ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW
NOVA SOUTHEASTERN UNIVERSITY
SHEPARD BROAD LAW CENTER

Volume 18 | Fall 2011 | Number 1

EDITORIAL BOARD

FACULTY ADVISORS

JUNIOR STAFF MEMBERS

NOVA SOUTHEASTERN UNIVERSITY
SHEPARD BROAD LAW CENTER

ADMINISTRATION

Athornia Steele, B.A., J.D., *Dean of the Law School & Professor of Law*
Leslie Larkin Cooney, B.S., J.D., *Associate Dean for Academic Affairs & Professor of Law*
Josh Metz, B.S., B.S., B.A., C.P.A., *Director of Finance and Administration*
Catherine Arcabascio, B.A., J.D., *Associate Dean for International, Online and Graduate Programs and Professor of Law*
Jennifer McIntyre, B. S., M.S., *Assistant Dean for Online Programs*
Janet Mosseri, B.S., J.D., *Associate Director for Student Affairs*
Lynn Acosta, B.A., M.S., *Assistant Dean for Student Services*
William Perez, B.A., *Assistant Dean for Admissions*
Linda F. Harrison, B.A., J.D., *Associate Dean, Critical Skills Program & Associate Professor of Law*
Bernadette Carnegie Baugh, B.S., M.S.M.F.T., *Administrative Director, Critical Skills Program*
Nancy Kelly Sanguigni, B.S., M.B.A., *Assistant Dean for Clinical Programs*
Robert Levine, B.S., J.D. *Assistant Dean of Career Development, & Adjunct Professor*
Jennifer Jarema, B.A., M.S., *Director of Communication and, Publications & Special Events*
Doug Kruse, B.A., M.S*., Director of Development*
Eric Young, B.A., M.L.S., J.D., *Director Law Library & Technology Center, Head of Information Services and Assistant Professor of Law*

FACULTY

John B. Anderson, B.A., J.D., LL.M., *Distinguished Visiting Professor of Law*
Catherine Arcabascio, B.A., J.D., *Associate Dean, International Programs and Professor of Law*
Timothy Arcaro, B.S., J.D., *Academic Director AAMPLE and Online Programs, and Professor of Law*
Heather Baxter, B.A., J.D., *Assistant Professor of Law*
Brion Blackwelder, B.S., J.D., *Director, Children & Families Clinic & Associate Professor of Law*
Ronald Benton Brown, B.S.M.E., J.D., LL.M., *Professor of Law*
Randolph Braccialarghe, B.A., J.D., *Professor of Law*
Barbara Britzke, M.A.T., J.D., LL. M, *Critical Skills Program Instructor*
Johnny C. Burris, B.G.S., J.D., LL.M., *Professor of Law*
Marilyn Cane, B.A., J.D., *Professor of Law*
Kathy Cerminara, B.S., J.D., LL.M., *Professor of Law*
Meg Chandelle, B.S., M.B.A., J.D., *Director of Advanced Lawyering Skills & Values & Adjunct Professor of Law*
David R. Cleveland, B.A., J.D., *Associate Professor of Law*

Phyllis G. Coleman, B.S., M.Ed., J.D., *Professor of Law*
Leslie Larkin Cooney, B.S., J.D., *Associate Dean of Academic Affairs and Professor of Law*
Jane Ellen Cross, B.A., J.D., *Director of Caribbean Law Programs and Associate Professor of Law*
Debra Moss Curtis, B.A., J.D., *Professor of Law*
Michael J. Dale, B.A., J.D., *Professor of Law*
Mark Dobson, B.A., J.D., LL.M., *Professor of Law*
Douglas Lee Donoho, B.A., J.D., LL.M., *Professor of Law*
Olympia Duhart, B.A., J.D., *Associate Professor of Law*
Lynn A. Epstein, B.S., J.D., *Professor of Law*
Michael Flynn, B.A., J.D., *Professor of Law*
Amanda Foster, B.A., J.D., *Associate Professor of Law*
Pearl Goldman, B.C.L., M. Phil., LL.B., J.D., LL.M., *Professor of Law*
Colleen Grady, M.S., Ed.., J.D., *Critical Skills Program Instructor*
Robert Gregg, J.D., *Critical Skills Program Instructor*
Joseph M. Grohman, B.A., M.A., J.D., *Professor of Law*
Richard Grosso, B.S., J.D., *Director, Environmental & Land Use Law Clinic and Associate Professor of Law*
Gwen Thayer Handelman, B.A., J.D., *Scholar in Residence*
Joseph D. Harbaugh, B.S., J.D., LL.B., LL.M., *Dean Emeritus & Professor of Law*
Linda F. Harrison, B.A., J.D., *Associate Dean, Critical Skills Program & Associate Professor of Law*
Joseph Hnylka, B.A., J.D., *Assistant Professor of Law*
Areto Imoukhuede, B. A., J.D., *Associate Professor of Law*
Robert M. Jarvis, B.A., J.D., LL.M., *Professor of Law*
Alicia Jackson, M.P.A., J.D., *Critical Skills Program Instructor*
Judith Karp, B.A., M.L.S., J.D., *Professor of Law*
Shahabudeen Khan, B.S., J.D., *Assistant Professor of Law*
Ishaq Kundawala, B.A., J.D., *Associate Professor of Law*
P. Camille Lamar, B.A., J.D., *Associate Professor of Law*
Elena Langan, B.A., J.D., *Director of First Year LSV Program and Associate Professor of Law*
Robert C. Levine, B.S., J.D., *Assistant Dean, Career Services & Adjunct Professor of Law*
James B. Levy, B.A., J.D., *Associate Professor of Law*
Kenneth Lewis, B.A., J.D., *Assistant Professor of Law*
Donna Litman, A.B., J.D., *Professor of Law*
Elena Marty-Nelson, B.A., J.D., LL.M., *Professor of Law*
Michael R. Masinter, B.A., J.D., *Professor of Law*
Jani E. Maurer, B.A., J.D., *Professor of Law*
Howard Messing, A.B., J.D., *Professor Emeritus of Law*
Joel A. Mintz, B.A., J.D., LL.M., J.S.D., *Professor of Law*
Hugh Mundy, B.A., J.D., *Assistant Professor of Law*
Heddy Muransky, B.A., M. Ed., J.D., *Critical Skills Program Instructor*
Timothy A. O'Brien, B.A., M.A., J.D., *Distinguished Visiting Professor of Law*
Roma Perez, B.A., J.D., *Associate Professor of Law*
Pouncy, Charles, B.A., J.D., LL.M., *Distinguished Visiting Professor of Law*
Patricia Murphy Propheter, M.A. Ed., J.D., *Critical Skills Program Instructor*
Rodney Rawls, J.D., LL. M., *Critical Skills Program Instructor*
Gail Levin Richmond, A.B., M.B.A., J.D., P*rofessor of Law*

Michael L. Richmond, A.B., M.S.L.S., J.D., *Professor of Law*
Eloisa C. Rodriguez-Dod, B.B.A., M.B.A., J.D., *Professor of Law*
Bruce S. Rogow, B.B.A., J.D., *Professor of Law*
Marc Rohr, B.A., J.D., *Professor of Law*
Raul Ruiz, B.A., J.D., *Critical Skills Program Instructor*
John Sanchez, B.A., J.D., LL.M., *Professor of Law*
Florence Shu-Acquaye, LL.B., LL.M., J.S.M., J.S.D., *Professor of Law*
Charlene Smith, B.A, M.A., J.D., LL.M., *Professor of Law*
Athornia Steele, J.D. *Dean and Professor of Law*
Michele Struffolino, M.A Ed., JD., *Assistant Professor of Law*
Fran L. Tetunic, B.A., J.D., *Director, Alternative Dispute Resolution Clinic & Associate Professor of Law*
Kathryn Webber, B.A., J.D., *Assistant Professor of Law*
James D. Wilets, B.A., M.A., J.D., *Professor of Law*
Tania Williams, B.A., J.D., LL. M., *Critical Skills Program Instructor*
Steven Wisotsky, B.A., J.D., LL.M., *Professor of Law*
Eric Young, B.A., M.L.S., J.D. *Assistant Dean for Law Library and Technology Services/Assistant Professor of Law*

ADJUNCT FACULTY

Scott Atherton, B.S., J.D.
Ross Baer, B.A., J.D.
Steve Ballinger, B.A., J.D.
Courtney Bannan-Strader, B.S., J.D.
Roshawn Banks, B.S., J.D.
Lorna Banister, B.S., J.D.
Marilyn Batista-McNamara, B.S., J.D.
Leyza Blanco, B.A., J.D.
Gabrielle Bouza, B.S., J.D.
Mark Bromley, B.S., J.D.
Dale A. Bruschi, B.S., J.D.
Robert Campbell, B.A., J.D., M.P.H., Ph.D.
Lydia Cannizzo, B.H.S., J.D.
Meg Chandelle, B.S., M.B.A., J.D.
Michele Chang, B.A., J.D., M.H.A.
Judith Chorlog, B.S., J.D.
Howard Citron, B.S., J.D.
Steven M. Collard, B.A., M.Ed.
Michael Constantino, B.A., J.D.
Christopher Crane, B.S., J.D.
Charles Curtis, B.S., J.D.
Arthur Ted Daus, B.A., J.D.
Morton A. Diamond, B.A., M.D.
Neil Karadbil, B.A., J.D.
Ken Kugler, B.A., J.D.
Warren Kwavnick, B.C., J.D.
Barbara Landau, B.A., J.D., LL.M.
Steven Leigh, B.S., M.S., J.D., Ph. D.
Allan M. Lerner, B.A., J.D.
Robert Levine, B.S., J.D.
James Lewis, B.A., J.D.
Juan Lopez-Campillo, B.A., J.D., LL.M.
Rochelle Marcus, B.S., M.ED., J.D.
Lisa A. McNeils, B.A., J.D.
Catherine M. Michael, B.A., J.D.
Elena R. Minicucci, B.A., J.D.
Seema Mohapatra Reddy, B.A., M.P.H.,
Kenneth Morgan, Jr., B.A., J.D.
Alberto Moris, B.A., J.D.
Gerald Morris, B.A., J.D.
Charles Morton, B.A., J.D.
John Napolitano, B.A., J.D.
Matthew Nelles, B.S., J.D.
Alice Nelson, B.A., M.S.W., J.D.
Paul A. Nidich, B.A., J.D., LL.M.
William Nortman, B.A., J.D.

Robert F. Diaz, A.A., B.A., J.D.
Ken S. Direktor, B.A., J.D.
Susan Dubow, B.S.
Rebecca Feinberg, B.A., J.D.
Jane Fishman, B.A., J.D.
Luis Font, J.D.
Rex J. Ford, B.S., J.D.
Steve Friedland, B.A., J. D., LL. M., J.S.D.
John A. Frusciante, B.A., M.S., J.D
Myrna Galligano, B.A., J.D.
Jason Glusman, B.A., J.D.
Stuart Gold, B.A., J.D.
Adam S. Goldberg, B.S., J.D., LL.M.
Anthony Gonzalez, B.A., J.D.
Robert C. Grosz, B.A., M.S., Ed.D.
Tonja Haddad, B.A., J.D.
Ross Hartog, B.S., J.D.
Robert Hartsell, B.A., J.D.
Ann Hesford, B.A., J.D.
Douglas F. Hoffman, B.S., B.A., J.D.
Alfred Horowitz, B.A., J.D., LL.M.
Julie Hough, B.A., J.D.
Jacqueline Howe, B.A., J.D.
Cynthia Imperato, B.S., M.S., J.D.
William Isenberg, B.A., J.D.
Yasmin Jacob, B.A., J.D.
Judith Jarvis, B.A., J.D.
Linnea Johnson, B.A., J.D.
Nick Jovanovich, B.S., J.D., LL.M
Norman Kaplan, B.S., J.D., LL.M.
Daniel L. Kaufman, B.S., J.D.
Phyllis Kotey, B.A., J.D., M.A.
Pamela Krauss, B.S., M.S., J.D.
Ira Kurzban, B.S., J.D.
Mark Nurik, B.A., J.D.
Elizabeth Pendo, B.A., J.D.
Laura Pincus, B.A., M.A., J.D.
Gary A. Poliakoff, B.S., J.D.
Vanessa Prieto, B.A., J.D.
Rachael Ricci, B.A., J.D.
Israel Reyes, A.A., B.S., J.D.
Rebecca Rich, A.B., J.D., M.S.
Christine Rickard, B.A., J.D.
H. John Rizvi, B.S., J.D.
Michael Rocque, B.A., J.D.
Jose A. Rodriguez-Dod, B.S., J.D.
Denise Roland, B.A. J.D.
Jon Rosenthal, B.A., J.D.
Diana Santa Maria, B.A., J.D.
Jessica Santiago, B.A., J.D.
Philip G. Schlissel, B.A., J.D.
Carl Schoeppl, B.S., J.D.
Adam Schulman, B.A., M.S., Ph.D.
Robert Schwartz, B.A., J.D.
Neal Shniderman, B.A., J.D.
Jodi Siegel, B.A., J.D.

Samuel Smargon, Ph.D., J.D.
Scott Smiley, B.S., J.D.
Mindy Solomon, B.S., J.D.
Richard Stone, B.A., J.D.
Frank Terzo, B.A., J.D.
Debbie Thaler, B.A., J.D.
Ellen S. Tilles, B.A., M.S.W., Ed.S., J.D.
Damian Thomas, B.B.A., J.D.
Emilie Tracy, B.A., J.D.
Rhonda Wallach, B.S., J.D.
Daniel S. Weinger, B.B.A., J.D.
Jason Weiss, B.A., J.D.
Harry Dohn Williams, B.A., J.D.
Camille Worsnop, B.S., J.D., LL.M
Bruce Zimet, B.A., J.D.

LIBRARY STAFF

Eric Young, B.A., M.L.S., J.D. *Assistant Dean for Law Library and Technology Services and Assistant Professor* of Law

Frank Novak, B.A., J.D., *Director of Network Services*

Stephan Sobchak, B.S., *Technology Development Manager*

Jason Rosenberg, B.A., M.B.A., M.I.S, *Information Systems Adm*

Carol Yecies, B.A., J.D., *Associate Director for Reference Services*

Becka Rich, B.A., J.D., M.S. *Senior Associate Director of Law Library and Technology Center and Adjunct Professor of Law*

Mary Paige Smith, B.A., M.L.S., *Associate Law Library Director for Technical Services*

Angie Stramiello, B.A., M.L.S., *Reference Librarian*

Alison Rosenberg, B.A., J.D., *Reference/Electronic Services Librarian*

Stephanie Hess, B.A., M.L.I.S., *Assistant Head of Technical Services, Acquisitions & Serials*

EDITOR'S NOTE

Articles ranging from the Arab Spring to the Eurozone debt to the United Kingdom's riots have populated the news throughout 2011. Like most years, the world was filled with war, crisis, and politics. But it was also filled with hope and progress. With so much going on in the world it would be impractical for the *ILSA Journal of International and Comparative Law* to select one specific theme. The *Journal*, rather, serves as a constructive collection of scholarly works, and takes a snap shot of different places, different times, and different conflicts throughout the 2011 year. The volume contains a wide variety of topics to preserve issues ranging from the Chinese abuse of human rights to individual obesity.

Professor Richard Klein, in the first article "An Analysis of China's Human Rights Policies in Tibet: China's Compliance with the Mandates of International Law Regarding Civil and Political Rights," candidly portrays the plight of the Tibetans at the hands of the oppressive Chinese government. He shows that even amidst international pressure, the Tibetans right to self-determination has not been restored since the Communist takeover, while gross violations of their rights continue to persist. Then, the second article, by Doctor Gianluca Gentili and Professor Tania Groppi, "Italian Constitutional and Cassation Courts: When the Right to Die of an Unconscious Patient Raises Serious Institutional Conflicts Between State Powers," illustrates how the Italian legal system is increasingly relying on judge-made law, especially for situations involving ethical and moral issues. They also explain how this is a divergence from the historical norm in the Italian legal system.

The next article, by Professor Jim Wilets, "Gender Dimorphism in the United States Legal System: A 'Post-Feminist' and Comparative Critique," argues that an understanding of history allows the debate over legal reform to shift from gender to functionality as our dispute resolution system evolves. This is different from the following article by Michael Eshelman, who wrote "Law in Isolation: The Legal History of Pitcairn Island, 1900-2010." This is a fascinating article about the various legal regimes of a little-known island in the western Pacific. He explores the influence of everything from Britain, to pirating, to the independence of Fiji and how it affected the island.

Shifting from the history and current status of a small, Pacific island, Christine Whited wrote "The UNIDROIT Principle of

International Commercial Contracts: An Overview of Their Utility and the Role They Have Played in Reforming Domestic Contract Law Around the World." This article praises, and criticizes, the UNIDROIT Principles and their effect in harmonizing international private law.

The remaining two articles, which were written by Nova Southeastern law students, are especially interesting and diverse topics that the *Journal* is proud to have printed. Sharifa Hunter's article, "A Comparative Analysis of the Foreign Corrupt Practices Act and the U.K. Bribery Act, and the Practical Implications of Both on International Business," argues that private, international businesses have suffered on behalf of bribery, but focuses on the United States and the U.K.'s efforts to combat said problem. Liza Escapa Lima, conversely, focuses on individual health in her article "From the Big Apple to Big Ben: An Insight Into Menu Labeling." She contends that menu labeling is a positive step in the fight against obesity world-wide.

Lastly, and finishing off this diverse volume, are the winning memorial briefs from the 2011 Philip C. Jessup International Law Moot Court Competition held in Washington, D.C., as well as an excerpt of the Moot Court problem.

On behalf of the *ILSA Journal of International & Comparative Law*, I would like to thank all of the distinguished authors who have contributed to this issue. It is an honor to publish their articles. Their insight, hard work, and commitment, I think, are evident in this volume.

I also want to thank the entire staff of the *Journal* for their consistent efforts and perseverance during the editing process to produce a world-class publication. Further, I want to thank the Editorial Board: Alana Faintuch, Rayna Karadbil, Alicia Zweig, Rafaela Vianna and Jany Martinez, Jennifer Lemberger, Cristina Cossio, Nathaniel Dutt; Martavis Clarke, Michel Morgan, Nicholas Leroy and Staci Burton for their tireless efforts and dedication to producing this journal. Additionally, I want to take this opportunity to thank Professors Douglas Donoho and Eloisa C. Rodriguez-Dod of Nova Southeastern University, Shepard Broad Law Center, for their continuing advice, time and assistance as our Faculty Advisors. We are fortunate to be under their mentorship as advisees and students. Finally, I want to thank my family and friends for their love, support, patience and humor during this process and my law school career. I

hope every reader finds this volume as meaningful and as important as we at the *Journal* do.

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

ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW
NOVA SOUTHEASTERN UNIVERSITY
SHEPARD BROAD LAW CENTER

Volume 18 Fall 2011 Number 1

TABLE OF CONTENTS

ARTICLES & ESSAYS

LAW 2011 PHILIP C. JESSUP INTERNATIONAL MOOT COURT COMPETITION DISTINGUISHED BRIEFS

FROM THE BIG APPLE TO BIG BEN: AN INSIGHT INTO MENU LABELING

Liza M. Escapa Lima

I. INTRODUCTION

Imagine looking around and recognizing that you are much heavier than your fellow peers. You are out of breath after jogging a quarter of a mile and shopping for new clothes is a nightmare. You dread stepping on the scale at the doctor's office because you know the nurse will have to move you up to the next weight category. These scenarios you have envisioned are not imaginary, but rather the unfortunate reality for many struggling with obesity. Ashley Pelman has fallen victim to this harsh reality. Although she had always been slightly heavier than most kids her age, she knew she had a problem when she reached the age of fourteen. At only four feet ten inches, Ashley Pelman weighed in at 170 pounds.[1] She ate McDonald's approximately three to four times a week since the age of five and had become obese.[2] Pelman would now be at serious risk for developing diabetes, heart disease, and high blood pressure.

---

1. Devon E. Winkles, *Weighing the Value of Information: Why the Federal Government Should Require Nutrition Labeling For Food Served in Restaurants*, 59 EMORY L.J. 549, 550 (2009).
2. *Id.*

Ashley Pelman claimed that McDonald's failed to adequately warn the public of its product's health content. A grease soaked wrapper was not enough to inform the public that its meals contained a lot of calories, fat, and salt.[3] Pelman filed a claim asserting that without nutritional disclosure, McDonald's was misleading the public.[4] The court dismissed her claim and held that the nutritional content of the food was common knowledge.[5] However, the court's assumption that fast food patrons are inherently informed of their purchase's nutrition is erroneous. In fact, nutritional information provides little to no consumer awareness to restaurant patrons, as they do not have accessible nutritional information at the point of purchase.

This Article will explore these issues in several parts. It will assert that countries that have rising levels of obesity similar to that of the United States should adopt menu labeling regulations. These countries, such as the United Kingdom, should adopt a nation-wide initiative to curb obesity through menu labeling at fast food restaurants. This conclusion is reached by comparing the current obesity statistics of these countries with the United States efficacy at reducing obesity through menu labeling.

Part II will provide an overview of obesity in the United States. As part of this discussion, this section will lay out how obesity is measured and the negative effects for not only individuals, but also the country as a whole. Part III will explain the legislative landscape regarding the actions taken to target obesity in New York City. It will begin with a brief overview of the nutritional disclosure mandate in New York City and end with a discussion of the studies performed regarding New York City's nutritional disclosure regulation. Part IV will explore the Patient Protection and Affordable Care Act's attempt at a national nutritional disclosure mandate. Further, it will briefly describe the arguments in favor of menu labeling. Finally, part V will assert that countries that have rising levels of obesity, like the United Kingdom, should adopt nation-wide legislation to curb obesity. It will reach that conclusion by analyzing the United Kingdom's obesity statistics and their correlation to a variety of factors that contribute to the crisis.

II. OBESITY IN THE UNITED STATES

America is consumed with body image and unhealthy eating habits. Upon examining obesity, it is important to note that the underlying problem is not one of appearance, but rather of health. Obesity has been a

3. *See* Ashley Pelman v. McDonald's Corp., 396 F.3d 508, 510 (2d Cir. 2005).
4. *Id.*
5. *Id.* at 511.

significant health concern in the United States over the past three decades.[6] It is a pandemic that has led to an overall decrease in the health of this country's population.[7] In the mid 1970s, approximately 15% of the U.S. population was obese.[8] Figures now suggest that more than 33% of adults are suffering from obesity.[9] These alarming statistics have led to regulatory tools to combat this crisis. This section will address the definition of obesity by measurement, the American dietary evolution, and the implications stemming from obesity in the United States.

A. Obesity—An insight into measurement and dietary habits

Prevention and treatment of obesity is an extremely important public health concern that can only be dealt with by examining the causes that have led to America's expanding waist sizes. Approximately a decade ago, an expert panel of the National Institutes of Health (NIH) developed a system for defining different weight categories. Upon further examination of these weight categories, studies reveal an undeniable link between higher weight and more financial and health complications in this country.

1. Measurement

Obesity is a label given for a range of weight that is greater than what is healthy for a certain height.[10] For adults, obesity ranges are broken down by using weight and height, to calculate a number called the Body Mass Index (BMI).[11] BMI is a reliable and inexpensive method for determining whether an individual is obese.[12] For BMI purposes, standard weight categories indicate whether an individual is underweight, normal, overweight, or obese.[13] Adults with a BMI below 18.5 are underweight and scores between 18.5–24.9 reflect a normal weight category.[14] Those adults that fall into a BMI category of 25.0–29.9 are considered overweight; anything higher indicates an individual is obese.[15] These statistics are

---

6. Ashley Arthur, *Combating Obesity: Our Country's Need For a National Standard to Replace the Growing Patchwork of Local Menu Labeling Laws*, 7 IND. HEALTH L. REV. 305, 307 (2010).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Overweight and Obesity*, CTRS FOR DISEASE CONTROL AND PREVENTION (Jun. 21, 2010), http://www.cdc.gov/obesity/defining.html (last visited Nov. 3, 2011).
11. *Id.*
12. Eloisa C. Rodriguez-Dod, *It's Not A Small World After All: Regulating Obesity Globally*, 79 MISS L.J. 697, 713 (2010).
13. Overweight and Obesity, *supra* note 10.
14. *Id.*
15. *Id.*

important because of their direct correlation between weight and the various health problems that contribute to the decline in health of this country.[16]

2. Dietary Evolution

Obesity is a major cause of preventable death.[17] Current statistics suggest that the incidence of obesity is not slowing.[18] If existing trends continue, 80% of American adults will be overweight or obese by 2022.[19] These numbers are largely reflective of the evolution of this nation's dietary habits. This country's dietary habits have been changing due to Americans working more hours and having less time to prepare meals at home.[20] In fact, one-third of domestic food consumption now comes from meals prepared outside the home.[21] In 2007, Americans spent about half of their food budget on restaurant meals.[22] This is a dramatic increase in comparison with a 26% restaurant consumption budget in 1970.[23] This presents a problem for places where the majority of restaurants are fast food establishments. Although these fast food restaurants provide easy and inexpensive food for out of home consumption, they are larger than necessary calorie-ridden meals.

The major concern regarding this change in dietary habits is the consumption of high caloric meals. Patrons who eat at fast food establishments are more likely to underestimate the amount of calories in the foods they choose and tend to consume significantly more calories.[24] Adults now consume 200 more calories per day than individuals several

16. Press Release, Pub. Health Serv., Office of the Surgeon Gen., U.S. Dep't of Health & Human Servs., The Surgeon General's Call to Action to Prevent and Decrease Overweight & Obesity, *available at* http://www.surgeongeneral.gov/topics/obesity/calltoaction/1_2.htm (last visited July 13, 2011) (stating that individuals with a BMI greater than thirty have up to a 100 percent increased risk of premature death).

17. Press Release, Tim Kensley, Obesity Epidemic Increases Dramatically in the United States: CDC Director Calls for National Prevention Effort (Oct. 26, 1999), *available at* http://www.cdc.gov/media/pressrel/r991026.htm (last visited July 19, 2011) (quoting that the Center for Disease Control estimates that obesity contributes to 300,000 deaths per year in the U.S., second only to tobacco-related deaths).

18. *See id*.

19. *See* Youfa Wang et al., *Will All Americans Become Overweight or Obese? Estimating the Progression and Cost of the US Obesity Epidemic*, 16 OBESITY 2323, 2329 (2008).

20. *Id*.

21. DEPT OF HEALTH AND MENTAL HYGIENE BOARD OF HEALTH, NOTICE OF ADOPTING OF A RESOLUTION TO REPEAL AND REENACT § 81.50 OF THE NEW YORK CITY HEALTH CODE, 2008, *available at* http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50-0108.pdf (last visited July 15, 2011) [hereinafter NOTICE OF ADOPTING OF A RESOLUTION].

22. *Id*.

23. *Id*.

24. Paul Simon et al., *Menu Labeling as a Potential Strategy for Combating the Obesity Epidemic: A Health Impact Assessment*, 99 AM. J. PUB. HEALTH 1680, 1681 (2009).

decades ago.[25] Restaurants have not only increased portion sizes throughout the years, but have also set price incentives for purchasing larger meals.[26] Extensive studies have shown that even lean individuals increase their food intake when given larger portions.[27] Americans are suffering from portion distortion and fail to realize that even one meal can encompass the entire caloric intake for an entire day.[28] Fast food restaurants use certain marketing techniques to give consumers the impression that these larger portions are normal. As a result, adults across the nation have been gaining weight. These weight changes in the population have lead to direct economic consequences on the entire United States' health care system.[29]

B. More weight - More problems

America's obesity crisis is at the pinnacle of its pandemic. Obesity costs Americans $147 billion each year in health care costs.[30] This staggering cost makes obesity in this country a ticking time bomb for the American health care system. The obesity pandemic has made Americans susceptible to a variety of chronic health conditions that are undeniably linked to these increasing costs.[31] These conditions range from heart disease, hypertension, high cholesterol, cancer[32], and Type II diabetes.[33]

Studies confirm that obese individuals who suffer from a variety of health conditions directly contribute to the rising health care costs. Recent studies reveal that a woman of normal weight between the age of thirty-five and forty-four spends an average of $2100 dollars on health care annually, as opposed to $2350 dollars for women in the same age range, but with BMIs between twenty-five and thirty.[34] Annual health care costs rise as a result of higher BMIs. For example, annual health care costs for women

---

25. ROBERTA R. FRIEDMAN, MENU LABELING: OPPORTUNITIES FOR PUBLIC POLICY: SCIENTIFIC STUDIES RELATED TO MENU LABELING 8 (Rudd Ctr. for Food Pol'y and Obesity Yale Univ.) (2008).

26. *Id*. at 7 (quoting that since the 1970s, the typical soft drink servings have increased by forty-nine calories and French Fries servings have increased by more than sixty-eight calories).

27. *See* Jeppe Matthiesen et al., *Size Makes a Difference*, 6 PUB. HEALTH NUTRITION 65, 70 (2002).

28. Barbara J. Rolls et al., *Portion Size of Food Affects Energy Intake in Normal-Weight and Overweight Men and Women*, 76 AM. J. CLINICAL NUTRITION 1207, 1207 (2002).

29. Eric A. Finkelstein et al., *Annual Medical Spending Attributable To Obesity: Payer and Service-Specific Estimates*, 22 HEALTH AFFAIRS 822, 822 (2003).

30. *Id*.

31. *Id*.

32. National Cancer Institute, U.S. National Institutes of Health, *Obesity and Cancer: Questions and Answers* (Mar. 16, 2004), http://www.cancer.gov/cancertopics/factsheet/Risk/obesity (last visited July 5, 2011).

33. *See* Finkelstein et al., *supra* note 29, at 829.

34. *See* Christina C. Wee et al., *Health Care Expenditures Associated With Overweight and Obesity Among US Adults: Importance of Age and Race*, 95 AM. J. PUB. HEALTH 159, 159 (2005).

with BMIs between thirty and thirty-five were about $2800, and for women with BMIs between thirty-five and forty, $3000.[35] In total, obesity related health care costs encompass a large portion of American health care expenditures and if these statistics continue, health care costs stemming from obesity could reach $860 billion dollars a year.[36]

Obesity is a large financial burden that will affect the tax paying public directly through programs such as Medicaid and Medicare.[37] Obesity related expenses constitute about $26.9 billion of adult medical expenditures outlaid by these programs.[38] When focusing on total payments, obesity attributes to 8.5% of all Medicare payments, 11.8% of Medicaid, and 12.9% of private payer spending.[39] In 2006, medical spending for obesity resulted in taxpayers incurring a 9.1% increase in annual medical spending, compared with only a 6.5% increase in 1998.[40] These statistics highlight the ever-increasing burden to both public and private taxpayers.

Obesity is also affecting this country's youth because obese children are very likely to become obese adults.[41] Obese children tend to suffer from more direct results of obesity like insulin resistance, orthopedic problems, liver damage, sleep apnea, and asthma.[42] Additionally, both obese children and adults are likely to suffer from stigmatization and discrimination from being obese. This stigmatization often times results in depression and low self-esteem.[43] These problems continue to plague this country. In response to these trends, policy-makers have set forth different regulatory approaches to slim down America's expanding waistlines.

III. LEGISLATIVE LANDSCAPE OF NEW YORK CITY'S NUTRITIONAL DISCLOSURE

In the last decade, there have been several movements to target obesity throughout the United States. States such as California, Oregon, Maine, Massachusetts, and New Jersey have all adopted menu labeling

35. *Id*.
36. Youfa Wang et al., *supra* note 19 at 2323.
37. Michael Fierro & Debra Lightsey, *Trends and Policy Solutions in Adult Obesity, Physical Activity and Nutrition*, COUNCIL OF STATE GOV'TS HEALTH SERV. INITIATIVE, *available at* http://www.healthystates.csg.org/NR/rdonlyres/24124F6F-1286-4B5F-AB21-D59D6F78F476/0/aooverview.pdf. (last visited July 24, 2011).
38. *Id*.
39. Finkelstein et al., *supra* note 29 at 829.
40. *Id*. at 828.
41. U.S. Dep't of Health & Human Services, Centers for Disease Control & Prevention, Childhood Overweight and Obesity (Oct. 12, 2011).
42. *Id*.
43. *Id*.

regulations.[44] However, New York City's fight for menu labeling has been the most notable. This section will address New York City's two attempts at implementation of the menu labeling regulation on fast food items, and the studies.

A. Regulation 81.50

New York City has been at the forefront of adopting menu labeling requirements for restaurants in the United States. On December 5, 2006, the Department of Health implemented the New York City Health Code Section 81.50, attempting to combat the obesity in the city.[45] The regulation mandated that any food service voluntarily publishing calorie information should post such information on its food menus.[46] Restaurants that did not post the information[47] were subject to fines.[48] However, due to legal challenges based on preemption and constitutionality, New York City adopted a revised version of regulation 81.50.

On January 2, 2008, New York City implemented a revised version of Regulation 81.50.[49] While the first law applied to restaurants that voluntarily released nutritional information, the revised version of the regulation mandated any restaurant with at least fifteen locations to provide nutritional information.[50] The drafters of the new version also made changes to other portions of the regulation to offer a more flexible standard for the restaurant industry.[51] The new regulation states that calorie information is to be shown as prominently as either the menu item's name or price.[52] The new regulation also allows restaurants to place nutritional information in a variety of places.[53] Nutritional information can now be placed on item tags on food displays, food display cases, or separate drive-through window displays, as long as the information could be easily read.[54]

The new law was set to cover about 2400 restaurants in New York City and would impact approximately 145 million to 500 million meals per year.[55] Regulation 81.50 promoters estimate that there would be 150,000

---

44. Michelle I. Banker, *I Saw the Sign: The New Federal Menu-Labeling Law And Lessons From Local Experience*, 65 FOOD & DRUG L.J. 901, 908 (2010).
45. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 353 (2nd Cir. 2007).
46. *Id*.
47. Wendy N. Davis, *Biting Back at Obesity: The Big Apple's calorie-counting law is staying on the menu*, 95 A.B.A.J. 17 (2009).
48. *Id*. (explaining that fines range between $200–$2000).
49. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F. 3d 114, 121 (2d Cir. 2009).
50. *Id*.
51. NOTICE OF ADOPTING OF A RESOLUTION, *supra* note 21.
52. *Id*.
53. *Id*.
54. *Id*.
55. NOTICE OF ADOPTING OF A RESOLUTION, *supra* note 21.

fewer obese New Yorkers and at least 30,000 fewer cases of diabetes as a result of the new law.[56] The new legislation was encouraging for officials who saw the obesity problem getting worse in New York City.

Regulation 81.50 is a narrowly tailored nutrient disclosure requirement for fast food establishments. The New York City regulation requires fast food establishments to make calorie information for standard menu items[57] available to the public at the point of purchase.[58] The proposal is set to affect approximately 10% of food service establishments that serve standard menu options.[59] The regulation states that restaurants must disclose calorie information that has been made publicly available or otherwise.[60] Although the regulation's accommodating requirements do not specify a particular typeface, the information must be posted as large as the price or name of the menu item.[61] Additionally, the regulation does not require the restaurant industry to engage in any analysis of the actual nutritional content of their items. The nutritional information would only have to adhere to the calculation of the Food and Drug Act.[62] Moreover, restaurants would remain free to post any additional information and possible disclaimers about calorie variations.[63]

B. Studies of Implementation

New York City's regulation 81.50 has been in effect for nearly three years now and a variety of studies have evaluated the regulation's efficacy. The studies evaluate a regulation that is still in its initial stages and many suggest that the law needs time to take effect before an accurate inference can be made.

One particular study asks consumers whether knowledge of calorie information would influence their purchasing decision.[64] The study reveals a mixed percentage of respondents claiming that the menu labels alter their habits.[65] In another survey, 37% of New Yorkers who saw nutritional information modified their purchasing behavior and changed their

---

56. Press Release, Michael A. Cardozo, New York City Government, Federal Court Upholds New York City Health Code Provision Requiring Certain Restaurants to Post Calorie Information on Menu and Menu Boards (Apr. 16, 2008), *available at* http://www.nyc.gov/html/law/downloads/pdf/pr041608.pdf (last visited July 29, 2011).

57. NOTICE OF ADOPTING OF A RESOLUTION, *supra* note 21.

58. N.Y.C., N.Y., RULES OF THE CITY OF NEW YORK TIT. 24, HEALTH CODE, § 81.50(a)–(e) (2008).

59. NOTICE OF ADOPTING OF A RESOLUTION, *supra* note 21.

60. Tit. 24 § 81.50.

61 *Id.*

62. *Id.*

63. *Id.*

64. Mary T. Bassett et al., *Purchasing Behavior and Calorie Information at Fast-Food Chains in New York City*, 98 AM. J. PUB. HEALTH 1457, 1458 (2008).

65. *Id.*

consumption.[66] Additionally, the New York City Health Department conducted a study that reported only 56% of consumers noticed the information at fast food establishments.[67] That study reveals that 15% of those who saw the information changed their food choice as a result of the nutritional information.[68]

Pilot studies examining restaurant purchases also reveal positive results.[69] One study reveals that Subway customers who saw the nutritional information; purchased on average products with fifty-two less calories than those who did not see anything.[70] In another study, results show people who saw the nutritional information chose a meal with 14% less calories than other people.[71] The Health Department's report indicates a modest reduction in calorie consumption, revealing a decrease in chains like Au Bon Pain, Kentucky Fried Chicken, McDonald's, and Starbucks.[72] The study reveals that the largest calorie reduction was found at coffee shops.[73] The number of calories that customers ordered was reduced by almost 10%. The average caloric consumption decreased from 260 in 2007 to approximately 237 calories in 2009.[74]

Another recent study from Stanford University assessing menu labeling regulation found that New York City's menu labeling law led to Starbucks' customers ordering, on average, products with 6% less calories than before.[75] The study also reveals that the calorie modification lasted the entire ten month duration after the regulation was set forth.[76] Lastly, studies have found that 75% of the decrease in calories has come from customers ordering fewer items, and 26% of the decrease in calories has come from customers ordering healthier options.[77] Additional studies reveal that although many individuals claim to have altered their decision due to nutritional influence, no statistics have shown a change in the calories they consume.[78] These studies reveal that menu labeling is altering restaurant patrons' consumption. These are positive results for a community that needs a drastic change. However, these positive results need to be applied on a larger scale to help all Americans.

---

66. *Id*.
67. *See* Roni Caryn Rabin, *How Posted Calories Affect Food Orders*, N.Y. TIMES, Nov. 9, 2009, at A7.
68. *Id*.
69. I*d*.
70. Mary T. Bassett et al, *supra* note 64 at 1458.
71. Bryan Bollinger et al., *Calorie Posting in Chain Restaurants* 1–51 (Stanford Univ. & Nat'l Bureau of Econ. Res., Working Paper No. 15648, 2010).
72. Rabin, *supra* note 67.
73. *Id*.
74. *Id*.
75. Bollinger et al., *supra* note 71, at 2.
76. *Id*.
77. *Id*. at 3.
78. *Id*. at 9.

IV. NATIONAL NUTRITIONAL DISCLOSURE REGULATION

There have been numerous menu labeling laws implemented across the country. However, the variety between the different laws has lead to an irregularity of its application. Although most local and state menu labeling regulations are quite similar, there are enough differences to make the application of the law inconsistent. In an attempt to eliminate the patchwork of legislation across the country, Congress has established a national nutritional disclosure regulation. This section will address the national attempt at menu labeling promulgated in the Patient Protection and Affordable Care Act (PPACA) and the arguments in favor of nutritional disclosure.

A. The Patient Protection and Affordable Care Act

In March 2010, the Patient Protection and Affordable Care Act was passed by Congress.[79] Section 4250 of the Act promulgates a national nutritional disclosure regulation.[80] This new regulation requires food establishments, with twenty or more locations, to disclose nutritional information regarding standard menu items.[81] Section 4250 marks Congress' first attempt at a successful federal nutritional disclosure mandate.

The federal mandate requires food establishments to post the number of calories next to the menu item.[82] Additionally, the restaurants are required to post the recommended daily caloric intake next to the menu items.[83] This federal law will preempt any state law regarding menu labeling. Therefore, section 4250 will supersede any local ordinance or regulation. Additionally, this federal law will have a voluntary opt-in provision.[84] Restaurants not required to, but wishing to post this information, may do so.[85] In turn, these restaurants would be exempted from local laws.[86] This national standard for nutritional information disclosure is a beneficial mandate that will not be difficult to implement. The Act's mandate will reach consumers all across the United States and can be expected to have a positive effect on the overall health of this country's citizens. Providing a national nutritional disclosure law will replace the patchwork of local legislation with a consistent mandate.

---

79. Patient Protection and Affordable Care Act, Pub. L. 111-148, § 4205, 124 Stat. 119, 413–16 (2010).
80. *Id*. at § 4205(b).
81. *Id*.
82. *Id*. § 4205(bb).
83. *Id*.
84. Patient Protection and Affordable Care Act, § 4205(bb).
85. *Id*.
86. *Id*. *at* § 4205(d).

B. Arguments in Favor of Menu Labeling

Officials raise numerous arguments in support of a nutritional disclosure law. The main argument in favor of the menu labeling concerns the encouragement of individuals to purchase and consume fewer calories, which would result in lower obesity rates.[87] Supporters of the menu labeling assert that obesity does not just affect an individual; it is a public health concern placing a heavy burden on the economy.[88] The government does not intend to stop people from eating fast food. Nutritional disclosure is simply meant to inform individuals of the meals they are purchasing and consuming.

Supporters also cite studies that show that the lack of information at the point of purchase leads to the overconsumption of high caloric meals.[89] Evidence illustrates that consumers cannot accurately estimate the amount of calories in their meals without menu labeling.[90] According to one study, Americans underestimate the amount of calories they consume by almost 55%.[91] In another study, individuals underestimated the amount of calories they ate by 600.[92] Consequently, although consumers may be aware that they are not consuming healthy food, the degree to which individuals underestimate their calories is astronomical.

Therefore, supporters argue that if individuals have more information about consumption it could lead to better eating habits. Menu labeling could provide information for consumers to make accurate decisions at the point of purchase. Better decisions can lead to people adopting healthier long term eating habits, and would in turn, reduce the demand for high caloric items at fast food restaurants.[93] Instead of putting a strain on fast food locations, menu labeling can provide new health-conscious marketing and advertising avenues for the restaurant industry. Supporters also state that the fast food industry could benefit from including healthier alternatives such as changing their ingredients, cooking methods, and even reducing portions sizes that have grown throughout the years.[94]

Lastly, supporters of menu labeling argue that adopting a mandatory nutrient disclosure regulation, rather than other anti-obesity initiatives,

87. Finkelstein et al., *supra* note 29, at 831.
88. Simon et al., *supra* note 24, at 1681.
89. *See* Mary T. Bassett et al., *supra* note 64, at 1459.
90. *Id*.
91. Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1176 (2004).
92. Scot Burton et al., *Attacking the Obesity Epidemic: The Potential Health Benefits of Providing Nutrition Information in Restaurants*, 96 AM. J. PUB. HEALTH 1669, 1669 (2006).
93. Banker, *supr*a note 44, at 917.
94. *Id*.

avoids discrimination against obese people.[95] Other unhealthy food restrictions could come into conflict with an individual's choice while menu labeling simply discloses information.[96] A national nutritional disclosure law is a tool that can help everyone make better decisions about consumption.

V. INTERNATIONAL MENU LABELING

Obesity is an international pandemic that is reaching every corner of the world. Even in Africa, where malnutrition was once a major health problem, countries are currently experiencing problems with obesity. Obesity is now as much of a concern as malnutrition and infectious diseases in many third-world countries around the world.[97] This section will explore the high incidence of obesity in the United Kingdom. It will assert that the United Kingdom should adopt a national menu labeling regulation similar to that of the United States to curb rising levels of obesity.

A. International Obesity-United Kingdom

The World Health Organization (WHO) describes global obesity, or "globesity," as one of the greatest health risks in the world.[98] People all around the world have been experiencing an ever-expanding waist size. In 1995, it was estimated that there were 200 million obese people worldwide.[99] Those figures have increased, soaring to over 300 million in 2005, while seemingly continuing to increase exponentially.[100] Statistics estimate that by the year 2015, there will be over 700 million obese individuals worldwide.[101] The obesity pandemic affects a large population of people in countries like Brazil, Germany, and Australia.[102] The World Health Organization has initiated a Global Strategy on Diet, Physical Activity, and Health to promote healthier eating habits but has yet to use its treaty making powers to implement a world-wide obesity control.[103]

Obesity rates vary throughout Europe. However, the European country with the most significant levels of obesity is the United

---

95. Katherine Mayer, *An Unjust War: The Case Against the Government's War on Obesity*, 92 GEO. L.J. 999, 1013–14 (2004).
96. *Id.*
97. Jane E. Brody, *As America Gets Bigger, The World Does, Too*, N.Y TIMES, Apr. 19, 2005, at A5.
98. *Id.*
99. *Id.*
100. *Id.*
101. Brody, *supr*a note 97, at A6.
102. *Id.*
103. *See* Mickey Chopra et al., *A Global Response to a Global Problem: The Epidemic of Overnutriton,* 80 BULL. WORLD HEALTH ORG. 952, 954 (2002).

Kingdom.[104] A wide variety of studies have indicated that there are many factors that contribute to these staggering levels of obesity. Some studies suggest that obesity is caused by socio-economic factors while other studies indicate that the cause of obesity is manipulative advertising.[105] Although there is growing controversy and much to debate as to the cause of obesity, few will dispute that this pandemic needs a solution to curtail the increasing rates of obesity.

In England 22% of men and 23% of women are considered obese.[106] There are many factors that have contributed to these alarming statistics. One strikingly similar correlation between England and the United States is the long working hours. People in England work longer hours than anywhere else in Europe.[107] Long working hours has lead to people eating fast food items more often. Also, these longer working hours result in families having little to no time to eat dinner together.[108] This often leads to children and adults substituting home cooked meals for high caloric fast food meals.

Additionally, another factor that contributes to obesity is the United Kingdom's climate.[109] Although studies are not conclusive that colder climates correlate to a higher rate of obesity, longer nights and shorter days reduce the likelihood that individuals exercise and lead a more mobile life. Individuals in England are less active and resort to comfort food, which are notorious for their high caloric value. Ultimately, the causes of obesity are complex and diverse, but a response to the crisis is essential for a healthier country. As a result, England has taken steps to try to curb obesity through legislation.

According to the Food Safety Act 1990, it is an offense to sell food that could harm a person's health.[110] Specifically, this act requires a showing of the food being "injurious to health."[111] This injurious to health standard requires a proof of causation between the food and the harm.[112] This standard is easily met in cases of immediate physical harm such as food poisoning, but would be exceedingly difficult to establish that unhealthy food leads to chronic diseases such as diabetes and heart diseases. While this act is a step in the right direction, it fails to address

---

104. *Id*. at 952.
105. *Id*. at 954.
106. Robyn Martin, *The Role of Law in the Control of Obesity in England: Looking at the Contribution of Law to a Healthy Food Culture*, 5 AUSTL. & N. Z. HEALTH POL'Y (2008).
107. *Id*. at 3.
108. *Id*.
109. DIW Phillips & JB Young, *Birth Weight Climate at Birth and the Risk of Bbesity in Adult Life*, 24 INTERNATIONAL JOURNAL OF OBESITY 281 (2000).
110. Food and Safety Act 1990 (c. 16/1990) (Scot.).
111. *Id*.
112. Martin, *supra* note 106, at 7.

nutritional content of food, but instead deals with the immediate safety of the food.

England has also attempted to regulate food labeling through the Food Labeling Regulations 1996, in accordance with European Union law. The law requires that nutritional content of food is to be disclosed only when a nutritional claim is made by the manufacturer.[113] Additionally, the nutritional disclosure is required to be labeled in a form that has not always been easy to interpret. Some of these labels call for extensive calculations to determine calories and would be misleading as to other nutrients contained in the product. Many of these manufactures resort back to the Food Safety Act 1990 and claim that these items are not injurious to people's health.[114] Although the government has agreed that certain foods should be labeled unhealthy while others should be labeled as healthy, legislation has done little to address these issues.

B. Author's Perspective

In the United Kingdom, the Food Standards Agency recognizes that some law needs to be established to curb obesity levels. The government accepts that businesses will not take it upon themselves to disclose nutritional facts unless they are mandated to do so. Until the present day, the English government has favored a voluntary regulatory approach to nutritional disclosure. However, this regulatory approach has not yielded fruitful results in the battle to curb obesity in the United Kingdom. The United Kingdom's obesity levels will continue to soar unless the government addresses this public health issue. Consumers need an informative system for nutritional content at the point of purchase. Legislation will aid in the United Kingdom's battle against the bulge. Mandatory menu labeling at fast food restaurants will enable consumers to make healthier consumption choices. The rise of the fast food nation in the United Kingdom necessitates a mandatory nutritional disclosure system. Therefore, the United Kingdom should adopt a national nutritional disclosure regulation similar to the legislation set forth in the PPACA. Every restaurant that contains twenty or more locations should provide nutritional disclosure for standard menu items. The legislation's nutritional disclosure will allow consumers to make better purchases. This can lead to not only a healthier lifestyle, but also a decrease in the rise of obesity. Lower obesity rates will decrease health care spending, and improve the health of the nation as well. Therefore, the United Kingdom should play its

113. The Food Labeling Regulations 1996, (Act No. 1499/1996) (Scot.).
114. *Id.*

part in the worldwide battle against obesity by adopting a menu labeling regulation.

VI. CONCLUSION

Obesity is both a serious medical condition and a lifestyle disorder that has lead to a worldwide pandemic. Although obesity rates vary throughout the world, almost every country has been affected by obesity in some way. There is no golden ticket in the prevention of obesity, and as noted, the last few decades have displayed how people are eating themselves to death. The problem is clearly identifiable and a definite solution is on the horizon. There has been a positive solution to this crisis by the government's efforts to reduce obesity through menu labeling in the United States, which has certainly proven to be a step in the right direction. Countries, such as the United Kingdom, should use the United States as a case study to implement their own national menu labeling regulation, which would attack the obesity pandemic head-on. Menu labeling is the long awaited solution to this worldwide problem.

LAW IN ISOLATION: THE LEGAL HISTORY OF PITCAIRN ISLAND, 1900-2010

Michael O. Eshleman[*]

"Mis-ter Chris-tian!" is a bark echoing through the decades, a byword for insubordination, thanks to Charles Laughton's signature—and quite fanciful—performance as Captain William Bligh, R.N., commander of the Royal Navy's *Bounty*.[1] Her crew had just enjoyed seven months of leisure

---

* Member of the Ohio Bar. J.D., University of Dayton School of Law; B.A. McMicken College of Arts & Sciences, University of Cincinnati. Former law clerk to Hon. Stephen A. Wolaver, Greene County Court of Common Pleas, Xenia, Ohio; formerly with Angstman Law Office, Bethel, Alaska. This article complements the Author's related *A South Seas State of Nature: The Legal History of Pitcairn Island, 1790–1900*, 29 UCLA PAC. BASIN L.J. (forthcoming 2011), and *The New Pitcairn Islands Constitution: Plenty of Strong Yet Empty Words for Britain's Smallest Colony*, 24 PACE INT'L L. REV. (forthcoming 2012).

1. MUTINY ON THE BOUNTY (Metro-Goldwyn-Mayer 1935); *Charles Laughton,* VARIETY, Dec. 19, 1962, at 67, *reprinted in* 7 VARIETY OBITUARIES, 1905−1986 (1988) (stating that Laughton's "varying villainy and caustic wit combined to set him up on his own pedestal" and this was the role he was "most closely identified with"). *Cf. Gilmore Girls: I Solemnly Swear* (WB Network television broadcast Jan. 21, 2003) (showing that student council president Paris Geller [Liza Weil], indignant at a meeting called in her absence and channeling Laughton's Bligh, speaking of "mutinous" behavior by all around and addressing one as "Mr. Christian"). *See also* BARRY MONUSH, ENCYCLOPEDIA OF HOLLYWOOD FILM ACTORS, FROM THE SILENT ERA TO 1965, at 413 (2003) ("Versatile, inimitable, unforgettable, Charles Laughton was one of the most colorful and exciting of all actors to have graced motion picture screens."). Bligh carried the rank of lieutenant on the voyage but the Author calls him "Captain Bligh" as the commander of a ship is her "captain" and Bligh is invariably referred to in this way.

and female companionship in Tahiti when Fletcher Christian in April 1789 led a rebellion against lawful authority.[2] The easy Tahitian attitude towards sex was well known in England.[3] The crew was "demoralized by the luxurious climate and their apparently unrestricted intercourse with the natives," and Captain Bligh wrote the mutineers felt nothing back home could compare to what they had just enjoyed.[4] As "the simplest explanation is probably the correct one," Bligh's supposition appears true.[5]

---

2. For the best of the scores of books on the mutiny, see CAROLINE ALEXANDER, THE BOUNTY: THE TRUE STORY OF THE MUTINY ON THE BOUNTY (2003). Also particularly useful are MANORIAL RESEARCH, WITH NATIONAL MARITIME MUSEUM, MUTINY ON THE BOUNTY, 1789−1989: AN INTERNATIONAL EXHIBITION TO MARK THE 200TH ANNIVERSARY, 28 APRIL 1989−1 OCT. 1989 (1989) (collection of essays) [hereinafter MANORIAL RESEARCH] and SVEN WALHROOS, MUTINY AND ROMANCE IN THE SOUTH SEAS: A COMPANION TO THE BOUNTY ADVENTURE (1989) (consisting of a narrative chronology and an encyclopedia of all people and things connected with the mutiny and Pitcairn.). *Cf.* United States v. Colby, 25 F. Cas. 490, 491 (D. Mass. 1845) ("The law gives to the captain of a ship at sea a power entirely unknown on land. . . . This authority is conferred for the preservation of the lives and property committed to his care, and is often as essential to the safety of the crew, as of the officers and ship. Hence the law has ever required of the seaman prompt and respectful obedience to all lawful orders of the captain. Even though the captain be in the wrong, or gives his orders in a harsh or insolent manner, or punishes without sufficient cause, still the seaman, at sea, must submit to the wrong and wait for redress till his return to port, rather than resort to violence.").

3. 16 THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE FOR THE YEAR 1773, Characters sec. at 7 (London, J. Dodsley 1774) ("Privacy . . . is little wanted among people who have not even the idea of indecency, and who gratify every appetite and passion before witnesses with no more sense of impropriety than we feel when we satisfy our hunger . . . with our family and friends"). *Cf.* DOUGLAS L. OLIVER, OCEANIA: THE NATIVE CULTURES OF AUSTRALIA AND THE PACIFIC ISLANDS 591 (1989) (quoting an Eighteenth Century missionary: "For deception, lasciviousness, fawning eulogy, shameless familiarity with men, and artful concealment of adulterers, I suppose no country can surpass Tahiti. She is the filthy Sodom of the South Seas. On her shores chastity, and virtue have no place"); *id*. at 591 ("Tahitians engaged in sexual intercourse diffusely, energetically, and perdurably, but they did so with gusto, with artistry, and with singular lack of shame.").

4. *William Bligh*, 2 DICTIONARY OF NATIONAL BIOGRAPHY 681 (Leslie Stephen & Sidney Lee eds., 1937); WILLIAM BLIGH, A VOYAGE TO THE SOUTH SEA, UNDERTAKEN BY COMMAND OF HIS MAJESTY FOR THE PURPOSE OF CONVEYING THE BREAD-FRUIT TREE TO THE WEST INDIES IN HIS MAJESTY'S SHIP THE BOUNTY, COMMANDED BY LIEUTENANT WILLIAM BLIGH, INCLUDING AN ACCOUNT OF THE MUTINY ON BOARD SAID SHIP, AND THE SUBSEQUENT VOYAGE OF PART OF THE CREW, IN THE SHIP'S BOAT, FROM TOFOA, ONE OF THE FRIENDLY ISLANDS, TO TIMOR, A DUTCH SETTLEMENT IN THE EAST INDIES 160−64 (London, George Nicol 1792), *reprinted in* WILLIAM BLIGH ET AL., A BOOK OF THE 'BOUNTY' at 1–188 (George Mackaness ed., 1938) (Everyman's Library No. 950). This theory is depicted in the film THE BOUNTY (Dino de Laurentiis 1984) (starring Anthony Hopkins as Bligh and Mel Gibson as Christian). *See also* Roy Porter, *Mixed Feelings: The Enlightenment and Sexuality in Eighteenth-Century Britain*, ch. 1, *in* SEXUALITY IN EIGHTEENTH-CENTURY BRITAIN 2−3, 9 (Paul-Gabriel Boucé ed., 1982) (discussing sex for average people in England at the time).

5. *The Simpsons: Grampa v. Sexual Inadequacy* (Fox Television broadcast, Dec. 4, 1994) (Lisa Simpson defining Occam's Razor). *See also* Cipollone v. Hoffmeier, Hamilton App. No. C-060482, 2007-Ohio-3788, 2007 WL 2141578, 2007 Ohio App. Lexis 3446, ¶ 25 (Ohio Ct. App. 1st Dist. July 27, 2007) (discussing Razor); IAN M. BALL, PITCAIRN: CHILDREN OF MUTINY ch. 5 (1973) ("That Old Standby, Sex").

After returning to Tahiti to pick up women, the mutineers realized they would be hunted down and so searched for a hiding place.[6] The answer was recorded in one of the books in Bligh's cabin in the form of an uninhabited island a thousand miles southeast of Tahiti charted a dozen years before: Pitcairn.[7] Even better for Christian and company, the island's discoverer had miscalculated the island's longitude significantly, an error that meant not even the great Captain Cook had been able to find it.[8] The mutineers arrived in January 1790 on a rock the size of Central Park—hundreds of miles from the nearest inhabited land—and began a new society.[9]

---

6. H.E. Maude, *In Search of a Home: From the Mutiny to Pitcairn Island (1789–1790)*, 67 J. POLYNESIAN SOC'Y 103 (1953) (N.Z.), *reprinted both in* H.E. MAUDE, OF ISLANDS AND MEN: STUDIES IN PACIFIC HISTORY ch. 1 (1968) [hereinafter MAUDE HISTORY] *and* U.S. SMITHSONIAN INSTITUTION, PUB. NO. 4392, ANNUAL REPORT OF THE BOARD OF REGENTS OF THE SMITHSONIAN INSTITUTION, SHOWING THE OPERATIONS, EXPENDITURES, AND CONDITION OF THE INSTITUTION FOR THE YEAR ENDED JUNE 30, 1959, at 533 (1960) (U.S. Congressional Serial Set vol. 12291) (AO).

7. 1 JOHN HAWKESWORTH, AN ACCOUNT OF THE VOYAGES UNDERTAKEN BY ORDER OF HIS PRESENT MAJESTY, FOR MAKING DISCOVERIES IN THE SOUTHERN HEMISPHERE, AND SUCCESSFULLY PERFORMED BY COMMODORE BYRON, CAPTAIN WALLIS, CAPTAIN CARTERET, AND CAPTAIN COOK, IN THE DOLPHIN, THE SWALLOW, AND THE ENDEAVOUR, DRAWN UP FROM THE JOURNALS WHICH WERE KEPT BY THE SEVERAL COMMANDERS AND FROM THE PAPERS OF JOSEPH BANKS, ESQ., TO WHICH IS ADDED A VOYAGE TO THE NORTH POLE BY COMMODORE PHIPPS 277–78 (London, W. Strahan & T. Cadell 1775).

8. 2 JAMES COOK, THE JOURNALS OF CAPTAIN JAMES COOK IN HIS VOYAGES OF DISCOVERY: THE VOYAGE OF THE *RESOLUTION* AND *ADVENTURE*, 1772−1775, at 189 (J.C. Beaglehole ed., 1965) (Hakluyt Soc'y Works Extra Series No. 35). For the Eighteenth Century problem of fixing a position in the open ocean, see generally, RUPERT T. GOULD, THE MARINE CHRONOMETER: ITS HISTORY AND DEVELOPMENT (1923) (discussing the Eighteenth Century problem of fixing a position at sea); HUMPHREY QUILL, JOHN HARRISON: THE MAN WHO FOUND LONGITUDE (1966); DAVA SOBEL, LONGITUDE: THE TRUE STORY OF A LONE GENIUS WHO SOLVED THE GREATEST SCIENTIFIC PROBLEM OF HIS TIME (1995). In the telefilm of Sobel's book her "lone genius," the Norfolk carpenter John Harrison, is played by Michael Gambon and Commander Rupert T. Gould, R.N., by Jeremy Irons.

9. DAVID SILVERMAN, PITCAIRN ISLAND 34 (1967) (part of an excellent sociological history of the island by an Ohio lawyer). *See also* ROBERT W. KIRK, PITCAIRN ISLAND, THE *BOUNTY* MUTINEERS AND THEIR DESCENDANTS (2008) (giving a good account of early days); TREVOR LUMMIS, PITCAIRN ISLAND: LIFE AND DEATH IN EDEN (1997) (same). Two popular Nineteenth Century accounts, still useful, are WALTER BRODIE, PITCAIRN'S ISLAND AND THE ISLANDERS IN 1850 (London, Whitaker 3d ed. 1851) (Brodie was a sailor stranded there for a time and his book is vital for reproducing primary source documents), *microformed on* American Culture Series, Reel 80.3 (University Microfilms), *available at* http://pitcairn.fatefulvoyage.com/Brodie/index.html (last visited Jan. 4, 2012); THOMAS BOYLES MURRAY, PITCAIRN: THE ISLAND, THE PEOPLE, AND THE PASTOR, TO WHICH IS ADDED A SHORT NOTICE OF THE ORIGINAL SETTLEMENT AND PRESENT CONDITION OF NORFOLK ISLAND (London, Society for Promoting Christian Knowledge, 12th ed. 1860) (Murray was a top official of S.P.C.K. and his book continued to be revised and reprinted as late as 1909). One Pitcairner published a history of the island, which is dated, but provides another useful perspective. ROSALIND AMELIA YOUNG, MUTINY OF THE BOUNTY AND STORY OF PITCAIRN ISLAND, 1790–1894 (Mountain View, Calif., Pacific Press Publishing Ass'n, 5th ed. 1894). *See also* SPENCER MURRAY, PITCAIRN ISLAND, THE FIRST 200 YEARS (1992).

The early days were filled with bloodshed and nearly every adult male was killed.[10] The lone survivor of the mutiny was John Adams, who Victorian moralists depicted as a South Seas Moses.[11] This ill-lettered tar taught them religion and led the islanders until his death in 1829.[12] By then George Hunn Nobbs, another Briton, had arrived and as their teacher and pastor was for years the guiding force of the community.[13] In 1856 he led the entire population to relocate to Norfolk Island.[14] But soon thereafter a small number returned to their old home and they resurrected the old ways.[15]

Throughout the Nineteenth Century the Royal Navy was the island's protector.[16] Its officers drafted several legal codes for the islanders.[17] Though Britain has dated its claim to the island to 1838, it took a very passive approach to governance of Pitcairn, placing it under formal administration only in 1898.[18] Britain then took action because a murder

---

10. KIRK, *supra* note 9, at 61–67.

11. *See*, *e.g.*, Charles Prestood Lucas, *Introduction* to THE PITCAIRN ISLAND REGISTER BOOK 15–16 (AMS Press 1977) (Charles Prestwood Lucas ed., 1929).

12. *See generally* NATHAN WELBY FISKE, ALECK: THE LAST OF THE MUTINEERS, OR, THE HISTORY OF PITCAIRN'S ISLAND (Amherst, Mass., J.S. & C. Adams, 2d ed. 1843); J.K. Laughton & Andrew Lambert, *John Adams*, *in* 1 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 237 (H.C.G. Matthew & Brian Harrison eds., 2004).

13. *See generally* H.E. Maude, *George Hunn Nobbs*, *in* 2 AUSTRALIAN DICTIONARY OF BIOGRAPHY 288 (1967); RAYMOND KEITH NOBBS, GEORGE HUNN NOBBS, 1799–1884: CHAPLAIN ON PITCAIRN AND NORFOLK ISLAND (1984).

14. *See generally* MERVAL HANNAH HOARE, NORFOLK ISLAND: A REVISED AND ENLARGED HISTORY, 1774–1998 (5th ed. 1999); T.C. Roughley, Bounty *Descendants Live on Remote Norfolk Island*, 118 NAT'L GEOG. MAG. 559 (1960); Ed Howard, *Pitcairn and Norfolk: The Saga of Bounty's Children*, 164 NAT'L GEOG. MAG. 511 (1983); PETER CLARKE, HELL AND PARADISE: THE NORFOLK-BOUNTY-PITCAIRN SAGA ch. 17 (1987).

15. *See generally* A Native [Rosalind Amelia Young], *The Mutineers of the "Bounty:" The Pitcairn Islanders From 1859–80*, *in* 22 SCRIBNER'S MAG. 54 (1881) (describing resettlement).

16. *Cf.* John Bach, *The Royal Navy in the Pacific Islands*, 3 J. PAC. HIST. 3 (1968) (Austl.) (describing role in providing law and order throughout Pacific); John Manning Ward, *Policing the Pacific: The Role of the Royal Navy, 1805–1844*, *in* BRITISH POLICY IN THE SOUTH PACIFIC (1786–1893) 58–71 (Greenwood Press 1976) (1950) (same).

17. *See* BRODIE, *supra* note 9, at 84–91 (reprinting laws drafted for islanders in 1838 by Capt. Russell Eliott of *H.M.S. Fly*); HARRY L. SHAPIRO, THE HERITAGE OF THE BOUNTY: THE STORY OF PITCAIRN THROUGH SIX GENERATIONS 289–91 (1936) (transcribing laws drafted in 1893 by Capt. Eustace Rooke of *H.M.S. Champion*).

18. Press Release No. 15 of 1990, British Foreign & Commw. Office, *reprinted in* 61 BRIT. Y.B. INT'L L. 1990, at 503 (1991) (statement issued on two-hundredth anniversary of mutineers settling on Pitcairn traces British claim to 1838 actions of Capt. Russell Eliott, R.N.); Instructions to the High Commissioner, Western Pacific, from Joseph Chamberlain, Colonial Sec'y, 1898 FIJI ROYAL GAZETTE 215

was committed on the island and colonial officials realized they had no way to prosecute the killer short of bringing him 12,000 miles around the world to stand trial at the Old Bailey.[19]

The Nineteenth Century closed with a sensational crime, and the Twentieth closed with a sensational criminal investigation that ended up before the Judicial Committee of the Privy Council in Downing Street.[20] The investigation sparked a massive burst of legislation for Pitcairn.[21] And in 2010, it helped spur a new constitution for the island.[22]

(adding Pitcairn to the territories governed by the Western Pacific High Commissioner), *reprinted in* R. v. Seven Named Accused, [2004] PNSC 1, 127 I.L.R. 232, ¶ 109 (Pitcairn Is. Sup. Ct.).

19. Minute of Edward Wingfield, Permanent Undersec'y of State, Colonial Office, Feb. 14, 1898, *in* 4 Privy Council Record (PCR) 4-1628–29 (TNA ADM 1/5618) [hereinafter "Privy Council Record" will be abbreviated "PCR"]; Letter from Richard E. Webster, Att'y-Gen. & Robert B. Finlay, Solicitor-Gen., to Joseph Chamberlain, Colonial Sec'y, Mar. 4, 1898, *reprinted in* D.P. O'CONNELL & ANN RIORDAN, OPINIONS ON IMPERIAL CONSTITUTIONAL LAW 11–3 (1971). For a full legal history of Pitcairn in the Eighteenth and Nineteenth Centuries, see Michael O. Eshleman, *A South Seas State of Nature: The Legal History of Pitcairn Island, 1790–1900*, 29 UCLA PAC. BASIN L.J. (forthcoming 2011).

20. R. v. Christian, [2005] PNSC 1, [2006] 1 L.R.C. 745, 75 BRIT. Y.B. INT'L L. 2004, at 428 (Pitcairn Is. Sup. Ct.), *aff'd* [2006] PNCA 1, [2006] 4 L.R.C. 746 (Pitcairn Is. Ct. App.), *aff'd sub nom*. Christian v. The Queen, [2006] UKPC 47, [2007] 2 A.C. 400, [2007] 1 L.R.C. 726, 130 I.L.R. 696 (appeal taken from Pitcairn Is.). *See generally* MAXWELL BARRETT, THE LAW LORDS ch. 5 (2001) (discussing history and role of Judicial Committee, which formerly sat at Number One Downing Street, next door to the Prime Minister). *Id*. at 165. In June 2007, the Author, inspired by Barrett's book, attended oral arguments before the Judicial Committee in Estate of Palmer v. Cornerstone Investments & Fin. Co., [2007] UKPC 49, [2008] 3 L.R.C. 1 (appeal taken from Jam.). Following the creation in 2009 of the United Kingdom Supreme Court, the Judicial Committee joined the Supreme Court at the former Middlesex Guildhall on Parliament Square across from the Palace of Westminster. Constitutional Reform Act, 2005, c. 4, § 23 (U.K.) (creating Supreme Court); Constitutional Reform Act 2005 (Commencement No. 11) Order 2009, S.I. 2009/1604 (U.K.) (bringing law creating Supreme Court into force); Martin Kettle, *It Took 142 Years, But at Last Bagehot Has Got His Way*, THE GUARDIAN (London), July 31, 2009, at 31 (commenting on separation of powers the Supreme Court represented); Hugh Pearman, *With Its Present Medieval Heritage and Hideously Garish Carpet, the New Supreme Court Building is Typical English Fudge*, SUNDAY TIMES (London), Sept. 20, 2009, at 18 (commenting on Supreme Court's home); Marcus Binney, *Middlesex Guildhall Has Been Blandly and Expensively Neutered to Accommodate the New Supreme Court*, THE TIMES (London), Jan. 16, 2010, at 99 (same).

21. *See Chronological Table of Ordinances*, *in* LAWS OF PITCAIRN, HENDERSON, DUCIE AND OENO ISLANDS xiii–xix (Paul Julian Treadwell comp. 2010), *available at* http://government.pn/Laws/index.html) (last visited Jan. 4, 2012) [hereinafter LAWS OF PITCAIRN] (providing a table listing all laws enacted from 1952 to 2010 shows few laws passed for decades and then many passed in last fifteen years); U.K. FOREIGN & COMMW. OFFICE, HUMAN RIGHTS AND DEMOCRACY: THE 2010 FOREIGN & COMMONWEALTH OFFICE REPORT, 2011, Cm. 8017, at 115 (discussing changes to Pitcairn law as a result of the rape investigation).

22. Pitcairn Constitution Order, 2010, S.I. 2010/244 (U.K.), *reprinted in* LAWS OF PITCAIRN, *supra* note 21, at xxvii; Proclamation Appointing the Day for the Coming Into Force of the Pitcairn Constitution Order 2010, *reprinted in* LAWS OF PITCAIRN, *supra* note 21, at xxx [hereinafter Proclamation Appointing the Day]. *See generally* Anthony H. Angelo & Ricarda Kessebohm, *The New Constitution of Pitcairn: A Primer*, 7 N.Z. Y.B. INT'L L. 2009, at 285 (2010); Michael O. Eshleman, *The New Pitcairn Islands*

I. THE WESTERN PACIFIC HIGH COMMISSION, 1898–1952

The British Colonial Secretary in 1898 placed Pitcairn under the purview of the Western Pacific High Commissioner so a murder trial could be conducted on the island.[23] The office of High Commissioner was created in 1877 to bring law and order to the Pacific.[24] The High Commissioner, based in Suva, Fiji, also held the office of Governor of Fiji.[25] Besides Pitcairn, he oversaw a number of islands including the Cooks, the New Hebrides, the Solomons, the Gilberts, the Ellices, and the Unions.[26] The High Commissioner had sole legislative authority over his islands, subject only to his laws being disapproved by the authorities in London.[27] The High Commissioner relocated to Honiara in the Solomons in 1952 and Pitcairn was then removed from his jurisdiction.[28] For the initial decades of his administration, the High Commissioner delegated authority over Pitcairn to the British consuls at Tahiti, who were appointed Deputy Western Pacific High Commissioners.[29]

Constitution: Plenty of Strong Yet Empty Words for Britain's Smallest Colony, 24 PACE INT'L L. REV. (forthcoming 2012).

23. *See Our Fiji Letter*, SYDNEY MORNING HERALD (Sydney, N.S.W.), Oct. 19, 1898, at 4 (NLA) (describing murder trial); *Pitcairn Islander Sentenced to Death*, THE TIMES (London), Nov. 8, 1898, at 4 (same). *See also* Eshleman, *supra* note 19 (giving account of debate in London on how to prosecute the murderer).

24. Western Pacific Order, 1877, § 7, 68 B.F.S.P. 328, 14 H.C.T. 871, *issued pursuant to authority granted by* Pacific Islanders Protection Act, 1877, 38 & 39 Vict., c. 51, § 6, *superseded by* Pacific Order, 1893, § 5, 1893 LONDON GAZETTE 5119, 85 B.F.S.P. 1053, 19 H.C.T. 570, 5 Stat. R. & O., Foreign Jurisdiction sec. at 484 (2d ed. 1904). *See also* W. ROSS JOHNSTON, SOVEREIGNTY AND PROTECTION: A STUDY OF BRITISH JURISDICTIONAL IMPERIALISM IN THE LATE NINETEENTH CENTURY 83–166 (1973) (Duke University Commonwealth Studies Center No. 41) (discussing the creation of the High Commission); Eshleman, *supra* note 19 (giving short account of same).

25. MARTIN WIGHT, BRITISH COLONIAL CONSTITUTIONS 1947, at 76 (1952).

26. HARRY C. LUKE, FROM A SOUTH SEAS DIARY, 1938–1942, at 9–10 (1945) (Luke was High Commissioner those years).

27. Pacific Order, 1893, § 108 (UK); *British Islands in Western Pacific*, 2 J. SOC'Y COMP. LEGIS., n.s. 113, 113–14 (1900) (Eng.).

28. JERRY DUPONT, THE COMMON LAW ABROAD 1185 (2001).

29. *See*, *e.g.*, 83 U.K. FOREIGN OFFICE, FOREIGN OFFICE LIST AND DIPLOMATIC AND CONSULAR YEARBOOK FOR 1910, at 356 (1910) (noting Arthur Longford Sholto Rowley, appointed consul at Tahiti in 1908, was also appointed Deputy Commissioner for the Western Pacific in 1909). The text also notes that Robert Teesdale Simons, appointed consul at Tahiti in 1894, was also appointed Deputy Commissioner for the Western Pacific in 1903. *Id*. at 369. 48 WILLIAM HEPWORTH MERCER & ARTHUR ERNEST COLLINS, COLONIAL OFFICE LIST FOR 1919, at 417 (1919) (noting W.J. Williams, consul in the Society Islands, was "Deputy Commissioner, Pitcairn Island").

II. CLAIMING ISLANDS: 1902

Consul Robert Teesdale Simons, a Deputy High Commissioners in 1902 instructed the Pitcairners to formally claim three neighbors of Pitcairn.[30] These were Henderson, Ducie, and Oeno—all uninhabited.[31] The British flag had already been raised over Henderson in 1819, a fact apparently unknown to Simons.[32] The president of Pitcairn Island, James Russell McCoy, visited each island, raised the Union Jack, and claimed them for Britain: Henderson on July 6, Oeno on July 10, and Ducie on December 19.[33] This was done out of concern that 1) the islands would be valuable once the Panama Canal was finished in a few years and 2) to keep them out of French hands, the French having already occupied most islands between Fiji and Pitcairn.[34] A British warship, *H.M.S. Leander*, visited the

---

30. Letter from R.T. Simons to Colonial Sec'y, May 19, 1902, *in* 4 PCR 4-1740.

31. *See generally* F. RAYMOND FOSBERG, MARIE SACHET & DAVID R. STODDART, HENDERSON ISLAND (SOUTHEASTERN POLYNESIA): SUMMARY OF CURRENT KNOWLEDGE (1983) (Smithsonian Inst. Atoll Res. Bull. No. 272); MICHAEL DE L. BROOKE, IAN HEPBURN & ROSIE J. TREVELYAN, HENDERSON ISLAND WORLD HERITAGE SITE: MANAGEMENT PLAN (2004), *available at* www.ukotcf.org/pdf/Henderson.pdf (last visited Jan. 4, 2012); HARALD A. REHDER & JOHN E. RANDALL, DUCIE ATOLL: ITS HISTORY, PHYSIOGRAPHY, AND BIOTA (1975) (Smithsonian Inst. Atoll Res. Bull. No. 183); Harry Yazell, *The (No) Importance of Ducie*, 14 PITCAIRN LOG, Dec. 1986-Feb. 1987, at 12; Steve Pendleton, *Ducie Island: Isolated and Inhospitable*, 25 PAC. MAG., July-Aug. 2000, at 36; Ada M. Christian, *Pitcairners' Holiday Cruise*, 13 PAC. ISLANDS MONTHLY, July 17, 1943, at 41 (Austl.) (Oeno Is.); Harry Yazell, *The Importance of Oeno Island*, 14 PITCAIRN LOG, Sept.-Nov. 1986, at 8; Steve Pendleton, *Party Place: The Story of Oeno Island*, 23 PAC. MAG., Mar.-Apr. 1998, at 60.

32. *See* Henry King, *Extract from the Journal of Captain Henry King of the Elizabeth*, 3 EDIN. PHIL. J. 380, 381−82 (1820) (Scot.); H.E. Maude, *Those Henderson Island Mysteries*, 22 PAC. ISLANDS MONTHLY, May 1951, at 62 (Austl.), *reprinted in* PIM'S PACIFIC: STORIES FROM THE SOUTH SEAS 177–81 (Judy Tudor ed., 1965).

33. 2 HYDROGRAPHIC OFFICE, U.S. NAVY, PUB. NO. 166, PACIFIC ISLANDS (EASTERN GROUP) PILOT 138, 140 (1916); Donald A. McLoughlin, *Law and Order on Pitcairn's Island: An Account of the Development of the System of Government and Laws of Pitcairn Island From 1791 to 1971*, *in* LAWS OF PITCAIRN, HENDERSON, DUCIE, AND OENO ISLANDS 65 (Donald A. McLoughlin comp., rev. ed. 1974) [hereinafter *McLoughlin Law*], *text of McLoughlin's history available at* http://library.puc.edu/pitcairn/pitcairn/govt-history.shtml (last visited Jan. 4, 2012); MERCER & COLLINS, *supra* note 29, at 419. Other sources—*see*, *e.g.*, Donald A. McLoughlin, *An Account of the Development of the System of Government and Laws on Pitcairn Island in the Twentieth Century*, 11 TRANS. & PROC. FIJI SOC'Y 63, 67 (1971) [hereinafter *McLoughlin Twentieth*]—say they were annexed only in 1938, apparently a reference to the Closed Districts (Pitcairn Group) Regulation 1938, § 2 (W. Pac. High Comm'n) (brought into force by W. Pac. High Comm'n Proclamation No. 5 of 1938, 1938 W. PAC. HIGH COMM'N GAZETTE 44) ("'the Pitcairn Group' means the Islands of Pitcairn, Henderson, Ducie and Oeno"). This regulation lapsed with the Pitcairn Order, 1952. J.B. Claydon, Report [to the Governor of Pitcairn] on Administrative Visit to Pitcairn Island, Jan. 30, 1954, ¶ 63, *in* 6 PCR 6-2585.

34. *Pacific Islands: Annexed by Great Britain*, THE ADVERTISER (Adelaide, S. Austl.), May 30, 1903, at 9 (NLA); *Annexation of Islands*, BAY OF PLENTY TIMES (N.Z.), June 1, 1903, at 2, *available at* http://paperspast.natlib.govt.nz (last accessed Jan. 4, 2012).

trio in 1937 to reaffirm the claim, leaving on each the British flag and a sign saying they belonged to George VI.[35] It did so because of the new potential for transpacific aviation, the cause of a scramble for Pacific islands in the 1930s.[36] Those islands today give Pitcairn a vast exclusive economic zone in the Pacific.[37]

III. IN WITH THE OLD: 1904

In 1893 a Royal Navy officer, Eustace Rooke, had written a new code that created a seven-member legislature elected annually with a president, vice-president, secretary, and judge chosen from their number.[38] This lasted until 1904 when Consul Simons called on Pitcairn.[39] Simons found the judges were incompetent and could not get their decisions enforced, while the other officials engaged in rivalries preventing good government.[40] He was highly critical of the Pitcairners:

---

35. *Remote Islands: British Ownership Reaffirmed*, SYDNEY MORNING HERALD (Sydney, N.S.W.), Aug. 23, 1937, at 10 (NLA). *See also* Ada M. Christian, *New Administrative Group: Three Islands Joined With Pitcairn*, 11 PAC. ISLANDS MONTHLY, Jan. 1943, at 11 (Austl.).

36. *Island Bases*, SYDNEY MORNING HERALD (Sydney, N.S.W.), Aug. 24, 1937, at 12 (NLA); *McLoughlin Law*, *supra* note 33, at 66; Harold Butcher, *Ocean Isles Now Valued: Tiny Places in Pacific Desired by Nations As Bases for Airlines*, N.Y. TIMES, Mar. 6, 1938, §12 at 6. *See also* Beatrice Orent & Pauline Reinsch, *Sovereignty Over Islands in the Pacific*, 35 AM. J. INT'L L. 443, 443, 447 (1941) (discussing claims to islands and aviation); DAVID N. LEFF, UNCLE SAM'S PACIFIC ISLETS 1–3 (1940) (discussing American government's policy on claiming islands for aviation); EDWIN H. BRYAN, JR., *The Race for Airports*, AMERICAN POLYNESIA AND THE HAWAIIAN CHAIN 31–34 (1942) (same); Felicity Caird, *The Strategic Significance of the Pacific Islands in New Zealand's Defence Policy, 1935–1939*, at 44–66 (1987) (unpublished M.A. thesis, University of Canterbury), *available at* http://ir.canterbury.ac.nz/handle/10092/4263 (last visited Jan. 4, 2012).

37. *See* Exchange of Notes Constituting an Agreement Concerning the Creation and Delimitation of an Economic Zone Around the Islands of Pitcairn, Henderson, Ducie, and Oeno, Fr.-U.K., Dec. 17, 1992-Jan. 19, 1993, U.K.T.S. No. 67 (1993) (Cm. 2358), 1772 U.N.T.S. 95 (effective Feb. 19, 1993); Convention on Maritime Boundaries, Fr.-U.K., Sept. 4, 1984, U.K.T.S. No. 56 (1984) (Cmnd. 9294), 1367 U.N.T.S. 182; Pitcairn Island Proclamation No. 1 of 1992, *reprinted in* 63 BRIT. Y.B. INT'L L. 1992, at 756 (1993); Pitcairn Island Proclamation No. 1 of 1997, *reprinted in* LAWS OF PITCAIRN, *supra* note 22, at 457–58. The idea of exclusive economic zones was codified in the Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 396, art. 55 (entered into force Nov. 16, 1994).

38. SHAPIRO, *supra* note 17, at 289–91 (reproducing laws).

39. Simons was appointed consul at Tahiti on September 27, 1894. *See* 1894 LONDON GAZETTE 5567. He was appointed Deputy Commissioner on September 29, 1903. 83 U.K. FOREIGN OFFICE, FOREIGN OFFICE LIST AND DIPLOMATIC AND CONSULAR YEARBOOK FOR 1910, at 369 (1910) [hereinafter 83 FOREIGN OFFICE LIST]. He served until 1908, when he was appointed consul at New Caledonia, but Simons did not take up that appointment because of illness. *Id*. *See also* 1908 LONDON GAZETTE 6513.

40. U.K. COLONIAL OFFICE, COLONIAL OFFICE MISCELLANEOUS REPORTS NO. 30, PITCAIRN ISLAND: REPORT OF MR. R.T. SIMONS, 1905, [Cd. 2397], at 4, 53 P.P. (1905) 55, MF 111.481 [hereinafter SIMONS REPORT].

