011] ECHR 108 (Eur. Ct. H.R. Jan. 21, 2011), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=880339&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (last visited Mar. 7, 2012). Judgments and other decisions of the European Court of Human Rights are available at http://echr.coe.int (last visited Mar. 7, 2012).

64. Case C-31/09, Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal, 2010 O.J. (C 221) 9 (Eur. Ct. Just. June 17, 2010).

65. Joined Cases C-175/08, C-176/08, C-178/08 & C-179/08, Aydin Salahadin Abdulla et al. v. Fed. Republic of Ger., 2010 O.J. (C 113) 4 (Eur. Ct. Just. Mar. 2, 2010).

66. Case C-465/07, Meki Elgafaji & Noor Elgafaji v. Staatssecretaris van Justitie, 2009 O.J. (C 90) 4 (Eur. Ct. Just. Feb. 17, 2009).

67. *Id*. ¶ 30.

68. *Introductory Note by Tom Syring*, *supra* note 76.

and the Content of the Protection Granted, intended to form the heart of CEAS, combines two forms of international protection: the traditional refugee protection regime under the 1951 Convention Relating to the Status of Refugees[69] (i.e., refugee status), and a subsidiary protection regime governed by international human rights law (i.e., subsidiary protection status).[70] The "Qualification Directive" expanded state responsibility for refugees by including other persons in need of international protection, making it one of the most significant pieces of European legislation introduced in the law of asylum.[71] Directive 2004/83/EC lays down minimum standards on the conditions third country nationals or stateless persons must meet to receive international protection in one of the EU Member States, as well as the content of the protection granted.[72] The Directive provides, *inter alia*, for the exclusion of a person from refugee status where serious reasons exist to believe that the applicant had committed a "crime against peace, war crime, or a crime against humanity,"[73] a "serious non-political crime,"[74] or has been guilty of "acts contrary to the purposes and principles of the United Nations."[75] Those provisions are based on Article 1(F) of the 1951 Refugee Convention.[76]

Also important to the ECJ's discussion was the role of the United Nations. On September 28, 2001, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, adopted Resolution 1373.[77] The Resolution declares that "acts, methods, and practices of terrorism," as well as "knowingly financing, planning and inciting terrorist acts," are contrary to the purposes and principles of the United Nations," stating that and calls upon all states to "[e]nsure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as

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69. Helene Lambert & Theo Farell, *The Changing Character of Armed Conflict and The Implications for Refugee Protection Jurisprudence*, 22 INT'L J. REF. L. 237–38 (2010). *See also* Refugee Convention, *supra* note 5.

70. Lambert & Farell, *supra* note 87, at 237–38.

71. *Id*.

72. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶¶ 17–18(a).

73. Directive 2004/83/EC, *supra* note 78, art. 12(2)(a).

74. *Id*. art. 12(2)(b).

75. *Id*. art. 12(2)(c).

76. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 102. *See also* Refugee Convention, *supra* note 5.

77. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 7.

grounds for refusing requests for the extradition of alleged terrorists."[78] In order to implement Resolution 1373, the Council of the European Union adopted Common Position 2001/931/CFSP on the use of specific measures to combat terrorism,[79] which, according to Article 1 (1), is applicable to "persons, groups and entities involved in terrorist acts" listed in the Annex.[80]

C. Background to the Case

The present case, in the form of a reference for a preliminary ruling from the German Federal Administrative Court, "*Bundesverwaltungsgericht*," deals with exclusion grounds in Article 12 (2) and status determination standards in Article 3 of the Directive.[81] Article 3 allows Member States to "introduce or retain more favourable standards for determining who qualifies as a refugee or a person eligible for subsidiary protection."[82] Article 3 was particularly important because of German constitutional provisions, mainly Article 16a (1) of the German Basic Law, "*Grundgesetz,*" which states that "persons persecuted on political grounds shall have the right of asylum," without expressly excluding any category of persons from that right.[83] Finally, the ECJ also had to take a stance on the level of involvement required for a person to be regarded as falling under one of the exclusion grounds based on terrorist activities within the meaning of Articles 12(2)(b) and (c), and the modes for assessing a person's involvement.[84] The proceedings concerned the Federal Office for Migration and Refugees,' "*Bundesamt's,*" rejection of B's application for asylum and recognition of refugee status, and its revocation of D's refugee status and right of asylum.[85]

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78. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1377, U.N. Doc. S/RES/1377 (Nov. 12, 2001) (basically reiterated the declaration of S.C. Res. 1373).

79. Council Common Position 2001/931/CFSP, on the Application of Specific Measures to Combat Terrorism, 2001 O.J. (L 344) 93 (Dec. 27, 2001) (last amended through Council Common Position 2005/936/CFSP, 2005 O.J. (L 340) 80).

80. *Id*.

81. *Id.*

82. Directive 2004/83/EC, *supra* note 78, art. 3 (i.e., protection offered, for example, to individuals found not to have a well-founded fear of persecution based on one of the Convention grounds (race, religion, nationality, membership of a particular social group, or political opinion), but, for example, granted stay on humanitarian grounds). *See also* Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 18(a)(c).

83. *Id*. ¶ 33.

84. *Id*. ¶ 55.

85. *Id*. ¶ 49.

The *Bundesverwaltungsgericht*, the final court of appeal, took the view that resolution of the disputes turned on the interpretation of Directive 2004/83/EC, stayed both proceedings, and referred a number of questions to the ECJ for a preliminary ruling, mainly:

> 1) Does it constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) of the Directive, if the person seeking asylum was a member of an organization which is included in the EU terror list, and the appellant has actively supported that organization's armed struggle?
> 2) Would exclusion under such circumstances require that the foreign national continue to constitute a danger?
> 3) Would exclusion require that a proportionality test be undertaken in relation to the individual case?;
> 4) Is availability of national or international protection against *refoulement* of relevance in considering proportionality?
> 5) Is it compatible with the Directive, for the purpose of its Article 3, to grant a right to asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12 (2) of the Directive is satisfied, or to uphold a right to asylum even if one of the exclusion criteria is satisfied and refugee status under Article 14 (3) of the Directive has been revoked?[86]

D. The Judgment of the Court

The Court held that support of an organization included on the EU terror list may, but did not automatically, constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) of Directive 2004/83/EC.[87] According to the Court, a finding that there are serious reasons for such an assessment is conditional, and should be determined on a case-by-case basis.[88] It will depend on the particular circumstances of the case and an individual's responsibility for carrying out the acts in question.[89] Where exclusion is found to apply, it is neither conditional on

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86. *Cf. Id.* ¶¶ 1, 67.

87. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 67(1). *See also* Directive 2004/83/EC, *supra* note 78, art 12(2)(b)(c).

88. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 99.

89. *Id.*

the respective person representing a present danger, nor on an assessment of proportionality in relation to the seriousness of the act committed.[90] Such balancing considerations pertain to whether the person concerned may be deported to his country of origin.[91]

Finally, applying Article 3 of the Directive, the ECJ held that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the Directive, provided that the alternative protection offered does not entail a risk of confusion with refugee status within the meaning of the Directive.[92]

E. Significance and Impact

In dismissing a separate proportionality test—balancing the seriousness of the act committed with the seriousness of the risk associated with the consequences of exclusion (i.e. *refoulement*)—the ECJ rejected the Opinion of the Advocate General and the submissions by the German, French, Dutch, and British governments advocating such approach.[93] Instead, the court concluded that the existence of exclusion grounds already presumed an assessment of proportionality and the particular circumstances of the case, and that applying a second proportionality test would unduly obscure legal clarity.[94]

Secondly, the judgment allows Member States to grant asylum to persons otherwise subject to exclusion, but stresses as a precondition that the status granted be sufficiently distinguishable from refugee status.[95] This, the Court ruled, will ensure that the international protection regime—which includes in particular, the dual purpose of Article 1(F) of the Refugee Convention (i.e., to deny the benefits of refugee status to those undeserving of it, and ensure that such persons do not misuse the institution of asylum)—will be preserved.[96]

Perhaps the most significant aspect of the judgment pertains to the Court's emphasis of the applicant's due process rights, and the Court's caution that individual responsibility must always be established, especially in the context of alleged affiliation with terrorist organizations.[97] Such

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90. *Id*. at ¶¶ 105, 111.

91. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶¶ 104–11.

92. *Id*. at ¶ 109.

93. *Id*.

94. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶¶ 107.

95. *Id*, at ¶¶ 119-21.

96. *Id*.

97. *Id*. at ¶¶ 87-89.

wariness seems particularly relevant in light of criticism of certain aspects of the procedures employed in drawing up the terror lists.[98] The ECJ already pointed to these flaws in 2006 in the case of the *People's Mojahedin Organization of Iran* (PMOI)—where the Court of First Instance[99] ruled that a Council decision placing the PMOI on the terror list was unlawful,[100] which in turn led the Proscribed Organizations Appeal Commission (POAC) to characterize the ensuing decision of the United Kingdom (U.K.) Home Secretary to keep the PMOI on the terror list as "perverse."[101] Subsequent efforts on the part of France to appeal the judgment removing the PMOI from the EU list of terrorist organizations were finally dismissed by the Grand Chamber of the Court of Justice on 21 December 2011,[102] in essence reconfirming the former court's judgment and evaluation of the terrorist organization designation procedure as severely flawed.

The ECJ judgment thus reinforced the need for an individual assessment in cases dealing with alleged participation in prohibited acts and the need and individual right to international protection. The judgment also cautioned against the shortcomings in existing procedures for labeling a person or an organization as a supporter of terrorism, with likely impact on other domestic and international courts' decisions regarding the application of exclusion clauses, especially in terrorism related cases.

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98. *Cf.* notes 103 and 104.

99. This court is now generally referred to as the "General Court."

100. In its judgment of December 12, 2006, the Court found that decisions on the list of organizations and persons whose assets are to be frozen based on Regulation 2580/2001, adopted in implementation of Common Position 2001/931/CFSP, lacked an adequate statement of reasons, an opportunity for affected persons or bodies to raise defenses or objections, and effective legal remedies. *Cf.* Case T-228/2, Organisation des Modjahedines du peuple d'Iran [People's Mojahedin Organization of Iran] v. Council of the Eur. Union, 2002 O.J. (C 247) 20 (Ct. of First Instance Dec. 12, 2006), *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0228:EN:HTML (last visited Mar. 7, 2012).

101. Proscribed Organizations Appeal Commission [POAC], Appeal No. PC/02/2006, ¶ 19 (Judgment of Nov. 30, 2007), *available at* http://www.statewatch.org/terrorlists/PC022006%20PMOI%20FINAL%20JUDGMENT.pdf (last visited Mar. 7, 2012). For a comprehensive account of the PMOI case, *see* Tom Syring, *Fata Morgana and the Lure of Law: Rebuilding a War-torn State after Regime Breakdown: Prospects, Limits, and Illusions*, *in* REBUILDING SUSTAINABLE COMMUNITIES IN IRAQ: POLICIES, PROGRAMS AND INTERNATIONAL PERSPECTIVES 53, 67 (Adenrele Awotona ed., 2008).

102. *Cf.* Case C-27/09 P, France v. People's Mojahedin Organization of Iran (Grand Chamber Dec. 21, 2011), *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=117189&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=479256 (last visited Jan.12, 2012).

IV. PRELIMINARY CONCLUSION AND OUTLOOK

Anti-terrorism legislation and refugee law point to almost inevitable opposites: national security versus civil liberties. Striking the right balance between concerns for national security and the exigencies of refugees may be a challenging task and one involving, at times, unfair or seemingly incomprehensive decisions and consequences, as also exemplified by the Mullah Krekar case.[103] However, the nature of "need assessments" and judgments within that subject matter is such that one most often does not have the luxury of absolute certainty. Whether a person has a well-founded fear of being persecuted, and thus qualifies for refugee status, cannot always be verified. Nevertheless, where persecution and potentially death is at issue, erring on the side of life (*e.g.* by perhaps granting refugee status to a person who should not have qualified) should be the guiding principle.