> With regard to the morals of the islanders in the aggregate, I fear I can say little in their favour. Fornication, adultery, illegitimate children, petty thefts, brawls, bad language, etc., are faults amongst them (happily they do not use intoxicants) and it was disquieting to learn that the laws and regulations dealing with those offences had seldom been enforced. Indeed the general laxity has been so great that abortion, brought about by means of drugs and instruments of local contrivance, was not of infrequent occurrence. I have made provision for the punishment of that and of other crimes in the future.[41]

The new regime came into force May 19, 1904, and was similar to the one before Captain Rooke's reform, consisting of an elected Chief Magistrate, two lawmaking committees—an Internal Committee and an External one—a secretary and treasurer, and two elected assessors to assist the magistrate.[42] The magistrate was forbidden to be a churchman because of concerns about the minister of the day.[43] The Internal and External Committees were to draw up local regulations.[44]

Court was to be held twice a month.[45] The magistrate was to try cases.[46] Where more than a week's imprisonment or a fine larger than £5 was at stake, he was to sit with the assessors. Their vote on guilt was the same as his but the magistrate alone decided the sentence.[47] The code stated "[c]ivil and criminal matters of a serious character for which punishment is not provided for in the local laws and regulations must be dealt with by" the High Commissioner's Court.[48] That tribunal was created with the office of Western Pacific High Commissioner in 1877 and consisted of the High Commissioner, the Judicial Commissioners, and the

---

41. *Id*. at 3.

42. *McLoughlin Twentieth*, *supra* note 33, at 65; MAUDE HISTORY, *supra* note 6, at 93; SILVERMAN, *supra* note 9, at 183. *See also* SHAPIRO, *supra* note 17, at 298–301 (reprinting 1904 laws). A facsimile of the Pitcairn Civil Recorder, the handwritten island ledger from which Shapiro made his transcriptions, is at 4 PCR 4-1503–19. The original is located in FCOA, PIT 1/II.

43. SHAPIRO, *supra* note 17, at 298 (reprinting law); SILVERMAN, *supra* note 9, at 183 (stating cause). *Cf*. SIMONS REPORT, *supra* note 40, at 4–5 (discussing islanders' complaints President McCoy was neglecting his governmental duties on Pitcairn while attending to church business and being a celebrity in America).

44. *McLoughlin Twentieth*, *supra* note 33, at 65. The External Committee was merged into the Internal Committee in 1911. *Id*. at 65, n.6.

45. SHAPIRO, *supra* note 17, at 301.

46. *Id*.

47. *Id*.

48. *Id*.

Deputy Commissioners.[49] Several such cases from Pitcairn, including attempted murder and abortion, were referred over the years.[50] Appeals from the Island Court went to the Deputy High Commissioner.[51]

The first law punished contempt of court.[52] The next five laws dealt with sex. "[S]educing a girl under the age of 14" was punishable by a £20 fine or a month in jail.[53] Adultery and rape had to be referred to the High Commissioner's Court.[54] Yet the former was still locally triable in addition to punishment by the High Commissioner's Court—a fine of £5 to £10 could be assessed locally for those "found in adultery or [who] shall associate together in secluded places for the purpose of acting in a manner not consistent with [their] marital vows, or for the purpose of committing carnal offenses."[55] (Those who helped in the commission were equally liable.)[56] Young people "congregating together in such a manner as to cause scandal or to endanger the morals of the younger" islanders could be fined, as could those who provided places for the congregation.[57] Voyeurism was banned, as it had been under the old code.[58]

The islanders were forbidden to change Simons's code on their own.[59] They could make local regulations on farming, branding of livestock, and the like.[60] The many detailed laws on livestock in the old code were dropped, but the Internal Committee was allowed to make criminal laws regarding animals.[61] The Nineteenth Century laws on violence, threats, guns, and public works were continued.[62] Inquests on suspicious deaths

---

49. Western Pacific Order, 1877, § 12 (creation) (U.K.); Pacific Order, 1893, § 13 (continuance) (U.K.); *id*. at § 12 (composition).

50. R. v. Christian, [2005] PNSC 1, [2006] 1 L.R.C. 745, 75 BRIT. Y.B. INT'L L. 2004, at 428, ¶¶ 67, 80 (Pitcairn Is. Sup. Ct.).

51. *See McLoughlin Twentieth*, *supra* note 33, at 69 (stating finding of Island Court was reversed in one case by R.T. Simons, Deputy Western Pacific High Commissioner).

52. SHAPIRO, *supra* note 17, at 301 (reprinting Local Law 1).

53. *Id*. at 301–02 (reprinting Local Law 2).

54. *Id*. at 302 (reprinting Local Law 3).

55. *Id*. at 302 (reprinting Local Law 4).

56. *Id*.

57. SHAPIRO, *supra* note 17, at 302 (reprinting Local Law 5).

58. *Id*. (reprinting Local Law 6).

59. *Id*. at 299.

60. *Id*. The local committee regulations appear in *id*. at 312–17.

61. *Id*. at 304 (reprinting Local Law 12). Such laws were adopted, *see*, *e.g*., F.D. Alley, *£50 for a Cat's Life*, SYDNEY MORNING HERALD (Sydney, N.S.W.), Nov. 20, 1937, at 7 (NLA) (describing Pitcairn law to protect cats). The older laws are described in Eshleman, *supra* note 19.

62. SHAPIRO, *supra* note 17, at 303–05 (reprinting Local Laws 10, 11, 13, 14, and 16).

were required.[63] The ban on immigration, in place since 1882, was not re-enacted, but the islanders were forbidden to deport anyone.[64]

The concern Simons had for abortifacients is also manifested in the code.[65] That brought about the most significant change to the criminal law, Local Law 15: "Abortion is a serious crime and is punishable by a lengthy term of imprisonment."[66] Prohibition was also enacted for the islanders—but not for resident foreigners.[67] Theft was regulated at length; children who stole could be caned.[68] These laws were amended a few times—such as abolishing the External Committee—but largely endured until 1941.[69] An example of a change was a quarantine law for ships, enacted in 1906.[70]

In the Nineteenth Century, Pitcairn had frequently been visited by American whalers, but after the decline of the whale fishery, it became a backwater so rarely visited that letters could take three years to arrive.[71] One observer in 1914 predicted the island's imminent demise.[72] However, that summer the Panama Canal opened, which changed the island's fortunes as it lay on the direct route from Panama to New Zealand.[73] That meant sometimes a ship a week called there, bringing large numbers of people

---

63. *Id*. at 306 (reprinting Local Law 21).

64. *Id*. at 305 (reprinting Local Law 19).

65. *Id*. at 304.

66. *Id*.

67. SHAPIRO, *supra* note 17, at 305–06 (reprinting Local Law 20).

68. *Id*. (reprinting Local Laws 8 and 9).

69. *Id.* at 306–12 (showing amendments).

70. *McLoughlin Twentieth*, *supra* note 33, at 67.

71. J. Bryant, *A Lonely Isle and a Curious People*, 30 SCOT. GEOG. MAG. 83, 85 (1914). *See also* Arthur A. Delaney, *Pitcairn's Early Postal History*, 83 AM. PHILATELIST 307, 307 (1969) (quoting 1878 statement on how erratic the mails were); *H.M.S. Condor and the Pitcairn Mail*, MORNING POST (Cairns, Queensl.), Feb. 18, 1902, at 3 (NLA) (stating mail arrived once a year); *Letters Once a Year*, THE EXAMINER (Launceston, Tas.), Jan. 11, 1902, at 2 (NLA) (same). *Contra* Emily M. McCoy, *The Pitcairn Island Miracle in Ethnology*, 57 INDEPENDENT 712, 717 (1904) (Pitcairnese author writing in 1904 saying mails arrived every two months from steamers on San Francisco–New Zealand run). *Cf. Letters from Pitcairn Island*, 18 OVERLAND MONTHLY 294 (1891) (exchange of correspondence showing dates written and received).

72. Bryant, *supra* note 71, at 85. *See also Joy on Pitcairn Island*, N.Y. TIMES, July 8, 1917, § 8, at 8 (noting only three ships a year stopped during World War I).

73. R.W. ROBSON, PACIFIC ISLANDS HANDBOOK 1944, at 125 (N. Am. ed. 1945). Pitcairn is 3,520 nautical miles from Panama, and 3,006 nautical miles from Wellington. CECIL HUNTER RODWELL, REPORT ON A VISIT TO PITCAIRN ISLAND ¶ 1 (1921) (Colonial Office Misc. Rep. 93). Its prime location on shipping routes was long foreseen. *See*, *e.g.*, *Pitcairn's Island—Interesting Sketch*, N.Y. DAILY TIMES, Oct. 11, 1852, at 3, *reprinting article from* PAN. STAR, Sept. 16, 1852 (noting the island is halfway between Panama and Australia). The many calls made possible by the canal weren't all good news, however. *See*, *e.g.*, *Pitcairn Island*, [1921] 2 BRIT. MED. J. 760, 761 (stating the worldwide 1918 influenza pandemic killed five Pitcairners).

eager to buy souvenirs.[74] And it massively improved communications as "[t]he lonely island overnight found itself with the best mail service south of the Equator."[75]

IV. NEILL'S DRAFT: 1937

High Commissioner Cecil Rodwell, visiting in 1921, thought the community of 170 had too many officials and that the number should be pared.[76] He also felt the Pitcairn laws ought to be put on a "more definite basis" than Simons's code.[77] Fifteen years later, something was done about Rodwell's suggestion when James Scott Neill, British Consul at Tonga, went to Pitcairn for five weeks.[78] As a Judicial Commissioner, he convened the High Commissioner's Court to hear a charge of murder—supposedly a woman poisoned her husband with tainted tea—but dismissed the case because there was no evidence at all, only the chatterings of gossips.[79] He suggested to the Colonial Office that the essential form of government was sound.[80] He drafted a new legal code and a code of procedure for the court.[81] Neill observed the Pitcairn magistrate "has never seen a proper Court function and has never received any practical instruction."[82] The

---

74. MAUDE HISTORY, *supra* note 6, at 95–96 (noting visits to buy souvenirs); DONALD A. MCLOUGHLIN, REPORT ON JUDICIAL AND ADMINISTRATIVE VISIT TO PITCAIRN ISLAND ¶¶ 15–16 (Oct. 27, 1958), *in* 6 PCR 6-2759 (TNA CO 1036/401) [hereinafter MCLOUGHLIN 1958 REPORT] (listing ships regularly calling there in 1958); Irving & Electa Johnson, *Westward Bound in the* Yankee, 81 NAT'L GEOG. MAG. 1, 32 (1942) (noting few actually landed on island but steamers regularly stopped for mail); Marc T. Greene, *Pitcairn Island: Port of Call*, CHRISTIAN SCI. MONITOR WKLY. MAG., June 16, 1945, at 16, 17 (noting liners arrived fortnightly); Luis Marden, *I Found the Bones of the Bounty*, 112 NAT'L GEOG. MAG. 725, 767 (1957) (noting in 1957 a ship arrived about weekly). *See also* MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶ 27 (a colorful account of getting supplies from a visiting ship).

75. ROBERT J. CASEY, EASTER ISLAND: HOME OF THE SCORNFUL GODS 78 (1931). *See also* V. LeYoung Ardiff, *Pitcairn Island Postal Affairs*, 51 AM. PHILATELIST 651 (1938); Clyde Carriker & John F. Field, *A Study of Pitcairn Island Life and Postal History, 1920–32* (pts. 1–2), 86 AM. PHILATELIST 607, 683 (1972) (studying Pitcairn correspondence handled by the American postmaster at Cristobal in the Panama Canal Zone).

76. RODWELL, *supra* note 73, ¶ 6.

77. *Id*.

78. *See* James Scott Neill, *General Administrative Report*, *in* U.K. COLONIAL OFFICE, COLONIAL OFFICE REP. NO. 155, PITCAIRN ISLAND (1938) [hereinafter *Neill Report*], *available in* 5 PCR 5-2083–2133; JAMES SCOTT NEILL, TEN YEARS IN TONGA 153–200 (1955) [hereinafter NEILL TONGA] (describing his visit). *See also* 342 PARL. DEB., H.C. (5th ser.) (1938) 407–08 (U.K.) (giving status of implementing the recommendations in Neill's report).

79. NEILL TONGA, *supra* note 78, at 173.

80. *Neill Report*, *supra* note 78, at 13.

81. *Id*. at 29–51.

82. *Id*. at 13, 15.

record bears out this ignorance. The government's legal adviser, writing in 1966 of his review of the court records, found its proceedings had "little relation, if any, to those of any Court of Justice known to more sophisticated societies. The system does, however, appear to have worked on the whole as a form of practical, although at times exceedingly rough, justice."[83]

(Some bizarre examples of criminal procedure exist. In a 1950s case, the island policeman, who "only appeared in the case in his capacity as public prosecutor," was convicted of an offense and fined ten shillings.[84] In another case involving the same officer, the court convicted him *in absentia* without summoning him, and then the officer cited himself for contempt of court when he failed to attend the session of court of which he had no notice.)[85]

Neill was generally pleased with the existing laws, which were "interesting for the good sense which prompted them and for the very simplicity of the language in which they [we]re framed. The Pitcairners ha[d] done a good job on their island."[86] Neill submitted a proposed code with his report, a comprehensive codification, and revision of the existing laws.[87] It was not enacted. However, Neill suggested that the people were willing for immigration to be controlled by the High Commissioner, the result being that the High Commissioner declared Pitcairn a closed district, and barred visitors without a permit.[88]

---

83. *McLoughlin Twentieth*, *supra* note 33, at 68. McLoughlin's private report in 1958 was much harsher: "the picture I obtained of criminal proceedings was rather disturbing and I consider the many complaints made to me that the Court was a farce were justified." MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶ 75. The irregularities of the court's practice, based on a review of the court records, are detailed in *McLoughlin Twentieth*, *supra* note 33, at 69–73. McLoughlin did try to systematically train the court officers when he visited. MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶ 79. He also left detailed instructions for procedures for investigating, prosecuting, and trying offenses. MCLOUGHLIN 1958 REPORT, *supra* note 74, at Enclosure No. 3. *See also* Notes of Discussions Held at Colonial Secretary's Office, Suva, Fiji, Aug. 7, 1937 at 6, *in* 5 PCR 5-2148 (original in WPA 2334/37) (James Scott Neill felt "[i]f appeals [from the island court] were allowed almost every case would necessarily quashed since the Chief Magistrate's knowledge of Court procedure was meagre in the extreme."). Extracts from the Register of Summons, 1908–1916, are in 4 PCR 4-1959 (FCOA PIT 1/I-13).

84. MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶ 77.

85. *Id.* ¶ 76. It was a conviction of the same police officer that led to the appeal to the Supreme Court of Fiji in 1951 that resulted in the entirety of the island regulations being invalidated.

86. NEILL TONGA, *supra* note 78, at 185−86.

87. *Id.* at 29–51.

88. *Id.* at 21; Closed Districts (Pitcairn Group) Regulation No. 3 of 1938, § 2 (W. Pac. High Comm'n) (brought into force by W. Pac. High Comm'n Proclamation No. 5 of 1938, 1938 W. PAC. HIGH COMM'N GAZETTE 44).

Britain had traditionally expected each colony to pay its own expenses.[89] The Treasury was so hard-hearted in its skinflint attitudes that it once responded to a request by the Colonial Office for funds for cemeteries abroad by suggesting the dead be buried at sea.[90] Neill examined the island's finances and concluded that the only possible way to pay for a proper government and school was to issue postage stamps.[91] The island economy at the time, and for many years thereafter, was on a subsistence-barter basis.[92] The islanders were even able to barter through the mail with suppliers in the United States.[93] The island's exports have been souvenirs—including baskets and carved wooden curios—sold to those on passing ships and through the mail.[94] So important is this work, there is a government agency for selling souvenirs.[95] Oranges were also once exported—but this trade was cut-off by World War II.[96]

V. H.E. MAUDE: 1940–41

Henry Evans "Harry" Maude was born in India in 1906, educated at Jesus College, Cambridge, and entered the colonial service in the Gilbert

---

89. BRIAN L. BLAKELEY, THE COLONIAL OFFICE, 1868–1892, at 138–42 (1972) (discussing allocating costs to colonies). *See also* ROBERT V. KUBICEK, THE ADMINISTRATION OF IMPERIALISM: JOSEPH CHAMBERLAIN AT THE COLONIAL OFFICE 68–91 (1969) (Duke Univ. Commonw. Stud. Ctr. Publication No. 37) (describing Treasury's control over colonial expenditures).

90. BLAKELEY, *supra* note 89, at 145–46. *Cf.* MICKEY'S CHRISTMAS CAROL (Walt Disney Pictures 1983) (Ebeneezer Scrooge [Scrooge McDuck (the voice of Alan Young)] happily notes the money he saved on the tombstone of Jacob Marley [Goofy (the voice of Hal Smith)] by burying his late partner at sea).

91. *Neill Report*, *supra* note 78, at 23–25.

92. *See*, *e.g.*, Ada M. Christian, *Life on Pitcairn Island: An Interesting Example of Modern-Day Socialism*, 18 PAC. ISLANDS MONTHLY, Aug. 25, 1937, at 19 (Austl.). *See generally* Albert V. Moverley, *Pitcairn Island: An Economic Survey*, 4 TRANS. & PROC. FIJI SOC'Y 61 (1950).

93. *See*, *e.g.*, *Bounty Barter*, 55 TIME, Mar. 20, 1950, at 85 (discussing transactions with a Philadelphia manufacturer).

94. *Neill Report*, *supra* note 78, at 8; SILVERMAN, *supra* note 9, at 103–05; Edwin N. Ferdon, Jr., *Pitcairn Island, 1956*, 48 GEOGRAPHICAL REV. 69, 76–80 (1958) (discussing islanders' income); *A Visit to Pitcairn Island*, SYDNEY MORNING HERALD (Sydney, N.S.W.), Jan. 9, 1905, at 6 (NLA) (describing visit to Pitcairn during which food was traded for curios); Cynthia Fletcher, *Pitcairn Island Emerges From Its Obscurity*, THE ADVERTISER (Adelaide, S. Austl.), Nov. 24, 1951, at 6 (NLA) (baskets).

95. *See* Pitcairn Souvenir Agency Ordinance No. 2 of 1964 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 27) (LLMC).

96. *Neill Report*, *supra* note 78, at 8; *Life on Pitcairn*, CAIRNS POST (Queensl.), Dec. 15, 1938, at 16 (NLA); *McLoughlin Twentieth*, *supra* note 33, at 82. *See also* MANORIAL RESEARCH, *supra* note 2, at 134 (illustrating the first issue of stamps, the lowest denomination of which depicts oranges); F.P. Ward, *Seven Months Mail in One Day*, 45 AUSTRALASIAN RECORD, Nov. 10, 1941, at 4 (Austl.) (discussing difficulties in shipping caused by war).

and Ellice Islands Colony.[97] In July 1940 he was dispatched to Pitcairn by the High Commissioner to bring "the islanders those twin blessings of civilization, a legal code[,] and . . . postage stamps."[98] Maude, appointed a Deputy High Commissioner for the purpose, spent eight months there—not by design but because the outbreak of hostilities in the Pacific disrupted shipping and stranded him.[99] His initial impression was that "the local government had little control over the people, and law enforcement was conspicuous by its almost total absence."[100]

Maude used Neill's 1937 draft in composing the new code.[101] He spent three months working on this and training the islanders in public administration.[102] Maude discussed the code with an elected committee,

---

97. *See generally* SUSAN WOODBURN, WHERE OUR HEARTS STILL LIE: HARRY AND HONOR MAUDE IN THE PACIFIC ISLANDS (2003). Maude, who died in 2006, after his colonial service, became a distinguished historian of the Pacific. Niel Gunson, Obituary, *Harry Maude:* Unimane, *Statesman, and Pacific Historian*, 42 J. PAC. HIST. 109 (2007) (Austl.); ROLF DU RIETZ, THE CAUSES OF THE BOUNTY MUTINY: SOME COMMENTS ON A BOOK BY MADGE DARBY 5 (1965) (Studia Bountyana No. 1) (calling Maude "that unrivalled [sic] authority on the history of Pitcairn Island and on early Pacific history in general.").

98. Letter from H.E. Maude, Pitcairn Island, to Harry L. Shapiro, American Museum of Natural History, New York, N.Y. Oct. 15, 1940, *in* 5 PCR 5-2231 (MP MSS 0003, Part 1, Series J, Box 28).

99. Robert Langdon, *Harry Maude: Shy Proconsul, Dedicated Pacific Historian*, *in* THE CHANGING PACIFIC: ESSAYS IN HONOR OF H.E. MAUDE 10–11 (Niel Gunson ed., 1978); WOODBURN, *supra* note 97, at 159–69. Maude's commission is at 5 PCR 5-2196 (MP MSS 0003, Part 1, Series A, Box 1, File 30).

100. H.E. Maude, *Pitcairn Island: A General Report*, ¶ 2 (June 6, 1941), *in* 5 PCR 5-2198–2229 [hereinafter *Maude General*].

101. *Cf.* H.E. Maude, Notes on Final Revision of the Pitcairn Government Regulations, 1940, May 1942, *in* 5 PCR 5-2270 (WPA WPHC 23/II, File 10/2/2, vol. 2, item 46(a)) [hereinafter Maude Notes on Final Revision]. This report shows how the Neill draft (*Neill Report*, *supra* note 78, at 29–51) was amended for the enacted regulations. Maude stated changes were made when:

> (a) owing to the legal phraseology employed, the meaning of the regulation was not clear to the Committee and it was consequently desirable to use one or more colloquial expressions; (b) the regulations were not based on any previous law or custom and was regarded as unnecessary or undesirable by the Committee; (c) the Committee were of the unanimous opinion that the regulation, while not included in the draft code, should be included in the draft code, should be inserted as being either in conformity with some existing law or custom or else a definite improvement on present practice. No alteration, other than in wording, was made until I was satisfied that is was in accordance with the wishes of the islanders themselves.

Maude General, *supra* note 100, ¶ 8. Maude also drafted another report tracing the sources of the code to the prior codes enacted for the island. H.E. Maude, *Pitcairn Island Government Regulations, 1940: Table Showing the Sources from Which the Regulations Are Derived* (May 1942), *in* 5 PCR 5-2283 (WPA WPHC 23/II, File 10/2/2, vol. 2, item 46(b)).

102. *Maude General*, *supra* note 100, ¶ 4.

and it was then reviewed at mass meetings before every adult signed it.[103] Maude felt this "confer[red] on the regulations the most authoritative sanction possible: the free and unanimous consent of the entire population."[104] When Maude had been stationed in the Gilbert and Ellice Islands Colony, he had similarly rewritten its laws in consultation with the people, replacing a noxious paternal regime whose legislative intent was of missionary reforming zeal.[105] The new Pitcairn code was approved by the High Commissioner in December 1941, then gazetted, and printed as a booklet.[106]

The government consisted of an Island Council made up of the Island Magistrate, two assessors, the chairman of the Island Committee, and the Island Secretary.[107] Essentially, the system codified by Simons in 1904 was retained.[108] All officers were elected except for the secretary, who was appointed by the High Commissioner.[109] The council was to meet monthly and issue regulations for "good order, prisons, public works, the public boats, education, the control of livestock, drainage, and sanitation," the latter being two particularly British fixations.[110]

A change came in 1954 by a new ordinance empowering the Governor to appoint an advisory member of the Island Council.[111] Traditionally, this

---

103. *Id.* ¶¶ 5–7. *See also* Langdon, *supra* note 99, at 10; WOODBURN, *supra* note 97, at 162; 2 NAVAL INTELLIGENCE DIVISION, U.K. ADMIRALTY, PACIFIC ISLANDS: EASTERN PACIFIC 87 (1943); *Won: A Constitution*, 40 TIME, Aug. 17, 1942, at 32. The original copy of the laws, signed by the islanders, is in the Maude Papers, MSS 0003, Part 1, Series A, Box 1, File 9/1940, *reprinted in* 5 PCR 5-2234–36.

104. *Maude General*, *supra* note 100, ¶ 12. Nevertheless, the regulations were found by the Chief Justice of Fiji to have no legal sanction. *See below at* section VI.

105. Langdon, *supra* note 99, at 7–8; WOODBURN, *supra* note 97, at 137–40.

106. *Instructions for the Guidance of the Local Government of Pitcairn Island*, 1941 W. PAC. HIGH COMM'N GAZETTE 359, *reprinted as* PITCAIRN ISLAND GOVERNMENT REGULATIONS 1940 (Suva, Fiji, F.W. Smith, Gov't Printer 1941), *in* 5 PCR 5-2237–64 (WPA WPHC 23/II, File 10/2/2, vol. 2, item 42).

107. Pitcairn Island Government Regulations, 1940, § 4 (W.P.H.C.).

108. *McLoughlin Twentieth*, *supra* note 33, at 68.

109. Pitcairn Island Government Regulations, 1940, §§ 3, 8(3).

110. *Id.* § 7.

111. Pitcairn Island Government (Amendment) Ordinance No. 4 of 1954 (repealed by Local Government Ordinance No. 1 of 1964 (LLMC), *reprinted in* 6 PCR 6-2648. This was enacted

> [I]n order to strengthen [the Island Council's] authority and to make clear the position of an education officer holding the appointment of [an] advisory member. . . . [I]n the past there has been some doubt among the people about the Education Officer's authority as Government Adviser and it is hoped that this legislation will make his position clear.

Letter from Office of Governor, Suva, to Pitcairn Island Chief Magistrate, Dec. 14, 1954, *in* 6 PCR 6-2651. Claydon had urged the schoolteacher's governmental role be put on a legal basis. Claydon, *supra* note 33, ¶ 57.

was the "education officer," i.e. for example, the schoolteacher.[112] The teacher, appointed from outside, before this law had acted unofficially as government adviser, and was, theoretically, the eyes on the ground of the administration in Fiji.[113] The government's legal adviser, visiting in 1958, thought this was an unwise combination of roles. "Chosen rather for their capabilities in the schoolroom than in matters administrative, and being accustomed to a position of ascendancy over their pupils, they were not always the most suitable persons to be entrusted with the somewhat difficult and delicate role of an administrative adviser."[114] Nevertheless, as late as 2004 the teacher was still identified as government adviser.[115]

The island court consisted of a magistrate and two assessors.[116] Its jurisdiction was limited to civil cases of less than £10 and criminal cases where the maximum punishment was three months imprisonment and a £10 fine. More serious cases had to be referred to the High Commissioner's

---

112. DAVID SCOTT, WINDOW INTO DOWNING STREET 171 (2003).

113. Claydon, *supra* note 33, ¶ 56 ("Ever since . . . 1948 there has been an increasing tendency on the part of the Administration to treat the Education Officer as a source of advice on administrative questions and as an intermediary between Suva and local government. The islanders . . . have now come to realize that if they want anything, their requests have a very much more favorable chance of acceptance if a sympathetic covering letter from the Education Officer is sent off. . . . The Chief Magistrate . . . readily seeks the Education Officer's advice, and generally follows it."); Ferdon, *supra* note 94, at 80 ("The more direct representative of the government, although he is unofficial, is the schoolteacher, whose position is by appointment out of Fiji. Anything that occurs on the island of interest to Fiji is taken up with, or through, the schoolteacher. Officially, therefore, Pitcairn is run by Pitcairners, one of whom is appointed by the Fiji government, but in fact the government maintains a 'blind' representative on the island whose job depends on Fiji and whose home ties are outside the island.") *Contra* Christian v. The Queen, [2006] UKPC 47, [2007] 2 A.C. 400, [2007] 1 L.R.C. 726, 130 I.L.R. 696, ¶ 47 (appeal taken from Pitcairn Is.) (opinion of Lord Hope of Craighead) ("The schoolteacher (from New Zealand) doubles as the Government Adviser. But [he] is not viewed by the islanders as being in a position of real authority."), *quoting* Letter from Karen S. Wolstenholme, Acting Pitcairn Governor, Wellington, to Stephen Paul Evans, Overseas Territories Dept., Foreign & Commw. Office, London, May 1, 2000 (the original letter is in 8 PCR 8-3629); MARKS, *infra* note 220, at 189 (stating "teachers were not heeded . . . unless they told colonial authorities what they wanted to hear").

114. *McLoughlin Twentieth*, *supra* note 33, at 80. McLoughlin's language in his 1958 private report to the High Commissioner was much stronger. He faulted past teachers—naming them—for abusing their position to push their "pet theories" even though they "had little experience of dealing with adult problems or of practical affairs" and claimed they "interfere[d] in matters of which they have no knowledge and [tried] to put into practice impractical theories." MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶ 28. He gave a specific example of the adviser involving himself in the running of the post office and causing a £30,000 discrepancy in the accounts because of faulty bookkeeping. *Id*. ¶ 42. McLoughlin accused advisers of committing other misconduct. *Id*. ¶¶ 112–19.

115. U.N. G.A., Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Pitcairn*, ¶ 38, U.N. Doc. A/AC.109/2004/2 (Mar. 23, 2004) [hereinafter 2004 DECOLONIZATION REPORT].

116. Pitcairn Island Government Regulations, 1940, § 14.

Court in Fiji.[117] Appeals from the Island Court went to the Supreme Court of Fiji.[118]

The Criminal Code contained a wide range of offenses: contempt of court, perjury, escape from prison, abusive or threatening language, profane or obscene language, making false reports, assault, disorderly conduct, indecent behavior, adultery, cohabitation, theft, receiving stolen property, conversion, neglect of illegitimate children, causing fires, damage to property, damaging Polynesian rock carvings, trespass, polluting the drinking water, harming noddy birds, having an unlicensed gun, carelessly firing a gun, harboring sick goats, fishing with dynamite, importing or making liquor, and breaking ships' quarantine.[119] A remarkable law fines registered voters who fail to cast a ballot.[120] Another punished those who cried "sail ho!" when no ship was in sight.[121] The common law crimes of murder and rape of an adult woman were not codified.[122]

While on Pitcairn, Maude convened the High Commissioner's Court for the Western Pacific. Maude heard two cases. One was a charge of assault—the accused plead guilty and was fined £5. The second was a charge of obstructing police business—that defendant was convicted and given two weeks at hard labor.[123]

---

117. *Id.* §§ 15–16.

118. *Id.* § 21(4).

119. *Id.* §§ 56–104.

120. *Id.* § 94. *Accord* Summary Offences Ordinance No. 15 of 2000, § 21 (codified in LAWS OF PITCAIRN, *supra* note 21 c. 5); Commonwealth Electoral Act 1918, § 245(1) (Austl.) ("It shall be the duty of every elector to vote at each election.").

121. *Id.* § 98. *Cf.* CASEY, *supra* note 75, at 79–80 (describing vividly how "sail ho!" stopped all other activity on island).

122. *Compare* Pitcairn Island Government Regulations, 1940, § 65 ("unlawful carnal knowledge" a crime only when victim is under fourteen) *with* Justice Ordinance No. 1 of 1966, § 88 (LLMC) ("Any male person who shall have carnal knowledge of any female child of or over the age of twelve years shall be guilty of an offense and liable to imprisonment for a hundred days.").

123. *In re* Elmer Smith, W. Pac. High Comm'r Ct. (Feb. 9, 1941), *in* 5 PCR 5-2358–63; *In re* Morris Christian, W. Pac. High Comm'r Ct. (Feb. 3, 1941), *in* 5 PCR 5-2364–70 (Both in the Maude Papers, MSS 0003, Part 1, Series A, Box 1, File 16/1941). In the latter case, Maude in his sentence observed "the Court has taken into account the fact that the accused, Morris Christian, appears to be of an excitable and unbalanced temperament and recommends that he should be examined by a qualified medical specialist on opportunity occurring." Maude in a report on the case harshly referred to the defendant as "a half-witted kleptomaniac" and claimed he was to blame for "a large part of the trouble in this island." Maude compiled a list of twenty-one convictions in the Island Court of Morris Christian, all minor charges such as petty theft and swearing. Letter from H.E. Maude, Deputy Western Pacific High Commissioner, Pitcairn Island, to H.H. Vaskess, W. Pac. High Comm'n, Suva, Fiji, Feb. 15, 1941, *in* 5 PCR 5-2374–79 (WPA WPHC 23/I MP 1816/1941). Claydon and McLoughlin were instead sympathetic toward the man, McLoughlin opining he should never have been convicted of anything because of his mental capacity "he [was] not capable of forming the necessary intention" for stealing. Claydon, *supra* note 33, ¶¶ 141–42; MCLOUGHLIN 1958

The post office Maude opened was a great success.[124] From 1926 to 1940 the New Zealand postal authorities operated a post office on Pitcairn using New Zealand stamps. Before then, letters were franked "Posted at Pitcairn Island: No Stamps Available."[125] During the first six months they were offered, £12,760 worth of Pitcairn Islands—plural—stamps were sold.[126] Stamp sales paid all public expenses for decades.[127] They paid entirely for the island schoolhouse.[128] This self-sufficiency ended recently when the accumulated surpluses were exhausted.[129]

REPORT, *supra* note 74, ¶ 62 (xxvi). A warm obituary of him appears at 26 PITCAIRN MISCELLANY, Sept. 1984, at 1 (Pitcairn Is.), *in* 8 PCR 8-3489.

124. Arthur A. Delaney, *History of Pitcairn Island Post Office*, 83 AM. PHILATELIST 405, 405 (1969) (noting orders for first-day covers of first stamps were so large it took two weeks to cancel them all); SPENCER MURRAY, *supra* note 9, at 127 (describing elaborate procedures for destroying unsold stamps, an indication of the importance of protecting philatelic market). *See also* SCOTT, *supra* note 112, at 176 (describing enthusiastically his role as Pitcairn Governor in approving stamp issues).

125. Arthur A. Delaney, *Pitcairn's Early Postal History*, 83 AM. PHILATELIST 307 (1969). *See generally* Carriker & Field, *supra* note 75.

126. *Maude General*, *supra* note 100, ¶ 35. Harry Luke, Western Pacific High Commissioner when the first stamps were issued, stated the plural "islands" was done at his insistence because of the outlying trio of islands. HARRY C. LUKE, ISLANDS OF THE SOUTH PACIFIC 90 (1962). For Pitcairn stamps, see generally VERNON N. KISLING, JR., PITCAIRN ISLANDS SPECIALIZED STAMP CATALOG (3d ed. 2010).

127. Arne Falk Rønne, *Pitcairn's New Mutineers?*, 28 GEOGRAPHICAL MAG. 669, 674–76 (1966) (Eng.) (quoting postmaster of island). *See also* Janet Kinnane, *People of Pitcairn*, 16 OCEANS, Sept.−Oct. 1983, at 42, 47 ("Philatelists keep Pitcairn solvent"); Dea Birkett, *Fletcher Christian's Children*, N.Y. TIMES, Dec. 8, 1991, § 6 (Magazine) at 66, 70 (stating stamps finance government); PITCAIRN GOVERNMENT, A GUIDE TO PITCAIRN 47 (1st ed. 1963) (showing government income and expenses 1957–1962, including postage sales).

128. Ernest Schubert, *A School from Postage Stamps*, 40 PAC. ISLANDS MONTHLY, June 1960, at 41 (Austl.), *reprinted in* PIM'S PACIFIC, *supra* note 32, at 35–37. Schubert was the Pitcairn teacher in 1958 to 1959. His most comprehensive report on Pitcairn during his time there is Biennial Report, Colony of Pitcairn Island, 1958 and 1959, *in* 6 PCR 6-2894–2932.

129. SILVERMAN, *supra* note 9, at 103–07 (self-supporting); OFFICE OF GOVERNOR OF PITCAIRN ET AL., PITCAIRN ISLANDS SINGLE PROGRAMMING DOCUMENT 19–21 (2003) [hereinafter PITCAIRN SINGLE PROGRAMMING DOCUMENT] (discussing island finances and presenting a financial statement for public accounts showing stamp revenue and depletion of surplus), *available at* http://ec.europa.eu/development/icenter/repository/print_pit_spd_en.pdf (last visited Jan. 4, 2012); Leslie Edwin Jacques, *No Man Is an Island*, 52 N.Z. MGMT., Mar. 2005, at 16 (stating surpluses exhausted; author was island commissioner). *Cf.* MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶ 29 ("The present [1958] Pitcairn economy is an unreal one relying for on stamps sales for revenue."); D.P.J. Wood, *The Smaller Territories: Some Political Considerations*, *in* PROBLEMS OF SMALLER TERRITORIES 33 (Burton Benedict ed., 1967) (University of London Inst. on Commonw. Stud., Commonw. Papers No. 10) (stating stamps "merely satisfy the whims of rich men and small boys. They are fragile foundations for economic and political advancement."); Joel Slemrod, *Why Is Elvis on Burkina Faso Postage Stamps? Cross-Country Evidence on the Commercialization of Sovereignty*, 5 J. EMPIRICAL LEGAL STUD. 683 (2008) (examining "stamp-pandering" nations selling their sovereignty).

In the late 1940s the High Commissioner and his staff argued that Pitcairn should be given by Britain to New Zealand. Since 1) Pitcairn had no natural connection to any of the other territories administered by the High Commission; 2) the existing shipping connections linked the island to New Zealand; and 3) there were a large number of Pitcairners residing in New Zealand.[130] (Plus New Zealand had a history of administering small Pacific Islands such as the Cooks, Niue, and the League of Nations-mandated territory of Western Samoa.)[131] The advice was not taken.

VI. POST-WAR: 1952

Maude in 1963 explained of his 1940 Code that "[m]y hope was that, regardless of arguments about the applicability of the British Settlements Act and other legislation, that the best sanction of all must surely be the written consent of every person affected by the legislation. But I imagine this is the naïve view of a layman."[132] Indeed it was, for the Supreme Court of Fiji—sitting in its appellate capacity over the Western Pacific High Commission islands—in 1951 had declared Maude's code to have been issued *ultra vires*, holding the High Commissioner had no power to create courts or laws for Pitcairn.[133] The Court did not consider the idea that the islanders had a common law right to make laws.[134] By ignoring the fact that the laws had local sanction, the islanders' views were made irrelevant. And having found the laws were invalid, the Supreme Court decided it had

---

130. Memorandum by the Chief Sec'y, Western Pacific High Commission, May 4, 1948, *in* U.K. FOREIGN & COMMW. OFFICE, WESTERN PACIFIC HIGH COMMISSION: SELECTED DOCUMENTS 167–72 (2002); Maude Notes on Final Revision, *supra* note 101, *passim*; S. Cameron, *Pitcairn—Its Place in a Pacific World*, 41 N.Z. GEOGRAPHIC SOC'Y REC. 3 (1966) (discussing Kiwi ties to island).

131. *See generally* NEW ZEALAND'S RECORD IN THE PACIFIC ISLANDS IN THE TWENTIETH CENTURY (Angus Ross ed., 1969); *Mandat pour le Samoa Allemand/Mandate for German Samoa*, 2 LEAGUE OF NATIONS OFFICIAL J. 91 (1922) (Switz.) (giving New Zealand authority to run Western Samoa, which it did until 1962), *reprinted in* 17 AM. J. INT'L L. SUPP. 173 (1923).

132. Letter from H.E. Maude, Research School of Pacific Studies, Australian National University, Canberra, to Kenneth O. Roberts-Wray, Colonial Office, London, Oct. 28, 1963, *in* 7 PCR 7-3015; (MP MSS 0003, Part III, Series D/3, Box 63).

133. *In re* Floyd McCoy, W. Pac. High Comm'n Review No. 41 of 1951, ¶ 3 (Fiji Sup. Ct., July 14, 1951) (Vaughn, C.J., in chambers) ("The Pitcairn Regulations of 1940 are clearly not made under [Pacific Order, 1893, §108]. . . . It appears, prima facie, therefore that they have no legal effect"), *in* 6 PCR 6-2539; *id*. ¶ 8 (Pacific Order, 1893, did not enable High Commissioner to neither create courts on Pitcairn nor provide for legislation for the island). This was not the first time fears were expressed about *ultra vires* regulations in the Pacific. Parliament in 1916 enacted a statute, the Pacific Islands Regulations (Validation) Act, 1916, 6 & 7 Geo. 5, c. 9, to validate regulations issued by the High Commissioner after the applicability of his regulations to "settlements" was questioned by Britain's Law Officers. 21 PARL. DEB., H.L. (5th ser.) (1916) 721–22 (U.K.) (statement of Lord Islington).

134. *Cf.* KENNETH O. ROBERTS-WRAY, COMMONWEALTH AND COLONIAL LAW 154 (1966).

no power to review an appeal from Pitcairn.[135] An order-in-council had to be issued by the Queen to remedy the lack of authority and under the new order Maude's code was re-enacted.[136]

The new order was also prompted by the decision to separate the offices of Governor of Fiji and Western Pacific High Commissioner, as the High Commissioner and his administration were being moved to the Solomon Islands.[137] (The High Commission terminated in 1978 after the Solomons, the last of the territories under it, gained independence.)[138] The Governor of Fiji continued to have responsibility for Pitcairn, as he was also Governor of Pitcairn.[139] There was no real change in the administration, however, only a change in nomenclature.[140] The Pitcairn

---

135. *In re* McCoy, W. Pac. High Comm'n Review No. 41 of 1951, ¶ 13 (Fiji Sup. Ct. July 14, 1951). Fiji Chief Justice J.H. Vaughn included this as a postscript to this opinion: "I am unable to find any authority for the statement in Hals. [Halsbury's] Laws of England, 2nd Ed., Vol[.] XI, p. 9, footnote (k) that Pitcairn was brought under the High Commissioner for the Western Pacific in 1898." The authority the Chief Justice could not find is described in note 19, *supra*.

136. Pitcairn Order, 1952, S.I. 1952/459, § 5 (U.K.), *amended by* Pitcairn (Amendment) Order, 1963, S.I. 1963/368 (U.K.), *revoked by* Pitcairn Order, 1970, S.I. 1970/1434 (U.K.), *issued pursuant to* British Settlements Act, 1887, 50 & 51 Vict., c. 54, *and* British Settlements Act, 1945, 9 & 10 Geo. 6, c. 7; Pitcairn Island (Local Government Regulations) Ordinance No. 2 of 1952 (LLMC) (repealed by Local Government Ordinance No. 1 of 1964 (LLMC)). Included in the re-enactment was the review by the Supreme Court of Fiji, which was exercised in *In re* Radley Christian (Fiji Sup. Ct., Mar. 2, 1957) (Hyne, C.J., in chambers), *in* 6 PCR 6-2670–71 (original in WPA F138/13/3).

137. DUPONT, *supra* note 28, at 1185. *Cf.* REPORT OF A COMMISSION APPOINTED TO INQUIRE INTO THE WORKINGS OF THE WESTERN PACIFIC ORDER IN COUNCIL AND THE NATURE OF THE MEASURES REQUISITE TO SECURE THE ATTAINMENT OF THE OBJECTS FOR WHICH THOSE ORDERS IN COUNCIL WERE ISSUED, 1884, [C. (2d ser.) 3905], ¶ 195, *in* 55 P.P. (1884) 781, MF 90.485 (suggesting offices separate and High Commissioner move to New Guinea); ALEXANDER WILLIAM GEORGE HERDER GRANTHAM, VIA PORTS: FROM HONG KONG TO HONG KONG 78 (1965) (Grantham, former High Commissioner, stating leaving Suva was a mistake and suggested the Solomons instead be administered by Australia).

138. *See* Solomon Islands Independence Order, 1978, S.I. 1978/783 (U.K.) (effective July 7, 1978). One source says the Western Pacific High Commission terminated four days later on July 11. U.K. FOREIGN & COMMW. OFFICE, *supra* note 130, at vii. The High Commissioner had served as Governor of the Solomon Islands until they became independent. CLIVE MOORE, HAPPY ISLES IN CRISIS: THE HISTORICAL CAUSES FOR A FAILING STATE IN SOLOMON ISLANDS, 1998–2004, at 35 (2004).

139. *Fiji to "Rule" Pacific Isles*, THE ARGUS (Melbourne, Vict.), Apr. 10, 1952, at 1 (NLA). There are other examples of double governorships. From 1965 to 1973 the Governor of the Bahamas concurrently served as Governor of the Turks and Caicos Islands, a separate colony. *See* Turks and Caicos Islands (Constitution) Order, 1965, S.I. 1965/1861 (U.K.); Turks and Caicos Islands (Constitution) Order, 1969, S.I. 1969/736 (U.K.). And today the Governor of the Falklands is also the Commissioner, i.e. governor, of South Georgia and the South Sandwich Islands. IAN D. HENDRY & SUSAN DICKSON, BRITISH OVERSEAS TERRITORIES LAW 35 (2011).

140. *McLoughlin Twentieth*, *supra* note 33, at 78.

Office on Fiji was merged in 1958 to become the South Pacific Office, reporting to the Governor.[141]

Despite the removal of the High Commissioner's authority over Pitcairn, the High Commissioner's Court initially continued to exercise jurisdiction. Its jurisdiction was invoked once more on Pitcairn: Donald A. McLoughlin, a magistrate in Fiji, was in 1958 appointed a judicial commissioner of the High Commissioner's Court to hear a petition for divorce.[142]

The new Pitcairn Order was accompanied by instructions to the Governor about oaths and the form of the laws.[143] Typically laws did not become effective until after they were posted on Pitcairn. The usual procedure was 1) the laws would be formulated at the governor's office with the input of the legal adviser; 2) copies would be mailed to Pitcairn to the Chief Magistrate with instructions to post them on the public notice board; 3) the Chief Magistrate would do so and send a telegram to the Governor informing him of the date of posting; and 4) notice would be placed in the *Fiji Gazette* that the law took effect on the date of.

These notices would later be made in the *Pitcairn Miscellany*, the island's newspaper—which was almost entirely circulated to Pitcairn's multitude of fans abroad.[144] The Royal Instructions forbade the Governor to pass laws to grant divorces, give properties to himself, affect the currency, or regulate the military, among other restrictions.[145]

VII. CONTINUED NEGLECT: 1950S

A colonial officer who visited for eight weeks in 1954 said the word to describe the island administration was "anarchy."[146] His explanation was that:

---

141. *Id.* at 83.

142. Young v. Young, W. Pac. High Comm'r Ct. No. 1/1958 (Feb. 21, 1958), *in* 6 PCR 6-2756–58 (original probably in WPA). The correspondence amongst officials of the Pitcairn Government about how to proceed with the divorce case, including the selection of McLoughlin to preside over them, is in 6 PCR 6-3712–55. McLoughlin's account of the case is at MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶¶ 64–71.

143. Pitcairn Royal Instructions, 1952 (London, H.M.S.O 1952), *in* 6 PCR 6-2553, amended by Pitcairn Royal Instructions, 1963, [1963] 1 S.I. 1423; *and* Pitcairn Royal Instructions, 1966, [1966] 3 S.I. 5185. *See also* ROBERTS-WRAY, *supra* note 132, at 146–49 (discussing royal instructions to colonial governors).

144. *See*, *e.g.*, 25 PITCAIRN MISCELLANY, Nov. 1983 at 4 (Pitcairn Is.), *in* 8 PCR 8-3484; 25 PITCAIRN MISCELLANY, May 1984 at 3 (Pitcairn Is.), *in* 8 PCR 8-3488. *Cf.* FAR EAST AND AUSTRALASIA 2009, at 1055 (Lynn Daniel ed., 40th ed. 2008) (Europa Regional Surveys of the World) (stating *Miscellany*'s circulation was 1,400).

145. *See supra* note 142 (Pitcairn Royal Instructions).

146. Claydon, *supra* note 33, ¶ 50.

> To hold office in the local government is no honor; in fact . . . election to the post of Chairman of the Internal Committee or Chief Magistrate is the precursor to a period of hard work, no thanks[,] and much abuse. The current Pitcairn attitude is [that officials] "are paid for the work; let them do the work."[147]

He attributed laxness in the administration to the fear that a zealous enforcer of the laws would, when out of office, face retribution by his successors.[148] The rule of law had not been established on Pitcairn, he claimed, and suggested an outside presence was needed.[149] Five years later another visiting official was highly critical of the island leadership, regarding these men as exemplars of the Peter Principle, and suggested an outsider be stationed there because the islanders were incapable of administering their own affairs.[150] He also observed a hostility to the island police officer "due to Pitcairner[s'] dislike of any sort of law enforcement."[151] These modern officials repeated the statements made by British visitors for a century that an outsider was needed to take charge.[152]

---

147. *Id.*

148. *Id.* ¶ 49 ("few, if any, of the candidates for office can offer themselves with clean hands. It is difficult then to expect an individual to invite reference to his past, or to incur ill-will and later retribution when he is out of office. . . . Councils go on from year to year in a humdrum fashion, hoping against hope that nothing will occur during their term of office to oblige them to depart from their state of lethargy."). The same thing was reported in 1885 on Norfolk Island, which was settled by Pitcairners in 1856:

> One thing is most certain, that is, that the present form of government by an elected Magistrate will never do, and *must* be stopped at once, for there is neither justice nor order. Everybody is so closely related, and everybody lives in a 'glass house', and is afraid to throw a stone, so that the Chief Magistrate *dare* not administer even justice, or he would be pounced upon at once, and is in a constant fear of how a decision will be regarded by others, who may, and would retaliate, if they do not approve.

Extract of a Letter from Henry Wilkinson, Q.C., to Lord Augustus Loftus, Governor of Norfolk Island & New South Wales, Sydney, *in* PAPERS RELATING TO HER MAJESTY'S COLONIAL POSSESSIONS: REPORTS FOR 1883, 1884, AND 1885, 1886 [C. (2d series) 4842], at 227–28 (U.K.), *in* 45 P.P. (1886) 1, MF 92.337-9, IUP Colonies 24. Other correspondence between Wilkinson and Loftus, highly critical of the Norfolkers' government, is printed in that report and at PAPERS RELATING TO HER MAJESTY'S COLONIAL POSSESSIONS: REPORTS FOR 1884 AND 1885, 1885, [C. (2d series) 4583], at 279–88 (U.K.), *in* 52 P.P. (1884–85) 559, MF 91.413-16, IUP Colonies 24.

149. Claydon, *supra* note 33, ¶ 50 ("law has little meaning to the average Pitcairner or to his local government.").

150. MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶¶ 26–29.

151. *Id.* ¶ 39.

152. *See*, *e.g.*, Letter from Capt. Edward Russell, *H.M.S. Actaeon*, to Commodore Mason, January 1837, *in* 3 PCR 3-1228 (TNA ADM 1/48) ("I fear that unless some person with authority from the Government is sent to superintend their internal affairs, that there will be constant quarrels and disturbances upon the Island."); Letter from Lt. Cmdr. Henry S. Hunt, *H.M.S. Basilisk*, to Rear Adm. Richard Thomas, Commander-in-Chief, Pacific Station, Valparaiso, Chile, Aug. 1, 1844, *in* 3 PCR 3-1298 (TNA ADM

One call was made as long ago as 1838.[153] These 1950s visitors were also ignored. A recurring theme in modern writings on Pitcairn, is the claim that Britain has always neglected the islanders—one going so far as to state that the neglect was "lax to the point of turpitude."[154] A typical example of the laxity is a 1945 government report seemed less concerned with the effect of the poor administration on the islanders than with the bad publicity it produced for Britain in the press.[155]

Neglect was standard. Visits from colonial officials were years apart and sometimes lasted only hours.[156] The Western Pacific High

---

1/5561) ("I would again take the liberty of pressing on the notice of the Government that this interesting people should no longer be left without more efficient Authority to control them."); U.K. COLONIAL OFFICE, REPORT OF VISIT OF H.M.S. SAPPHO TO PITCAIRN ISLAND, 1882, ¶ 20 (London, H.M.S.O. 1882) (report of Capt. Bouverie F. Clark, who visited in 1882, stating an outsider was needed to take charge), *available at* http://www.jstor.org/stable/60229116 (last visited Jan. 4, 2012), *and in* 4 PCR 4-1481.

153. H.W. Bruce, *Voyage of H.M.S. Imogene, Captain H.W. Bruce—Sandwich, Tahiti, and Pitcairn Islands*, 7 NAUTICAL MAG. & NAVAL CHRON. 737, 743 (1838) (Eng.) ("It would be a great boon to this most amiable and deserving people, were our government to send them a duly authorized person of character, intelligence, and ability, to preside over them and their interests.").

154. Andrew Lewis, *Pitcairn's Tortured Past: A Legal History*, *in* JUSTICE, LEGALITY, AND THE RULE OF LAW: LESSONS FROM THE PITCAIRN PROSECUTIONS 61 (Dawn Oliver ed., 2009) (turpitude). *See also* Marc T. Greene, *Pitcairn's Island Is Losing Its 'Mutineers'*, 79 AM. MERCURY, Aug. 1954, at 35 (alleging the "British government has neglected [Pitcairn] from the start" and "Britain has been and continues to be singularly indifferent to it."); SILVERMAN, *supra* note 9, at 188 (stating "the paternal and sporadically generous attitude of the Crown has not precluded complaints that is was not doing enough for these distant cousins of the Empire"); Glynn Christian, Letter, *Looking After Pitcairn's Future*, THE TIMES (London), June 22, 1983, at 9 (complaining of neglect of Pitcairners and contrasting money spent on Falklanders); SIMON WINCHESTER, THE SUN NEVER SETS: TRAVELS TO THE REMAINING OUTPOSTS OF THE BRITISH EMPIRE 280 (1985) (stating "Pitcairners have good reason to think they and their tiny island are being shunned by the policy-makers and the bureaucrats in London"; this volume was published in Britain as *Outposts*); William Prochnau & Laura Parker, *Trouble in Paradise*, VANITY FAIR, Jan. 2008, at 103 (chronicling the history of London ignoring issues on Pitcairn). *Contra* R. v. Christian, [2005] PNSC 1, [2006] 1 L.R.C. 745, 75 BRIT. Y.B. INT'L L. 2004, at 428, ¶¶ 111−47 (Pitcairn Is. Sup. Ct.) (detailing last half century of efforts to inform islanders of the law and efforts to police Pitcairn). *Compare* Carlton Skinner, *Self-Government in the South Pacific*, 43 FOREIGN AFF. 137, 143−46 (1963) (criticizing "the 'zoo' theory of colonial administration" deliberately neglectful of residents' needs and desires) *with* Patsy T. Mink, *Micronesia: Our Bungled Trust*, 6 TEX. INT'L L. F. 181, 184–86 (1971) (giving examples of gross neglect by United States in administering Trust Territory of the Pacific Islands and how it had followed the "zoo theory").

155. H.E. Maude, Notes for Western Pacific High Commissioner on Pitcairn and New Zealand, Oct. 12, 1945, § (C)(b), *in* 7 PCR 7-3320 (WPA) (specifically mentioning American writer Marc Greene). Examples of Greene's critical articles are Marc T. Greene, *Pitcairn Island*, 174 THE SPECTATOR 475 (1945) (Eng.) [hereinafter Greene *Pitcairn Island*]; Marc T. Greene, *Pitcairn's Future*, 182 THE SPECTATOR 74 (1949) (Eng.); Greene, *supra* note 74; Greene, *supra* note 154.

156. The only visits under the High Commission administration were: Deputy High Commissioner R.T. Simons, five days in 1904; Simons, three days in 1907; High Commissioner Cecil Rodwell, seven hours in 1921; H.G. Piling, six hours in 1929; Consul Neill, thirty-seven days in 1937; Deputy High Commissioner Maude, seven months and nineteen days in 1940-1; Maude, eleven days in February 1944; and Maude,

Commissioners governed Pitcairn for fifty-four years, and only one visited: seven hours in 1921 while *en route* to England via the Panama Canal.[157] No Governor of Pitcairn visited his charge for the first twenty years the office existed.[158] When David Scott became governor in 1973, he found there was no ready way to visit the island. He had to rely on the good offices of the Royal Navy to convey him and it did so only because the Navy wished to observe France's nuclear tests nearby.[159] In 1982 the Governor visited for the first time in six years.[160] The governor in 1990, asked the Foreign Secretary for funds to provide for an annual visit by the administration to end the government's cheapskate policy of "ineffective long-range benevolence."[161]

VIII. REENACTMENTS: 1960S

In 1961, the laws of England were explicitly extended to Pitcairn.[162] Later the reception ordinance would be repeatedly changed to adopt the

---

twenty-one hours in August 1944. Maude, *supra* note 155, § (c). The 1929 visit is documented in H.G. PILLING, REPORT ON A VISIT TO PITCAIRN ISLAND, 1929 (1930) (Colonial Office Misc. Rep. 53). This problem of British colonial administrators failing to visit their charges is long-standing. *Compare* Guy H. Scholefield, *Problems of Reconstruction in the Pacific*, 10 UNITED EMPIRE: J. ROYAL COLONIAL INST., n.s. 330, 334 (1919) (Eng.) (AO) (observing Sir Ernest Bickham Sweet-Escott, Western Pacific High Commissioner from 1912 to 1918, "was not in the whole of his term of six years to visit the most important region of the High Commission, the Solomons and New Hebrides") *with* Ernest Bickham Sweet-Escott, Letter, *Problems of Reconstruction in the Pacific*, 10 UNITED EMPIRE: J. ROYAL COLONIAL INST., n.s. 338, 338 (1919) (Eng.) (AO) (confirming Scholefield's assertions and adding "he might have added that I was unable to visit Ocean and Pleasant (Walrus) Islands, the Gilbert, Ellice, and Union Islands, Fanning Island, and Pitcairn Island"—but was able to visit Tonga, which was *not* a British colony).

157. GRANTHAM, *supra* note 137, at 78 (Grantham, High Commissioner 1945–47, stated only one High Commissioner ever visited); RODWELL, *supra* note 73 (report of that one visit). Another account of Rodwell's visit is Ivy Dean, *The Loneliest Island: A Visit to Pitcairn*, 98 ADVENTIST REV. & SABBATH HERALD, Oct. 20, 1921, at 13, *reprinting account in* DAILY MAIL (London), Sept. 13, 1921.

158. SCOTT, *supra* note 112, at 162, 170 (Scott, governor 1973–75, was the first to visit). *See also* 391 PARL. DEB., H.C. (6th ser.) (2002) 882W (U.K.) (F.C.O. spokesman unable to state when a minister visited the island and no F.C.O. official of any rank had visited in seven years).

159. SCOTT, *supra* note 112, at 170.

160. 433 PARL. DEB., H.L. (5th ser.) (1982) 618 (U.K.) (statement of Lord Belstead).

161. Letter from Robin A.C. Byatt, Governor of Pitcairn, Wellington, to Douglas Hurd, Sec'y of State for Foreign & Commonwealth Affairs, London, Apr. 30, 1990, ¶ 18, *in* 8 PCR 8-3496 (TNA FPP 014/1/90). *Cf.* 849 PARL. DEB., H.C. (5th ser.) (1973) 278W (U.K.) (stating economic aid to Pitcairn in 1971 was only £379).

162. Judicature Ordinance No. 1 of 1961, § 7 (LLMC) (repealed by Judicature Ordinance No. 2 of 1970). Under the Pacific Order, 1893, §§ 21–22, English law had applied within the ambit of the High Commissioner. The laws of the United Kingdom do not apply in the dependent territories and generally Parliament does not legislate for them, instead it typically authorizes the sovereign to issue orders-in-council to provide for the territories. ROBERTS-WRAY, *supra* note 132, at 141–42. *See generally* ROBERT

laws of England as of a specified date; *e.g.*, in 1983 the laws of England as of January 1, 1983, were adopted.[163] Maude's 1940 regulations were replaced with new ordinances, but in substance left largely intact.[164] The Justice Ordinance, 1966, abolished the annually elected assessors and instead selected them off the voter rolls, like drawing names for jury duty.[165] It mostly retained the list of criminal offenses.[166] Codes of evidence and procedure were also enacted.[167]

Also in 1961 the judges of the Fiji Supreme Court were given jurisdiction over the islands in place of the High Commissioner's Court.[168] The office of Chief Magistrate was renamed Island Magistrate in 1964.[169]

The Queen granted the island a coat-of-arms by a Royal Warrant on November 4, 1969:

> Azure on a Pile in base Vert fimbriated Or a representation of the *Bounty* Bible proper and in base of the Anchor of H.M.S. Bounty Or. And for the Crest on a Wreath Or and Vert on a Mount Vert a representation of the Pitcairn Island Wheelbarrow in front of a Slip of Miro leaved and fructed proper.[170]

Translated from heraldic: a shield of blue, the lower portion in green, the two parts divided by a thin pointed gold band, the point being at the top of the shield. In the lower part is a picture of the *Bounty's* Bible in its

---

LIVINGSTON SCHUYLER, PARLIAMENT AND THE BRITISH EMPIRE: SOME CONSTITUTIONAL CONTROVERSIES CONCERNING IMPERIAL LEGISLATIVE JURISDICTION (1929) (discussing the ability of the Imperial Parliament, i.e. the Parliament at Westminster, to legislate for colonies).

163. Judicature (Amendment) Ordinance No. 4 of 1983, § 2.

164. Local Government Ordinance No. 1 of 1964 (LLMC); Justice Ordinance No. 1 of 1966 (LLMC). After McLoughlin visited in 1958, he submitted a long list of possible amendments to Maude's code. *See* MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶¶ 109–30.

165. Local Government Ordinance No. 1 of 1964, § 9 (LLMC).

166. *Id.* §§ 78–104.

167. *Id.* §§ 12–52.

168. Judicature Ordinance No. 1 of 1961, § 3 (LLMC). The Pitcairn Order, 1952, § 5, empowered the Governor to create Pitcairnese courts but until that was done the High Commissioner's Court had jurisdiction. *Id.* § 3. The Judicature Ordinance, 1961, put the Fiji Supreme Court over the Island Court but this was a change only in name and not substance, for the High Commissioner's Court the same year became the High Court of the Western Pacific and it continued to have the chief and puisne judges of the Fiji Supreme Court as its members. *See* Western Pacific (Courts) Order, 1961, S.I. 1961/1506, §§ 3–4 (U.K.). The High Court had the same jurisdiction as the High Court in England, *id.* § 14(1), and was governed by the law of England. *Id.* § 15.

169. Local Government Ordinance No. 1 of 1964, §§ 3, 16 (LLMC). This ordinance was characterized as "an intriguing new constitution" in S.A. de Smith, *Constitutional Law*, [1965] ANN. SURV. COMMW. L. 1, 36–37 (1966) (Eng.).

170. Letters Patent, Nov. 4, 1969, *in* 7 PCR 7-3286.

natural colors sitting on the top of *Bounty*'s anchor, the anchor in gold. Atop it, a crest, which is a green hill on top of which is the Pitcairn wheelbarrow, in front of the flower and stem of the miro tree with the leaves and flowers in their natural colors.[171] The island's flag, approved in 1984, is the British Blue Ensign, i.e. the British flag as the canton on a blue field with the coat-of-arms in the field.[172]

IX. YOU CAN'T GET THERE FROM HERE, 1960S TO DATE

For a half century after the Panama Canal opened, Pitcairn enjoyed prosperity.[173] But in the 1960s, transpacific jets ended the calls by passenger liners, and goods began to be shipped by modern container ships with little time to call.[174] Pitcairn's population had peaked at 233 in 1937.[175] Between 1960 and 1962, there was a mass exodus, the population

---

171. Translated by the Author.

172. The flag's design was recorded by the College of Heralds on April 2, 1984, in their "I" series, vol. 84, p. 190.

173. For a range of views of Pitcairn daily life during the Twentieth and Twenty-First Centuries, *see* Duncan Cook, *Medical Report*, *in* U.K. COLONIAL OFFICE, COLONIAL OFFICE REP. NO. 155, PITCAIRN ISLAND, at 56–59 (1938); WOODBURN, *supra* note 97, at 159–69 (1940s); Marden, *supra* note 74, at 725; Ferdon, *supra* note 94, *passim* (same); EDWIN N. FERDON, JR., ONE MAN'S LOG 125–38 (1966) (same); Ernest Schubert, *Pitcairn Island Is Catching Up*, 11 S. PAC. BULL., Apr. 1961, at 55 (New Caledonia) (1960s); Margaret Cowell, *Life on Today's Pitcairn*, 36 PAC. ISLANDS MONTHLY, Dec. 1965, at 49 (Austl.) (same); BALL, *supra* note 5, *passim* (1970s); Ian M. Ball, *Last Week Six Pitcairn Leaders Were Convicted of Sexual Abuse Against Girls As Young As Five,* SUNDAY TELEGRAPH (London), Oct. 31, 2004, at 19 [hereinafter Ball *Last Weeks*] (same); John E. Randall, *Expedition to Pitcairn*, 6 OCEANS, Mar.-Apr. 1973, at 12 (same); Gwenda Cornell, *Pitcairn's Hallmarks: Geographical Isolation, Human Closeness*, 51 PAC. ISLANDS MONTHLY, June 1980, at 63 (Austl.) (1980s); Joanna Barlow, *Keeping Pitcairn in Touch With the World*, 56 GEOGRAPHICAL J. 140 (1983) (Eng.) (same); DEA BIRKETT, SERPENT IN PARADISE (1997) (1990s); Simon Winchester, *Pitcairn: The Loneliest Island in the World*, 14 ISLANDS, Mar.-Apr. 1994, at 126 (same); Joshua Benton, *The Dwindling Days of 'A Heaven on Earth'*, THE BLADE (Toledo, Ohio), Aug. 22, 1999, at A1 (same); MARKS, *infra* note 220, *passim* (2000s).

174. *Pitcairn Call to Be Abandoned*, 38 PAC. ISLANDS MONTHLY, July 1967, at 109 (Austl.) (stating Shaw Savill line ending service); SCOTT, *supra* note 112, at 174 (stating that after Panama Canal opened "several cargo ships travelling in each direction passed within sight of the island every month. Many of these were prepared to call to deliver or collect small quantities of freight and mail, and to convey a passenger or two [but by 1973] conventional merchant ships were increasingly being replaced by much larger container ships whose schedules made them prohibitively expensive to stop to unload small parcels of goods."); 428 PARL. DEB., H.L. (5th ser.) (1982) 187 (U.K.) (statement of Lord Greenway) (stating container ships changed access to Pitcairn). *See also Neill Report*, *supra* note 78, at 9 (describing shipping arrangements in 1937); R. Gerard Ward, *Earth's Empty Quarter?: The Pacific Islands in a Pacific Century*, 155 GEOGRAPHICAL J. 235 (1989) (Eng.) (reviewing changes in travel patterns and economics); 2004 DECOLONIZATION REPORT, *supra* note 115, ¶ 33 (noting company whose container ships represented 20 of 35 annual calls at island suspended service to Pitcairn in 2003).

175. SILVERMAN, *supra* note 9, at 84, 92–95.

dropping from 140 to 90 because a single shipping company decided to reroute its vessels away from Pitcairn.[176]

Pitcairn is 300 miles away from the nearest inhabited land, Mangareva in the Gambiers of French Polynesia.[177] The only access is by sea and the lack of good connections to the outside world has been dangerous for Pitcairners.[178] The inaccessibility limits the islanders' future, something noted as far back as 1904.[179] (Describing the difficulty in reaching Pitcairn is another staple of recent writing.)[180] A 1980s effort by a coal millionaire from Virginia to lease Henderson Island and build airstrips there and on Pitcairn—a plan which would have provided security, financial and otherwise, to the islanders and was supported by them—was killed by the

176. T. Reid Cowell, Report on a Visit to Pitcairn Island from 31st December, 1963 to 22nd January, 1964, ¶1 (1964), *in* 7 PCR 7-3039 (WPA).

177. Donald A. McLoughlin, *An Account of the Development of the System of Government and Laws on Pitcairn Island During the Nineteenth Century*, 10 TRANS. & PROC. FIJI SOC'Y 138, 139 (1969) [hereinafter *McLoughlin Nineteenth*]. Tristan da Cunha, a British possession in the South Atlantic, claims to be the most remote inhabited island in the world. SIMON WINCHESTER, ATLANTIC: GREAT SEA BATTLES, HEROIC DISCOVERIES, TITANIC STORMS, AND A VAST OCEAN OF A MILLION STORIES 437–38 (2010). Winchester notes there are even more remote islands—*e.g.*, Kerguélen, Île Amsterdam, and Bjørnøya—but none of these are inhabited. Winchester, *supra* note 173, at 130.

178. *See*, *e.g.*, *Shipping Will Improve, Promise to Pitcairn*, 42 PAC. ISLANDS MONTHLY, Mar. 1971, at 68 (Austl.) (stating Pitcairners were nearly out of food and water because of a drought and lack of shipping to provide relief supplies); *Pitcairn Man Dies on Mercy Dash*, DOMINION POST (Wellington, N.Z.), May 23, 2011, at A3 (discussing ill Pitcairner who died during the 32-hour sail from Pitcairn to Mangareva); *Morning Report*: *Mercy Dash Fails to Save Unwell Pitcairn Man* (Radio N.Z. broadcast, May 23, 2011) (further discussing death and stating Pitcairner was to be put on a medevac plane at Mangareva), *available at* http://www.radionz.co.nz/national/programmes/morningreport/audio/2489692/mercy-dash-fails-to-save-unwell-pitcairn-man.asx (last visited Jan. 4, 2012).

179. Barlow, *supra* note 173, at 140 (noting lack of access and Britain's unwillingness to spend anything on the island); Diana Souhami, *Fletcher's Legacy*, 136 NEW STATESMAN, June 4, 2007, at 48 (Eng.) (noting how French islands in the Pacific have good connections with the outside world in contrast to nothing being done by Britain for Pitcairn); U.K. COLONIAL OFFICE, *supra* note 40, at 10 (noting in 1904 "the future prosperity and well-being of the Pitcairn people depend entirely upon their ability to maintain communication with the neighboring islands").

180. *See*, *e.g.*, SCOTT, *supra* note 112, at 162 (island's governor); Eugenia Sheppard, *Visiting in Wake of the 'Bounty'*, PLAIN DEALER (Cleveland, Ohio), May 6, 1973, at 41 (reporter); Mitchell F. Bunkin, *Getting the Mail to Pitcairn*, 22 PITCAIRN LOG, Sept.-Nov. 1994, at 10 (mail); Matthew Bell, *Police Go 12,000 Miles on the Disappearing Rape Case*, SUNDAY MIRROR (London), Oct. 20, 1996, at 33 (police); Michael Wood, *Field Trip to Pitcairn*, 89 CHARTERED ACCT. J., Apr. 2010, at 12 (N.Z.) (island's auditors); MARKS, *infra* note 220, at 4–5 (reporters); Claire Harvey, *Pitcairn Trials Test Skills of Intrepid Reporters*, THE AUSTRALIAN (Sydney, N.S.W.), Oct. 7, 2004, at 17 (same). The best account is Mitchell F. Bunkin, *My Voyage to Pitcairn*, 21 PITCAIRN LOG, June-Aug. 1994, at 5.

British government at the behest of scientists interested in wildlife but not their fellow men.[181]

The anchorage at Pitcairn is poor.[182] And once landed, the Hill of Difficulty, a 200-foot, nearly vertical ascent, must be surmounted.[183] Only in the last decade has Britain invested in infrastructure to make arrivals easier by building a breakwater and a road from the landing to the village.[184] Even communicating with the island has long been difficult. For decades, immediate contact was maintained via radiogram and ham radio.[185] As late as 1982, all official communications were done via Morse.[186] The island was connected to the international phone system only

---

181. 439 PARL. DEB., H.L. (5th ser.) (1983) 1130W–1131W (U.K.) (discussing proposal of Arthur M. "Smiley" Ratliff); 38 PARL. DEB., H.C. (6th ser.) (1983) 439W (U.K.) (same); *Has Smiley the Answer for Pitcairn?*, 53 PAC. ISLANDS MONTHLY, Nov. 1982, at 31 (Austl.) (same); Gary Karasik, *Smiley Ratliff: Some Men Are Islands*, 4 ISLANDS, Oct. 1984, at 16 (same); WINCHESTER, *supra* note 154, at 280−83 (same); 433 PARL. DEB., H.L. (5th ser.) (1982) 620 (U.K.) (statement of Lord Belstead) (noting Island Council approved plan); James Serpell, *Desert Island Risk*, 98 NEW SCIENTIST 320 (1983) (Eng.) (opposing plan because of environmental concerns); *Island at Risk*, 17 ORYX: J. FAUNA PRESERVATION SOC'Y 109 (1984) (Eng.) (same); F. Raymond Fosberg, *Henderson Island Threatened*, 10 ENVTL. CONSERVATION 171 (1983) (Switz.) (same); 57 PARL. DEB., H.C. (6th ser.) 364W (U.K.) (giving statement of Foreign Office minister that plan was dead); F. Raymond Fosberg, *Henderson Island Saved*, 11 ENVTL. CONSERVATION 183 (1984) (Switz.) (noting plan was dead); Harry L. Yazell, *Pitcairn—It Might Have Been Different*, 46 VOICE OF PROPHECY NEWS, Jan.-Feb. 1988, at 6 (lamenting killing plan). The airstrip proposal led to a comprehensive scientific expedition to the islands. Juliet Vickery, *Pitcairn Islands: Paradise Past, Paradise Present?*, 9 TRENDS IN ECOLOGY & EVOLUTION 316 (1994) (Neth.). The results of the expedition are presented in THE PITCAIRN ISLANDS: BIOGEOGRAPHY, ECOLOGY, AND PREHISTORY (Tim G. Benton & Tom Spencer eds., 1995), *reprinting* Symposium, 56 BIOLOGICAL J. LINNEAN SOC'Y 1 (1995) (Eng.) (the entire volume consists of papers on the expedition). For Ratliff, see Bill Archer, *Region Laments Passing of "Smiley" Ratliff*, BLUEFIELD DAILY TELEGRAPH (Bluefield, W. Va.), Nov. 3, 2007, at 1, *available at* http://bdtonline.com/local/ x519511612/Region-laments-passing-of-entrepreneur-Smiley-Ratliff (last visited Jan. 5, 2012).

182. RODWELL, *supra* note 73, at 16 (report of A.H. Summers, Commander, *S.S. Ionic*, assessing anchorage).

183. SPENCER MURRAY, *supra* note 9, at 54. The best description of the laborious nature of getting people and supplies from the landing to the village before the road and motor vehicles is MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶ 5.

184. 424 PARL. DEB., H.C. (6th ser.) (2004) 97WS (U.K.) (stating £1.9 million allocated for road and breakwater); 455 PARL. DEB., H.C. (6th ser.) (2007) 383W (U.K.) (breakwater); INT'L DEV. COMM., EFFECTIVENESS OF EC DEVELOPMENT ASSISTANCE, 1999–2000, H.C. 669, ¶¶ 167–68 (U.K.) (road). A 2008 article claimed Britain had spent £15 million on Pitcairn since the rape investigations began. Kathy Marks, *Islands of Dark Secrets,* 137 NEW STATESMAN, Aug. 4, 2008, at 16. A later article said the total was up to £20 million. *Mayor of Pitcairn Island Charged With Child Porn Offenses*, THE INDEPENDENT (London), Dec. 6, 2010, at 26 [hereinafter *Mayor of Pitcairn Island Charged With Child Porn Offenses*].

185. MARKS, *infra* note 220, at 29 (radiograms); SCOTT, *supra* note 112, at 176 (ham radio).

186. 428 PARL. DEB., H.L. (5th ser.) (1982) 180 (U.K.) (statement of Lord McNair). *Cf.* U.S. TRUST TERR. OF THE PAC. IS., 1955 ANNUAL REPORT OF THE HIGH COMMISSIONER OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED

in 1985—though for years before, calls could be patched through via shortwave by ham operators.[187] The Internet arrived in 2002.[188]

"[Y]ou can reach any where on the island in minutes. Wherever you stand, you hear the crash of the surf. There's nowhere to go; no escape," observed a visitor in the 1990s.[189] Confinement did not appeal to many islanders. "Pitcairn is a paradise, but there's not a lot to do in Paradise."[190] So the difficulty in travel meant many left permanently.[191] Pitcairn's is the "familiar story of the depopulation of inconvenient and inaccessible places where there are few opportunities and few attractions to young people who

---

JUNE 30, at 28 (1955) [hereinafter U.S. TRUST TERR. OF THE PAC. IS., 1955 ANNUAL REPORT] (stating United States had established radiotelephone circuits throughout the Trust Territory after only seven years administering the islands).

187. Peter W. Barnes, *Think It's Tough to Make a Call to a Tiny Pacific Island? Not Atoll*, WALL ST. J., July 10, 1985, at 1 (reporting American Telephone & Telegraph Co. had begun service to Pitcairn); FERDON, *supra* note 173, at 128–29 (giving account by Ferdon of being connected from Pitcairn to his wife in Santa Fe, N.M., a ham radio operator in Mesa, Ariz., being the intermediary by telephoning Ferdon's wife and connecting the telephone to the radio). More recently, telephone calls were made via Inmarsat satellite and cost several dollars a minute. Winchester, *supra* note 173, at 126, 130. *Cf.* Henry Robinson Palmer, *A Visit to Pitcairn's Island*, 38 HARPER'S WKLY. 1167, 1167 (1894) (saluting Pitcairn's lack of telegraph cables, sounding like Thoreau in *Walden*).

188. Joe Voergst, *From Wild to Wired: The World's Most Famous Outpost Goes Online*, 30 ISLANDS, June 2010, at 24. *Cf.* 303 PARL. DEB., H.C. (6th ser.) (1997) 182W–183W (U.K.) (discussing lack of Internet access on island).

189. Dea Birkett, *Purgatory in Paradise*, THE AGE (Melbourne, Vict.), Oct. 2, 2004, Insight Section at 7.

190. Barnaby Conrad, *What Happened to Mister Christian of H.M.S. Bounty*, 18 SMITHSONIAN, Feb. 1988, at 92, 100 (quoting an islander describing Pitcairn terrain).

191. *Cf.* John Connell, *Islands Under Pressuer—Population Growth and Urbanization in the South Pacific*, 13 AMBIO 306, 307 (1984) (Swed.) (stating Pitcairn and many Pacific territories have more natives living abroad than at home); John Lynch & France Mugler, *English in the South Pacific*, 8 WORLD ENGLISHES (Issue 1) 20 (1989) (Eng.) (stating "there has been substantial emigration from a number of the Polynesian countries, especially to New Zealand and the United States. Indeed, there are more Niueans and Tokelauans in New Zealand than there are in Niue and Tokelau."). Noting the decline in population has been another staple of Pitcairn articles for decades. *See*, *e.g.*, Greene *Pitcairn Island*, *supra* note 154, at 33; Robert Trumbull, *Pitcairn Island Reverses Exodus: But Future of British Colony of 88 Remains in Doubt*, N.Y. TIMES, Oct. 5, 1969, at 11 (giving a particularly good account); Harriet Choice, *Pitcairn Island: From Bligh's Bounty to Long, Lonely Decline*, DAILY NEWS (Los Angeles, Cal.), Dec. 22, 1985, (Travel Section), at 1; John Connell, *The End Ever Nigh: Contemporary Population Change on Pitcairn Island*, 16 GEOJOURNAL 193 (1988) (Ger.); Harriet Shapiro, *Trouble in Christian's Paradise*, 31 PEOPLE WKLY., Apr. 17, 1989, at 44; Benton, *supra* note 173, at A1; Michael J. Field, *A Few Good Men Needed on Pitcairn*, AGENCE FRANCE-PRESSE, Feb. 2, 1998, *available at* http://archives.pireport.org/archive/1998/february/02-04-05.html (last visited Jan. 4, 2012); Bunkin, *supra*, note 180 at 5. But the phenomenon was reported in the 1890s. *Cf.* Letter from Capt. Henry H. Dyke, *H.M.S. Comus*, to Sec'y of the Admiralty, London, Nov. 23, 1897, ¶ 5 (stating young men wanted to leave), *in* U.K. COLONIAL OFFICE, CORRESPONDENCE RELATING TO THE CONDITION OF THE PITCAIRN ISLANDERS, 1899, [C. (2d series) 9148], at 2.

have to leave in order to obtain further education, and there are few reasons to attract them back."[192]

X. FIJI INDEPENDENCE: 1970

Fiji won independence in 1970.[193] A new Pitcairn Order and companion royal instructions were issued by the Queen, which served as the island's fundamental law until 2010.[194] Fiji's independence caused Britain to entrust the governorship of Pitcairn to the British High Commissioner[195] to New Zealand.[196] His office was chosen for reasons similar to why a transfer of the islands had been mooted—New Zealand possessed shipping connections to Pitcairn, a Pitcairn expatriate community, and Pitcairn's purchasing agents.[197] London had given little

192. 428 PARL. DEB., H.L. (5th ser.) (1982) 179 (U.K.) (statement of Lord McNair). *See also Radio on Pitcairn Upsets Its Youth*, N.Y. TIMES, May 24, 1938, at 21 (noting news of the outside world via radio was making people want to leave); Ferdon, *supra* note 94, at 83 (attributing exodus of young to limited educational opportunities); 2004 DECOLONIZATION REPORT, *supra* note 115, ¶ 1 (same); Rønne, Rønne, *supra*, note 127 at 38 (alleging Adventist Church's "anti-pleasure" attitude was driving young away); Dea Birkett, *Fletcher Christian's Children*, N.Y. TIMES, Dec. 8, 1991 (Magazine), at 66, 72 (noting lack of opportunities for young islanders).

193. Fiji Independence Act 1970, c. 50 (U.K.); Fiji Independence Order, 1970, [1970] 3 S.I. 6630 (U.K.). In 2010, the Fiji archives admitted it lost its original copy of the Fiji Independence Order, which is the equivalent of America's National Archives losing both the Declaration of Independence and the Constitution. *See Fiji Loses Copy of Independence Order*, DOMINION POST (Wellington, N.Z.), Oct. 16, 2010, at A23.

194. Pitcairn Order, 1970, S.I. 1970/1434 (U.K.), *as amended by* Pitcairn (Amendment) Order, 2000, S.I. 2000/1340 (U.K.) *and* Pitcairn (Amendment) Order, 2002, S.I. 2002/2638 (U.K.); Pitcairn Royal Instructions, 1970, [1970] 3 S.I. 6725 (U.K.); U.K. FOREIGN & COMMW. OFFICE, PARTNERSHIP FOR PROGRESS AND PROSPERITY: BRITAIN AND THE OVERSEAS TERRITORIES, 1999, Cm. 4264, at 62 [hereinafter PARTNERSHIP FOR PROGRESS AND PROSPERITY]. The Royal Instructions continued the rules on the form and subject of ordinances contained in the prior set of instructions. For correspondence discussing the drafting of the Pitcairn Order, *see* Letter from R.N. Posnett, Pacific & Indian Ocean Dep't, Foreign & Commw. Office, London, to Robert S. Foster, Governor of Fiji & Pitcairn, Suva, Fiji, July 23, 1970, *in* 7 PCR 7-3329, and the reply letter, Aug. 11, 1970, *in* 7 PCR 7-3333; Memorandum from D.G. Gordon-Smith, Legal Adviser, Foreign & Commw. Office, to Posnett, Aug. 20, 1970, *in* 7 PCR 7-3336; Letter from Foster to Posnett, Sept. 22, 1970, *in* 7 PCR 7-3339, and the reply letter dated Oct. 2, 1970, *in* 7 PCR 7-3341.

195. As an "ambassador" represents one head-of-state to another, Commonwealth countries which recognize Queen Elizabeth II as head-of-state—such as the United Kingdom and New Zealand—would, if they exchanged "ambassadors," be sending a representative *from* the Queen *to* the Queen. These countries instead call their mutual ambassadors "high commissioners." *See* ROBERT HICKEY, HONOR & RESPECT: THE OFFICIAL GUIDE TO NAMES, TITLES, AND FORMS OF ADDRESS 32 (2008).

196. 263 PARL. DEB., H.C. (6th ser.) (1995) 1020W (U.K.); PARTNERSHIP FOR PROGRESS AND PROSPERITY, *supra* note 194, at 62. *See also* FOREIGN AFFAIRS COMM., OVERSEAS TERRITORIES: REPORT, 2007-8, H.C. 147-II, Ev-58 (U.K.) (discussing criteria for appointing governors) [hereinafter FOREIGN AFFAIRS OVERSEAS].

197. Memorandum from the Acting Commissioner, South Pacific Office, Suva, Fiji, to Donald A. McLoughlin, Legal Adviser, Feb. 12, 1970, *in* 7 PCR 7-3324. The United States also did some governing

thought to how Fijian independence would affect Pitcairn. There is no mention of the island in the debate in Parliament on the Fiji Independence Act.[198] The bureaucrats had no time to plan the transition, since the Act was being considered by Parliament only twelve weeks before Independence Day.[199] And the fact the Commonwealth Office—the former Colonial Office—had been merged with the Foreign Office just a few years before meant official attention was focused on foreign rather than colonial issues.[200]

After the administration of Pitcairn fell upon him, the new governor complained about "the problems involved, which may not have been fully realised in London, in transferring responsibility for a dependent territory from a well-organized colonial administration to a small diplomatic post like" his and pleaded for the resources to properly administer the island. Among the issues were the lack of staff in Auckland for the day-to-day work, the lack of direct radio communications between New Zealand and Pitcairn—whose radio aerials were still pointed toward Fiji—the lack of anyone to audit the Pitcairn books, and the fact his legal adviser was in Fiji. Previously, staff had been borrowed from the Fiji colonial administration for free—but in New Zealand there were no resources to borrow and everything had to be paid for.[201] The High Commissioner bluntly told his superiors that if he did not get the proper funding London needed to find someone else to be Pitcairn's governor.[202]

---

from afar when it ran the Trust Territory of the Pacific Islands from Honolulu and then Guam. U.S. TRUST TERR. OF THE PAC. IS., 1952 ANNUAL REPORT OF THE HIGH COMMISSIONER OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, at 2–3 (1952) (stating that when the Navy Department administered the Trust Territory, 1947–51, territorial headquarters was at Pearl Harbor, and in 1951, when the Interior Department took over, headquarters moved to Fort Ruger, Honolulu); U.S. TRUST TERR. OF THE PAC. IS., 1955 ANNUAL REPORT, *supra* note 186, at 4 (stating headquarters moved in 1954 to Guam, also outside the Trust Territory). *See also* RUTH G. VAN CLEVE, THE OFFICE OF TERRITORIAL AFFAIRS 140, n.* (1974) (Praeger Library of U.S. Gov't Dep'ts & Agencies) (discussing seats of government of Trust Territory).

198. *See* 803 PARL. DEB., H.C. (5th Ser.) (1970) 1427–59 (U.K.).

199. *See id.*

200. 761 PARL. DEB., H.C. (5th ser.) (1968) 1866 (U.K.) (statement of John Biggs-Davison) (stating the merger subordinated the interests of colonial citizens to good relations with foreigners). *See also* 491 PARL. DEB., H.C. (6th ser.) (2009) 160WH (U.K.) (statement of Andrew Rosindell) (stating the overseas territories "should not be under foreign affairs. The [overseas territories] are not foreign; they are British. Why is it under foreign affairs? Why are British overseas territories—territories of Her Majesty the Queen—under the Foreign Office? They are neither foreign nor Commonwealth. They are not members of the Commonwealth in their own right. There are British overseas territories in the Commonwealth only via Britain, so they should not really be under the Foreign Office at all.").

201. *Cf.* FIJI LEGISLATIVE COUNCIL DEBATES, SECOND SESSION, 1908, at 32 (1909) (Governor of Fiji and High Commissioner stating Fiji government provided free space to High Commission).

202. Letter from Arthur Galsworthy, Governor of Pitcairn, Wellington, to David L. Cole, Foreign & Commw. Office, London, Nov. 23, 1970, *in* 7 PCR 7-3360.

The Governor appoints a commissioner, who handles the day-to-day affairs.[203] The actual administration has been run from the British consulate in Auckland, three thousand nautical miles from Pitcairn.[204] Only in recent years have efforts been made to devolve responsibility to the islanders or station an official liaison on Pitcairn, despite such calls having being made for a century.[205]

Fiji's independence meant its courts were severed from Pitcairn's.[206] A Pitcairn Supreme Court was created on paper but no judges or staff were appointed and its phantom existence continued until the Twenty-First Century.[207] Upon the creation of the Supreme Court the Island Commissioner in New Zealand wrote the Pitcairners: "With Pitcairn's splendid record of freedom from crime and civil litigation it seems highly improbable that a need will ever arise for the establishment of such courts."[208] No provision was made for appeals from the island until 2000.[209]

---

203. Salt v. Fell, [2006] E.R.N.Z. 475, ¶ 5 (N.Z. Emp. Relations Auth. 2004).

204. Salt v. Fell, [2008] NZCA 128, [2008] 3 N.Z.L.R. 193, ¶¶ 4–5; PARTNERSHIP FOR PROGRESS AND PROSPERITY, *supra* note 194, at 62.

205. FOREIGN AFFAIRS OVERSEAS, *supra* note 196, at Ev-6 (statement of Pitcairn Commissioner); U.N. Second International Decade for the Eradication of Colonialism: Pacific Regional Seminar, Nouméa, New Caledonia, *Statement of Pitcairn Islands Study Center (Dr. Herbert Ford, USA)*, at 2, 5–6, U.N. Doc. PRS/2010/DP.5 (May 18, 2010) (discussing administrative changes); U.N. G.A., Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Pitcairn*, ¶¶ 6–7, U.N. Doc. A/AC.109/2011/4 (Jan. 9, 2011) (discussing the creation of division managers on island and creating "fair and transparent systems of Government job selection and performance management"); U.N. G.A., Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Pitcairn*, ¶ 7, U.N. Doc. A/AC.109/2007/6 (Mar. 9, 2007) (stating British diplomat stationed there as "Governor's Representative" since 2003); *Maude General*, *supra* note 100, ¶ 41 (writing in 1941 upon reviewing colonial files: "I was impressed by the long series of reports from about 1890 onwards emphasizing, often in strong terms, the unsatisfactory state into which the island's affairs had been permitted to get and urging, for the most part, the appointment of a resident administrative official as the only solution"). *See also* Glynn Christian, *supra* note 154, at 9 (calling for permanent government representative on the island beyond the schoolteacher).

206. Even after independence, appeals from the High Court of the Western Pacific still went to the Court of Appeals of Fiji and then to the Privy Council. Western Pacific (Appeals to Privy Council) Order, 1970, S.I. 1970/1435 (U.K.); Western Pacific (Courts) (Amendment) Order, 1971, S.I. 1971/715 (U.K.).

207. Judicature Ordinance No. 2 of 1970, § 3 (repealed by Judicature (Courts) Ordinance No. 2 of 1999, *codified in* LAWS OF PITCAIRN, *supra* note 21, c. 2) (continuing previous set-up)

208. Letter from C.E. Dymond, Pitcairn Island Commissioner, Auckland, to the Island Magistrate, Nov. 6, 1970, ¶ 3, *in* 7 PCR 7-3352.

209. Pitcairn Court of Appeal Order, 2000, S.I. 2000/1341 (U.K.); Pitcairn (Appeals to Privy Council) Order, 2000, S.I. 2000/1816 (U.K.). *See also Neill Report*, *supra* note 78, at 15 (noting that when a proposed legal code was submitted to the Colonial Office in 1938, the code's author "purposely made no

In its campaign in the 1970s against colonialism the United Nations (U.N.) repeatedly pressed for Pitcairn's independence.[210] Despite the fact that nobody, let alone the Pitcairners, was calling for such a step "such [was] the emotion-laden drive to eradicate the last vestiges of 'colonialism.' The non-viability of [this] bit of real estate [was] irrelevant."[211] The islanders were opposed to any change in their status.[212] (Though there have been reports, denied by the government, that Pitcairners are interested in being annexed by France.)[213] More recently, the U.N. has backed off and

---

provision for appeals. The jurisdiction is very limited, and it would be impossible to provide for an expeditious hearing of appeals.").

210. *See*, *e.g.*, G.A. Res. 2709 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8249 (Vol. 1), at 99 (Dec. 14, 1970). *See generally* Robert E. Gorelick, *Self-Determination and the Absurd: The Case of Pitcairn*, 23 INDIAN J. INT'L L. 17 (1983) (discussing the U.N.'s decolonization campaign). The basis for the U.N.'s decolonization efforts is Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR, 15th sess., Supp. No. 16, U.N. Doc. A/4684, at 66 (1961); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR, 15th sess., Supp. No. 16, U.N. Doc. A/4684, at 29 (1961) (giving standards for self-determination). *See also* The Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1654 (XVI), U.N. GAOR, 16th sess., Supp. No. 17, U.N. Doc. A/5100, at 65 (1962) (stating decolonization must be pursued immediately). *Cf.* E. Timor (Port. v. Austl.), 1995 I.C.J. 90, ¶ 29 (June 30) (stating right to self-determination is "one of the essential principles of contemporary international law"). *See also* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 11–28 (1993) (discussing U.N. and self-determination); Thomas M. Franck & Paul Hoffman, *The Right of Self-Determination in Very Small Places*, 8 INT'L L. & POL. 331 (1976); James Crawford, *Non Self-Governing Territories: The Law and Practice of Decolonization*, *in* THE CREATION OF STATES IN INTERNATIONAL LAW ch. 14 (2d ed. 2006); Anthony H. Angelo, *To Be or Not to Be . . . Integrated, That Is the Problem of Islands*, 2 REVUE JURIDIQUE POLYNÉSIENNE 87 (2002) (Fr. Polynesia); Barrie McDonald, *Decolonization and Beyond: The Framework for Post-Colonial Relationships in Oceania*, 21 J. PAC. HIST. 115 (1986) (Austl.); Alison Quentin-Baxter, *Sustained Autonomy: An Alternative Political Status for Small Islands?*, 24 VICT. U. WELLINGTON L. REV. 1 (1994) (N.Z.) (providing an astute analysis of alternatives for small Pacific Islands).

211. Howard F. Smith, Book Review, 44 PAC. AFFAIRS 650 (1971) (B.C.). *See also* Roger Fisher, Book Review, 66 AM. J. INT'L L. 644 (1972) (U.N. ignored "the real problems of the small places, their tangible problems of economics and administration."); Roberto Adam, *Micro-states and the United Nations*, 2 ITALIAN Y.B. INT'L L. 1976, at 80 (1977). *Cf.* Press Release, Pitcairn Islands Study Center, Pitcairn Island Under Martial Law and "Selective Prosecution" Academic Charges (May 27, 2003) (American professor who heads the Study Center stating that because of British mistreatment of island the residents should declare independence and send a delegation to Turtle Bay asking for admission), *available at* http://library.puc.edu/pitcairn/news/releases/news27--05-27-03.shtml (last visited Jan. 4, 2012); Kim Ruscoe, *Pitcairn Asks UN to Remove British Police*, DOMINION POST (Wellington, N.Z.), May 30, 2003, at A4 (same).

212. 880 PARL. DEB., H.C. (5th ser.) (1974) 19W–20W (U.K.) (reprinting resolution of the Pitcairn Island Council of June 16, 1968). *See also* 603 PARL. DEB., H.C. (5th ser.) (1959) 1283–369 (U.K.) (discussing the futures of Britain's small colonies).

213. *Compare* Simon Winchester, *Mutiny for French Bounty*, THE GUARDIAN (London), June 12, 1993, at 26; York Membery, *Bounty Island Shapes up for Final Mutiny*, SUNDAY TIMES (London), Apr. 16, 2000, at 29; *and* Victoria Main, *A Mutiny Too Far as Bounty Heirs Drift to France*, THE TIMES (London),

seems content with the *status quo*.[214] Britain objects to Pitcairn being listed by the U.N. as a "non self-governing territory" subject to its review.[215]

In the 1990s, efforts were made by Britain to spur economic development and attract tourists.[216] A new—and minor—source of income has been registrations for the island's Internet domain.[217] The islanders began selling pure honey—which has been endorsed by the House of Windsor.[218] The honey and curios—still a mainstay of the economy—are now sold online.[219]

XI. RAPE INVESTIGATIONS: 1996[220]

July 8, 2000, at 13 *with* 238 PARL. DEB., H.C. (6th ser.) (1994) 544W–545W (U.K.) (denying reports of Pitcairnese disloyalty).

214. *See*, *e.g.*, G.A. Res. 65/115, U.N. GAOR, 65th Sess., Supp. No. 23, U.N. Doc. A/RES/65/115 A-B, at 13 (Jan. 20, 2011).

215. U.K. FOREIGN & COMMW. OFFICE, SEVENTH REPORT OF THE FOREIGN AFFAIRS COMMITTEE, SESSION 2007–08, OVERSEAS TERRITORIES: RESPONSE OF THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, 2008, Cm. 7473, ¶ 14.

216. Martin Williams, *Pitcairn: A Two-Century Old Haven*, 26 N.Z. INT'L REV., Mar.–Apr. 2001, at 26 (Pitcairn Governor Williams discusses economic development); Bruce Ansley, *The Pitcairn Problem*, 189 THE LISTENER, July 26, 2003 (N.Z.) (TL) (discussing development); Angela Gregory, *Pitcairn Looks to Break Out of Its Isolation*, N.Z. HERALD (Auckland), Mar. 30, 2006, at A12 (discussing economic development with island commissioner); Elenoa Baselala, *Getting Ready for International Dealings*, ISLANDS BUS., Oct. 2007, at 35 (Fiji); Nick Squires, *Pitcairn Island Wants to End Centuries of Isolation*, OTTAWA CITIZEN (Ont.), Nov. 11, 2001, at A12; Oliver Bennett, *Bounty Islands Fear Tourists Will Result in Paradise Lost*, THE INDEPENDENT (London), May 6, 2001, at 2 (plans for hotel on Oeno); Tim Donoghue, *Pitcairn Hopes to Cash in on Kiwi Cop's Island Wedding*, DOMINION POST (Wellington, N.Z.), June 11, 2011, at A1 (promoting island as "adventure wedding" destination). *See also* Maria Amoamo, *Remoteness and Myth Making: Tourism Development on Pitcairn Island*, 8 TOURISM PLANNING & DEV. 1 (2011) (Eng.) (discussing appeal of Pitcairn).

217. Helen Studd, *Mutiny Isle Awaits Online Bounty*, THE TIMES (London), Dec. 27, 2000, at 3; Philip E. Steinberg & Stephen D. McConnell, *Mutiny on the Bandwith: The Semiotics of Statehood in the Internet Domain Registries of Pitcairn Island and Niue*, 5 NEW MEDIA & SOC'Y 47 (2003); PITCAIRN SINGLE PROGRAMMING DOCUMENT, *supra* note 129, at 19–21 (showing income from registrations). Other islands have the same idea, most prominently Tuvalu (.tv) and the Cocos (Keeling) Islands (.cc). Navin Katyal, *The Domain Registration .BIZness: Are We Being "Pulled Over" on the Information Super Highway?*, 24 HASTINGS COMM. & ENT. L.J. 241, 251 (2002).

218. James Driscoll, *Beekeeping in Pitcairn*, 6 N.Z. BEEKEEPER, Feb. 1999, at 16; 2004 DECOLONIZATION REPORT, *supra* note 115, ¶ 23 (discussing apiculture); Sri Carmichael, *I'll Let You Off, Mr. Christian: You Make Honey Fit for a Queen*, EVE. STANDARD (London), Jan. 8, 2010, at 3. *Cf.* Apiaries Ordinance No. 1 of 1999 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 18) (enacted to protect the honey's pureness).

219. Voergst, *supra* note 188, at 24.

220. There is a significant literature on the rape cases. There are two books on them. The first is KATHY MARKS, LOST PARADISE: FROM MUTINY ON THE BOUNTY TO A MODERN-DAY LEGACY OF SEXUAL MAYHEM, THE DARK SECRETS OF PITCAIRN ISLAND REVEALED (2009), to give the title of the American edition, written by a reporter who covered the trials. This book was published in Britain as TROUBLE IN

The need for effective policing was long noted. For example, an official in 1953 observed the Governor's appointment of a native islander as policeman on Pitcairn, which came with "no official backing of any description, save a tenuous channel of correspondence, some 3000 miles long, was morally wrong."[221] But the Foreign Office told the press it was "not viable" to have a full-time police officer there.[222] After the eleven-year-old daughter of an Australian resident on Pitcairn reported being

---

PARADISE: UNCOVERING THE DARK SECRETS OF BRITAIN'S MOST REMOTE ISLAND (2008) and in Australia as PITCAIRN: PARADISE LOST: UNCOVERING THE DARK SECRETS OF A SOUTH PACIFIC FANTASY ISLAND (2008) (All page references herein are to the American edition.). Academics discuss the cases in the essay collection Oliver, *supra* note 154. The chapters therein are: Dawn Oliver, *Problems on Pitcairn* (an introduction to topic and the book) [hereinafter Oliver *Problems on Pitcairn*]; Dawn Oliver, *The Pitcairn Prosecutions: Paper Legal Systems and the Rule of Law* (an overview of the cases); Andrew Lewis, *Pitcairn's Tortured Past: A Legal History;* Gordon Woodman, *Pitcairn Island: A Peculiar Case of the Diffusion of the Common Law*; Dino Kritsiotis & A.W.B. Simpson, *The Pitcairn Prosecutions: An Assessment of Their Historical Context by Reference to the Provisions of Public International Law*; Colm O'Cinneide, *"A Million Mutinies Now:" Why Claims of Cultural Uniqueness Cannot Be Used to Justify Violations of Basic Human Rights;* George Letsas, *Rights and Duties on Pitcairn Island*; and Stephen Guest, *Legality, Reciprocity, and the Criminal Law on Pitcairn*. There are a number of articles on the prosecutions in foreign legal publications: Anthony Trenwith, *The Empire Strikes Back: Human Rights and the Pitcairn Proceedings*, 7 J. S. PAC. L. 6 (2003) (Vanuatu) (early article before the trials began on legal issues in cases); Anthony H. Angelo & Andrew Townsend, *Pitcairn: A Contemporary Comment*, 1 N.Z. J. PUB. INT'L L. 229 (2003) (suggesting restorative justice better solution than criminal trials); Anthony H. Angelo & Fran Wright, *Pitcairn: Sunset on the Empire?*, 2004 N.Z. L.J. 431 (discussing prosecutions and future for Pitcairn) [hereinafter Angelo & Wright *Pitcairn Sunset*]; Anthony H. Angelo & Fran Wright, *The Pitcairn Trials Act 2003 (NZ), Ordinance 6 of 2004 (Pit) and the Bounty of the Mutiny*, 21 N.Z. U. L. REV. 486 (2004) (discussing ordinance removing mayor from office following his conviction and arguing it was a bill of attainder) [hereinafter Angelo & Wright *Pitcairn Trials Act*]; Fran Wright, *Pitcairn—The Saga Continues*, 2005 N.Z. L.J. 295 (giving status of cases); Anthony H. Angelo, *Pitcairn—The Saga Continues*, 2006 N.Z. L.J. 249 (same) [hereinafter Angelo *Pitcairn—The Saga Continues*]; Sue Farran, *The Case of Pitcairn: A Small Island, Many Questions*, 11 J. S. PAC. L. 124 (2007) (Vanuatu) (discussing legal process issues raised in prosecutions); Sue Farran, *The "Re-Colonising" of Pitcairn*, 38 VICTORIA U. WELLINGTON L. REV. 435 (2007) (N.Z.) (examining how courts addressed question of British jurisdiction over Pitcairn); Sue Farran, *Conflicts of Laws in Human Rights: Consequences for Colonies*, 11 EDIN. L. REV. 121 (2007) (Scot.) (discussing formation of Pitcairn judiciary in light of European human rights law); Sue Farran, *Prerogative Rights, Human Rights, and Island People: The Pitcairn and Chagos Island Cases*, 2007 PUB. L. 414 (Eng.) (comparing Pitcairn case to those involving the British subjects exiled from the British Indian Ocean Territory); Helen Power, *Pitcairn Island: Sexual Offending, Cultural Difference and Ignorance of Law*, 2007 CRIM. L. REV. 609 (Eng.) (discussing legal issues on the defendants' knowledge of wrong-doing); Fran Wright, *Certainty and Ascertainability of Criminal Law After the Pitcairn Trials*, 39 VICTORIA U. WELLINGTON L. REV. 659 (2008) (N.Z.) (discussing Privy Council's 2006 decision) [hereinafter Wright *Certainty and Ascertainability*]; Fran Wright, *Legality and Reality: Some Lessons from the Pitcairn Islands*, 73 J. CRIM. L. 69 (2009) (Eng.); Stephen Guest, *Pitcairn: Sexual Enculturation and Promulgation of Law*, 2010 N.Z. L.J. 36 (discussing legal issues on the defendants' knowledge of wrong-doing) [hereinafter Guest *Sexual Enculturation*].

221. J.B. Claydon, Report [to the Governor of Pitcairn] on Administrative Visit to Pitcairn Island, Jan. 30, 1954, ¶ 75, *in* 6 PCR 6-2585.

222. Tim Minogue, *Policing Paradise*, 44 WORLD PRESS REV., Sept. 1997, at 40.

raped, Britain, in 1996, dispatched two officers from Kent to investigate.[223] Those officers "cautioned" the accused for underage sex.[224] In 1997 Britain sent a member of the Kent Constabulary, Gail Cox, to visit and train Pitcairn's sole officer since that officer had never before received instruction on police work.[225] When she returned in 1999 a girl told Cox that she had been raped by a New Zealand visitor to the island.[226] The accused, aged twenty-three, pleaded guilty to unlawful carnal knowledge of a minor—the first court case since 1972—and his one-hundred day jail sentence was commuted so he could be deported.[227] When Cox returned to England a wide-ranging investigation began.[228] The ensuing multi-year "Operation Unique," run by the Kent Constabulary, interviewed dozens of Pitcairners, past and present.[229] One of the investigating officers reported: "We were literally cold calling on people and the responses were unbelievable. Every single Pitcairn girl we spoke to disclosed she had been

---

223. MARKS, *supra* note 220, at 29; Claire Harvey, *Paradise Lost for Pitcairn, the Island Where Sex Abusers Imposed Their Brutal Will*, THE TIMES (London), Oct. 26, 2004, at 8.

224. MARKS, *supra* note 220, at 29–30; Bell, *supra* note 180, at 33; Christopher Niesche, *Dark Secrets of the World's Most Isolated Speck of Rock*, THE AUSTRALIAN (Sydney, N.S.W.), Mar. 10, 2001, at 10.

225. Stewart Tendler & Peter Birkett, *WPC's Crime-Free Paradise*, DAILY TELEGRAPH (London), Sept. 12, 1997, at 9 (profiling Cox); Sebastian O'Kelly, *Her Word Is Law for a Mutinous People*, DAILY TELEGRAPH (London), Sept. 20, 1997, at 16 (same). *Cf. Maude General*, *supra* note 100, ¶ 3 (writing in 1941: "the primary need of the community is a period of firm but sympathetic administration, during which the islanders can become used to standards of law enforcement such as are usual in other parts of the Empire and the local officials can be trained to govern the island without fear or favour."); Ross Clark, *Empire Strikes at Pitcairn*, THE TIMES (London), Oct. 26, 2004, at 21 (stating "Pitcairners were a people minding their own business until [officer Gail Cox] was dispatched to help with 'community policing' in 1999.").

226. Claire Harvey, *Lawyers' Odyssey to Pitcairn for Child Sex Trial*, THE TIMES (London), Sept. 23, 2004, at 16.

227. MARKS, *supra* note 220, at 36–40; R. v. Christian, [2005] PNSC 1, [2006] 1 L.R.C. 745, 75 BRIT. Y.B. INT'L L. 2004, at 428, ¶ 177 (Pitcairn Is. Sup. Ct.). The government later realized it was mistaken as to the age of consent, at issue in this case. The defendant was pardoned and received a financial award from the government. MARKS, *supra* note 220, at 228–29. Under section 65 of Maude's code, the age of consent was fourteen; it was raised to sixteen by Pitcairn Island Government Regulations (Amendment) Ordinance No. 1 of 1957, § 4 (LLMC). Some commentators on the 2004 trials argued the islanders could not have know of British law on the age of consent and appeared unaware of the 1940 and 1957 laws which were published on Pitcairn. *See*, *e.g.*, Clark, *supra* note 225, at 21 ("It may suit us in Britain to have an age of consent of 16, but what right do we have to apply our own standards, retrospectively, to a remote society on the other side of the earth. It is clear that until the trials were announced many of the island's population were unaware that they were supposed to conform to British laws.").

228. *See generally* Eve Pertile, *Culture of Shame*, POLICE REV., Feb. 29, 2008, at 24 (Eng.) [hereinafter Pertile *Culture*]; Eve Pertile, *Islanders on Trial*, POLICE REV., Mar. 7, 2008, at 24 (Eng.) [hereinafter Pertile *Islanders on Trial*].

229. Tim Watkin, *Trials of a Faraway Island*, N.Z. HERALD (Auckland), May 10, 2003, at B6; MARKS, *supra* note 220, at 29–44.

a victim of sexual abuse."[230] One of the appellate judges characterized it as "child sexual abuse on a grand scale."[231]

The investigator said, "I made a report to the Foreign Office, recommending the island should be abandoned if the residents didn't pull their socks up."[232] Thus, there was concern that the British government was using the prosecutions as a justification to shut the island down—a claim seemingly proven when a letter between cabinet ministers was released, showing island funding was cut because of the prosecutions.[233] Those views are not new. A top colonial official, in 1846, wrote Pitcairners were "of no more use to the Nation at large, than if they were settled in the Interior of Africa," and the population should be resettled.[234] With this attitude it is understandable why Britain's colonial administrators were accused of ignoring issues on Pitcairn.[235] One of the most damning assessments came from the Law Lords.

> But the fact that this scale of offending [in the present case was] . . . almost certainly the tip of the iceberg, [and] was tolerated for so long in such a small, isolated and closely knit community is an indication of the poor state of supervision exercised over its affairs by the colonial authorities.[236]

---

230. Pertile *Culture*, *supra* note 228, at 25 (quoting Detective Inspector Peter George).

231. Christian v. The Queen, [2006] UKPC 47, [2007] 2 A.C. 400, [2007] 1 L.R.C. 726, 130 I.L.R. 696, ¶ 48 (appeal taken from Pitcairn Is.) (opinion of Lord Hope of Craighead).

232. Tim Minogue, *Law Catches Up With 'Bounty' Islanders: U.K. Police Are Being Sent to Tackle A Crime Wave on Remote Pitcairn Island*, THE INDEPENDENT (London), June 1, 1997, at 5.

233. Press Release, Pitcairn Islands Study Center, British Foreign Office Minister's Rhetoric Signals U.K. Government Plans to End Habitation of Pitcairn Says Academic (Aug. 20, 2003), *available at* http://library.puc.edu/pitcairn/news/releases/news31--08-20-03.shtml (last visited Jan. 4, 2012); Letter from Clare Short, Sec'y of State for Dev., to Robin Cook, Sec'y of State for Foreign & Commw. Affairs, Feb. 8, 2001, *in* JUSTICE, LEGALITY, AND THE RULE OF LAW: LESSONS FROM THE PITCAIRN PROSECUTIONS 265 (Dawn Oliver ed., 2009).

234. Minute of James Stephen, Under Sec'y of State for the Colonies, to George William Lyttelton, Lord Lyttelton, Under Sec'y of State of War & the Colonies, Jan. 14, 1846, *in* 3 PCR 3-1308 (TNA CO 201/370).

235. MARKS, *supra* note 220, ch. 14 (detailing British indifference as documented in official papers). However, a major source of complaint relied on by Marks—the schoolteacher and government adviser in the 1950s—appears from official correspondence to have been a particularly difficult, self-important man. *See*, *e.g.*, Letter from H.A.C. Dobbs, Deputy W. Pac. High Comm'r, to Chief Sec'y, W. Pac. High Comm'n, Apr. 12, 1950, *in* 6 PCR 6-2425 (WPA).

236. Christian v. The Queen, [2006] UKPC 47, ¶ 56 (opinion of Lord Hope of Craighead).

One change for the better for Pitcairners—and citizens of all other territories—was the restoration of British citizenship with a right to live in Britain that came in 2002.[237]

XII. THE GROWING STATUTE BOOK: 2000S

The accusations levied against the men of Pitcairn generated a passel of scandalous news stories.[238] Britain also had a major procedural problem in that there was no working court system, as the island's judiciary, once active, had been allowed to fall into complete desuetude for decades.[239] As long ago as the 1970s, it was reported the door to the island's jail cell had rusted into position—open.[240] There had been no arrests since the 1950s.[241] Not a single criminal case, not even for minor charges, had been brought

---

237. *See* British Overseas Territories Act, 2002, c. 8 (U.K.); GABRIELLE GARTON GRIMWOOD, THE BRITISH OVERSEAS TERRITORIES BILL, [HL] BILL 40 OF 2001–2002 (2001) (House of Commons Library Research Paper 01/90).

238. *See generally* Lisa Fletcher, *Reading the News: Pitcairn Island at the Beginning of the Twenty-First Century*, 3 ISLAND STUD. J. 57 (2008) (Can.) (analyzing press coverage of rape trials); Melanie Simons, Keith Tuffin & Karen Frewin, *Newspaper Constructions of Sexual Abuse on Pitcairn Island*, 37 AUSTL. J. COMM. 95 (2010) (same). A sampling of article titles give the tone of the coverage: Dea Birkett, *Island of Lost Girls*, N.Y. TIMES, Oct. 29, 2004, at A25; Neil Tweedie, *Pitcairn Island Mayor Treated Girls as 'Harem' Court Told*, NAT'L POST (Don Mills, Ont.), Oct. 5, 2004, at A15; Neil Tweedie, *Pitcairn Men 'Given Free Rein' to Use Girls for Sex*, DAILY TELEGRAPH (London), Oct. 1, 2004, at 16; Kathy Marks, *Former Pitcairners Tell of Rape As a Way of Life*, THE INDEPENDENT (London), Oct. 1, 2004, at 35; Kathy Marks, *Island Chief Raped Me When I Was 11, Pitcairn Trial Told*, BELFAST TELEGRAPH (N. Ire.), Sept. 30, 2004, at 1; Claire Harvey, *Pitcairn Gang 'Led Sex Spree of 30 Years'*, THE TIMES (London), Sept. 30, 2004, at 39; Neil Tweedie, *Sex at 12 Is Normal, Say Pitcairn Women*, DAILY TELEGRAPH (London), Sept. 29, 2004, at 3.

239. *McLoughlin Law*, *supra* note 33, at 39−44 (analyzing docket from 1904−1940 and noting court procedures deteriorated far from due process); PACIFIC ISLANDS YEARBOOK & WHO'S WHO 200 (Judy Tudor ed., 10th ed. 1968) (reporting island court sat twice a year then); Oliver *Problems on Pitcairn*, *supra* note 220, at 12 (stating until the late 1990s, "[t]here was . . . no operative internal legal system" and detailing how the Island Court created under the Justice Ordinance No. 1 of 1966 (LLMC) (repealed by Justice Ordinance No. 3 of 1999), could impose no sentence greater than six months imprisonment and £25 fine, while more serious offenses were triable in the Pitcairn Supreme Court, to which no judge or officials ever had been appointed); Governor of Pitcairn & Associated Islands v. Sutton, [1995] 1 N.Z.L.R. 426, 429, 104 I.L.R. 508, 511 (C.A. 1994) (stating that after the Judicature Ordinance No. 2 of 1970 (repealed by Judicature (Courts) Ordinance No. 2 of 1999) terminated role of Fiji courts, Pitcairn's courts existed only on paper). *Contra* R. v. Christian, [2005] PNSC 1, [2006] 1 L.R.C. 745, 75 BRIT. Y.B. INT'L L. 2004, at 428, ¶ 110 (Pitcairn Is. Sup. Ct.) ("We find that English administration of justice over Pitcairn Island was not a paper administration operating in an occasional and ad hoc way, but a reality when considering how civil and criminal disputes were dealt with through the twentieth century."). *See also* Eric Were, *Ten Weeks on (Tax-Free, Traffic-Free, Almost Money-Free) Pitcairn Island*, AUSTL. WOMEN'S WKLY., Nov. 27, 1963, at 39 (stating attending the regular sessions of court was then popular entertainment).

240. HERBERT P. FORD, PITCAIRN 92−93 (1972); Ball *Last Weeks*, *supra* note 173, at 19.

241. MARKS, *supra* note 220, at 30–31.

from 1972 to 1999.[242] An elaborate court system was erected to handle the rape accusations.[243] Britain also negotiated a treaty with New Zealand to allow the Pitcairn courts to sit there.[244] New laws on the judiciary and criminal procedure—mainly based on New Zealand law because the lawyer drafting them was a Kiwi—were also enacted.[245]

Pitcairn now has a statute book of 887 pages.[246] That is up significantly from the previous code of 500 pages.[247] Along with the lawmaking on the trials and criminal procedure, a flurry of legislation regulating everything from beekeeping, registration of sex offenders, endangered species, and liquor were issued in the last decade.[248] One

---

242. *Id*. at 193.

243. *Id*. at 5 ("island had no legal infrastructure"); Judicature (Courts) (Amendment) Ordinance No. 2 of 2000 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 2); Pitcairn Court of Appeal Order, 2000, S.I. 2000/1341 (U.K.), *amended by* Pitcairn Court of Appeal (Amendment) Order, 2004, S.I. 2004/2669 (U.K.); Pitcairn (Appeals to Privy Council) Order, 2000, S.I. 2000/1816 (U.K.), *amended by* Judicial Committee (Appellate Jurisdiction) Rules Order, 2009, S.I. 2009/224 (U.K.). For courts in the Pacific in general, see PACIFIC COURTS AND LEGAL SYSTEMS (Guy Powles & Mere Pulea eds., 1988).

244. Agreement Concerning Trials Under Pitcairn Law in New Zealand and Related Matters, N.Z.-U.K., Oct. 11, 2002, 2219 U.N.T.S. 57, U.K.T.S. No. 33 (2003) (Cm. 5944), 2003 N.Z.T.S. No. 2; Pitcairn Trials Act 2002 (N.Z.); Pitcairn Trials Act Commencement Order, 2003, S.R. 2003/11 (N.Z.). *See also* N.Z. H.R., FOREIGN AFFAIRS, DEF. & TRADE COMM., PITCAIRN TRIALS BILL (2002) (explaining Pitcairn Trials Act), *available at* http://www.parliament.nz (last visited Jan. 4, 2012); N.Z. PARLIAMENTARY LIBRARY, BILLS DIGEST NO. 918: PITCAIRN TRIALS ACT 2002 (2002) (same), *available at* http://www.parliament.nz (last visited Jan. 4, 2012); *Cf*. Agreement Concerning a Scottish Trial in the Netherlands, Neth.-U.K., Sept. 18, 1998, 2062 U.N.T.S. 82, U.K.T.S. No. 43 (1999) (Cm. 4378) (Anglo-Dutch agreement to provide for trial of the Pan Am 103 bomber) [hereinafter Agreement Concerning a Scottish Trial in the Netherlands].

245. Transcript of Arguments at 56, R. v. Seven Named Accused, Pitcairn Is. Sup. Ct. Nos. 1-55/2003 (testimony of Paul Julian Treadwell, Pitcairn Legal Adviser, who drafted the legislation stating he based laws on New Zealand laws even though English law was supposed to apply on Pitcairn), *in* 2 PCR 2-619. *See also* R. v. Christian, [2005] PNSC 1, [2006] 1 L.R.C. 745, 75 BRIT. Y.B. INT'L L. 2004, at 428, ¶ 83 (Pitcairn Is. Sup. Ct.) (full listing of Pitcairnese ordinances related to courts); Angelo & Townsend, *supra* note 220, at 231 (stating "40 Ordinances dealing with justice and penal orders" enacted 1999−2003, "a number equivalent to the total number of Ordinances made in the previous 33 years."). A review of Pitcairn law before the recent legislative activity is Dhirendra K. Srivastava, *Pitcairn Island*, *in* SOUTH PACIFIC ISLANDS LEGAL SYSTEMS 252–67 (Michael A. Ntumy gen. ed., 1993).

246. LAWS OF PITCAIRN, note 21. *See also* Farran *Prerogative Right*, *supra* note 220, at 419 ("The flurry of legislative activity affecting Pitcairn might seem excessive, unreasonable, and not proportionate.").

247. JERRY DUPONT, THE COMMON LAW ABROAD 1208 (2001) (describing previous code: "circa 550p+forms").

248. Apiaries Ordinance No. 1 of 1999 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 28); Sexual Offences (Notification and Prevention) Ordinance No. 3 of 2010 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 44); Endangered Species Protection Ordinance No. 3 of 2004 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 42); Sale and Use of Liquor Ordinance No. 5 of 2009 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 26); Registration of Business Names Ordinance No. 7 of 1999 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 16). Britain over the years has also applied a number of international

important change was a land reform law. The limited acreage had come to be owned mainly by emigrants, so a law was finally enacted in 2000 to redistribute property to actual occupants of Pitcairn—a step that had been repeatedly urged on the government for a half-century.[249] All these new laws joined existing ones on such irrelevancies as labor unions and collisions at sea.[250] This is a big change from the Nineteenth Century when a visitor claimed the islanders "have laid down a rule for themselves—a golden one—NEVER TO MAKE A LAW UNTIL IT IS WANTED."[251]

Yet the Governor has failed to enact something as elemental to government as a criminal code.[252] Like many British territories, Pitcairn incorporates British law into its domestic law.[253] Pitcairners are said to be

---

conventions to Britain, many of which seem to have little relevance to the island. *See*, *e.g.*, Michael O. Eshleman, & Stephen A. Wolaver, *Prego Signor Postino: Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 ORE. REV. INT'L L. 283, 359 (2010) (noting Pitcairn's participation in Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, U.K.T.S. No. 50 (1969) (Cmnd. 3986), 658 U.N.T.S. 163).

249. Land Tenure Reform Ordinance No. 7 of 2000 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 14); Lands Court Ordinance No. 8 of 2000 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 15); U.N. Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Pitcairn*, ¶ 22, U.N. Doc. A/AC.109/2005/10 (Mar. 23, 2005); Claydon, *supra* note 221, ¶ 147 (predicting in 1954 that unless something was done, most of the island would be owned by off-islanders); MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶¶ 32, 35, 90–101 (noting in 1958 land records were a mess, observing the fractionalized ownership caused land to sit idle, and offering suggestions on land and title reform—including adopting the Torrens system); 578 PARL. DEB., H.C. (5th ser.) (1957) 89W–90W (U.K.) (stating government was considering land reform).

250. Trade Unions and Trade Disputes Ordinance No. 1 of 1959 (LLMC) (codified in LAWS OF PITCAIRN, *supra* note 21, c. 23); Prevention of Collisions at Sea Ordinance No. 2 of 1983 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 30). The Pitcairn Government's legal adviser said the trade union law was "enacted in order to comply with the requirements of an International Labour Convention." *McLoughlin Twentieth*, *supra* note 33, at 83. That appears to be the Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257, 154 B.F.S.P. 653, to which the United Kingdom is a signatory. But it has not been extended to Pitcairn. Letter from Kulwant Dulai, Treaty Section Enquiry Serv., Legal Adviser's Directorate, Foreign & Commw. Office, London, to Author (Apr. 13, 2011). The Universal Declaration of Human Rights calls for the right to join trade unions. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 23, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810, at 71 (Dec. 10, 1948).

251. ΜΕΤΟΙΧΟΣ, *Pitcairn's Island*, SYDNEY MORNING HERALD (Sydney, N.S.W.), Oct. 19, 1850, at 3. The same rule is stated—*sans* capitals—in THOMAS BOYLES MURRAY, *supra* note 9, at 252.

252. *Cf.* Angelo & Wright *Pitcairn Sunset*, *supra* note 220, at 432 (stating it is "very unusual for a colony not to have a criminal law of some kind of its own from the earliest times" and noting the first territorial laws usually include criminal code).

253. HENDRY & DICKSON, *supra* note 139, at 139–41. The territorial laws adopting British law are Administration of Justice Ordinance No. 5 of 1990, §§ 5–6, 33 BRIT. ANTARCTIC GAZETTE No. 1 (1990) (Brit. Antarctic Terr.); Courts Ordinance No. 3 of 1983, §§ 3–4 (Brit. Indian Ocean Terr.); Interpretation and General Clauses Ordinance No. 14 of 1977, § 83 (Falkland Is.); English Law (Application) Ordinance No. 10

displeased by the adoption of "foreign" law—as are citizens of the British Virgin Islands, who have also had outside law brought to their island.[254] There is now only a very limited Pitcairn Criminal Code consisting of minor offenses such as damaging the Polynesian rock carvings and failing to vote.[255] "[F]rom time immemorial the criminal law has been found an absolute necessity for the public order and for human society in general."[256] Jeremy Bentham long ago argued it essential to have a comprehensive body of law.[257] Rather than doing so, the government legislates about trivia, *e.g.*, the government's legal adviser in 1965 was very pleased with himself in drafting a traffic code to govern the "tractors, bicycles, and two motor cycles" on the island.[258]

While it has laws for minutia, Pitcairn continues to incorporate England's criminal law by reference, a state of affairs persisting for a century now.[259] Those laws were unknown to Pitcairners as only in 1997 was a set of the statutes delivered to the island.[260] In contrast, within two

---

of 2005 (St. Helena, Ascension & Tristan da Cunha); Application of Colony Laws Ordinance No. DS1 of 1977 (S. Ga. & S. Sandwich Is.); Courts (Constitution and Jurisdiction) Ordinance No. 5 of 2007, § 33 (Sovereign Base Areas of Akrotiri & Dhelika), *in* S.B.A. GAZETTE No. 1450, Mar. 9, 2007.

254. U.N. Second International Decade for the Eradication of Colonialism: Pacific Regional Seminar, Nouméa, New Caledonia, *Statement of Pitcairn Islands Study Center (Dr. Herbert Ford, USA)*, at 5–6, U.N. Doc. PRS/2010/DP.5 (May 18, 2010) (stating Pitcairners object to incorporation by reference and want the British to explicitly promulgate laws for them); Bill Maurer, *Writing Law, Making a "Nation": History, Modernity, and Paradoxes of Self-Rule in the British Virgin Islands*, 29 LAW & SOC'Y REV. 255, 273–74 (1995) (discussing resentment of the government bringing in outside laws for adoption rather than drafting original laws).

255. Summary Offenses Ordinance No. 15 of 2000, §§ 19(1), 21 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 5).

256. CARL LUDWIG VON BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW 379 (Thomas S. Bell et al. trans., 1916) (Continental Legal History Series 6).

257. 4 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 537 (Russell & Russell 1962) (John Bowring ed., 1843). Britain's Statute Law Society long ago recommended Britain enact laws as part of code. STATUTE LAW SOCIETY, STATUTE LAW: THE KEY TO CLARITY (1972). This was not done and the current system of amending statutes by reference continues—even more inconvenient for Pitcairners than Britons since Pitcairners have very limited access to legal materials.

258. *McLoughlin Twentieth*, *supra* note 33, at 84.

259. Judicature Ordinance (Courts) (Amendment) Ordinance No. 2 of 2000, § 16 (codified at LAWS OF PITCAIRN, *supra* note 21, c. 2). The Pacific Order, 1893, § 21, which applied to Pitcairn from 1898 to 1952, had a provision stating crimes in England would be crimes within the ambit of the Pacific Order; its predecessor, the Western Pacific Order, 1877, § 22, contained similar language.

260. R. v. Christian, [2005] PNSC 1, [2006] 1 L.R.C. 745, 75 BRIT. Y.B. INT'L L. 2004, at 428, ¶ 95 (Pitcairn Is. Sup. Ct.) (stating a set of *Halsbury's Statutes* was sent to Pitcairn). The island secretary testified the lawbooks were requested by Officer Cox and were stored in the secretary's office initially, and then later placed in the newly-built prison. Transcript of Arguments at 24–26, R. v. Seven Named Accused, Pitcairn Is. Sup. Ct. Nos. 1-55/2003 (testimony of Betty Christian), *in* 2 PCR 2-619. One member of the Judicial Committee observed that having a set of *Halsbury* "gathering dust" on Pitcairn was "a meaningless gesture."

years of the *ancien régime* being toppled, France's revolutionaries had enacted a complete penal code.[261] Having a consolidated criminal code is an improvement for both the citizens and those who must enforce it.[262] Pitcairners have been failed by their colonial masters in this regard.

XIII. RAPE PROSECUTIONS: 2003–06

After years of investigation, charges were finally brought in April 2003; they were sixty-four counts under Britain's Sexual Offenses Act of 1956[263] against seven Pitcairn men.[264] The charges were twenty-one counts of rape, forty-one of indecent assault, and two of gross indecency with a child under fourteen.[265] The incidents occurred many years, even decades, before.[266] Among those charged were the mayor of the island and his predecessor.[267] Two months later, similar counts were made against six Pitcairn men living in New Zealand.[268] Some claimed sex at a young age was part of the island's culture.[269] However, the charges were not about

---

Christian v. The Queen, [2006] UKPC 47, [2007] 2 A.C. 400, [2007] 1 L.R.C. 726, 130 I.L.R. 696, ¶ 39 (appeal taken from Pitcairn Is.) (opinion of Lord Woolf).

261. LUDWIG VON BAR, *supra* note 259, at 322–24.

262. *Cf.* 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND ch. 34 (London, Macmillan 1883) (The author, a judge of the Queen's Bench, helped draft a proposed consolidated criminal law of England and in this chapter discusses the advantages of such a code.).

263. 4 & 5 Eliz. 2, c. 69 (U.K.). *Cf.* Angelo & Wright *Pitcairn Sunset*, *supra* note 220, at 431 ("The Sexual Offences Act is not self-evidently the law of Pitcairn.").

264. MARKS, *supra* note 220, at 81–83.

265. *Id*. at 83.

266. *Id*.

267. Claire Harvey, *Pitcairn Island's Mayor "Initiated Girls Into Harem"*, DAILY TELEGRAM (Sydney, N.S.W.), Oct. 5, 2004, at 12 (discussing charges against sitting mayor); Claire Harvey, *Pitcairn Judge in the Dock*, THE AUSTRALIAN (Sydney, N.S.W.), Oct. 8, 2004, at 5 (discussing charges against former magistrate; his office was renamed mayor subsequent to his term and the judicial functions transferred).

268. MARKS, *supra* note 220, at 83.

269. *See generally* Tim Watkin, *Lonely Island Weathering a Storm*, N.Z. HERALD (Auckland), Aug. 25, 2002, at B6 (N.Z.). MARKS, *supra* note 220, ch. 12; Stephen D'Antal, *That's What Girls Are For*, THE TIMES (London), May 9, 2001, at 22. Examples of this perspective include Garth George, *A Land Awash With Sex, Hypocrisy, and Double Standards*, N.Z. HERALD (Auckland), Nov. 3, 2004, at A17 (stating practice "obviously been part of the Pitcairn culture since the place was settled" and wondering why anyone should be outraged since "[e]very night on the streets of Auckland girls as young as 11 and 12 are peddling their bodies and having sex with men three, four and five times their age."); Jane Sullivan, *Pitcairn Men Were Following Custom: McCullough*, SYDNEY MORNING HERALD (Sydney, N.S.W.), Nov. 16, 2004, at 3 (quoting best-selling author Colleen McCullough, who wrote *The Thorn Birds*: "It's Polynesian to break your girls in at 12."); Clark, *supra* note 225, at 21 ("[A]nthropological history would suggest that it is we in advanced industrial societies who are unusual in insisting that sexual intercourse be delayed until well after sexual maturity. You would not expect Bushmen to have an age of consent and neither, until the Marriage

young people having sex, they were about much older men being with girls.[270] Among the victims were an eleven-year-old and a seven-year-old.[271]

Defense counsel tried to stop the rape trials by arguing that Pitcairn was never properly made a British colony and, therefore, Britain had no authority to prosecute. In addition, they claimed the judiciary had no authority since it was formed only in anticipation of these specific cases.[272] "You cannot have a very large nation totally crushing a small community. The world won't put up with it [anymore]," said one of the defense lawyers.[273] But these arguments were rejected by the Supreme Court, the Court of Appeals, and the Privy Council.[274] The courts ruled that since the

---

Act of 1753 [26 Geo. 2, c. 33 (U.K.)] outlawed the marriage of child brides in the Fleet chapel, did we. [*But see* An Act to take Away Clergy from the Offenders in Rape or Burglary, and an Order for the Delivery of Clerks Convict Without Purgation, 18 Eliz. 1, c. 7, § 4 (1576) (U.K.) (setting age of consent at ten).] Our Government has an obsession with preserving 'diversity,' by which it seems to mean languages and headscarves. Yet a genuine example of cultural diversity is treated as perversion and is stamped out with the full force of the human rights charter."); D'Antal, *supra* note 272, at 22 (quoting Glynn Christian, television chef resident in Auckland and a cousin of the islanders: "You can't take middle-class standards onto Pitcairn."). *Cf.* Trenwith, *supra* note 220, pt. 4; Power, *supra* note 220; O'Cinneide, *supra* note 220. It was long ago recognized by a colonial officer that the islanders' society was a blend of European and Polynesian. Duncan Cook, *Medical Report*, *in* U.K. COLONIAL OFFICE, COLONIAL OFFICE REP. NO. 155, PITCAIRN ISLAND, at 53 (1938) ("Though the material requirements of the islanders have been met in more or less a Polynesian manner, the social and religious life has been predominately European in nature. By living example, by education, and by religious training, [mutineers Edward] Young and [John] Adams and, later, Adams alone stamped the English traditions of justice, moral rectitude, and social solidarity on the growing children who later transmitted the same teaching. The school, which has always been a feature of Pitcairn life, also has fixed the above virtues.").

270. *Cf.* D'Antal, *supra* note 272, at 22 (quoting Adventist minister on Pitcairn: "There were some who thought that sex among and with the under 16's was merely Pitcairn's way. But as far as I was concerned, when children are hurt cultural mores are not an issue."); Alexander Ward, Comment, *What Possible Victory in Pitcairn Challenge?*, THE ADVERTISER (Adelaide, S. Austl.), Nov. 13, 2004, at 28 (Ward, president of the Law Society [i.e., bar association] of South Australia: "Cultural considerations could never excuse the abuse that occurred. If British law did not apply then would the law of the jungle apply," where the weakest would be preyed upon?).

271. Claire Harvey, *Paradise Lost for Pitcairn, the Island Where Sex Abusers Imposed Their Brutal Will*, THE TIMES (London), Oct. 26, 2004, at 8.

272. *See generally* R. v. Seven Named Accused, [2004] PNSC 1, 127 I.L.R. 232 (Pitcairn Is. Sup. Ct.).

273. Claire Harvey, *Islanders on Verge of Mutiny As Sex Trial Outsiders Flood Pitcairn*, THE AUSTRALIAN, July 2, 2004, at 6 (quoting Adrian Cook, a Queen's Counsel from Norfolk Island).

274. *Seven Named Accused*, [2004] PNSC 1, *aff'd* [2004] PNCA 1, [2004] 5 L.R.C. 706, 127 I.L.R. 284 (Pitcairn Is. Ct. App.), *aff'd sub. nom.* Christian v. The Queen, [2004] UKPC 52, [2004] 5 L.R.C. 735 (appeal taken from Pitcairn Is.). The Privy Council decision is discussed at length in Oliver *Problems on Pitcairn*, *supra* note 220; Wright *Certainty and Ascertainability*, *supra* note 220. *See also* Tim Watkin, *Remote Control*, 204 THE LISTENER, July 29, 2006, at 28 (N.Z.) (TL) (discussing how Privy Council refused to entertain oral arguments about the sovereignty argument); David Hope, Lord Hope of Craighead,

government had declared Pitcairn to be British, the judiciary would not disturb that declaration.[275]

The trials were held on Pitcairn in October 2004.[276] The prosecutor stated that conditions on Pitcairn were "[v]ery rudimentary but holding the trial on Pitcairn, rather than in Britain or elsewhere, gives us the greatest chance of justice."[277] Despite the logistical difficulties, the government rejected options such as having the trials in New Zealand or aboard a visiting warship.[278] Some suggested an attempt at restorative justice, something akin to South Africa's experience following Apartheid.[279] This too was rejected. The newly created Pitcairn bar consisted entirely of New Zealanders serving as judges and attorneys.[280] (Staffing courts with

---

Foreword to JUSTICE, LEGALITY, AND THE RULE OF LAW: LESSONS FROM THE PITCAIRN PROSECUTIONS v–viii (Dawn Oliver ed., 2009) (criticizing the way the Judicial Committee handled the appeal; Lord Hope was one of the members of the panel that heard the 2006 appeal); Michael Beloff, *Lawless Island*, TIMES LITERARY SUPP., Apr. 30, 2010, at 25 (Eng.) (reviewing JUSTICE, LEGALITY, AND THE RULE OF LAW: LESSONS FROM THE PITCAIRN PROSECUTIONS (Dawn Oliver ed., 2009)) (discussing Lord Hope's preface).

275. Christian v. The Queen, [2006] UKPC 47, [2007] 2 A.C. 400, [2007] 1 L.R.C. 726, 130 I.L.R. 696, ¶ 9 (appeal taken from Pitcairn Is.) (opinion of Lord Hoffmann), *citing* Coast Lines, Ltd. v. Societa Nazionale di Navigazione (The Fagernes), [1927] P. 311, 324 (C.A.) (Eng.). *Cf.* Nyali v. Att'y-Gen., [1956] 1 Q.B. 1, 15 (Eng.) ("The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged."); Post Office v. Estuary Radio, Ltd., [1968] 2 Q.B. 740, 755 (Eng.) (The crown knows limits of its jurisdiction); Watts v. United States, 1 Wash. Terr. 288, 295–6 (1870) (in a case from the San Juan Islands—now a part of Washington State but then disputed between the United States and Canada—court dismissed sovereignty question because it was a political question for the executive to resolve); Legal Status of E. Green. (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 46 (Apr. 5) (holding a sovereign need not exercise its powers extensively in a territory to be sovereign over it); Clipperton Island Arbitral Award of King Victor Emmanuel III, Jan. 28, 1931, 26 AM. J. INT'L L. 390, 393 (1932) (holding sovereignty over an uninhabited territory is perfected from the moment possession is taken as long as no other state disputes possession), *translating* 6 REVUE GÉNÉRALE DU DROIT INT'L PUBLIC, 3d ser. 129 (1932) (Fr.), *original reprinted in* 2 R.I.A.A. 1105.

276. MARKS, *supra* note 220, chs. 8–11 (report on trial by reporter present for them).

277. Harvey, *supra* note 274, at 6.

278. Pertile *Islanders on Trial*, *supra* note 228, at 24. *See also* Kim Griggs, *The Pitcairn Code*, 185 THE LISTENER, Aug. 17, 2002, at 26, 27 (N.Z.) (considering trial options).

279. Angelo & Townsend, *supra* note 220, at 239–44; Griggs, *supra* note 281, at 27 (quoting Glynn Christian suggesting restorative justice). *Cf.* 1 S. AFR. TRUTH & RECONCILATION COMM., TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 1–174 (1998) (explaining origins and processes of Commission), *available at* http://www.justice.gov.za/trc/report/index.htm (last visited Jan. 4, 2012); DESMOND MPILO TUTU, NO FUTURE WITHOUT FORGIVENESS (1999) (account by chairman of Truth & Reconciliation Commission).

280. Judicial Practitioners Ordinance No. 3 of 2001 *(codified in* LAWS OF PITCAIRN, *supra* note 21, c. 10) (creating Pitcairn bar); MARKS, *supra* note 220, at 64 (stating prosecutor was a New Zealand lawyer); *id*. at 73 (same as to defender); *id.* at 90 (same as to trial judges); *id*. at 224 (same as to appellate judges); *Jan Corbett & Tony Stickley,* End of a Legend As Pitcairn Meets the Modern Law, N.Z. HERALD *(Auckland),* June 30, 2001, at E1 (N.Z.) (same as to magistrates); *R. v. Seven Named Accused,* [2004] PNCA 1, [2004] 5

foreigners is routine in the Pacific.)[281] Some of the proceedings of the Pitcairn courts took place in New Zealand.[282] But for the actual trial, lawyers and judges went to Pitcairn and testimony was taken from the many witnesses living in New Zealand by video-teleconferencing.[283] The rape cases in 2004 were tried by judges, not jurors[284]—understandable since the

---

L.R.C. 706, 127 I.L.R. 284, ¶ 88 *(*Pitcairn Is. Ct. App.*) (noting magistrates and lawyers were Auckland barristers); Trenwith, supra* note 220, at 6*,* appx. (listing names of court personnel); *Watkin, supra* note 272*,* at B6 (stating there were "no lawyers" and Public Defender Paul Dacre was first admitted to the Pitcairn bar); Guest Sexual Enculturation*, supra* note 220*,* at *36. See also* Tim Watkin, *Defending the Right*, 198 THE LISTENER, Apr. 30, 2006, at 26 (N.Z.) (TL) (Pitcairn's chief justice refused to admit to bar a N.Z. attorney desired by defendants). *Cf.* Leis v. Flynt, 439 U.S. 438 (1979) (finding no constitutional right to have attorney of one's choice admitted to practice pro hac vice).

281. Anthony H. Angelo, *Legal Capacity in Pacific Island Countries*, *in* REGIONALISING INTERNATIONAL CRIMINAL LAW IN THE PACIFIC ISLANDS 73 (Neil Boister & Alberto Costi eds., 2006); JENNIFER CORRIN & DON PATTERSON, INTRODUCTION TO SOUTH PACIFIC LAW 100 (2d ed. 2007) (South Pacific Law Series). For example, the current Chief Justice of the Marshall Islands, Daniel Cadra, lives in Alaska and is an Assistant Attorney General there. *Cf.* 20 ALASKA BAR RAG, Sept.-Oct. 1996, at 3; ALASKA DIRECTORY OF ATTORNEYS, FALL 2011, at 89 (Eloise Robbins ed., 2011). In the 1990s, the Public Defender in Micronesia and then Palau was another Alaskan, Marvin C. Hamilton, III. Victoria Barber, *Hundreds Attend Service to Mourn Bethel Judge*, TUNDRA DRUMS (Bethel, Alaska), Apr. 25, 2011, at 2 (stating Judge Hamilton, who the Author knew, served in those roles). And the Chief Justice of Tuvalu in the Pacific, Sir Gordon Ward, also served as the Chief Justice of the Turks and Caicos Islands in the Caribbean and lives in Fiji, whose court of appeals he formerly sat on. R. v. Kauapa, [2010] TVHC 4 (Tuvalu High Ct.) (Ward, C.J.); Palms Resort, Ltd. v. P.P.C., Ltd., [2010] UKPC 30, ¶ 9 (appeal taken from Turks and Caicos Is.) (noting decision below was by Chief Justice Ward); *Blaze Guts Judge's Home*, FIJI TIMES (Suva), Aug. 27, 2007, at 5 (stating Justice Ward, formerly of the Fiji Court of Appeals, lived in Pacific Harbor, Fiji).

282. *See*, *e.g.*, *NZ Courtroom Part of Pitcairn—Briefly*, DOMINION POST (Wellington, N.Z.), Nov. 18, 2003, at A4 (describing sitting of the Pitcairn Supreme Court at Papakura District Court, South Auckland). *Cf.* BRIT. INDIAN OCEAN TERR. CONST., Art. 13(4) (allowing Supreme Court of the British Indian Ocean Territory to sit in the United Kingdom); Falkland Islands Courts (Overseas Jurisdiction) Order, 1989, S.I. 1989/2399, § 2 (U.K.) (allowing Falkland Islands Magistrate's Court to hear cases arising in the British Antarctic Territory and South Georgia and the South Sandwich Islands); Cocos (Keeling) Islands Act, 1955, § 15 (Austl.) (permitting Supreme Court of the Territory of the Cocos (Keeling) Islands to sit anywhere in Australia); Supreme Court Ordinance, 1955, § 4 (Cocos (Keeling) Is. [Austl.]) (same); Wake Island Code, 32 C.F.R. § 935.66(c) (2010) (U.S.) (permitting Wake Island Court of Appeals to sit on Wake, in Hawaii, or in the vicinity of Washington, D.C.); Agreement Concerning a Scottish Trial in the Netherlands, *supra* note 244 (allowing trial of the Pan Am 103 bomber); High Commissioner Law No. 46 of April 28, 1955, ALLIED KOMMANDATURA GAZETTE 1056 (U.S. High Comm'r for Ger.) (creating American civilian court in West Berlin), *reprinted in* Allied Kommandatura v. Tiede (U.S. Ct. Berlin 1979), 86 F.R.D. 227, 261–65.

283. Pertile *Islanders on Trial*, *supra* note 228, at 25.

284. R. v. Seven Named Accused, [2004] PNSC 1, 127 I.L.R. 232, ¶¶ 196–206 (Pitcairn Is. Sup. Ct.) (allowing rape trials despite lack of jury); Harvey, *supra* note 274, at 5 (quoting Kari Boye Young, wife of a defendant, saying islanders were upset at the lack of a jury trial: "Britain has given these men British passports but they don't have the basic rights of every British citizen to be tried by their peers."). *Compare* 390 PARL. DEB., H.C. (5th ser.) (1943) 1634W–1635W (U.K.) (statement of Col. Oliver Stanley, Colonial Sec'y) (listing the twelve British colonies without trial by jury, including Pitcairn, and stating "in none of these . . . has there ever been any actual right of trial by jury.") *with* FISKE, *supra* note 12, at 154 (stating

community is so small and the entire population is related to one another.[285] Reporters, previously banned from the island, were allowed to come to Pitcairn to cover the trials.[286]

All this was enormously expensive. In comparison, when the former Pitcairn police officer was herself prosecuted in 2005 for assaulting her successor, New Zealand lawyers—a judge, prosecutor, and public defender—were transported to the island. The trial resulted in the defendant being convicted, placed on probation, and ordered to pay court costs of $60 NZD That case cost the Pitcairn Government $40,000 NZD, over $600 NZD per islander.[287]

All the rape defendants were convicted; four on rape charges, the others on indecent assault charges.[288] The judges imposed light sentences under British law.[289] For example, when the island's mayor—convicted of five counts of rape—was sentenced the judge noted that in England a judge would begin his calculation for such a conviction with a prison term of ten to fifteen years.[290] But because of the special circumstances of Pitcairn, the

---

islanders were conducting jury trials in 1830s) *and* NEILL TONGA, *supra* note 78, at 157 (stating laws he examined provided for jury trials).

285. *See generally* Harvey, *supra* note 274 (stating in the rape cases a jury was impossible because everyone is related). *Cf.* HENRY HUTCHISON MONTGOMERY, THE LIGHT OF MELANESIA: A RECORD OF THIRTY-FIVE YEARS MISSION WORK IN THE SOUTH SEAS 26–27 (London, Society for Promoting Christian Knowledge 1896) (writing of the Pitcairners' cousins on Norfolk Island that they needed "a magistrate from outside. At present, as they are all related, the magistrate is uncle or cousin to every soul amongst them, and it must be hard indeed for the embodiment of the law to resist the pleadings of his relations."). Another colonial power failing—at least for a time—to provide for trial by jury in the Pacific was the United States in the Trust Territory of the Pacific Islands. James Robert Artnett, II, *The American Legal System and Micronesian Customary Law: The Legal Legacy of the United States to the New Nations of the Trust Territory of the Pacific Islands*, 4 UCLA PAC. BASIN L.J. 161, 170 (1985).

286. Russell Brown, *Meals Not Included*, 195 THE LISTENER, Sept. 4, 2004, at 52 (TL) (discussing reporters at trial); Keri Welham, *Isle of Unease*, CHRISTCHURCH PRESS (N.Z.), July 27, 2002, at D1 (discussing previous ban on reporters).

287. Phil Taylor, *Island Justice Costly But Worth the Price*, N.Z. HERALD (Auckland), Sept. 3, 2005, at A11.

288. R. v. Christian, [2005] PNSC 1, [2006] 1 L.R.C. 745, 75 BRIT. Y.B. INT'L L. 2004, at 428, ¶¶ 18–43 (Pitcairn Is. Sup. Ct.) (stating factual findings at hearings).

289. Claire Harvey, *"You Seemed to Believe You Had Some Right to Sexually Violate Young Girls"*, HERALD SUN (Melbourne, Vict.), Oct. 30, 2004, at 13; Pertile *Islanders on Trial*, *supra* note 228, at 26. The title of Harvey's article quotes the sentence of Justice Russell Johnson in R. v. Randall Kay Christian, Pitcairn Is. Sup. Ct. Nos. 23-36/2003 (Oct. 24, 2004), *in* 2 PCR 2-571: "You seemed to believe you had some right to sexually violate young girls whenever you felt like it. These are beliefs that are contrary to laws and human rights wherever mankind lives."

290. R. v. Stevens Raymond Christian, Pitcairn Is. Sup. Ct. Nos. 37-46/2003, ¶ 7 (Oct. 24, 2004) (Blackie, C.J.), *in* 2 PCR 2-579.

mayor was sentenced to three years and eligible for parole after one.[291] Following the convictions, the Supreme Court heard arguments on the legality of the prosecutions.[292] Several legal theories were advanced.[293] The main themes were: 1) abuse of process; 2) denial of justice; and 3) breach of Britain's Human Rights Act of 1998.[294]

Among the factors argued were the long delay in prosecution,[295] the failure to promulgate British law on the island, the formation of the legal system after the allegations were raised, the lack of knowledge on Pitcairn of the age of consent, and the lack of legal advice.[296] The last is a long-standing issue. When Donald A. McLoughlin visited in 1958 to preside over a divorce, he reported that he "was placed in the somewhat unusual position of having to interview the parties, prepare the papers, witness them, and then hear the evidence in open Court" in trying the resulting case.[297]

The argument regarding the lack of notice of the British law the defendants were charged with violating had merit.[298] The Pitcairn

---

291. *Id*. at ¶¶ 8–17.

292. *R. v. Christian*, [2005] PNSC 1, ¶ 1; Beloff, *supra* note 277, at 25 ("the trial, unusually, was bifurcated, with the facts being ascertained in Pitcairn and the law being argued in New Zealand."). *Cf*. Angelo *Pitcairn—The Saga Continues*, *supra* note 220, at 296 (criticizing "back-to-front" procedure).

293. *R. v. Christian*, [2005] PNSC 1, ¶ 45.

294. *Id*.; Human Rights Act, 1998, c. 42 (U.K.). *See also* THE HUMAN RIGHTS ACT 1998: WHAT IT MEANS (Lammy Betten ed., 1999).

295. Chief Justice Charles S. Blackie in 2004 denied a request to stay the prosecutions based passage of time. The four areas of delay identified by the defense and rejected by the Court were: 1) the time between the alleged offending and when a complaint was lodged; 2) the time from the beginning of the investigation and prosecution deciding to charge; 3) the time between the decision to charge and formally making the charge; and; 4) the time between the charges and the start of the trial. R. v. Seven Named Accused, Pitcairn Is. Sup. Ct. Nos. 1-55 (Aug. 6, 2004), *in* 1 PCR 1-157.

296. *R. v. Christian*, [2005] PNSC 1. Finding out the law on Pitcairn was for all practical purposes impossible and no legal advice was available except from the government's own lawyers. Angelo *Pitcairn—The Saga Continues*, *supra* note 220, at 296. And they did not visit Pitcairn. Paul Treadwell, the legal adviser from 1979 to 2010, never visited the island, and his predecessor, Donald A. McLoughlin, last visited in 1958. Lewis, *supra* note 154, at 59–60. *Compare* Derek O'Brien & John Arnold Epp, *Legal Aid in the Overseas Territories*, 33 COMMON L. WORLD REV. 160, 162, n.8 (2004) (Eng.) (stating Pitcairn was only permanently-inhabited British territory without provision for legal aid) *with* Legal Aid (Criminal Proceedings) Ordinance No. 1 of 2001 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 9).

297. MCLOUGHLIN 1958 REPORT, *supra* note 74, ¶ 64. *See also* ROBERTS-WRAY, *supra* note 132, at 909 (writing in 1966: "It is permissible to wonder how far English law has in fact been effective . . . it seems likely that the island's magistrates have never known much about it and have formed their own written laws sufficient for most purposes.").

298. *See generally* Guest *Sexual Enculturation*, *supra* note 220. *See also* Beloff, *supra* note 277, at 25 ("It is well established that ignorance of the law is no excuse: but what if those who are subject to the law have no means of gaining access to its content? Is it appropriate for a modern Western democracy to impose

prosecutor told the press that "the Pitcairn laws . . . will be (unfamiliar) to every person in the process."[299] Only in 1997 were a set of British statutes sent to Pitcairn—but they were not made publicly available.[300] This was comparable to the Australian territory of the Cocos Islands, which had laws so incomprehensible and unknowable that an Australian parliamentary committee in 1991 found "the lack of accessibility and ready ascertainability of the laws of the Territory [to be] a violation of fundamental human rights."[301] In 1859 the Governor of Norfolk Island—and of New South Wales—wrote London categorically opposing to any effort to impose British or New South Wales law on Norfolk, where the Pitcairners had moved *en masse* three years before. He opposed such a move for reasons that apply to Pitcairn today:

> The habits and modes of thought of the islanders are so different from those of Englishman, the circumstances of the colony are so unique, that I confess I should be sorry to see the laws of England or of New South Wales, either civil or criminal, adopted in the aggregate as the laws of Norfolk Island. Were this done . . . the islanders would be subjected to a legal system, which having been framed to suit a state of society altogether different from that which it is proposed to apply it, would probably be found to be a variance with their feelings and habits, and of the bearing of which upon all their relations with each other they would be utterly ignorant.[302]

---

its values through law—especially in the area of sex, where the boundaries of what should be tolerated are in a constant state of revision—on a community, far distant in terms of geography and practices, who have had no part in the making of that law?"); Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, 51 FORDHAM L. REV. 255 (1982).

299. Welham, *supra* note 289, at D4.

300. *Id*.

301. AUSTL. H.R. STANDING COMM. ON LEGAL & CONSTITUTIONAL AFFAIRS, ISLANDS IN THE SUN: THE LEGAL REGIMES OF AUSTRALIA'S EXTERNAL TERRITORIES AND THE JERVIS BAY TERRITORY ¶ 4.10.3 (1991), *available at* http://www.aph.gov.au/house/committee/reports/1991/ 1991_PP47report.htm (last visited Jan. 4, 2012). *See also* 184 PARL. DEB., H.R. (1992) 2804 (Austl.) (statement of Bob Collins, Minister for Transport & Communications, calling Cocos (Keeling) Islands' legal regime to be "seriously deficient, unfair and inappropriate"), *reprinted in* 14 AUSTL. Y.B. INT'L L. 434 (1992). *Cf*. F.C. Hutley, *Sources of the Law on Norfolk Island*, 24 AUSTL. L.J. 108 (1950) (complaining of the "chaotic state of" the laws of the Australian territory of Norfolk Island at the time and noting the Australian government by its failure to publish the laws had made it impossible for anyone, including the lawyers, to find the law).

302. Letter from William T. Denison, Governor of Norfolk Island & New South Wales, Sydney, to Sir Edward Bulwer-Lytton, Colonial Sec'y, London, Jan. 22, 1859, *in* U.K. COLONIAL OFFICE, PITCAIRN ISLANDS: COPY OF CORRESPONDENCE WITH THE GOVERNMENT OF NEW SOUTH WALES IN REFERENCE TO PITCAIRN ISLANDERS SETTLED IN NORFOLK ISLAND, H.C. 297, at 23, *in* 38 P.P. (1863) 337, MF 69.306-7. *Cf*. Brian Z. Tamahana, *A Proposal for the Development of a System of Indigenous Jurisprudence in the*

The Judicial Committee in the Pitcairn appeal sympathized with the Pitcairn defendants on the issue of notice of the law. "Their Lordships would accept that the fact that a law had not been published and could not reasonably have been known to exist may be a ground for staying a prosecution for contravention of that law as an abuse of process."[303] Nevertheless, the defendants' argument was rejected. "It is . . . unnecessary to discuss the philosophical basis or legal limits of such a principle because" the trial and appellate courts had rejected the argument.[304] Another of the Law Lords felt that the failure to publish the 1956 law on Pitcairn was acceptable since it did not create new offenses but only recodified an earlier statute which put the common law on the books.[305]

All the process arguments were rejected by the trial court and on appeal.[306] After the mayor of Pitcairn was convicted of rape, the Governor enacted a law removing him from office and banning him and the other convicts from office.[307] This was criticized as a bill of attainder and retrospective punishment.[308] Following the Privy Council judgment, trials in a Pitcairn court of the defendants living in New Zealand went forward; two men were convicted of rape.[309] A total of nine men were convicted in the two sets of trials. The British government agreed to pay women who had been attacked under its Victims of Crime Compensation Program,

---

Federated States of Micronesia, 13 HASTINGS INT'L & COMP. L. REV. 71, 94–99, 112–14 (1989) (discussing consequences of imposing outside law).

303. Christian v. The Queen, [2006] UKPC 47, [2007] 2 A.C. 400, [2007] 1 L.R.C. 726, 130 I.L.R. 696, ¶ 24 (appeal taken from Pitcairn Is.) (opinion of Lord Hoffmann). *See also id.* ¶¶ 40–41 (opinion of Lord Woolf) (stating that while "persons who are intended to be bound by a criminal statute must first be given either actual or at least constructive notice of what the law requires" and defendants "were probably unaware of the terms of the Sexual Offences Act or even that there was legislation of that name or the sentences that could be imposed for those offenses" the Pitcairn prosecution was acceptable because the islanders "were aware . . . that their conduct was contrary to the criminal law.").

304. *Id.* ¶ 24 (opinion of Lord Hoffmann).

305. *Id.* ¶¶ 83–86 (opinion of Lord Hope of Craighead) (citing Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, §§ 48, 52 (U.K.)).

306. R. v. Christian, [2005] PNSC 1, [2006] 1 L.R.C. 745, 75 BRIT. Y.B. INT'L L. 2004, at 428 (Pitcairn Is. Sup. Ct.); R. v. Christian, [2006] PNCA 1, [2006] 4 L.R.C. 746 (Pitcairn Is. Ct. App.).

307. Local Government (Special Electoral Provisions) Ordinance No. 6 of 2004 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 11A). *Cf.* U.S. CONST. art. I, § 9.

308. *See generally* Angelo & Wright *Pitcairn Trials Act*, *supra* note 220. *See also* Local Government Ordinance No. 1 of 1964, § 3(3) (providing for removal of Pitcairn officials who were sentenced to prison). *Cf.* U.S. CONST. art. I, § 9, cl. 3 (prohibiting bills of attainder).

309. *Two More Guilty of Child Sex on Pitcairn*, CAIRNS POST (Queensl.), Jan. 10, 2007, at 15.

regardless of whether their attackers were prosecuted.[310] Britain also finally brought in outsiders to enforce the law, military policemen, and a Scottish officer from the Orkneys.[311]

XIV. CONSTITUTION: 2010

It was no "miracle at Philadelphia" for the Pitcairn Constitution.[312] The road to it started in 1999 when the Foreign and Commonwealth Office resolved to undertake a review of colonial governance.[313] Most of the fourteen British overseas territories[314] received new constitutions in the twenty-first century.[315] The Pitcairn Constitution was based on the constitution issued in 2009 for St. Helena, Ascension, and Tristan da Cunha.[316] Meetings were held on Pitcairn with the islanders and British officials to discuss the proposal.[317] The Constitution was approved by Her Majesty as an order-in-council at Buckingham Palace on February 10, 2010

---

310. *Morning Report: Pitcairn Victims Eligible for Compensation* (Radio N.Z. broadcast, Oct. 10, 2008), *available at* http://www.radionz.co.nz/national/programmes/morningreport/ audio/1753231/pitcairn-island-victims-eligible-for-compensation (last visited Jan. 4, 2011).

311. Judith Slater, *Pitcairn Island Deployment: British Community Policing in the Raw*, TALK THROUGH: THE MAGAZINE OF THE MINISTRY OF DEFENCE POLICE, Jan. 2007, at 8 (Eng.) (account of British M.D.P.'s stationed there); Malcolm Gilbert, *A Policeman's Lot is Such a Happy One*, THE SCOTSMAN (Edinburgh), June 5, 2007, at 10 (account by a policeman from the Orkneys).

312. *Cf.* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA (1966).

313. *See generally* PARTNERSHIP FOR PROGRESS AND PROSPERITY, *supra* note 194. A further government review, giving its position on the overseas territories, is to be published in 2012. 532 PARL. DEB., H.C. (6th ser.) (2011) 48WS (statement of William Hague, Foreign Sec'y).

314. This is now the preferred term of art in Britain, replacing older terms such as "dependent territories" and "colonies." *See* British Overseas Territories Act, 2002, c. 8, § 1 (U.K.). *But see* Interpretation Act, 1978, c. 30 (U.K.) (defining "colony" in a way which includes all current British overseas territories).

315. HENDRY & DICKSON, *supra* note 139, at vii. Counting Pitcairn, there are fourteen British overseas territories. British Nationality Act, 1981, c. 61, sched. 6 (U.K.) (listing them). Those with recent constitutions are the British Indian Ocean Territory (2004), the Cayman Islands (2009), the Falkland Islands (2008), Gibraltar (2006), Montserrat (2010), Pitcairn (2010), St. Helena, Ascension, and Tristan da Cunha (2009), the Turks and Caicos Islands (2006), and the Virgin Islands (2007). Those with older constitutions are Anguilla (1982), Bermuda (1968), the British Antarctic Territory (1989), the Sovereign Base Areas of Akrotiri and Dhekelia (1960), and South Georgia and South Sandwich Islands (1985).

316. OFFICE OF THE GOVERNOR OF PITCAIRN, CONSULTATION DOCUMENT FOR CONSTITUTIONAL REVIEW, Sept. 22, 2009, ¶ 1 (stating connection to St. Helena document) *available at* http://www.government.pn/Consultation%20document%20for%20constitutional%20review.pdf (last visited Jan. 4, 2012); St. Helena, Ascension, and Tristan da Cunha Constitution Order, 2009, S.I. 2009/1751 (U.K.).

317. E-mail from Andrew Allen, Head of Southern Oceans Team, Overseas Territories Directorate, Foreign & Commonwealth Office, London, to Author, Mar. 11, 2011, 12:46:57 (G.M.T.).

and took effect three weeks later on March 4.[318] ("Miracle in S.W.1," perhaps?) This was one of many orders-in-council issued the same day which concerned military pensions, Libyan taxes, Welsh, and other tedious subjects.[319] It is a detailed document with about as many articles as there are islanders.

The Queen is the executive.[320] She nominally appoints a governor—but in reality the Foreign Office chooses for her.[321] The Governor has sole legislative powers.[322] There is also an Island Council.[323] Its composition is fixed by law and currently consists of a mayor, the deputy mayor, four councilors—these six being elected—and an appointed member chosen by the Governor.[324] The Governor, Deputy Governor, and Commissioner are all *ex officio* members.[325] The Island Council is to enforce the law and make regulations about zoning, "keeping the Islands clean," quarantine, soil conservation, explosives, and similar minor matters—but anything they do can be overturned by the Governor.[326] There is an Attorney General, appointed by the Governor, who cannot be removed except for cause.[327] Numerous minor functionaries exist under the island laws, such as the Registrar of Business Names, the Registrar of Births and Deaths, the Registrar of Marriages, and the Postmaster.[328] There is a civil service and

---

318. Pitcairn Constitution Order, 2010, S.I. 2010/244 (U.K.), *reprinted in* LAWS OF PITCAIRN, *supra* note 21, at xxvii; Proclamation Appointing the Day, *supra* note 22. *See also* ROBERTS-WRAY, *supra* note 132, at 143 (orders-in-council "almost invariably employed to establish a constitution"); Amicus Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Petitioner, at 7, Matimak Trading Co. v. Khalily, 522 U.S. 1098 (1998) (No. 97-893), 1997 WL 33549577, 1997 U.S. S. Ct. Briefs LEXIS 744 (describing constitutional arrangements of British colonies).

319. Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions (Amendment) Order 2010, S.I. 2010/240 (U.K.); Double Taxation Relief and International Tax Enforcement (Libya) Order 2010, S.I. 2010/243 (U.K.); National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2010, S.I. 2010/245 (U.K.).

320. PITCAIRN CONST., art. 33(1).

321. *Id.* art. 33(2); Memorandum of the Foreign & Commonwealth Office, *in* FOREIGN AFFAIRS COMM., OVERSEAS TERRITORIES: EVIDENCE, 2007−8, H.C. 147-II, Ev-144, ¶ 32 (U.K.) (stating appointments made on advice of F.C.O.).

322. PITCAIRN CONST., art. 36.

323. *Id.* art. 34.

324. *Id.*

325. Local Government Ordinance of 1964, § 6 (codified as amended as LAWS OF PITCAIRN, *supra* note 21, c. 11).

326. *Id.* § 7.

327. PITCAIRN CONST., art. 35.

328. *See* Registration of Business Names Ordinance No. 7 of 1999, § 2 (codified as amended as LAWS OF PITCAIRN, *supra* note 21, c. 16); Births and Deaths Registration Ordinance No. 1 of 1952, § 2 (codified as amended as LAWS OF PITCAIRN, *supra* note 21, c. 18) (LLMC); Marriage Ordinance No. 4 of

an ombudsman.[329] There is a Court of Appeals, a Supreme Court, a Magistrate's Court, and a Lands Court.[330] All of this recent legislative activity gives tiny Pitcairn an enormous amount of government for its five-dozen residents.[331]

XV. THE NEXT STEPS

Queen Elizabeth II put it on the bicentennial of settlement. "Few other small communities can be so well known around the world or held in such universally warm regard as Pitcairn or its people."[332] Yet the rape prosecutions showed a dark side to the island.[333] An American argued "[t]he legal structure . . . changes only in response to crisis," and Pitcairn in the last decade affirms that.[334] Thirty years ago in Parliament, it was suggested that there were only three courses of action for Pitcairn: evacuation of the population, investing in the island and its people, or "playing for time, of dragging out discussions while the situation on the island deteriorates from bad, to worse, to desperate."[335] Britain, for decades, sailed the third course and only in the last decade, tacked to the second.[336] Even though New Zealand would be a better fit to govern the

---

1952, § 1(2) (codified as amended as LAWS OF PITCAIRN, *supra* note 21, c. 20) (LLMC); Post Office Ordinance No. 3 of 1954, § 4 (codified as amended as LAWS OF PITCAIRN, *supra* note 21, c. 21) (LLMC).

329. PITCAIRN CONST. arts. 56–57, 59–60.

330. *Id*. art. 49 (Court of Appeals); *id*. art. 45 (Supreme Court); Judicature (Courts) Ordinance No. 2 of 1999, § 10 (codified as amended in LAWS OF PITCAIRN, *supra* note 21, c. 2) (Magistrate's Court); Lands Court Ordinance No. 8 of 2000 (codified in LAWS OF PITCAIRN, *supra* note 21, c. 15).

331. *Cf*. Graham Hassell & Feue Tipu, *Local Government in the South Pacific Islands*, [2008] COMMW. J. LOC. GOVERNANCE 3 (Austl.) (discussing local government elsewhere in the Pacific). This is nothing new for Pitcairn: America's National Broadcasting Company in 1938 ran up against a great deal of bureaucracy involving the Colonial Office in London and the Western Pacific High Commissioner in Fiji when it sought to transmit from the island. A.A. SCHECHTER, WITH EDWARD ANTHONY, I LIVE ON AIR ch. 20 (1941).

332. *The Queen's Message*, 32 PITCAIRN MISCELLANY, Jan. 1990, at 1 (Pitcairn Is.).

333. *Cf*. Ball *Last Weeks*, *supra* note 173, at 19.

334. MARTIN MAYER, THE LAWYERS 137 (New York, Harper & Row 1967).

335. 428 PARL. DEB., H.L. (5th ser.) (1982) 179 (U.K.) (statement of Lord McNair). *Cf*. AUST. ROYAL COMM'N INTO MATTERS RELATING TO NORFOLK ISLAND, REPORT OF THE ROYAL COMMISSION INTO MATTERS RELATING TO NORFOLK ISLAND 345–46 (1976) (faulting Australian government for an ad hoc policy that allowed Norfolk Island to "stumble along" for a half century), *text of report available at* http://www.info.gov.nf/reports/external%20reports/ 1976%20Royal%20Commission%20Nimmo.pdf (last visited Jan. 4, 2012) (the pagination here does not correspond to the printed version).