By the same token, to the degree that it would not constitute a real risk to national security, setting the bar for material support of terrorism leading to exclusion from refugee status higher, rather than too low, seems to represent a preferable restatement of the courts' "margin of appreciation."

The balancing effort, as also pronounced as a requirement in the ECJ case, stresses the need for an individual evaluation of each particular refugee and his or her level of potential participation in "unlawful activities." However, irrespective of adequate attention being paid to the balancing effort in the face of the potential of flawed designations of organizations and people as "being engaged in terrorism," the paramount task seems to ensuring that the process of drawing up terror lists in the first place is scrutinized, and that wrongful designation as a terrorist organization may be legally challenged.

Wherever such due process safeguards are absent, victims may be victimized anew. Erring on the side of victimization, however, renders inhibited protectors *de facto* perpetrators—that's where the bar should be set.

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103. *See generally supra* note 50.

THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE: THE CRUCIAL ROLE OF THE UNITED STATES

*Judge Richard Goldstone**

Eight or nine years ago the American Bar Association honored the then President of Romania, Emil Constantinescu, at a luncheon during its annual meeting in Atlanta. I was invited to deliver the keynote speech at the luncheon. I arrived at Atlanta Airport after a long flight from Johannesburg. I presented my passport to the immigration official and the passport officials said to me, "What are you doing in the United States?," and I said, "Well, I am attending the annual meeting of the American Bar Association" and he looked down and he looked up and he said "oh, you're giving a keynote address?" and I said, "Yes, you're correct". He made me feel very important and after buttoning my jacket and standing a little taller, I asked him: How do you know that?" and he responded "Everyone coming in today is giving a keynote address. I thanked him for giving me a great opening for my keynote address. I thought it might be good opening today.

The subject of my talk today is the future of international criminal justice and the crucial role of the United States (U.S.). It is important that I spend a few minutes talking about recent history and especially the huge advances that have been made during the past seventy years. Advances in the law and legal institutions are invariably the consequence of changes on the ground. This applies to all branches of the law. Changes in tax law occur after new ways of avoiding the payment of tax are developed. New inventions such as the Internet require new laws to cope with the consequences. New laws always come after the event. That is particularly the case with regard to international criminal law. It is probably inevitable that the significant changes have come about as a result of catastrophes. The beginning of modern international criminal law is obviously the Nuremberg Trial of the major Nazi leaders. That was one of the consequences of the terrible crimes that were committed by the Hitler regime and especially the Holocaust.

One of the most important of the legacies of Nuremberg was the idea of crimes against humanity. The idea is that some crimes, atrocity crimes, are so egregious and shocking to all decent people that they constitute crimes not only against the immediate victims, but against all of humankind

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no matter where situated. This led to the extension of universal jurisdiction from piracy to these international crimes.

The first international recognition of universal jurisdiction is to be found in the four Geneva Conventions of 1949. It was made applicable to the investigation and prosecution of the "grave breaches" defined by those conventions. The second application of universal jurisdiction occurred only some 24 years later in the United Nations (U.N.) convention of 1973 that declared Apartheid in South Africa to constitute a crime against humanity. It conferred universal jurisdiction upon the courts of all countries to prosecute that offense. It took another eleven years for universal jurisdiction to be used in the Torture Convention of 1984. Whilst the Apartheid Convention did not lead to any investigations at all, the Torture Convention became the basis for a Spanish Court in 1999 seeking the arrest in the United Kingdom of General Pinochet, the former dictator of Chile.

Since then universal jurisdiction has been incorporated into more than a dozen international conventions dealing with the combatting of international terrorism. They date from the 1970s. One of the main reasons for this is the avoidance of safe havens for terrorists.

After the Nuremberg Trials it was widely assumed that there would be a treaty-based international criminal court. There is indeed reference to such a court in the Genocide Convention of 1948. However, the Cold War intervened and the very idea of such a court barely survived. And then again in 1993, it took genocide and crimes against humanity to have the Security Council of the United Nations establish an international criminal court to investigate and prosecute the war crimes being committed in the former Yugoslavia. For a similar reason the second such court was established by the Security Council for Rwanda. In turn, they were followed by the so-called hybrid tribunals—the Special Courts for Sierra Leone, East Timor, Cambodia and Lebanon. They were followed by the permanent International Criminal Court (ICC) that now has the support of 121 nations.