336. John Kay, *We Hand Mutiny Isle £1.5m in Bounty*, THE SUN (London), May 17, 2011, at 25 (quoting spokesman for U.K. Department of International Development justifying expenditure for wind turbines: "The people of Pitcairn are British citizens and therefore the U.K. Government is legally responsible for their wellbeing.").

islands, Britain has now shown its first real interest in what is now its sole Pacific possession.[337]

The legal adviser to the Governor observed four decades ago, "the most outstanding factors in the development of their system of government and laws have been their comparative isolation from the rest of the world and the impact on them of their various contacts with outsiders."[338] The 2010 charges against the mayor of Pitcairn for possessing child pornography obtained over the Internet is evidence that the principle of *plus ça change* is universal and ever-lasting.[339]

XVI. A NOTE ON SOURCES

Archival documents cited herein were part of the record submitted to the Judicial Committee of the Privy Council in its consideration of *Christian v. The Queen*. These items are cited as PCR ("Privy Council Record") followed by a two-part page number (e.g., "2 PCR 156 means volume two, page 156, and the pagination is continuous through all volumes). Because the PCR is not readily available to scholars, the Author has deposited electronic copies it with the Pitcairn Islands Study Center, Pacific Union College, Angwin, California;[340] the Pacific Collection, Thomas Hale Hamilton Library, University of Hawaii, Honolulu; and the Center for Adventist Research, James White Library, Andrews University, Berrien Springs, Michigan. The University of Hawaii's posting most of the Privy Council Record at its online historical document depository, eVols, available athttp://evols.library.manoa.hawaii.edu/. The file numbers herein were supplied by Ned Fletcher, a New Zealand barrister who worked for the prosecution on the *Pitcairn* case. The Author has reviewed the documents only through the PCR. The archives are abbreviated thusly with the archival file numbers indicated:

---

337. *See* Anthony H. Angelo, *The Pitcairn Prosecutions*, 2010 N.Z.L.J. 34, 35 (reviewing JUSTICE, LEGALITY, AND THE RULE OF LAW: LESSONS FROM THE PITCAIRN PROSECUTIONS (Dawn Oliver ed., 2009)).

338. *McLoughlin Nineteenth*, *supra* note 177, at 138.

339. *See Mayor of Pitcairn Island Charged With Child Porn Offenses*, *supra* note 184, at 26; *Pitcairn's Mayor Charged Over Child Pornography*, DOMINION POST (Wellington, N.Z.), Dec. 4, 2010, at A3; *Papakura Trial for Pitcairn Mayor*, SUNDAY STAR-TIMES (Wellington, N.Z.), Dec. 11, 2010, at A4 (describing plans for hearing in Pitcairn Supreme Court, sitting in New Zealand); *One News: Pitcairn Mayor Appears on Child Pornography Charges* (TV One broadcast, New Zealand, Dec. 11, 2011) (reporting on preliminary hearing held in New Zealand), *available at* http://tvnz.co.nz/national-news/pitcairn-mayor-appears-child-pornography-charges-video-4631653 (last visited Jan. 4, 2012).

340. *See Book on Pitcairn Given to PUC Library*, 153 ADVENTIST REV. & SABBATH HERALD 1338 (1976); *Pitcairn Island Material Is Donated to PUC*, 76 PAC. UNION RECORDER, Nov. 22, 1976, at 7; Herbert P. Ford, *Pitcairn Study Center Is Begun at PUC*, 154 ADVENTIST REV. & SABBATH HERALD 646 (1977); *Pitcairn Island Gift Is Given to PUC Study Center*, 77 PAC. UNION RECORDER, Mar. 20, 1978, at 8; *The Pitcairn Islands Study Center*, 18 PITCAIRN LOG, Sept.-Nov. 1990, at 8.

(FCOA) = Foreign and Commonwealth Office Archives, Hanslope Park, Hanslope, Milton Keynes, Buckinghamshire, England; (MP) = Papers of Henry Evans and Honor Courtney Maude, Special Collections, Barr Smith Library, University of Adelaide, Adelaide, South Australia, Australia; (WPA) = Western Pacific Archives, Special Collections, University of Auckland Library, Auckland, New Zealand;[341] (TNA) = The National Archives of the United Kingdom, Public Record Office, Kew, Richmond, Surrey, England.

"P.P." indicates the British Parliamentary Papers.[342] The cite "59 P.P. (1899) 563, MF 105.516" means the document is at page 563 of volume 59 of the *Accounts and Papers* for Parliament's 1899 session and on microfiche number 105.516 of the Chadwyck-Healey edition. "IUP" refers to the selective Irish University Press reprint *1000-Volume Series of British Parliamentary Papers, 1801–1899*, giving the division (*e.g*. "Australia") and volume number the report appears in. Britain's *Parliamentary Debates*, also known as *Hansard*, are all online at http://hansard.millbanksystems.com (covering 1803–2005), and http://www.parliament.uk/business/publications/hansard (covering Commons debates from 1988 to date and Lords debates from 1995 to date).

Some sources relied upon by the Author are available online. Rather than clutter the footnotes with addresses impossible to retype, the presence of an online version is indicated by an abbreviation following the print citation. These abbreviations are:

(AO) = Project Archive, www.Archive.org; (GB) = Google Books, www.books.google.com; (NLA) = National Library of Australia's "Trove" website for newspapers, http://trove.nla.gov.au/newspaper; (TL) = *The Listener*, the magazine of New Zealand public radio, www.listener.co.nz.

Finally, the Law Library Microfilm Consortium, Honolulu, Hawaii, has filmed some of the Pitcairn Ordinances on LLMC Microfilm 97-495. The note (LLMC) identifies them.

---

341. For information about the Western Pacific Archives, see A.I. Diamond, *The Central Archives of Fiji and the Western Pacific High Commission*, 1 J. PAC. HIST 204 (1966) (Austl.); Frank Rogers, *Western Pacific and Western Pacific High Commission Archives*, ARCHIFACTS: BULL. ARCHIVES & RECORDS ASS'N N.Z., Mar. 1986, at 10 (lamenting the archives had been moved from Fiji to England by the British government without any consultation of those in the region); Stephen Innes, *Western Pacific Archives In Their New Home*, 42 J. PAC. HIST 265 (2007) (Austl.) (discussing return of archives to South Pacific by the librarian overseeing the collection).

342. *See also* FRANK RODGERS, A GUIDE TO BRITISH GOVERNMENT PUBLICATIONS ch. 8 (1980) (discussing *Sessional Papers*); PERCY FORD & GRACE FORD, A GUIDE TO PARLIAMENTARY PAPERS: WHAT THEY ARE, HOW TO FIND THEM, HOW TO USE THEM 71–73 (3d ed. 1980) (discussing how to cite *Sessional Papers*).

ITALIAN CONSTITUTIONAL AND CASSATION COURTS: WHEN THE RIGHT TO DIE OF AN UNCONSCIOUS PATIENT RAISES SERIOUS INSTITUTIONAL CONFLICTS BETWEEN STATE POWERS

Gianluca Gentili[*] *and Tania Groppi*[**]

I. INTRODUCTION

On February 9, 2009, the death of a young woman who had lain in a permanent vegetative state (PVS) for seventeen years brought an end to an unprecedented conflict between institutional powers in Italy. The case drew attention to issues such as the refusal of life-sustaining medical treatments, living wills, and the application of the "substitute judgment test." It also focused the interest of scholars and society on the power of judges to decide cases dealing with controversial ethical issues in areas not addressed by legislation. In giving account of the events surrounding the case, this note will focus on the case's constitutional implications and

* Ph.D., Comparative Public Law, University of Siena; comments are welcome. Email: gianluca.gentili@unisi.it

** Professor of Public Law, University of Siena. Email: groppi@unisi.it

analyze relevant acts issued by the Italian judicial, legislative, and executive powers. The case stands out as an example of the process of the re-definition of the traditional framework of sources of law and of the structure of judicial review currently taking place in Italy. This process is characterized by the growing relevance given to judicial intervention in the production of law and by an increasingly residual role played by the Parliament.

Eluana Englaro is the name of the woman who, with her personal story, has focused public debate in Italy on right-to-die issues. The events leading to her death began in 1992, when, at age twenty-one, she entered a PVS due to a car accident, which left her dependent on a life-sustaining treatment. Since 1999, her father and guardian, Mr. Beppino Englaro, had repeatedly[1] sought a judicial order authorizing the removal of her feeding tube. He claimed that the woman, in informal statements made before the car accident (i.e., when conscious and of sound mind), had expressed a desire to be left dying should she ever fall into a PVS. While over the years bills have been introduced into the Italian Parliament, Italy still lacks legislation that legally recognizes advanced directives and living wills.[2] Moreover, until the decision of the Supreme Court of Cassation at issue here, courts had consistently refused to order the removal of life-sustaining support on the basis of previous oral statements made by a now unconscious patient.

II. THE GUIDELINES ISSUED BY THE COURT OF CASSATION AND THEIR APPLICATION BY THE COURT OF APPEAL OF MILAN

Court of Cassation decision no. 21748 of October 16, 2007,[3] originated from Mr. Englaro's latest application for removal of the feeding tube. The Lecco Tribunal of first instance and the Milan Court of Appeal rejected the application.[4] However, on October 16, 2007, on appeal from this latter decision, the Court of Cassation determined for the first time that the feeding tube could be removed. After the Court qualified hydration through the feeding tube as non-aggressive medical treatment, the Court of Cassation defined "informed consent" as the only legitimate ground to provide medical treatments. This decision was in reference to its own previous jurisprudence interpreting Articles 2, 13, section 1, and Article 32,

1. In 1999 and 2002, to no avail. Mr. Englaro then lodged again an application in 2005.

2. Absent legislation, in Italy controversies involving informed consent and living wills are addressed by courts on a case-by-case basis, on the basis of the general principles set forth in the Constitution and in other non-statutory legal sources. *See generally* COSTITUZIONE [COST.] [Constitution] arts. 1–12 (Jan. 1, 1948) (It.).

3. Cass., 1 civ., 16 Oct. 2007, n.21748, Foro It. I 2007, vol. I, C.c., 3025 (It.).

4. Trib. Lecco, 2 Feb. 2006, n.727/2005; Corte App., 16 Dec. 2006 (It.).

section 2, of the Italian Constitution.[5] According to the Court, informed consent also includes the right to refuse medical care every time that refusal is present, authentic, and informed. In the Court's view, refusal of medical treatment (even when causing death) does not amount to euthanasia and gives rise to the doctor's legal obligation to respect the patient's will and discontinue undesired treatments. The Supreme Court also stated that *express* advanced directives provided earlier in time (i.e., when conscious and of sound mind) by a now-unconscious patient and identified as undesired treatments, qualified as present, authentic, and informed refusal. When directives are missing, however, (here lies the innovative part of the decision), after prompt life-saving treatments are provided, the guardian should be allowed to balance protection of the patient's life with her conception of dignity and decorous life. Then, it can be ascertained whether the now-unconscious patient would have preferred treatments to be discontinued. The guardian, together with the court requested to grant removal, will consider the patient's mind before losing consciousness or infer it from her personality, lifestyle, and values. In addition, the removal will be predicated on her ethical, religious, cultural, and philosophical beliefs. The Court cited Articles 5 ("General Rule") and 6 ("Protection of Persons Not Able to Consent") of the Oviedo Convention,[6] Article 3 of the EU Charter of Fundamental Rights,[7] and cases decided by the Supreme Court of New Jersey (*In re Quinlan*[8] and *In re Nancy Ellen Jobes*,[9] which applied the so-called "substituted judgment test.") Following *Bundesgerichtshof* and the House of Lords (the *Bland* case[10]), the Court of Cassation provided a detailed account of efforts carried out by foreign courts to identify a PVS patient's mind with regard to the possibility of ending life-sustaining treatments when no express advanced directives existed.[11] After urging the Italian Parliament to enact legislation in an area still unaddressed by statutory law, the Supreme Court remanded the case to

---

5. COSTITUZIONE [COST.] [Constitution] art. 2; 13, § 1; 32, § 2 (Jan. 1, 1948) (It.). The Italian Constitution is available, in English, at: http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited Jan. 8, 2012)

6. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Apr. 4, 1997, E.T.S. No. 164, It. No. 145/2001.

7. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J.(C364/01), *available at* http://www.europarl.europa.eu/charter/pdf/text_en.pdf (last visited Nov. 4, 2011).

8. *In re* Karen Quinlan, 355 A.2d 647, 672 (N.J. 1976).

9. *In re* Nancy Ellen Jobes, 529 A.2d 434, 427 (N.J. 1987).

10. Airedale N.H.S. Trust v. Bland, [1993] 2 W.L.R. 316 (Eng.).

11. The Court also cited to Vacco v. Quill, 521 U.S. 793, 793 (1997) and Pretty v. United Kingdom, App. No. 2346/02, 96 Eur. Ct. H.R. 943–949 (2002).

the Milan Court of Appeal for a new determination, instructing the lower court that a judge could authorize removal of life support, when two circumstances occurred:

> a) When the PVS condition is, under rigorous medical assessment, irreversible and incurable, and no evidence exists, according to the best international scientific standards, in support of the possibility for the patient to regain consciousness and awareness of the outer world.
> b) When request of removal is based upon clear, unambiguous, and convincing evidence that the act would be consistent with the patient's mind as inferred from her previous declarations, lifestyle, beliefs, and concept of human dignity.[12]

With a decree issued on July 9, 2008,[13] sixteen years after her car accident, the Court of Appeal of Milan, on remand, applied the principles established by the Court of Cassation. The court authorized Mr. Englaro and Eluana's doctors to discontinue her life-sustaining treatment, finding that possibilities for Eluana to regain consciousness and awareness of the outer world were lacking. The evidence presented by Mr. Englaro was sufficient to determine that Eluana would have requested withdrawal of the treatment had she been aware of her post-accident physical condition. The decision provoked immediate reactions by the public.

III. THE ITALIAN PARLIAMENT RAISES A CONFLICT OF COMPETENCE BEFORE THE CONSTITUTIONAL COURT

After the decision of the Milan Court of Appeal on remand, the issue escalated. It reached the highest level of relations between different branches of government. The House of Deputies (July 31, 2008) and the Senate (August 1, 2008) of the Italian Parliament passed motions to raise a conflict of competence between state powers before the Italian Constitutional Court.[14] In the Parliament's view, the judicial branch (i.e., the Court of Cassation and Milan Court of Appeal, respectively, in issuing and applying decision no. 21748/2007) overstepped the boundaries of their judicial competence, *de facto* providing innovative statutory-like guidelines in a field where no legislation had been previously enacted and where

12. *See* Stefano Biondi, *Can Good Law Make Up For Bad Politics? The Case of Eluana Englaro*, 17 MED. L. REV. 447, 452 (2009), where the author emphasizes the Court of Cassation's combined use of the "substituted judgment test" and "best interests" approach to limit withdrawal of treatment to extreme circumstances.

13. Court Decree, 9 July 2008, n.88, *in* Corte App. of Milan, 25 June 2008 (It.).

14. COSTITUZIONE [COST.] [Constitution] art. 134 (Jan. 1, 1948) (It.).

Parliament is deemed to be vested with discretion in balancing the constitutional rights involved. Moreover, instead of deciding the case according to principles inferred and identified within the legal system, as provided by Article 12, section 2 of the preliminary provisions to the Italian Civil Code,[15] the guidelines issued by the Court of Cassation would have been so removed from those principles as to substantially qualify as an exercise of legislative power, therefore encroaching on a function reserved by the Constitution exclusively for the Parliament.[16] According to the Parliament, action taken by the judiciary would have been more unconstitutional since it addressed a controversial ethical and political issue, which is the objective of bills previously introduced into the legislative assembly.[17] It should thus be qualified as an interference with the legislative process. The Parliament, therefore, asked the Constitutional Court to annul decision no. 21748/2007 and acts adopted by the Milan Court of Appeal in an effort to comply with the decision.[18]

IV. THE DECISION OF THE CONSTITUTIONAL COURT

With order no. 334[19] issued on October 10, 2008, the Constitutional Court declared the conflict of competence raised by the Parliament inadmissible on three grounds. First, the Court emphasized that the decisions of the Court of Cassation and the Court of Appeal did not amount to an exercise of legislative power (i.e., with *erga omnes* effect) but, conversely, could only be qualified as judicial acts with *inter partes* effects, that is, limited to a single specific case. Second, referring to specific complaints raised by the Parliament, the Constitutional Court stated that the Legislative assembly, far from alleging only an encroachment of its constitutionally protected prerogatives, had criticized the way the Court of Cassation had selected, interpreted, and applied relevant normative materials in deciding the case. According to the constant jurisprudence of the Constitutional Court, these complaints, addressing so called *errores in iudicando* (errors in judging the case), do not provide a legitimate ground for raising a conflict of competence between state powers under Article 134

15. CODICE CIVILE [C.c.] art. 12, § 2, preliminary provisions (R.D. 16 Mar. 1942, n.262) (It.). The article ("Interpretation of Statutory Law"), notes that "whenever a case cannot be decided applying a specific provision, the judge should consider other provisions addressing similar cases or analogous matters; if a decision cannot still be issued, the case will then have to be decided according to the general principles of the State legal order" (translation provided by the authors). The article is therefore clear in imposing a duty on courts to decide every case filed, and forbids a declaration of *non liquet.*

16. COSTITUZIONE [COST.] [Constitution] art. 70 (Jan. 1, 1948) (It.).

17. *Id*.

18. *Id*.

19. Corte Cost., 8 Oct. 2008, n.334, *in* Gazz. Uff. No. 43, 15 Oct. 2008 (It.).

of the Italian Constitution. Indeed, should the Constitutional Court issue decisions in response to this type of complaints, the traditional role of the Court would be changed from a specialized body exercising only functions of judicial review into a judicial body of further instance deciding cases on the merits.[20] Finally, the Constitutional Court emphasized that the Parliament still retained the power to enact legislation on the subject at any future time, striking the preferred balance between the various constitutional interests in consideration.[21]

V. SUBSEQUENT DEVELOPMENTS

Contemporaneous with the raising of the conflict of competence before the Constitutional Court, on August 1, 2008, the General Office of the Milan Public Prosecutor (*Procura Generale della Repubblica*) challenged, in court, the validity of the decree issued by the Court of Appeal on remand, and asked for a suspension of its execution. The Joint Divisions of the Court of Cassation, however, eventually rejected the challenge declaring it inadmissible on November 13, 2008. The decision of the Milan Court of Appeal became, therefore, *res judicata* and fully enforceable.

On September 3, 2008, the General Director of the Public Health Service Management for the Lombardy Region, an administrative body, issued administrative guidelines to all public hospitals of the Region forbidding withdrawal of artificial hydration from helpless disabled persons hosted in the Region's public health facilities.[22] The Regional Administrative Tribunal (*Tribunal Amministrativo Regionale,* TAR) for the Lombardy Region, was called upon to decide the legitimacy of these guidelines.[23] On January 22, 2009, the TAR annulled them, affirming the duty of public health facilities to grant admission to their structures and provide medical care to everyone, including patients lying in PVS to whom

20. *See*, *e.g.*, Corte Cost., 19 Dec. 1974, n.289, *in* Gazz.Uff., 1974 (It.).

21. *See* Roberto Romboli, *Il Conflitto Tra Poteri Dello Stato Sulla Vicenda Englaro: Un Caso di Evidente Inammissibilità* [*The Conflict Between State Powers in the Englaro Case: A Case of Clear Inadmissibility*], ASSOCIAZIONE DEI CONSTITUZIONALISTI, *available at* http://associazionedeicostituzionalisti.it. (last visited Nov. 5, 2011) (It.).

22. Eluana Englaro was hosted by a public hospital in Lombardy at that time. Mr. Englaro had asked to the Public Health Service Management of the Region to indicate a public hospital where withdrawal of the feeding tube could take place.

23. In Italy and in other civil law countries influenced by the French model of administrative law, disputes between private parties and the State are handled by "administrative" courts. A first instance administrative court (TAR) is established in each of the Italian Regions, with jurisdiction over administrative actions in that Region.

courts have recognized the right to the withdrawal of life-sustaining medical treatment.[24]

The case then reached the supranational level when six Italian disabled persons and six pro-life associations lodged applications[25] with the European Court of Human Rights (ECtHR) claiming that Italy, through the decision of the Court of Appeal, had infringed Articles 2 ("Right to Life"), 3 ("Prohibition of Torture"), and 6 ("Right to a Fair Trial") of the European Convention on Human Rights (ECHR).[26] On December 23, 2008, the ECtHR rejected the joint applications on procedural grounds, declaring unfounded the applicants' claim of harm resulting from the decision, and also determining that the associations lacked standing as defined by Article 34 of ECHR,[27] since they could not prove a direct connection with Eluana Englaro. The application was also rejected since applicants had not proved that Italy had violated Articles 2 and 3 of ECHR, failing to adequately protect the right to life and to enforce the prohibition of torture and inhumane or degrading treatments.

While in the first days of February Eluana Englaro was moved from a public hospital to a nursing institution in Udine, Italy, where her feeding tube could be removed, the Italian Government, under the leadership of then-President of the Council of Ministers Silvio Berlusconi, resorted to the Decree-Law mechanism to enact temporary statutory law, making the feeding and hydration of all unconscious, disabled patients mandatory.[28] On February 6, 2009, however, the Italian President of the Republic,

---

24. Trib. Lombardia-Milano-Sec. III., 1 civ., Jan. 22, 2009, n.214, Foro.It.2009, *available at* http://www.ratioiuris.it/File/File/TARMI214.pdf. (last visited Nov. 5, 2011) (It.).

25. Press Release, European Court of Human Rights, Inadmissibility Decision Ada Rossi and Others v. Italy (Dec. 22, 2008) (Note on case denying review in Caso Englaro, App. Nos. 55185/08, 55516/08, 55519/08, 56010/08, 56278/r08, 58420/08, 58424/08 on Nov. 18, 2008, and 55483/08 on Nov. 19, 2008).

26. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S 221, *amended by* Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established thereby, Strasbourg, 11. V. 1994, 155 E.T.S. (1994) (*effective* Nov. 1, 1998), *available at* http://conventions.coe.int. (last visited Nov. 5, 2011).

27. Press Release, European Court of Human Rights, Inadmissibility Decision Ada Rossi and others. v. Italy, (Dec. 22, 2008). *See also* Illaria Andrò, *Il Caso Englaro di Fronte alla Corte Europea dei diritti Dell'Uomo: Un Confronto con la Corte di Giustizia delle Comunità Europee circa la Legittimazione ad Agire delle Associazioni a Difesa dei Diritti Dell'Uomo* [*The Englaro Case before the European Court of Human Rights: A Comparison with the Court of Justice about the Legal Standing of Associations in Defense of Human Rights*], *available at* http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/giurisprudenza/corte_europea_diritti_uomo/0002_anro.pdf (last visited Jan. 8, 2012).

28. According to article 77, § 2 of the Italian Constitution, "the Government, adopts under its responsibility temporary legislation" (so-called "decree-law"), which is immediately effective. COSTITUZIONE [COST.] [Constitution] art. 77 (Jan. 1, 1948) (It.).

Giorgio Napolitano, refused to sign the Decree-Law adopted by the Government, considering the measure unconstitutional on two grounds: first, the two constitutional requirements of "necessity and urgency" listed by Article 77 of the Italian Constitution as a condition for adoption of the Decree-Law were lacking; second, the Decree-Law would have *de facto* overruled the decisions of the Court of Cassation and Milan Court of Appeal in violation of the principle of separation of powers between the Judicial and Executive branches. Lacking the signature by the President of the Republic, the Decree-Law could not become effective. On that same day, the feeding tube was removed from Eluana's body. In a struggle between the Executive and Judiciary, closely reminding some of the passages of the Terry Schiavo case that occurred in 2005 in the United States,[29] Prime Minister Silvio Berlusconi convened the Council of Ministers to draft a bill to be promptly introduced into the Italian Parliament for approval. The bill aimed to make illegal the act of removing a feeding tube from all comatose patients. While the vote on the bill was being scheduled for the following two days, the death of Eluana Englaro was announced on Monday, February 9, 2009.

VI. SOME REFLECTIONS ON THE PROTECTION OF RIGHTS, SEPARATION OF POWERS, AND THE RELATIONSHIP BETWEEN LAW AND MORALITY

The events surrounding the Englaro case show both "old" and "new" features in the longstanding, but never faded, clash between protection of fundamental rights and intrusiveness of political power.[30] The decisions of the Court of Cassation, Milan Court of Appeal, and Constitutional Court, taken together, also represent a perfect example of a new trend within the Italian Constitutional system, which furthers movement of the Italian centralized system of judicial review towards a more decentralized arrangement, where ordinary courts play a significant constitutional role. Finally, the decision issued by the Court of Cassation is representative of a new global trend in which courts worldwide, in deciding cases involving controversial ethical and moral issues, refer for guidance to foreign case law addressing analogous matters.

---

29. *See also* Chiara Bologna, *Sentenze in forma di legge? Il Caso Englaro e la Lezione Americana nella Vicenda di Terri Schiavo* [*Decisions as Law? The Englaro Case and the American Lesson of the Terry Schiavo Case*] (Feb. 25, 2009), FORUM COSTITUZIONALE http://www.forumcostituzionale.it/site/index.php?option=com_file_index&key=1461&name=0017_bologna.pdf (last visited Jan. 8, 2012) (It.).

30. *See* Tania Groppi, *Il Caso Englaro: Un Viaggio alle Origini dello Stato di Diritto e Ritorno* [*The Englaro Case: A Journey to the Origins of the Rule of Law and Back*], 15 POLITICA DEL DIRITTO 483 (2009) (It.)

VII. INVASIVENESS OF THE POLITICAL PROCESS

The intrusiveness of the political powers has been clear since the Court of Cassation recognized the possibility to remove the feeding tube. The purpose of the political powers was unambiguous—to hinder the legitimate and constitutionally-protected exercise of the right to self-determination, coercing the right of a person by means of a heteronymous command, alien to her own will and her own conception of life.[31] The actions taken by the political power aimed to deny the exercise of the right recognized by the courts, thwarting the application of the decision of the Court of Cassation.

A. "Old" Features

In our view, some of the elements of this case are directly connected to the classic conception of rights as negative guarantees against the state's abuse of powers. They stand as a clear evidence of the need to protect and reaffirm the basic concept underlying the rule of law principle—that men should be governed by laws and not by absolute discretion translating into abuse. The personal right Mr. Englaro required courts to recognize is the most classic among the so-called "first generation" rights; the right to personal freedom, codified in Article 13, section 1, of the Italian Constitution.[32] The right to refuse a medical treatment implies a "negative liberty" and abstention on the part of the public powers from any interference in the private and personal sphere of the subject. This right is connected to what has been defined by Article 8.1 of the European Convention on Human Rights, as interpreted by the ECtHR, as the "right to private life,"[33] that is, the right of an individual to determine what should be done with her own body. To protect this right, guarantees have been established over time to limit public powers. Among these guarantees, it is important to mention for purposes of analysis of the present case, those represented by the adjudicatory function of the judiciary. Specifically, the separation of powers principle and the mechanism of "reservation of law,"

---

31. Cass., 1 civ., 16 Oct. 2007, n.21748, Foro It. I 2007, vol. I, C.c., 3025, ¶ 7.5 (It.).

32. COSTITUZIONE [COST.] [Constitution] art. 13, § 1 (Jan. 1, 1948) (It.); but *see*, also, COSTITUZIONE [COST.] [Constitution] art. 2; 32 § 2 (Jan. 1, 1948) (It.) Which has been interpreted as "the possibility to refuse medical treatments, to get sick, to lose one's health, living the final stages of life according to one's own conception of human dignity, and, eventually, die," *see* Cass., First Civil Division, October 16, 2007, no. 21748, *in* Foro it., 2007, vol. I, cc., 3025 (It.).

33. Pretty v. United Kingdom, App. No. 2346/02, 96 Eur. Ct. H.R. 943–949, ¶ 63 (2002), *available at* http://www.cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=78490355&skin=hudoc-en&ac (last visited Sept. 15, 2011).

(*riserva di legge*)[34] which is expressly included in the text of Article 13 of the Italian Constitution.

The fundamental rights to refuse medical treatment and to self-determination have been consistently recognized and guaranteed by the judiciary in the various decisions issued during the unfolding of events characterizing Ms. Englaro's story.[35] A key role in the judicial guarantee of these rights has been played both by the Court of Cassation with decision no. 21748/2007 (recognizing for the first time the right to withdrawal of life-sustaining medical treatments for a patient on the basis of her previous statements) and by the TAR of Lombardy with decision no. 214/2008 (which, in declaring the illegitimacy of refusals of hospitalization for patients whose right to discontinue medical treatment had been recognized by courts, affirmed the duty for the State and all public hospitals to provide conditions for the concrete exercise of that right).

On a different level, to state that rights and freedoms translate into a claim of non-intrusiveness of the political power into personal freedom does not necessarily mean that public bodies should be excluded from playing any role in the protection of rights, even in case of negative liberties. This role should find a first and privileged ground of application in the use of the so-called "reservation of law" guarantee, which is the tool that the political power can use to balance and possibly limit some constitutional rights, respecting at the same time the rigidity of the Constitution.[36] In our view, the reservation of law mechanism safeguards an individual's rights in two ways: on one hand, exclusively reserving definition of the subject matter to an act of the legislative body, it implicitly mandates a public and transparent parliamentary debate and involvement of parliamentary minorities in the enactment of the law; on the other hand, since it furthers adoption of an act (statutory law) that applies generally, it guarantees the principle of equality and avoids abuse. The inactivity of the legislature in the area of living wills compromised both guarantees. In the absence of statutory law, the Executive took, through the adoption of a Decree-Law, action directed at affecting a single subjective situation (*ad personam* acts). The system of constitutional guarantees established by the Italian Constituents to safeguard respect for the principle of separation of powers has, nonetheless, proved to be effective. This is particularly evident, at the outset, in the ordinance issued by the Constitutional Court, rejecting the Parliament's contention of encroachment of powers reserved

---

34. Matters subjected by the Constitution to the "*riserva di legge*" (reservation of law) are deemed reserved to definition by a legislative body, to the exclusion of all the others. *See*, *e.g.*, COSTITUZIONE [COST.] [Constitution] art. 13, § 2 (Jan. 1, 1948) (It.).

35. Cass., 1 civ., 16 Oct. 2007, n.21748, Foro It. I 2007, vol. I, C.c., 3025, ¶ 7.5 (It.).

36. COSTITUZIONE [COST.] [Constitution] art. 13, § 2 (Jan. 1, 1948) (It.).

to the legislative body by the judiciary. The issue presented before the Constitutional Court is connected to a foundational element of the rule of law principle—the distinction between the power assigned to the Parliament of adopting general, open-ended legislative acts and the exercise of jurisdictional activity, which, by way of difference, applies only to the single case before a court. Situations like this in which, as underlined by the Constitutional Court, "the Parliament is free to adopt, at any given moment, specific legislation addressing the subject, striking the appropriate balance between the fundamental constitutional interests involved."[37] Moreover, in our view, the refusal of the President of the Republic to sign the Decree-Law is consistent with the role assigned by the Italian Constitution to the Head of State as guarantor of the Constitution and of the correct unfolding of the relations between different State powers. In the case at issue, the President exercised this role in a twofold way: first, safeguarding the judicial power from an act of the executive aiming *de facto* at overruling the decisions of the courts in violation of a well-rooted principle of the rule of law tradition as recognized by the Constitutional Court in several cases.[38] Second, in determining the absence of the conditions of "necessity and urgency" required by Article 77, section 2, of the Constitution, for adoption of a Decree-Law, and, therefore, guaranteeing the correct exercise of the legislative function as vested in the legislative body against encroachment by the executive power.[39]

B. "New" Features

Some features of this case present new elements which are connected to the establishment of the so-called "Constitutional State."[40] The clash between a specific political, parliamentary majority and the judiciary was enhanced by protection given by the Court of Cassation to a right in the absence of any previously enacted statutory law on the subject. This issue found its most dramatic point in the conflict of competences raised by the Italian Parliament before the Constitutional Court. In our view, this is the consequence of the increased difficulty for legislative bodies in the Constitutional State to strike a balance between different and competing

---

37. *Corte Cost.*, 8 Oct. 2008, order no. 334, *in* Gazz. Uff. no. 43, October 15th, 2008, *available at* http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.).

38. *See e.g. Corte Cost.*, 12 July 200, decision no. 374, *available at* http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.). An act directly affecting the holding of a single judicial decision determines a "harm to the principles shaping the relations between legislative and judicial power." Decision available at http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.).

39. COSTITUZIONE [COST.] [Constitution] art. 77, § 2, (Jan. 1, 1948) (It.).

40. NICK BARBER, THE CONSTITUTIONAL STATE (Oxford University Press, 2010).

constitutional interests and to adopt general rules applicable *erga omnes* in sensitive areas of law. Indeed, in the Constitutional State understood as a Pluralist State, legislation enacted by legislative bodies has lost its ability to play the unifying role it had furthered in the Legislative State.[41] The reaction of the Italian Parliament is understandable only in terms of a political power still acting according to the tenets and principles of the Legislative State, where a central role is played by statutory law. The Italian Parliament refused to accept the idea that "its own legislation, [could be] treated only as 'a part' of the general law applicable in the legal system, and not as the whole of it," i.e., its pure embodiment.[42] This reaction represents the attempt to hinder the establishment of a different conception of State—that of the Constitutional State—in which the concept of "law," in general, does not necessarily coincide with legislation, but, conversely, is the product of the "moderate" coexistence of statutory law, rights, and judge-made law.

VIII. TOWARD A "MORE DECENTRALIZED SYSTEM" OF JUDICIAL REVIEW? THE JUDICIAL POWER AS GUARANTOR OF THE STRUCTURAL COMPLEXITY OF THE CONSTITUTIONAL STATE

In our view, the Englaro case is also emblematic in showing the general process of re-definition of the traditional hierarchy of legal sources currently experienced by Italy, a civil law country[43]—a process characterized by the increased relevance played by judicial intervention in the production of law, to the detriment of the central role traditionally enjoyed by legislation. In issuing decision no. 21748/2007[44], the Court of Cassation correctly interpreted the task requested to a judge in the Constitutional State and proved to be receptive of the approach mandated by the Italian Constitutional Court. Indeed, since the 1990s, the Italian Constitutional Court has initiated a process of redefinition of the very roots of the Italian system of constitutional justice. Traditionally classified as centralized,[45] the Italian system of constitutional justice vests a single specialized judicial body with functions of judicial review while lower courts and judges have always been described as "doorkeepers"[46] in a "bottom-up" process activated through the "incidenter" review. Ordinary

41. *Id*.

42. GUSTAVO ZAGREBELSKY, IL DIRITTO MITE [DUCTILE LAW] 213 (Einaudi, 1992).

43. KONRAD ZWEIGERT, HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW, 104 (Oxford University Press, 1998).

44. Cass., 1 civ., 16 Oct. 2007, n.21748, Foro It. I 2007, vol. I, C.c., 3025 (It.).

45. *See* Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183 (1942).

46. The expression was originally created by Piero Calamandrei.

and administrative judges decide whether to raise a question of constitutional legitimacy before the Constitutional Court when some prerequisites ("*non manifesta infondatezza*" e "*rilevanza*") are found to be present.[47] However, the Constitutional Court, in the past years, through its innovative case law has reversed this process, making it a "top-down" one. The Court has recognized an important role for all judges, not only in applying its decisions, but also and more importantly, in *directly* carrying on a control on the constitutionality of statutory law with the only limit represented by the impossibility for ordinary judges to directly not apply (i.e., without first resorting to the Constitutional Court) the law deemed unconstitutional.[48] Increasingly often, the Constitutional Court declares the inadmissibility of the question of constitutional legitimacy asking the *ad hoc* judge to provide a "constitutionally adequate" interpretation of the statutory law at issue.[49] Before referring a question to the Constitutional Court, an ordinary judge is now expected to look for an interpretation of the statute that would preserve its constitutional validity[50] and show, together with the two aforementioned requirements, that a constitutionally adequate interpretation was not possible.[51] These developments assign greater importance to the role ordinary judges play in the process of constitutional adjudication, taking it closer to the one played by ordinary judges in

47. The "not manifestly unfounded" character of the issue of constitutionality and the necessity to apply the statutory law at issue to decide the case ("relevance") must be deemed present by the ordinary or administrative *a quo* judge to apply to the Constitutional Court.

48. It is worth remembering, though, that ordinary judges already suspend the application—in Italy as in all the other States members of the European Union—of statutory laws which they deem are inconsistent with European Union law, further promoting the general level of decentralization of the system.

49. *See*, *e.g.*, Corte Cost., 20 Jul. 1990, n.356/1990, Foro It. I 1990, *available at* http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.); Corte Cost., 26 Sept. 1998, n.347/1998, Foro It. I 1998, *available at* http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.); Corte Cost., 9 Oct. 1998, n.349/1998, Foro It. I 1998, *available at* http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.); Corte Cost., 30 Dec. 1998, n.450/1998, Foro It. II 1998, *available at* http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.); Corte Cost., 9 Jul. 1999, n.283/1999, Foro It. I, *available at* http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.); Corte Cost., 1 Dec. 1999, n.436/1999, *available at* http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.).

50. Corte Cost., 20 Jul. 1990, n.356/1990, Foro It. I 1990, *available at* http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.). *See also* Tania Groppi, *The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?*, 2 J. COMP. L. 100 (2008); Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization?*, 2 ICON INT'L J. CONST. L. 461, 472 (2004).

51. Tania Groppi, *Corte costituzionale e principio di effettività* [*The Constitutional Court and the Principle of Effectiveness*], 1 RASSEGNA PARLAMENTARE 189, 213 (2004) (It.); Corte Cost., n.343/2006, Foro It. I 2006, *available at* http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.)

decentralized systems of judicial review.[52] The Court now tries, therefore, to decentralize its work maximally, calling upon ordinary judges to participate in the constitutional review more than the traditional European centralized model of judicial review would normally require, sharing with them the task of safeguarding the Constitution. This new development is also based on the difficult distinction between the power to interpret (for ordinary judges) and the power to set aside (for the Constitutional Court) a legislative provision, which is characteristic of the European model of judicial review.[53] Although ordinary judges cannot disregard statutes on constitutional grounds, they can interpret them, even if sometimes it is difficult to identify the limits of an "interpretation."[54] One fact is clear, though. In Italy, this distinction is changing in favor of the judiciary by request of the Constitutional Court, prompting a transfer of power from the Constitutional Court to ordinary judges. While this practice brings with it the risk that ordinary judges will avoid referring questions of constitutional legitimacy to the Constitutional Court in cases when it would be necessary and appropriate, it also has the advantage of bringing about a more concrete (i.e., closer to the facts of the case) analysis of the constitutionality of the legislation in a decision which only has *inter partes* effect (unlike decisions issued by the Constitutional Court declaring the unconstitutionality of a Statute, which enjoy *erga omnes* effect).

The Italian Constitutional Court, however, has gone even further. In a famous decision dealing with a case of artificial insemination, the Court called upon ordinary judges not only to apply a legal principle previously established by the Constitutional Court, but also to decide a case making direct application of the provisions of the Constitution.[55] That case was dealing, just like the Englaro case, with an issue—artificial insemination—which at that time was still not regulated by legislation.[56] Requested by the ad hoc judge to declare unconstitutional the lack of legislative discipline and to elaborate on the legal principles to be applied to the case through an interpretation of the Constitution, the Constitutional Court refused to do so.[57] Conversely, in declaring the request inadmissible, the Court invited

---

52. *Id*.

53. *See* Groppi, *supra* note 63, at 113; Ferreres Comella, *supra* note 63, at 461, 474.

54. The judge, for example, is forbidden to avoid raising a question of constitutionality before the Constitutional Court by manipulating the statute's meaning to the point of making the statute say what nobody would reasonably infer from it. This would be equivalent to setting aside the statute and replacing it with a different one.

55. Corte Cost., 26 Sept. 1998, n.347/1998, Foro It. I 1998, *available at* http://www.cortecostituzionale.it (last visited Jan. 8, 2012) (It.).

56. *Id*.

57. *Id*.

the ad hoc judge to identify, on her own, the principles to be applied to the case, elaborating them directly from the constitutional system considered in its entirety, without calling into cause the Constitutional Court.[58] In reaching its decision in the Englaro case, the Court of Cassation demonstrated a full awareness of the evolution of the Constitutional Court's jurisprudence. Indeed, the Court of Cassation, in issuing decision no. 21748/2007, made explicit reference to decision no. 347/1998 of the Constitutional Court, without raising the issue of constitutionality, and directly identifying the principles and legal rules to be applied to the instant case within the Italian Constitutional framework.[59]

XI. TRANS-JUDICIAL COMMUNICATION

Finally, the decision of the Court of Cassation is representative of a general trend embraced with increased frequency by courts worldwide. When confronted with cases dealing with controversial ethical and moral issues (and increasingly so in areas still unaddressed by the legislature), several courts worldwide have shown a tendency to refer to decisions of foreign judicial bodies on analogous matters for guidance. This phenomenon has attracted increasing attention by legal scholars worldwide, who have variously defined it as instances of trans-judicial communication, cross-judicial fertilization, furthering a migration of constitutional ideas, and addressing mainly problems of legitimacy involved in the practice.[60]

---

58. *Id*.

59. Cass., 1 civ., 16 Oct. 2007, n.21748, Foro It. I 2007, vol. I, C.c., 3025 (It.).

60. *See generally* Cheryl Saunders, Judicial Engagement with Comparative Law, in TOM GINSBURG, ROSALIND DIXON (EDS.), COMPARATIVE CONSTITUTIONAL LAW RESEARCH HANDBOOK, 571 (Edward Elgar, 2011); VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (Oxford University Press, 2010); SAM MULLER & SIDNEY RICHARDS (EDS), HIGHEST COURTS AND GLOBALISATION (Springer, 2010); GIUSSEPPE DE VERGOTTINI, OLTRE IL DIALOGO TRA LE CORTI, GIURISDIZIONI INTERNAZIONALI E GIUDICI STATALI [BEYOND THE DIALOGUE BETWEEN COURTS, INTERNATIONAL JURISDICTIONS AND NATIONAL JUDGES] (Il Mulino 2010); SABINO CASSESE, I TRIBUNALI DI BABELE: I GIUDICI ALLA RICERCA DI UN NUOVO ORDINE GLOBALE [THE TRIBUNALS OF BABEL: JUDGES IN SEARCH OF A NEW GLOBAL ORDER] (Donzelli 2009); GUSTAVO ZAGREBELSKY, LA LEGGE E LA SUA GIUSTIZIA [LAW AND ITS JUSTICE] (Il Mulino 2008). *See also* Maria Rosaria Ferrarese, *When National Actors Become Transnational: Transjudicial Dialogue Between Democracy and Constitutionalism*, 9 GLOBAL JURIST (FRONTIERS) art. 2, *available at* http://www.bepress.com (last visited Jan. 8, 2012); Groppi, *supra* note 40; Maria Rosaria Ferrarese, *Transjudicial Dialogue and Constitutionalism: A Risk or an Opportunity for Democracy?*, 36 SOCIOLOGIA DEL DIRITTO 113 (2009), *available at* http://www.bepress.com (last visited Jan. 8, 2012) (It.); Gustavo Zagrebelsky, *Corti Costituzionali e Diritti Universali* [*Constitutional Courts and Universal Rights*], 56 RIVISTA TRIM. DI DIRITTO PUB., 297, 297–311 (2006) (It.).

X. CONCLUSION

The current system of judicial review of legislation in Italy differs from the one originally designed by the constituents, even if its structure remains formally unaltered. The shift from a centralized system of judicial review towards a more decentralized system brings with it an important consequence. That is, there is a shift from a judicial review of legislation, based almost exclusively on Constitutional Court decisions with *erga omnes* effects, to one that increasingly relies on decisions by ordinary judges with *inter partes* effects. In a globalized world where statutory law increasingly proves to be an inadequate tool to discipline areas of law involving sensitive ethical and moral issues, ordinary judges are assigned a new task—that of becoming guarantors of the structural complexity of the Constitutional State.

A COMPARATIVE ANALYSIS OF THE FOREIGN CORRUPT PRACTICES ACT AND THE U.K. BRIBERY ACT, AND THE PRACTICAL IMPLICATIONS OF BOTH ON INTERNATIONAL BUSINESS

*Sharifa G. Hunter**

I. INTRODUCTION

Prior to 1977, bribery was considered legal in many countries worldwide.[1] In fact, bribery payments were often tax deductible in many of

* Sharifa G. Hunter: Nova Southeastern University, Shepard Broad Law Center, Juris Doctor, Candidate May 2012; Nova Southeastern University, H. Wayne Huizenga School of Business and Entrepreneurship, Master of Business Administration in Finance, Candidate June 2012; Florida Memorial University, Bachelor of Science in Management Information Systems, December 2005. The author wishes to thank Mark David Hunter and Louis Taubman of Hunter Taubman Weiss LLP for their expertise and guidance. Mrs. Hunter would also like to thank the members of the ILSA Journal of International & Comparative Law for their assistance regarding the publication of this Note.

1. *See History of the FCPA: How a Tough U.S. Anti-Bribery Law Came to Pass*, PBS (Feb. 13, 2009), http://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html (last visited Oct. 20, 2011).

these territories.[2] However, the general atmosphere towards bribery began to change after the United States (U.S.) explicitly proscribed the practice of bribery by enacting the Foreign Corrupt Practices Act (FCPA) in December 1977.[3] The FCPA was established following a Securities and Exchange Commission (SEC) investigation into illegal contributions made to President Nixon's re-election campaign.[4] The SEC's investigation uncovered over $300 million of corrupt foreign payments made by over 400 U.S. companies, over 100 of which ranked in the Fortune 500.[5] The FCPA was created in an attempt to terminate such bribery practices and "restore public confidence in the integrity of the American business system by making it unlawful for U.S. citizens and companies to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person."[6]

The years following the FCPA's enactment saw a change in the general attitude towards transnational bribery; bribery and corruption became universally discouraged.[7] Bribery and corruption by international businesses inhibits free trade and economic development in many countries by undermining competition in these international markets.[8] During the 1990s, corruption was considered one of the principle impediments to economic growth and democratic accountability.[9] The World Bank, in a report, noted that "corruption has a negative relationship with per capita GDP, . . . lowers the quality of public infrastructure, . . . lowers public satisfaction with health care, . . . undermines the official economy, and reduces the effectiveness of development aid and increases inequality and

2. *See generally* John Hatchard, *Recent Developments in Combating the Bribery of Foreign Public Officials: A Cause For Optimism?*, 85 U. DET. MERCY L. REV. 1, 4–5 (2007).

3. *See generally* 15 U.S.C. §§ 78dd-1, 78dd-2 (2006); Hatchard, *supra* note 2, at 4–5.

4. DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 1.1 (Prac. L. Inst. 1998).

5. Hatchard, *supra* note 2, at 4; Todd Swanson, *Greasing the Wheels: British Deficiencies in Relation to American Clarity in International Anti-Corruption Law*, 35 GA. J. INT'L & COMP. L. 397, 402 (2007).

6. Hatchard, *supra* note 2, at 4.

7. Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 628–29 (2000) (noting that people no longer tolerated corruption and that various groups have employed extraterritorial anti-bribery laws to combat corruption); Leslie Benton et al., *Anti-Corruption*, 42 INT'L LAW 709, 717 (2008) (noting that China executed the head of the State Food and Drug Administration for approving untested medicine in exchange for money).

8. Swanson, *supra* note 5, at 399.

9. Daniel P. Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Applications of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897, 2909–10 n.86 (2005).

poverty."[10] Global nations quickly realized that corruption was not confined to only developing countries, but rather affected all participants of international markets.[11] International rules regulating transnational bribery are necessary to foster free and fair trading conditions for participants in today's international markets, but the extent to which these trading conditions are regulated remains heavily debated.[12]

For twenty years after the FCPA's enactment in 1977, the United States was the only country with a formal law that facilitated prosecution of domestic companies that paid bribes abroad to foreign government officials.[13] Eventually, other countries followed suit and ostracized foreign bribery by uniting and establishing the Organization for Economic Co-operation and Development (OECD).[14] On November 21, 1997, in an effort to create concrete rules to govern bribery in international business transactions, the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).[15] Thirty-seven nations, including all of Western Europe, signed and ratified the OECD convention.[16] The OECD Convention:

> [R]equires that each signatory prohibit the bribing of foreign officials, set criminal and civil penalties for violations, and either extradite or prosecute its nationals who are accused of bribery by another signatory . . . [i]t also contains provisions for continued monitoring of the implementation of the convention by signatories.[17]

Although the United Kingdom (U.K.) signed the OECD's anti-corruption convention, its inadequate anti-bribery laws were the subject of

---

10. WORLD BANK, REP. NO. 29620, MAINSTREAMING ANTI-CORRUPTION ACTIVITIES IN WORLD BANK ASSISTANCE: A REVIEW OF PROGRESS SINCE 1997, 1 (2004), *available at* http://lnweb90.worldbank.org/oed/oeddoclib.nsf/24cc3bb1f94ae11c85256808006a0046/048351b876971b9285256eed006aae69/$FILE/anti_corruption.pdf (last visited Oct. 20, 2011) [hereinafter OECD REP.].

11. Ashe, *supra* note 9, at 2911.

12. *See generally* Abiola Makinwa, *The Rules Regulating Transnational Bribery: Achieving a Common Standard*, 2007 INT'L BUS. L.J. 17.

13. *See* Timothy W. Schmidt, Note, *Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines*, 93 MINN. L. REV. 1120, 1125–28 (2009).

14. *Id*. at 1126.

15. Swanson, *supra* note 5, at 406.

16. *See* Schmidt, *supra* note 13, at 1126.

17. *Id*. at 1127.

constant criticism by the OECD.[18] As a result, the OECD published a report in October 2008 extensively criticizing the United Kingdom's persistent failure to address its deficient anti-corruption and anti-bribery laws.[19] In response to the OECD's report, the United Kingdom enacted the U.K. Bribery Act (Bribery Act) in April 2010.[20] The Act came into force on July 1, 2011 and focuses on bribery in both the public and private sectors.[21] The Bribery Act creates new offenses that reach far beyond the scope of the United States' FCPA.[22]

This Note has four principal purposes. The first is to establish the background of the FCPA and the Bribery Act by discussing the events that influenced each law's creation. Second, it will examine both the FCPA and the Bribery Act in depth and illustrate their differences. Third, it analyzes the Bribery Act's global impact on international business transactions and in conjunction with the FCPA. Finally, the Note will conclude with an analysis of the likely outcome of the Bribery Act in the near future.

II. OVERVIEW OF THE FCPA AND THE U.K. BRIBERY ACT

The FCPA is comprised of accounting provisions, which impose both accounting and recordkeeping requirements upon publicly held U.S. companies, as well as anti-bribery provisions that prohibit the bribing of foreign government officials for the purpose of obtaining or retaining business.[23] This Note will only discuss the FCPA's anti-bribery provisions since the Bribery Act does not address corporate accounting. The United Kingdom's Company Act of 2006 imposes requirements similar to those of the FCPA with respect to books and records.[24] The FCPA's anti-bribery provisions impose criminal and civil penalties; criminal regulation falls within the exclusive jurisdiction of the United States Department of Justice

18. Swanson, *supra* note 5, at 401; Joseph Warin et al., *The British Are Coming!: Britain Changes Its Laws on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1 (2011).

19. ORG. FOR ECON. COOP. AND DEV., UNITED KINGDOM: PHASE 2*BIS,* 5–6 (2008) (criticizing the United Kingdom); Warin et al., *supra* note 18, at 4.

20. *See generally* Bribery Act, 2010, c.23 (U.K.).

21. *See generally* Bribery Act, 2010, c.23 (U.K.); Celia Joseph, *The United Kingdom's Bribery Act 2010: Implications for Companies on a Global Basis*, (Fisher & Phillips, LLP Atlanta, Ga.) Apr. 11, 2011, http://www.crossborderemployer.com/post/2011/04/11/The-United-Kingdoms-Bribery-Act-2010-Implications-for-Companies-on-a-Global-Basis.aspx (last visited Aug. 5, 2011).

22. *See generally* 15 U.S.C. §§ 78dd-1, 78dd-2; Bribery Act, 2010, c.23 (U.K.).

23. ZARIN, *supra* note 4, at 2-1; Warin et al., *supra* note 18, at 7.

24. Warin et al., *supra* note 18, at 8.

(DOJ) and civil regulation falls within the SEC's exclusive authority.[25] Five elements must be met to constitute a violation of the FCPA:

> 1) The briber must be any U.S. citizen, business entity or employee of a U.S. business entity or any company listed on a U.S. stock exchange;
> 2) The bribe must be made with corrupt intent;
> 3) Payment or offer of payment must be anything of value;
> 4) The recipient must be a foreign government official; and
> 5) The bribe must have been offered or paid to obtain or retain business.[26]

Distinguishably, the Bribery Act creates four separate offenses:

> 1) Bribing;
> 2) Being bribed;
> 3) Bribing a foreign public official; and
> 4) Failing as a commercial organization to prevent bribery.[27]

The United Kingdom's Serious Fraud Office (SFO) is responsible for investigating and prosecuting the most serious cases of fraud and corruption in the United Kingdom and thus appropriately is responsible for enforcing the Bribery Act's provisions.[28]

A. Jurisdiction: Who Falls within the FCPA & Bribery Act's Scope?

The FCPA defines bribery as a corrupt payment or offer of payment of money or anything of value made to a foreign official in his or her capacity as such for the purposes of influencing any act or decision of that foreign official.[29] The FCPA establishes criminal and civil liability for such corrupt

---

25. R. Christopher Cook & Stephanie L. Connor, *The Foreign Corrupt Practices Act: Enforcement Trends in 2010 and Beyond*, JONES DAY, at 2, *available at* http://www.jonesday.com/files/Publication/f0950ee5-18bb-496f-acfe-662b219a108e/Presentation/PublicationAttachment/ada2352f-00b0-4240-aeef-250a23629ba8/FCPA%20Enforcement%20Trends.pdf (last visited Aug. 5, 2011).

26. U. S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS 2 (2004), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited Aug. 5, 2011) [hereinafter DOJ GUIDE].

27. *See generally* Bribery Act, 2010, c.23, §§ 1–2, 6–7 (U.K.).

28. SERIOUS FRAUD OFFICE, APPROACH OF THE SERIOUS FRAUD OFFICE TO DEALING WITH OVERSEAS CORRUPTION 1 (2009), *available at* http://www.sfo.gov.uk/media/128701/approach%20of%20the%20serious%20fraud%20office%20v6.pdf (last visited Nov. 4, 2011).

29. *See generally* 15 U.S.C. §§ 78dd-1, 78dd-2(2006).

payments made to foreign officials by issuers, domestic concerns, or any officer, director, employee, or agent of such issuer or domestic concern, or any stockholder acting on behalf of such issuer or domestic concern.[30] An issuer is a corporation that has registered its securities in the United States or who is required to file periodic reports with the SEC.[31] The FCPA defines domestic concern very broadly to include U.S. citizens, nationals, and residents, as well as, any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is either incorporated under the laws of a state or commonwealth of the United States, or whose principal place of business is in the United States.[32] Therefore, the foreign activity of private U.S. companies also falls within the FCPA's scope.[33] In addition, the FCPA applies to foreign national officers and directors of a U.S. company or foreign national stockholders acting on behalf of a U.S. company.[34] Issuers and domestic concerns may be held liable for acts occurring *within* the United States if they perform an act in furtherance of a corrupt payment to a foreign official using the U.S. mail, or means and instrumentalities of interstate commerce.[35] Such means or instrumentalities include wire transfers, facsimile transmissions, telephone calls, and interstate or international travel.[36] Foreign companies and officers, directors, employees, agents, and stockholders acting on behalf of such foreign companies, as well as foreign natural persons, can be held liable under the FCPA for acts in furtherance of foreign corrupt practices while within the United States.[37] Issuers and domestic concerns may also be held liable for any act in furtherance of a corrupt payment authorized by employees or agents operating entirely *outside* the United States without any involvement from personnel located within the United States.[38] Similarly, U.S. corporations may be held liable for the acts of their foreign subsidiaries if they authorized, directed, or controlled the activity in question.[39] Domestic concerns may be liable if they were employed by or acting on behalf of the

30. 15 U.S.C. §§ 78dd-1, 78dd-2; Zarin, *supra* note 4, at 4-1; Warin et al., *supra* note 18, at 9.

31. 15 U.S.C. § 78c(a)(8) (2006); DOJ GUIDE, *supra* note 26.

32. 15 U.S.C. § 78dd-2(h)(1); Christopher L. Hall, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?*, 2 TUL. J. INT'L & COMP. L. 289, 294 (1994); ZARIN, *supra* note 4, at 4-3 to 4-4.

33. *See generally* DOJ GUIDE, *supra* note 26.

34. ZARIN, *supra* note 4, at 4-5.

35. *See generally* DOJ GUIDE, *supra* note 26.

36. *Id*.

37. Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 360 (2000).

38. *See generally* DOJ GUIDE, *supra* note 26.

39. *Id*.

foreign-incorporated subsidiary.[40] Furthermore, the FCPA imposes liability on foreign companies or persons if they cause, directly or through agents, an act in furtherance of the corrupt payment to take place within the United States.[41] In this scenario, the DOJ has indicated that there is no requirement that this particular act make use of the U.S. mails or other means or instrumentalities of interstate commerce.[42]

The Bribery Act has a wider extra-territorial reach than the FCPA.[43] The Bribery Act creates four anti-bribery offenses:

> 1) Bribing;
> 2) Being bribed;
> 3) Bribing a foreign public official; and
> 4) Failing as a commercial organization to prevent bribery.[44]

The first two offenses, bribing and being bribed, relate to commercial (domestic) as well as foreign bribery.[45] The Bribery Act refers to bribing as offering, promising, or giving a financial or other advantage to induce a person to improperly perform a relevant duty or function, to reward a person for such improper activity, or to know or believe that the acceptance of the advantage would itself be an improper performance of a duty or function.[46] The second offense, being bribed, prohibits requesting, agreeing to receive, or accepting a financial or other advantage while intending that a relevant function or activity be performed improperly.[47] The last two offenses, bribing a foreign public official and failing as a commercial organization to prevent bribery, are likely to form the basis of the majority of foreign corruption investigations pursued by U.K. enforcement authorities.[48] The offense of bribing a foreign public official criminalizes the act of bribing such an official with the intention of influencing that

---

40. *Id*.

41. *Id*.

42. *Id*.

43. *Weil Alert: U.K. Bribery Act*, (Weil, Gothshal & Manges, London, U.K.), May 24, 2010, at 2, *available at* http://www.weil.com/files/Publication/c1e306e1-bf27-466e-8063-756ea952cbe9/Presentation/PublicationAttachment/fbb5317d-d916-4e0f-a290-7c91588b66a1/LO_UK_Bribery_Act_2010_May_2010.pdf (last visited Nov. 14, 2011) [hereinafter *Weil Alert: U.K. Bribery Act*].

44. Bribery Act, 2010, §§ 1–2, 6–7.

45. *Id*.

46. Bribery Act § 1; Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and the United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 441 (2010).

47. Ryznar & Korkor, *supra* note 46, at 441.

48. Warin et al., *supra* note 18, at 8.

foreign official in his or her capacity as such.[49] This offense is governed by a "close connection" test, which gives the United Kingdom jurisdiction if the person or entity committing the act of bribery has a close connection with the United Kingdom, even if the challenged act or omission took place outside of the United Kingdom.[50] British citizens, other types of British passport holders, U.K. residents, entities incorporated under any part of U.K. law, and Scottish partnerships are all treated as having a "close connection with the United Kingdom" for purposes of the Bribery Act.[51] The Bribery Act's last offense of failing as a commercial organization to prevent bribery is a strict liability corporate offense.[52] An organization is guilty of such offense if a person associated with the organization bribes another person with the intention of obtaining or retaining business for the organization or obtaining an advantage in conducting business for the organization.[53] The Bribery Act is not limited to U.K. companies alone, but also applies to any company that conducts business, or part of its business, in any part of the United Kingdom, even if no part of the bribery occurred in the United Kingdom.[54] Under the Bribery Act, the offenses of offering a bribe, accepting a bribe, and bribing a foreign public official have a similar jurisdictional scope as the FCPA because jurisdiction is conferred when the relevant act or omission takes place within the United Kingdom, or anywhere in the world, when committed by a person closely connected to the United Kingdom.[55] The Bribery Act's last offense of failing as a corporation to prevent bribery by persons associated with the corporation has a broader reach than the FCPA, because it covers both U.K. companies, as well as, companies that carry out business in any part of the United Kingdom.[56]

B. Bribery of Foreign Public Officials & Commercial Bribery

The FCPA prohibits corrupt payments made to foreign officials, employees, or persons acting on behalf of such officials, foreign political parties, or candidates for foreign political office.[57] However, the FCPA

49. Ryznar & Korkor, *supra* note 46, at 441.
50. Warin et al., *supra* note 18, at 15.
51. *Id*.
52. *See generally* 15 U.S.C. §§ 78dd-1, 78dd-2; Ryznar & Korkor, *supra* note 46, at 441.
53. Ryznar & Korkor, *supra* note 46, at 441.
54. *See generally* Bribery Act; Ryznar & Korkor, *supra* note 46, at 441.
55. 15 U.S.C. §§ 78dd-1(g), 78dd-2(i); *see generally* Bribery Act, 2010, c.23 (U.K.).
56. *See generally* Bribery Act, 2010, c.23, § 7 (U.K.).
57. ZARIN, *supra* note 4, at 4-11; Swanson, *supra* note 5, at 409.

does not prohibit bribes paid to officers or employees of private, non-governmental entities.[58] The FCPA defines foreign official as:

> [A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization[59], or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[60]

Despite the FCPA's detailed definition of foreign official, the FCPA fails to provide any guidance as to the scope of the terms "employee" and "officer."[61] It is also unclear whether these terms should be determined with reference to foreign local law.[62] Nevertheless, U.S. enforcement authorities broadly interpret foreign officials to include both traditional government officials as well as officials of state-owned or state controlled entities.[63] The FCPA also prohibits payments that indirectly benefit persons committing bribery to obtain or retain foreign business.[64] Accordingly, any act that directly or indirectly aids in the obtaining or retaining of foreign business will fall within the FCPA's purview.[65]

Unlike the FCPA, the Bribery Act prohibits both public and commercial bribery.[66] This sweeping jurisdictional reach subjects many

---

58. Eric Engle, *I Get by with a Little Help from my Friends? Understanding the U.K. Anti-Bribery Statute, By Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT'L LAW. 1173, 1186 (2010); Zarin, *supra* note 4, at 4-11; Swanson, *supra* note 5, at 409.

59. 15 U.S.C. §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B) (Public International Organizations refer to organizations that are designated by Executive Order or any other international organization that is designated by the President by Executive Order and includes organizations such as the International Monetary Fund, the United Nations, and the Red Cross); Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946); Exec. Order No. 9751, 11 Fed. Reg. 7713 (July 11, 1946); Exec. Order No. 12,643, 53 Fed. Reg. 24,247 (June 23, 1988).

60. 15 U.S.C. § 78dd-2(h)(2).

61. ZARIN, *supra* note 4, at 4-12.

62. *Id*.

63. *See* United States v. Aguilar, 783 F. Supp. 2d 1108, 1114 (C.D. Cal. 2011) (holding that the definition of "foreign officials" in the FCPA could extend to officers of state-owned utilities. The judge also noted that the inclusion of such officials was a matter of statutory construction).

64. Makinwa, *supra* note 12, at 19 (referencing United States v. David Kay & Douglas Murphy, S.D. Tex. 2001, where the Court determined that Congress meant to prohibit a range of payments wider than only those that directly influence the obtaining or retaining of business. The Court also added that Congress intended the FCPA to prohibit all illicit payments that are intended to influence non-trivial official foreign action in an effort to obtain or retain business).

65. Makinwa, *supra* note 12, at 19.

66. *See generally* Bribery Act, 2010, c.23 (U.K.).

organizations to the Bribery Act because, under the provisions of the Bribery Act, a commercial organization includes both organizations incorporated in the United Kingdom, as well as, any other organization that conducts business in the United Kingdom.[67] In contrast to the FCPA, the Bribery Act does not require that a bribe be made with corrupt intent, but rather makes the inducing of improper performance of a relevant function a necessary requirement for prosecution.[68] The Bribery Act defines a foreign public official as an individual who holds a legislative, administrative, or judicial position, whether appointed or elected, of a country or territory outside the United Kingdom.[69] In addition, the Bribery Act characterizes a foreign public official as an individual who exercises a public function for or on behalf of a country or territory outside the United Kingdom, for any public agency or public enterprise of that country or territory, or an official or agent of a public international organization.[70] The Bribery Act's definition of foreign public official closely mirrors the FCPA's definition of the same.[71] The definition of foreign official under the Bribery Act does not include candidates for public office, but such individuals fall within the scope of the Bribery Act's general offenses.[72] The wide scope of the Bribery Act's general anti-bribery offenses allows U.K. enforcement authorities to pursue cases as commercial bribery when they cannot otherwise be prosecuted based on a bribery of a government official theory.[73]

---

67. *Id*. § 7 (the Act defines a commercial organization as
> a) 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);
> b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom;
> c) 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); or
> d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and for purposes of this section, a trade or profession is a business.);

Ivonne M. King et al., *U.K. Bribery Act: Raising the Bar For Anti-Corruption Programs*, 2011 PRAC. L. INST. 353, 357 (2011).

68. Bribery Act, 2010, c.23, § 1 (U.K.).

69. *Id*. § 6(5).

70. *Id*.; Bribery Act § 6(6) (defines public international organisation as an organisation whose members are countries or territories, governments or countries or territories, other public international organizations, or a mixture of any of the above).

71. 15 U.S.C. §§ 78dd-2(h)(2)(A), 78dd-1(f)(1)(A); Warin et al., *supra* note 18, at 18.

72. *See generally* Bribery Act, 2010, c.23 (U.K.).

73. *Id*.

C. What Constitutes a Bribe Under the FCPA and the Bribery Act? – "Anything of Value"

The FCPA prohibits the payments of gifts or "anything of value" to influence a foreign official.[74] The FCPA does not define the term "anything of value," but the term "has been broadly construed by Federal courts interpreting criminal statutes to include both tangible and intangible benefits which an official subjectively believes to be of value."[75] However, the FCPA gives no indication whether the term extends to payments given to a third party for whose welfare the official is interested, but rather focuses on whether there is any intent or expectation that the official will personally benefit from the thing of value.[76] On the other hand, the Bribery Act considers a bribe to be any financial or other advantage.[77]

D. Exceptions: Facilitation or "Grease" Payments

The FCPA creates an exception to its anti-bribery provisions that allows for any facilitating or expediting payments to be made to a foreign official, political party, or party official in order to expedite or secure the performance of a routine governmental action.[78] These exclusive payments are commonly referred to as "facilitating payments" or "grease payments."[79] Routine governmental action refers to general bureaucratic tasks that foreign officials ordinarily perform.[80] Notably, the FCPA's definition of a facilitation payment expressly excludes any foreign official's decision to award new business to, or continued business with, any particular party.[81] The 1977 House Report differentiates facilitation payments from acts of bribery by distinguishing between payments that "cause an official to exercise other than his free will in acting or deciding or influencing an act or decision" and payments that "merely move a

---

74. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

75. *See* United States v. Schwartz, 785 F.2d 673, 679 (9th Cir. 1986) (interpreting thing of value under 18 U.S.C. § 1954 broadly to include tangible and intangible items); United States v. Zouras, 497 F.2d 1115, 1121 (7th Cir. 1974) (treating testimony of a witness as something of value). *See generally* United States v. Crozier, 987 F.2d 901 (2d Cir. 1993) (considering loans and promises of future employment as things of value); United States v. McDade, 827 F.Supp. 1153, 1174 (E.D. Pa. 1993) (characterizing a college scholarship and sports equipment as things of value).

76. *See generally* 15 U.S.C. §§ 78dd–1, 78dd–2; ZARIN, *supra* note 4, at 4-25 to -26.

77. Bribery Act § 1; Ryznar & Korkor, *supra* note 46, at 441.

78. 15 U.S.C. § 78dd-1(b).

79. Monty Raphael & Ben Summers, *At Last the United Kingdom Confronts Bribery: Will the Draft Bribery Bill be Enough to Silence Its Critics?*, 10 BUS. L. INT'L 242, 243 (2009).

80. 15 U.S.C. §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(A); Hall, *supra* note 32, at 300.

81. 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B); Hall, *supra* note 32, at 300; Raphael, *supra* note 78, at 243.

particular matter toward an eventual act or decision or which do not involve any discretionary action."[82] Gratuity paid to a customs official to expedite the processing of a customs document is characterized as a facilitation payment in the legislative history.[83] It is important to note, as well, that the Senate Report also reaffirmed that the exception is meant to apply only to "grease payments."[84]

The Bribery Act, on the other hand, contains no exception for facilitation payments.[85] The only facilitation payments likely to be acceptable are those expressly allowed by law.[86] Consequently, the Bribery Act prohibits the types of payments currently permitted under the FCPA.[87] As a result, U.K. companies and individuals are potentially placed at a commercial disadvantage compared to similarly situated companies in the United States.[88] The differences in these two laws could considerably impact organizations' corporate compliance programs, as the two are disjointed in this regard.[89] However, the SFO has asserted that they do not anticipate many prosecutions on facilitation payments.[90] It is important to bear in mind that the SFO will have full discretion to pursue investigations according to the Bribery Act's prohibition against facilitation payments.[91] Although the authorities indicate a low probability of enforcement towards these types of payments, companies are still expected to ultimately adopt a zero tolerance policy.[92]

---

82. H.R. REP. NO. 95-640, at 8 (1977); Andrew B. Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 365 (2010).

83. H.R. REP. NO. 95-640, at 8 (1977); Spalding, *supra* note 81, at 365.

84. S. REP. NO. 95-114, at 10 (1977); Spalding, *supra* note 81, at 365 (noting that the 1977 House Report demonstrates a degree of cultural sensitivity to differing cultural norms surrounding conduct that in the United States is considered bribery); For a thorough discussion on the history behind the facilitation payments exception, *see* Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 889–894 (2011).

85. *See generally* Bribery Act, 2010, c.23 (U.K.).

86. *Id*.

87. *See generally* MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE 19 (2011), *available at* http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf (last visited Aug. 5, 2011) [hereinafter BRIBERY ACT GUIDANCE]. (Noting that "[e]xemptions 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."); Warin et al., *supra* note 18, at 20.

88. Warin et al., *supra* note 18, at 20.

89. *Id*.

90. *Id*.

91. *Id*. at 20–21.

92. *Id*. at 21.

E. Affirmative Defenses

The FCPA creates two affirmative defenses to its anti-bribery provisions.[93] The first affirmative defense asserts that the payment of a gift, or promise of anything of value is lawful if the written laws and regulations of the foreign official's country permit such payments.[94] To fall within its limits, the conduct must be *explicitly* permitted under the written laws and regulations of the foreign country.[95] The simple absence of a law prohibiting the conduct is not sufficient.[96] The second affirmative defense asserts that the payment, gift, or promise of anything of value is lawful if it was a reasonable and bona fide expenditure, such as travel and lodging expenses, and was directly related to the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract with a foreign government or agency.[97] However, the FCPA's legislative history makes it clear that "any payments made with 'corrupt intent' would not be considered bona fide expenses and would fall outside the purview of permissible activity."[98] Several useful guidelines that can help minimize FCPA concerns for the payment of travel and lodge expenses for government customers are as follows:

> 1) The expenditure should be for a bona fide and legitimate business purpose;
> 2) The expenditure should be directly related to the promotion, demonstration or explanation of a product or service, or the execution or performance of a contract;
> 3) The U.S. company should follow a rule of reasonableness in determining the level of service and hospitality;
> 4) There should be no question that the foreign official's government is unaware of the travel;
> 5) The payment of travel and lodging expenses should be permissible under local law and government customers regulations and guidelines;
> 6) The selection of the officials going on the business trip should generally be by the government customer;

93. 15 U.S.C. §§ 78dd-1(c), 78dd-2(c).

94. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1); Hall, *supra* note 32, at 300.

95. ZARIN, *supra* note 4, at 5-9.

96. H.R. REP. NO. 100-418, at 922, 100th Cong., 2d Sess. (1988) (Conf. Rep.), *reprinted in* 1988 US.C.C.A.N. 1547, 1955.

97. 15 USC. §§ 78dd-1(c)(2), 78dd-2(c)(2).

98. H.R. REP. NO. 100-418, at 922 100th Cong., 2d Sess. (1988) (Conf. Rep.), *reprinted in* 1988 US.C.C.A.N. 1547, 1955; ZARIN, *supra* note 4, at 5-6.

> 7) To the extent practical, the U.S. company should avoid making direct payments to a foreign official:
>
> a) Where practical, the company should directly pay the government agency an agreed-upon per diem for each attendee. The government agency would then be directly responsible to pay each attendee's per diem living expense;
>
> b) Where practical, all travel expenses should be paid directly to the service providers, upon receipt of appropriate invoices;
>
> c) Where direct payments are unavoidable, the U.S. company should reimburse the foreign official only upon receipt of appropriate invoices and confirmation that the expense has in fact been paid by the official;
>
> 8) The itinerary and budget for the trip should be reviewed and approved by a senior manager outside of the sales department;
>
> 9) Expenses incurred by the customer for side trips or stopovers for the pleasure of the customer should not be paid or reimbursed by the U.S. company;
>
> 10) Expenses generally incurred for spouses and family members should not be paid or reimbursed, except in exception situations and subject to review by legal counsel;
>
> 11) The books and records should accurately record all expenditures.[99]

The Bribery Act contains no similar defense to the FCPA's business promotion expenditures defense.[100] This has raised questions amongst commentators as to whether the Bribery Act may result in prosecutions for payments that would be considered lawful under the FCPA.[101] Nevertheless, guidance from the United Kingdom's Ministry of Justice (MOJ) suggests that reasonable and proportionate promotional expenditures will not be prosecuted.[102] However, unlike the FCPA the Bribery Act

---

99. ZARIN, *supra* note 4, at 5-7 (noting that the affirmative defense is not limited to travel and lodging expense; but rather, it applies to any reasonable and bona fide expenditure incurred by or on behalf of a foreign official when the expenditure is directly related to the promotion, demonstration, or explanation of products or the execution or performance of a contract).

100. *See generally* Bribery Act, 2010, c.23 (U.K.).

101. BRIBERY ACT GUIDANCE, *supra* note 86, at 12.

102. *Id*. (Noting that "bona fide hospitality and promotional, or other business expenditure which seeks to improve that image of a commercial organization, better to [sic] present products and services, or establish cordial relations, is recognized as an established and important part of doing business and it is not the intention of the Act to criminalize such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar

provides an explicit affirmative defense to companies that can demonstrate that they had adequate procedures in place geared towards preventing bribery.[103]

F. Penalties

Corporations and individuals face potential civil and criminal penalties if they violate the anti-bribery provisions of the FCPA.[104] The DOJ prosecutes criminal matters arising under the FCPA while the SEC prosecutes civil matters arising under the same.[105] Individuals prosecuted under the FCPA's anti-bribery provisions face a maximum of five years imprisonment, criminal fines of up to $100,000, and civil penalties of up to $10,000 per violation, as well as restitution and forfeiture.[106] The individual's employer or principal is prohibited from paying these fines.[107] FCPA violators also face suspension or revocation of the benefits of conducting business in the United States.[108] In criminal prosecutions, corporations and other business entities face hefty fines of up to two million dollars per violation.[109] Under the Alternative Fines Act, these fines may be much higher.[110] Where the offense resulted in pecuniary gain or loss, the

---

business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes."); Michelle Shapiro, *FCPA + UK Bribery Act = Greater Global Exposure*, COMPLINET.COM (Jan. 28, 2011) http://www.complinet.com/dodd-frank/news/analysis/article/fcpa-uk-bribery-act-greater-global-exposure.html (last visited Aug. 5, 2011).

103. *See generally* Bribery Act, 2010, c.23, § 7(2) (U.K.).

104. DOJ GUIDE, *supra* note 21.

105. *Id*.; For a detailed discussion on current FCPA enforcement, *see* Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 N.Y.U. J. L. & BUS. 845, 853–856.

106. 15 U.S.C. § 78dd-2(g); DOJ GUIDE, *supra* note 21 (The SEC may bring civil actions for fines of up to $10,000 against any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the FCPA's anti-bribery provisions. In addition, the SEC has discretion to impose additional fines that do not exceed the greater of the gross amount of the pecuniary gain to the defendant as a result of the violation. Individuals and companies that violate the FCPA's anti-bribery provisions may have their import/export licenses revoked or denied).

107. 15 U.S.C. § 78dd-2(g)(3); Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT'L L. 365, 382 (2011).

108. U. S. DEP'T OF STATE, FIGHTING GLOBAL CORRUPTION: BUSINESS RISK MANAGEMENT 28 (2d ed., 2011), *available at* http://www.ogc.doc.gov/pdfs/Fighting_Global_Corruption.pdf (last visited Nov. 6, 2011) [hereinafter DOS CORRUPTION REPORT]; Ryznar & Korkor, *supra* note 46, at 431.

109. DOJ GUIDE, *supra* note 21; ZARIN, *supra* note 4, at 8-4.

110. 18 U.S.C. § 3571; DOJ GUIDE, *supra* note 21; DOS CORRUPTION REPORT, *supra* note 107, at 28.

actual fine may be up to twice the amount of the benefit the defendant sought to obtain by making the corrupt payment.[111]

Penalties under the Bribery Act are much stricter than penalties under the FCPA.[112] Corporations running afoul of the Bribery Act face unlimited fines as well as civil confiscation actions arising pursuant to the Proceeds of Crime Act of 2002 to recover profits or gains recognized from the bribe.[113] In addition, individuals face a maximum of ten years imprisonment and unlimited fines, while company directors face potential disqualification under the Company Directors Disqualification Act of 1986.[114] Unlike the FCPA, which imposes both criminal and civil liabilities on individuals, the Bribery Act imposes only criminal liability on individuals violating its provisions.[115] Under the Bribery Act a company, or its directors, may also be barred from participation in public sector contracts in the European Union.[116]

G. Compliance

The FCPA does not create a compliance defense to corporate liability, but U.S. enforcement authorities have indicated that in making charging and disposition decisions related to FCPA violations, they consider whether, and to what extent, a company had a preexisting and effective compliance program in place.[117] The Federal Sentencing Guidelines also indicate that a court will consider an effective compliance program when deciding whether to mitigate the penalties imposed on a company for FCPA violations.[118] When companies encounter FCPA issues, they must be able

---

111. 18 U.S.C. § 3571(d); DOJ GUIDE, *supra* note 21.

112. *Compare* 15 U.S.C. § 78dd-2(g) *with* Bribery Act, 2010, c.23, § 11 (U.K.).

113. Proceeds of Crime Act, 2002, c.29, § 6 (2002) (U.K.); Toby Duthie & David Lawler, *The United Kingdom Bribery Bill*, 26 CONST. L.J. 146, 149 (2010).

114. *See generally* Company Directors Disqualification Act, 1986, c.46 (1986) (U.K.); Timothy Ashby, *The New U.K. Bribery Act: A Legal Mindfield for CEOs*, CHIEF EXEC. (May 6, 2011), http://chiefexecutive.net/the-new-uk-bribery-act-a-legal-minefield-for-ceos (last visited Aug. 5, 2011) (noting that the Bribery Act holds senior executives and directors personally liable for failing to prevent bribery being committed by employees, agents, or subsidiaries doing business on their behalf).

115. *See* Bribery Act, 2010, c.23, § 11 (U.K.).

116. Shapiro, *supra* note 101.

117. *See* 15 U.S.C. § 78dd-1; 18 U.S.C. § 3553(b).

118. 18 U.S.C. § 3553(b); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, 1(4)(b) (2010); Michael T. Gass et al., *Corporate FCPA Compliance Programs: A Necessity In Today's Aggressive Enforcement Environment*, EAPDLAW.COM, Mar. 28, 2006, at 1–2, *available at* http://www.eapdlaw.com/files/News/605faaa2-2fc3-49eb-ba81-1b005ec9675c/Presentation/NewsAttachment/1394a9e9-8fbf-44e6-bf17-9ed992347ce5/Client%20Advisory_Corporate%20FCPA%20Compliance%20Programs.pdf (last visited Aug. 5, 2011).

to demonstrate the practicality of their compliance programs.[119] Companies conducting international business should establish a standalone FCPA compliance policy.[120] A company should not rely on a few paragraphs addressing international bribery and corruption in its General Standards of Business Conduct as this would be entirely insufficient to mitigate the company's exposure to FCPA violations.[121] The DOJ has indicated that, ideally, a company's compliance program should be comprehensive and should typically include the following:

> 1) A clearly articulated corporate policy against violations of the FCPA and foreign anti-corruption laws and the establishment of compliance standards and procedures to be followed by all directors, officers, employees, agents, and all business partners involved in business transactions, representation, or business development or retention in a foreign jurisdiction that are reasonably capable of reducing the possibility that these laws will be violated;
> 2) The appointment of a Chief Compliance Officer who shall report to the CEO of the company and to the Audit Committee of the Board of Directors and be responsible for implementation and oversight of the company's compliance policies and procedures;
> 3) The effective communication to all directors, officers, employees, agents and business partners of the company's compliance policies, standards, and procedures regarding the FCPA, by requiring regular training concerning the requirements of the FCPA and annual certification of compliance with the FCPA;
> 4) An effective reporting system, including a "Hotline," for directors, officers, employees, agents, business partners, and third parties to report suspected violations of the compliance program or other suspected illegal conduct under the FCPA;
> 5) An appropriate disciplinary procedure designed to address violations or suspected violations of the FCPA,

---

119. Amy Hatcher, *The Latest Surge in Anti-Corruption Enforcement: What Looms on the Horizon for Global Businesses and Their Leadership*, ETHISPHERE (May 25, 2010), http://ethisphere.com/the-latest-surge-in-anti-corruption-enforcement-what-looms-on-the-horizon-for-global-businesses-and-their-leadership/ (last visited Aug. 5, 2011).

120. Stephen Clayton, *Top Ten Basics of Foreign Corrupt Practices Act Compliance for the Small Legal Department*, ASSOC. OF CORP. COUNSEL (June 1, 2011), http://www.acc.com/legalresources/publications/topten/SLD-FCPA-Compliance.cfm (last visited Aug. 5, 2011).

121. *Id.*

> the foreign anti-corruption laws, or the company's compliance code;
> 6) Extensive due diligence requirements pertaining to the company's agents and business partners, including the maintenance of complete due diligence records at the company;
> 7) Clearly articulated corporate procedures designed to ensure that substantial discretionary authority is not delegated to individuals that the company knows, or should know, through the exercise of due diligence, have a propensity to engage in illegal or improper activities;
> 8) A system to review and to record, in writing, actions relating to the retention of any agents or subagents and all contracts or payments related thereto;
> 9) The inclusion in all agreements, contracts, and contract renewals, with all agents and business partners of provisions:
> i) Setting forth anti-corruption representations and undertakings;
> ii) Relating to compliance with the FCPA and foreign anti-corruption laws;
> iii) Allowing for periodic internal and independent audits of the books and records of the agent or business partner to ensure compliance with the company's policies and procedures; and
> iv) Providing for termination of the agent or business partner as a result of any breach of the FCPA or foreign anti-corruption laws.[122]

Considering U.S. enforcement authorities' current aggressive FCPA enforcement, a comprehensive FCPA compliance program will undoubtedly be invaluable in protecting U.S. companies operating overseas.[123] Unlike the FCPA, the U.K. Bribery Act offers a compliance defense to corporate liability, where a company will not be subject to prosecution if it had adequate procedures in place, which were designed to prevent persons associated with the company from engaging in the type of conduct that precipitated the prosecution.[124] The term "adequate procedures" was left undefined in the Act itself. However, the U.K. Secretary of State, Kenneth Clarke, published guidance that outlines six

122. DOJ Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 04-02, at 2–3 (July 12, 2004), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf (last visited Aug. 5, 2011).

123. *See generally* Cook & Connor, *supra* note 25.

124. *See* Bribery Act, 2010, c.23, § 7(2) (U.K.).

principles that commercial organizations should employ when implementing their policies and procedures.[125] The principles mentioned are as follows:

1) Proportionate procedures;
2) Top-level commitment;
3) Risk assessment;
4) Due diligence;
5) Communication (including training); and
6) Monitoring and review.[126]

The U.K. authorities have indicated that the adequacy of a firm's procedures will be evaluated based on these six principles.[127] The Guidance also suggests that these principles are not prescriptive, but rather are intended to be flexible in order to apply to a wide variety of circumstances.[128] The first principle suggests that a company's procedures to counter bribery should be proportionate to the bribery risks it faces and to the nature, scale, and complexity of the commercial organization's activities.[129] These procedures should also be clear, practical, accessible, and effectively implemented and enforced.[130] The guidance notes that a company's level of risk will be linked to the size of the organization to some extent, but that size will not be the exclusive determinant of such risk.[131] The second principle asserts that companies must demonstrate a top-level commitment to preventing bribery by persons associated with them.[132] This type of commitment can be reflected in effective formal statements that demonstrate a commitment to engaging in honest and transparent business, as well as a commitment to zero tolerance towards bribery.[133] An articulation of the business benefits of rejecting bribery is also an effective way to demonstrate a company's top-level commitment to preventing bribery.[134] The third principle suggests that companies should conduct an informed assessment of the nature and extent of their exposure

125. BRIBERY ACT GUIDANCE, *supra* note 86, at 20.

126. *Id*. at 20–31.

127. *Id*. at 20; Matt T. Morley, Robert V. Hadley, & Laura Atherton, *U.K. Bribery Act: What Non-U.K. Companies Need to Know* (K & L Gates, Pittsburg, Pa.), Mar. 31, 2011, *available at* http://www.klgates.com/uk-bribery-act-what-non-uk-companies-need-to-know-03-31-2011/ (last visited Nov. 6, 2011).

128. BRIBERY ACT GUIDANCE, *supra* note 86, at 20.

129. *Id*. at 21.

130. *Id*. at 21.

131. *Id*. at 21.

132. *Id*. at 23.

133. BRIBERY ACT GUIDANCE, *supra* note 86, at 23.

134. *Id*. at 23.

to potential external and internal risks of bribery on their behalf by persons associated with them.[135] U.K. enforcement authorities encourage companies to create procedures that will accurately identify and prioritize their risks.[136] A company's assessment should be reevaluated periodically as the company's business evolves and such assessment should be consistently documented.[137] Particular attention should be paid to the types of external risks that a company may encounter.[138] The country or sector in which an organization operates may pose a distinct type of risk for that organization.[139] Similarly, certain types of transactions or business opportunities and certain kinds of business relationships may also pose unique risks to the organization.[140] The fourth principle suggests that companies should develop due diligence procedures that are proportionate to the companies' risks.[141] The Guidance notes that due diligence procedures are a form of bribery risk assessment as well as a means of mitigating risk.[142] The Guidance also suggests that considerable care be exercised when entering into certain business relationships that are particularly difficult to modify or terminate.[143] The fifth principle expresses the need for bribery prevention policies to be embedded and understood throughout an organization through internal and external communication and training that demonstrates the organization's commitment to preventing bribery by person's associated with it.[144] Training should be proportionate to the organization's risks and should raise awareness about the threats of bribery and the ways in which such bribery may be addressed.[145] The sixth principle suggests that companies should develop ways of monitoring and evaluating the effectiveness of their bribery prevention procedures, and these procedures should be modified where necessary.[146] Companies should consistently review their policies and procedures in light of governmental changes in countries in which they operate, negative press reports, or incidents of bribery experienced by the company.[147]

---

135. *Id.* at 25.
136. *Id.*
137. *Id.*
138. BRIBERY ACT GUIDANCE, *supra* note 86, at 26.
139. *Id.*
140. *Id.*
141. *Id.* at 27.
142. *Id.*
143. BRIBERY ACT GUIDANCE, *supra* note 86, at 27.
144. *Id.* at 29.
145. *Id.* at 30.
146. *Id.* at 31.
147. *Id.*

III. IMPACT OF THE BRIBERY ACT

A. How Will the Bribery Act Impact Doing Business With the United Kingdom?

Considerable fuss has been made about the Bribery Act and its impending impact, primarily because compliance with the FCPA will not necessarily equal Bribery Act compliance.[148] The Bribery Act has been characterized as the strictest anti-corruption legislation to date.[149] However, the Bribery Act's force will largely depend on the SFO's prosecutory appetite.[150] The SFO has encountered problems in the past with regards to its ineffective criminal enforcement, and has been highly criticized for its low conviction rates in comparison to the DOJ and SEC.[151] The SFO's director, Richard Alderman, stated that the SFO is not interested in pursuing "decent" companies conducting business under difficult circumstances, but asserted that the SFO would assist organizations in resolving issues with "minimum fuss."[152] The SFO has encouraged companies to self-report when they have evidence of or suspect misconduct by their employees.[153] The Bribery Act utilizes broad language and gives the SFO tremendous discretion, but it remains to be seen whether the SFO will take advantage of this discretion.[154] Currently, the United States is the global leader in enforcing anti-corruption legislation but this could change very quickly if the SFO commits to adamantly enforcing the United Kingdom's new law.[155]

Legal analysts have indicated their expectation that the SFO will aggressively prosecute individuals and organizations that run afoul of the

---

148. Shapiro, *supra* note 101.

149. *Id*.; *Weil Alert: U.K. Bribery Act*, *supra* note 43; Ashby, *supra* note 113.

150. Warin et al., *supra* note 18, at 36.

151. *Id*. at 4.

152. Jonathan Russell, *The SFO Needs A Big Scalp if Bribery Act is to be Feared*, TELEGRAPH (U.K.) (July 1, 2011), http://www.telegraph.co.uk/finance/comment/8609414/The-SFO-needs-a-big-scalp-if-Bribery-Act-is-to-be-feared.html (noting that the SFO will be going after big companies, with big pockets that are capable of engaging in big acts of bribery).

153. PETER WILKINSON, THE 2010 U.K. BRIBERY ACT: ADEQUATE PROCEDURES 79 (Transparency Int'l U.K., July 2010), *available at* http://www.transparency.org.uk/publications/adequate-procedures/120-adequate-procedures/download (last visited Aug. 5, 2011).

154. *The United Kingdom's Bribery Act 2010 and other Recent Anti-Corruption Enforcement Activity in the United Kingdom*, (Chadbourne & Parke, LLP New York, N.Y.), May 3, 2010, at 1, *available at* http://www.chadbourne.com/files/Publication/b428aea0-6774-459d-b38c-69c70124d271/Presentation/PublicationAttachment/be805ef7-f4a2-4c27-b517-77b2ab7205a4/UKBriberyAct.pdf (last visited Aug. 5, 2011).

155. Michelle Duncan et al., *A Comparison of the US Foreign Corrupt Practices Act and the UK Bribery Act*, PAULHASTINGS.COM, Oct. 2010, at 1, *available at* http://www.paulhastings.com/assets/publications/1750.pdf (last visited Aug. 5, 2011).

Bribery Act.[156] These analysts also surmise that companies that currently have aggressive anti-bribery systems in place should be able to effectively adapt to the Bribery Act.[157] In enforcing the Bribery Act, and before commencing an investigation, the SFO will likely attempt to establish a pattern of conduct that demonstrates an organization's failure to alter its procedures to comply with the Bribery Act.[158] One attorney indicated that the Bribery Act would not be a "game changer" for most companies that have been subject to the FCPA, but companies that have been remiss in anti-bribery compliance may have reasons to be concerned.[159] It is essential to note that the SFO intends to aggressively pursue foreign companies listed in the United Kingdom despite the MOJ's assertion that a listing in itself would not give rise to Bribery Act liability.[160] Although the SFO does not conduct sector-wide investigations the organization has warned that it plans to work closely with the foreign authorities that do conduct such investigations, in particular the DOJ and the SEC.[161] The SFO has also expressed its intention to combat bribery by utilizing the United Kingdom's money laundering laws.[162] Rigid implementation of the Bribery Act's provisions will likely cause many companies to terminate various foreign relationships in an effort to avoid prosecution.[163] A recent Dow Jones State of Anti-Corruption Compliance Survey indicated that more than 55% of companies delay or avoid working with global business partners because they are fearful of noncompliance with anti-bribery regulations.[164]

B. How Do Facilitation Payments Affect a Company's Ability to do Business in a Foreign Country?

The Bribery Act's prohibition on facilitation payments could make it impossible to do business in some countries if the officials of these foreign

---

156. Michael Connor, *New U.K. Bribery Law Could Have International Impact*, BUSINESS-ETHICS (Jan. 6, 2011), http://business-ethics.com/2011/01/06/1525-new-uk-bribery-law-could-have-international-impact/ (last visited Aug. 5, 2011).

157. *Id.*

158. *Our Top 5 Predictions For the 1st Year of the Bribery Act*, BRIBERYACT.COM (July 1, 2011), http://thebriberyact.com/2011/07/01/our-top-5-predictions-for-the-1st-year-of-the-bribery-act/ (last visited Aug. 5, 2011) [hereinafter *Our Top 5 Predictions*].

159. Connor, *supra* note 155.

160. *Our Top 5 Predictions*, *supra* note 157.

161. *Id.*

162. *Id.*

163. *Dow Jones Risk & Compliance, Dow Jones State of Anti-Corruption Compliance Survey*, DOW JONES (Mar. 11, 2011), http://www.dowjones.com/pressroom/SMPRs/DJACCSurvey2011.html (last visited Aug. 5, 2011).

164. *Id.*

countries refuse to provide services absent the payment of bribes.[165] This prohibition has created much concern for organizations in light of the SFO's statement that it intends to rigorously enforce that particular provision.[166] However, the SFO has expressed that it is unlikely to prosecute persons or entities that make small payments to compel routine, non-discretionary government action, unless these payments are part of a larger pattern, or are systemic of a wider lack of adequate procedures.[167] The SFO's ultimate plan is to completely phase out facilitation payments, but it recognizes that the process may take a few years.[168] In light of such leniency towards small facilitation payments, the U.K. authorities will expect companies to consult with them if issues arise, as this would demonstrate to the authorities that these companies are working towards zero tolerance in the near future.[169] The conflict between the FCPA, which excludes facilitation payments from the scope of its prohibitions, and the Bribery Act would likely force organizations to follow the higher U.K. standard and incur higher costs in order to remain compliant with the Act while doing business with the United Kingdom.[170]

C. What Industries Will Be Most Affected By the Bribery Act?

Research conducted by Ernst & Young based on the analysis of FCPA bribery convictions illustrates ten sectors that are most vulnerable to the Bribery Act.[171] These sectors, listed in order of vulnerability, are as follows:

---

165. Bonneau, *supra* note 106, at 401; WILKINSON, *supra* note 152, at 29 (explaining that the prohibition on facilitation payments results in adverse consequences because in some markets it is impossible to travel or get business done without these types of payments. In addition, the article states that apart from the legal risks of facilitation payments, a practice of making such payments can make a company more vulnerable to bribery as it sends a message to employees and business partners of inconsistency in no-bribery policies as well as creates a dependency among public officials to rely on these facilitation payments).

166. Bonneau, *supra* note 106, at 401.

167. *When a Bribe is Merely Facilitating Business*, ECONOMIST (June 11, 2011), http://www.economist.com/blogs/blighty/2011/06/anti-bribery-laws (last visited Nov. 6, 2011) (SFO director, Richard Alderman, notes that banning facilitation payments may be impractical. He also notes that it may be unrealistic for small firms to implement zero-tolerance policies on bribes and still be able to do business in the shadier parts of the world) [hereinafter *When a Bribe is Merely Facilitating Business*]; WILKINSON, *supra* note 152, at 11.

168. *When a Bribe is Merely Facilitating Business*, *supra* note 166.

169. *Id*.

170. Bonneau, *supra* note 106, at 401.

171. *Oil and Gas Sector Most at Risk From Investigation Under the U.K. Bribery Act, Warns Ernst & Young* (Ernst & Young London, U.K.), May 9, 2011, http://www.ey.com/UK/en/Newsroom/News-releases/Assur---11-5-9---Oil-and-gas-sector-most-at-risk-from-investigation-under-the-UK-Bribery-Act (last visited Aug. 5, 2011).

1) Oil and Gas;
2) Life Sciences;
3) Consumer Products;
4) Technology;
5) Real Estate;
6) Automotive;
7) Telecoms;
8) Asset Management;
9) Banking and Capital Markets;
10) Government and Mining Metals.

Ernst & Young's Fraud Investigations and Dispute Services' (FIDS) director, David Lister, stated:

> [Although the oil and gas sector] is the most "at risk" sector in terms of the number of prosecutions that are likely to be incurred, there is no suggestion that individuals and companies within the oil and gas sector are intrinsically more corrupt than their counterparts in other sectors. Rather, it is the nature and locations of their businesses that exposes them to additional risk.[172]

Lister also added that the FCPA data is a good indicator of potential Bribery Act prosecutions because the DOJ and the SFO commonly share information.[173] The pharmaceutical industry is another industry that will likely fall under the Bribery Act's radar.[174] U.K. enforcement authorities have mentioned this industry as a potential target under the new law, indicating the DOJ's recent probe into this industry as the likely reason.[175]

IV. CONCLUSION

Bribery is no longer an acceptable form of doing business. Such a notion is a thing of the past, yet bribery remains a threat to both developed and developing countries. The FCPA and the Bribery Act are designed to abate the threats that stunt economic development in many countries. For many years, the United States led the crusade on eradicating bribery and corruption from the global economy through rigid FCPA enforcement. The

172. *Id.*

173. *Id.*

174. Patrick Gilfillan, *The Bribery Act and the Pharmaceutical Industry: Is Big Pharma in Big Trouble?*, BRIBERYLIBRARY.COM (July 8, 2011), http://www.briberylibrary.com/gifts-hospitality/the-bribery-act-and-the-pharamaceutical-industry-is-big-pharma-in-big-trouble/ (last visited Oct. 20, 2011).

175. Dionne Searcey, *U.K. Law on Bribes Has Firms in a Sweat*, WALL ST. J., Dec. 28, 2010, at B1.

United Kingdom, on the other hand, came under constant scrutiny for its relaxed enforcement attitude towards bribery. The United Kingdom eventually responded to this scrutiny; the response was deafening. Organizations worldwide can be assured that the United Kingdom will use its new Bribery Act powers to improve its long-standing reputation as an ineffective enforcer. Organizations should familiarize themselves with every provision of the Act and adjust their practices accordingly. U.K. authorities will have tremendous discretion to prosecute bribery, and organizations should be prepared for their scrutiny.

AN ANALYSIS OF CHINA'S HUMAN RIGHTS POLICIES IN TIBET: CHINA'S COMPLIANCE WITH THE MANDATES OF INTERNATIONAL LAW REGARDING CIVIL AND POLITICAL RIGHTS

Richard Klein[*]

I. HISTORICAL BACKGROUND AND OVERVIEW

Tibet is commonly viewed in the West as having been a "Shangri-La"—a utopia unspoiled by industrialization, commercialization, or pollution.[1] Such a view was furthered by the fact that Tibet is geographically isolated—at "the roof of the world"[2]—and one visited infrequently by Westerners. A devoutly Buddhist area, the monasteries were centers of power which considered foreign influence or contact as possible threats to the continued hegemony of the monasteries.[3] Infrastructure was almost non-existent, and the nomadic or pastoral peoples lived as they had for centuries[4] . . . until China invaded in 1949 to 1951.[5]

---

* Bruce Gould Distinguished Professor of Law, Touro Law School. J.D. Harvard Law School, 1972. The author wishes to express his gratitude to his outstanding research assistants, Michael Boykin and Billy Germano.

1. *See, e.g.*, Gary Vause, *Tibet to Tiananmen*: *Chinese Human Rights and United States Foreign Policy*, 42 VAND. L. REV. 1575, 1579 (1989).

2. *Id*. at 1575.

3. The important political role that the monastic system traditionally enjoyed in Tibet was highlighted in a report appended to the 1990 Hearings of the Senate Subcommittee on East Asian and Pacific Affairs:

> The monastic system had considerable political influence and was a conservative force, impeding foreign influence as well as domestic reform. The large monasteries aggressively opposed attempts to modernize Tibet and to allow influences from the foreign world in what proved to be a vain effort to preserve its unique civilization.

See INTERNATIONAL CAMPAIGN FOR TIBET, FORBIDDEN FREEDOMS: BEIJING'S CONTROL OF RELIGION IN TIBET, 521 (1990) [hereinafter FORBIDDEN FREEDOMS].

4. *See* REBECCA R. FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET 25 (1995).

Prior to the invasion of the Chinese, at least one boy from every family was expected to study and reside in a monastery and would be ordained.[6] Monks had traditionally devoted themselves to scholarly endeavors, spending twelve hours a day studying Buddhist philosophy and logic, reciting prayers, and debating scriptures.[7] The monasteries were political and social centers, as well as religious. Schools were contained within the buildings, and the typical indicia of government operations were located in the monasteries as well.[8] The community would gather at times to discuss issues of import, to be informed of secular matters, and to receive religious instruction.[9] The site of monasteries, typically set high on mountain plateaus, served to provide refuge for Tibetans from the frequent, and extreme, cold and high winds.[10]

Tibetan cultural isolation, although arguably no more or less than that of any other rural peasantry, may have been distinctive because of the conjunction of isolating circumstances developed over two thousand years:

> 1) The area's location on a high plateau not easily accessible to outsiders;

---

5. Sources appear to differ as to the precise year of the Chinese invasion of Tibet. *Compare* Peter Hessler, *Tibet Through Chinese Eyes,* THE ATLANTIC, Feb. 1999, *available at* http://www.theatlantic.com/magazine/archive/1999/02/tibet-through-chinese-eyes/6395/ (last visited Feb. 7, 2012) (stating the western view that "before being forcibly annexed, in 1951, [Tibet] was an independent country"), *with* FRENCH, *supra* note 4, at 49 (describing the Chinese invasion of the Tibetan Plateau as occurring in the fall of 1950), and HUM. RTS. IN DEVELOPING COUNTRIES YEARBOOK 1994, 194 (Peter Baehr, Hilde Hey, Jacqueline Smith & Theresa Swinehart eds., 1994) (stating that the Chinese army invaded Tibet in 1949).

6. *See* Tsenzhab Serkong Rinpoche II, *Overview of the Gelug Monastic Education System*, BERZINARCHIVES.COM (Sept. 2003), http://www.berzinarchives.com/web/en/archives/study/history_buddhism/buddhism_tibet/gelug/overview_gelug_monastic_education.html (last visited Oct. 30, 2011); *see also* Tsechen Damchos Ling Buddhist Monastery, *Monastic (Religious) Activities*, http://www.tibetan-village.org.uk/routine.html (last visited Oct. 30, 2011); *Life of Tibetan Monks*, PRESSCLUBOFTIBET.ORG, http://www.presscluboftibet.org/china-tibet-51/life-of-tibetan-monks.htm., Amy Yee, *Tibetan Monks and Nuns Turn their Minds Toward Science*, N.Y. TIMES, June 30, 2009, at D3, *available at* http://www.nytimes.com/2009/06/30/science/30monks.html?pagewanted=all (last visited Oct. 30, 2011) (describing the study schedules and practices of Tibetan Monks).

7. Yee, *supra* note 6, at D3.

8. *See* Jeffery Hays, *Tibetan Monasteries and Pilgrims*, FACTSANDDETAILS.COM (Apr. 2010) http://factsanddetails.com/china.php?itemid=217&catid=6&subcatid=34 (last visited Jan. 3, 2012).

9. *Id*.

10. Despite their unusual location, the monasteries would occasionally house non-Tibetans as well. Prior to 1959, monks came to the monasteries from Indian border regions as well as other parts of Tibet, including Mongolia and Bhutan. In a few cases, some Europeans and Japanese monks studied at Sera, a major Tibetan monastery. José Ignacio Cabezón, *People at Sera*, *in* People at Sera (2004) *available at* http://www.thlib.org/places/monasteries/sera/essays/#!essay=/cabezon/sera/people/ (last visited Oct. 30, 2011).

> 2) A harsh climate;
> 3) A generally stable and static polity and economy;
> 4) A separate Tibetan language with dialects varying noticeably from region to region;
> 5) A strong Tibetan national consciousness punctuated by the existence of regional cultural differences; and
> 6) A particular, widespread emphasis on an institutionalized Tibetan form of Buddhism.[11]

Upon their arrival in 1950, the Chinese Communists tried to persuade the Tibetan government to begin negotiations for "peaceful liberation" of the country.[12] When Tibetan officials hesitated, Chinese forces attacked the Tibetan army in October 1950 and captured the city of Chamdo and the Tibetan troops defending it. Lhasa, the Tibetan capital, was, as a result, left virtually defenseless. The Chinese army did not, however, occupy Lhasa, since Mao Zedong wanted China's claim to Tibet legitimized by having the Dalai Lama voluntarily accept Chinese rule.[13] The Tibetan government, demoralized by the lack of support by other countries, most notably Britain and India, for Tibetan independence, sent negotiators to Beijing in the spring of 1951 to reach a settlement with the Chinese government.[14] In May 1951, the Tibetan delegates signed a "17-Point Agreement"—without the Dalai Lama's knowledge or authority[15]—formally recognizing Chinese sovereignty over Tibet.[16] To this day, the Chinese refer to the events from 1949 to 1951 as culminating in the "peaceful liberation" of Tibet.[17]

The West has perceived the Chinese presence in Tibet as that of an occupying force—subjugating the people, wiping out the traditional culture,[18] and forcing the Tibetan leader, the Dalai Lama, into exile.[19]

---

11. However, throughout its history, Tibet has been influenced by cultural and economic contact with other societies bordering the Tibetan Plateau. FRENCH, *supra* note 4, at 26.

12. MELVYN C. GOLDSTEIN, THE SNOW LION AND THE DRAGON 44 (1997).

13. *Id*. at 45.

14. *Id*. at 46.

15. *Id*. at 48.

16. GOLDSTEIN, *supra* note 12, at 46. At least two authors state that the Dalai Lama and/or the Tibetan government first heard of the 17-Point Agreement over the radio when it was announced by Radio Beijing. A. TOM GRUNFELD, THE MAKING OF MODERN TIBET, 111–14 (1996). M. C. VAN WALT VAN PRAAG, THE STATUS OF TIBET: HISTORY, RIGHTS, AND PROSPECTS IN INTERNATIONAL LAW 148 (1987).

17. GOLDSTEIN, *supra* note 12, at 46.

18. *See* TIBET: HUM. RTS., INTERNATIONAL COMMISSIONER OF JURIST 7–10 (1997) (describing the findings of several reports published since 1959 by the International Commission of Jurists) [hereinafter TIBET: HUM. RTS.].

19. *See, e.g*., Daniel J. Sobieski, *What About Human Rights in Tibet?* CHI. TRIB., July 29, 1999, at 20, *available at* http://articles.chicagotribune.com/1999-07-29/news/9907290364_1_tibetan-central-tibet-dalai-lama (last visited Oct. 30, 2011).

Tenzin Gyatso, the Fourteenth Dalai Lama, fled China, according to his supporters, to avoid imminent arrest by the Chinese in 1959.[20] The Dalai Lama settled in Dharamsala, India and instituted the Tibetan Government-in-Exile, which claimed to be the only legitimate ruling body of the Tibetan people.[21]

Hollywood could not have found a better man to cast in the role of the Fourteenth Dalai Lama than Gyatso—his humility, gentleness, good spirit, and overall likeability have contributed to the perception of the Tibetans as innocent, nonviolent victims of Chinese oppression.[22] In the statement made when granting the Dalai Lama the Nobel Peace Prize in 1989, the Nobel Committee declared that:

> [T]he Dalai Lama in his struggle for the liberation of Tibet consistently has opposed the use of violence. He has instead advocated peaceful solutions based upon tolerance and mutual respect in order to preserve the historical and cultural heritage of his people. The Dalai Lama has developed his philosophy of peace from a great reverence for all things living and upon the concept of universal responsibility embracing all mankind as well as nature.[23]

The Dalai Lama is, however, approaching seventy-seven years of age, and it might well be the policy of China to avoid serious talks about any possibility of the Lama's return to Tibet because of China's hope that old age might naturally lead to an elimination of the problem[24]—not that the

---

20. FRENCH, *supra* note 4, at 50; TIBET: HUM. RTS., *supra* note 18, at 51.

21. *See* FRENCH, *supra* note 4, at 50; GOLDSTEIN, *supra* note 12, at 54; Vause, *supra* note 1, at 1589.

22. *See* Sir CHARLES ALFRED BELL, THE RELIGION OF TIBET 2, 134 (1998) ("As a recipient of the Nobel Peace Prize, and an advocate of peaceful resolution with the Chinese, the Dalai Lama is a prime example of a man living his religion."); 133 Cong. Rec., H5219 (daily ed. June 18, 1987) (stating the sense of the Congress that the United States "should urge the Government of the People's Republic of China to actively reciprocate the Dalai Lama's efforts to establish a constructive dialogue" and that "Tibetan culture and religion should be preserved and the Dalai Lama should be commended for his efforts in this regard"); LEGAL MATERIALS ON TIBET, INT'L COMM. OF LAWYERS FOR TIBET (2nd ed. 1997).

23. Press Release, Nobel Foundation, The Nobel Peace Prize for 1989 (Oct. 5, 1989), *available at* http://nobelprize.org/nobel_prizes/peace/laureates/1989/press.html (last visited Oct. 30, 2011).

24. *See* Richard Klein, *The World's Youngest Political Prisoner*, THE HUMANIST, Mar/Apr 1999, at 8, *available at* http://thehumanist.org/humanist/articles/klein.html (last visited Oct. 30, 2011). *See also* Isabel Hilton, *Flight of the Lama*, N.Y. TIMES, Mar. 12, 2000, at 7, *available at* http://www.nytimes.com/2000/03/12/magazine/flight-of-the-lama.html?pagewanted=all&src=pm (last visited Oct. 30, 2011).

Dalai Lama's birthdays were given significance in China. In July of 2010, when his seventy fifth birthday occurred, a foreign Ministry spokesman said China preferred to ignore the Dalai Lama's birthday and instead remember two dates in modern Tibetan history: those of Tibet's "peaceful liberation" and Serf Emancipation Day. "I can only remember two dates," the spokesman, Qin Gang said.[25] "[O]ne was March 28, 1951, when the Chinese Army took over central Tibet, and the other was May 23, 1959, after the Chinese Army suppressed a Tibetan uprising, a day the government recently designated Serf Emancipation Day."[26]

Moreover, the Chinese have taken into custody the Dalai Lama's designated eleventh Panchen Lama,[27] historically the second most important Lama in the Tibetan hierarchy, and have anointed their own eleventh Panchen Lama ready to take authority upon the Dalai Lama's death.[28] According to Hao Ping, a Communist Party official, the reincarnations of Tibetan spiritual leaders, including the Dalai Lama, must be approved by the Chinese central government.[29] According to Ping, the living [incarnated] Buddhas must now follow a process that was rooted in history and that culminated in approval of the reincarnations by the central government. The Chinese Communist Party, which is officially atheist, nevertheless insists that religious traditions be followed. There were two crucial steps in the process: "the name of the reincarnated lama must be chosen from several rods with names put into a ceremonial vessel, the Golden Urn, and the child selected from that must be approved by the central government."[30] In 2007, the Chinese government passed a law requiring that "all living Buddhas" need to be approved by Beijing.[31]

---

25. *See* Edward Wong, *China: Dalai Lama's Birthday Ignored*, N.Y. TIMES, July 8, 2010, A6, *available at* http://www.nytimes.com/2010/07/08/world/asia/08briefs-China.html (last visited Oct. 30, 2011).

26. *Id.*

27. For a discussion of the controversy between the Dalai Lama and Beijing over the selection of the successor to the Tenth Panchen Lama, *see* TIBET INFO. NETWORK & HUM. RTS. WATCH (Asia), CUTTING OFF THE SERPENT'S HEAD: TIGHTENING CONTROL IN TIBET, 1994-1995, 4–5 (1996) [hereinafter CUTTING OFF THE SERPENT'S HEAD].

28. *See* Klein, *supra* 24, at 1. However, the successful escape into India of Ugyen Trimley Dorje, recognized by both the Dalai Lama and Beijing as the rightful seventeenth Karmapa Lama, may provide the Tibetan exile movement with a respected leader who could be well situated to be a spokesman for the Tibetans in the absence of the Dalai Lama. *See also* Hilton, *supra* 24, at 7.

29. Edward Wong, *China Asserts Role in Choosing Dalai Lama*, N.Y. TIMES, July 1, 2010, at A6, *available at* http://www.nytimes.com/2010/07/02/world/asia/02dalai.html (last visited Oct. 30, 2011).

30. *Id.*

31. *Id.*

II. DENIAL OF FREEDOM OF RELIGION

It has been recognized that "Tibetan Buddhism is the cornerstone of Tibet's unique cultural heritage."[32] Accordingly, for the Tibetan Buddhists, the denial of their right to practice their religion[33] has had ramifications of gargantuan proportions.[34] The attack on the Tibetans' religion focused on interference in the monasteries' affairs, and ultimately, the physical destruction of many of them.[35] Accounts differ as to the amount, the timing, and the nature of the destruction that actually occurred. According to the Physicians for Human Rights, in the years following the aborted 1959 Tibetan uprising, the Chinese decimated the monastic system by razing over 6000 monasteries and temples.[36] The International Commission of Jurists (ICJ) asserts that Chinese Communist "democratic reforms" in 1956 were accompanied by "cultural destruction, which began with the depopulation, looting, and destruction of monasteries."[37] After the intensification of the revolt in 1959, the process of attacking the monasteries, depopulation, and looting spread to central Tibet.[38] It may be

---

32. *Sino-American Relations: One Year After the Massacre at Tiananmen Square:* Hearing before the Subcomm. on East Asia and Pacific Affairs of the Comm. on Foreign Relations, 101st Cong. 58 (1990) [hereinafter *Sino-American Relations*] (prepared statement of Michele Bohana, Director of the International Campaign for Tibet). *See* FRENCH, *supra* note 4, at 12 ("The Tibetans' religion is the foundation of all their culture, the source of their jurisprudence, the well-spring of their political history, the guiding principle in every Tibetan's life."). Interestingly, the Chinese government has also expressly recognized the importance of Tibetan Buddhism in Tibetan affairs: "Tibetan Buddhism was founded in a certain historical period in Tibet, and it has had a widespread and long-standing effect on the people. In our region's [Tibet's] Socialist cause we consider it as an important issue to fully understand and solve this problem." TIBET JUSTICE CTR., A GOLDEN BRIDE TO STRIDE INTO THE NEW CENTURY: THIRD FORUM ON WORK IN TIBET 36 (1994).

33. The Political Covenant guarantees the "right to freedom of thought, conscience religion." *See Political Covenant*, *supra* note 22 , art. 18 sec. 1, at 23.

34. *See* Dalai Lama, Statement of His Holiness the Dalai Lama on the Occasion of the 36th Anniversary of the Tibetan National Uprising (Mar. 10, 1995) (stating that "[w]ith the occupation of Tibet, Tibetan Buddhism has been robbed of its cradle and homeland, not only violating the Tibetan people's right to freedom of religion but also endangering the very survival of this rich spiritual and cultural tradition in Tibet and Central Asia.") [hereinafter Statement of His Holiness].

35. John Prados, in describing the growing unrest in Tibet during the late 1950s, notes that armed resistance against the invading Chinese caused a moral dilemma for traditionally nonviolent Buddhist Tibetans. However, the Chinese People's Liberation Army (PLA) "helped resolve these problems by bombing monasteries, beginning with Litang in 1956." *See* JOHN PRADOS, PRESIDENTS' SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS SINCE WORLD WAR II 157 (1986).

36. John Ackerly & Blake Kerr, *The Suppression of a People: Accounts of Torture and Imprisonment in Tibet* 354 (1989) (A report by the Scientific Buddhist Association for the U.N. Commission on Human Rights asserts that 80% of monasteries and temples in Tibet were destroyed from 1960 to 1966, even before the Cultural Revolution).

37. TIBET: HUM. RTS., *supra* note 18, at 120.

38. *Id*. at 121.

the case that the greatest degree of physical destruction took place from 1966 to 1969, the time of the Great Proletarian Cultural Revolution, when "[a]ll but a handful of monasteries and temples (the figures range from 2000 to 6500) were destroyed, many taken down brick by brick until not a trace was left."[39]

Monasteries in Tibetan society were far more central to people's lives than churches and synagogues are to most Christians and Jews. They were *the* centers of education, culture, and community life.[40] Thus, when some Western journalists were permitted to visit Tibet in the late 1970s, and to see the destruction wrought upon Tibetan temples, monasteries, and Tibetan culture in general, they described Tibet as "the graveyard of a murdered civilization."[41] Monks and nuns—traditionally constituting approximately fifteen to twenty percent of the total population of Tibet[42]—were arrested and jailed[43] and, by many accounts, tortured[44] and, during the Cultural Revolution, even executed.[45] Ancient Buddhist texts have been destroyed, especially during the years of the Great Leap Forward and the Cultural Revolution in China.[46] Although there had been some loosening of the

---

39. GRUNFELD, *supra* note 16, at 185; *See* DAWA NORBU, TIBET: THE ROAD AHEAD 275 (1997) (describing the Chinese Cultural Revolution, which covered the period from May, 1966 to January, 1969, as a time when "almost 90 percent of Tibet's monasteries, temples and historical monuments were razed to the ground"); *Sino-American Relations*, *supra* note 32, at 521, 528.

40. *See* TIBET: HUM. RTS., *supra* note 18, at 121 ("Tibetan monasteries contained the vast majority of Tibetan material as well as intellectual culture.").

41. NORBU, *supra* note 39, at 276.

42. *See* GRUNFELD, *supra* note 16, at 13–14, 31 (stating that in 1959 the Chinese government estimated the clergy as totaling fifteen percent of the Tibetan population). Grunfeld notes that:

> A tradition evolved of sending at least one son from each family into the clergy to ensure him some dignity and more than likely guarantee his livelihood. . . . The monastic orders also provided a safety valve when a family had too many sons and not enough property to divide reasonably.

FRENCH, *supra* note 4, at 30 (Monks and nuns "made up an estimated twenty percent of the population in the first half of the twentieth century.").

43. The Chinese government has stated that there are no religious prisoners in China, and that infringement of the law, not religion, constituted the grounds for every conviction. *See Visit by the Special Rapporteur to China* (1994), *in* LEGAL MATERIALS ON TIBET, *supra* note 22, at 69, 77.

44. *See Sino-American Relations*, *supra* note 32, at 55; ASIAN WATCH REP., MERCILESS REPRESSION 67 (1990) (Since monks and nuns are often arrested for pro-independence activities, they are arrested, imprisoned and tortured as are other political prisoners.) [hereinafter MERCILESS REPRESSION].

45. TIBET: HUM. RTS., *supra* note 18, at 74 (at least one source claims that executions of Tibetan Buddhist clergy took place even in the 1950s). *See* FORBIDDEN FREEDOMS, *supra* note 3, at 524, 525–26, 528 (stating that "[w]hile the government was proclaiming liberal policies . . . to protect religion . . . [a]ttacks on religion became more violent. Lamas were assaulted and humiliated; some were put to death" and there was "imprisonment, *execution* and expulsion" of monks) (emphasis added).

46. *See* TIBET: HUM. RTS., *supra* note 18, at 74.

restrictions on the right to religious freedom,[47] as well as restoration and reconstruction of some monasteries,[48] the Chinese government maintains a close vigil to ensure that no political activity is occurring within the monasteries.[49] Attempts by monks or nuns to engage in any form of political activity, other than that supportive of the Chinese Communist Party, have been violently suppressed.[50]

Tibetan Monks have traditionally engaged in small-scale protests in the month of March, the month in which the Dalai Lama fled to India from

---

47. *See* MERCILESS REPRESSION, *supra* note 44, at 48. However, restrictions on freedom of worship remain: while temples and monasteries are open for prayer, the days on which they are open have been limited. Additionally, Tibetans have been warned not to "abandon production to go to worship Buddha." GRUNFELD, *supra* note 16, at 217.

48. *See* MERCILESS REPRESSION, *supra* note 44, at 69. Tibetans are forbidden, however, to "'arbitrarily revive' monasteries 'without permission.'" GRUNFELD, *supra* note 16, at 217. "Only a small percentage of monasteries and religious monuments and a few of the buildings of each monastery have been restored or rebuilt. Some completely new monasteries have been erected where none existed before 1949." TIBET: HUM. RTS., *supra* note 18, at 123.

49. *See* MERCILESS REPRESSION, *supra* note 44, at 70 (describing the manner by which the Chinese authorities control activities conducted within Tibetan monasteries as follows:

> Since [the fall of 1988], what are termed "democratic" administrative organizations are said to have been set up under the leadership of monks chosen by their respective monastic communities. The Chinese government, however, has charged these management units with responsibility for guarding "against the influence of a small number of separatists," and the implication is that the new "democratic" management system, like much else in the structure of "regional autonomy" in Tibet, allots to such units the task of enforcing and implementing policies and directives from the Central Government. In such a context, these new units are clearly destined to function as further extensions of state power, thus merely reinforcing the suppression of the basic rights of Tibetans to free expression.).
>
> The Chinese authorities have also sought to remove the Dalai Lama as a religious leader and a person to whom reverence is due from all aspects of Tibetan Buddhism. Yet, the measures for increased Chinese political control of Tibetan monasteries has caused some unrest in small, rural monastic communities, even though some larger monasteries with established histories of protest—what might be termed "criminal records" in the eyes of the Chinese authorities—appear to have accepted actions such as the placement of a police station within a monastery and the appointment of a carefully selected "Democratic Management Committee" without much objection, since they were used to such treatment.

See CUTTING OFF THE SERPENT'S HEAD, *supra* note 27, at 48, 66–69. This close supervision by the Chinese government has not, however, pacified the opposition towards Tibetan Buddhism as manifested by some Chinese hard-liners. S*ee* GRUNFELD, *supra* note 16, at 227.

50. *See* MERCILESS REPRESSION, *supra* note 44, at 71.

Tibet in 1959, to demonstrate his opposition to the Chinese occupation.[51] Tensions were especially heightened in March 2008 due to the scheduled start of the Beijing Olympics in August and the Chinese determination that the conditions in Tibet appear to be orderly.[52] What originated as small demonstrations developed into a large-scale uprising across most of Tibet by the end of March of 2008.[53] From March 10–12, monks from Tibetan monasteries led a series of small-scale protests in Tibet, resulting ultimately in a sudden breakdown of public order in Lhasa on March 14.[54] The protests were widely interpreted as a reaction to the harsh Chinese policies toward Tibetans in general, and to the Dalai Lama in particular.[55]

The March, 2008 riots were the most significant uprising the Chinese communist party had faced since the 1959 invasion of Tibet which had forced the Dalai Lama to flee the country.[56] No Chinese government had been confronted by such serious expressions of citizen discontent since the Chinese Communist Party had first established the People's Republic of China (PRC) in 1949.

There are two distinguishing factors relating to the March, 2008 uprising which exist when compared to previous Tibetan protests. First, the 2008 protests spanned an unprecedented area of Tibet and the Tibetan Autonomous Region (TAR), with riots occurring in twelve areas[57] and

---

51. TIBETAN CTR. FOR HUM. RTS. AND DEMOCRACY, HUMAN RIGHTS SITUATION IN TIBET, ANN. REP. 2009, at 17 (2009) [hereinafter TCHRD ANN. REP. 2009].

52. The Chinese Government and Communist Party hardened the policies which had frustrated Tibetans prior to the wave of Tibetan protests that started in March, 2008. As a result of the Chinese Government and Party policies, as well as the campaigns to "educate" Tibetans about their obligations to adhere to policy and the law that many Tibetans believe diluted their cultural identity and heritage, the level of repression of Tibetans' freedoms of speech, religion, assembly, and association increased. ONE HUNDRED ELEVENTH CONG., CONG.-EXEC. COMM'N ON CHINA: ANN. REP. 2009, at 270 (2009), *available at* http://www.cecc.gov/pages/annualRpt/annualRpt09/CECCannRpt2009.pdf (last visited Oct. 30, 2011) [hereinafter CECC ANN. REP. 2009].

53. *See* ONE HUNDRED TENTH CONG., CONG.-EXEC. COMM'N ON CHINA: ANN. REP. 2008, at 183 (2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:45233.pdf (last visited Oct. 30, 2011) [hereinafter CECC ANN. REP. 2008].

54. HUM. RTS. WATCH, I SAW IT WITH MY OWN EYES: ABUSES BY CHINESE SECURITY FORCES IN TIBET, 2008–2010, at 16 (2010) *available at* http://www.hrw.org/sites/default/files/reports/tibet0710webwcover.pdf (last visited Oct. 30, 2011) [hereinafter I SAW IT WITH MY OWN EYES].

55. Chinese government and Communist Party policy toward Tibetan Buddhists' practice of their religion had constituted a primary role in creating the frustration and the protests which began on March 10, 2008. *See* CECC ANN. REP. 2008, *supra* note 53, at 182.

56. *Id*. at 183.

57. *Id*.

> The 12 county-level areas are: Lhasa city, Duilongdeqing (Toelung Dechen), Linzhou (Lhundrub), and Dazi (Tagtse) counties, located in Lhasa municipality in the TAR; Aba (Ngaba) and Ruo'ergai (Dzoege)

generally peaceful protests occurring in over forty additional areas.[58] Second, the demonstrations continued in spite of the very obvious presence of Chinese armed forces and police.[59] It was widely reported that these Chinese security forces opened fire on Tibetans who were peacefully demonstrating in many parts of the Tibetan inhabited regions of China.[60]

Although the specific sequence of events remains contested, there are a number of eyewitness accounts which maintain that Chinese security forces responded[61] with a disproportionate level of lethal force.[62] Authorities used the legal system to punish the protestors who were arrested.[63] What made this particular uprising unique, however, was that journalists and visitors were still in the region when the protests, as well as the responses, began because the Chinese authorities had not yet closed off the region. Thus, there have been some verified accounts as to what occurred.

One eyewitness reports that the riots were triggered by police brutality on March 10, 2008[64] when a group of monks from the Sera Monastery began a small-scale, peaceful protest.[65] It was reported that police arrested fifteen monks for "participating in 'a disturbance' in which the monks 'shouted reactionary slogans and brandished the [Tibetan] Snow Lion

---

> counties, located in Aba Tibetan and Qiang Autonomous Prefecture in Sichuan province; and Xiahe (Sangchu), Maqu (Machu), Luqu (Luchu), Zhuoni (Chone), and Diebu (Thewo) counties, and Hezuo (Tsoe) city, located in Gannan (Kanlho) TAP in Gansu province.

CECC ANN. REP. 2009, *supra* note 52, at 275.

58. CECC ANN. REP. 2008, *supra* note 53, at 183.

59. *Id*.

60. AMNESTY INT'L, PEOPLE'S REPUBLIC OF CHINA, TIBET AUTONOMOUS REGION: ACCESS DENIED 4 (2008).

61. "The uprising of 2008 by the Tibetans in Tibet was a thunderous call for reform and solution to the Tibetan issue, yet the government continues to callously dismiss the legitimate voice of the people." TCHRD ANN. REP. 2009, *supra* note 51, at 5. The Chinese authorities engaged in executing Tibetans during the spring 2008 protests, announced 'serf emancipation day,' and "struck hard on Tibetan intellectuals and wangled law to drive home the point that the Communist Party is above law." *Id*.

62. *Compare* I SAW IT WITH MY OWN EYES, *supra* note 54, at 16, *with* MINISTRY OF FOREIGN AFF. OF THE PEOPLE'S REPUBLIC OF CHINA, FOREIGN MINISTRY SPOKESPERSON QIN GANG'S REGULAR PRESS CONFERENCE ON MAY 18, 2008 (Mar. 19, 2008), http://www.fmprc.gov.cn/eng/xwfw/s2510/t416255.htm (last visited Jan. 2, 2012).

63. *See* I SAW IT WITH MY OWN EYES, *supra* note 54, at 16.

64. *See,* TCHRD ANN. REP. 2009, *supra* note 51, at 17 ("Security measures were intensified with sharp early warning in many Tibetan areas during a month long before and during sensitive anniversaries and observances in February of Tibetan New Year and March anniversary in 2009.").

65. "At around 5 p.m. a group of monks from the Sera Monastery began a low level protest in front of central Lhasa's Jokhang Temple. Police broke up the protest, hitting protesters with batons and arresting every member of the group." I SAW IT WITH MY OWN EYES, *supra* note 54, at 18.

flag.'"[66] Tightened security measures immediately resulted along with calls to "crush" any demonstrations of support for the Dalai Lama or in opposition to Chinese rule.[67] Historically, Chinese officials have sought to pressure Tibetans to participate in public events such as the celebration of the Tibetan New Year, in order to prevent Tibetans from joining political protests.[68]

Demonstrations continued throughout the region. Some individuals participated in small-scale civil disobedience movements. Others, including monks, brazenly displayed photographs of the Dalai Lama, the exiled leader who is revered as a god-king but whom China maligns as a "wolf in monk's robe."[69] Nearly all of the protestors complained of a lack of religious and political freedom.[70] Although Chinese authorities proclaimed that the monks were "later persuaded to leave in peace"[71] and that "no disturbance to social stability was caused,"[72] witnesses reported that individuals who had initially attempted to cross police boundaries were knocked to the ground, kicked, and taken away.[73]

The following day, March 11, several hundred monks from the Sera Monastery demonstrated and demanded the release of the monks who had been arrested the prior day. Reports indicated that as the monks began to leave the monastery compound and assemble in the street, security personnel stationed in the monastery attempted to prevent them from leaving.[74] The security personnel physically obstructed the monks, "kicking and punching them as they tried to pass through the doors."[75] Similar incidents occurred the following day in other monasteries as well.[76]

---

66. *Id*.

67. TCHRD ANN. REP. 2009, *supra* note 51, at 17.

68. *Id*. at 18.

69. Christopher Bodeen, *China brands Dalai Lama 'Wolf in Monk's Robes' as Struggles Deepen*, SCOTMAN, Mar. 20 2008, *available at* http://news.scotsman.com/world/China—brands-Dalai-Lama.3896802.jp (last visited Oct. 30, 2011).

70. TCHRD ANN. REP. 2009, *supra* note 51, at 17.

71. *See Tibet Issues Arrest Warrants for 16 Suspects In Riot*, XINHUA (Apr. 5, 2008), http://news.xinhuanet.com/english/2008-04/05/content_7924421.htm (last visted Jan. 1, 2012).

72. *Llamas' Rally in Lhasa 'Properly Handled*,' XINHUA (Mar. 11, 2008), http://english.cri.cn/2946/2008/03/11/195@332636.htm (last visited Oct. 30, 2011).

73. I SAW IT WITH MY OWN EYES, *supra* note 54, at 19.

74. *Id*.

75. *Id*. at 18. The eyewitness further stated:

> There were four or five [policemen] in uniform and another 10 or 15 in regular clothing. They were grabbing monks, kicking and beating them. One monk was kicked in the stomach right in front of us and then beaten on the ground. The monks were not attacking the soldiers, there was no

The protests continued. On March 12, approximately 300 monks from the Drepung Monastery staged a peaceful demonstration with the goal of reaching the Potala Palace, the historic residence of the Dalai Lama.[77] However, the monks were intercepted by members of the People's Armed Police[78] who prevented them from reaching the Palace.[79] Rioting occurred in Lhasa on March 14[80] and on March 16.[81] Monks who were residing in monasteries attacked government offices, police stations, and shops in outlying areas during the period from March 14–19. Shortly thereafter, students from the Sera Monastery staged a brief political protest near the Jokhang Temple, the most sacred temple in Tibet.[82] At least fifteen of the protesters were detained by the police.[83] Thirteen of the students were subsequently charged with illegal assembly.[84]

> melee. They were heading out in a stream, it was a very clear path, and the police were attacking them at the sides.

Eyewitness: Monk 'Kicked to Floor,' BBC NEWS (Mar. 14, 2008), *available at* http://news.bbc.co.uk/2/hi/asia-pacific/7296134.stm (last visited Oct. 30, 2011).

76. Hundreds of monks and nuns from Ganden Monastery and Chubsang nunnery attempted to march to Lhasa to protest the security presence. Police surrounded them and forced them back to their monasteries and sealed off the area. I SAW IT WITH MY OWN EYES, *supra* note 54, at 20.

77. CECC ANN. REP. 2008, *supra* note 53, at 285.

78. *Id*.

79. TIBETAN CTR. FOR HUM. RTS. AND DEMOCRACY, TIBETAN RIGHTS BODY FEARS TORTURE AND INHUMANE TREATMENT ON THE ARRESTEES FROM BARKHOR PROTEST ON TIBETAN UPRISING DAY 1 (2008) [hereinafter TIBETAN UPRISING DAY].

80. Lou Chen & Yi Ling, *Dalai's Separatist Activities Condemned*, XINHUA (Mar. 20, 2008), http://news.xinhuanet.com/english/2008-03/15/content_7792827.htm (last visited Oct. 30, 2011); *China Clamps Down on Tibetan Protests As Many Deaths, Injuries Reported*, RADIO FREE ASIA (Mar. 15, 2008), http://www.rfa.org/english/news/politics/tibet_protest-20080314.html (last visited Oct. 30, 2011); Jim Yardley, *Chinese Police Clash With Tibet Protesters*, N.Y. TIMES, Mar. 15, 2008, at A1, *available at* http://www.nytimes.com/2008/03/15/world/asia/15tibet.html?pagewanted=all (last visited Oct. 30, 2011).

81. *Police, Officials Hurt in Sichuan Riots*,' XINHUA (Mar. 20, 2008), http://www.china.org.cn/government/news/2008-03/20/content_13101713.htm (last visited Oct. 30, 2011); *Violence, Protests Spread From Tibet to Western China*, RADIO FREE ASIA (Mar. 16, 2008), http://www.rfa.org/english/news/tibet-protest-20080316.html (last visited Oct. 30, 2011); Benjamin Kang Lim & Chris Buckley, *Tibetan Riots Spread, Security Lockdown in Lhasa*, REUTERS (Mar. 16, 2008, 5:54 AM), http://ca.reuters.com/article/topNews/idCASP10739920080316 (last visited Oct. 30, 2011).

82. TIBETAN UPRISING DAY, *supra* note 79, at 1.

83. *See* Chris Buckley & Lindsay Beck, *Tibet deaths, arrests and protests shadow Olympics*, REUTERS (Mar. 26, 2008), http://in.reuters.com/article/2008/03/26/idINIndia-32679920080326 (last visited Jan. 2, 2012).

84. *Id*.

The primary focus of the protests were calls for the autonomy of Tibet, the Dalai Lama's return to Tibet,[85] the release of the Panchen Lama,[86] and freedom of religion generally.[87] Hundreds of the demonstrators carried photographs of both the Dalai Lama and the Panchen Lama.[88] Many, though not all, of the protests originated at Tibetan Buddhist monasteries and nunneries.[89] At one demonstration, for example, monks from the Drepung Monastery were reported to have "joined the peaceful

85. Jim Yardley, *Tibetans Clash with Chinese Police in Second City*, N.Y. TIMES, Mar. 16, 2008, at AA3, *available at* http://www.nytimes.com/2008/03/16/world/asia/16tibet.html?pagewanted=allt (last visited Oct. 30, 2011) (stated that thousands of protesters on March 16 shouted slogans including, "[t]he Dalai Lama must return to Tibet"); *see also* TIBETAN CTR FOR HUM. RTS. AND DEMOCRACY, SCORES OF TIBETANS ARRESTED FOR PEACEFUL PROTEST IN LHASA 4 (2008) (a few hundred protesters shouted slogans calling for the Dalai Lama to return to Tibet). Approximately 100 Tibetan middle school students demonstrated from within the school compound, likewise calling for the return of the Dalai Lama to Tibet. TIBETAN CTR. FOR HUM. RTS. AND DEMOCRACY, AROUND 40 MIDDLE SCHOOL STUDENTS ARRESTED IN MARTHANG 4 (2008).

86. Press Release, Tibetan Center for Human Rights and Democracy, Protest Erupts After Prayer for Deceased in Drango County (Mar. 25, 2008), www.tchrd.org/press/2008/pr20080326.html (last visited Feb. 22, 2012). The position of the Chinese government is illustrated by the explanation of a Chinese judicial official that a photograph of Gedun Choekyi Nyima is illegal because the Chinese Government had already approved a legal Panchen Lama (Gyaltsen Norbu). According to the official, disseminating photos of an illegal Panchen Lama can endanger the sovereignty and unity of the country, and aims to split the country. *Id*.

87. *11 years on! The 11th Panchen Lama, Gendun Choekyi Nyima, still remain disappeared*, PHAYUL.COM (Apr. 24, 2006) http://server3.tibethosting.com/news/article.aspx?id=12436&article=11+years+on!+The+11th+Panchen+Lama%2C+Gendun+Choekyi+Nyima%2C+still+remain+disappeared&t=1&c=2 (last visited Jan. 2, 2012); Press Release, Tibetan Center for Human Rights and Democracy, China Detains Drakar and Gaden Choeling Nuns in Kardze (May 18, 2008), www.tchrd.org/press/2008/pr20080517a.html; CHINA DETAINS DRAKAR AND GARDEN CHOELING NUNS IN KARDZE, (2008) (last visited Feb. 22, 2012). A group of Jokhang Temple monks shouted that there was no religious freedom when a group of international journalists on a government-guided tour visited the temple. Charles Hutzler, *Tibet Monks Disrupt Tour by Journalists*, ASSOC. PRESS, Mar 27, 2008, Sec. Int'l News, *available at* http://www.phayul.com/news/article.aspx?id=20109&t=0 (last visited Oct. 30, 2011).

88. Press Release, Tibetan Center for Human Rights and Democracy, Hundreds of Tibetans Protested in Chentsa, Malho "TAP", Qinghai Province (Mar. 23, 2008), http://www.tchrd.org/press/2008/pr20080323a.html (last visited Sept. 26, 2011); *Latest Updates on Tibet Demonstrations*, RADIO FREE ASIA (Mar. 25, 2008), http://www.rfa.org/english/tibet/latest_update_tibet-20080325.html?searchterm=None (last visited Sept. 26, 2011) (noting that more than 1,000 monks and other Tibetans shouted slogans on March 18, "[r]elease the Panchen Lama").

89. *Climate of Fear as Olympic Torch Arrives in Lhasa: Tibet Government Emphasizes Political Education to Ensure 'Stability'*, SAVETIBET, June 20, 2008, http://www.savetibet.org/media-center/ict-news-reports/climate-fear-olympic-torch-arrives-lhasa-tibet-government-emphasizes-political-education-e (last visited Sep. 26, 2011) (according to ICT, of 125 "separate incidents of dissent'' that the organization documented, "47 have been carried out by monks, 44 by laypeople, and 28 by both monks and laypeople.").

demonstration, demanding the freedom for religious belief."[90] In another instance, several hundred citizens joined monks from the major monastic center of Labrang Tashikhyil and shouted slogans such as, "return us to religious freedom."[91]

Few details are available about the thousands of Tibetans who were "detained, beat, fired on, or otherwise harmed as armed forces suppressed protests or riots and maintained security lockdowns."[92] Conversely, the Chinese government produced videos[93] and provided accounts of personal injury and property damage[94] that Tibetan rioters caused throughout March in locations such as Lhasa,[95] omitting details about the thousands of Tibetans detained.[96] There has been little specific information about the detention of thousands of Tibetans.[97] There is no doubt that hundreds of Tibetan civilians had in fact attacked shops owned by ethnic Han Chinese and that street fights between Tibetans and the Chinese were widespread.[98]

---

90. Press Release, Tibetan Center for Human Rights and Democracy, China Detains Drakar and Gaden Choeling Nuns in Kardze (May 17, 2008), http://www.tchrd.org/press/2008/pr20080517a.html (last visited Sept. 26, 2011).

91. *Id.*

92. CECC ANN. REP. 2008, *supra* note 53, at 194; *Police: Four Rioters Wounded Sunday in Aba of SW China*, XINHUA (Mar. 20, 2008), http://news.xinhuanet.com/english/2008-03/20/content_7829872.htm (last visited Oct. 18, 2011) (noting that in an effort to end the rioting in Aba (Ngaba) county, Aba Tibetan and Qiang Autonomous Prefecture, Sichuan province security forces shot and wounded four Tibetans); Press Release, Tibetan Center for Human Rights and Democracy, Scores of Tibetans Arrested for Peaceful Protest in Lhasa (Mar. 11, 2008), http://www.tchrd.org/press/2008/pr20080311.html (last visited Oct. 18, 2011) (TCHRD reports that security forces shot and killed at least 18 Tibetans in this incident).

93. The author of this article was in China teaching International Human Rights in Southern China in May and June of 2008 and witnessed the endless repetition of telecasts of Tibetans in Lhasa destroying shops belonging to the ethnic Chinese residents.

94. *Media Tour in Gansu Interrupted, Resumes Soon*, XINHUA (Apr. 10, 2008), http://www.china.org.cn/china/Lhasa_Unrest/2008-04/10/content_14732093_2.htm (last visited Oct. 21, 2011) (noting that "[A]ssaults, vandalism, looting and arson occurred in the Xiahe, Maqu, Luqu, Jone, Hezuo and Diebu areas of Gannan.").

95. *See, e.g.*, Jill Drew, *Tibet Protests Turn Violent, Shops Burn in Lhasa*, WASH. POST, Mar. 14, 2008.

96. CECC ANN. REP. 2008, *supra* note 53, at 194.

97. Press Release, Tibetan Center for Human Rights and Democracy, Tensions are High as the Olympic Torch Arrives in Lhasa (June 20, 2008), http://www.tchrd.org/press/2008/pr20080620.html (last visited Oct. 21, 2011) (reporting that it "has recorded the arrests or arbitrary detention of more than 6,500 Tibetans"). There was no information provided as to whether this figure includes more than 4000 Tibetans who official Chinese news media had reported surrendered or were detained by police in connection to alleged rioting.

98. Jill Drew, *10 Dead as Protesters, Police Clash in Tibetan Capital*, WASH. POST, Mar. 15, 2008, at A1. *See also* INT'L CAMPAIGN FOR TIBET, TIBET AT A TURNING POINT: THE SPRING UPRISING AND CHINA'S NEW CRACKDOWN, Aug. 6, 2008, *available at* http://www.savetibet.org/files/documents/Tibet_at_a_Turning_Point.pdf (last visited Oct. 21, 2011) (relaying an eyewitness

At least 218 Tibetans were thought to have died by June, either as the result of Chinese security forces shooting at the protesters or from beatings and torture.[99] The Tibetan Government-in-Exile also claims that Chinese authorities cremated more than eighty bodies of Tibetans who were killed in connection with the demonstrations.[100] The March 14 protests and rioting in Lhasa reportedly resulted in the highest number of Tibetan fatalities for any single incident.[101] The Chinese-appointed Chairman of the TAR government, however, denied that security forces carried or used "any destructive weapons" to deal with the March 14 riot.[102]

Additional incidents of the firing of lethal weapons against Tibetan protesters occurred on at least six occasions outside the TAR, according to non-government organizations and media reports.[103] The TAR and adjacent

---

description of activity on March 14 near Ramoche Temple in Lhasa. "Then they poured into Tromsikhang [the market at the corner of Barkhor Street] from Ramoche Temple. On the way, many shops owned by Chinese and Chinese Muslims (Hui) were destroyed.").

99. *Latest Casualty Figures in Tibet*, CENT. TIBETAN ADMIN. (Aug. 21, 2008), http://www.tibet.net/en/index.php (last visited Oct. 21, 2011); *Update on Death Toll from Tibet Demonstrations*, CENT. TIBETAN ADMIN. (Mar. 26, 2008), http://www.tibet.net/en/flash/2008/0308/26A0308.html (last visited Oct. 21, 2011) (listing the first forty names published by the TGIE of Tibetans allegedly killed by Chinese security forces). *See also* CECC ANN. REP. 2008, *supra* note 53, at 194.

100. *Update on Tibet*, CENT. TIBETAN ADMIN. (May 1, 2008), http://www.tibet.net/en/index.php?id=562&articletype=flash&rmenuid=morenews&tab=1#TabbedPanels1 (last visited Oct. 21, 2011) (the report alleges that on March 28, Chinese security forces cremated "around 83 corpses" in a crematorium in Duilongdeqing county near Lhasa in an attempt to destroy "evidence related to the recent protests." The report described the corpses as "dead bodies of people who have been killed since the March 14 protest in Tibet," but did not disclose how the location, time, or cause of any of the deaths was established reliably).

101. *See* CECC ANN. REP. 2008, *supra* note 53, at 194.

102. Yi Ling & Lou Chen, *Governor Denies Use of Lethal Force in Lhasa Riot, Indignant Over Dalai's Lies*, XINHUA (Mar. 17, 2008), http://news.xinhuanet.com/english/2008-03/17/content_7809010.htm (last visited Oct. 22, 2011) (noting that Jampa Phuntsog told reporters in Beijing, "[t]hroughout the process, [security forces] did not carry or use any destructive weapons, but tear gas and water cannons were employed.").

103. *Complete One-Week Update on Tibet Protests*, CENT. TIBETAN ADMIN. (Mar. 18, 2008), http://www.tibet.net/en/flash/2008/0308/18A0308.html (last visited Oct. 22, 2011) (The TGIE reports three Tibetans shot and killed and ten others shot and injured). *See also* Press Release, Tibetan Center for Human Rights and Democracy, Middle School Student Shot Dead in Ngaba County (Mar. 19, 2008), http://www.tchrd.org/press/2008/pr20080320a.html (last visited Oct. 22, 2011) ("At least 23 people including as young as 16 years old student, Lhundup Tso, were confirmed dead following Chinese Armed police shot many rounds of live ammunitions into the protesters."); *Monks, Nomads Protest as Demonstrations Spread Across Entire Tibetan Plateau*, SAVETIBET (Mar. 19, 2008), http://www.savetibet.org/media-center/ict-news-reports/monks-nomads-protest-demonstrations-spread-across-entire-tibetan-plateau (last visited Oct. 22, 2011) (noting that on March 16 protesters stoned government offices and burned a police station and vehicles before 11 truckloads of security personnel "suppressed the protests." Although the precise number of casualties was unclear, as many as 19 deaths

Tibetan autonomous areas continued to be closely monitored and "saturated with troops long after the eruption of the protests commenced in the region in March 2008."[104]

Within one month after the beginning of the protests, Chinese officials reported that more than 2500 Tibetans had surrendered to the government.[105] An additional 1393 were detained by the Chinese.[106] Amnesty International has concluded that possibly thousands more had been imprisoned without any acknowledgment of their whereabouts or the lodging of formal charges against them.[107] Upon release, some of the prisoners described widespread torture, including the breaking of arms and legs.[108]

March, 2009 was the fiftieth anniversary of the Dalai Lama's departure from Tibet to India. In preparation for possible demonstrations, the Chinese authorities increased police presence and established procedures in Lhasa, focusing on "identifying and detaining people suspected of hindering the government's anti-separatism campaign or planning to join protests in the run-up to the fiftieth anniversary."[109] The suspected people included those who were former political prisoners and their families, minor offenders, and even temporary visitors.[110]

---

were approximated). See *Questions, Answers About Casualties, Damages of Recent Riots*, XINHUA (Mar. 25, 2008), http://news.xinhuanet.com/english/2008-03/25/content_7857168.htm (last visited Jan. 2, 2012); Press Release, Tibetan Center for Human Rights and Democracy, At Least Three Tibetans Shot Dead in Kardze Protest (Mar. 18, 2008), http://www.tchrd.org/press/2008/pr20080318f.html (last visited Oct. 22, 2011) (security forces fired indiscriminately, shooting and killing three Tibetans and injuring 15 more); ("Hundreds of Tibetans gathered in the town market and shouted slogans calling for independence and the Dalai Lama's long life."); Press Release, Tibetan Center for Human Rights and Democracy, One Shot Dead and Another in Critical Condition in Drango Protest (Mar. 24, 2008), http://www.tchrd.org/press/2008/pr20080324a.html (last visited Oct. 22, 2011) (noting that security officials killed one person and critically wounded another when they fired indiscriminately on about 200 protesters shouting slogans calling for independence and the Dalai Lama's long life as they marched toward township offices).

104. HUM. RTS. WATCH, WORLD REPORT 292 (2010), *available at* http://www.hrw.org/sites/default/files/reports/wr2010.pdf (last visited Oct. 22, 2011) [hereinafter HUM. RTS. WATCH 2010].

105. AMNESTY INT'L, PEOPLE'S REPUBLIC OF CHINA: TIBET AUTONOMOUS REGION: ACCESS DENIED 7 (2008), *available at* http://www.amnesty.org/en/library/asset/ASA17/085/2008/en/815aa2e7-3d33-11dd-a518-c52d73496467/asa170852008eng.pdf (last visited Oct. 22, 2011).

106. *Id*.

107. *Id*.

108. Press Release, Tibetan Center for Human Rights and Democracy, Testimony by a Tibetan Youth in Lhasa (May 19, 2008), http://www.tchrd.org/press/2008/pr20080519.html (last visited Oct. 22, 2011).

109. *See* HUM. RTS. WATCH 2010, *supra* note 104, at 293.

110. *Id*.

In an example of one reported conflict, a monk from the Nekhor Monastery engaged in a solo protest which led to the police beating and detention of the monk.[111] Political unrest resulted in the following days,[112] as protesters chanted slogans calling for "Tibetan independence, the Dalai Lama's long life and return to Tibet."[113] Arrests followed, and some protesters were injured.[114] When monks from Lutsang marched to the local government headquarters, they demanded that the central Chinese government "recognize the will of the Tibetan people," but were surrounded by police and forced to leave.[115]

The Democratic Management Committee was established in 1962 as a mechanism for the Chinese to exercise control of the monasteries throughout the Tibetan occupied lands.[116] All religious publications are reviewed, as are applications to study at the seminaries.[117] Although Article 11 of the Regional National Autonomy Law of the PRC provides that freedom of religious belief applies to all citizens of the "various nationalities," another provision declares that "no one may make use of religion to engage in activities that disrupt public order. . . ."[118] In 2007, the State Administration for Religious Affairs issued Order Number 5 which requires state approval for any claim that a particular individual is a reincarnated lama.[119] Occasionally, the Chinese will install an individual as a lama who was selected in a manner at variance with traditional Tibetan procedures.[120] Such policies are designed to enable the Chinese to attempt to insure that the future religious leaders of the Tibetans are loyal to the communist state. The Communist Party itself sponsored a meeting in 2010

---

111. *China Arrests a Solo Protester in Lithang*, 2 HUM. RTS. UPDATE 6, 1 (2009), *available at* http://www.tchrd.org/publications/hr_updates/2009/hr200902.pdf (last visited Oct. 22, 2011) [hereinafter HUM. RTS. UPDATE].

112. Press Release, Tibetan Center for Human Rights and Democracy, More Cases of Detention and Disappearance Emerges After Lithang Protest (Feb. 17, 2009), http://www.tchrd.org/press/2009/pr20090217.html (last visited Oct. 22, 2011).

113. *Id*.

114. *See generally* HUM. RTS. UPDATE, *supra* note 111.

115. *Authorities Surround Monastery: Issue 48 Hour Ultimatum for Organizers to "Surrender" After Latest Protest in Tibet*, SAVETIBET (Feb. 27, 2009), http://www.savetibet.org/media-center/ict-news-reports/authorities-surround-monastery-issue-48-hour-ultimatum-organizers-surrender-after-latest-p (last visited Oct. 22, 2011).

116. TIBETAN CTR. FOR HUM. RTS. AND DEMOCRACY, HUMAN RIGHTS SITUATION IN TIBET, ANN. REP. 2010, at 66–67 (2010), *available at* http://www.tchrd.org/publications/annual_reports/2010/ar_2010.pdf (last visited Oct. 22, 2011) [hereinafter HUM. RTS. SITUATION IN TIBET 2010].

117. TCHRD ANN. REP. 2009, *supra* note 51, at 135.

118. HUM. RTS. SITUATION IN TIBET 2010, *supra* note 116, at 61.

119. *Id*. at 67.

120. *Id*. at 62.

for the heads of Tibetan monasteries, the theme was the obligation of the monks and nuns to promote the unity of China and to oppose any "splittist" inclinations.[121]

A report by Amnesty International concluded that the majority of the political prisoners who were incarcerated in Tibet were monks or nuns.[122] The Chinese government routinely attempts to "re-educate" many Tibetan monks during periods of imprisonment. An example would be that of Norgye, a Tibetan Monk who was subsequently arrested and incarcerated in March, 2008 after suddenly bursting in during a tour of journalists hosted by the Chinese government and exclaiming "Tibet is not free. The [Chinese] government is telling lies; it's all lies," and, "[t]hey killed many people."[123] Two years later, upon his release, Norgye stated during a press conference that "[he] wasn't beaten or tortured. [They] had to learn more about the law. Through education about the law, [he] realized what [they] had done in the past was wrong and was against the law."[124] Norgye said that the monks had originally protested merely because security forces had kept them locked inside the Jokhang Monastery when they wanted to go outside.[125] As part of his sentence, Norgye was ordered to undergo "patriotic re-education"—hours of classes on the law and communist thought, during which monks are told to denounce the Dalai Lama. One journalist present at the press conference wrote that, "When asked by reporters whether Tibetans have religious freedom, Norgye said, 'Yes,' with a quiet voice and bowed head."[126]

The Patriotic Re-education Campaign dates back to April of 1996, and the Chinese have promoted it as "Love your Religion, Love Your Country."[127] An integral part of the re-education consists of denouncing the Dalai Lama; monks who have refused to participate in the attacks on the Dalai Lama have been expelled from the monasteries and, at times, detained.[128] The re-education focuses on the benefits of life under Chinese Communism, as well as the concept that His Holiness has the intention of

---

121. *Id*. at 62, 66–67.

122. AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 1995, 69 (1995), *available at* http://www.amnesty.org/en/library/asset/POL10/001/1995/en/37044a8f-eb4d-11dd-8c1f-275b8445d07d/pol100011995en.pdf (last visited Oct. 22, 2011) [hereinafter AMNESTY INT'L REP. 1995].

123. Edward Wong, *After Chinese Re-education, Monk Regrets Action*, N.Y. TIMES, June 29, 2010, at A6, *available at* http://www.nytimes.com/2010/06/30/world/asia/30tibet.html (last visited Oct. 23, 2011).

124. *Id*.

125. *Id*.

126. *Id*.

127. HUM. RTS. SITUATION IN TIBET 2010, *supra* note 116, at 65.

128. *Id*. at 66.

dividing the nation.[129] After the March 2008 protests, the emphasis on the need for patriotic education increased and it was, at times, required that written denunciations be signed.[130]

The United Nations Special Rapporteur on Human Rights in China, Manfred Nowak, undertook a mission to China at the invitation of the Chinese government from November 20, 2005 to December 2, 2005 to report on possible torture and other cruel, inhuman, or degrading punishment.[131] Nowak interviewed political prisoners in Qushui Prison, a facility in the TAR that opened in 2005. Nowak was informed that "Tibetan monks held in this prison are not allowed to pray,"[132] and that all Tibetans who are serving political crimes are not allowed to practice Buddhism.[133]

China, in 2005, enacted new regulations on religious affairs, which were intended to illustrate a commitment to safeguard religious freedom through the rule of law.[134] Brad Adams, the Director of Human Rights

---

129. *Id*. at 65.

130. AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2009, at 4 (2004), *available at* http://www.amnesty.org/en/library/asset/POL10/001/1995/en/37044a8f-eb4d-11dd-8c1f-275b8445d07d/pol100011995en.pdf (last visited Oct. 22, 2011) [hereinafter AMNESTY INT'L REP. 2009].

131. U.N. Comm'n on Hum. Rts. [UNCHR], *Civil and Political Rights Including the Question of Torture and Detention: Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at 2, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006) (*prepared by* Manfred Nowak), *available at* http://www.freetibet.org/files/Nowak%20report.pdf (last visited Oct. 22, 2011) [hereinafter UNCHR *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*].

132. *Id*. at 46.

133. Letter from Doma Kyab, to The U.N. Hum. Rts. Comm'n (Nov. 30, 2005), *available at* http://www.tchrd.org/publications/hr_updates/2006/hr200608.html#writer (last visited Oct. 23, 2011) (A letter by Tibetan writer serving ten year prison term, noting that the Chinese government acted to hide information from Nowak). An individual named Dolma Kyab sent a letter to the U.N. Human Rights Council while imprisoned for a ten year term in Lhasa for writing but not publishing a book on the topics of democracy, self determination, and other Tibetan issues. Kyab states that when Manfred Nowak "arrived in Lhasa, [the Chinese authorities] transferred and hid [her] in another place fearing that he might get to know the real situation." The letter, which was translated into English from a Tibetan text, stated that, "[a]ccording to the Chinese Criminal Procedure Law, although [Kyab is] not supposed to be charged for 'separatism' on the basis of the book . . . [the Chinese authorities] alleged [her] of 'espionage.'" *Tibet: China Denies Jailing Tibetan Teacher for Book*, UNREPRESENTED NATIONS AND PEOPLES ORG. (Aug. 18, 2006), http://www.unpo.org/article/5184 (last visited Oct. 23, 2011) (noting that a spokeswoman for the Information Office under China's State Council said that "there was no young man named Dolma Kyab sentenced in Tibet." She also maintained that no such book entitled The Restless Himalayas, which is a reference to the unpublished book by Kyab, exists).

134. *China: A Year After New Regulations, Religious Rights Still Restricted*, HUM. RTS. WATCH (Mar. 1, 2006), http://www.hrw.org/news/2006/02/28/china-year-after-new-regulations-

Watch Asia, has concluded that "the intentional vagueness of the regulations allows for continued repression of disfavored individuals or groups . . . there is nothing accidental about the vagueness—it gives officials the room they need to legitimize closing mosques, raiding religious meetings, reeducating religious leaders, and censoring publications."[135] Human Rights Watch determined that the "most significant problem with the regulations is that arbitrariness is implanted in the text. The regulations state that 'normal' religious activities are allowed, but then fail to define what the term 'normal' means, leaving practitioners unclear about what is allowed and what is banned."[136] Examples of undefined key terms include the following: "religious extremism," "disturbing public order," and "undermining social stability."[137]

In 2010, there was a new attempt to weaken the bond between the Tibetans who live within Tibet with those who are religious leaders currently in exile, mostly in India.[138] The State Administration for Religious Affairs issued the regulation, "Management Measure for Tibetan Buddhist Monasteries and Temples."[139] The intent of the regulation is to block the transmission as well as the overall influence of spiritual teachings of the Tibetan leaders living outside of Tibet.[140] Although the regulations may have been targeted at the Dalai Lama, the clear effect is to enable the Chinese to influence greater control over the religious teachings that occur in the monasteries.

The Chinese government's response to claims that basic religious freedoms are denied can be illustrated by the comments of Qin Gang, a spokesman for the Foreign Ministry. Gang commented that such accusations "violated basic norms guiding international relations and interfered with China's internal affairs . . . [and] it is an undisputable fact that the Chinese government protects the citizens' freedom of religious belief in accordance with laws, and Chinese people of all ethnic groups enjoy full freedom of religious belief according to laws."[141]

---

religious-rights-still-restricted (last visited Oct. 23, 2011) [hereinafter *China: A Year After New Regulations*].

135. *Id.*

136. *Id.*; HUM. RTS. SITUATION IN TIBET 2010, *supra* note 116, at 65 (informing that the 2005 White Paper on Regional Autonomy for Ethnic Minorities states that, "Organs of self-government in autonomous areas . . . respect and guarantee the freedom of religious belief of the ethnic minorities and safeguard all legal and *normal* religious activities of people of ethnic minorities.").

137. *China: A Year After New Regulations*, *supra* at note 134.

138. HUM. RTS. SITUATION IN TIBET 2010, *supra* note 116, at 67.

139. *Id.*

140. *Id.*

141. *China Blasts U.S. Accusation on Religious Freedom*, CHINA'S HUM. RTS. (Sept. 18, 2006), http://www.humanrights-china.org/zt/situation/20040200692590556.htm (last visited Oct. 23, 2011).

Beijing retains control over the composition of the Tibetan Buddhist clergy[142] and the finances of the monasteries which are given authorization to function.[143] Thus, the real impact of China's claim regarding liberalization of Chinese controls over the Tibetans' freedom of religion is limited.[144] After the March 2008 demonstrations, it was reported that the rooms of monks residing in monasteries were searched in order to find any evidence of a link with the Dalai Lama.[145] At the site of the Drepung Monastery, the location of a protest by monks on March 10, it was reported that if CDs of the Dalai Lama or Tibetan flags were found, the monks would be arrested.[146] In one Tibetan region, the Communist local government administration implemented its "Measures for Dealing Strictly with Rebellious Monasteries in Ganzi."[147] Were there to be significant demonstrations by the monks in any of the 500 monasteries in the region, Buddhist practices would be suspended.[148]

III. DENIAL OF FREEDOM OF SPEECH AND ASSEMBLY

Denial of freedom of religion in Tibet can rarely be separated from denial of freedom of speech. The monks and nuns who play such a central role in Tibetan religious and cultural life[149] also have a most significant

142. *See* MERCILESS REPRESSION, *supra* note 44, at 65 (speaking of the imposition of state-imposed limits on monastic ordination: "More recent measures have included the introduction of a more conspicuous government role in the actual training of monks, via the establishment of government-led religious training institutions and the establishment of various state-controlled supervisory bodies.").

143. *See id*. at 65.

144. *See* Statement of His Holiness, *supra* note 34 (stating that "Monasteries have been raided by the People's Armed Police and the chain of political arrests has now been extended to rural areas. The rebuilding and construction of new monasteries has been prohibited and the admission of new monks and nuns stopped."); FORBIDDEN FREEDOMS, *supra* note 3, at 531–33 (asserting that despite the provision in China's 1982 constitution which prohibits the state "from forcing anyone 'to believe or not believe in religion,'" this constitutional guarantee is not being enforced); AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 1998, 130 (1998) [hereinafter AMNESTY INT'L REPORT – 1998] ("Official propaganda teams continued to carry out 'patriotic education' in Tibetan monasteries and nunneries."); HUM. RTS. WATCH, WORLD REPORT 2000, 182 (2000), http://www.hrw.org/legacy/wr2k/Asia-03.htm#TopOfPage (last visited Oct. 23, 2011) [hereinafter HUM. RTS. WATCH 2000] ("[a]t the beginning of [1999], authorities announced a three-year campaign designed to free rural Tibetans from the 'negative influence of religion.'").

145. *See, e.g.*, I SAW IT WITH MY OWN EYES, *supra* note 54, at 40.

146. *Id*.

147. *Id*. at 43.

148. *Id*.

149. *See* FRENCH, *supra* note 4, at 12–14, and accompanying text.

political presence.[150] There is not only the suppression of the right of the members of the clergy to express their views, but the freedom of speech[151] of ordinary Tibetans has also been undeniably restricted as well.[152] There can be no public calls for the Dalai Lama to return[153] or for the independence of Tibet.[154] There can be no public display of the Tibetan flag[155] or of photographs of the Dalai Lama.[156] There is, by many accounts, surveillance of suspected dissidents.[157] In connection with general restrictions on speech, there exists a denial of freedom of assembly and association and the rights to demonstrate and protest have been severely

150. *See, e.g.*, MERCILESS REPRESSION, *supra* note 44, at 65. *See also* AMNESTY INT'L REPORT – 1998, *supra* note 61, at 130 ("Protests by monks and nuns who refused to denounce the Dalai Lama led to expulsions and arrests."); HUM. RTS. WATCH 2000, *supra* note 144 (asserting that the Chinese authorities seek to "work against the Dalai Lama's 'splittist struggle'" and on the fortieth anniversary of the 1959 Tibetan uprising, two Tibetan monks were arrested and convicted for demonstrating in a square in Lhasa).

151. The Political Covenant likewise secures for everyone the right to freedom of expression, *see* International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., pt. 1, Annex 1, Supp. No. 16, U.N. Doc. A/6316, at 168 (1967), and provides that "[t]he right of peaceful assembly shall be recognized." *Id*. art. 21.

152. *See, e.g.*, MERCILESS REPRESSION, *supra* note 44, at 20 (stating that during the regime of martial law imposed in March, 1989, after a wave of allegedly violent anti-Chinese demonstrations in Tibet, assemblies and demonstrations were banned).

153. *Cf*., *e.g.*, AMNESTY INT'L REPORT – 1997, *supra* note 65, at 119 ("enforcement of a ban on photographs of the Dalai Lama led to clashes between government officials and monks at the Gamden Monastery"); HUM. RTS. WATCH 2000, *supra* note 144 (stating that "[s]everal monks, arrested for putting photos of the Dalai Lama on the main altar in Kirti Monastery in Sichuan Province, were sentenced in July and August 1999.").

154. *See, e.g.*, MERCILESS REPRESSION, *supra* note 44, at 5 (asserting that [s]peeches, writings and other activities in support of Tibetan independence have occasioned retaliatory measures as cruel as summary execution in the streets."); *Martial Law*, *supra* note 190, at 278 (relating that several nuns "'were sentenced without trial to three years' 're-education through labor' on charges of having 'shouted pro-independence slogans'"); AMNESTY INT'L REPORT – 1997, *supra* note 61, at 120 ("Lay Tibetans suspected of supporting Tibetan independence were . . . arrested, although few cases were publicly reported.").

155. *See*, *e.g.*, *One Year Under Martial Law*, *supra* note 190, at 278 (mentioning the conviction and sentencing of a monk arrested for having taken part in a demonstration and "holding the Tibetan national banner with snow-capped mountains and snow lions"); *Id*. at 280 (stating that two monks were sentenced, one to four years' imprisonment, and the other to three years in jail for having hung a Tibetan nationalist banner in their monastery).

156. *See*, TIBET: HUM. RTS., *supra* note 18, at 19.

157. *See, e.g.*, MERCILESS REPRESSION, *supra* note 44, at 27 (noting that after the imposition of martial law in Tibet in 1989, Chinese authorities have maintained "an air of suspicion and surveillance," and have created "an atmosphere of fear of being informed against (perhaps even by one's own family members)").

curtailed.[158] If any demonstration involves demands related to Tibetan autonomy or independence, it is broken up immediately.[159]

The National People's Congress amended China's Constitution in 2004. A provision, "[t]he State respects and safeguards human rights," was added in order to indicate that there was constitutional protection of human rights.[160] Article 4 of the Constitution states that "[t]he People of all nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own ways and customs." Article 35 of the Constitution states that the "[c]itizens of the PRC enjoy freedom of speech, of press, of assembly, of association, of procession and of demonstration." The Constitution's provisions provide for the citizens of the PRC to be able to enjoy the freedoms to worship and express their political and social views without facing criminal penalties. However, it appears to be clear that the Tibetan people's freedom of expression is severely restricted.

The country's criminal codes are often used as pretexts to prohibit free exercise of basic liberties, such as raising the Tibetan national flag in public. The Tibetan Centre for Human Rights and Democracy (TCHRD) reported, for example, that monks were detained in February of 2004 and subsequently sentenced to eleven years in prison for raising a banned Tibetan national flag.[161] After Choeden Rinzen was arrested for possessing

---

158. *See, e.g.*, *Sino-American Relations, supra* note 32, at 49 (prepared statement of Holly Burkhalter, Washington Director of HUMAN RIGHTS WATCH) (stating that "groups of Tibetan monks and nuns have been arrested . . . for attempting to demonstrate peaceably in favor of Tibetan independence"). *See also* Amnesty International, *China: Detention Without Trial, Ill-Treatment of Prisoners and Police Shootings of Civilians in Tibet* [hereinafter *Detention Without Trial*], *in Sino-American Relations* (describing the arrest of 30 monks and 100 lay people demonstrating for Tibetan independence); U.S. STATES DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS, PRACTICES FOR 1998: CHINA (section on Tibet) (1999), http://www.state.gov/www/global/human_rights/1998_hrp_report/china.html (last visited Oct. 23, 2011) [hereinafter 1998 REPORTS: CHINA (TIBET)] (describing the suppression of demonstrations in Tibetan prisons, some of which allegedly occurred in conjunction with planned prison visits by international delegations). *See* TIBET: HUM. RTS., *supra* note 18, at 262, 301 (stating that the "[d]issent expressed during and in the wake of demonstrations that started in 1987 in Lhasa has met with suppression" and that "[p]eaceful Tibetan demonstrations of 1987-89 and since have been met by the Chinese authorities with violent force, including beatings and torture of those arrested.").

159. *See* GRUNFELD, *supra* note 16, at 242 (during 1995, "Beijing has apparently redoubled its efforts to . . . crack down ever harder on the public display of Tibetan nationalism"). *See generally* CECC: Criminal Law of China *infra* note 169.