Many politicians are ambivalent about the ICC. They think it is a good idea for other nations but not for them. This is perhaps best exemplified by the approach of the United States and I will revert to this question. There is an ambivalence of a different kind in some of the African capitals and at the African Union. The facts are that of the seven situations presently before the ICC, two have been referred by the Security Council (Sudan and Libya), three have been referred by governments (Uganda, the Democratic Republic of the Congo and the Central African Federation and only two have come before the Court as a result of the Prosecutor using his own powers (Kenya and the Ivory Coast). It is a little unfair to accuse the Court of being biased against African countries. This

unfortunate perception will continue to exist until non-African countries become the subject of ICC investigations.

In parenthesis, I would add that prosecutors at the ICC should be wary of too readily accepting referrals from governments. It is inevitable that such referrals are made for political gain rather than to seek justice. It is not in itself a reason to refuse to accept a reference but it is, I would suggest, a good reason for caution. To borrow Justice Jackson's immortal phrase, it might well be a poisoned chalice.

When the Security Council established the ad hoc tribunals or refers cases to the ICC it clearly invades the sovereignty of the targeted nations. This was true of the nations of the former Yugoslavia, Serbia Croatia and Bosnia and Herzegovina. So, too, Rwanda which, after having requested the tribunal decided in the end that it did not wish the Security Council to establish it. There was a similar clear invasion of the sovereignty of Sudan and Libya when the Security referred those situations to the ICC under Article 16 of the Rome Statute.

I turn now to consider the role that the United States of America played in these events. I need not dwell too long on Nuremberg but I'm sure there are a few people in this room who do not know that it was at the United States' insistence the Nuremberg trials were held in 1945. Its view prevailed over the notorious resistance and opposition to the idea by then Prime Minister, Winston Churchill. He wanted to line up the Nazi leaders and summarily execute them. He said, "Everybody knows what they did and why should we give them the benefit or the privilege of having a trial." Josef Stalin, the Soviet leader, supported the U.S. insistence on a trial. He clearly had in mind a "show trial" in the form that was only too familiar to him. So, in the end, it is the United States that can claim the major credit for having set up the Nuremberg trials. That role was crowned by the outstanding leadership of the enterprise that came from Justice Robert Jackson, the U.S. Chief Prosecutor.

I now fast-forward to 1993 when the ICTY was set up as the first truly international criminal tribunal. Nuremberg, it should be remembered, was not an international tribunal. Together with the Tokyo War Crimes proceedings, they were multi-national courts set up by the victorious nations. They were really founded on the theory that what these nations could do on their own, they could clearly do together. In effect they pooled their individual jurisdictions. I would also point out that the judges came from victorious nations and, so too, the prosecutors. There was not even a multi-national prosecutors' office. Each of the four nations at Nuremberg appointed its own chief prosecutor and he worked with his own nationals.

It was also the United States that pushed the Security Council, in 1993, to set up an international criminal tribunal for the former Yugoslavia. Both

Russia and China had mixed feelings about it. And certainly, before the end of the Cold War in 1989 this would not have happened. It was the politics of 1993 that created a window of opportunity. It allowed led the United States during the Clinton administration and particularly under the supervision of Madeline Albright, who was then the U.S. permanent representative at the United Nations, to push for the establishment of the first ever truly international criminal court. It was Ambassador Albright's personal commitment; it was her leadership and enthusiasm that were really the main driver of the Yugoslavia and the Rwanda tribunals. I say this from personal knowledge and personal involvement.

There are many anecdotal illustrations I could give of this role that the United States played. First, without the role played by the United States, the Yugoslavia tribunal would not have been established. Having been established, it experienced severe teething problems. It took 18 months before the Security Council found a prosecutor. I was approached as at act of desperation. I was hardly equipped for the position. However, in the preceding 8 months, one or other of the members of the Security Council had vetoed no less than eight of the nominees put forward by the Secretary General. The ICTY was on the point of collapse and it took the support of newly elected President Nelson Mandela for a South African nominee to enable the Russians and the Chinese to agree on the Prosecutor.

When I arrived at the Tribunal on 15th of August of 1994, I found a skeleton staff of some 30 people in the office. That staff had not been regularly appointed—only the Prosecutor was authorized by the Security Council Statute to make appointments. There were twenty-three Americans, sent as a gift to the United Nations, who had already begun crucial work in those early days. Some of them had begun to create a database. Amongst them were highly competent investigators and lawyers. The first crisis I experienced after I arrived related to these twenty-three Americans.

There is a strange 13% rule in the U.N. On first being informed of it, it sounded crazy—that if any member state makes a gift to the U.N., such as these twenty-three outstanding people, the provider, the donor country, has to pay in cash to the United Nations 13% of the cost them of making the gift. Under that rule along with the considerable cost of the paying for the twenty-three, the United States would have had to pay some additional millions of U.S. dollars to comply with the rule. There is, however, a good reason for the rule. If you donate twenty-three people to the U.N., it costs the U.N. money to accept the gift. The experts sent to The Hague needed offices, they needed secretaries, investigators needed money to travel. The 13% is an arbitrary figure intended to supplement the budget. Without it the U.N. would, in effect, be forced to use funds for which no provision had

been made in the budget. A budget, remember, that is approved by all the members of the United Nations. On this occasion, the United States said "No, we've given this gift, this is a special gift, and we're not paying the 13%." And when I arrived in The Hague at their office, the headquarters of the U.N. said we will not pay a penny towards the expenses for these twenty-three people if we don't have the 13%. They couldn't use their offices and effectively they could not do the work. This is what I faced in the first day in the office. It was a most unpleasant shock. To be brief, I did succeed in having the U.N. agree to waive the 13% rule but only for one year. At the end of our second year, we had the same problem, and I went cap in hand back to New York. They waived the rule for a second year. Unfortunately, for my successor, Louise Arbor, the U.N. was adamant that rule would not be waived. The result was that many of the twenty-three had to go home. The roles played by those American experts were absolutely essential in the early days of the office of the prosecutor.

Another crucial area of support and assistance from the United States was cooperation on intelligence information. I didn't dare talk about this until I was invited by the American Society of International Law to join a panel talking about this question. Fortunately, the then head of the FBI was one of the panel members. During a telephone conference call about a week before the event he said that he would welcome my speaking about some of the detail relating to the kind of information we received from the United States. He added that there was no reason that that should be regarded as classified in any way. He said that, "We are rather proud of the assistance that we gave to the ICTY."

It took many days of meetings in Washington and The Hague with United States officials to hammer out an agreement under which the Yugoslavia tribunal prosecutors would be given classified information. We were required under the agreement to build a special safe room to keep the information that was accessible only to the chief prosecutor. Some highly classified material could only be inspected at the U.S. Embassy in The Hague. The importance of that information can't be exaggerated. A couple of examples: the briefing that we received in Washington D.C. There was a huge map on the wall showing the villages that had been attacked and ethnically cleansed by the Serb army in Bosnia. It was part of the "Greater Serbia" plan of incorporating into Serbia those towns and villages in which there were significant numbers of Serbs. One could see on the map the dates on which they were "ethnically cleansed:" the mosques bombed, the women raped, and the people tortured. Very little of that information was classified or sensitive. However, it would have taken us some months to collect the information that was highly relevant in building cases against the

Bosnian Serb leadership. And, bear in mind that we had very limited resources in those early days of the life of the Tribunal.

Our investigators had access to hundreds of thousands of victims and witnesses. There were over 300,000 Bosnian refugees living in Germany. Now, those witnesses had not come into contact with members of the leadership. They could provide testimony against camp commanders and police officers. They could identify the criminals who tortured them in their villages. We indicted some of those local leaders in order to create the building bricks with which to go against those higher up the ladder of command. We did that by relying on circumstantial evidence and proof of command and control. We used in the indictment against Karadzic his boasts, as commander-in-chief of the Bosnian Serb Army that nothing happened in his army without him knowing of it.