160. UNCHR *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 131, at 7.

161. *See generally* U.S. DEP'T OF STATE, CHINA COUNTRY REPORT ON HUMAN RIGHTS 2006 (Released on March 6, 2007), http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm#tibet (last visited Oct. 23, 2011) [hereinafter CHINA COUNTRY REPORTS 2006].

pictures of the Dalai Lama and the Tibetan national flag,[162] the International Campaign for Tibet reported that Chinese police officers called a meeting of about 500 monks at Gaden to tell them that Rinzen had been arrested for "possessing anti-government materials . . . [and the officers] informed the congregation of monks that [Rinzen] was involved in criminal activities and warned that if any other members of the monastery possessed a photo of the Dalai Lama, they would face the same consequences."[163] TCHRD reported that in July 2006, Tashi Gyatso was observed carrying a Tibetan national flag and was "arrested and subjected to [a] severe beating. He was given [a] four year sentence in the name of 'Endangering State Security.'"[164] It has been maintained that the prison conditions which await monks and nuns are particularly abusive.[165]

According to the U.S. Department of State Report on Tibet released in 2007, trials for crimes such as "endangering state security" and "splitting the country" were both "cursory" and "closed to the public."[166] Human Rights Watch has concluded that terms such as "undermining social stability" and "disturbing public order" are intentionally vague so as to allow for arbitrary enforcement.[167] Certainly an example of this is the language of the court when imposing a sentence of seven years imprisonment on a nun in 2008: "The Ganzi Tibetan Autonomous Prefecture (TAP) Intermediate People's Court found that defendant Dorji Khandro wrote pro-independence leaflets, and scattered them along major thoroughfares in Ganzi County. This was a flagrant act of inciting

---

162. *Id.*

163. *Monk Arrested for Dalai Lama Picture and Tibetan Flag*, RADIO FREE ASIA (Mar. 31, 2004) http://www.rfa.org/english/news/politics/132140-20040331.html (last visited Oct. 23, 2011).

164. *Tibetan Sentenced to Four Years for Carrying Small Tibetan Flag*, TIBETAN CTR. FOR HUM. RTS. AND DEMOCRACY (July 2006), http://www.tchrd.org/publications/hr_updates/2006/hr200607.html#four (last visited Oct. 23, 2011).

165. UNCHR *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 131, at 46 (monks may be prohibited from praying and permitted to leave their cells for only 20 minutes a day); TIBETAN CTR. FOR HUM. RTS. AND DEMOCRACY, KUXING: TORTURE IN TIBET: A SPECIAL REPORT, 52 (2005), *available at* http://www.tchrd.org/publications/topical_reports/torture/torture.pdf (last visited Oct. 23, 2011) (monks may be forced to carry human excrement on their backs over a religious scroll).

166. CHINA COUNTRY REPORTS 2006, *supra* note 161, at 39.

167. *China: A Year After New Regulation*, *supra* note 134; *China Jails Tibet Activist for Five Years*, BBC NEWS (July 3, 2010), http://www.bbc.co.uk/news/10498734 (last visited Oct. 23, 2011) (In 2010, for example, an environmental activist was sentenced to five years in jail for inciting to split the nation because he had posted a pro-Dalai Lama article on his website). *See also Tibetan Environmentalist Jailed for 5 Years*, REUTERS (July 3, 2010) http://www.reuters.com/article/2010/07/03/us-china-tibet-environmentalist-idUSTRE6620EZ20100703 (last visited Oct. 23, 2011).

separatism and undermining national unity, and it constitutes the crime of inciting separatism."[168]

It is not only Article 103 of the PRC's Criminal Code—"splitting the State of undermining unity of the country"—that has led to the arrest of so many Tibetans, but also Article 111, "unlawfully [supplying] State secrets or intelligence for an organ, organization or individual outside the territory."[169] As reported by the Congressional-Executive Commission on China (CECC) in 2010, the charge of "splittism" was invoked to arrest those who even peacefully may criticize the policies of the PRC, and the charge of leaking state secrets was utilized to prosecute those who may have attempted to tell others of the instances of repression and punishment by the government.[170] Chinese authorities have not only detained monks, nuns, and those who may have been involved in actual protests, but have also targeted Tibetan singers, comedians, artists, and other cultural figures who have not been directly involved in demonstrations.[171] Many writers have been detained and sentenced or have simply disappeared.[172] Intellectuals, artists, and Internet bloggers have been persecuted by the Chinese government for expressing their opinions and accused of "leaking state secrets."[173] Other reported instances include the sentencing of Kunga Tsangyang, a Tibetan citizen, to five years of incarceration for writing essays as well as photographing environmental degradation in Tibet;[174] the sentencing of Kunchok Tsephel Gopeytsang to a term of fifteen years for promoting "Chonmei," a website;[175] and Kang Kunchok, the former editor of *Gangsai Meiduo*, was sentenced to a term of two years of

---

168. *See* I SAW IT WITH MY OWN EYES, *supra* note 54, at 59.

169. Criminal Law of the People's Republic of China, art. 103, 111 (adopted at the 2d Sess. of the Fifth National People's Congress on July 1, 1979, revised at the 5th Sess. of the Eighth National People's Congress on Mar. 14, 1997, effective Oct. 1, 1997), *available at* http://cecc.gov/pages/newLaws/criminalLawENG.php (last visited Oct. 23, 2011).

170. ONE HUNDRED ELEVENTH CONG., CONG.-EXEC. COMM'N ON CHINA: ANNUAL REPORT 2010, 2nd Sess., at 225, *available at* http://www.purdue.edu/crcs/itemResources/CECC/CECCannRpt2010.pdf (last visited Oct. 23, 2011) [hereinafter CECC ANN. REP. 2010].

171. Barbara Demick, *China Silences a Tibetan Folk Singer*, L.A. TIMES, June 8, 2008, at A14, *available at* http://articles.latimes.com/2008/jun/08/world/fg-singer8 (last visited Nov. 2, 2011).

172. TCHRD ANN. REP. 2009, *supra* note 51, at 45.

173. *Id.*; *See also Four Tibetan Writers Jailed for Criticizing Chinese Government*, REPORTERS WITHOUT BORDERS (Aug. 4, 2009), http://en.rsf.org/asia-four-tibetan-writers-jailed-for-04-08-2009,34071.html (last visited Nov. 2, 2011) [hereinafter *Four Tibetan Writers Jailed*].

174. TCHRD ANN. REP. 2009, *supra* note 51, at 7. *See also Four Tibetan Writers Jailed*, *supra* note 173.

175. TCHRD ANN. REP. 2009, *supra* note 51, at 7. *See also* Press Release, Tibetan Center for Human Rights and Democracy, *A Website Proprietor Arrested in Gansu Province* (Mar. 7, 2009), http://www.tchrd.org/press/2009/pr20090307b.html (last visited Nov. 2, 2011).

incarceration.[176] Tashi Rabten, the editor of a banned literary magazine and author of "Written in Blood," has been missing since July 2009,[177] and Tashi Dondrup, a singer who has released an album "Torture Without Trace," was arrested in December 2009.[178] In another instance of a prosecution for "splittism," a Chinese court reportedly sentenced Dondrub Wangchen to imprisonment for the use of film media to "disseminate Tibetan views on topics such as Tibetan freedom and the Dalai Lama."[179] Prosecutors also reportedly invoked the crime of "leaking secrets" to obtain the conviction of two Tibetans for the utilization of their websites to share information with other Tibetans who were residing both in and outside of China about their "experiences of detention, imprisonment, and religious and cultural repression."[180]

In May of 2010, Chinese authorities announced that twenty-seven popular Tibetan-language songs, including "The Hope of the Son of the Snow-City," and "The Five-Colored Prayer Flags"[181] would be banned in audio, video, digital media, or ringtone format.[182] Authorities warned that there would be serious repercussions for anyone caught in possession of

176. TCHRD ANN. REP. 2009, *supra* note 51, at 7. *See also Four Tibetan Writers Jailed*, *supra* note 173.

177. *Id*.

178. TCHRD ANN. REP. 2009, *supra* note 51, at 7 (citing Jane Macartney, *Tibetan Singer Tashi Dondrup Arrested Over 'Subversive' CD*, TIMES ONLINE (U.K.) (Dec. 4, 2009), *available at* http://www.timesonline.co.uk/tol/news/world/asia/article6943997.ece (last visited Nov. 2, 2011)).

179. CECC ANN. REP. 2010, *supra* note 170, at 225. *See also* Luisetta Mudie, *China Jails Tibetan Filmmaker*, RADIO FREE ASIA (Jan. 6, 2010) (Karma Dorjee tran., Sarah Jackson-Han ed.), http://www.rfa.org/english/news/tibet/filmmaker-01062010111100.html?searchterm=None (last visited Nov. 2, 2011) (according to RFA, Tibetans discussed on camera "their views on Tibet's exiled leader the Dalai Lama, the Beijing Olympics, and Chinese laws.").

180. CECC ANN. REP. 2010, *supra* note 170, at 225. *See also Founder of Tibetan Cultural Website Sentenced to 15 Years in Closed-Door Trial in Freedom of Expression Case*, INT'L CAMPAIGN FOR TIBET (Nov. 16, 2009), http://www.savetibet.org/media-center/ict-news-reports/founder-tibetan-cultural-website-sentenced-15-years-closed-door-trial-freedom-expression-c (last visited Nov. 2, 2011); Press Release, Tibetan Center for Human Rights and Democracy, A Tibetan Writer-Photographer Sentenced (Nov. 19, 2009), http://www.tchrd.org/press/2009/pr20091119.html (last visited Nov. 2, 2011); *Chinese Courts Use "Secrets" Law to Sentence Tibetan Online Authors to Imprisonment*, CONG.-EXEC. COMM'N ON CHINA (Jan. 21, 2011), http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=133098 (last visited Nov. 2, 2011).

181. Luisetta Mudie, *Crackdown on Tibetan Ringtones*, RADIO FREE ASIA (May 5, 2010) (Luisetta Mudie tran., Sarah Jackson-Han ed.), http://www.rfa.org/english/news/tibet/ringtones-05212010110758.html (last visited Nov. 2, 2011).

182. TIBETAN CTR. FOR HUM. RTS. AND DEMOCRACY, HUMAN RIGHTS SITUATION IN TIBET, ANN. REP. 2010, 26 (2010), *available at* http://www.tchrd.org/publications/annual_reports/2010/ar_2010.pdf (last visited Nov. 2, 2011) [hereinafter TCHRD ANN. REP. 2010]. *See generally* Bhuchung Sonam, *Where Tibetans Write*, TIBETANWRITES.ORG, http://www.tibetwrites.org/?_Bhuchung-D-Sonam (last visited Nov. 12, 2011).

them. The crackdown on "reactionary ringtones" has impacted Tibetan students as well. TCHRD reports that Chinese police are conducting "routine searches of students' personal belongings in government-run schools in Tibetan areas as part of its broader patriotic re-education campaign."[183]

IV. DENIAL OF DUE PROCESS

The Political Covenant[184] clearly guarantees the right to the due process of the law, whether at the time of the arrest, during the pretrial stages, at the trial itself, or after judgment is rendered. Article 9 states that:

> [N]o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. . . . Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is now lawful.[185]

In Tibet, the due process rights of those arrested are often violated because of the absence of any independent judiciary to assess the validity of the charges.[186] Human rights organizations report that individuals are

---

183. *Id*.; *see also China Bans Religious Practice in Tibetan Schools in TAR*, TIBETAN CTR. FOR HUM. RTS. AND DEMOCRACY (JUNE 2009), http://www.tchrd.org/publications/hr_updates/2010/hr201006.html#bans (last visited Nov. 2, 2011).

184. ICCPR, *supra* note 33.

185. *Id*. art. 9. The Covenant also mandates that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall promptly be informed of any charges against him." *Id*. art. 9, § 2. Also, that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." *Id*. art. 10, § 1. And that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law," *Id*. art. 14, § 1. Furthermore, the covenant states that everyone shall be entitled "[t]o have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." ICCPR, *supra* note 33, at art. 14, § 3(b). Finally, it mandates that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," and that "[n]o one shall be arbitrarily deprived of his life." *Id*. art. 7, 6, § 1.

186. TIBET: HUM. RTS., *supra* note 18, at 252.

arbitrarily arrested.[187] The TCHRD concluded that the Chinese government "feels free to impose arbitrary punishment on anyone who exercises basic human rights. . . . Under the current law and practice, Tibetans are

---

187. *Sino-American Relations*, *supra* note 32, at 57 (mentioning the deprivation of human rights by Chinese officials in Tibet, including the denial of freedom from arbitrary arrest); TIBET: HUM. RTS., *supra* note 18, at 239 states that:

> The UN experts have found that . . . Tibetan prisoners held pursuant [sic] to "re-education through labor" were arbitrarily detained. . . . In 1994 the UN Working Group on Arbitrary Detention found that 32 Tibetan prisoners whose cases it examined were "arbitrarily detained in contravention of Articles 19 and 20 of the Universal Declaration of Human Rights. . . .

Id.

The Tibetan Centre for Human Rights and Democracy (TCHRD) reports that "five of more than 160 people detained in August 2005 have yet to be officially charged and have not been allowed to meet with lawyers, doctors, or family members." TIBETAN CTR. FOR HUM. RTS. AND DEMOCRACY, HUMAN RIGHTS SITUATION IN TIBET, ANN. REP. 2006, at 17 (2006), *available at* http://www.tchrd.org/publications/annual_reports/2006/ar_2006.pdf (last visited Nov. 2, 2011) [hereinafter TCHR ANN. REP. 2006]. The TCHRD claims that "China's continued practice of detaining prisoners for extended lengths of time without charge or trial violates Article 9 of the ICCPR." *Id*. *See* UNCHR *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 131, at 42. Nowak interviewed individual prisoners from various prisons around China, including Xu Wei, an inmate at Beijing Prison No. 2. According to Nowak, Wei was held in secret detention for over two years without trial. After being tortured for about two years, Wei gave a confession in 2003 that landed him a ten-year prison sentence. Wei indicated that he was "not allowed to see a lawyer until after his trial." *Id*. Also, Nowak interviewed Yang Jianli, a U.S. permanent resident, who was arrested in 2002 when he re-entered China illegally after being barred from the country 13 years earlier. Yang's family was not informed of his arrest, and he was held in a Beijing public security facility for over seven months. In 2004, Chinese authorities sentenced Yang to five years in prison. According to Nowak, the Working Group on Arbitrary Detention concluded that:

> Dr. Yang's arrest and detention and arbitrary, and infringed on his right to a fair trial. This decision was based on evidence that the Chinese authorities has detained Dr. Yang for more than two months without an arrest warrant or charge. They also failed to formally acknowledge Dr. Yang's arrest or give him access to a lawyer throughout this time.

Id. at 43.

Amnesty International [A.I.] has reported that A.I. "continues to receive regular reports of individuals being assigned to 'Re-education through Labor' and other forms of administrative detention imposed without charge, trial or judicial review." Press Release, Amnesty International, *China: Olympics Countdown —Important Reforms Marred by Increasing Repression* (Apr. 30, 2007), *available at* http://www.amnesty.org/en/library/info/ASA17/019/2007/en (last visited Nov. 2, 2011). A.I. reports that Chen Guangcheng, a Chinese human rights defender, was put under house arrest in 2005, but in 2006 was sentenced to over four years in prison for "damaging public property and gathering people to block traffic." *See* Letter from Amnesty Int'l, China: Torture/Medical Concern/Prisoner of Conscience, Chen Guangcheng, (June 22, 2007), *available at* http://www.amnesty.org/en/library/info/asa17/022/2007/en (last visited Nov. 11, 2011). Guencheng sought to file an appeal, but according to A.I., "the prison authorities have refused to permit either his lawyer or his wife to visit him for longer than 30 minutes per month, making it impossible for Chen Guangcheng to prepare an appeal." *Id*.

imprisoned either through summary judicial process or an administrative detention," which can have a duration of up to four years.[188] Individuals are often held without any charges[189] and may have no counsel provided to them to challenge their detention.[190]

Article 14(3)(d) of the Political Covenant provides for the right to legal assistance.[191] However, under Chinese law, the right is not absolute. Article 34 of the Criminal Procedure Law provides for the assignment by the court of an attorney if the defendant does not have a lawyer *and* is blind, deaf, mute, a minor, or facing the possibility of a death sentence.[192] In fact, one survey showed that the actual rate of legal representation in criminal cases in the year 2010 was less than 10%.[193] And the right to have one's own counsel in Tibet is often ignored by the court.[194] In one example, the

---

188. Press Release, Tibetan Center for Human Rights and Democracy, TCHRD Releases New Prisoner Report (Mar. 23, 2007), http://www.tchrd.org/press/2007/pr20070323.html (last visited Nov. 2, 2011).

189. *See* TIBET: HUM. RTS, *supra* note 18, at 235 (stating that "[d]uring and after the demonstrations of 1987–89, and up to the present . . . Tibetans have been detained for long periods without charge. . . .").

190. *See* MERCILESS REPRESSION, *supra* note 44, at 44–45 (stating that "Tibetans have told us [Asia Watch] that they are afforded no independent legal counsel when brought to trial, nor can they mount anything that might reasonably be recognized as being a proper legal defense."). Former Tibetan prisoners interviewed in India by the ICJ and other human rights organizations frequently inform that they had never been brought before a judge or a court, nor had they been able to consult with a defense lawyer, despite Chinese constitutional and legal guarantees to the contrary. TIBET: HUM. RTS., *supra* note 18, at 202. Another report states that Tibetan prisoners are at times held incommunicado, without access to their family or lawyers. *See also* AMNESTY INTERNATIONAL, CHINA: DETENTION WITHOUT TRIAL, ILL-TREATMENT OF PRISONERS AND POLICE SHOOTINGS OF CIVILIANS IN TIBET [hereinafter DETENTION WITHOUT TRIAL].

Still another account mentions that "[i]n China's legal system there is no presumption of innocence, and suspects are often not told of the formal charges against them nor given access to a lawyer until very shortly before their trial." *See* AMNESTY INT'L, PEOPLE'S REPUBLIC OF CHINA – TIBET AUTONOMOUS REGION: ONE YEAR UNDER MARTIAL LAW: AN UPDATE ON THE HUMAN RIGHTS SITUATION [hereinafter ONE YEAR UNDER MARTIAL LAW] in SINO-AMERICAN RELATIONS, at 279.

Moreover, political defendants in China generally have frequently found it difficult to find an attorney, since authorities have retaliated in the past against lawyers representing such defendants. TIBET: HUM. RTS., *supra* note 18, at 202. Thus, Tibetan dissidents have stated that, at trial, "[w]e did not have any advocate as common-law prisoners do." *Id*. at 203. Nonetheless, the Chinese authorities have sometimes permitted family members of those arrested to argue in the defense of the detainee. *See* MERCILESS REPRESSION, *supra* note 44, at 44–45.

191. ICCPR, *supra* note 33, art. 14(3)(d).

192. CRIMINAL PROCEDURE LAW (adopted by the Second Session of the Fifth National People's Congress, July 1, 1979, effective Jan. 1, 1980) (China); CECC ANN. REP. 2010, *supra* note 170, at 90. *See also* LAW ON LAWYERS (promulgated by the Nineteenth meeting of the Eight National People's Congress Standing Committee, May 15, 1996, effective Jan. 1, 1997) (China).

193. CECC ANN. REP. 2010, *supra* note 170, at 90.

194. *Id*. at 18.

request by Chinese human rights lawyers to represent Tibetans who had been arrested after the March 2008 demonstrations was denied.[195]

Lawyers who volunteer to represent clients on sensitive, political matters may often pay a price. The lawyers mentioned above who had volunteered in an open letter to provide legal assistance to Tibetans arrested in connection with the demonstrations were threatened with disbarment.[196] The request had stated that "[a]s professional lawyers, we hope that the relevant authorities will handle Tibetan detainees strictly in accordance with the constitution, the laws, and due process for criminal defendants."[197] It was added that, "[w]e hope that they will prevent coerced confessions, respect judicial independence and show respect for the law."[198]

Similarly, lawyers who had volunteered to provide free legal assistance to some Tibetans who had been arbitrarily detained, received warnings from the Chinese that they should not take on such sensitive cases.[199] In March of 2010, the President of the All China Lawyers Association stated that the practice of criminal defense representation may well be declining because lawyers "hope to avoid the risks associated with criminal law."[200] Lawyers who are engaged in criminal defense work cite three major obstacles which they confront: obtaining the case files of the prosecutor for review,[201] the ability to collect evidence, and obtaining

---

195. *China: Rights Lawyers Face Disbarment Threats: Intimidation Overshadows Reforms to Law on Lawyers*, INT'L CAMPAIGN FOR TIBET (May 30, 2008), http://www.savetibet.org/media-center/tibet-news/china-rights-lawyers-face-disbarment-threats-intimidation-overshadows-reforms-law-lawyers (last visited Nov. 2, 2011).

196. *Id*.

197. *Id*.

198. *Id*.

199. *Chinese Authorities Target Lawyers Offering Legal Assistance to Tibetans*, HUM. RTS. IN CHINA (Apr. 9, 2008), http://www.hrichina.org/content/85 (last visited Nov. 2, 2011); *see also* U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: CHINA (INCLUDES TIBET, HONG KONG AND MACAU) (2009), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135989.htm (last visited Jan. 2, 2012).

200. CECC ANN. REP. 2010, *supra* note 170, at 90.

201. ONE HUNDRED TENTH CONG., CONG.-EXEC. COMM'N ON CHINA, ANN. RPT. 2007, at 47 (2007), *available at* http://www.cecc.gov/pages/annualRpt/annualRpt07/CECCannRpt2007.pdf (last visited Nov. 2, 2011) [hereinafter CECC ANN. REP. 2007]. *See also* Terence C. Halliday & Sida Liu, *Birth of a Liberal Movement? Looking Through a One-Way Mirror at Lawyers' Defence of Criminal Defendants in China*, *in* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 65, 72 (2007), *available at* http://www.lexglobal.org/files/024_halliday_liu_b_irth_of_a_liberal_moment.pdf (last visited Nov. 2, 2011). HUM. RTS. WATCH, "WALKING ON THIN ICE" CONTROL, INTIMIDATION AND HARASSMENT OF LAWYERS IN CHINA 66 (2008), *available at* http://www.hrw.org/reports/2008/china0408/ (last visited Nov. 2, 2011) [hereinafter WALKING ON THIN ICE]; CECC ANN. REP. 2008, *supra* note 92, at 38.

access to clients who are being detained.[202]

Criminal defense lawyers are also vulnerable under Article 306 of the Criminal Code, Lawyer Perjury, which states that a lawyer may be charged with suborning perjury if a defendant withdraws an earlier statement. Defendants often face significant delay before appearing in front of a judge.[203] The government may itself harass lawyers who choose to aggressively pursue the human rights of their clients.[204] Individuals who had been imprisoned, and subsequently were able to flee Chinese-controlled Tibet, have reported being subjected to various forms of torture,[205] including beatings and electric shocks, in the jails of Tibet.[206] The report of

---

202. WALKING ON THIN ICE CONTROL, *supra* note 201, at 66; Press Release, Tibetan Center for Human Rights and Democracy, Revised 'Lawyers Law' Fails to Protect Lawyers (June 19, 2008), http://www.hrichina.org/content/159 (last visited Nov. 2, 2011); CECC ANN. REP. 2008, *supra* note 53, at 39.

203. AMNESTY INT'L, ADMINISTRATION DETENTION: AN OPPORTUNITY TO BRING THE LAW INTO LINE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 8, 16 (2006), *available at* http://www.amnesty.org/en/library/info/ASA17/016/2006 (last visited Nov. 2, 2011) (reporting that it may be months, or even years, before a detainee may appear before a judge).

204. CECC ANN. REP. 2009, *supra* note 52, at 3.

205. The rules of evidence in China are considered to favor the prosecution on issues relating to torture because the burden of proof is on the defendant to show that any evidence was obtained through the use of torture. AMNESTY INT'L, JUDGES AND TORTURE 5 (2003), *available at* http://www.amnesty.org/en/library/info/ASA17/007/2003/en (last visited Nov. 2, 2011) ("[w]hen hearing cases in which defendants claim that they were tortured during investigation, some judges refuse to consider the defendant's allegations of torture and, instead, ask the defence lawyers to 'prove' that their clients have been tortured."). *See also Use of Torture Still Endemic in Chinese Occupied Tibet: TCHRD*, PHAYUL (June 26, 2007), http://www.phayul.com/news/article.aspx?id=16977&t=1 (last visited Nov. 2, 2011).

206. *See Sino-American Relations*, *supra* note 32, at 267, 269, 271–75; MERCILESS REPRESSION, *supra* note 44, at 50, 53; TIBET: HUM. RTS., *supra* note 18, at 246–48. Other forms of torture reportedly used against Tibetan prisoners have included infliction of cigarette burns, scalding with boiling water and attacks by trained dogs, as well as overwork, starvation, exposure to cold, suspension by ropes, long periods of solitary confinement, denial of medical treatment, and sexual abuse of female prisoners. *See* MERCILESS REPRESSION, *supra* note 44, at 53. *See also Sino-American Relations*, *supra* note 32, at 274; TIBET: HUM. RTS., *supra* note 18, at 246–51. Human rights reports and various media outlets suggest that torture is still a prevalent system used by Chinese and Tibetan officials within detention centers and prisons to force confessions and information from Tibetan political prisoners. The Tibetan Centre for Human Rights and Democracy ["TCHRD"] has discovered that a prison outside Lhasa built in the 1960s has become operational once again. The new prison is in Chushul, and "it has been described as 'very tough and hard for prisoners, even compared to Drapchi prison.'" TCHRD 2006, *supra* note 183, at 27; *New Prison in Lhasa: Increased Surveillance for Political Prisoners, 'oppressive' Cell-Blocks*, INT'L CAMPAIGN FOR TIBET (Jan. 30, 2006), http://www.savetibet.org/media-center/ict-news-reports/new-prison-lhasa-increased-surveillance-political-prisoners-oppressive-cell-blocks (last visited Nov. 2, 2011) (stating that "A political prisoner who is familiar with the new prison told ICT: "On the outside the prison looks very modern and many of the facilities are new. But inside it is very tough and hard for prisoners, even compared to Drapchi prison."). The ICT "has received confirmation that a number of political prisoners have been transferred

the U.N. Special Rapporteur on Torture, Manfred Nowak, revealed that the methods of alleged torture used in the prisons and detention centers throughout China include hooding or blindfolding, submersion in pits of water or sewage, deprivation of food, sleep, or water, and being suspended from overhead fixtures.[207] In one widely reported incident in 2009, there

---

from Drapchi (Tibet Autonomous Region Prison) to the new facility." *Id*. Sonam Dorjee, a Tibetan now in exile, served 11 years in prison following a protest in 1992 where he and four others displayed a Tibetan national flag and shouted Tibetan independence slogans during a township meeting. Dorjee was transferred from the Drapchi to Chushur prison, and "[h]e described [Chushur] as being far worse than the notorious Tibet Autonomous Region Prison, Drapchi, saying that surveillance is more stringent and conditions more oppressive." *Display of Tibetan Flag Leads to Death of Detainee: An Account of Imprisonment After Rare 1990s Rural Protest*, INT'L CAMPAIGN FOR TIBET (June 27, 2007), http://www.savetibet.org/media-center/ict-news-reports/display-tibetan-flag-leads-death-detainee-an-account-imprisonment-afte (last visited Nov. 2, 2011). ICT reported on Dorjee's chilling torturous experiences, which occurred shortly after his initial arrest by armed police guards. The following is one example:

> Prison guards asked me to stand on the chair placed in the middle of the room, and tied my thumbs to the thin nylon thread that was hanging from the ceiling. Once the chair on which I was standing on was kicked away, I was hanging from the ceiling and was beaten again. The pain experienced from the beating was relatively minor compared to the burning sensation I experienced from the pull on my thumbs. After hanging for three minutes from the thin thread, my entire body from the tips of my toes to the ears started burning and hurting and I began to hear a ringing noise. I fell unconscious.

Id.

Dorjee continued to describe one interrogation session where he was beaten severely by a young woman who was half-Tibetan and half-Chinese. He said:

> [S]ince we are struggling against the Chinese, it does not hurt my heart when they torture us. On the other hand, when Tibetans torture us, it hurts from within. . . . Tibetans would scold us saying that we should be more grateful to the Chinese as general conditions have improved much since the Chinese overthrew the old Tibetan government.

Id.

Tibetan police guards may not always be as aggressive towards political prisoners as are the Chinese, but at times it may be required that Tibetan guards act with malice towards the political prisoners. Dorjee added:

> There are a few Tibetans who would only scold us and not beat us. The head of the department [of police guards at a detention center] was Chinese and there were always one or two Chinese together with the Tibetan [guards], so the Tibetan guards had to beat [the political prisoners] or risk demotion or worse, [political] condemnation.

Id.

207. UNCHR *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 131, at 47.

> Jigme Tenzin . . . a lama . . . told the Special Rapporteur that . . . [h]e was . . . handcuffed with one hand behind his shoulder and the other

was a death which allegedly resulted from a beating by the police of a Tibetan youth.[208] In another instance, after a monk had been subjected to "harsh beatings, inhumane torture and long interrogation," he escaped and reportedly committed suicide.[209] Chinese officials and analysts had characterized the torture problem to Nowak as one which was widespread, deeply entrenched, and similar to a malignant tumor that is difficult to stop in practice. Reports dealt "with forced confessions characterized as 'common in many places in China because the police [were] often under great pressure . . . to solve criminal cases.'"[210] Forced confessions continue to occur despite the Supreme People's Court in China holding that "[c]riminal suspects' confessions, victims' statements, and witness testimonies collected through torture to extract a confession, or threats, enticement, cheating and other illegal methods cannot become the basis for a criminal charge."[211] However, there is no prohibition on the *use* of such confessions in judicial proceedings.[212]

China's Criminal Code has been revised to present the appearance of conformance to a greater degree with international norms, yet it still enables the prosecution of Tibetan activists. "Hooliganism" and engaging in "counterrevolution" have been replaced with crimes such as "endangering

---

> around his waist, and empty bottles were put in the spaces between his arms. His legs were fettered, he was hooded and made to kneel on a law stool for 1.5 hours. . . . Regular interrogations continued over . . . three months. Most of the time he was wearing handcuffs and shackles, even when eating or sleeping.

Id.

208. Joshua Lipes, *Tibetan Youth Dies in Custody*, RADIO FREE ASIA (Jan. 30, 2009) (Karma Dorjee tran.), http://www.rfa.org/english/news/tibet/tibetandeathincustody-01302009131007.html (last visited Nov. 2, 2011) (reporting police detained Pema Tsepag and two other men on January 20, 2009). A Tibetan living in India told RFA, "[Pema Tsepag] was so severely beaten that his kidneys and intestines were badly damaged. He was initially taken to Dzogang [county] hospital, but they could not treat him, and they took him to Chamdo hospital instead." *China Beats Tibetan Youth to Death*, PHAYUL (Jan. 27, 2009), http://www.phayul.com/news/article.aspx?id=23683 (last visited Nov. 2, 2011); CONG.-EXEC. COMM'N ON CHINA, SPECIAL TOPIC PAPER: TIBET 2008–2009, 141 (2009), *available at* http://www.cecc.gov/pages/virtualAcad/tibet/tibet_2008-2009.pdf (last visited Nov. 2, 2011) [hereinafter SPECIAL TOPIC PAPER].

209. Press Release, Tibetan Center for Human Rights and Democracy, Ragya Monastery Encircled, Reeling Under Severe Restriction (Mar. 23, 2009), http://www.tchrd.org/press/2009/pr20090323b.html (last visited Nov. 11, 2011); SPECIAL TOPIC PAPER, *supra* note 204, at 141 (stating "a monk 'suspected of breaking the law and under investigation at the Ragya police station' climbed over the wall while on a toilet break. 'Someone reported to the local police' that [this] monk jumped into the Yellow River . . . and attempted to swim to the opposite bank").

210. UNCHR *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 131, at 14.

211. *Id*. at 12.

212. *Id*.

national security,"[213] "splitting the State or undermining the unity of the country,"[214] or "subverting the state power or undermining the unity of the country."[215]

The precise number of actual political prisoners who are Tibetan is, of course, difficult to ascertain. As the International Campaign for Tibet reported in 2007, Chinese authorities have increased "their efforts to prevent information about political prisoners reaching the outside world, which means that it can sometimes take years to confirm details about prisoners serving long sentences for acts of peaceful protests."[216]

On occasion, the use of torture has led to the death of prisoners while in custody.[217] It has also been reported that some individuals have simply disappeared after having been arrested.[218] There have been documented

---

213. *Id*. at 11.

214. *Id*.

215. UNCHR *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 131, at 11.

216. *Display of Tibetan Flag Leads to Death of Detainee*, INT'L CAMPAIGN FOR TIBET (June 27, 2007), http://www.savetibet.org/media-center/ict-news-reports/display-tibetan-flag-leads-death-detainee-an-account-imprisonment-afte (last visited Nov. 2, 2011). The TCHRD reports, as of March 2007, that there are currently 116 Tibetan political prisoners "out of which 51 are serving a sentence of ten years or more. Monks and nuns number . . . 69% of the total number of political prisoners in Tibet." Press Release, Tibetan Center for Human Rights and Democracy, TCHRD Releases Prisoner Report (Mar. 23, 2007), http://www.tchrd.org/press/2007/pr20070323.html (last visited Nov. 2, 2011).

217. *See* MERCILESS REPRESSION, *supra* note 44, at 54; *Sino-American Relations*, *supra* note 28, at 270; HUM. RTS. WATCH, WORLD REPORT 1999, 286 (1999), http://www.hrw.org/legacy/worldreport99/asia/china.html (last visited Nov. 2, 2011) [hereinafter HUM. RTS. WATCH 1999]; TIBET: HUM. RTS., *supra* note 18, at 249, 257–58.

218. *See* TIBET: HUM. RTS., *supra* note 18, at 263. One source describes the authorities' use of a relatively new security technique called "recurrent disappearance" as follows:

> This is the simple device of detaining suspects repeatedly for short periods, often about two days each week. They are in long enough to be effectively interrogated but are often sufficiently intimidated when they come out that they refrain from informing anyone about their detention, in case they are punished further. This technique is typically used for people who are otherwise likely to be able to communicate news to the outside world, usually lay people who are seen as possible organizers or conduits for information, and again it is a technique which interrogators use either to intimidate or to persuade people to become informers. It is associated inevitably with the use of more sophisticated torture techniques: the use of recurrent disappearance means that torture should leave no visible traces. It is thus not surprising that there is an increase in use of such methods as exposure to extremes of temperature, making people stand in cold water, or making them sit in awkward positions for long periods.

CUTTING OFF THE SERPENT'S HEAD, *supra* note 27, at 72–73.

executions of Tibetan dissidents.[219] It was estimated that in one recent year, China had executed four times as many individuals as the rest of the world combined.[220]

V. DENIAL OF FREEDOM OF INFORMATION

The Universal Declaration provides that the right to freedom of opinion and expression "includes freedom to seek, receive and impart information and ideas through any media and regardless of frontiers."[221] The Political Covenant contains almost identical language in order to highlight the import of the right of access to information.[222] The Chinese,

---

219. *See* TIBET: HUM. RTS., *supra* note 18, at 259 (citing one known judicial execution of two Tibetans, officially for attempted escape from prison:

> [B]ut court documents establish that they were accused of planning pro-independence activities after their escape. The TAR High Court sentenced the two men to death and denial of political rights for life. Meetings were held in the . . . prison to announce their death sentences and [they] were executed that same day..

Id.

One report mentions the shooting of a Tibetan monk while in police custody after he was arrested during a peaceful demonstration. *See Sino-American Relations*, *supra* note 28, at 268. Official numbers of those who are executed by China each year are not released to the public, but in the middle of 2007, the Death Penalty Information Center estimated that over 10,000 individuals have been executed annually. *Executions Declining in China*, DEATHPENALTYINFO.ORG (June 8, 2007), http://www.deathpenaltyinfo.org/node/2117 (last visited Nov. 2, 2011) [hereinafter *Executions Declining in China*]. The Chief of the People's Supreme Court, Justice Xiao Yang, urged that there be "extreme caution" in handing down death sentences because "capital punishment should be given only to an 'extremely small' number of serious offenders." *Court Hails Death Penalty Review a Success*, CHINA.ORG.CN (June 10, 2007), http://www.china.org.cn/english/news/213454.htm (last visited Nov. 2, 2011). Xiao Yang added that any "case involving a human life is a matter of vital importance." *Executions Declining in China*, *supra* note 219. China has developed a new method for cheaper administration of lethal injection. What appears to be a standard vehicle used for law enforcement purposes is actually a "Death Van." Proponents of the death vans claim that the vehicles and injections are a civilized alternative to the firing squad, causing death of a condemned more quickly and safely. The switch from gunshots to injections was represented to be a "sign that China 'promotes human rights now,' says Kang Zhongwen," the designer of the Jinguan Automobile death van. *China Makes Ultimate Punishment Mobile*, USATODAY.COM, June 15, 2006, at A8, *available at* http://www.usatoday.com/news/world/2006-06-14-death-van_x.htm (last visited Nov. 2, 2011) [hereinafter *China Makes Ultimate Punishment Mobile*]. Makers of death vans say they "save money for poor localities that would otherwise have to pay to construct execution facilities in prisons or court buildings. The vans ensure that prisoners' sentences to death can be executed locally, closer to communities where they broke the law." *Id*. However, another theory maintains that the forty death vans have an alternative purpose, aiding in organ extraction and trafficking. *Id*.

220. *China Makes Ultimate Punishment Mobile*, *supra* note 219.

221. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, art. 19, U.N. Doc. A/180 (Dec. 10, 1948).

222. ICCPR, *supra* note 33, art. 19, § 2.

however, tightly control information reaching Tibet, as well as the flow of information out of Tibet.[223] Chinese officials have restricted communication reaching Tibet which relates to the Dalai Lama[224] and to the activities of Tibetan refugees in their struggle to win support for autonomy or meaningful negotiations with the Chinese.[225] To add to their general restrictions on the flow of information in and out of Tibet, Chinese officials maintain tight surveillance of foreign tourists and journalists in Tibet, limiting their contacts with ordinary Tibetans.[226] There have been widespread reports that foreigners leaving Tibet after incidents of unrest have been strip-searched, and photographs, films, tapes, letters, diaries, and other documents confiscated.[227] Likewise, Tibetans have been arrested for initiating contact with foreigners.[228]

As a result of China hosting the Olympics in 2008, the Chinese government implemented a licensing requirement for journalists.[229] The Chinese government had claimed that the governmental licensing and supervision of journalists was needed to prevent corruption and to protect journalists.[230] Journalists became subject, however, to political demands which were not related to either corruption or the protection of journalists.[231] In March 2010, a high-level official at the General Administration of Press and Publication, the Chinese government's primary agency in charge of oversight of the press, stated that "journalists in China

---

223. *See* TIBET: HUM. RTS., *supra* note 18, at 19.

224. *See* CUTTING OFF THE SERPENT'S HEAD, *supra* note 27, at 49 (mentioning increased efforts by Chinese border patrols to catch Tibetans carrying illegal documents into Tibet, notably speeches by the Dalai Lama).

225. *See* GRUNFELD, *supra* note 16, at 242. States that:

> Part of [the Chinese policy as of late 1995] is to . . . crank up the propaganda attacks on the Dalai Lama and continue to argue . . . that *all* difficulties are caused by outsiders, now dubbed "the Dalai Clique." . . . According to the local [Tibetan Communist] party secretary, "hostile forces abroad and the Dalai clique have never ceased their heavy interference in Tibet."

Id.; *Cf*. U. S. DEP'T OF STATE, COUNTRY REP. ON HUM. RTS. PRAC. FOR 1998: CHINA 837, 852 (Feb. 26, 1999) [hereinafter 1998 REPORTS: CHINA (TIBET)] (stating that "[t]he authorities continued to jam . . . Tibetan-language broadcasts of Voice of America and Radio Free Asia . . . with varying degrees of success.").

226. *See* TIBET: HUM. RTS., *supra* note 18, at 264–67.

227. *See id*. at 266.

228. *See id*. at 266–67.

229. CECC ANN. REP. 2010, *supra* note 170, at 69.

230. *Id*. at 57; *see* Isabella Bennett, *Media Censorship in China*, COUNCIL ON FOREIGN REL., Mar. 7 2011, available at http://www.cfr.org/china/media-censorship-china/p11515 (last visited Jan. 2, 2012).

231. CECC ANN. REP. 2010, *supra* note 170, at 68.

would be required to pass a new qualification exam that will test them on their knowledge of 'Chinese Communist Party journalism' and Marxist views of news."[232] The Chinese government had previously, in February of 2009, issued a new "Code of Conduct" which threatened Chinese news assistants who were working with foreign correspondents with job dismissal and loss of accreditation if they engaged in independent reporting.[233]

Journalists from foreign news organizations in China continue to be subjected to fewer restrictions than is true of their domestic counterparts.[234] Since China hosted the Olympics in 2008, foreign journalists who have been allowed into China are able to issue reports without additional government permission, but special authorization is still needed in order to enter restricted locations, such as the TAR.[235]

The level of access by foreign journalists and tourists to Tibetan areas varied during the critical March 2008 period.[236] The Chinese government denied both foreign tourists and journalists any access to the TAR.[237] The Ministry of Foreign Affairs spokesman, Qin Gang, blamed the closure on the supporters of the Dalai Lama and stated that the TAR would remain temporarily closed to foreign journalists.[238] International media organizations reported that the Chinese took measures to close Tibetan areas to foreign travelers,[239] including international journalists, in advance of the problematic dates of 2009.[240] Foreign journalists have continued to

---

232. *Id*.

233. HUM. RTS. WATCH 2010, *supra* note 104, at 286.

234. CECC ANN. REP. 2010, *supra* note 170, at 69.

235. *Id*.

236. CECC ANN. REP. 2008, *supra* note 53, at 200.

237. *Tibet to Reopen for Tourists on May 1*, XINHUA (Apr. 3, 2008), http://news.xinhuanet.com/english/2008-04/03/content_7912583.htm (last visited Nov. 2, 2011).

238. MINISTRY OF FOREIGN AFF. OF THE PEOPLE'S REPUBLIC OF CHINA, FOREIGN MINISTRY SPOKESPERSON QIN GANG'S REGULAR PRESS CONFERENCE ON JUNE 12, 2008 (June 15, 2008), http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t465468.htm (last visited Nov. 2, 2011). After MFA Spokesman Qin Gang stated that the Chinese government is "not to blame" for the closure of Tibetan areas to journalists following the "severe violent incident [that] happened on March 14," a journalist asked, "Who's responsible for this?" Qin replied, "Is it really not clear to you? Of course it's the Dalai Clique." *Id*.

239. TCHRD ANN. REP. 2009, *supra* note 168, at 45.

240. Malcolm Moore, *China Closes Tibet to Foreigners*, TELEGRAPH (Feb. 18, 2009), http://www.telegraph.co.uk/news/worldnews/asia/tibet/4688657/China-closes-Tibet-to-foreigners.html (last visited Nov. 2, 2011); *China Official: Tibetan Areas Closed to Foreigners*, INT'L CAMPAIGN FOR TIBET (Feb. 12, 2009), http://www.savetibet.org/media-center/tibet-news/china-official-tibetan-areas-closed-foreigners (last visited Nov. 2, 2011); TCHR ANN. REP. 2009, *supra* note 51, at 45.

confront other forms of harassment as well.[241]

In early February 2009, several foreign journalists reported that they had actually been required to leave Tibetan areas of China.[242] In early March, police officials detained a New York Times reporter at a mountainous checkpoint[243] where public security officials reportedly interrogated him before placing him on a plane to Beijing.[244] Later in March 2009, an investigative journalist was reportedly "beaten out" of a village.[245] After a protest broke out in March 2009 near a major Tibetan monastery, the Chinese, fearful of new unrest, sealed off many Tibetan areas to foreign journalists.[246] In August 2009, two security guards, who were employed by the Chinese, reportedly "attacked Guangzhou Daily

---

241. CECC ANN. REP. 2009, *supra* note 204, at 9. The Chinese authorities continued to suppress the Tibetan people's basic rights to freedom of speech, expression, and opinion. Internet users, bloggers, and journalists were at risk of harassment and imprisonment for addressing politically sensitive issues. TCHRD ANN. REP. 2009, *supra* note 51, at 44.

242. *China Official: Tibetan Areas Closed to Foreigners*, INT'L CAMPAIGN FOR TIBET (Feb. 12, 2009), http://www.savetibet.org/media-center/tibet-news/china-official-tibetan-areas-closed-foreigners (last visited Nov. 2, 2011) (stating that "[s]everal foreign journalists have reported being expelled from Tibetan populated areas in China in the past week."). In the aftermath of the series of protests in Tibet, international media organizations reported that Chinese authorities took measures to close Tibetan areas to foreign travelers including foreign journalists in advance of the sensitive date of March, 2009. There were several reports of foreign reporters having been kicked out of Tibet from unspecified Tibetan areas during the first week of February. TCHRD ANN. REP. 2009, *supra* note 51, at 45. "Similar stringent security measures of closing Tibetan areas to foreign tourists were taken by the Chinese authorities prior to the 60th Anniversary of the People's Republic of China." *Id*.

243. Edward Wong, *The Heights Traveled to Subdue Tibet*, N.Y. TIMES, Mar. 14, 2009, at WK1, *available at* http://www.nytimes.com/2009/03/15/weekinreview/15WONG.html (last visited Nov. 2, 2011) [hereinafter Wong] (according to the report, "[t]he paramilitary officer took our passports. It was close to midnight, and he and a half-dozen peers at the checkpoint stood around our car on the snowy mountain road. After five days, our travels in the Tibetan regions of western China had come to an abrupt end."). *See also* CECC ANN. REP. 2009, *supra* note 204, at 288.

244. Wong, *supra* note 243, at WK1.

245. CECC ANN. REP. 2009, *supra* note 52, at 157 reported that:

> Investigative journalist Wang Keqin and three companions were "beaten out of [Yuan Weijing's] village" when they attempted to bring food and toys to Yuan and her two young children. When Wang telephoned Yuan to inform her that he could not visit, she responded: "[T]hese people have been around our home for more than a year. . . . There are always 11 people around our home, 24 hours a day. . . . When we go shopping or work in the fields, someone is watching us. At night, they even stoop outside the window to eavesdrop on us." In April 2009, Yuan tried to visit her grieving sister after her brother-in-law's death in a car accident, but nine men forcibly escorted her home where she was "punched and kicked by the men while being dragged back to her house."

Id.

246. TCHRD ANN. REP. 2009, *supra* note 51, at 23.

reporter Liu Manyuan when he attempted to take photos at a crime scene. The guards beat him, prompting his temporary hospitalization."[247]

In a May 2008 interview, the Dalai Lama revealed that the most significant gesture he would appreciate seeing from the Chinese would be to permit foreign reporters entry to the TAR so that they can examine and investigate until "the picture becomes clear."[248] The Dalai Lama emphasized that such censorship "is a major barrier and the actual source of the problems between Tibetans and Chinese,"[249] because the Communist Party's control of the information received by its citizens allows it to portray him as a terrorist.[250]

The situation has not changed much since 2010. Chinese President Hu Jintao informed that journalists should "promote the development and causes of the Party and the state," and that their "first priority" is to "correctly guide public opinion."[251] Foreign journalists are still prohibited from entering certain areas, and the government has tightly controlled the flow of information. Additionally, the availability of the Internet is still "under special regime with all information filtered."[252] Human Rights Watch, in its 2010 report, determined that China's journalists, bloggers, and its estimated 340 million Internet users continued to be victims of the "arbitrary dictates of state censors."[253]

The Chinese government's use of law to restrict freedom of speech has continued into 2011, and may have even increased due to the availability of

---

247. HUM. RTS. WATCH 2010, *supra* note 104, at 286.

248. *Full Transcript of Interview with the Dalai Lama*, FIN. TIMES (May 25, 2008), *available at* http://www.ft.com/cms/s/0/8bdc479c-2a5f-11dd-b40b-000077b07658.html#axzz1aQ3y1pNm (last visited Nov. 2, 2011) (quoting the Dalai Lama saying, "[t]hen stop, inside Tibet, arresting and torture. This must stop. And then they should bring proper medical facilities. And most important, international media should be allowed there, should go there, and look, investigate, so the picture becomes clear."). The CECC, in its 2009 Report's recommendations, stated they would "urge the Chinese government allow international observers to visit Gedun Choekyi Nyima, the Panchen Lama whom the Dalai Lama recognized, and his parents." CECC ANN. REP. 2009, *supra* note 204, at 38 (recommending that the Chinese government "support funding for Radio Free Asia and Voice of America news reporting and multi-dialect broadcasting to the Tibetan areas of China so that Tibetans have access to uncensored information about events in China and worldwide.").

249. TCHRD ANN. REP. 2010, *supra* note 182, at 21.

250. *Dalai Lama: Chinese 'Censorship' at Root of Tibet Problem*, RADIO FREE EUR. (Feb. 21, 2010), http://www.rferl.org/content/Dalai_Lama_Chinese_Censorship_At_Root_Of_Tibet_Problem/1964030.html (last visited Nov. 2, 2011); TCHRD ANN. REP. 2010, *supra* note 182, at 21.

251. TCHRD ANN. REP. 2010, *supra* note 182, at 21.

252. *Id*. at 28.

253. HUM. RTS. WATCH 2010, *supra* note 104, at 285.

new technology and the Internet.[254] Back in 2008, the CECC had reported that the "Chinese authorities' use of law as an instrument of politics continued unabated and intensified."[255] The crime of "inciting subversion of state power," under Article 105, Paragraph 2 of the Chinese Criminal Law, has continued to be a primary tool used against individuals who demand human rights or criticize the government when using the Internet.[256] The Chinese government has instituted Internet Regulations, which prohibit content designated "harmful to the honor or interests of the nation,"[257] and that which is "disrupting the solidarity of peoples."[258] According to the CECC, such disruptive content supplied "legal justification for the censorship of [I]nternet content deemed politically sensitive."[259]

In the name of preventing the dissemination of pornographic and defamatory content, Internet companies have also censored political and religious communication. Information "harming the honor or interests of the nation," "disrupting the solidarity of peoples," "disrupting national policies on religion," and "spreading rumors" is prohibited.[260] Chinese law does not provide well-defined meanings for these terms, thereby allowing for much arbitrary enforcement.[261] The Chinese government monitors content by the use of public security officials and agencies[262] and by "overseeing the [I]nternet and placing burdens on [I]nternet and cell phone

254. The report states that the government continued to restrict the rights and freedoms of journalists, bloggers and an estimated 384 million Internet users, in violation of domestic legal guarantees of freedom of press and expression. HUM. RTS. WATCH, WORLD REPORT 2011, at 303, *available at* http://www.hrw.org/sites/default/files/reports/wr2011.pdf (last visited Oct. 22, 2011) [hereinafter HUM. RTS. WATCH 2011].

255. CECC ANN. REP. 2008, *supra* note 53, at 4.

256. *Id*.

257. *Id*.

258. *Id*. *See also* TCHRD ANN. REP. 2010, *supra* note 186, at 22.

259. CECC ANN. REP. 2008, *supra* note 53, at 4. *See also* TCHRD ANN. REP. 2010, *supra* note 186, at 22.

260. CECC ANN. REP. 2008, *supra* note 53, at 60; *Measures for the Administration of Internet Information Services*, MINISTRY OF INFO. INDUS. (China), art. 15 (promulgated by the St. Council, on, and effective Sept. 25, 2000), *available at* http://tradeinservices.mofcom.gov.cn/en/b/2000-09-25/18565.shtml (last visited Nov. 2, 2011).

261. *Measures for the Administration of Internet Information Services*, *supra* note 260, art. 15.

262. David Bandurski, *China's Guerilla War for the Web*, 171 FAR E. ECON. REV. 41, 41–44 (Aug. 2008), *available at* http://farectification.wordpress.com/2008/09/15/china%E2%80%99s-guerrilla-war-for-the-web/ (last visited Nov. 2, 2011); *Beijing To Recruit Tens of Thousands of "Internet Supervision Volunteers*", XINHUA (June 19, 2009), http://news.xinhuanet.com/english/2009-06/19/content_11568565.htm (last visited Nov. 2, 2011).

providers to filter and remove content."[263] Mobile phones have not only been monitored, but service has been limited,[264] interrupted,[265] and the phones confiscated as well.[266] According to a report by Radio Free Asia, Chinese authorities had torn down satellite towers to eliminate radio service.[267]

The Chinese government has also imposed various punishments on Tibetans for relaying information to destinations outside of Tibet.[268] During 2009, Chinese judicial officials imprisoned Tibetans for distributing information concerning Tibetan protests to individuals or groups outside of China.[269] Authorities also took measures in various locations to prevent

---

263. CECC ANN. REP. 2009, *supra* note 52, at 60. *See e.g.*, *Measures for the Administration of Internet Information Services*, *supra* note 260, art. 15.

264. In at least seventeen counties of the Sichuan province, cell phone messaging and Internet service were cut off in mid-February and that "phone calls from foreign countries to Tibetan areas cannot get through." Maureen Fan, *China Tightens Grip as Tibet Revolt Hits 50-Year Mark*, WASH. POST, Mar. 16, 2009, at A11, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/03/15/AR2009031501924.html (last visited Nov. 2, 2011).

265. Audra Aung, *China's Show of Force Keeps Tibet Quiet*, ASSOC. PRESS, Mar. 10, 2009, *available at* http://azdailysun.com/news/world/article_a58ab470-244e-5dea-a51d-203e7b00db4c.html (last visited Nov. 2, 2011) (stating "Lhasa residents received notice on their cell phones Tuesday from carrier China Mobile that voice and text messaging services may face disruptions from March 10 to May 1 for 'network improvements.'").

266. CONG.-EXEC. COMM'N ON CHINA, SPECIAL TOPIC PAPER: TIBET 2008–2009 at 126 (2009) (stating that a middle-aged monk at Sera Monastery said he had been "without communications since police confiscated all their mobile phones and other equipment last April [2008].").

267. According to the report, a Tibetan resident of Xiahe (Sangchu) county, Gannan (Kanlho) TAP, told RFA, "[b]eginning in April of this year, the local broadcasting department in Kanlho prefecture dispatched staff to the counties to install cable lines and to pull down the satellite dishes used by local Tibetans to listen to foreign broadcasts like RFA and VOA Tibetan programs." Richard Finney, *Tibetan TV Dishes Pulled*, RADIO FREE ASIA (June 21, 2009) (Karma Dorjee tran., Sarah Jackson-Han ed.), http://www.rfa.org/english/news/tibet/Tibetandishes-06202009092817.html (last visited Nov. 2, 2011).

268. The Lhasa Intermediate People's Court in late 2008 sentenced seven Tibetans to terms of imprisonment ranging from eight years to life imprisonment on charges of "espionage" or unlawfully "providing intelligence" to an organization or individual outside of China. "The Tibetans allegedly provided information ('intelligence') to Tibetan organizations based in India that are part of what the Chinese government and Party refer to collectively as 'the Dalai Clique.'" *Lhasa Court Sentences Tibetans for Sharing Information With 'The Dalai Clique,'* CHINA HUM. RTS. & RULE L. UPDATE (CONG.-EXEC. COMM'N ON CHINA, WASHINGTON, D.C.), Feb. 3, 2009, at 3, *available at* http://www.cecc.gov/pages/general/newsletters/CECCnewsletter20090130.pdf (last visited Nov. 13, 2011).

269. *See* Fan, *supra* note 264, at A11. Andrew Jacobs, *Tibet Atrocities Dot Official China History*, N.Y. TIMES, Mar. 3, 2009, at A8, *available at* http://www.nytimes.com/2009/03/13/world/asia/13exhibit.html (last visited Nov. 2, 2011) (describing the TAR as "mysteriously, troubled by patchy phone and Internet service").

Tibetans from receiving information originating outside of China via the Internet.

In addition to keeping information from crossing Tibetan borders, Chinese security officials have also imposed measures which isolate Tibetan communities from each other.[270] There have been reports that Chinese "authorities confiscated cell phones and computers, turned off cellular transmission facilities, and interfered with Internet access," with the goal of separating communities.[271] Internet companies that operate in China, even though based in other countries, are required to "monitor and record the activities of its customers or users" and to filter information deemed politically sensitive.[272] The companies are also required to report suspicious activity to authorities.[273] The dilemma presented by the breadth and vagueness of the laws, as well as the consequences for permitting too much of an information flow, leads many companies to "err on the side of censoring more information."[274] The lack of clarity has led to inconsistencies amongst the companies,[275] and the amount of censorship from company to company "varies drastically."[276]

In its 2007 Annual Report, the CECC noted that "Chinese officials provided only limited government transparency, practiced pervasive censorship of the [I]nternet and other electronic media. . . ."[277] In subsequent years, there has been little to no improvement in these matters.[278] Censorship and manipulation of the Internet was aggravated due to major events, including the March 2008 protests in Tibet and the Chinese hosting the 2008 Olympics.[279] It has been reported that the Chinese

---

270. CECC ANN. REP. 2008, *supra* note 53, at 199. *See also* CECC ANN. REP. 2009, *supra* note 52, at 58.

271. CECC ANN. REP. 2008, *supra* note 53 at 199. "[C]ell phones were known to have been confiscated to curb the report of the incident from leaking to the outside world. . . ." *12 Monks of Dingri Shelkar Choedhe Monastery Arrested for Opposing the "Patriotic Re-Education" Campaign*, CHINA HUM. RTS. & RULE L. UPDATE (CONG.-EXEC. COMM'N ON CHINA, WASHINGTON, D.C.), May 31, 2008, at 3.

272. CECC ANN. REP. 2009, *supra* note 52, at 60.

273. *Id*.

274. *See Officials Increase Censorship of Foreign and Domestic Web Sites*, CHINA HUM. RTS. & RULE L. UPDATE (CONG.-EXEC. COMM'N ON CHINA, WASHINGTON, D.C.), Feb. 1, 2009, at 2.

275. *Id*.

276. Rebecca MacKinnon, *China's Censorship 2.0: How Companies Censor Bloggers*, 14 FIRST MONDAY 2 (Feb. 2, 2009), http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2378/2089 (last visited Nov. 2, 2011).

277. CECC ANN. REP. 2008, *supra* note 53, at 57.

278. *See generally id*.; CECC ANN. REP. 2009, *supra* note 52; CECC ANN. REP. 2010, *supra* note 170; HUM. RTS. WATCH 2011, *supra* note 254; HUM. RTS. WATCH 2010, *supra* note 104.

279. CECC ANN. REP. 2007, *supra* note 201, at 73–73. In the midst of the 2008 Olympics, Chinese authorities placed Zeng Jinyan, a blogger and spouse of imprisoned human rights activist Hu

the 2008 Olympics.[279] It has been reported that the Chinese government even employed paid agents to issue pro-government comments online.[280]

Such restrictions led the International Olympic Committee in April 2008, to express its concern about the Internet censorship which followed the Tibetan protests.[281] Jiang Yu, the spokesperson for the Chinese Ministry of Foreign Affairs, responded that "[t]he Chinese government's regulation of the Internet is 'in line with general international practice' and 'the main reason for inaccessibility of foreign websites in China is that they spread information prohibited by Chinese law.'"[282] In June 2008, President Hu, remarked that the Internet "had become a significant source of information that needed to be managed better."[283] According to official statistics, there were 420 million Internet users in China by the end of June 2010, constituting an increase of eighty-two million over the previous year.[284]

But there has been no demonstration of a willingness by the Chinese to loosen the state's political control, despite the ever-increasing usage of the Internet. In an April 2010 speech before the National People's Congress Standing Committee, Wang Chen, Director of the State Council Information Office (SCIO), stated "the government is using the [I]nternet to promote 'positive propaganda'; 'guide public opinion' (citing guidance of the Internet following unrest in Tibetan and Uyghur areas of China in 2008 and 2009); enhance China's 'soft power'; and 'balance the hegemony of the Western media.'"[285] Chen added that officials would "strengthen the blocking of harmful information from outside [China's] borders."[286] In April 2010, the New York Times reported that the SCIO had opened a new

279. CECC ANN. REP. 2007, *supra* note 201, at 73–73. In the midst of the 2008 Olympics, Chinese authorities placed Zeng Jinyan, a blogger and spouse of imprisoned human rights activist Hu Jia, who had been detained since December, 2007, under house arrest. The authorities subsequently forced Zeng and her infant daughter to leave Beijing, and confined them to a hotel for sixteen days with limited communications with family. CECC ANN. REP. 2008, *supra* note 53, at 57.

280. Michael Wines, Sharon LaFraniere & Jonathan Ansfield, *China's Censors Tackle and Trip Over the Internet*, N.Y. TIMES, Apr. 7, 2010, at A1, *available at* http://www.nytimes.com/2010/04/08/world/asia/08censor.html?pagewanted=all (last visited Nov. 2, 2011).

281. Jiang Yu, Spokesperson, Foreign Ministry, Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on April 1, 2008 (Apr. 1, 2008), *available at* http://www.mfa.gov.cn/eng/xwfw/s2510/2511/t420464.htm (last visited Nov. 2, 2011).

282. *Id*.

283. CECC ANN. REP. 2009, *supra* note 52, at 56.

284. CECC ANN. REP. 2010, *supra* note 170, at 61. *See also* CHINA INTERNET NETWORK INFO. CTR., STATISTICAL REPORT ON INTERNET DEVELOPMENT IN CHINA 4 (2010).

285. CECC ANN. REP. 2010, *supra* note 170, at 62.

286. *Id*.

bureau to monitor the social networking sites which have rapidly grown in popularity in China.[287]

In 2009, the Chinese government had proposed, but then backed away from,[288] a requirement that all computers in China be sold with "pre-installed censorship software found to filter political and religious content and monitor individual computer behavior."[289] Officials did begin to require that news sites mandate that new users provide their real identities in order to be able to post comments.[290] It can certainly be expected that such a requirement may well have a chilling effect on free expression. Attempts to aggressively remove content have continued[291] and have extended beyond the removal of content such as pornography and spam to include limiting political and religious material that the government deems to be politically sensitive.[292] In July 2009, the CECC reported that Chinese

---

287. Jonathan Ansfield, *China Starts New Bureau To Curb Web*, N.Y. TIMES, Apr. 16, 2010, at A4, *available at* http://www.nytimes.com/2010/04/17/world/asia/17chinaweb.html (last visited Nov. 2, 2011); Jonathan Ansfield, *China Tests New Controls on Twitter-Style Services*, N.Y. TIMES, July 16, 2010, at A7, *available at* http://www.nytimes.com/2010/07/17/world/asia/17beijing.html (last visited Nov. 2, 2011); Cara Anna, *Dozens of Outspoken, Popular Blogs Shut in China*, ASSOC. PRESS, (July 15, 2010), https://www.washingtontimes.com/news/2010/jul/15/dozens-of-outspoken-popular-blogs-shut-in-china/?page=all (last visited Nov. 2, 2011).

288. In its 2010 report, Human Rights Watch described the occurrence as a rare victory for proponents of freedom of expression. On, June 30, 2009, the Chinese government indefinitely delayed a plan to compel computer manufacturers to pre-install the Internet filtering software Green Dam Youth Escort on all personal computers sold in China. Human Rights Watch reports that the "decision followed weeks of scathing criticism from some of China's more than 300 million netizens, unprecedented opposition by foreign computer manufacturers and international business associations, and a threat from both the United States trade representative and secretary of commerce that Green Dam might prompt a World Trade Organization challenge." HUM. RTS. WATCH 2010, *supra* note 104, at 285.

289. CECC ANN. REP. 2009, *supra* note 52, at 9.

290. *Id*. According to the New York Times article, officials have been promoting real name registration systems since 2003. Jonathan Ansfield, *China Web Sites Seeking Users' Names*, N.Y. TIMES, Sept. 5, 2009, at A4, *available at* http://www.nytimes.com/2009/09/06/world/asia/06chinanet.html?pagewanted=all (last visited Nov. 2, 2011). As reported in CECC 2007, officials had sought to implement a policy requiring all bloggers to register under their real names, but decided against making the policy mandatory following industry resistance. CECC ANN. REP. 2007, *supra* note 201, at 83.

291. CECC ANN. REP. 2009, *supra* note 52, at 61; Michael Wines, *China: Censors Bar Mythical Creature*, N.Y. TIMES, Mar. 20, 2009, at A8, *available at* http://www.nytimes.com/2009/03/20/world/asia/20briefs-CENSORSBARMY_BRF.html (last visited Nov. 2, 2011).

292. In responding to a question about China's blocking of the YouTube Web site, Qin Gang, a spokesperson for the Chinese foreign ministry, said the Chinese government "had drawn upon the experience of other countries." The spokesperson specifically cited U.S. regulations, including "the Child Protection Act, Digital Millennium Copyright Act, acts protecting consumers and minors, and intellectual property rights, as well as the Patriot Act." But, according to the CECC ANN. REP. 2009, "[t]he official failed to note, however, that these acts have been challenged and litigated before U.S. courts, and in some cases provisions have been struck down as being overbroad." The CECC ANN. REP.

government "issued a secret directive that strengthens monitoring of comments posted by [I]nternet users on Chinese news Web sites."[293] The Chinese authorities shut down thousands of Internet cafes, and it was only subsequent to the installation of filtering software to block web sites considered "politically sensitive" or "reactionary," that they were permitted to reopen.[294]

While companies operating in China may claim to respect and adhere to the general concepts of human rights, many find it necessary to adopt positions of the government which interfere with the exercise of such rights. The Chinese government urges corporations, at times, to assist in censoring freedom of expression.[295] A September 2000 prerogative issued by the Administration of Internet Information Services required that "[a]ll commercial websites must obtain a government license,"[296] and all non-commercial website operators must register with the state.[297] The government has discretion to reject an application based on content, and therefore, "it is qualitatively different from registration which all website operators must undertake with a domain registrar, and constitutes a de facto licensing scheme."[298]

Although the Internet has, on occasion, served as an important outlet for individual expression, the Chinese government's continuing regulation of the Internet and other electronic communications violates international standards of free expression. Officials continue to restrict access to both

---

2009 continued to state that "[n]o practical equivalent exists in China for citizens to challenge the constitutionality of such provisions even though events this past year indicated widespread discontent with official campaigns nominally aimed at censoring 'vulgar' material but which also swept up content deemed politically sensitive." The spokesperson also cited "the sizable number of Internet users, Web sites, and blogs in China" as "convincing evidence of the fully open [I]nternet in China." CECC ANN. REP. 2009, *supra* note 52, at 316 (quoting Liu Jianchao, Foreign Ministry Spokesperson, Ministry of Foreign Aff., Foreign Ministry Spokesperson Liu Jianchao's Regular Press Conference on Dec. 16, 2008 (Dec. 17, 2008), *available at* http://au.chineseembassy.org/eng/fyrth/t553628.htm (last visited Nov. 10, 2011)).

293. CECC ANN. REP. 2009, *supra* note 52, at 60. According to the CECC, officials have been pushing real name registration systems since 2003. Ansfield, *supra* note 290, at A4. As reported in CECC ANN. REP. 2007, officials had sought to implement a policy requiring all bloggers to register under their real names, but decided against making the policy mandatory following industry resistance. CECC ANN. REP. 2007, *supra* note 201, at 83. But, even without the real name system, officials can trace comments back to an Internet protocol (IP) address. CECC ANN. REP. 2007, *supra* note 201, at 234, n.109.

294. *See generally* CECC ANN. REP. 2010, *supra* note 170.

295. CECC ANN. REP. 2009, *supra* note 52, at 318, § II, n.214.

296. *Id*.

297. *Id*.

298. *Id*.

domestic and foreign websites based on political content,[299] and the companies offering internet service in China continue to monitor, filter, and eliminate certain political and religious content.[300]

The Chinese government has specifically required Internet search companies, such as Google and Yahoo!, to abide by restrictive rules. A "Public Pledge on Self-Discipline" was introduced in August 2002, mandating that Internet companies agree to prohibit the posting of "pernicious" information that may "jeopardize state security, disrupt social stability, contravene laws and spread superstition and obscenity."[301] China accused Google of permitting the distribution of obscene content over the Internet after U.S. officials urged that China abandon its proposal of installing the porn-filtering software, Green Dam, on new computers.[302] If the Internet companies did not comply with the government directives, punishments were to be imposed.[303]

The China-based search engines of Yahoo!, MSN, and Google have, in fact, filtered politically sensitive information.[304] In October 2008, these companies announced the formation of the Global Network Initiative, "a coalition of companies, human rights groups, and [I]nternet experts, whose purpose is to encourage companies to comply with principles of freedom of expression and to submit to monitoring by independent experts."[305] After some Chinese individuals posted "Charter 08," a major and highly controversial document that called for political reform and greater

---

299. *Id*. at 9. All Internet users within the PRC face a number of restrictions while trying to browse websites. Companies are required by the government to conduct self-censorship of unwanted materials. These include, for example, politically sensitive information and morally undesirable pages. The major barrier between all the traffic within PRC and outside has been referred to as a "Great Chinese firewall." This system filters the vulgar web pages and institutes a connection reset in the event of undesirable content. TCHRD ANN. REP. 2010, *supra* note 189, at 22. *See also* Owen Fletcher & Dan Nystedt, *Google Says Mobile Services Now Mostly Accessible in China*, PCWORLD.COM, (Apr. 8, 2010), http://www.pcworld.com/businesscenter/article/193773/google_says_mobile_services_now_mostly_accessible_in_china.html (last visited Nov. 2, 2011).

300. CECC ANN. REP. 2009, *supra* note 52, at 9.

301. CECC ANN. REP. 2010, supra note 170, at 303; http://foreign.senate.gov/testimony/2003/KumarTestimony030911.pdf.

302. Cui Jia & Ding Qingfen, *Govt Steps Up Heat on Google*, CHINA DAILY, June 26, 2009, *available at* http://www.chinadaily.com.cn/china/2009-06/26/content_8324498.htm (last visited Nov. 2, 2011).

303. Qin Gang, a spokesman for the Chinese Foreign Ministry, told reporters that the "punishment measures" taken against Google were lawful. *Id*.

304. *Bottom: Corporate Complicity in Chinese Internet Censorship*, HUM. RTS. WATCH, Aug. 9, 2006, *available at* http://www.unhcr.org/refworld/docid/45cb138f2.html (last visited Jan. 2, 2012).

305. CECC ANN. REP. 2009, *supra* note 52, at 60–61.

protection of human rights, online references to the Charter appeared to have been removed from the Baidu, Sina, and Google.cn search engines.[306]

The government requires that state-owned media, as well as Internet search firms, censor references to issues ranging from the June 1989 Tiananmen demonstrations to the details of the 2010 Nobel Peace Prize which was awarded to Liu Xiaobo, a leading Chinese dissident.[307] Reporters Without Borders issued a report in 2010 confirming the continued censorship of Internet searches in China relating to the 1989 Tiananmen protests.[308] In August 2009, China Daily reported that both Google.cn and Baidu had blocked searches for Xu Zhiyong, the law professor and civil rights activist who had been detained on charges of tax evasion.[309]

In 2010, a dispute arose between Google and the Chinese government which drew worldwide attention to the levels of Internet restrictions in China. After having been given access to the PRC in 2006, Google had been engaging in self-censorship to comply with the local rules. Google incurred widespread international criticism, and in January 2010, Google announced that it would no longer engage in such censorship[310] and declared that it would attempt to reach an agreement with the Chinese government to terminate the firm's self-censorship activities.[311] In March of 2010, Google stopped its censorship searches on its website and redirected search results to its uncensored Hong Kong-based site.[312]

It was also announced by Google that its system had "been under sophisticated cyber attack originating in PRC," which was "aimed at the Gmail accounts of various human rights activists."[313] At least another two

---

306. *Officials Harass Charter 08 Signers; Liu Xiaobo Under Residential Surveillance*, CHINA HUM. RTS. & RULE L. UPDATE (CONG.-EXEC. COMM'N ON CHINA, WASHINGTON, D.C.), Feb. 1, 2009, at 3.

307. HUM. RTS. WATCH 2011, *supra* note 254, at 303.

308. *See generally All References to Tiananmen Square Massacre Closely Censored for 20 Years*, REPORTERS WITHOUT BORDERS (June 2, 2009), http://en.rsf.org/china-all-references-to-tiananmen-square-02-06-2009,33198 (last visited Nov. 3, 2011). *See also* CECC ANN. REP. 2010, *supra* note 170.

309. *Human Rights Lawyer Arrested on Tax Evasion Charges*, CHINA DAILY, Aug. 19, 2009, *available at* http://www.chinadaily.com.cn/business/2009-08/19/content_8588748.htm (last visited Nov. 3, 2011).

310. *See* Malcolm Moore, *Dell and Go Daddy Threaten to Follow Google out of China*, TELEGRAPH (Mar. 25, 2010), http://www.telegraph.co.uk/technology/google/7517291/Dell-and-Go-Daddy-threatento-follow-Google-out-of-China.html (last visited Nov. 3, 2011).

311. HUM. RTS. WATCH 2011, *supra* note 254, at 304.

312. *Id*.

313. *Google Stops Censoring Search Results in China*, BBC.CO.UK (Mar. 23, 2010), http://news.bbc.co.uk/2/hi/business/8581393.stm (last visited Nov. 3, 2011).

international Internet companies—Dell and Go Daddy—also announced that they might consider withdrawing from the Chinese market due to the regulations regarding Internet use.[314] In early 2011, Google had indicated its willingness to reactivate its China website,[315] but the terms for any such return are still in dispute.[316]

The Chinese tightly control information via the Internet from reaching Tibet and the flow of information out of the area as well. A new plan for Internet surveillance was begun in Lhasa in 2003 which required residents to obtain and use individual registration numbers and passwords in order to access Internet Explorer.[317] Such a system is unusual in that it applies to the individual user as opposed to being imbedded in the computer system itself.[318] The identification registration card expands the surveillance abilities of the Chinese authorities, because "[t]he new system of registration for Internet use in Lhasa is a step beyond filters as it allows authorities to easily track anything that is viewed on the computer screen and place an individual's name with a visited website."[319]

Tibetans in Lhasa have informed the International Campaign for Tibet that "[Public Security Bureau] and Internet security officers in Lhasa sometimes detain individuals for lengthy interrogations regarding

---

314. *See* Moore, *supra* note 310.

315. *See generally Google CFO Hints at Return to China*, FOXBUSINESS.COM (Jan. 3, 2011), http://www.foxbusiness.com/markets/2011/01/03/google-cfo-hints-return-china/# (last visited Nov. 3, 2011); *Google CFO Hints at Return to China*, HUFFINGTONPOST.COM (Jan. 5, 2011), http://www.huffingtonpost.com/2011/01/05/google-cfo-china-return_n_804555.html (last visited Nov. 3, 2011).

316. It was reported that:

> Google attempts to strike a balance between the requirements of the Chinese government and the company's stated policy of not censoring results on Google.cn, said this person, who requested anonymity. Thus, visitors to Google.cn are greeted with a search page that lets them type general web queries in the search box, but when they hit the "search" button, they are taken to the Hong Kong site, where the query is resolved. There is also a prominent link to go directly to the Hong Kong site without having to enter anything into the search box.

Juan Carlos Perez, *Google China Search Returns, But Site is Limited in Features: Google.cn Only Allows Product and Music Searches, as well as Translations*, TECHWORLD.COM (July 12, 2010), http://news.techworld.com/networking/3230184/google-china-search-returns-but-site-is-limited-in-features/# (last visited Nov. 3, 2011) (stating that it was Google's decision to provide the limited services it does on the China site, because those are the only ones it can currently offer without having to censor search results).

317. *Chinese Authorities Institute Internet ID Card System in Tibet for Online Surveillance*, INT'L CAMPAIGN FOR TIBET (Apr. 30, 2004), http://www.savetibet.org/media-center/ict-news-reports/chinese-authorities-institute-internet-id-card-system-tibet-online-sur (last visited Nov. 3, 2011).

318. *Id.*

319. *Id.*

suspicions of visiting banned websites or reading emails from India."[320] There have been many repeated reports of beatings and imprisonments of citizens who have attempted, or actually posted, certain information on the Internet.[321] Official censorship, as well as manipulation of the press and Internet for political purposes, intensified due to the Tibetan protests that began in March 2008 as well as the 2008 Olympics.[322] In 2010, officials and companies continued to filter political and religious content which criticized the Chinese government and its policies toward the Tibetan areas of China.[323]

After the posting of a graphic video on the Internet showing the Chinese police violently beating some Tibetan citizens including some monks,[324] the Chinese government restricted the use of YouTube and Google in Tibet. Three days after the initial release of the videos on the Internet, any uploading on YouTube[325] was totally blocked.[326] Furthermore, in March 2009, Internet and cellphone text messaging services were reportedly disrupted in the Tibetan areas of western China in advance of the Fiftieth Anniversary of the Dalai Lama's departure from China.[327] It was reported that cellphone messaging, as well as Internet service, had been disabled and that phone calls from foreign countries could not be received in the Tibetan areas.[328]

As a consequence of the March 2009 demonstrations, the use of YouTube was completely blocked in China. Other video-sharing websites were not totally restricted, but any Tibet-related content was blocked.[329]

---

320. *Id*.

321. Jia & Qingfen, *supra* note 302.

322. CECC ANN. REP. 2008, *supra* note 53, at 10.

323. CECC ANN. REP. 2010, *supra* note 170, at 62.

324. Tohkondanzi, *Chinas Brutality in Tibet Exposed*, YouTube (June 28, 2009), http://www.youtube.com/watch?v=23tq18y3zTA\ (last visited Jan. 2, 2012).

325. Miguel Helft, *YouTube Being Blocked In China, Google Says*, N.Y. TIMES, Mar. 24, 2009, at A14, *available at* http://www.nytimes.com/2009/03/25/technology/internet/25youtube.html (last visited Nov. 3, 2011).

326. *Id*. *See also YouTube Blocked In China*, CNN.COM (Mar. 26, 2009), http://articles.cnn.com/2009-03-25/tech/youtube.china_1_video-sharing-youtube-tibet-and-taiwan?_s=PM:TECH (last visited Nov. 3, 2011).

327. *Restrictions on Information Access in Tibetan Areas Increase*, Mar. 12, 2009, *in* CHINA HUM. RTS. & RULE L. UPDATE 2 (CONG.-EXEC. COMM'N ON CHINA, WASHINGTON, D.C.) (citing Ben Blanchard, *Heavy Security as Tibetans Prepare for New Year*, REUTERS, (Feb. 22, 2009), http://ca.reuters.com/article/topNews/idCATRE51M1D920090223?pageNumber=2&virtualBrandChannel=0 (last visited Nov. 3, 2011)).

328. The owner of one Internet café reported that Internet service was just cut off with no notice in his entire district. Fan, *supra* note 264, at A11.

329. *China Blocks YouTube after videos of Tibet Protest are Posted*, ASSOC. PRESS, Mar. 17, 2010, *available at* http://www.heraldtribune.com/article/ 20080317/ZNYT05/803170750 (last visited Jan. 2, 2012).

These restrictions were confirmed by Scott Rubin, a spokesperson for Google.[330] There was an initial decline in the use of its video website, YouTube, which was followed by no use at all.[331] The restricted Internet access included the blocking of certain blogs, including that of well-known Tibetan poet and blogger, Tsering Woeser.[332] Footage of the protests in Tibet, as well as searches for news, was inaccessible as well.[333] But such blockage was not the first time such interference has occurred. According to TCHRD, China has routinely filtered Internet content and blocked material which was considered to be critical of its policies.[334]

VI. CONCLUSION

The takeover of Tibet by the PRC in 1950 has had severe repercussions for the Tibetan people. Over sixty years have passed, and the human rights of the Tibetans remain a matter of great concern. The Tibetan people, with a unique language, religion, dance and music, medicine and culture, have minimal power of self-determination. The Chinese control the organs of government and make decisions relating to educational issues and most other areas of significance.

These intensely religious Buddhists have seen their monasteries destroyed and their religious freedoms limited. The Dalai Lama, the leader of the Tibetan Buddhists, fled in 1950 and has not been able to return. His followers in Tibet cannot even publicly display photographs of him, and the monasteries are not permitted to discuss his teachings. It has been the monks and nuns who, at times, have demonstrated most visibly against the Chinese control of Tibet, especially in March of 2008 and 2009. The result has been the arbitrary arrest, unaccounted for absences, forced confessions, long periods of incarceration and torture of the monks and nuns as well as other suspected individuals who protest against the continued rule by the Chinese.

The major human rights treaties emphasize the need for people to have the freedom to receive and communicate one's thoughts. Access to information is paramount. Yet the Chinese tightly control the flow of information reaching Tibet, as well as that which emanates from Tibet. Special authorization from China is required for journalists to enter Tibetan areas. There is pervasive censorship of the Internet, prohibiting information or communication about any sensitive political or religious matter.

---

330. Helft, *supra* note 325.

331. *Id.*

332. U.S. DEPT. OF STATE, 2008 HUMAN RIGHTS REPORT: CHINA (2009), *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119037.htm (last visited Nov. 3, 2011).

333. *Id.*

334. TCHRD ANN. REP. 2009, *supra* note 51, at 53.

The freedom of speech of the Tibetans has been severely curtailed. Tibetans are denied the freedom of assembly to demand self-governance and to criticize China's policies, call for the Dalai Lama's return to China, or display the Tibetan flag. If an individual is arrested, there is scarcely any due process of law. If there is counsel at all, such counsel may well be beholden to the Chinese Communist Party, and the judiciary is rarely independent of the Chinese government. The months leading up to the Beijing Olympics in 2008 were particularly traumatic for the Tibetans; China was determined, by use of its police and army, to block any protests in order to avoid any negative publicity at a time when the whole world was watching.

The violations of the Tibetan people's rights to self-determination, freedom of religion, freedom of speech and assembly, freedom to obtain and send information, and the protections of the due process of the law continue into 2012. Such violations continue in clear contravention of numerous provisions of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Chinese certainly seem determined to hold onto Tibet, and discussions with the Dalai Lama for his return to Tibet remain at an impasse. China's ever-increasing economic might means, in the practical, pragmatic, political world we live in, that its domination of the Tibetans will likely continue unless those concerned with human rights spotlight the abuses and unite in an unparalleled demand for true autonomy for the Tibetan people.

THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS: AN OVERVIEW OF THEIR UTILITY AND THE ROLE THEY HAVE PLAYED IN REFORMING DOMESTIC CONTRACT LAW AROUND THE WORLD

Christine M. Whited

I. UNIDROIT: AN OVERVIEW OF ITS FUNCTION AND PURPOSE

Efforts to promote the unification of private substantive law took off in the latter part of the 20th century due to globalization, which rapidly increased the volume of international trade.[1] The increase in international trade brought a tremendous potential for economic growth, but with it came greater risks to the contracting parties, primarily due to new legal challenges that are unique to international transactions.[2] Parties to international contracts had to consider what law to apply in the event of a dispute. However, choosing one party's national laws over another's gave one party a clear advantage for linguistic reasons, availability of in-house

1. Salvatore Mancuso, *Trends on the Harmonization of Contract Law in Africa*, 13 ANN. SURV. INT'L & COMP. L. 157, 158 (2007).

2. *Id*.

counsel, and overall easier access to counsel.[3] For these reasons, the growth in international trade created a unique demand for a legal framework that could transcend national boarders and provide security for international players, irrespective of the nations they came from.[4] Such an autonomous body of international law could foster trade in all regions of the globe, each with unique legal, economic, and political systems: those with planned market economies and free market economies, those with civil law systems and common law systems, third world countries as well as highly industrialized nations.[5] It was at this point that international private law was in its infancy, and work began to be done to provide legal solutions that would meet the needs of the modern market—an international market. Uniform commercial law tailored to international commercial transactions surfaced as one of the best solutions available due to its inherent neutrality.[6]

The advantages offered by a uniform system of international commercial law have created demand for such a system and has led to the creation of a number of substantive law conventions, such as the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG), the Uniform Commercial Code (UCC), and United Nations Commission on International Trade Law (UNCITRAL).[7] One organization at the forefront of this movement whose work is specialized in the area of harmonizing international private law is the independent intergovernmental organization that goes by the French acronym UNIDROIT—the International Institution for the Unification of Private Law.[8] UNIDROIT was originally established as an auxiliary organ of the League of Nations in 1926 and was later re-established in 1940 due to the dismantlement of the League of Nations by a multilateral agreement—the UNIDROIT statute.[9] UNIDROIT's purpose is to identify the needs and methods for harmonization and modernization of commercial law as applied between parties of different states and to promote coordination of commercial law between states by formulating uniform law instruments, principles, and guidelines to achieve these objectives.[10] One of UNIDROIT's most notable and widely recognized accomplishments is the creation of the UNIDROIT

3. Mancuso, *supra* note 1, at 158.

4. Franco Ferrari, *The Relationship Between International Uniform Contract Law Conventions* 22 J. L. & COM. 57, 58 (2003).