With regard to the worst act of genocide since World War II, the Srebrenica massacre, we were able to obtain first-hand information from a member of the Bosnian Army firing squad, Drazan Erdemovic. He informed us that he was an unwilling executioner who acted under extreme duress. He lost count after he counted over seventy innocent Bosnian men and boys were executed next to a mass grave. He was the only eye-witness available to us. He was, however, able with some precision to tell us the location of the mass grave. Within days we received satellite images from Washington that conclusively corroborated the evidence of Erdemovic. We received this information in confidence and it could not be used without the consent of the U.S. Government. In no way did that detract from this important corroborative information.

A prosecutor in an International Court is really a sitting duck for malicious misinformation. A number of reports came in during my term in office intended to have the Prosecutor use scarce resources on what would have been a wild goose chase. It was helpful to be able to send send the reports to Washington and say, "Please tell us whether this is serious. Should we be looking into this or should we ignore it?" If we were told that it was not worth following up that saved us many wasted hours of work. The value of this kind of assistance cannot be exaggerated.

There was also important assistance for the Rwanda Tribunal. In the weeks after the new Office of the Prosecutor was established, we had office space in Kigali, the capital of Rwanda. We had no furniture and we had no computers. The United Nations at that point was just about on the brink of bankruptcy in consequence of the United States going through one of its severe anti-U.N. phases and withholding payment of its U.N. dues. The United Nations couldn't afford to give us furniture or office supplies. A friend in the U.N. Headquarters in New York mentioned to me that there was a U.N. warehouse in Brindisi, on the eastern coast of Italy, full of

furniture and computers—everything we needed was there. However, on inquiry I was informed by the U.N. that the department that owned the supplies could not afford to give them to us because of the adverse effect that would have on its balance sheet. Kofi Annan was then the head of Peacekeeping and we had become friendly. I called Kofi Annan and explained the problem. He came back to me very promptly the next day and he said, "Well, I have good news and bad news. The furniture is there and the computers are there; you can have them." And I said, "What's the bad news." And he said, "The bad news is we can't afford to send it to you!" So, I picked up the phone and I called David Scheffer, the then Senior Counsel in Madeleine Albright's office and I told him the problem. Within 24 hours a huge U.S. transport plane brought us the supplies from Brindisi. Until then our few staff members were literally using Coca-Cola boxes as desks and chairs. We had to scrounge for paper and pencils for them to use. There were no computers. So, you can image what a boost of morale this was for the people in the office.

The United States' judges played a crucial role. Gabrielle Kirk McDonald was one of the first eleven judges of the ICTY. She was a former Federal judge in Texas. I know from hearsay from other judges of the crucially important role she played in assisting her colleagues in writing the rules of procedure and evidence that they had to work out for the Yugoslavia tribunal, and years later almost without change for the Rwanda tribunal.

Judge Pat Wald, the former Chief Judge of the D.C. Circuit also played an important role during the two years she served at the ICTY. Then, of course, there was Judge Ted Meron, formerly of NYU Law School, who was recently elected to serve a second term as the President of the ICTY.

American judges and lawyers played a similarly important role at the ICTR and in the mixed or hybrid tribunals. The U.S. financial support for these tribunals was also crucially important. This all makes me saddened at the fact that the United States is not playing this kind of role with regard to the ICC.

It was the United States that was primarily responsible for encouraging the United Nations Secretary General, Kofi Annan to call the diplomatic meeting in Rome in June 1998 to consider a statute for the ICC. It was, however, literally on the way to Rome that the United States grew cold. Opposition to the Court from the Pentagon caused this instant chill. It was their fear of U.S. military and political leaders coming before an international court that was felt to be anathema. This led to the US joining only six other countries in voting against the Rome Treaty. 120 voted in favor of it.

As one of his last acts as President, Bill Clinton signed the Rome Treaty indicating that the United States would not take any action inconsistent with the Rome Treaty. Regrettably that was soon followed President George W. Bush "unsigning" the treaty. With the encouragement of John Bolton the Bush Administration soon took active steps in an attempt to kill the court in its infancy. The support of more than half of the members of the U.N. ensured that those efforts failed.