5. THE PRACTICE OF TRANSNATIONAL LAW 1, 14 (Klaus Peter Berger ed. 2001).

6. Mancuso, *supra* note 1, at 158.

7. *Id*.

8. UNIDROIT, *UNIDROIT: An Overview,* http://www.unidroit.org/dynasite.cfm?dsmid+103284 (last visited Oct. 24, 2011).

9. *Id*.

10. *Id*.

Principles of International Commercial Contracts, which will be the focus of this article.[11]

In 1994, the first draft of the UNIDRIOT Principles of International Contracts was published.[12] The draft reflected many years of research and debate in the area of comparative and international law. These principles were negotiated and drafted by a working group composed of representatives from different regions of the world with diverse legal systems and backgrounds.[13] The UNIDROIT Principles are a codification of the main tenants of contract law, covering areas such as formation, validity, interpretation, performance, non-performance, termination, and remedies and were created with a view of establishing a model code of international contract law.[14] Furthermore, each provision has commentary and illustrations that demonstrate how the provisions are intended to apply.[15] National laws, arbitral case law, comparative law, and international instruments, such as the CISG, all inspired the UNIDROIT Principles.[16]

The UNIDROIT Principles have been commonly referred to as an "International Restatement of Contracts," but it is important to note that the goal of the Principles was not to simply codify contract principles that prevailed in the majority of states, but rather to select solutions that have the most utility for the international commercial community.[17] As a consequence of using this approach, there are some provisions that stray from the general rules or practices in the international commercial community.[18] For example, the provisions on fairness under Article 3.2.7 of the third edition of the UNIDROIT Principles, which is the rule governing gross disparity, allow a party to avoid a contract or individual terms of a contract when, at the time of concluding the contract, one party had an unjustifiable excessive disadvantage over the other.[19] While the idea

---

11. Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purpose?*, 1996 UNIF. L. REV. 229, 229 (1996) [hereinafter *Similar Rules for the Same Purpose*].

12. *Id*.

13. *Id*. at 230.

14. International Institute for the Unification of Private Law [UNIDROIT] 1994 Principles of International Commercial Contracts; Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG—Alternatives or Complementary Instruments?*, 1996 UNIF. L. REV. 26, 29 (1996).

15. *Id*.

16. *Similar Rules for the Same Purpose*, *supra* note 11, at 230.

17. Fabio Bortolotti, *The UNIDROIT Principles and the Arbitral Tribunals* 2000 UNIF. L. REV. 141, 142—43 (2000).

18. *Id*. at 143.

19. *Id*.

that a contract may be avoided in the case of excessive advantage is one that has legal roots in many legal systems, this provision's applicability is much more expansive than similar provisions seen in most domestic laws.[20] Thus, the UNIDROIT Principles, in large part, reflect accepted international trade practices but cannot be regarded simply as a codification of generally recognized tenants of international commercial transactions because some of the provisions adopt a minority view.[21]

Following the first publication of the UNIDROIT Principles, the worldwide recognition and success prompted UNIDROIT to continue work on the Principles as early as 1997 with a view of creating a more comprehensive and expansive second edition.[22] A new working group was selected, which included seventeen members who represented all major legal systems around the world, as well as representatives from influential international and arbitration organizations, such as UNCITRAL, the International Court of Arbitration, the Milan Chamber of National and International Arbitration, and the Swiss Arbitration Association.[23] The second edition was published in 2004 and included additional provisions in the area of agency, assignment of rights, obligations, set-off, and limitation periods.[24] When approving the second edition of UNIDROIT Principles, the Governing Council determined that these principles should be a long-term project and that a new working party shall be appointed to prepare the third edition.[25] Work on the third edition was commenced in 2005 and was formally approved in May of 2011.[26] Additional provisions include restitution, illegality, plurality of obligors and of obligees, conditions, and termination of long-term contracts for just cause.[27]

---

20. *See* Michael Joachim Bonell, *Policing the International Commercial Contract Against Unfairness Under the UNIDROIT Principles* 3 TUL. J. INT'L & COMP. L. 73 (1995).

21. *See* Bartolotti, *supra* note 17, at 142—43.

22. Michael Joachim Bonell, *UNIDROIT Principles 2004 – The New Edition of the Principle of International Commercial Contracts Adopted by the International Institute for the Unifaction of Private Law*, 2004 UNIF. L. REV. 5, 5 (2004) (hereinafter *New Edition of the Principles 2004*).

23. *Id*. at 5—6.

24. *New Edition of the Principles 2004*, *supra* note 22, at 6; SWISS INSTITUTE OF COMPARATIVE LAW, THE UNIDROIT PRINCIPLES 2004 THEIR IMPACT ON CONTRACTUAL PRACTICE, JURISPRUDENCE, AND CODIFICATION 18-19 (Elanor Cashin Ritaine & Eva Lein eds., 2006).

25. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 263.

26. International Institute for the Unification of Private Law [UNIDROIT], Working Group for the Preparation of the Principles of International Commercial Contracts (3rd), Fifth Session (May 26, 2010) *available at* http://www.unidroit.org/english/workprogramme/study050/wg03/wg-2010.htm (last visited Oct. 31, 2011).

27. *Id*.

II. HARMONIZATION DEFINED

One of the main objectives of UNIDROIT is to harmonize private international law, but what does harmonization mean? The harmonization of law refers to a process of legal integration, which aims to encourage legal cooperation between countries and reduce differences between national laws or provide supranational legal instruments that can be used to govern specific areas of law.[28] The process of harmonization can take many different forms and as such, many different methods have been used to harmonize laws at the domestic, international, and multilateral level.[29] For example, harmonization has been accomplished by the reformation of national laws, which correspond with international legal trends, the establishment of binding international codes, such as the CISG, the creation of non-binding international legal instruments, such as the UNIDROIT Principles, the ratification of regional choice of law Conventions, such as the Rome Convention on the Law Applicable to Contractual Obligations, or the creation of Uniform Acts, such as the U.S. Model Penal Code, which states can adopt as national law or simply use as inspiration in reforming national law.[30]

III. THE ARGUMENT IN FAVOR OF HARMONIZING INTERNATIONAL CONTRACT LAW

I have briefly discussed some of the reasons why a uniform system of law is particularly appealing to international traders, but this section will lay out, in greater detail, the arguments in favor of harmonizing international contract law. In the modern course of business, corporations frequently engage in international commercial transactions. For example, a Canadian manufacturer contracts with a Chinese corporation for the supply of labeling materials; a German Corporation retains an Indian Consultancy firm to assist with the integration of a complex IT system; an Australian Company purchases trucks from a New Zealand Company for use in Australia; or a U.S. investor funds a start-up company in Brazil. Various risks are attached when engaging in these types of cross-border transactions that are not generally problematic with domestic transactions.[31]

Fabio Bortolotti, a lawyer and an Italian Professor of International Commercial Law, eloquently explains some of the challenges lawyers are faced with when representing a client who is engaged in an international transaction:

---

28. Mancuso, *supra* note 1, at 160.
29. *Id*.
30. *See id*.
31. Bortolotti, *supra* note 17, at 141.

> [D]omestic rules on contracts, and particularly those rules dealing with the general aspects of contract law, are, in most countries, the fruit of a long evolution. Such rules are often complicated, not only because the matters covered are complex but also because they reflect long years (if not centuries) of legal thinking, which sometimes complicates even simple things. It is very difficult therefore for a lawyer negotiating an international contract (or who must make up his mind about a dispute relating to such a contract) really to understand a foreign country's rules on contracts: he may, of course, be able to locate the text of these rules (if codified, which is not always the case, and if available in an accessible language), but in most cases he will not be able to assess their actual content with any certainty.[32]

Professor Bortolotti goes on to explain that these problems can be addressed by retaining a foreign attorney, but in many cases, particularly during contract negotiation, there is no time to obtain legal advice and as stated,

> [T]here are usually considerable problems of communication between lawyers from different countries (probably because most of them are used to reasoning within the confines of their domestic law), so that often the local lawyer will fail to grasp the substance of the problem he is required to answer, while the requesting lawyer will have trouble understanding . . . advice base on legal reasoning unfamiliar to him.[33]

As such, even simple legal questions for a local lawyer will be difficult for a foreign lawyer to resolve or even communicate to a lawyer from a different country, and hiring foreign council is not always an option due to tight time frames inherent in contract negotiation.

Another risk that parties to international contracts must bear is the uncertainty of the outcome in the face of a legal dispute. In an ideal world, a contract should eliminate surprises by setting forth the parties obligations and laying out the course of action and the remedies available if one of the parties fails to perform. The need for such predictability is even more essential to international traders, in light of the fact that parties are usually not dealing at arms length and have a higher frequency of misunderstanding

---

32. Bortolotti, *supra* note 17, at 141.

33. *Id*. at 141—42.

due to communication barriers. Unfortunately, it can be very difficult to predict the outcome of a dispute for your client involved in a cross-border transaction. A contract interpreted by a California court under California law may have a very different outcome than the very same contract interpreted by a Bavarian court in accordance with German law. This could happen for a number of different reasons: the laws governing contract interpretation from jurisdiction-to-jurisdiction are not universal, the law applied when there is no choice of law clause could vary, a jurisdiction may not recognize a choice of law clause choosing another country's laws or the law applied in the case of a gap in the chosen body of law may be different. What is more, a company may be forced to absorb unexpected costs for things such as travel and retaining foreign counsel. Thus, a reliable and predictable contract between two or more parties engaged in an international business transaction is essential to the success of the deal.

Now let us take a moment to think about the various solutions that are available to minimize these impacts for clients. Of course, the contract could be drafted to include a choice of law provision selecting one party's domestic law in the event of a dispute. On a basic level, it may be difficult for the parties to agree on the application of one party's domestic law over the other's, because a party that is not familiar with the other party's domestic contract law is not likely to be comfortable agreeing to be bound by an unfamiliar foreign legal system to resolve potential disputes. If one party is willing to agree to apply another party's domestic law, it will be difficult to predict the outcome of the dispute for the party whose domestic law does not apply because a foreign lawyer will not have an intimate understanding of the other nation's laws. Moreover, assuming there is time for the lawyer to retain a foreign lawyer during contract negotiations, there could be communication barriers amongst the two lawyers due to language or differences in legal reasoning. These factors will make it difficult for a lawyer to understand how a contract will be interpreted by a foreign court or arbitration panel applying foreign law and will make it difficult for a lawyer to draft a contract giving the client maximum legal protection and sound legal advice.

To clearly illustrate the risk associated with international transactions and the potential for uncertain outcomes, let us consider a potential scenario. Two companies from different countries contract for the sale of widgets and choose Florida law as the governing law and Miami as the forum. The first thing to consider is that in choosing Florida law, the parties would have to have been aware that there is no such thing as American contract law. Parties must choose the law of a specific state, a concept that is not often recognized by non-American lawyers. Additionally, if both parties were signatories of the CISG—where the

contract is for the sale of goods—and the contract provided that Florida law would apply, the applicable law would be the CISG and only the procedural law of Florida would apply. However, if the contract stated that Florida contract law is to apply and specifically excluded the application of the CISG, then Florida contract law would apply and the CISG would not. To complicate matters even more, if the contract had no connection to the State of Florida, then a Florida court *may* hold that jurisdiction is not appropriate in the state based on *forum non conveniens*, in which case the contract would be subject to some other law in America or elsewhere.[34] In this case, the result of the dispute would be anyone's guess. For the purpose of this example, let us assume that the parties choose Florida law, to the exclusion of the CISG, and the contract was signed in Florida and there were sufficient contacts in the state for the court to accept jurisdiction. The foreign lawyer would then have to determine what Florida state contract law is and how those laws affect the rights and obligations of the parties to the contract. This is not a simple task, even for American-trained lawyers. The legal teams will need to determine if the state in question has adopted the Restatement of Contracts in full or in part, and if so, which provisions of which edition of the Restatement of Contracts it has adopted. The lawyers will also be required to read through endless cases, which requires paying top dollar for access to such information on legal databases, such as Westlaw or LexisNexis. The foreign lawyer will need to Shepardize the relevant case law to ensure the holdings coming out of the cases are good law, a concept that is not generally understood by lawyers coming from civil law jurisdictions. The time spent researching unfamiliar law is not only extremely costly, but could also result in ethical violations for lack of competency. Most importantly, crucial mistakes are more likely to occur which will disadvantage the client. Alternatively, paying to retain a foreign lawyer will also be a costly endeavor.

So what is the alternative? The logical alternative is to create a legal framework that is neutral and does not put one party at an unfair advantage. International legal instruments, such as the UNIDROIT Principles, have made great progress in establishing a neutral legal framework to provide international business actors with a viable legal alternative. Another point worth noting is that international legal instruments, such as the CISG or the UNIDROIT Principles, are not only translated in many different languages, but they also are written simply to be easily understood by foreign actors.[35] Furthermore, with regard to the UNIDROIT Principles, each provision has comprehensive commentary as well as illustrations that show how the

34. *Gulf Oil Corp. v. Gilbert*, 330 US 501, 506-07 (1947).

35. *Similar Rules for the Same Purpose*, *supra* note 11, at 229.

provisions were intended to operate.[36] International case law and arbitrary decisions are also provided free of charge on UNIDROIT's website, substantially reducing the cost of research.[37]

Harmonizing international contract law can also promote economic growth in third world countries or countries with underdeveloped legal systems.[38] The availability of a trusted transnational legal system helps to promote investment in foreign markets, particularly third world countries, where investors often do not have the confidence in the protection provided by a third world legal system.[39] An international legal system in the field of private international law gives investors a sense of security, helping underdeveloped countries attract investment and build their economies.[40] Following a single set of international rules encourages economic activity in all parts of the world because it is more predictable and reduces transaction costs.[41] Rather than having to apply a set of law coming from various nations, a transnational system allows for the application of one set of neutral rules.[42]

On the other hand, one major criticism of uniform sources of international law is that they increase the amount of sources that a court will apply.[43] Thus, two distinct legal regimes would exist side by side: one for domestic obligations that would reflect the national system and one for the international system that would reflect the international nature of the contract.[44] This could be confusing for lawyers and judges alike, forced to apply two independent sets of rules depending on the nature of the contract. In a federal system, where courts are often required to apply another state's law, this does not seem so far-fetched, but in a jurisdiction where the law is uniform throughout, this multilayered system may seem to cause more confusion than is necessary. Another risk, in some jurisdictions more than others, is a country's willingness to apply an international set of laws over domestic laws.[45] Some jurisdictions have been adverse to the application of international instruments, such as the UNIDROIT Principles, and have refused to apply these principles in favor of applying their own national

---

36. International Institute for the Unification of Private Law [UNIDROIT], *Principles of International Commercial Contracts* (2010).

37. *See* Unilex, http://www.unilex.info/ (last visited Oct. 31, 2011).

38. *See* Mancuso, *supra* note 1, at 158.

39. *Id*.

40. *Id*.

41. *Id*.

42. *Id*.

43. *See generally* John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343 (2011).

44. *Id*.

45. *Id*.

laws.[46] The consequence of this is severe because the parties likely believed to have put themselves in a situation of neutrality and probably did not account for the additional expense of retaining foreign counsel. Now the parties are subject to the laws of whatever jurisdiction the court decides to apply.

IV. UNIDROIT PRINCIPLES IN ACTION

Of course the creation of uniform law serves no purpose if it is not applied in practice. The end goal in creating uniform legal instruments is not for them to remain dead letter law, but for them to be applied in practice and to be used as a harmonization tool.[47] The UNIDROIT Principles have made steady progress since their initial publication in 1994, but how has this come to be? After all, the Principles are simply non-binding rules placed at the parties' disposal. While the UNIDROIT Principles do not have binding force, as do many Conventions, the Principles have become an important source of non-binding soft law, and their application has been used in a variety of different ways. The following section will explain the principal ways in which the UNIDROIT Principles have been applied in practice and how they have affected the harmonization of international contract law.

The most obvious way in which the UNIDROIT Principles may be used is as the sole law governing a contract through their incorporation into the contract by the parties.[48] Here, the parties must intend for the UNIDROIT Principles to apply, rather than having a set of national laws apply.[49] The Preamble provides that the Principles "shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like."[50] Furthermore, when the Principles are applied as the governing law and there are gaps left by the Principles, a solution should, to the extent possible, be found within the Principles themselves.[51] Additionally, the parties may opt to have the Principles apply as the applicable law, but refer to a national legal system that shall act as a supplement to matters that are not covered by the Principles.[52] For example, lack of capacity is not dealt with by the

---

46. *Id*. (explaining that Brazil frequently rejects choice-of-law provisions in contracts applying foreign law).

47. *New Edition of the Principles 2004*, *supra* note 22, at 6.

48. *Id*. at 9.

49. *Id*.

50. *Principles of International Commercial Contracts*, *supra* note 36.

51. *Id*. at art. 1.6.

52. *Id*.

Principles, thus, if a conflict were to arise dealing with a question of validity due to a lack of capacity, the national law selected as a gap-filler would apply.[53]

A second manner in which the Principles may be applied to a contract is through incorporation of the Principles into the contract as a contractual provision.[54] This option is exercised when the parties choose a national legal system or the CISG as their choice of law, and also when they make reference to the Principles, showing that the parties intend for the Principles to apply within the body of law that they have selected to govern the contract.[55] What this means is that if there seem to be conflicts within the contract itself, the contract will be construed in accordance with the Principles.[56]

Pursuant to Section 5 of the Preamble, the UNIDROIT Principles can be applied as a gap-filler to "interpret or supplement international uniform law instruments."[57] In fact, the parties do not necessarily have to refer to the UNIDROIT Principles for them to be used as a gap-filler. In a recent case before the Supreme Court of Belgium, the Court rejected the use of domestic law as a gap-filler, in favor of the UNIDROIT Principles in a contractual dispute governed by the CISG.[58] The Court held that with regard to a contract governed by the CISG that has an international

---

53. *Principles of International Commercial Contracts*, *supra* note 36, at art. 3.1.1.

54. Bortolotti, *supra* note 17, at 147.

55. *Id*.

56. *Id*.

57. .*Principles of International Commercial Contracts*, *supra* note 36, at pmbl. *See also* Elonora Finazzi-Agrò, L'effettiva, Incidenza dei Principi UNIDROIT nella Risoluzione delle Controversie Internazionali: Un'indagine Empirica, Diritto del Commerico Internazionale [The Actual Incidence of the UNIDROIT Principles in International Dispute Resolution: An Empirical Investigation, International Law of Commerce] 577 (2009) (discussing many cases around the world that have cited the UNIDROIT Principles in order to provide additional support for their holding); Anna Veneziano, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate According to the Belgian Supreme Court*, 2010 Unif. L. Rev. 137, 137 (2010) (citing decisions from the UNILEX database that use UNIDROIT principles to interpret national laws:

> 1) Federal Court of Australia, Oct. 30, 2009, Austl. Medic-Care Co. Ltd. v. Hamilton Pharm. Pty. Ltd. (interpretation of contracts);
> 2) Tribunale di Catania (Italy), Feb. 6, 2009 (restitution);
> 3) Audencia Provincial de Valencia (Spain), Mar. 6, 2009 (fundamental breach);
> 4) High Court of Delhi (India), Aug. 20, 2008, Hansalaya Properties and Anr. v. Dalmia Cement (Bharat) Ltd. (contract interpretation);
> 5) Commercial Court of Brest Region (Belarus), Nov. 8, 2006 (rate of interest); and
> 6) Polish Supreme Court, Nov. 6, 2003 (penalty clause)).

58. Anna Veneziano, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate According to the Belgian Supreme Court*, 2010 UNIF. L. REV. 137, 137 (2010).

character, gaps should be filled uniformly and thus not through the application of domestic law.[59] As such, the Court applied the UNIDROIT Principles, over domestic law, in order to interpret a gap left by the CISG.[60] Pursuant to Section 6 of the Preamble, the UNIDROIT Principles may also be used as a means "to interpret or supplement domestic law."[61] The official commentary describes that "where the dispute relates to an international commercial contract, it may be advisable to resort to the Principles as a source of inspiration" where there is a lack of authority on the issue.[62] Reference to the Principles under these circumstances would not have binding effect, but may be used to provide persuasive support. Many courts have used the UNIDROIT Principles to bolster their arguments as to issues that are unclear under the national law.[63]

The UNIDROIT Principles have arguably made the largest impact in conflicts that have been resolved through means of Alternative Dispute Resolution. To illustrate their impact, the UNILEX database contains cases and arbitral awards from jurisdictions across the world that have applied the UNIDROIT Principles or the CISG. The database also contains 156 arbitral awards that either generally cite to the UNIDROIT Principles as persuasive support, use the Principles to interpret uniform or domestic law, or apply the Principles as the applicable law governing the contract.[64] One common way in which the Principles are applied during arbitration is when the parties choose to have the Principles govern the contract after the contract has been concluded.[65] For example, when parties have agreed to resolve a dispute through arbitration and the contract at issue is silent as to the choice of law, the parties may agree to have the contract interpreted in accordance with the Principles. This option is viewed as neutral because it does not favor one party over the other.

An arbitration panel may also choose to apply the UNIDROIT Principles when hearing a dispute over an international contract, regardless of whether the parties have included a choice of law provision in the contract.[66] To cite an example, in an arbitration before the International Chamber of Commerce which involved a contract that did not explicitly contain a choice of law clause, but provided that the contract should be

---

59. *Id*. at 137—38.

60. *Id*.

61. *Principles of International Commercial Contracts*, *supra* note 36.

62. *Id*.

63. *See generally* Finazzi-Agrò, *supra* note 55.

64. UNIDROIT, UNILEX database (International Principles of International Commercial Contracts) http://www.unilex.info/dynasite.cfm?dsside=2377&dsmid=14311 (last visited Oct. 31, 2011).

65. Bortolotti, *supra* note 17, at 150.

66. *Id*.

guided by "natural justice," the panel held that the parties intended for the contract to be governed by "general legal rules and principles."[67] In so holding, the panel determined that the general legal rules and principles were largely reflected in the UNIDROIT Principles and relied on them to resolve the dispute.[68] In another case resolved before an arbitral panel involving a dispute between an English company and an Iranian governmental agency, the arbitrators applied the Principles even though the contract did not call for their use. The arbitrators reasoned,

> General legal rules and principles enjoying wide international consensus, applicable to international contractual obligations and relevant to Contracts are primarily reflected by the Principles of International Commercial Contracts adopted by UNIDROIT. . . .[69] In consequence, without prejudice to taking into account the provisions of the Contract and relevant trade usages, this Tribunal finds that the Contracts are governed by, and shall be interpreted in accordance to, the UNIDROIT Principles with respect to all matters falling within the scope of such Principles. . . .[70]

Due to the availability of the Principles in many languages of the world, they can be used to help parties draft contracts when negotiating international deals.[71] While it is difficult to quantify the extent to which the Principles have been utilized as a guide for negotiating contracts, some studies have shown the increase in utilization in this area.[72] UNIDROIT conducted a questionnaire in 1996, and out of those who responded, two-thirds claimed that they used the Principles when negotiating and drafting cross-border commercial contracts.[73] In 1999, a study was conducted by the Center for Transnational Law, targeting 1000 business professionals, lawyers, in-house counsel, and arbitrators from all over the world on the use of Transnational Law in International Contract Law and Arbitration.[74] One of the questions asked was if they had used the Principles as guidelines in contract negotiations, and 59% responded that they had.[75]

---

67. *Id*. at 151.
68. *Id*.
69. *Similar Rules for the Same Purpose*, *supra* note 11 at 242.
70. *Id*.
71. *New Edition of the Principles 2004*, *supra* note 22, at 9.
72. *Id*.
73. *Id*.
74. BERGER, *supra* note 5, at 93.
75. *Id*. at 107.

The drafters of the Principles also contemplated the idea that the Principles could apply on their own, without the parties selecting them as the choice of governing law, by way of becoming part of *lex mercatoria*. In order for the Principles to be deemed part of *lex mercatoria*, the relevant principles would have to be consistent with the prevailing standards of international trade.[76] Thus, to the extent that the individual provisions are consistent with the general practices in international trade, the Principles may be applied as part of *lex mercatoria*.[77]

A U.S. Federal court upheld an award issued by a foreign arbitral tribunal that referenced the UNIDROIT Principle's provisions on good faith and fair dealing as general principles of international law, or in other words, as a part of *lex mercatoria*.[78] In that case, the Respondent moved to vacate a foreign arbitral award on the grounds that it violated Article V(I)(c) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards.[79] Article V(I)(c) provides that a Tribunal must not decide an issue based on legal principles that "deals with a difference not contemplated by or not falling within the terms of the submission to the arbitration" or "contains decisions beyond the scope of the submission to the arbitration."[80] The Respondent claimed that the Tribunal's reference to the Principles as international equitable principles is in violation of Article V(I)(c) because the application exceeds the scope of the terms of reference provided for in the contract.[81] The court rejected this argument, holding that one of the issues before the Tribunal was whether general principles of international law could be applied. The Tribunal held that such principles could be applied.[82] The court reasoned that the Tribunal's reference to the UNIDROIT Principles does not violate Article V(I)(c) because "the tribunal applied these principles to differences contemplated by, and falling within the terms of the submission to arbitration."[83]

Lastly, the UNIDROIT Principles have gained recognition by national lawmakers and have been used as a source of inspiration when reforming contract law on a domestic level. To this end, the UNIDROIT Principles have a function similar to the function of the Model Penal Code in America. The Model Penal Code is a statutory criminal code that was developed by

---

76. Bortolotti, *supra* note 16, at 148—49.

77. *Id*.

78. *See* Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys. Inc., 29 F. Supp. 1168 (S.D. Cal. 1998); *see also Similar Rules for the Same Purpose*, *supra* note 11 at 242.

79. Ministry of Def., *supra* note 76 at 1170.

80. *Id*. at 1172.

81. *Id*. at 1173.

82. *Id*.

83. *Id*. at 1173.

the American Law Institute with the goal of standardizing criminal law among states.[84] Legislators are able to adopt the code in full or in part or simply use it as a source of inspiration when reforming state criminal law.[85] Since its inception, the Model Penal Code has had the effect of harmonizing criminal law among states, as over two-thirds of states have adopted the code in full or in part.[86] Much like the Model Penal Code, the UNIDROIT Principles have been used as a model code by legislators, and parts of the Principles have found their way into domestic provisions on contract law. In the subsequent section, this article will outline examples of states such as Russia, China, and Spain that have used the UNIDROIT Principles as a resource in their national reform of contract law.[87] Bear in mind that the examples provided are not meant to be an exhaustive list of all the countries that have relied on the Principles to affect domestic private law reform.

V. THE UNIDROIT PRINCIPLES AS A MODEL FOR NATIONAL LAWMAKERS

As stated before, the UNIDROIT Principles have been characterized as a soft body of law. However, one purpose of creating soft law is to use it as a means to produce hard law. To this end, one of the purposes of the UNIDROIT Principles is to develop an instrument that serves "as a model for national and international legislators."[88] When national lawmakers use the Principles to reform domestic laws, this soft law instrument has the effect of creating hard law on a domestic level. As stated in a letter sent in 1993 by the Australian Government to the Secretary General of UNIDROIT

> The Principles could be a timely additional resource for the authorities of those and other countries in their efforts in drafting an important and difficult area of commercial

84. Markus Dirk Dubber, *Penal Panoticon: The Idea of a Modern Penal Code*, 4 Buff. Crim. L. Rev. 53, 53 (2000).

85. *Id*.

86. Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 297 (1998) (commenting on the persuasive force of the original Model Penal Code and noting that "[i]n the first two decades after its completion in 1962, more than two-thirds of the states undertook to enact new codifications of their criminal law, and virtually all of those used the Model Penal Code as a starting point" (citing Herbert Wechsler, Foreword to Model Penal Code and Commentaries xi (1985))).

87. *New Edition of the Principles 2004*, *supra* note 22, at 8 (discussing how the UNIDROIT Principles have been used as a Model in the reform of national laws in Lithuanian, Estonia, Hungary, China, Germany and in the Middle East by the Economic Cooperation Organization set up by Pakistan, Iran, and Turkey; *see also Similar Rules for the Same Purpose*, *supra* note 11 at 242 (noting the UNIDROIT Principles have played a role in reforming domestic laws in New Zealand, Spain, Russia, Israel, and Argentina).

88. Principles on International Commercial Contracts, *supra* note 35.

> law. In that respect those authorities may derive confidence from the fact that the Principles [. . .] have been drafted in an atmosphere free from any particular political or ideological persuasion and by some of the most eminent world experts in this area of law.[89]

It can be confidently confirmed that the goal of the UNIDROIT Principles to serve as a model body of law has been realized, as a number of national legislators, Public Organizations, and Multilateral Organizations have used the Principles as inspiration or as a model code when reforming or creating domestic law.[90] The following section will outline some examples of how the UNIDROIT Principles have been used to affect domestic reform.

A. The 1995 Civil Code of the Russian Federation

Before the first draft of the UNIDROIT Principles were even published, they played an important role in harmonizing international contract law, as the draft of the 1994 UNIDROIT Principles was used by Russian lawmakers in the drafting of the Russian Civil Code of 1995.[91] While it has been difficult to quantify the extent to which the Principles influenced the Russian Civil Code, it has gone undisputed that Russian legislators relied on them as a point of reference during the drafting stages.[92] As evidence, the Russian President of the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry and member of the UNIDROIT governing council stated that "in relation to the new Russian Civil Code the Principles have already played the role indicated for them in the Preamble . . . in the sense that they have served as a model for national legislation."[93]

One provision of the code that was clearly influenced by the Principles is the rules on change in circumstances and hardship contained in Article 451 of the Russian Civil Code of 1995. More specifically, the language of Articles 6.2.1–6.2.3 of the 1994 UNIDROIT Principles along with their comments, were used in drafting Article 451, which previously had no

89. *Similar Rules for the Same Purpose*, *supra* note 11 at 242.

90. Pierre Meyer, *The Harmonization of Contract Law within OHADA General Report on Ouagadougou Colloquium 15-17 November 2007*, 2008 UNIF. L. REV. 393, 401 (2008).

91. Alexander S. Komarov, *The UNIDROIT Principles of International Commercial Contracts: A Russian View*, 1996 UNIF. L. REV. 247, 249 (1996) [hereinafter Komarov].

92. *See generally id*.

93. *Id*.

precedent in Russian law.[94] The Russian Civil Code of 1995 permits a contract to be modified, with court approval, in the event of a material change in circumstances.[95] Similarly, Articles 6.2.1-6.2.3 of the 1994 UNIDROIT Principles impose a duty on the parties to renegotiate the contract in the event of a change in circumstances.[96] In the event the parties are not able to reach an agreement the parties are entitled to bring the dispute before a court.[97]

B. Estonia Republic

The Minister of Justice for Estonia sent a letter dated June 8, 1995 to UNIDROIT stating that at the "present time we're elaborating a new draft law of obligations of the Estonian Republic. The UNIDROIT Principles of International Commercial Contracts is certainly one of the most important and authoritative sources for drafters of the new law of obligations because . . . it contains a positive experience of different States."[98] The new draft law of obligations entered into force in 2001.[99]

C. The Lithuanian Civil Code

The Lithuanian Civil Code is arguably the national body of law that most closely reflects the UNIDROIT Principles. This can be largely attributed to the fact that after the Republic of Lithuania gained their independence, national lawmakers were faced with the task of formulating an entirely new body of private law that reflected the new economic and political state of the country, but they had limited resources at their disposal.[100] To provide a clearer understanding of how the UNIDROIT

---

94. Komarov, *supra* note 89, at 249; *see also* Joseph Skala, *The UNIDROIT Principles of International Commercial Contracts: A Russian Perspective* found in SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 119—33 (for a discussion of the historical development of the Russian Civil Code and the role the UNIDROIT Principles have played).

95. CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION (Kluwer Law International, the Hague, 2009) 490.

96. International Institute for the Unification of Private Law [UNIDROIT], *Principles of International Commercial Contracts* (1994), art. 6.2.1—6.2.3.

97. *Id*.

98. Michael Joachim Bonell, *The UNIDROIT Principles in Practice, the Experience of the First Two Years*, 1997 UNIF. L. REV. 34, 37 (1997).

99. Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 AM. J. COMP. L. 1, 19 (2008) (citing information sent by the Estonian Minister of Justice to the Secretary General of UNIDROIT on June 8, 1995) [hereinafter *Development of a World Contract Law*].

100. *See* SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 231—32.

Principles were essential to the creation of the Lithuanian Civil Code, it will be helpful to briefly explain key historical events and obstacles that Lithuania had to overcome in creating the Lithuanian Civil Code.

The Republic of Lithuania regained its independence in May of 1990 and was officially recognized as a state upon the collapse of the former Soviet Union in 1991.[101] Although Lithuania gained its independence in relatively recent history, it is not a newly independent nation, as it gained its independence in 1918.[102] However, from 1940–1991, the country was under Soviet rule, and during this period in Lithuanian history, the development of its legal system halted because many of the country's elite legal minds were imprisoned by Soviet leaders, died as a result of Soviet imprisonment, or managed to flee the country.[103] Upon regaining independence, one of the main priorities of the Lithuanian legislators was to modernize the contract law to support the switch from a programmed economy to a free market economy.[104]

In the redrafting of the Lithuanian Civil Code, the legislators decided to incorporate "as many provisions of the UNIDROIT Principles of International Commercial Contracts as possible, taking into account social and economic realities in Lithuania."[105] As a result of this strict adherence to the UNIDROIT Principles in the redrafting of the Civil Code, it can be said that Lithuania is, to date, the clearest example of a nation incorporating the Principles into its own domestic law, because the majority of the Principles have been incorporated into the Lithuanian Civil Code.[106] The differences in legal terminology required the wording of the Lithuanian Code to vary from the terminology used in the Principles, but the drafters of the Lithuanian code did not change the underlying content of the Principles.[107] The drafters of the Lithuanian Civil Code even used the commentary of the UNIDROIT Principles to develop commentary of the Lithuanian Civil Code, in order to ensure that the interpretation of the two bodies of law would be in sync with one another.[108]

---

101. Valentinas Mikelenas, *Unification and Harmonization of Law at the Turn of the Millenium: The Lithuanian Experience*, 2000 UNIF. L. REV. 243, 244 (2000) [hereinafter Mikelenas].

102. *Id*.

103. *Id*. at 246.

104. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 232.

105. Mikelenas, *supra* note 96, at 251.

106. *See id*.

107. *Id*. at 252.

108. Mikelenas, *supra* note 96, at 252; Tadas Zukas in his article entitled *Reception of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law in Lithuania* found in the SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 231—43 provides an in depth analysis of the impact of the UNIDROIT Principles on the Lithuanian Civil Code. Art. 6.156 of the Lithuanian Civil Code Corresponds to Art. 1.1 of the UNIDROIT Principles. Art.

D. Law on Obligations in the German Civil Code

A more subtle impact can be traced in the German law on obligations, which entered into force in 2002.[109] The Final Report of the Commission for the Revision of the German Law on Obligations within the German Civil Code—*Bürgerliches Gesetzbuch*, which is abbreviated as BGB—made reference to individual provisions of the UNIDROIT Principles.[110] While the provisions may not have been directly modeled after the UNIDROIT Principles, German lawmakers found support in the Principles.

E. The Spanish Commercial Code

In 2004, the Spanish Ministry of Justice published its proposal to reform the Spanish Commercial Code in order to bring the laws up-to-date with modern markets.[111] The draft of the Commercial Code incorporates solutions from the UNIDROIT Principles and the Principles of European Contract Law.[112] The references to the UNIDROIT Principles by the drafting Commission marked the first time that the Principles were so much as cited in Spanish Law.[113] Martínez Cañellas sheds light as to the motivations of the Spanish General Commission in opting to rely on the Principles as a model for effectuating their domestic commercial law reform.

> It has done this because its objective was to unify the International and domestic rules of commercial law. Today, the CISG is in force in Spain, but it only covers international sales contracts. In order to extend this to a general regulation of commercial contracts, the UNIDROIT Principles seem to be the most accepted expression of international commercial contract law.[114]

6.157 par. 1 of the Civil Code mimics Art. 1.4 of the Principles. The UNIDROIT Principles are referenced in the comments of Art. 6.158, 6.162 par. 1, 6.153, 6.164, 6.166, 6.167 par. 1, 6.168, 6.169, 6.170, 6.173, 6.174, 6.175, 6.176, 6.153, 6.164, 6.166, 6.167 par. 1, 6.168, 6.169, 6.170, 6.173, 6.174, 6.175, 6.176, 6.177, 6.178, 6.179, 6.180, 6.181 par. 3, 6.182, 6.185 par. 1, 6.186, 6.187, 6.193, 6.194, 6.195, 6.196, 6.197, 6.198, 6.199, 6.202, 6.203, 6.204, 6.205, 6.206, 6.207, 6.208, 6.209, 6.211, 6.212, 6.213 of the Lithuanian Commercial Code.

109. *Development of a World Contract Law*, *supra* note 94, at 19; *see also* Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, Bundesgesetzblatt [BGBI] 43, § 280*; see also* Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, Bundesgesetzblatt [BGBI] 64, § 346.

110. *Id*. *(*referencing Reinhard Zimmerman, *The New German Law on Obligations*, 41 (2005)).

111. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 215.

112. *Id*. at 220.

113. *Id*.

114. *Id*.

In order to provide some examples of how the UNIDROIT Principles have been used as a model for reform of the Spanish Commercial Code, we can look directly to the draft reform.[115] Article 51 of the draft models the language of Article 1.7 of the UNIDROIT Principles, a rule handling good faith.[116] The general principle of good faith is codified in Article 7 of the Spanish Civil Code and incorporates the abuse of rights doctrine, utilizing the terms in the commentary of the 2004 edition of the Principles.[117] Additionally, while pre-contractual liability in cases of bad faith was accepted in Spanish case law, it was never codified as part of the Civil Code.[118] The new draft mimics article 2.15 and 2.16 of the Principles, covering pre-contractual liability.[119] Finally, the section on formation of a contract in the Spanish Civil Code adopts the terminology of articles 2.1.1–2.1.7 and 2.1.11 of the Principles almost verbatim.[120] The Spanish Commercial Code also closely follows the UNIDROIT provisions on contractual interpretation. The provisions on interpretation in the draft of the Spanish Commercial Code are drafted following articles 4.1–4.7 of the UNIDROIT Principles.[121] The only derivation is the exclusion of the term "reasonable person," and the omission of Article 4.5 of the Principles requiring "all terms to be given effect."[122]

---

115. Anslemo Martínez Cañellas provides a complete overview of the similarities between the draft of the Spanish Commercial Code and the UNIDROIT Principles in his article *The Influence of the UNIDROIT Principles on the Proposal of the Reform of the Spanish Commercial Code* found in the SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 215—29. The article explains how the following provisions in the Spanish Commercial Code were influenced by the UNIDROIT Principles: Pre-contractual Liability, Formation of Contract, Interpretation of Contract, Content of Contract, Performance of Contract, Termination of Indefinite Terms Contracts and Hardship, Breach of Contract, Late Payment, Assignment of Debts, Presumption of Joint Liability for the Performance of Commercial Obligations, and Limitations of Actions on Voidness.

116. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 222; *See generally* International Institute for the Unification of Private Law [UNIDROIT], *Principles of International Commercial Contracts* (2004), art. 1.7.

117. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 222 (noting that the Spanish draft does not mimic the principles verbatim but the intentions are the same. The Spanish draft provides: "Each of the parties must keep secret the confidential information given by the other party during negotiations. The party who breaches the duty of confidentiality will be responsible for the damage caused to the other party by the breach of its duty.").

118. *Id*.

119. *Id*.

120. *Id*.

121. *Id*.

122. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 222.

F. The Danish & Dutch Systems

Countries that rely heavily on statutory bodies of law rather than case law are more likely to use the Principles as a tool to reform domestic law.[123] It is important to note that reform can happen within countries that depend more on case law through interpretation of national laws using the Principles. This type of interpretation has the effect of changing national laws, however, it is a little more difficult to trace. Professor Lookofsky of the University of Copenhagen Law Faculty discusses his take on the incorporation of the UNIDROIT Principles into the Danish system, a jurisdiction where a large portion of contract law is not codified.

> [The] source-of-law function (purpose) of the Principles seems particularly important in systems where great reliance is placed on uncodified essentially judge-made rules of law. In Denmark, for example, where the bulk of our existing law is not to be found in statutes, it seems unlikely that our Parliament would make use of the Principles as a model for future legislation: Our Contracts Act . . . is not currently up for revision and in the absence of any European commandment Denmark would hardly elect to codify the rest of its Contract law, let alone enact a Civil Code. What does, however, seem very likely is that some UNIDROIT Principles will rub off on, and thus become part of our judge-made contract law. We in Denmark predict, for example, that our domestic rules on liability will drift towards the international formulations in UNIDROIT and CISG.[124]

Professor Lookofsky's prediction has, to some extent, been accurate in the neighboring country, the Netherlands. In a case before the Supreme Court of the Netherlands, the judge strengthens his support of the interpretation of the applicable Dutch Civil Code by explicitly referencing Article 7.1.4 of the UNIDROIT Principles. In another 2008 case before the Dutch Supreme Court, the issue before the Court was whether or not an exemption clause is valid under Dutch law.[125] The Court held that exemption clauses are valid, reasoning that this was consistent with the

123. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 149.

124. Joseph Lookofosky, *The Limits of Commercial Contract Freedom: Under the UNIDROIT "Restatement" and Danish Law*, 46 AM. J. COMP. L. 485, 488 (1998).

125. HR 11 July 2008, NJ 2008, 546 m.nt. (Eisers/Atria Water Management B.V.) (Neth.), *available at* http://www.unilex.info/case.cfm?pid=2&do=case&id=1547&step=Abstract (last visited Oct. 25, 2011).

prevailing international practice, citing to Article 7.1.6 of the UNIDROIT Principles for support.[126]

G. The New Contract Law of the People's Republic of China

The UNIDROIT Principles largely inspired the 1999 reformation of Chinese Contract Law adopted by the Second Session of the People's Congress of the People's Republic of China.[127] In developing the new legislation, Chinese lawmakers heavily referenced the UNIDROIT Principles, particularly the Chapter laying out the general provisions.[128] In fact, former head of the Department of Treaty Law of the Chinese Ministry of Commerce, Professor Zhang Yuqing, stated "the broad scope of application of the UNIDROIT Principles has no doubt had an impact on the new [Chinese] Contract Law."[129] Thus, the drafters of Chinese Contract Law relied heavily on the UNIDROIT Principles and adopted various provisions when reforming their existing domestic contract law. The following section will provide some, but not all, examples of how the Chinese Contract Law and the UNIDROIT Principles are closely related.

Prior to China's reformation of its body of contract law, there was no provision on contract formation.[130] Chinese contract law, as it currently stands, adopted the offer and acceptance model used by the Principles and the CISG.[131] Articles 3–7 of the Chinese Contract Law embody basic contractual principles, such as equality, party autonomy, fairness, good faith, and public interest.[132] These basic principles are similarly provided for by the UNIDROIT Principles. Article 1.1 of the UNIDROIT Principles is similar to Article 4 of the Chinese Contract Law, which protects party autonomy by emphasizing that the parties are free to contract.[133] Article 1.7 of the UNIDROIT Principles requires that the parties must act in good faith, as does Article 6 of the Chinese Contract Law. There are also similar provisions with regard to the effectiveness of a contract. Article 8 of the Chinese Contract Law provides

---

126. *Id*.

127. *Development of a World Contract Law*, *supra* note 94, at 19; *see also* Huang Danhan, *The UNIDROIT Principles and their Influence in the Modernisation of Contract Law in the People's Republic of China*, 2003 UNIF. L. REV. 107 (2003); Zhang Yuqing & Huang Danhan, *The New Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts: A Brief Comparison*, 2000 UNIF. L. REV. 429, 430 (2000) [hereinafter Yuqing & Danhan].

128. Yuqing & Danhan, *supra* note 122, at 430.

129. Chi Manjiao, *Application of the UNIDROIT Principles in China: Successes, Shortcomings, and Implications*, 2010 UNIF. L. REV. 5, 14 (2010).

130. *Id*. at 13.

131. *Id*.

132. Yuqing & Danhan, *supra* note 122, at 431.

133. *Id*.

> [A] contract established in accordance with the law shall be legally binding on the parties. The parties shall perform their respective obligations in accordance with the terms of the contract. Neither party may unilaterally modify or rescind the contract. The contract established according to law shall be under the protection of the law.[134]

In contrast, Article 1.3 of the UNIDROIT Principles reads that "a contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles."[135] Here, the terminology used in the respective articles is not identical, but the underlying concept is the same.

Prior to the reformation of Chinese Contract Law, contracts generally had to be in writing. This was contrary to the trend in international commercial law that allows for greater flexibility in order to accommodate the modern market, particularly in regards to electronic commerce. Article 10 of the Chinese Contract Law provides that contracts may be written, oral, or in some other form.[136] Similarly, the UNIDROIT Principles do not require that a contract be concluded in a written form. The existence of the contract may be proved by any means including by witnesses.[137]

H. The Organization for the Harmonization of Business Law in Africa

Let us turn to Africa, one of the clearest and unique examples of how the UNIDROIT Principles may be used to reform domestic law. The Organization for the Harmonization of Business Law in Africa—known by the French acronym OHADA—was instituted on October 17, 1993 by a Treaty signed in Port-Louis, Mauritius and is comprised of sixteen member states: Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo, and the Union of the Comoros. The purpose behind creating the Organization was to "promote regional integration and economic growth and to ensure a secure legal environment

---

134. Yuqing & Danhan, *supra* note 122, at 431; SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 114.

135. Yuqing & Danhan, *supra* note 122, at 431.

136. *Id*. at 432.

137. *Id*.

through harmonization of business law," which was considered indispensable to the economic development of the region.[138]

In furtherance of the goal of creating a secure legal framework that would promote investment and economic growth among member countries, OHADA decided to undergo an ambitious harmonization project in the field of commercial law and called on UNIDROIT to assist the organization in creating a Uniform Act on Commercial Law.[139] In 2004, Marcel Fontaine, a member of the UNIDROIT working group from Belgium, was appointed the expert responsible for the project and worked directly with OHADA officials in creating the draft and providing commentary.[140] The Organization's Uniform Law not only drew inspiration from the UNIDROIT Principles, but more importantly, used the Principles as a model, adopting many principles almost verbatim.[141] In fact, the drafters of the Uniform Act only strayed from the Principles when it was absolutely necessary, due to the availability of a large amount of scholarly work, which had the ability to aid arbitral tribunals and courts in interpreting the new code.[142] The Uniform Act, however, diverges from the Principles in order to fill gaps left by the principles, with the view of creating a more comprehensive body of law. More specifically, the Uniform Act has strayed from the Principles in the area of illegality, nullity, privity of contracts, promise for another, performance to the detriment of a seizing creditor, third party performance, merger, conditional, joint and several, and alternative obligations, protection of obligees and third parties, paulian action, and simulation, because at the time the draft was created, the UNIDROIT Principles did not cover these areas of the law.[143]

How does this Uniform Act relate to the discussion of this section? That is, how are the UNIDROIT Principles being used as a tool to reform domestic laws? Like a self-executing treaty that applies directly to the states upon ratification, OHADA Uniform Acts will immediately come into force in all OHADA member states, once adopted, pursuant to Article 10 of

---

138. *In Brief—The Treaty,* OHADA, *http://www.ohada.com/plaquette_english.pdf* (last visited Oct. 25, 2011). For an in depth look at the harmonization process of commercial law in Africa *see generally* BORIS MARTOR ET AL., BUSINESS LAW IN AFRICA: OHADA AND THE HARMONIZATION PROCESS (2d ed. 2007).

139. *See generally* Marcel Fontaine, *The Draft of OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts*, 2004 UNIF. L. REV. 573 (2004); *see also* SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 95 an article by Marcel Fontaine entitled *Un Project d'harmonisation du Droit des Contracts en Afrique*.

140. *Development of a World Contract Law*, *supra* note 94, at 20.

141. *See id*.

142. Meyer, *supra* note 88, at 400.

143. *Id*.

the Treaty.[144] This means that the Uniform Acts automatically become domestic law without requiring the legislator to adopt the Act as law. The provisions of the Uniform Act supersede previous national legislation that covers the same subject matter.[145] The implications of the collaboration of OHADA and UNIDROIT are tremendous. The Uniform Act of OHADA, which has drawn its inspiration directly from the UNIDROIT Principles, will become the domestic law governing commercial contracts in sixteen Western African Countries when it is adopted.

VI. CONCLUSION

A major achievement in the area of international harmonization of private law has been the adoption of the UNIDROIT Principles. The UNIDROIT Principles have made tremendous progress since their first publication in 1994. Arbitral tribunals have applied the Principles as the law governing contracts, and national courts have used the Principles to support interpretation of national laws. They have been selected by parties as governing law or simply to fill the gaps of national laws or treaties, such as the CISG. The Principles have been used as a reference when negotiating international contracts, and they have been used as a tool to create hard law in many countries around the world that used the Principles as a model or simply as inspiration in making domestic reforms. Turning to supranational law reform, the UNIDROIT Principles may make their most substantial impact in West and Central Africa if and when the OHADA Uniform Act on Contracts is ratified. UNIDROIT should be recognized for their contribution to the legal system in the field of private international law, as the Principles have provided an important solution for international traders looking for security and neutrality when choosing to trade internationally and for countries who are looking to bring their contract law up-to-date with the modern markets and international commercial law trends.

144. MARTOR, *supra* note 133, at 18.

145. *Id*.

GENDER DIMORPHISM IN THE UNITED STATES LEGAL SYSTEM: A "POST-FEMINIST" AND COMPARATIVE CRITIQUE

Jim Wilets[*]

---

* Professor of Law, Chair of the Inter-American Center for Human Rights, and former Co-Director of the American Caribbean Law Initiative, Nova Southeastern University; M.A. in International Relations, Yale University; J.D., Columbia University School of Law. I would like to particularly thank Professor Lundy Langston, Sarah M. Anderson, Natasha Chisty, Heather Last, Veronica Krapackova, and Valerio Spinaci who contributed an enormous amount of research and insight into this article.

Professor Wilets prepared, at the request of the UN Secretary-General, the first two drafts of a proposal for reforming the human rights functions of the United Nations, which was subsequently incorporated into the U.N.'s *Agenda for Peace.* He worked as an attorney for the International Human Rights Law Group's Rule of Law Project in Romania, specifically addressing ethnic tension in the context of the judiciary and elections. He also represented the National Democratic Institute in a joint mission to Liberia with the Carter Center. Professor Wilets worked in Paris on some of the first negotiations between Israelis and Palestinians for a two-state solution and assisted in drafting a proposed Basic Law for a future Palestinian state. Professor Wilets has written extensively on international law and rule of law, including: *A Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization,* 31 U. PA. J. INT'L L. 753 (2010); *The Thin Line Between International Law and Federalism: a Comparative Legal and Historical Perspective on US Federalism and European Union Law*, RIVISTA STUDI SULL'INTEGRAZIONE EUROPEA, Dipartimento Di Diritto Internazionale E Dell 'Unione Europea Dell' Universita Di Bari, Anno V – nn. 1-2 (2010); one chapter in the ENCYCLOPEDIA OF FORENSIC AND LEGAL MEDICINE, *SECTION ON WAR TRIBUNALS* (Elsevier Publishing, winter, 2005); *Introduction: The Building Blocks to Recognition of Human Rights and Democracy: Reconciliation, Rule of Law and Domestic and International Peace, 25 Nova L. Rev. 387 (2001); 7* ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 597 (2001). *The Spanish edition of this article can be found at* 7 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 731 (2001) *(Introduccion: Los Pilares Fundamentales Para El Reconocimiento de los Derechos Humanos y la Democracia: la Reconciliacion, el Estado de Derecho y la Paz Nacional e Internacional); Lessons from Kosovo: Towards a Multiple Track System of Human Rights Protection, 6 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 645 (2000);* and *An International Legal Response to the Demise of the Nation-State: Towards A New Theory of The State,* 17 BERKELEY JOURNAL OF INT'L L. 193 (1999).

I. ABSTRACT

There has been extensive jurisprudential literature positing that the structure, values, and processes of the American legal and educational system, focusing heavily on adversarial battle among parties in court, and competition in law school, are fundamentally "male-centered." This "male-female" construct suggests that there is an essential dichotomy between the two genders with respect to resolving disputes that is reflected in the legal system, and that this "male-female" dichotomy is harmful to all participants and perhaps to justice itself.

This article expands upon this literature by arguing that many of the dysfunctional characteristics of the American legal system labeled "male" in the traditional feminist critiques are, from a comparative and historical perspective, not *essentially* male at all, but simply deviant from the jurisprudential approach of the great bulk of the world's legal systems, most of which are also dominated by men.

II. INTRODUCTION

In the last three decades, there has been extensive jurisprudential literature positing that the structure, values, and processes of the American legal and educational system, focusing heavily on adversarial battle among parties in court, and competition in law school, are fundamentally "male-centered."[1] The "male-centered" adversarial approach to legal education

1. *See, e.g.*, LANI GUINIER ET AL., BECOMING GENTLEMAN: WOMEN, LAW SCHOOL AND INSTITUTIONAL CHANGE (1997); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession,* 4 DUKE J. GENDER L & POL'Y 119 (Spring 1997); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (2d ed. 1993); Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289 (Spring 1989); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (Fall 1994); Robin

and legal process has also been termed the "gladiatorial" approach.[2] This "male-female" construct suggests that there is an essential dichotomy between the two genders with respect to resolving disputes that is reflected in the legal system,[3] and that this "male-female" dichotomy is harmful to all participants and perhaps to justice itself.[4]

West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (Winter 1988); Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867, 869 (1988); Yxta Maya Murray, *A Jurisprudence of Nonviolence,* 9 CONN. PUB. INT. L.J. 65, 77, (2009) (quoting Carrie Menkel Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process,* 1 BERKLEY WOMEN'S L.J. 39, 45 (1985) "As Carrie Menkel-Meadow explains: 'Where men see danger in too much connection or intimacy, in being engulfed and losing their own identity, women see danger in the loss of connection, in not having an identity through caring for others and by being abandoned and isolated.'"); Susan D. Carle, Review Essay, *Gender in the Construction of the Lawyer's Persona: Florence Kelley and the Nation's Work: The Rise of the Women's Political Culture*, 1830–1900, 22 HARV. WOMEN'S L.J. 239 (Spring 1999); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (Summer 1983) (arguing that the "objective standard" is simply the male point of view in disguise. Traditional liberal legalism makes male dominance invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society.).

2. *See*, *e.g.*, Sturm, *supra* note 1, at 119; Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State,* 86 TEX. L. REV. 819, 847–48 (2008).

> To be sure, they do not ask students to play the role of warrior litigators, but nor do they ask them to play the role of problem-solving collaborators. In failing to do so, they fail to maximize the chances that tomorrow's lawyers will act to change the adversarial legal culture in which they operate.

3. Murray, *supra* note 1, at 76 (Women's thinking is "contextual" and "informed by a more complex understanding of the psychological dynamics of relationships." She distinguishes this feminine mode of analysis from the masculine, which analyzes moral problems using "abstract[ions]" and "moral absolutes," a style she characterizes as "math[ematical]" and "hierarchical."); *id*. at 65 (This article "celebrates women's 'ethic of care,'" which is a brand of moral reasoning that emphasizes empathy, particulars, and human relationships, as opposed to men's "standard of justice," which stresses individualism, abstraction, and autonomy"); Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357, 362 (2007) ("many of the feminist objections to the adequacy or desirability of economics as a tool for capturing family life can be traced to feminist impulses that tend to entrench the male/female dichotomy in a number of ways.").

4. *See*, *e.g.*, Sari Bashi & Maryana Iskander, *Why Legal Education is Failing Women,* 18 YALE J.L. & FEMINISM 389, 391–92 (2006).

> As individuals, law school professors treat women differently from men, and as institutions, law schools cultivate and reward patterns of behavior that are more likely to be found among men than among women, even though these behaviors do not necessarily reflect the skills students need to be good lawyers, judges, and legal academics;

Tracy E. Higgins, *Feminism as Liberalism: A Tribute to the Work of Martha Nussbaum*, 19 COLUM J. GENDER & L. 65, 68–69 (2010).

This article expands upon this literature by arguing that many of the dysfunctional characteristics of the American legal system labeled "male" in the traditional feminist critiques are, from a comparative and historical perspective, not *essentially* male at all, but simply deviant from the jurisprudential approach of the great bulk of the world's legal systems. Needless to say, the vast majority of the world's legal systems are dominated by men, and presumably incorporate the value characteristics of those men. Nevertheless, the adversarial approach to resolving disputes is not the method for resolving disputes adopted by the great majority of the world's men. Thus, the most that could be said is that the United States system reflects the approach of *men in the United States* towards dispute resolution. Again, however, if the great majority of the rest of the world's men choose a different manner of dispute resolution than those of United States men, including those legal systems that derived from the gladiatorial approach of the early British common law system, then that difference must be accounted for by something in United States culture, society, and/or history apart from the essential characteristics of maleness. In fact, this article would argue that the sources of the American gladiatorial approach

---

> Recognizing that the exercise of individual choice is always constrained by culture and context, feminists have argued that under conditions of gender inequality, assumptions about choice and responsibility are not politically neutral. This critique has at least two distinct but related strands. The first and earlier strand emphasizes women's position in various social relationships--women as providers of care. According to this critique, liberal notions of autonomy posit an unrealistically unencumbered individual or "atomistic man." Beginning from this conception of liberal autonomy, some feminists have argued that liberalism undervalues care and connection and, as a result, is distinctly masculine in its orientation.

Chiwen Bao et al., *Left Learning: Theory and Practice in Teaching from the Left in Law School*, 31 N.Y.U. REV. L. & SOC. CHANGE 479, 487 (2007).

> Today's legal environment demands different skills: negotiation, managing multiple sources of information, and role flexibility are important skills for lawyers. Some skills modern lawyers must possess, such as collaboration with clients and colleagues, correspond to those that feminists ascribe to women more generally; the failure to teach law as to improve those skills, however, may signal that what is learned in law school and what legal practice actually entails may be largely unrelated.

NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION (1984); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Martha Minow, The Supreme Court 1986 Term Foreword, *Justice Engendered*, 101 HARV. L. REV. 10, 43, n.155 (1987).

to dispute resolution can be witnessed not just in law, but in the American economic, social, and political system.[5]

For example, all common-law countries share the common history of the British legal system, which incorporated "trial by battle" from its earliest genesis and still relies on an adversarial conflict between the participants. Nevertheless, the jurisprudential approach in the United States is somewhat unique in that it reflects an exaggerated free-market, "gladiatorial" approach to resolving a wide variety of legal and non-legal disputes. Thus, the gladiatorial, or "trial by battle" approach to resolving disputes can be witnessed in the unique United States legal approach to resolving labor disputes, delineating the limits of free speech, as well as, in the more quintessentially legal procedural issues of determining guilt and innocence in a criminal trial or economic liability in a civil trial. Indeed, many legal commentators defend the adversarial system precisely because it reflects the competition that is encouraged in other sectors of American society.[6]

This article is principally concerned with the dysfunctionality of the "gladiator" approach in American law, which is primarily a procedural, or process-oriented, concern. This focus on the *process* by which substantive rules are created should be distinguished from the substantive rules themselves. Thus, a critique of the dysfunctionality of those substantive rules or laws, or the means by which substantive rules in the United States and other countries perpetuate patriarchy, is beyond the scope of this article.[7]

---

5. *See* Kutak, *infra* note 6, at 174, and accompanying text.

6. *See* Robert J. Kutak, *The Adversary System and the Practice of Law, in* DAVID LUBAN, THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 172, 174 (1983), in which the author argues that the adversarial system is culturally appropriate for Americans because of their predominantly competitive society. The adversarial system reflects "the same deep- seated values we place on competition among economic suppliers, political parties, and moral and political ideals. It is an individualistic system of judicial process for an individualistic society." *See also* Anatol Rapaport, *Theories of Conflict Resolution and Law, in* M.L. FRIEDMAN, COURTS AND TRIALS: A MULTIDISCIPLINARY APPROACH 22, 29 (1975), in which the author argues that the U.S. adversarial system reflects the emphasis on competition in our society, and is a "direct transplant of competitive economics into the apparatus of justice."

7. This author assumes as proven that the great majority of the world's legal systems contain substantive rules that reflect male dominance. Indeed, a woman lawyer may, as a gross generalization, be arguably more caring and less adversarial oriented in her approach to procedure and yet still share very traditional assumptions about gender roles that would lead her to support substantive legal rules that disproportionately harm women and/or or men or enforce gender stereotyping. This article therefore also assumes as proven the enormous legal literature demonstrating that our legal system has adopted, as a substantive matter, legal norms enforcing male dominance through *de jure* sexual stereotyping. Based upon these assumptions, it would therefore be difficult to argue that this substantive institutionalization of male hegemony is not "essentially" gendered, particularly since, unlike the

This article accepts that the legal system in the United States does reflect "male" values, *at least as far as male values are socially constructed in the United States*. This article also accepts the assumption that many men throughout the world have historically chosen to resolve disputes through violence, and that, as a gross generalization, this mode of dispute resolution may be more typical of males than females. This article merely argues that the vast majority of the world's societies, historically and contemporaneously, have chosen to resolve disputes outside of war or armed struggle through means which are much less aggressive and conflict-driven as that exhibited by the United States (and to some extent the British) system of justice. This article will first discuss the contemporary feminist critique of the United States legal system. It will then expand upon this critique, arguing that the dysfunctions identified by the feminist critique are not essentially male at all, but simply unique to the particular history of Anglo-Saxon legal culture, and particularly that of the United States. The particular approach of the United States towards dispute resolution is reflected in the free-market, "gladiatorial" or adversarial approach to resolving a wide variety of political, economic, social, and legal disputes,[8] which frequently differs even from other *common law* systems. This article will then explore the unique history of the Anglo-American legal system that could explain at least some of its significant deviation from the rest of the world's legal systems. Lastly, the article will discuss how many male-dominated, non-common law systems do not share many of those dysfunctional characteristics labeled "male" in United States society. This article will then explore forms of dispute resolution adopted by other societies. This article will then conclude with a discussion of the implications of this argument for reforming the United States legal system through reforming the manner in which law is created and applied.

III. EXPANDING THE CONTEMPORARY FEMINIST CRITIQUE OF THE UNITED STATES LEGAL SYSTEM

There has been an enormous amount of literature written on the particular ways in which the United States legal system reflects particularly male values in the manner in which it trains lawyers and the ways in which the legal system resolves disputes.[9] Much of this literature has posited that

---

procedural differences between the US legal system and the rest of the world's legal systems, this male dominance of substantive legal rules is global, and historically consistent.

8. *See generally* Paul T. Wangerin, *The Political And Economic Roots of The "Adversary System" of Justice And "Alternative Dispute Resolution,"* 9 OHIO ST. J. ON DISP. RESOL. 203 (1994).

9. *See generally* Sturm, *supra* note 1; *See also* Rand Jack & Dana Crowley Jack, *Women Lawyers: Achetype and Alternatives*, 57 FORDHAM L. REV. 933 (1989).

this particularly "male" approach to training lawyers and resolving disputes is problematic for the legal system in general[10] and for the achievement of the legal system's primary goal of justice.[11]

Feminist critiques of the adversary system incorporate numerous elements. The two most salient are a general critique of the adversary system in terms of its negative consequences for achieving justice, and a specifically gender based critique, focusing on the negative consequences for the individuals engaged in the process, and on the system's promulgation of the "male" values of aggression and atomistic individualism.

---

10. Nancy A. Welsh, *Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically*, 2008 J. DISP. RESOL. 45, 57–58 (2008).

> I do know, however, that other professional schools are incorporating the development of "emotional intelligence" into their curricula, researchers are exploring the revision of law school *58 admissions practices to include consideration of humanistic factors that predict effective lawyers, and the Carnegie Foundation for the Advancement of Teaching has highlighted the law schools that are trying to assist law students in connecting legal conclusions "with the rich complexity of actual situations that involve full-dimensional people."

Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 517 (2009).

> A pitfalls pedagogy gives law students the vantage point from which to see any topic of professional responsibility both as a quick prod for a lawyer and in all its depth. By talking about problems for lawyers as sources of strategy and strength, and commending vigor in response to a setback, the pedagogy combats a tendency toward anxiety and unhappiness that wafts through law schools.

Id. at 481 (2009).

> This morose assessment, spoken from a locus of relative comfort and ease, appears to be shared at varying levels of privilege within the profession. Whether they choose to address demoralization, depression, dissatisfaction at work and in school, alienation, cynicism, heartlessness, or another pathology that lawyers and law students manifest, commentators on this population are united in their gloom. The empirically inclined among them gather data about lawyers' unhappiness that suggest an intractable problem.

11. *See*, *e.g.*, Susain Daicoff, *Articles Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997) ("In the last ten to fifteen years, three related crises have emerged with respect to the legal profession: 'professionalism' has declined, public opinion of attorneys and the legal profession has plummeted, and lawyer dissatisfaction and dysfunction have increased. . . ."). *See also* Sturm, *supra* note 1, at 119 ("Dissatisfaction permeates the public and professional discourse about lawyers and legal education. . . .").

Regarding the first element of this critique, the negative effects of the adversary system on justice and society as a whole have been widely discussed in the legal literature, and include such concerns as:

> a) Its non-contextual focus, based on winning with an abstract set of rules rather than achieving a mediated approach with a result more beneficial for both parties;[12]
> b) Its tendency to reward the wealthiest members of society, since they can afford the best lawyers or "gladiators," and are more likely to win, even if "objective" criteria of "justice"[13] would dictate a different outcome;
> c) A focus not just on the economically dominant actors in society and third parties, but also a disregard for the non-dominant economic actors to the dispute itself, as epitomized by the "economic" approach to calculating contracts and torts damages, rather than actual damages;[14]
> d) Its focus on the short-term economic interests of those in power, rather than the longer-term interests on third parties and the community in general;[15]

---

12. Jack, *supra* note 9, at 934 ("An attitude of emotional detachment reinforces the idea that law is a game to be played for its own sake; the adversary nature of law makes it easy to maintain personal distance. . . ."). "Women entering the practice of law find that the mores of the game bear the imprint of boys' play rather than that of girls." *Id*. at 935. *See also* West, *supra* note 1, at 1 (There are, of course, other dysfunctional aspects of the adversary system on justice and other nocent consequences of the system on individuals and society of this particular approach. Robin West has been one of the leading advocates of such a position, arguing a "Separation Thesis," which posits that the male-dominated dominant culture has forced us to think of ourselves and the world as separate. Males thus think of themselves as definitionally separate from other human beings. West asserts that women are "connected;" they differ fundamentally from men in that their basic experience is of connection (because of pregnancy and breast-feeding and because women are penetrated, rather than penetrating, in sexual intercourse) rather than of individuality. Women are more likely to view the morality of actions against a standard of responsibility to others, rather than against a standard of rights and autonomy from others. Males are therefore more likely to be more aggressive in litigation and negotiation, and in the manner they construct the legal system itself. Thus, women are more likely to be contextualist in their interpretation of the law, while men are more likely to apply abstract legal principles to issues, disregarding the human connections involved.).

13. The author apologizes for the use of quotations, as it tends to resemble a well-known Saturday Night Live skit, but it is arguable whether objective concepts of justice can actually be absolutely ascertained. Nevertheless, such terms are used in a relativist sense.

14. *See*, *e.g.*, *Peevyhouse v. Garland Coal & Min. Co.*, 382 P.2d 109 (Okla. 1962), in which the interests of the plaintiffs in seeing their property restored to its original state, pursuant to their contract with the mining company (specific performance), was sacrificed to the economic interests of the mining company in paying only market-level damages for its destruction of the property, which were minimal. *See also* economic approach to calculation of torts and contract damages.

15. Sturm, *supra* note 1, at 119.

> e) Its marginalization of women, people of color and sexual minorities;[16]
> f) Legal education's preoccupation with analysis rather than the "multi-faceted, transactional nature of legal practice[;]"[17]
> g) Whether law schools adequately train lawyers to deal effectively with 21st Century challenges, and whether the models of legal professionalism advanced by those schools are "morally and ethically justifiable;"[18] and finally;
> h) A disregard for non-adversarial means of dispute resolution,[19] reflecting the preferred (and unique) United States conflict-based or "market" approach to resolving disputes.

The second element of the gender-based critique focuses more on the gender-specific aspects of the adversarial system, arguing that the dysfunctional aspects contained in the first element of the critique results from the essentially male characteristics of the system and the system's actors. Heather Elliott, in a critique of the "difference model" of feminist theory, describes that model as follows:

---

16. *Id.;* Hon. Deanell Reece Tacha, *Women and Law: Challenging What is Natural and Proper*, 31 NOVA L. REV. 259, 272 (2007) ("Women in the judiciary have certainly had a positive effect on society in general and the legal profession specifically. For example, their presence has encouraged young women to pursue legal careers, and they have raised awareness of gender bias in the court system.").

17. Sturm, *supra* note 1, at 119.

18. *Id*.

19. Andrea Macerollo, *The Power of Masculinity in the Legal Profession: Women Lawyers and Identity Formation*, 25 WINDSOR REV. LEGAL & SOC. ISSUES 121, 125–26 (2008).

> The current state of the adversarial system exerts a disproportionate influence over lawyers' ethics and challenges the contemporary use of alternative dispute resolution and collaborative approaches to problem-solving. This thereby undermines practice styles which may be valuable for women in order to explore new means to validate their professional identities. Thornton found in her interviews of female lawyers that women become more affected by the ethical dilemmas posed by private practice's obsession with profits and the devaluation of family and personal life. These ongoing trends in the legal profession continue to undermine equality goals and render gender issues invisible, which unduly complicate women lawyers' identity formation.

Id. at 138 ("The 'double bind' means that women lawyers must achieve a delicate balance between the expression of masculine qualities and the repression of feminine qualities, with only subtle exposure of characteristics emanating from either side of the gender dichotomy.").

> Many scholars posit that an essentially female point of view affects the decision making of female judges. Women are thought to "contribut[e] a new, and perhaps uniquely female, perspective to lawyering—a more collaborative, cooperative and contextual approach with a preference for non- adversarial modes of dispute resolution over binary, rights-based justice."[20]

The argument is that many of those dysfunctional characteristics of the system can be remedied by incorporating arguably, essentially, "female" values of mediation and cooperation. The vast majority of the literature would argue that the stereotypical male characteristics of the legal profession are not simply a function of the dominance of men in the profession, but rather the institutional embrace and reproduction of those male values, regardless of the gender of the person participating in the system. Indeed, much of the contemporary literature addressing this issue has posited that admitting women into the legal profession has only a limited impact on the profession and legal education since women learn to change themselves to conform to the "male" profession.[21]

For example, it could be argued that the positive law approach in civil law, applying a rather broad general rule to each factual case on a *de novo* basis,[22] permits civil law courts to take context into account in applying law. This stands in opposition to the common law approach of forcing individuals into rigid legal rules, most of which were created with men in mind.[23] As noted above, this article would argue that the contemporary

---

20. Heather Elliott, *The Difference Women Judges Make: Stare Decisis, Norms of Collegiality, and "Feminine Jurisprudence:" A Research Proposal*, 16 WIS. WOMEN'S L.J. 41, 41 (2001) (*quoting* Cynthia Grant Bowman, *Bibliographical Essay: Women and the Legal Profession*, 7 AM. U. J. GENDER SOC. POL'Y & L. 149, 172 (1999)).

21. *See* Jack, *supra* note 9, at 935.

> Given that qualities learned by women at home and in play make them vulnerable in a predominantly male profession, one solution women have attempted is to eradicate feminine characteristics. . . . Particularly in the legal profession, which prides itself on objectivity, professionalism, and combativeness, traditional feminine traits are unacceptable.

22. This author acknowledges that while many civil law countries do not technically employ *stare decisis*, in reality, they may frequently employ something akin to *stare decisis* by employing case precedent as very persuasive case authority. As we know in the common law system, a skillful advocate can frequently turn persuasive authority into binding authority and *vice versa*.

23. The author also recognizes that theoretically, the civil law attempts to limit judicial discretion rather than permit it, as the preceding sentence seems to suggest. Nevertheless, in practice, the civil law system arguably permits more judicial discretion in responding to the particular context of

feminist critique of the United States legal system is too limited in its overly narrow focus on only gender-based sexual explanations for these dysfunctions in the United States legal system. This article would itself posit at least seven ways in which the traditional feminist critique is overly narrow.

First, characterizing the debate over the future of our legal system as a debate over essentially male and female values gives our present legal system too much credit. There are aspects of the United States legal system that are not essentially male at all, but simply dysfunctional. As long as the debate over the nature of the American legal system is characterized by an essentially "male-female" dichotomy, there implies a certain equality between the dual perspectives on our legal system. It implicitly also suggests that one variant is appropriate for a male and one for a female. This article would argue that what is characterized as "female" in the present literature may simply be a less dysfunctional legal approach to resolving disputes. The corollary to this argument is that what is characterized as "male" in the present literature may not constitute an appropriate approach to dispute resolution for *either* gender. In support of this argument, this article will demonstrate that the vast majority of the world's legal systems, historically and contemporaneously, have come to a similar conclusion, even though those systems have been overwhelmingly dominated by men. This article would thus take issue with those legal commentators such as Linda Chavez, who would argue that women should stop whining and "get with the program."[24] Those legal commentators assume, in an ethnocentric, sexist, and simplistic fashion, that the present United States legal system is the appropriate yardstick by which to evaluate the functionality of legal systems in general.

Second, the debate over what is male or female risks not only focusing on gender rather than the dysfunction itself, but also risks stereotyping women into an essentialist straightjacket. Indeed, empirical research undertaken by at least one legal commentator has indicated that the United States legal profession attracts both men and women who have a pre-existing tendency to engage in the more unsavory gladiatorial aspects of legal combat than the population at large.[25] Those women who may be

---

a case, the incorporation of which is one of the hallmarks of a feminist approach to the law, according to some legal commentators.

24. Linda Chavez, *Would-be Women Lawyers Need to Quit Looking for Excuses and Get with the Program*, CHI. TRIB., Apr. 16, 1997, at 23, *available at* http://articles.chicagotribune.com/1997-04-16/news/9704160002_1_lani-guinier-law-students-top-law-firms (last visited Oct. 12, 2011).

25. *See*, *e.g.*, Daicoff, *supra* note 11, at n.5, and accompanying text.

> Attorneys appear to differ from the general population in the way that they approach problems and make decisions, what they value and respond to, and what motivates them. Some of their personality and

attracted to the legal profession because they exhibit some of the traditionally defined male characteristics are no less essentially "female" than women with more traditionally defined female characteristics. Thus, it may not be men themselves that are the problem, but rather those aggressive characteristics we traditionally associate with men, which are present in both men and women, albeit to arguably different degrees.[26]

It is also possible to argue that we cannot even ascertain what women essentially are since they are the social constructs of a male dominated society. As Catharine MacKinnon argues:

> Women have a history all right, but it is a history both of what was and of what was not allowed to be. So I am critical of affirming what we have been, which necessarily is what we have been permitted, as if it is women's, ours, possessive. As if equality, in spite of everything, already ineluctably exists. [27]

From a different perspective, Justice O'Connor categorically rejects the "difference model" and articulates the viewpoint shared by many people that essentialism can prejudice women who choose to participate in the legal system as presently structured. Her insight is helpful in understanding this position, although this author would argue that her position too facilely dismisses the difference model, and too easily accepts, as a normative matter, the present structure of the legal system:

> [T]he move to ask again the question whether women are different merely by virtue of being women recalls the old myths we have struggled to put behind us. Undaunted by the historical resonances, however, more and more writers have suggested that women practice law differently than men. One author has even concluded that my opinions differ in a peculiarly feminine way from those of my colleagues. . . . The gender differences currently cited are surprisingly similar to stereotypes from years past. Women attorneys are more likely to seek to mediate disputes than litigate them. Women attorneys are more likely to focus on resolving a client's problem than on vindicating a position. Women attorneys are more likely

---

> cognitive characteristics appear to be present prior to law school, and some appear to be amplified by or inculcated in law school.

26. *Id*. at n.183–188, and accompanying text. This author makes no suggestion as to whether there is any empirical validity to postulations of differences in "aggression" between men and women.

27. CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987).

> to sacrifice career advancement for family obligations. Women attorneys are more concerned with public service or fostering community than with individual achievement. Women judges are more likely to emphasize context and de-emphasize general principles. Women judges are more compassionate. And so forth.

This "New Feminism" is interesting, but troubling, precisely because it so nearly echoes the Victorian myth of the "True Woman" that kept women out of law for so long. It is a little chilling to compare these suggestions to Clarence Darrow's assertion that women are too kind and warm-hearted to be shining lights at the bar.[28] From a somewhat different viewpoint, human rights legal commentator Ratna Kapur argues that the essentialization of women as victims is counterproductive in the international human rights context. She writes that:

> My main argument is that the focus on the victim subject in the [violence against women] campaign reinforces gender and cultural essentialism in the international women's human rights arena. It also buttresses claims of some "feminist" positions in India that do not produce an emancipatory politics for women. This focus fails to take advantage of the liberating potential of important feminist insights. These insights have challenged the public/private distinction along which human rights has

28. Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1553 (1991). But that is not, of course, the same as arguing that qualities that are traditionally associated with women are not valuable in the judicial context. It's just that they don't have to be characterized as solely female qualities. *Cf.* Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 17 (2009).

> In the context of judicial decision-making, empathy, which, at its core, involves the ability to understand the life experiences or emotions of another person, need not mean "intuition" nor should it be perceived as injecting the "mystical" into the ordered resolution of disputes. Rather, as Professor Lynne Henderson explains, "empathy enables the decision maker to have an appreciation of the human meanings of a given legal situation," ultimately aiding the judge both in the process of reaching a legal conclusion and in justifying that conclusion "in a way that disembodied reason simply cannot." Moreover, the fact that a judge has the ability to empathize with human beings involved in a legal dispute does not mean that the judge is, thus, unable to decide the case in a fair and impartial manner.

> operated, and traditional understandings of power as emanating exclusively from a sovereign state.[29]

Even assuming the validity of the "difference model" assumptions posited by some feminist theorists, there can be little doubt that there is a tremendous amount of overlap between men and women with respect to these sex differences.[30]

Third, traditionally "male" values of aggression in conflict resolution are so institutionally imbedded in our legal system that women frequently find themselves forced to adapt to that traditionally male model, and thus,

---

29. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 2 (2002). *See also* Darren Rosenblum, *Rethinking International Women's Human Rights Through Eve Sedgwick*, 33 HARV. J. L. & GENDER 349, 353–54 (2010).

> Positing that women are sexualized victims relies on the currency of MacKinnon-style essentialist notions of both sex and culture in the International Women's Human Rights arena. IWHR's emphasis on the victim subject overlooks multi-layered experiences that take into account perspectives of class, race, religion, ethnicity, and/or sexual orientation. This posture marginalizes and disempowers women in the developing world. These women victim subjects need states to protect them, opening the door to their moral regulation. This moral regulation can serve to imprison women in a second wave sexual paradigm. In this recreated attic reverberating with yellow wallpaper, it is not men's perception of women's hysteria that traps them, but women's own obsession with victimhood.

See also Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 611 (2009) ("I argue, however, that the issue of the victim-subject narrative in the dominant discourse on human trafficking is one aspect of a larger problem—the operation of otherness in the conception of the problem of human trafficking and, consequently, the legal strategies developed to combat it."). *See also id*. at 609.

> Othering operates across multiple dimensions, including race, gender, ethnicity, class, caste, culture, and geography. The result is a devaluation of certain individuals, communities, and even nations, and a privileging of those who are members of the dominant group, class, or country. Some populations experience "intersectional othering" because they possess multiple characteristics that are devalued in the current global power structure. For example, poor women of color in developing countries confront othering across potentially all of the above mentioned dimensions, giving them little or no voice in shaping the dominant understanding of human trafficking or appropriate remedies to the problem.

30. *See*, *e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 410–11 (1990) ("The male and female distributions of attributes intersect. Many women are more aggressive and less nurturant than many men, just as many women are taller than many men, although the average man is taller than the average woman.").

women themselves become perpetrators of that system that was, in fact, created by men. Thus, focusing solely on the sex of the perpetrator of "male" values ignores that many of the perpetrators are women, albeit women who have been "co-opted" by a "male" system.

Fourth, as a corollary to the argument immediately above, restricting the debate over reforming the United States' judicial system to a "male-female" debate risks generalizing American concepts of "male" as universally male. As this article will argue, many of the dysfunctional characteristics of the United States legal, political, and economic system labeled male, are not shared by most other legal systems that are as male dominated as the United States system. Thus, the traditional feminist critiques of the United States legal system risk perpetuating the myth that the structure and functioning of United States society is indicative of what the rest of the world is, does, or should do.

Fifth, although the purpose of this article is to suggest a conceptual framework for thinking about our legal system that transcends a rigidly dualist social constructed male-female paradigm, it should be recognized that the dysfunctional consequences of those aspects of the United States legal system that are labeled "male" may, in fact, be experienced by individuals as very gender-specific.[31] In this sense, the essentialist-social constructionist debate may appear largely irrelevant to those experiencing the harmful consequences of male hegemony in their daily lives. Those consequences are, after all, certainly gender based to the extent gender is always socially constructed within a particular society. Nevertheless, it is important to look beyond the United States social construction of gender in order to explore and advance the best means of reforming the legal system without limiting ourselves to the United States experience.

Sixth, from a practical perspective, characterizing the dysfunctional aspects of the United States legal system as essentially "male," encourages the male members of the legal profession to be more resistant to reforming the dysfunctional characteristics of the United States legal system than they might otherwise be.[32] After all, the negative consequences of these

---

31. *See*, *e.g.*, DRUCILLA CORNELL, BEYOND ACCOMMODATION 120 (1991). ("Sexual difference as gender inequality no less 'real' for being socially constructed.").

32. *See generally* Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1038 (1996) ("Feminist legal theorists have paid mild attention to whether men could embrace feminist objectives. . . . This issue is treated as a relatively unimportant one, usually relegated to footnotes."). *See also* Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 204 (2008).

> Men are the dominant casualties and injuries in war. Systemically, men are the dominant victims of violent crime. Men often pay a price for their privilege, a price that many may be unwilling to pay but are blocked from another alternative. In addition, how the price of privilege

dysfunctional aspects of the United States legal system can negatively affect both male and female members of the legal profession and society.[33] As Nancy Levit argues, the traditional discourse between cultural feminists and dominance theorists on the one hand, and men on the other, leads to dialogue as a competition. "The form of the argument—that women's ethics should prevail over men's—sets up a discourse that is at best competitive, at worst combative. Whose values should prevail?"[34] In this battle, unfortunately, society cannot win, particularly when men currently dominate the political, legal, and economic spheres of American society.

This article does not suggest that the comparative critique proffered herein boils down to a simple argument for alternative dispute resolution as the solution for the gladiatorial aspects of the United States legal system. Many leading scholars have proffered just such an alternative as a solution to the problems with the adversarial system,[35] and some legal commentators have suggested that "alternative dispute resolution" (ADR) constitutes, to some extent, the feminist alternative to the "male" adversarial system. Nevertheless, this article limits its scope to suggesting that because many societies have already incorporated ADR techniques as part of their legal procedure, the ADR present in those societies simply evidences that a non-adversarial approach to dispute resolution is more likely to be determined

---

> can be exacted, even when privilege itself may not be enjoyed, exposes the complex way in which gender hierarchy is sustained.

Id. at 204.

> Powerlessness of the individual has to be taken into account but does not remove the reality of power—and maybe advantage or privilege—for the group as a whole. Institutions, structures, and practices that reinforce such arbitrary gender power must be our focus, including where they subordinate and injure boys and men.

33. *See* Levit, *supra* note 32, at 1040, in which the author observes:

> The image of masculinity is also formed by legal responses to areas in which men suffer injuries. Laws preventing male plaintiffs from suing for same-sex sexual harassment, and analysts' lack of interest in male rape and spousal battery of men contribute to a climate in which men are taught to suffer in silence. In the areas of parental leave and child custody, men are socially and legally excluded from caring and nurturing roles. Various legal doctrines send distinct messages about what it means to be male. This cumulative legal ideology of masculinity is under-explored.

34. *Id*. at 1047.