During the second administration of President George W. Bush, in 2006, and to my astonishment, at an ASIL meeting a panel which I happened to be moderating, the Legal Advisor at the State Department, John Bellinger, stated that the State Department had decided now to actively assist the ICC Prosecutor in those cases considered to be consistent with U.S. foreign policy and that such assistance had already begun. That announcement was followed by the United States deciding not to veto the reference by the Security Council of the Darfur situation to the ICC. That policy was still actively opposed by the military and the State Department reportedly fought a tough battle to ensure that the United States did not exercise its veto. I remember reading a speech by the then Ambassador for War Crimes Issues, a few weeks before the Security Council vote, to the effect that the United States would veto any reference of Darfur to the Security Council because such a reference would give the court credibility. And of course he was correct: it did give them credibility but he was incorrect in that the State Department won that battle. It was Secretary of State, Colin Powell who declared that what was happening in Darfur constituted genocide. That was followed by unanimous resolutions in both the House and Senate to the same effect. It was against that background that the State Department correctly came to the conclusion that to veto a reference of that situation to the ICC would have left its African policies in tatters. More importantly, there was the more recent unanimous decision of the Security Council to refer the Lbyan situation to the ICC. This warmer approach to the ICC was carried forward by the administration of President Obama.

The ICC is hardly out of the woods. There are serious problems and we have been hearing about many of them from speakers yesterday and today. There are the negative views coming from African leaders in consequence of all seven situations before the Court relating to African nations. That perception is understandable but a little unfair. Only two of them have been initiated by the Prosecutor. The others were referred to the Court by the Security Council or by African governments themselves. Then there are the financial problems that result from some of the leading members of the Assembly of States Parties calling for a negative growth budget for the Court. That the Court is weaker for the absence of active

participation of the United States is not difficult to comprehend. The change in attitude in Washington to international courts is drastic.

The United States fear of bias on the part of the ICC was raised in one of the panels. What is not appreciated sufficiently and especially in the United States is that a professional office such as the Office of the Prosecutor would not be able to get away with that kind of bias. There are no secrets between members of a prosecutor's office. In such an office there are senior lawyers and investigators from forty, fifty, sixty countries. If there was a bias, an unprofessional bias, against any country in that sort of office, it would become public in less than 24 hours. I can assure you of that.

When I was chief prosecutor of the ICTY, we had a Russian lawyer on our staff. He was sent to The Hague at my request. I have no doubt that he would have reported to his Government any inappropriate anti-Serb sentiment in the office. I would not have blamed him for doing so. So, too, there would be objections to anti-United States or any other similar bias. There are Americans working at the ICC. If there was a bias against the United States they would certainly not tolerate it.

I will conclude by repeating what John Washburn said earlier today concerning the importance of civil society and especially in the United States. The United States is different from other major nations that oppose the International Criminal Court. Russia is not ambivalent. China is not ambivalent. For them the International Criminal Court is a bad idea and if war criminals benefit from impunity, so be it. That is not the position in the United States. In this country there must be few who approve of the commission of serious war crimes and do not believe that war criminals should not be punished. But there is this political fear or at least suspicion that powerful countries including the United States have in respect of international organizations. That is the main reason for U.S. "exceptionalism." And bear in mind, the United States did not object to being within the jurisdiction of the Yugoslavia tribunal with regard to NATO attacks on Kosovo. There were complaints from Russia to the effect that war crimes were committed by NATO. The prosecutor decided that there was insufficient evidence to justify an inquiry into the allegations. What is important is that the United States didn't for a moment say, "We are not going to get involved in the Kosovo campaign.

There is no more effective way to withdraw impunity from war criminals than to strengthen international justice. Some leaders around the world are not sleeping well in light of the fate suffered by Milosevic and the trials ongoing against Charles Taylor, Radovan Karadzic and Ratko Mladic. In respect of some of them there must surely be a deterrent factor. To achieve success in the long run the role of the United States is crucial. This

places a huge burden on civil society in this country. You, the people in this room can make the difference. You can continue to influence your government to do more in assisting international criminal justice. Thank you very much.