35. *See* Landsman, *infra* note 42, and accompanying text (Justice Burger's condemnation of adversarial litigation and endorsement of ADR as a solution to those problems with litigation).

by culture than determined by essentialist concepts of gender.[36] Moreover, ADR may frequently and simply reproduce adversarial values in a new form.[37] ADR may also perpetuate and expand the uniquely aggressive American concept of "freedom of contract," which arguably is one more way of introducing adversarial, gladiatorial values into the structure of social relations.

IV. A HISTORY OF THE COMMON LAW APPROACH TO DISPUTE RESOLUTION

A. "Trial by Battle" in Litigation

It would be helpful to examine the history of that adversarial/gladiatorial approach to understand how this adversarial approach to dispute resolution has been a unique component of common law dispute resolution for over a millennium.

1. A Very Short History of the Common Law

It is easier to understand the unique legal experience of common law countries when one understands the unusual development of dispute resolution in England. "Litigation" in medieval England was frequently characterized by, *inter alia*, a literal battle between the parties, appropriately termed "trial by battle," or, somewhat later, through a kind of metaphorical battle between the defendant and God, exemplified by "trial by ordeal" involving such specific litigation techniques as "trial by fire" and "ordeal of cold water."[38]

---

36. *See* Julie Barker, *A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOYOLA INT'L & COMP. L.J. (1996).

37. *See*, *e.g.*, Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 1 J. INST. STUD. LEG. ETH. 49, 72 (1996).

> I strongly believe that we are on the right track in experimenting with and using a variety of forms of "alternative dispute resolution" – I prefer the new term – "appropriate dispute resolution." Yet, as I have stated elsewhere, I fear many of these forms (mediation, mini-trials, settlement conferences, early neutral evaluations, reg-neg) are becoming corrupted by the persistence of adversarial values.

38. *See*, *e.g.*, Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 39 (2002) (Civil and criminal disputes in medieval England were decided by primitive trials by battle, wagers of law, and trial by ordeal). *See also* STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND A DEFENSE 8–9 (1984); and Henry Lea, *The Wager of Battle*, *in* LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT 233–53 (Paul Bohannan ed., 1967). For an outstanding statistical analysis and description of medieval English forms of adjudication and their prevalence, *see* Daniel Klerman, *Settlement And The Decline Of Private Prosecution In Thirteenth-Century England*, 19 LAW

Legal historian Theodore F.T. Plucknett gives a description of trial by battle in the context of criminal litigation, observing that battle occurred in criminal cases, "[w]hen a private person brought a criminal charge against another. It was deadly; if the defeated defendant was not already slain in the battle he was immediately hanged on the gallows which stood ready."[39] Legal historian J.H. Baker discusses some of the other adjudication techniques in criminal cases, where the litigation more closely resembled contemporary litigation to the extent society as a whole—or fire, water, etc.— functioned as the arbiter of justice:

> Ordeals involved an appeal to God to reveal the truth in human disputes. . . . In [ordeal by fire], a piece of iron was put into a fire and then in the party's hand; the hand was bound, and inspected a few days later; if the burn had festered, God was taken to have decided against the party. The ordeal of cold water required the party to be trussed and lowered into a pond; if he sank, the water was deemed to have "received him" with God's blessing, and so he was quickly fished out.[40]

English legal historian F.M. Powicke noted the explicit interrelationship between law and force throughout common law legal history:

> Law in a feudal society was inseparable from force, but not obscured by it: they were informed by the theory of contract which informed all feudal relations. . . . Force was never absent, yet was never uncontrolled. In civil procedure we find the elements of war, such as the duel, and the hue and cry; and in war, we find constant applications of legal theory. War was a great lawsuit. The truce was very like an essoin, a treaty drawn up on the lines of a final concord, the hostage a surety, service in the field was the counterpart of suit of court. *The closeness of the analogy between the field of battle and the law court is seen in judicial combat*. Trial by battle

& HIST. REV. 1 (2001); CHRISTOPHER BROOKE, FROM ALFRED TO HENRY III, 871–1272 (1961); GEORGE HOLMES, THE LATER MIDDLE AGES, 1272–1485 (1962).

39. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 105 (1929).

40. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 5 (3d ed., 1990).

> was a possible incident in all negotiations.[41] (Emphasis added).

Some have taken a different viewpoint, arguing that the adversarial system is a relatively new concept, conceptually quite distinct from such systems as "trial-by-battle."[42] A problem with this argument is that it focuses on the modern technical aspects of the adversary system, which certainly did arise later, largely to offset the problematic consequences of the previously existing system. Nevertheless, the adversarial system is fundamentally analogous to the original "trial by battle," even if the mechanisms have changed. Indeed, Chief Justice Warren Burger noted the similarities between the two, and the similarly destructive impact of both means of trial: "For many claims, trial by adversarial contest must, in time, go the way of the ancient trial by battle and blood. Our litigation system is too costly, too painful, too destructive for a truly civilized people."[43]

B. Dispute Resolution in other Male Dominated Societies

1. The Common Law versus the Civil Law

Since this article is an effort at illustrating the implications of the peculiar Anglo-Saxon approach to the legal system, it is useful to think how an adversarial process is central to the common law's approach to *creating* law, as well as its procedural application of law. This is particularly appropriate since the creation and application of law are dialectical: although the creation of law such as statutes and constitutions is an entirely political process, the interpretation and application of that positive law by judges itself creates new law. This dialectic is particularly pronounced in the common law, which itself is sometimes defined as "judge made" law. The intrinsic interrelationship between the creation and application of law thus makes an analysis of the peculiar mode of law creation in the common law countries of particular interest for the purposes of this article.

At the same time that the English were attempting to adjudicate by beating each other to death, or drowning each other, in an effort to

---

41. MATTHEW STRICKLAND, WAR AND CHIVALRY: THE CONDUCT AND PERCEPTION OF WAR IN ENGLAND AND NORMANDY, 1066–1217, at 45 (1996) (*citing* F.M. POWICKE, THE LOSS OF NORMANDY, 1189–1204, at 242 (2d rev. ed., 1961)).

42. *See*, *e.g.*, Wangerin, *supra* note 8, at 206–08. *See also* STEPHEN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE (1984); ROSCOE POUND, JURISPRUDENCE 696–703 (1959); Stephan Landsman, *The Decline of the Adversary System and the Changing Role of the Advocate in That System*, 18 SAN DIEGO L. REV. 25 (1981).

43. Barbara Dawson & Michele L. Stevenson, *Getting Help with ADR: A Guide to the Main Players*, 10 BUS. L. TODAY 51, 54 (Jan.–Feb. 2001).

determine God's will,[44] other civilizations, even at this early date, were creating more rational means of creating law.[45] This is not to say that the barbaric forms of trial and legal procedure employed by the medieval British were unique to the British. Nevertheless, at a much earlier date, other European societies employed more rational, logical means of creating law and, to a much lesser extent, resolving disputes.[46] Of course, "rational" does not always mean "good," as evidenced by the variant of the civil law used during the Inquisition. Indeed, the common term for the Continental European approach to judicial dispute resolution is frequently termed the "Inquisitorial System," which does not readily conjure images of impartial justice.

The development of a more "rational" or "civilized" approach to law was more pronounced in the more Romanized areas of the former Roman Empire, and weaker in the Germanic and Anglo-Saxon areas of Europe.[47] For example, in the context of bankruptcy, one legal commentator has noted that:

---

44. *See*, *e.g.*, PAUL R. HYAMS, "TRIAL BY ORDEAL: THE KEY TO PROOF IN THE EARLY COMMON LAW," ON THE LAWS AND CUSTOMS OF ENGLAND 90–126 (1981).

45. To avoid oversimplification, it is important to note that English theories and philosophy of law shared a great deal with their continental counterparts, even though the actual procedure of dispute resolution may have differed substantially. *See* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1656–57 (1994).

> It is conventional wisdom that distinctively English conceptions of the nature, sources, and purposes of law can be traced back to the early history of the English common law in the twelfth to fifteenth centuries. In fact, however, there is little in the legal literature of those centuries that distinguishes English philosophy from that of other peoples of Western Christendom.

46. *See*, *e.g.*, Remigius N. Nwabueze, *Historical and Comparative Contexts for the Evolution of Conflict of Laws in Nigeria*, 8 ILSA J. INT'L & COMP. L. 31, 31 (2001) ("It was in the Italian city-states in the Middle Ages that a scientific approach was adopted toward the solution of disputes arising from transactions and intercourse with foreigners. They had separate courts, laws and magistrates for that purpose."). *See also* KENNETH PENNINGTON, "Law, Procedure of, 1000–1500," Dictionary of the Middle Ages, 7 (1986) at 502–06; Evan R. Seamone, *When Wishing on a Star Just Won't Do: The Legal Basis for International Cooperation in the Mitigation of Asteroid Impacts and Similar Transboundary Disasters*, 87 IOWA L. REV. 1091, 1139 n.167 (2002), and accompanying text (*citing* RONALD W. CARSTENS, THE MEDIEVAL ANTECEDENTS OF CONSTITUTIONALISM 55 (1992)) (in turn, crediting John of Paris (1250/4–1304) for articulating the ideal of "stewardship as an authorization to use or to distribute goods," and the idea that "the community determines jurisdiction over the use of common things"). RONALD W. CARSTENS, THE MEDIEVAL ANTECEDENTS OF CONSTITUTIONALISM 81 (1992) (*citing* Marsilio of Padua (1275/80–1342), based on the Aristotelian notion that "[t]he utility of government is measured by the degree to which it can provide the conditions necessary for a 'sufficient life.'").

47. *See generally* Katherine Fischer Drew, *Public vs. Private Enforcement of the Law in the Early Middle Ages: Fifth to Twelfth Centuries*, 70 CHI. KENT L. REV. 1583, 1587 (1995).

> [T]he innovation of discharge seems much more ordinary if the comparison is not with a brutal system such as the medieval English one, which was not even rivaled by the German one in this count, but with other legal systems which also had greater experience with commerce. The cessio bonorum of later Roman Law was followed by Italian city-states of commercial success such as Padua or Venice. Cessio bonorum did retreat with the adoption of the civil codes that substituted Roman law in continental Europe, but it was not replaced by anything like the English debtors' prison.[48]

Much of the historical reason for this divergent development resides in the particularly historically focused development of the civil law, based in the longstanding Roman and even earlier legal jurisprudential traditions. To simplify matters, the civil law created law through the conscious, rational application of human thought to systematically create rules for human conduct. The civil law, first of all, approaches law as a logical, deliberate, formulation of rules to cover every potential factual circumstance that may arrive. An analogy can be made to a hotel reception area with its set of cubbyholes in which keys and mail are placed. The law is structured as a set of cubbyholes of legal rules, into which every factual exigency can be placed.

Richard B. Cappalli, a comparative legal scholar who is a critic of the civil law system, nevertheless describes the civil law's creation of law as follows:

> [The Civil Law's] centerpiece is the civil code, a vast elaboration of legal concepts, definitions, institutions, principles, and rules stated at a high level of generality and purporting to cover the entire realm of private relations: persons and the family, adoption, succession, property rights, contractual obligations, agency, surety, unlawful harm-causing acts, labor, companies, prescription of actions, evidence, creditor preferences, and others. The goal of the civil code is to state in a general, orderly, integrated, and complete way the rules of private law needed to regulate private relations.[49]

---

48. Nicholas L. Georgakopoulos, *Bankruptcy Law for Productivity*, 37 WAKE FOREST L. REV. 51, 57 (2002).

49. Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage Over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 93–94 (1998).

This elaborate process has been termed "legal science" by legal commentators in the sense that rational thought has been employed by legal scholars to create a logical legal structure, and deductive logic is then used to deduce the law that should be applied to a particular set of factual circumstances.[50] Cappalli further observes that:

> The civilian codes, substantive and procedural, are structured as magnificent exercises in logic, starting with the most general purposes, propositions, and definitions, and logically elaborating their implications and interactions in a network of increasingly detailed rules. Once launched, the codes form the premises for case solutions. Through logical reasoning, deductive and analogic, the civilian lawyers and judges extract the code's solutions to a myriad of human conflicts.[51]

The common law, unlike the civil law, is created in piecemeal fashion, based on a line of cases, or conflicts, between parties. In the common law, sense is made of these series of cases through a process of synthesis, an analytically complex process by which facts of one case are distinguished or analogized to those of other cases. This process is, however, not perfect, and an argument can be made that any case can be differentiated from another, depending upon the ultimate goal of the judge. One has only to observe the number of closely split decisions by justices of the United States Supreme Court to detect that the common law process of synthesis is less than scientifically precise. Moreover, the almost perfect correlation between the Justices' decisions, and their pre-existing ideological inclinations, suggests that the inconsistencies in this less than perfect process are not random, but rather quite deliberate. In contrast, in the civil law, each decision is based on the facts before it, and must rise and fall on the merits of the application of the law to the specific facts of the case before the judges. That is not to say that civil law judges are always impartial—far from it. Nevertheless, a civil law judge is not bound by precedents that may require a certain result as a matter of law, but be inequitable in a particular set of circumstances. This view of the civil law is, of course, in tension with the common shibboleth that the civil law does not permit discretion on the part of judges. In theory, a civil law judge cannot exercise discretion since she is strictly bound by the positive law. In practice, however, the absence of *stare decisis* gives her considerably more latitude in how she applies the words of the fixed law to a particular set of

50. *Id*. at 94.
51. *Id*. at 89.

facts. For example, in the United States Constitution, the words of the equal protection clause have remained constant, but women were not originally considered sufficiently "persons" under that clause to give them the right to vote. Now, such a reading of the clause would be unthinkable. This process of adapting to new realities and different contexts is facilitated in the civil law.

The civil law not only benefited from a rich history of rational analysis of legal problems, it responded rapidly to the Enlightenment's struggle between the Church and more traditional rational approaches to law. Charles Reid notes that in the twelfth Century, European continental law, or civil law, responded rapidly to the developments of the Enlightenment by developing a system of canon law. At the same time, the legal scholars and rulers in Western Europe re-examined the Roman Law of Justinian. Schools of law were established expressly for the teaching, and a "Digest was reintroduced to a Western readership in the late eleventh century."[52]

It should also be noted that there are aspects of the common law system that can promote justice and fairness. For example, the use of juries as independent fact-finders clearly helps avoid sole reliance on potentially biased judges. The adversary system between lawyers engaged in adversarial combat also arguably permits a greater exposition of every possible fact of relevance. That the common law may have some, or even many, features that promote justice better than a less-adversarial system only supports the central thesis of this article that the development of the particular American approach to dispute resolution is not *simply* a bizarre, male approach to dispute resolution, but rather an approach that reflects a very particular philosophical approach to dispute resolution in general. Having discussed the historical basis for the unique approach of the common law towards dispute resolution, it is helpful to take a comparative approach to dispute resolution to avoid drawing sweeping conclusions from a narrow comparison of the common and civil law systems.

2. Indigenous Methods of Dispute Resolution

Indigenous societies frequently employ forms of dispute resolution that one might expect in relatively tight knit communities where social harmony is a critical value. Although it is difficult to generalize about such disparate societies, it is helpful to discuss some general aspects of dispute resolution that are common, although certainly not universal, in indigenous

---

52. Charles Reid, *"Am I, by Law, the Lord of the World?" How the Juristic Response to Frederick Barbarossa's Curiosity Helped Shape Western Constitutionalism*, 92 MICH. L. REV. 1646, 1647 (1994); KENNETH PENNINGTON, THE PRINCE AND THE LAW, 1200–1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION (1993).

societies. Dispute resolution is usually focused on restoring harmony among the members of the group, healing wounded pride and feelings. To that end, the focus of the process tends to be on resolving the dispute so that all members feel that justice has been served. Although there may be "punishment," that is not the primary focus of the process: rather it may be a means towards achieving a generally understood community based concept of "justice." This contrasts with Western styles of adjudication, where the focus is almost entirely on satisfaction of abstract notions of justice, with clear winners and losers.[53] Common to most of these indigenous methods of dispute resolution are formalized rituals to solemnify the acts of apology, forgiveness, or retribution. The case studies below of indigenous dispute resolution are but a very small snapshot of indigenous systems of dispute resolution. These case studies are simply intended to illustrate how other, male dominated societies that are neither civil law nor common law based, have approached dispute resolution.

It also must be recognized that indigenous societies frequently have unique social conditions that permit a less adversarial system of dispute resolution than that found in the common law, or even civil law systems. The close community, tight relationships among the parties, and relatively homogenous values and religious beliefs are conditions that simply cannot be replicated in larger societies.[54] Nevertheless, regardless of the means employed to accomplish the particular goals of each indigenous system of dispute resolution, these systems illustrate that male dominated societies other than the civil law system have effectuated dispute resolution systems that are radically at odds with the supposedly essentially male common law dispute resolution system.

a. Case Study: The Navajo Justice System of Dispute Resolution

The Code of Indian Offenses of 1938 and the Indian Reorganization Act of 1934 set forth the structure of the Indian Courts.[55] As a result of forced migration and assimilation, few tribes had recollection of the traditional dispute resolution processes.[56] Today, tribes make effort to

---

53. Carole E. Goldberg, *Symposium: Indian Law into the Twenty-First Century: Overextended Borrowing: Tribal Peacemaking in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1005–06 (1997).

54. *Id*.

55. Gretchen Ulrich, *Current Public Law and Policy Issues: Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 HAMLINE J. PUB. L. & POL'Y 419, 432 (1999).

56. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (Fall 1997).

include "traditional tribal values, symbols, and customs into their courtrooms and decisions."[57]

The Navajo Nation Peacemaker Court uses the adversarial system. Nevertheless, the Navajo legal system is distinguished from the state model of adjudication, in that, it is "horizontal" as opposed to "vertical."[58] A vertical system relies on hierarchy, using rank and coercive power to address conflicts. Parties have limited control over the process and a judge or jury makes the final decision. In contrast, a horizontal legal system uses a line to portray equality. The Navajo Nation uses the circle to analogize, explaining that in a circle there is no right or left, nor is there a beginning or end, and that every point—person—on a line of the circle looks to the same center as the focus. Further, it conveys the image of people gathering together for discussion. The Navajo Nation makes this alternative to vertical justice work by favoring methods which use solidarity to restore good relations among people and with one's self. It employs a system of egalitarian relationships, replacing force and coercion with group solidarity, having no ranks or status classifications. The process is referred to as "peacemaking."[59]

The use of the clan as a tool fosters deeply emotional feelings, which create solidarity; this is referred to as *k'e*.[60] "Navajo Justice uses *k'e* to achieve restorative justice. When there is a dispute the procedure, which [they] call 'talking things out,'" includes providing notice to every person concerned or affected by the dispute to a gathering to discuss the matter.[61] The gathering is in a relaxed atmosphere where every member of the community affected by the case, even indirectly, "has the opportunity to be heard."[62] The "zone of dispute" is wider than that of the vertical system, in that, it includes not only the parties to the dispute but also relatives that the problem affects.[63] The Navajo Justice system has no formal rules of procedure or evidence.[64] Free communication is encouraged until a consensus is reached.[65] "The process has been described as a ceremony."[66]

---

57. *Id*. at 2.

58. Robert Yazzie, *"Life Comes From It:" Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177 (1994).

59. *Id*. at 181.

60. *Id*.

61. *Id*.

62. *Id*. at 182–83.

63. Yazzie, *supra* note 58, at 183.

64. *Id*.

65. *Id*.

66. *Id*. at 184.

Navajo tort law, an example of restorative justice, is based on the theory of *nalyeeh*, a demand to be made whole by an injured party.[67] The injured party does not seek answers regarding intent, causation, fault, or negligence.[68] The underlying premise for *nalyeeh* is compensation for the injured party so there are no bad feelings within the tribe.[69] In addition, the Navajo employ the concept of distributive justice to address the well being of the community.[70] Distributive justice does not address fault or adequate compensation; instead, distributive justice is concerned with the well being of the community. The injured party's feelings and the defendant's ability to pay are considered in the award of compensation.[71]

The Navajo Peacemaker Court allows judges to refer cases to local communities so that issues can be resolved in a free-form gathering instead of taking the case to court.[72] The Court uses a *naat'aanii*, a peacemaker, who is selected by the community to act as a civil leader.[73] The *naat'aanii* is a guide who helps implement distributive justice by sharing knowledge with the disputants in order to help them achieve consensus.[74] Additionally, the *naat'aanii* has personal knowledge of the parties and dispute and is not impartial or neutral like Western mediators.[75] The desired outcome of the process is to restore harmony between the parties and within the tribe.

b. Case Study: The Rotuman System of Dispute Resolution

The Rotumans are a minority ethnic group in the Republic of Fiji. The Rotumans bear a closer cultural resemblance to other Polynesian ethnic groups, such as the Samoans, than the other ethnic groups in Fiji.[76] In his book, *Dispute Management in Rotuma*, Alan Howard notes that disputes may be as heated as any in the United States. Nevertheless, they are frequently prevented from escalating into violence through dispute resolution techniques such as mediation by local chiefs and ritualized apology.[77]

Again, this indigenous dispute resolution system is aided by:

---

67. *Id*.
68. Yazzie, *supra* note 58, at 184.
69. *Id*. at 185.
70. *Id*.
71. *Id*.
72. *Id*. at 186.
73. Yazzie, *supra* note 58, at 186.
74. *Id*. at 186–87.
75. Ulrich, *supra* note 55, at 432.
76. Alan Howard, *Dispute Management in Rotuma*, 46 J. ANTHRO. RES. 263, 263 (1990).
77. *Id*. at 271.

> 1) a cultural belief system that teaches that vengeance may be effected by ancestors if justice is not done in the present;
> 2) a social conditioning to take into account the interests of the larger community, as opposed to solely individual interests; and
> 3) a belief that an apology is frequently more important than restitution and/or retribution.[78]

The Rotumans have five ritualized versions of the formal apology.[79] When performed correctly, acceptance of the formal apology, *faksoro*, is virtually mandatory, and is considered an honorable act.[80] The Rotumans are more typical than not of dispute resolution techniques in Polynesia and Melanesia. Jim Dator, in his Report to the State Justice Institute,[81] documents the use of ADR techniques of dispute resolution in cultures such as Polynesia, Micronesia, and Japan. In his Report, Dator notes, *inter alia*, the importance of "apology," and the involvement of community figures in resolving the dispute.

c. Case Study: The Minority Iban System of Dispute Resolution in the Malaysian Sultanate of Brunei

While the government of Brunei implements the national ideology of Melayu Islam Baeraja (MIB), which enforces Islamic principles, the Iban tribe does not follow the dispute resolution methods set forth by the MIB. Instead, religious law does not have any effect on the dispute resolution process of the Iban. Historically, all members of the Iban tribe lived collectively in an elevated longhouse, a house built on high stilts. The high construction of the house made it easier to defend the dwelling against attack as ladders were drawn up and the house defended by all members of the community.[82] Today, the longhouse still survives as the communal dwelling although it no longer serves the purpose of protection against the enemy. Given that multiple families—sometimes up to twenty-five—share one roof, it is imperative to preserve the peace among the members of the community. The longhouse, therefore, serves as the site of dispute

78. *Id*. at 268.

79. *Id*. at 272.

80. *Id*. at 274.

81. Jim Dator, Culturally-Appropriate Dispute Resolution Techniques and the Formal Judicial System in Hawaii, Aug. 1991: *available at* http://www.futures.hawaii.edu/publications/courts/CultApproAD1991.pdf (last visited Oct. 9, 2011).

82. Ann Black, *Survival or Extinction? Animistic Dispute Resolution in the Sultanate of Brunei*, 13 WILLAMETTE J. INT'L L. & DISP. RESOL.1, 8 (2005).

resolution. Two sets of rituals guide the process: adat— customary system of beliefs and practices that guide all behavior— and augury— rules for the magic-religious requirements of the participants.[83] A headman guides the dispute resolution process, acting similarly to a mediator in Western dispute resolution.[84] The headman is the member of the longhouse who has the greatest knowledge of adat and augury.[85] Unlike a western mediator, the headman does not stay impartial and neutral.[86] Instead, the headman knows the parties in the dispute and their history in the community.[87] The headman conducts a hearing in the longhouse in which all members of the house can participate.[88] The hearing allows the community to openly discuss the dispute and reach a settlement that would return harmony to the longhouse.[89] A settlement can include restitution, apology, or even ritualistic practices such as spell-casting and performing ceremonies to return good-fortune to the longhouse.[90] Further, the general principles of adat and augury are followed in the resolution of a dispute between members of different longhouses and members of the Iban with non-Iban.[91]

d. China

In pre-revolutionary China, the cultural aspects of conflict resolution are mainly dictated by Confucian values and ethics, such as harmony and compromise. *Li*, rules of conduct governing relations between men and patterns of behavior, are keyed to a person's status or social context.[92] *Fa* is enacted law designed to maintain order through the fear of punishment.[93] Mediation, an integral part of Chinese dispute resolution since the 17th century, continues to fulfill the needs of several levels of society.[94] In addition to *li* and *fa*, there are several other principles that promote mediation instead of adversarial conflict resolution.[95] Honor is very

83. *Id*. at 9.
84. *Id*. at 11.
85. *Id*.
86. *Id*. at 12.
87. Black, *supra* note 82, at 12.
88. *Id*. at 14.
89. *Id*. at 13.
90. *Id*. at 15.
91. *Id*. at 17.
92. Carlos de Vera, *Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 150, 163 (2004). *See also* JOHN H. BARTON ET AL., LAW IN RADICALLY DIFFERENT CULTURES 108 (1983).
93. Vera, *supra* note 92, at 163.
94. *Id*. at 168.
95. *See id*. at 166.

important in the Chinese system of dispute resolution.[96] Thus, in order to maintain good relations, *ganqing*, the Chinese use mediation to preserve *guanxi*, special relationships in which parties can make unlimited demands of the other.[97] *Renqing*, personal goodwill, and *rang*, willingness to compromise, make the dispute resolution process flow more smoothly.[98] Mediators are elected by the government or local committees. Chinese mediators often educate the disputants, advising how they should think or act and argue for concessions, and therefore, differ in their role from Western mediators who are neutral and impartial.

e. Case Study: African Systems of Dispute Resolution

In Africa, there are numerous examples of indigenous, non-adversarial forms of dispute resolution. Josiah Osamba, for example, has documented examples of indigenous conflict resolution and reconciliation among societies in Eastern Africa.[99] In fact, Osamba argues that the marginalization of indigenous conflict resolution practices is a significant factor to violence in the pastoral regions.[100] In East Africa, as elsewhere in indigenous societies, dispute resolution traditionally involves the whole society, solemn rituals, and agreements. The focus of dispute resolution is on overall justice and respect for each other.

In South Africa, traditional indigenous courts mediate rather than adjudicate. Tribal chiefs or headmen, who are frequently familiar with the participants, often participate in the proceedings. The focus of the proceedings is on restoring harmony and relationships, thereby preventing disruption within and among the tribes.[101]

In the context of Africa, Louise Vincent makes the argument that it is inappropriate in the context of Africa to make an essentialist distinction between men and women.[102] She would therefore argue that it is a

---

96. *Id*.

97. *Id*. at 167.

98. Vera, *supra* note 92, at 167.

99. *See generally* Josiah Osamba, *Peace Building and Transformation from Below: Indigenous Approaches to Conflict Resolution and Reconciliation Among the Pastoral Societies In The Borderlands Of Eastern Africa*, 2 AFR. J. CONFLICT RESOL. (2001), *available at* http://www.accord.org.za/downloads/ajcr/ajcr_2001_1.pdf (last visited Oct. 9, 2011).

100. *Id*.

101. *See generally* R.B.G. Choudree, *Traditions of Conflict Resolution in South Africa*, 1 AFR. J. CONFLICT RESOL. (1999), a*vailable at* http://www.accord.org.za/ajcr/1999-1/accordr_v1_n1_a2.pdf (last visited Oct. 9, 2011).

102. *See generally* Louise Vincent, *Entering Peace in Africa: A Critical Inquiry into Some Current thinking on the Role of African Men in Peace-building*, 2 AFR. J. CONFLICT RESOL. (2001) *available at* http://www.accord.org.za/downloads/ajcr/ajcr_2001_1.pdf (last visited Oct. 9, 2011)[hereinafter *Vincent*].

questionable assumption that women possess essential qualities that make them particularly effective peacemakers.[103] Engaging in such essentialist categorization prevents them from obtaining advantages primarily available to men and ignores the substantial differences among women. Moreover, doing so forgets women who contribute directly or indirectly to violence.

On a practical level, many post-war reconstruction social programs attempt to "empower" women to take active roles but actually focus solely on these roles—attention to which is drawn by the same persons who pigeon-hole in the first place—and focuses women on empowering themselves in these limited capacities without consideration of issues which are the actual bases of war and violence. Peace and roles of women are marginalized by socially constructed gender stereotypes and unequal gender relationships. The vulnerability of women in times of crises comes not from their sensitive natures but from the constrictions placed on them by social structures forcing them to be victims.[104]

IV. CONCLUSION

The Common Law approach to dispute resolution, with its focus on a battle between the participants, is a result of the unique history of the common law rather than male domination of the process *per se*. The present system of dispute resolution employed in common law countries, while containing certain attributes that are certainly functional with respect to adjudicating disputes, is nevertheless based upon a long tradition ultimately rooted in ritualized gladiatorial combat having little to do with contemporary notions of justice. Understanding this history allows society to change the debate over legal reform from an essentialist battle over gender to a battle over functionality and a focus on the values that we, as a society, wish to see implemented in our system of dispute resolution.

---

103. *See also* Rosenblum, *supra* note 29, and accompanying text.

104. Vincent, *supra* note 102.

INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE 2011 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

THE CASE CONCERNING DIFFERENCES BETWEEN THE STATES CONCERNING THE ZETIAN PROVINCES

THE STATE OF ARDENIA
(APPLICANT)

v.

THE STATE OF RIGALIA
(RESPONDENT)

MEMORIAL OF THE APPLICANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

CASES BEFORE THE ICJ AND PCIJ

EUROPEAN COURT OF HUMAN RIGHTS CASES

CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNALS

DOMESTIC CASES

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD) DOCUMENTS

U.N. DOCUMENTS AND REPORTS

JOURNALS AND YEARBOOKS

BOOKS AND TREATISES

MISCELLANEOUS DOCUMENTS

STATEMENT OF JURISDICTION

The State of Ardenia filed this case against the State of Rigalia before the International Court of Justice pursuant to Article 36(2) of the Statute of the Court on May 5, 2010. Both countries are party to the Court's Compulsory jurisdiction, and the parties have submitted a Compromis in order to stipulate the agreed facts of the dispute pursuant to Article 40(1) of the Court's Statute. In preliminary proceedings, Rigalia objected to the Court's jurisdiction on the grounds that Morgania was a necessary third party, under Article 79 of the Rules of Court. By a ruling of 8-7, the Court denied that Morgania was a necessary party, and allowed this case to proceed to the merits phase.

QUESTIONS PRESENTED

The State of Ardenia respectfully asks this Honorable Court:

1. Whether Rigalia's Predator drone strikes in Rigalia and Ardenia violated international law.
2. Whether the attack on the Bakchar Valley hospital violated international law, specifically:
    a. whether the act is attributable to Rigalia;
    b. whether the act was an unlawful use of force rising to the level of aggression; and
    c. whether Rigalia has an obligation to investigate the attack and compensate Ardenia for the harm caused by the attack.
3. Whether Rigalia's Mavazi ban constitutes a violation of international human rights law.
4. Whether Ardenia violated the OECD Anti-Bribery Convention and/or the OECD Decision on MNE Guidelines when it refused to conduct an investigation into corruption allegations.

STATEMENT OF FACTS

The Zetian Provinces and the Zetian Democratic Party

The dispute before this Court centers on conflicts arising in the Zetian Provinces of the states of Ardenia (Applicant) and Rigalia (Respondent) and the related economic, political, and military actions of Rigalia. The two states share a population of ethnic Zetians - a nomadic people who move between Ardenia's Southern and Rigalia's Northern Provinces (Comp. ¶10). These Provinces are the location of major deposits of Coltan; mining the economically important mineral is the region's major industry.

Ardenia, a decentralized state, permits its ten provinces to control their own legislative policies in most matters (Comp. ¶6). Ardenia's Southern Regions are inhabited by ethnic Zetians, a devout people who practice the Masinto religion and govern themselves through tribal law, which exercises dominion over most areas of their society (Comp. ¶3). Traditionally, Masinto women wear the Mavazi, a head covering that symbolizes their orthodoxy, in all aspects of public life (Comp. ¶3). The central Ardenian authority limits its interference with such religious customs and practices.

The Zetians have been granted dual citizenship by both states (Comp. ¶8). Due to the Rigalian government's anti-Zetian policies, a group known as the Zetian Democratic Party ("ZDP") has been gaining in popularity and now represents more than 75% of Zetians in the Northern Provinces (Comp. ¶9). At the May 5, 2008 Regional Joint Tribal Council Meeting, Zetian leaders of Rigalia's Northern Provinces issued a manifesto calling for increased autonomy for Zetian lands, with the ultimate goals of independence, a larger portion of the coltan mining revenue, and respect for their traditional way of life (Comp. ¶13). Rigalia's President, Teemu Khutai, responded through a nationally televised speech, peppered with ethnically-charged invectives against Zetians, referring to their societal practices as barbaric, oppressive, and backwards (Comp. ¶14).

The Mavazi Ban

Rigalia and Ardenia took different approaches to addressing these tensions. Angered, President Khutai, invoked the Rigalian emergency powers clause, banned organized assembly in public places, and ordered the detention of suspected ZDP members (Comp. ¶16). Ardenian President, Glenda Arwen, stating that she respected Zetian piety, responded to the protests by dedicating substantial funds to Zetian schools and agricultural subsidies to Zetian farmers (Comp. ¶17).

ZDP members called for full independence (Comp. ¶18). In the period from December 2008 to February 2009, violence escalated, resulting in

more than 250 casualties (Comp. ¶18). One of the suicide bombers donned a Mavazi as a disguise (Comp. ¶18). In reaction, Rigalia passed legislation that restricted the Zetians' religious rights by banning the wearing of the sacred garment in public places, effectively banning it completely (Comp. ¶¶10,21).

The Predator Drone Program

Responding to Rigalian oppression, Zetians began to cross the border into Ardenia (Comp. ¶19). In an effort to mitigate violence and promote peace, President Arwen met with Zetian tribal leaders in January, 2009 (Comp. ¶20). She assured them that their customs would be respected and that Ardenia supported Zetian unification in Rigalia (Comp. ¶20). In consideration of her gesture, the Zetian leaders offered their assurance that Ardenian sovereignty would be respected and Ardenian civilians and government would not be harmed (Comp. ¶20).

Angered by President Arwen's efforts at peace, President Khutai announced on March 22, 2009 that Ardenia was at war with the Zetian secessionist movement and its supporters, whether found in Ardenia or Rigalia (Comp. ¶21). He requested military assistance from President Sophia Ratko of the technologically sophisticated, industrialized state of Morgania through the use of its Predator drone technology (Comp. ¶¶27, 28). With security and economic interests in mind, President Ratko agreed to deploy Morganian Predator drones on behalf of Rigalia for purposes of combating Zetian terrorists (Comp. ¶27).

The unmanned Predator drones, armed with Hellfire missiles, are launched from Fort Raucus, a Rigalian Air Force base leased by Morgania. The drones are operated by the Morganian army in Morgania (Comp. ¶29). The Morganian operators receive targeting information from Rigalian prisoners, recruited and paid by the Rigalian government as informants (Comp. ¶29). At the urging of the Rigalian Defense Force, controlled by President Khutai, more than 50 strikes were carried out against suspected Zetian separatists, killing an estimated 230 civilians in Rigalia, but only 15 suspected Zetian separatist leaders (Comp. ¶29).

On March 15, 2010, Morgania launched a Predator drone strike in Ardenia (Comp. ¶30). The attack was directed against a single ZDP Leaders, Adar Bermal. The attack killed ZDP Bermal, but also struck the Bakchar Valley Hospital, a 300-bed public hospital, next door killing 150 civilians, and maiming 200 more (Comp. ¶30). Ardenia immediately lodged a protest with Rigalia for targeting innocent civilians (Comp. ¶31). Rigalia's defense minister responded that the incident was "a regrettable consequence of Rigalia's fight to defend itself and its people" (Comp. ¶31).

Corruption Allegations

The economic relations between Ardenia and Rigalia center around the Coltan mining in Rigalia, run by the state-owned Rigalian Refining Inc. ("RRI"), which is headed by CEO Leo Bikra (Comp. ¶10). However, recent developments surrounding the exploration and development of the Moria Mine, situated in the Rigalian Northern Provinces, under a contract with the Ardenian state-owned corporation, Mineral Dynamics Incorporated ("MDI"), has strained this relationship.

MDI is active in its community and voluntarily publishes information regarding its donations on its website, the forum in which it revealed that it donated funds to the Zetian Refugee Fund ("ZRF"), a charitable organization whose goals are to supply education and humanitarian assistance to ethnic Zetians (Comp. ¶11). This charity is headed by Clyde Zangara, Leo Bikra's nephew (Comp. ¶11).

The Moria Mine contract was renewed in 2002 (Comp. ¶12). A media report stated that the deal had been partially secured through a promise by MDI to pay $10 million dollars into a trust account for the ZRF charity (Comp. ¶12). Rigalia believes that such funds may be used for political activities, and there is speculation about tribal council members soliciting promises of payment from MDI (Comp. ¶12).

President Khutai pushed the Ardenian government to ignore its business records protection laws and proceed with an investigation into these allegations (Comp. ¶22). Khutai then called for his Minister of Justice, Charlene Finch, to open an investigation, suspended Leo Bikra, and requested that the OECD Working Group on Bribery in International Business Transactions put pressure on the Ardenian government (Comp. ¶22, 24). This led the Committee for Responsible Business Conduct ("CRBC"), an organization that received 30% of its operating budget from the Rigalian government, to file a complaint with the OECD Council (Comp. ¶26). The Ardenian National Contact Point responded that it was unable to examine the complaint because the alleged actions occurred in Rigalia, the OECD Guidelines for Multinational Enterprises do not apply to Rigalian Refining Inc., and investigations had already been launched in both states (Comp. ¶26).

Ardenia subsequently filed a protest with Rigalia regarding the drone strikes, and referred the accidental missile strike to the U.N. Security Council, which advised the parties to seek a peaceful resolution for this matter. Meanwhile, claims brought by Zetians within the Rigalia courts, contesting the legality of the drone strikes and the Mavazi ban, were dismissed and not subject to appeal (Clarification #5). Thereafter, Ardenia

filed this case before the International Court of Justice under its compulsory jurisdiction.

SUMMARY OF PLEADINGS

I. Violence in Rigalia did not rise to the level of an armed conflict because the Zetian secessionist movement did not possess sufficient organizational capacity to constitute an armed group, nor did the tensions rise to the requisite threshold. As such, the conflict is governed by international human rights law. Rigalia's Predator drone strikes, which killed 230 Zetian civilians in Rigalia and killed and wounded 350 in Ardenia, violated human rights law enshrined in Article 6(1) of the International Convention on Civil and Political Rights ("ICCPR"), which guarantees that every human has an inherent right to life, and states may not arbitrarily deprive persons of this right to life. This right is non-derogable even in times of public emergency or threats to national existence. Even if the conflict did rise to the level necessary to amount to an armed conflict, Rigalia violated the *lex specialis* of international humanitarian law by failing to distinguish between innocent civilians and legitimate military targets in carrying out its Predator drone strikes. Moreover, since the number of innocent civilians killed was twenty-five times the number of targeted Zetian leaders, the strikes violated the international principles of necessity and proportionality, and the prohibition on causing superfluous harm.

II. Though the Predator drone strikes were operated by Morgania, Rigalia is responsible for the bombing of the Bakchar Valley hospital in Ardenia and is obligated to make reparations for the damages under international law. Rigalia requested the strike, allowed its territory to be used to carry out the strike, and Rigalian informants played an integral part in the operation. Moreover, by making official statements to justify rather than condemning the illegal act, Rigalia endorsed the action and should be held responsible for the harm suffered. Rigalia's attack on the Bakchar valley hospital was an unjustified act of aggression. Rigalia cannot claim that destruction of this hospital was justified by self-defense, because the requisite elements of necessity and proportionality were not present. Furthermore, Rigalia is foreclosed from asserting self-defense because it did not make the required notification to the Security Council immediately following the attack pursuant to Article 51 of the U.N. Charter.

III. The freedoms of religion, thought and expression are fundamental principles of international human rights enshrined in the Covenant on Civil and Political Rights and the Convention on the Rights of the Child. Rigalia's Mavazi ban violates these internationally protected rights of Zetian women and girls by usurping their autonomy to participate in their religion and denying their ability to outwardly manifest their faith and

culture. Moreover, the ban is illegitimate as it is not narrowly construed or tailored to a particular goal, nor does the aim of the ban fit into the exception for maintaining public order.

IV. Rigalia's counterclaim that Ardenia has violated the OECD Convention is without merit. The case does not come within the ambit of the OECD convention or guidelines because the targets of the alleged bribery were not "foreign officials." Ardenia, therefore, had no obligation to investigate the alleged acts of bribery; nevertheless, it launched an investigation into the CRBC's claims. When Ardenia faced national security concerns tied to the investigation and the heightened tensions arising from the Rigalian-Zetian hostilities, the state was forced to drop the investigation. Even if the case came within the OECD Convention, this would have been a permissible action, as the Convention creates an exception for national security concerns. While the OECD does not allow for an exception on national economic interest grounds, the fact remains that overwhelming state practice takes this element into account. Finally, the small facilitation payments made by MDI are not a violation of the OECD Convention or the MNE Guidelines.

PLEADINGS

I. THE PREDATOR DRONE STRIKES TARGETING ZETIANS IN RIGALIA VIOLATE INTERNATIONAL LAW.

A. The tensions between Rigalia and the ZDP did not rise to the level of an armed conflict and therefore human rights law governs the use of Predator drones.

International humanitarian law ("IHL") only applies to armed conflicts.[1] At all other times, only the *lex generalis* of international human rights law ("HRL") applies. In the present case, tensions between the ZDP and Rigalia did not rise to the level necessary to constitute an armed conflict and thus international human rights law is the applicable standard.

Common Article 3 of the Geneva Conventions and Additional Protocol II set forth general criteria to use in determining the existence of an armed conflict.[2] Drawing from these criteria, international jurisprudence focuses on two key elements: (1) the organization of the parties to a conflict; and (2) the intensity of the conflict.[3]

1. The Zetian separatists do not possesses sufficient organizational capacity to constitute a party to an armed conflict.

A group must possess sufficient organizational capacity in order to be a party to an armed conflict.[4] Drawing upon the framework of the Geneva Conventions, courts have focused on the following incidia of organizational capacity: existence of headquarters; designated zones of operation; the

---

1. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 2004 I.C.J. 136, ¶¶95,105 (July 9) [hereinafter *Palestinian Wall*].

2. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; *See also* Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, art. 1(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; *See also* COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, CONVENTION IV 49-50 (Jean Pictet, ed.)(1958)(describing the scope of application for Common Article 3).

3. Rome Statute of the International Criminal Court art. 8(2)(f), July 17 1998, UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 9 [hereinafter ICC Statute]; *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶70 (Oct. 2, 1995) [hereinafter *Tadic* Defense];

4. GC III, *supra* note 2, at art. 4(2); ICC Statute, *supra* note 3, at art. 8(2)(f); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Judgment) ¶¶618-621 (Sept. 2, 1998) [hereinafter *Akayesu*].

ability to procure, transport and distribute arms;[5] a demonstrable hierarchy;[6] and capacity to coordinate its actions.[7]

There is no evidence to suggest that the Zetian separatists possess the requisite organizational elements. Rigalia cannot impute the pre-existing structure of the ZDP and the Zetian social hierarchy to the amorphous rebel group that Rigalia claims to be fighting. President Khutai has not specified with who Rigalia is at war; rather he simply claimed to wage war against an amorphous collection of individuals which he described as the "Zetian secessionist movement and its supporters."[8] As demonstrated by the facts and by Khutai's statements, the Zetian secessionist movement and the ZDP are separate entities.[9]

The societal organization of Zetians and the structure of the ZDP cannot be used in an attempt to show that the Zetian secessionists possess sufficient organizational capacity to be a party to an armed conflict. As noted in the Goldstone Report, a state cannot simply attribute one organization's structure or militant qualities to another simply because both share the same nationality, race, or location.[10]

2. The tensions between Zetians and Rigalia do not meet the intensity threshold necessary to constitute an armed conflict

In order to constitute an armed conflict, fighting between armed groups must exceed the intensity of mere "internal disturbances and tensions, such as riots, isolated and sporadic attacks of violence or other acts of a similar nature."[11] International tribunals have considered factors including seriousness of attacks, increase of attacks over time, and an increase in mobilization and distribution of weapons among both parties.[12]

---

5. *Prosecutor v. Fatmir Limaj*, Case No. IT-03-66-T, Judgment, ¶90 (Nov. 30, 2005)[hereinafter *Limaj*].

6. *Id.* at ¶110.

7. *Id.* at ¶108.

8. Compromis ¶21 [hereinafter Comp.].

9. Comp. ¶¶9,21.

10. Human Rts. Council, *Human Rights in Palestine and Other Occupied Arab Territories*, ¶34, U.N. Doc. A/HRC/12/48 (Sep. 15, 2009) [hereinafter Goldstone Report].

11. Protocol II, *supra* note 2, at art. 1(2); *see also* ICC Statute, *supra* note 3, at art. (8)(2)(f).

12. *Limaj, supra* note 5, at ¶90. *See also Prosecutor v. Boskoski and Tarculovski,* Case No. IT-04-82-T, Judgment, ¶¶177-78,193 (July 10, 2008), *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶566 (July 15, 1999) [hereinafter *Tadic* Judgment].

Additionally, most courts have held that tensions must exist for a prolonged period of time before hostilities can be classified as an armed conflict.[13]

The facts of this case do not indicate a demonstrable pattern of increased or even sustained attacks, either geographically or temporally. In fact, the Zetian attacks only spanned a three-month period.[14] As such, the present conflict resembles a short-lived internal disturbance that does not meet the intensity threshold required by Common Article 3.

B. Rigalia's Predator drone strikes within its territory violate applicable human rights law.

Rigalia's use of Predator drones must comport with human rights law, because it is not engaged in an armed conflict with the ZDP.[15] As such, Rigalia is obligated to abide by the International Convention on Civil and Political Rights ("ICCPR"), which expressly guarantees every human being's inherent right to life, and forbids the arbitrary deprivation of human life.[16] These rights are non-derogable even in times of public emergency or national security.[17]

Rigalian attacks both in Rigalia and Ardenia killed hundreds of innocent Zetian Ardenians,[18] arbitrarily depriving them of their lives, in direct violation of the ICCPR and customary international law.[19] Rigalia may attempt to claim that the ICCPR does not apply to acts outside of its territory. However, this contention must be rejected as this Court has

---

13. *Tadic* Defense, *supra* note 3, at ¶70; *See also* ICC Statute, *supra* note 3, art. 8(2); *Akayesu*,

supra note 4, at ¶¶618-621.

14. Comp. ¶18.

15. International Covenant on Civil and Political Rights art. 4, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

16. *Id.* at art. 6(1) (declaring "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

17. *Id*. at art 4(1).

18. Comp. ¶¶29-30.

19. *Palestinian Wall*, *supra* note 1, ¶8. *See also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, 12 Aug. 1949, 75 U.N.T.S. 31[hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 51, 12 Aug. 1949, 75 U.N.T.S. 85[hereinafter GC II]; Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 147, 12 Aug, 1949, 75 U.N.T.S. 287[hereinafter GC IV]; GC III, *supra* note 2, at art. 130.

established that the ICCPR applies "in respect of acts done by a state in the exercise of its jurisdiction outside of its own territory."[20]

C. Even if the tensions amounted to an armed conflict, Rigalia violated its international obligations under international humanitarian law.

Rigalian drone strikes violated applicable *lex specialis* of non-international armed conflicts enshrined in Common Article 3 and Additional Protocol II to the Geneva Conventions, as well as customary international law.[21] Under IHL, Rigalia's Predator drone strikes must comply with four elements: (1) the attack must distinguish between civilian and military targets; (2) the attack must be necessary; (3) the attack must be proportional; and, (4) the attack must not cause superfluous harm.

1. Rigalia failed to abide by the principle of distinction.

Parties to an armed conflict must distinguish between civilians and combatants.[22] Therefore, even if the Zetian secessionist movement were an armed party to a conflict, Rigalia has an obligation to make distinctions between civilians and legitimate military targets. Rigalia failed to determine whether the targets of its Predator drone strikes were members of an organized group participating in hostilities or whether they were innocent civilians.[23] Instead, Rigalia indiscriminately carried out attacks against "supporters" of the Zetian movement,[24] be they civilian or otherwise, in clear violation of international law and the principle of distinction.

---

20. *Palestinian Wall, supra* note 1, at ¶111; *See also Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 1996 I.C.J. 226,¶25 (July 8) [hereinafter *Nuclear Weapons Advisory Opinion*]; Goldstone Report, *supra* note 10, at ¶298.

21. Protocol II, *supra* note 2. *See also* GC III, *supra* note 2; *Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts (Taormina Declaration)*, Apr. 7, 1990, 30 INT'L REV. OF THE RED CROSS 383-403.

22. Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; *See also Nuclear Weapons Advisory Opinion*, *supra* note 20, at ¶78(declaring that the principle of distinction is one of the "cardinal principles contained in the texts constituting the fabric of humanitarian law."); Protocol on Prohibitions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 art. 3(7), 3 May, 1996, 2048 U.N.T.S 93 (1996).

23. Int'l Comm. of the Red Cross, *ICRC Interpretive Guidance on Direct Participation in Hostilities*, 90 INT'L REV. RED CROSS 991 (Dec. 2008); HCJ 769/02 Pub. Comm. against Torture in Israel v. Gov't of Israel [2005].

24. Comp.¶¶21,29.

2. Rigalian Predator drone strikes against Zetians were not necessary and proportional

Under the principal of military necessity, states may use force only to the extent necessary, and are prohibited from destruction of property and life unless "imperatively demanded by the necessities of war,"[25] for which there is no equivalent alternative.[26] Rigalia's Predator drone program was a manifest violation of this principle, as the circumstances did not necessitate the use of such force. Rigalia made no attempt to utilize less destructive means of force to suppress Zetian attacks, and instead chose to wage a lethal campaign to achieve ends that could likely have been attained through the non-lethal means that Ardenia implemented on its side of the border.

The use of force must also be proportional with respect to the expected military advantage.[27] IHL prohibits launching attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." [28] Rigalia's Predator drone strikes, which killed or injured 230 civilians in Rigalia and 350 in Ardenia, caused disproportionate harm in relation to the military advantage to be attained, violating the customary international law principle of proportionality.

3. Rigalian Predator drone strikes caused superfluous harm.

It is a principle of customary international law, recognized by this court in the *Nuclear Weapons Case*, that a state does not have unfettered freedom in its choice of weapons and may not use weapons that cause

---

25. The Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23(g), 18 October 1907, 1 Bevans 577, *available at* http://www.unhcr.org/refworld/docid/4374cae64.html. *See also* ICC Statute, *supra* note 3, at art. 8(2)(b)iv); GC IV, *supra* note 19, at art. 53.

26. Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict art 6(1), March 26, 1999, 2253 U.N.T.S 172 (1999).

27. *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392, ¶¶176,194 (Nov. 26) [hereinafter *Nicaragua*]; *See also Nuclear Weapons Advisory Opinion, supra* note 20, at ¶¶30,41,.

28. Protocol I, *supra* note 22, at art. 51(5)(b). *See also* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *supra* note 27, at art. 3(3)(c); ICC Statute, *supra* note 3, art. 8(2)(b)(iv).

disproportionate injury or unnecessary suffering.[29] As this Court stated, "[s]tates must never. . . use weapons that are incapable of distinguishing between civilian and military targets."[30]

Though there is no quantified threshold for what constitutes superfluous harm, the dispositive element is that Rigalia continued to use Predator drones over a prolonged period, despite the fact that the weapons were causing excessive harm to civilians, in clear contravention of the obligation to respect the principle of distinction as a matter of common sense and good faith.[31] For every death of a suspected Zetian leader, more than 25 civilians were killed, and many more wounded.[32] Either the Predator drones are incapable of distinguishing between military and civilian targets and are therefore illegal pursuant to *Nuclear Weapons,* or the Predator drones are capable of such distinction, and Rigalia willfully targeted innocent Zetian civilians in violation of IHL.[33] In either scenario, Rigalia has violated international law.

II. THE ATTACK ON THE BAKCHAR VALLEY HOSPITAL IS ATTRIBUTABLE TO RIGALIA AND WAS AN UNLAWFUL ACT OF AGGRESSION FOR WHICH IT IS OBLIGATED TO MAKE REPARATIONS.

A. The attack on the Bakchar Valley Hospital is attributable to Rigalia.

1. Rigalia is directly responsible for the Bakchar Valley bombing.

Although Morgania controlled the Drones, Rigalia is directly responsible for the attack on the Bakchar Valley hospital because: (1) Rigalian reconnaissance personnel directly participated in the operation; and (2) Rigalia subsequently adopted the attack. Per the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, relevant portions of which this Court has determined to be

---

29. Protocol I, *supra* note 20, at art. 58(3)(b); *See also Nuclear Weapons Advisory Opinion*, *supra* note 25, ¶78-79.

30. *Nuclear Weapons Advisory Opinion, supra* note 20, at ¶78 (French judgment)(mentioning the prohibition of superfluous harm: "*il ne faut pas causer des maux superflus aux combatants*").

31. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1997 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶2199 (Yves Sandoz et al., eds.) (1987).

32. Comp.¶¶29,30.

33. *Nuclear Weapons Advisory Opinion, supra* note 20, at 564 (separate opinion of Judge Koroma) ("humanitarian law does prohibit the use of certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary and superfluous harm caused to combatants").

customary international law,[34] when actors are organs of a state, conduct of these actors is directly attributable to that state.[35] Rigalia is directly liable for the attack on the Bakchar Valley hospital because the informants who conducted the reconnaissance for the Morganian Drone attack were paid agents of Rigalia that played an integral part in the operation.[36] Rigalian agents did not merely aid or assist Morgania, but were in effect co-perpetrators in the internationally wrongful act.[37]

Furthermore, the Predator drone strikes are directly attributable to Rigalia because the act was "adopted" by Rigalia per Article 11 of the ILC Draft Articles.[38] This court in the *Iran Hostages* case recognized that conduct can be attributed to a state upon "endorsement by those authorities of the situation thus created."[39] This endorsement need not be express; rather, simply failing to condemn an illegal action can attribute that action to a state.[40] Yet, Rigalia went further than mere failure to condemn the attacks. Rigalia endorsed the egregious attack on the Bakchar Valley hospital when the Rigalian defense minister proclaimed that the killing of hundreds of innocent civilians in Ardenia was "a regrettable consequence of Rigalia's fight to defend itself and its people."[41]

2. Rigalia is also indirectly responsible for the Bakchar Valley bombing.

Internationally wrongful conduct may be attributed to a state where the state offers assistance to another state for the commission of an internationally wrongful act.[42] In particular, a state breaches its international

---

34. *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), 1997 I.C.J. 7, ¶¶47-49 (Sept. 25) [hereinafter *Gabčíkovo-Nagymaros*]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 138, ¶385 (Feb. 26). Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

35. Int'l L. Comm'n, *Draft articles on Responsibility of States for Internationally Wrongfully Acts with commentaries* art. 2(2),Y.B.INT'L L.COMM'N (2001) [hereinafter ILC Draft Articles].

36. Comp. ¶29.

37. ILC Draft Articles, *supra* note 35, at arts.16(1),19(4).

38. *Id.* at art. 11.

39. *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, ¶9 (May 24) [hereinafter Iran Hostages].

40. ILC Draft Articles, *supra* note 35, at art. 11. *See also Iran Hostages*, *supra* note 39,at ¶74.

41. Comp. ¶31.

42. ILC Draft Articles, *supra* note 35, at art.16.

obligations by permitting the use of its territory by another state to carry out an armed attack against a third state.[43]

In 1986, the U.N. called on states "to refrain from extending any assistance or facilities for perpetrating acts of aggression."[44] This resolution admonished the United Kingdom for its joint responsibility in the 1986 bombing of Tripoli, when it allowed several of its air force bases to be used to launch U.S. planes which carried out attacks on Libyan targets.[45] Similarly, Rigalia permitted Morgania to launch strikes against Ardenia from a base within Rigalia and is therefore at least jointly responsible for the attacks.[46]

Moreover, Rigalia is indirectly liable for the bombing of the Bakchar Valley hospital because of the operational support it provided Morgania in carrying out the Predator drone strike.[47] This Court in *Nicaragua* found that a state is liable for the internationally wrongful acts committed by another party when the former provides aid or assistance to the latter, even if such acts are not specifically directed by the assisting party.[48]

B. Rigalia's bombing of the Bakchar Valley hospital was an unlawful use of force amounting to aggression.

The U.N. General Assembly's 1974 definition of aggression, and the International Criminal Court's ("ICC") Assembly of State Parties' adoption of that definition in 2010, provide a basic framework for determining whether an act of aggression has been committed.[49] U.N. General Assembly Resolution 3314 establishes in no uncertain terms that "[t]he first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression;" this includes "[b]ombardment by the armed forces of a State against the territory of another State or the use

---

43. ILC Draft Articles, *supra* note 35, at art. 16(8). *See also* 20 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 663–664 (Aug. 1960); Rosalyn Higgins, President, Int'l Court of Justice, Speech during the 59th session of the Int'l L. Comm'n (July 7, 2007), *available at* http://www.icj-cij.org/presscom/files/9/13919.pdf.

44. G.A. Res. 41/38 art.3, U.N. Doc. A/RES/41/38 (Nov. 20, 1986).

45. *Id.*

46. Comp. ¶28.

47. Comp. ¶29.

48. *Nicaragua*, *supra* note 27, at ¶292(3); *See also* ILC Draft Articles, *supra* note 35, art. 16.

49. U.N. Charter art. 2(4); Kampala Special Working Group on the Crime of Aggression, *The Crime of Aggression*, annex 2, art. 8, 13th plen. mtg, June 8-11, 2010, U.N. Doc. RC/Res.6(June 11, 2010) [hereinafter Kampala Definition].

of any weapons by a State against the territory of another State."[50] When a state fails to adhere to the conduct required to assert a right to self-defense, the state is prohibited from engaging in invasion, attack, bombardment, or use of any weapon against the territory of another state.[51]

In assessing whether Rigalia's attack on the Bakchar Valley hospital constitutes an act of aggression this court should consider that: (1) force was used against the territory of another state;[52] (2) there was a violation of the *jus cogens* norm of non-intervention;[53][53] (3) the force was of a sufficient character, gravity, and scale to constitute an armed attack;[54] and (4) the act was not a mistake but was committed with the intent to violate another state's sovereignty guaranteed by the U.N. Charter and customary international law.[55] The attack on the Bakchar Valley hospital was a clear violation of Ardenian sovereignty. Moreover, Rigalia's bombing of the hospital, which resulted in 350 casualties, is manifestly of sufficient gravity. Conducting hostilities against a medical facility whether during an armed conflict or in peace time, is of the gravity that would amount to an armed attack.[56] Finally, while blowing up the hospital might have been a mistake, Rigalia does not deny that it acted with the intent to conduct a military strike within Ardenia's border.

C. Rigalia's bombing of the Bakchar Valley hospital is not justified by self-defense.

In order to lawfully use force in another state's territory, a state invoking self-defense must satisfy three criteria: (1) it must show that it suffered attacks of sufficient gravity to constitute an armed attack.;[57] (2) The armed attack must have been perpetrated by a state;[58] and (3) the state's

---

50. Resolution on the Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 142 (Dec. 14, 1974) [hereinafter *1974 Definition*]

51. UN Charter art. 2(a)-(b).

52. *1974 Definition*, *supra* note 50, at art. 1.

53. U.N. Charter art. 2, para. 7. *See also* Declaration on the inadmissibility of intervention in the domestic affairs of the States and the protection of their independence and sovereignty, G.A. Res. 2131, U.N. GAOR 20th Sess., Supp. No 14, U.N. Doc. A/6014, at 11 (1966).

54. Kampala Definition, *supra* note 49.

55. U.N. Charter art. 2(4); *see Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶266 (Dec. 19) [hereinafter Armed Activities].

56. GC I, *supra* note 19, at art. 19; GC IV, *supra* note 22, at art. 18; Protocol I, *supra* note 22, at art. 12; Protocol II, *supra* note 2, at art. 11(1).

57. U.N. Charter art. 51; *see also Nicaragua*, *supra* note 27, at ¶195.

58. U.N. Charter art. 51.

use of self-defense must conform to the customary principles of necessity and proportionality.[59] Rigalia's use of force does not satisfy these criteria; thus its claim that it is justified in the bombing of the Bakchar Valley hospital by self-defense is without merit.

1. Rigalia cannot claim self-defense because its attack on the Bakchar Valley hospital was not precipitated by an armed attack.

The exercise of the right of self-defense is subject to a state having been the victim of an armed attack.[60] Armed attacks are classified as the gravest use of force and must be distinguished from other lesser uses of force.[61] This Court in *Oil Platforms* found that a series of minor attacks did not cumulatively give rise to the justification of self-defense.[62] Rigalia suffered no armed attack which would give rise to the right of self-defense.

2. Even if the court finds that an armed attack occurred against Rigalia, Rigalia is barred from utilizing the self-defense justification in response to an attack from a non-state actor.

This Court has rejected the claims of states that have attempted to justify their use of violence against non-state actors as self- defense.[63] In *Palestinian Wall*, this Court held that states are not justified in using self-defense if they are not attacked by another state.[64] Further, in *Armed Activities* this Court found that Uganda's claim to self-defense was unjustified because the attacks which gave rise to the claim did not emanate from another state, nor were they undertaken on behalf of another state.[65] Similarly, in this case, Rigalia used armed force in Ardenia against and in response to attacks by non-state actors in the absence of evidence that their acts were controlled or directed by any state.

Rigalia may attempt to argue that the U.N. Security Council resolution affirming the U.S. use of force in Afghanistan in response to attacks by al-Qaeda[66] has altered this rule.[67] This assertion, however, must be rejected, as

---

59. *Nicaragua, supra* note 27, at ¶¶54-55,60; *see also Nuclear Weapons Advisory Opinion, supra* note 20, at ¶245.

60. *Nicaragua*, *supra* note 27, at ¶195.

61. *Id.* at ¶191.

62. *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, ¶64 (Nov. 6).

63. *Palestinian Wall, supra* note 11, at ¶¶139-41; *See also Nicaragua, supra* note 27, at ¶195.

64. *Palestinian Wall*, *supra* note 1, at ¶¶139-41.

65. *Armed Activities*, *supra* note 55, at ¶¶145-46.

66. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

it overlooks the fact that U.N. approval of the U.S. invasion of Afghanistan in response to an attack by non-state actors (al-Qaeda) was predicated on the assumption, based on evidence provided by the United Kingdom, [68] that the Taliban government of Afghanistan was intimately implicated in the acts of al-Qaeda, as a single jointly-criminal entity.[69] Thus, there was not alteration of international law; rather, the same underlying principles were applied and still apply: a state may be justified in using self-defense *only* when the acts of non-state actors are imputable to a foreign state.[70] Rigalia makes no claim that the terrorist attacks are imputable to Ardenia, nor is there a sufficient nexus between ZDP activities and Ardenia.

3. Rigalia's failure to immediately notify the Security Council estops Rigalia from claiming that the attack is justified by self-defense.

Article 51 of the UN Charter requires states resorting to the use of force in self-defense to immediately report to the Security Council.[71] The Charter's notice requirement serves the purpose of informing the Security Council of the specific justifications for the use of force, thus enabling the council to gauge whether the military action was necessary and proportional.[72] This Court held in *Armed Activities* that, because Uganda failed to immediately notify the Security Council of its military actions in the Congo, Uganda was prohibited from relying on the doctrine of self-defense to justify its use of force.[73] Similarly, Rigalia's failure to provide the required immediate notice to the Security Council disqualifies it from relying on self-defense as justification for its armed attack.

D. Rigalia is obligated to make reparations to Ardenia for the bombing of the Bakchar Valley hospital.

States that commit an internationally wrongful act are obligated to make full reparation for the injury caused by the act.[74] Because the Predator

---

67. Michael P. Scharf, *Seizing the 'Grotian Moment'*, 43 CORNELL INT'L L.J. 439 (2010).

68. Elena Katselli & Sangeeta Shah, *September 11 and the UK Response*, 52 Int'l & Comp. L.Q. 245-255 (2003).

69. S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

70. *Palestinian Wall, supra* note 1, at ¶¶6,139.

71. U.N. Charter art. 51.

72. *Id.*

73. *Armed Activities*, *supra* note 55, at ¶145.

74. ILC Draft Articles, *supra* note 35, at art. 31. *See generally Factory at Chorzòw* (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 44 (May 25).

drone strikes are attributable to Rigalia and the harm suffered was a product of an internationally wrongful act, Rigalia must make reparations to account for all of the consequences of the illegal act, both material and moral.[75] As was the case in *Armed Activities*, Rigalia is bound to make reparations for the harm it caused through the perpetration of an internationally wrongful act.[76] Ardenia need not provide a precise monetary sum at this time; rather, the Court can appoint a special expert to determine the monetary award or require the parties to negotiate the award in good faith.[77]

III. RIGALIA'S MAVAZI BAN VIOLATES THE RIGHTS OF ZETIAN WOMEN AND GIRLS.

The Rigalian law banning Zetian women from wearing the Mavazi, a sacred religious headcovering, contravenes articles 2, 18 and 19 of the ICCPR which sets forth the rights to freedom of religious belief[78] and expression.[79] External manifestations of religion, such as wearing headcoverings for religious purposes, have also been granted protection under the authoritative interpretations of the International Human Rights Committee and the case law of the European Court of Human Rights.[80] In its general commentary on the ICCPR, the Human Rights Committee stressed that where religious symbols place emphasis on female modesty and humility as the Mavazi does, these symbols are protected by the international human rights principles contained in the ICCPR.[81]

---

75. *Factory at Chorzòw* (Ger. v. Pol.), Jurisdiction, 1927 P.C.I.J. (ser. A) No. 9 (July 26); *Factory at Chorzów* (Ger. v. Pol.), Merits, 1928 P.C.I.J (ser. A) No. 13 (Dec. 16). *See also Rainbow Warrior* (N.Z. v. Fr.), 20 R.I.A.A. 215, ¶110 (1990).

76. *Armed Activities, supra* note 55, at ¶259; *Gabčíkovo-Nagymaros*, *supra* note 34, at ¶152. *See also Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. , ¶119 (Mar. 31).

77. Statute of the International Court of Justice art. 50, June 26, 1945, 3 Bevans 1179; *see Armed Activities*, *supra* note 55, at ¶261; *Gabčíkovo-Nagymaros*, *supra* note 34, at ¶83.

78. ICCPR, *supra* note 15, at art. 18.

79. *Id.* at art. 19.

80. *Id.*; *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 462, ¶83 (Feb. 15). *See also* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; International Covenant on Economic, Social, and Cultural Rights, 933 U.N.T.S. 3, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966)[hereinafter ICESCR].

81. Human Rights Comm., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Comment 22: Art. 18(4), 48th Sess., U.N. Doc. HRI/GEN/1/Rev.1. (1994)[hereinafter General Comment 22] *reprinted*

In *Dahlab v. Switzerland*, the European Court of Human Rights examined a narrow restriction on public school teachers wearing a Muslim headscarf. There, the Court articulated that such principles of freedom of thought, expression and religion were foundational to a democratic society and that the protection of those rights was at the core of the Convention's aims.[82] In another case, Belgium's Hasselt Civil Court overturned a ban on the patka, a head covering of the Sikh faith, stating that such a ban was incompatible with ideals of religious tolerance and freedom.[83] With respect to the one country (France), whose recently expanded ban on Muslim head coverings is as broad as Rigalia's Mavazi ban, experts have opined that it is unlikely to withstand constitutional challenge or European Court scrutiny.[84]

The Rigalian Mavazi ban also violates Articles 14 and 15 of the Convention on the Rights of the Child ("CRC"), which grant children the same rights as adults in terms of practicing their religions, adhering to their faiths and embracing their cultures.[85] In accordance with Zetian cultural and religious traditions, at the age of 14, a Zetian girl is supposed to have the ability to don the Mavazi and become a woman in the eyes of her people.[86] Under Rigalia's ban, this traditional rite of passage has been barred, impacting both the religious and social expression rights of Zetian children.[87]

Under the ICCPR and the CRC, limitations on an individual's religious expression are only permissible if they meet the following test: (1) the limitation must be prescribed by law;[88] (2) it must have a legitimate aim and narrow purpose;[89] and (3) the restriction must be necessary to protect

---

in SARAH JOSEPH ET. AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 502 (2d ed. 2004).

82. General Comment 22, *supra* note 81.

83. *Belgian Court Overturns Ban on Sikh Headcoverings in* School, SikhNet, July 2, 2008, *available at* http://www.sikhnet.com/daily-news/belgian-court-overturns-ban-on-sikh-headcovering-in-school.

84. *Questions and Answers on Restrictions on Religious Dress and Symbols in Europe*, HUMAN RIGHTS WATCH, Dec. 21, 2010, *available at* http://www.hrw.org/en/news/2010/12/20/ questions-and-answers-restrictions-religious-dress-and-symbols-europe.

85. CRC, *supra* note 81, at arts. 13,14.

86. Comp. ¶3.

87. *Id*.

88. *R (on the application of SB) v Governors of Denbigh High School*, [2005] EWCA Civ 199; *Dogru v. France*, App. No. 27058/05, 49 Eur. H.R. Rep. 8 (2008); *Sahin v. Turkey*, App. No. 44774/98, 2005-XI Eur. H.R. Rep. 173 (Nov. 10); *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993).

89. *Dogru v. France*, *supra* note 88.

public safety, order, health, morals, or the rights of others.[90] While the ban has been codified by the Rigalian legislature,[91] neither of the latter two elements has been met.

A. The ban lacks legitimate aim and narrow purpose.

Rigalia passed the ban as a piece of reactionary legislation, rather than a legitimate attempt at mitigating public disorder. The ban was adopted immediately following President Khutai's declaration of war with the Zetian secessionist movement, by a vote of 275-25; only ethnic Zetians were in the dissenting minority.[92] This context suggests a piece of legislation lacking a legitimate aim.

Rigalia may attempt to argue that this ban has a narrow purpose. However, where bans on head coverings have been upheld, the bans were much more narrowly tailored than the broad Rigalian ban.[93] In *Karaduman v. Turkey*, for example, a young woman was asked to remove a headscarf for purposes of taking a university identification photograph.[94] She was not prohibited from wearing the headscarf generally. There, the European Court of Human Rights focused its decision on the voluntary nature of her attendance at that particular university.[95] Rigalia's ban, in contrast, is broad and general; it bars women from wearing the Mavazi in public without exception.[96] As the European Court explained in *Dogru v. France*, such a broad ban goes too far. There the court stated that France had the burden to show that its ban on Muslim headscarves from public schools was appropriately limited, justified and tied closely to the purposes for which it was intended.[97] The European Court reiterated its commitment to secularism, but focused on the narrow scope of the ban in question. Here,

---

90. ICCPR, *supra* note 15, at art. 18(3).

91. Comp. ¶21.

92. *Id*.

93. *See*, *e.g.*, *United States v. Board of Education for the School District of Philadelphia* (where the secular appearance of state-funded schools was at issue), *Hudoyberganova v. Uzbekistan*, UN Doc CCPR/C/82/D/931/2000 (18 January 2005) (where the Human Rights Committee found a violation of Article 18(2) regarding a broad ban of Islamic headscarves).

94. *Karaduman v. Turkey*, *supra* note 88.

95. *R (on the application of SB) v Governors of Denbigh High School*, *supra* note 88 (held that a school, as an extension of the state, would have to show reasons to prohibit religious dress); *Sahin v. Turkey*, *supra* note 88 (held that the need for prohibiting the wearing of the headscarf in a university setting was specific enough to justify the law).

96. Comp. ¶16.

97. *Dogru v. France*, *supra* note 88.

Rigalia has articulated neither a legitimate aim for its ban, nor has it shown that the ban is limited and tailored to a particular goal that falls within the narrow exception of the ICCPR.

B. Rigalia cannot rely on the margin of appreciation doctrine.

Rigalia may attempt to assert that this Court should adopt a deferential approach to its legislation under the margin of appreciation doctrine, which has only been applied by the European Court of Human Rights.[98] While the European Convention has been used as a model for interpreting the ICCPR, the margin of appreciation has not been used outside of the European context.[99] Even if this Court were to entertain applying this doctrine for the first time, such an application would not go so far as legitimizing the Mavazi ban. The European Court of Human Rights recognized the limits to the margin of appreciation doctrine, stressing that a state, in striking a balance between the collectively-oriented needs of the state and the needs of the individual, could not disregard human rights concerns.[100]

C. Rigalia cannot rely on the public safety and order exception to Article 18 of the ICCPR.

While Rigalia has experienced unrest in the Zetian provinces and finds it necessary to respond to the secessionist threats from the Zetian Democratic Party, this does not justify violating international human rights conventions.[101] The basic human rights of the Zetian women cannot be usurped due to an alleged national necessity.[102] The ICCPR expressly permits some narrow exceptions to the freedom of religious belief, but only to protect public safety, order, health, or morals or to ensure the protection of others' rights and freedoms.[103] National security must not be confused with ensuring public order, especially in times of declared emergency.[104] In

---

98. George Letsas, *Two Concepts of the Margin of Appreciation Doctrine*, 26 OXFORD J. L. STUDIES 705 (2006); Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 INT'L & COMP. L.Q. 638-50 (1999).

99. Letsas, *supra* note 98, at 705.

100. *Sahin v. Turkey*, *supra* note 88.

101. Comp. ¶6.

102. General Comment 22, *supra* note 81, at ¶1 ("The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.")

103. ICCPR, *supra* note 15, at art. 18(3).

104. Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U.J. INT'L L. & POL. 437 (2008).

interpreting these limitations, the Human Rights Committee declared in General Comment 22 that "[p]aragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds . . . such as national security."[105] Therefore, Rigalia cannot justify its illegal Mavazi ban on national security grounds.

Further, Rigalia cannot meet the requirements of the narrow Article 18 exception for the "protect[ion of] public safety."[106] In order for a state party to meet this exception by passing legislation that restricts the external manifestation of a religious belief, the party must show that such a restriction meets the threshold established in General Comment 22.[107] While Rigalia attempts to assert that it carried out the Mavazi ban for purposes of public order and safety in a time of emergency, it can point to only a single instance of an extremist using the Mavazi to conceal his identity while carrying out an act of terrorism, and has never specified the number of casualties, if any, from this incident.[108] This was a solitary event, and cannot justify a broad and sweeping ban of the religious garment. In order for this Court to legitimize the ban, Rigalia bears the burden to show that there is a "sufficient justification" for the law, or that there is an "objective and reasonable justification" for the ban.[109] Here, there is no evidence that the ban has decreased terrorist activity in the region, nor that it actively protects any fundamental rights of Rigalians.[110] Furthermore, the affirmative defense of necessity as a justification for breaching human rights has been overruled time and time again, as human rights law continues to apply even in states of emergency.[111]

---

105. Human Rights Comm., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Comment 18: Art. 22, 48th Sess., U.N. Doc. HRI/GEN/1/Rev.1. (1994) *in* JOSEPH, *supra* note 81.

106. ICCPR, *supra* note 15, at art. 18(3); General Comment 22, *supra* note 81, at ¶1.

107. General Comment 22, *supra* note 82.

108. Comp. ¶16.

109. *Mauritian Women's Case,* HRC Resn. 9.35, UN Doc. A/36/40, at 134, 36 U.N. GAOR, Supp. (No. 40)(1981); *Belgian Linguistics*, (1979-1980) 6 Eur. H.R. Rep. (ser. A) at 252 (1968).

110. Comp. ¶28.

111. Judgments of the Israel Supreme Court, *Israeli General Security Service, GSS's Methods of Interrogation: Fighting Terrorism Within the Law*, 34, *available at* http://www.jewishvirtual library.org/jsource/Politics/terrorirm_law.pdf.

D. Rigalia's Mavazi ban is discriminatory.

1. The Mavazi ban violates the rule that any legislative restriction of expression must be crafted in the interest of creating equality in fact.

Under Article 2 of the ICCPR, states party to the Covenant shall not infringe on the rights of an individual to practice his or her religion, partake in his or her culture, or discriminate against an individual based on his or her religion, sex or social status.[112] While the Mavazi ban appears neutral on its face, its effect is discriminatory as it is felt only by Zetian women practicing Masinto, who wear the Mavazi as an external manifestation of their internal devotion to their religion, their tribe, and their culture.[113]

The Rigalian government did not ban any other forms of religious attire at the time that it banned the Mavazi or at any point thereafter; elimination of the Mavazi from public life was the sole purpose of the legislation, as President Khutai stated publicly.[114] Consequently, the only ill-affected members of society were Zetian-Masinto women. If the goal was actually to enhance public order and safety, the Rigalian legislature would have banned other garments that have been used in the course of terrorist attacks, such as burqas,[115] niqabs,[116] or even ski masks.[117]

2. Rigalia may not rely on CEDAW to justify its discriminatory legislation.

The Court should not accept Rigalia's claim that the Mavazi ban furthers the purposes of CEDAW. According to Articles 26 and 31 of the Vienna Convention on the Law of Treaties, all international obligations must be interpreted in good faith and in the context in which they were

---

112. ICCPR, *supra* note 15, at art 2(1).

113. Comp. ¶3; *see generally* W. MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW (1983)(describing the distinction between belief in the forum internum and manifestations in the forum externum.).

114. Comp. ¶21.

115. Zeeshan Haider, *Pakistan Suicide Bomber was woman covered in Burqa*, REUTERS.COM, Dec. 26, 2010, *available at* http://www.reuters.com/article/idUSTRE6BP10P20101226.

116. Daniel Pipes, *Lion's Den: Niqabs and Burqas:The Veiled Threat Continues*, JERUSALEM POST, Sept. 1, 2009, *available at* http://www.jpost.com/Opinion/Columnists/Article.aspx?id=153585.

117. Thomas Sheehan, *Italy: Behind the Ski Mask*, N.Y. REV. BOOKS, Aug. 16, 1979, *available at* http://www.nybooks.com/articles/archives/1979/aug/16/italy-behind-the-ski-mask/(ski masks were used to disguise identity by groups such as the Italian Red Brigades terrorist organization, in the 1970's).

intended and with their specific goals and purposes in mind.[118] International obligations must be interpreted in light of all other applicable international treaty obligations as well.[119] The objectives of CEDAW are to equalize standards for men and women, not to force women to conform to secular dress codes.[120] If Rigalia's interpretation of the Convention is upheld, CEDAW would be turned on its head to remove the decision-making abilities of women, at a time when human rights courts around the world are upholding a woman's right to wear symbols of her faith.[121] Although women may be subjected to tribal penalties in the Northern Provinces for not wearing the Mavazi, the choice to express their religious beliefs must be protected by Rigalia.[122] It is not the role of the state to prescribe permissible religious expression.[123]

Moreover, in contrast to Rigalia's professed objective, the elimination of the Mavazi from public life further burdens Zetian women. Anthropologists have examined this issue as it applies to Muslim women and have found that the wearing of religious garments is a reassurance to the wearer that she is demonstrating the norms and values of her culture, as well as actively participating in it.[124] Similarly, sociological studies have confirmed that the linkage between religious attire and the connection a woman feels to her culture confers a sense of liberation rather than oppression.[125] The wearing of a head covering for a devout woman should not be confused with a lack of legal agency.[126] The adherence to her religion and tradition, as well as the expression thereof, is a guaranteed human right that should not be removed by Rigalian legislators presuming to act on her behalf.[127]

---

118. Vienna Convention on the Law of Treaties art. 26,31, May 23, 1969, 1155 U.N.T.S. 331 (1969)[hereinafter VCLT].

119. *Id*.

120. Convention on the Elimination of all forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

121. *Sahin v. Turkey*, *supra* note 88; *Karaduman v. Turkey*, *supra* note 88; *Dogru v. France*, *supra* note 88; *Dahlab v. Swizerland*, *supra* note 80.

122. International Covenant on Economic, Social, and Cultural Rights, 933 U.N.T.S. 3, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966)[hereinafter ICESCR].

123. *Id* at art. 1, ¶3.

124. *Id*.

125. Muhammad Khalid Masud , Dress Matters: Change and Continuity in the Dress Practices of Bosnian Muslim Refugee Women, 19(1) GENDER & SOCIETY 44, 45 (2005).

126. *Id*.

127. ICCPR, *supra* note 15, at art. 2(1)-(2).

IV. ARDENIA DID NOT VIOLATE THE OECD ANTI-BRIBERY CONVENTION OR THE OECD DECISION ON MNE GUIDELINES.

As an preliminary matter, Ardenia notes that Rigalia has the burden of proof on all aspects of this counter-claim. [128]

A. Rigalia cannot demonstrate the undue influence on a foreign public official in the bidding process, which is necessary for violations of the OECD Convention.

1. There is no undue advantage or injury shown in the bidding process for the Moria Mine contract renewal.

In order for a violation to fall within the scope of the OECD Anti-Bribery Convention, it must amount to gaining an "undue pecuniary or other advantage" in a bidding process.[129] The OECD Guidelines for Multinational Enterprises are concerned with acts of bribery in terms of how these acts create unfairness and undue advantage in global markets.[130] Here, the prerequisite for applying the Convention and the Guidelines is absent, as Rigalia has failed to demonstrate that the renewal of the Contract constituted an undue advantage or injury. Rigalia, itself, suffered no direct injury in this bidding process, and thus lacks standing to bring this claim under the OECD Convention. Further, no aggrieved Rigalian party has come forward alleging financial injury, so there is no national for whom Rigalia may espouse a claim. Therefore, there is no injury for Rigalia to assert before this Court.

2. The alleged targets of the bribe are not foreign public officials within the meaning of the Convention.

Both the Convention and Guidelines apply only to the bribing of "foreign" public officials, and do not address purely domestic acts of

---

128. *Oil Platforms*, *supra* note 62, at 214; *see also Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 6).

129. Organization for Economic Cooperation and Development(OECD), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 1¶1, Nov. 21, 1997 *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf[hereinafter Anti-Bribery Convention].

130. Comm. on Int'l Investment and Multinat'l Enterprises, OECD, *The OECD Declaration and Decision on International Investment and Multinational Enterprises: Basic Texts*, annex 1, OECD Doc. DAFFE/IME(2000)20, Nov. 9, 2000 [hereinafter MNE Guidelines].

bribery.[131] In the present case, all of the alleged acts occurred within Ardenia: MDI allegedly paid the bribe to the Zetian Refugees Fund ("ZRF"), an Ardenian charity, in the name of Clyde Zangara, who lives in Ardenian territory.[132] While Rigalia alleges that Leo Bikra was the ultimate target of these bribes, the standard of active bribery means that only the alleged affirmative actions of MDI may be evaluated.[133]

Furthermore, the Guidelines and Convention only apply to the bribery of foreign "public officials." The ZRF is a private charity, not a government entity. [134] Clyde Zangara, in turn, is an agent of a non-governmental organization and not a public official.[135] Any money donated to the fund, or to Clyde Zangara, therefore, does not constitute a payment to a public official. While Rigalia claims that the target of the bribe was Leo Bikra, RRI's Director General, the MNE Guidelines may be triggered only when a public official exercises "sovereign authority." [136] In the present case, there is no evidence that Leo Bikra exercises any such authority; he is merely a state-appointed head of a business entity.[137] Consequently, neither the OECD Convention nor the MNE Guidelines are applicable in this case.

3. Ardenia justifiably denied the request for mutual legal assistance because it was too broad.

Requests for mutual legal assistance ("MLA") must be "for the purpose of criminal investigation in proceedings brought by a party concerning offenses within the scope of the Convention."[138] Since MDI's alleged actions do not fall within the scope of the Convention, the MLA request was invalid. Assuming, *arguendo*, that the Court feels that the allegations do fall within the scope of the Convention, the documents requested would still not be accessible, as the request is too broad. Ardenia may provide access only to MDI's bank records under the OECD Convention, as the scope of the investigation is MDI's conduct in allegedly bribing RRI;[139] Rigalia's request for correspondence between ZRF and

---

131. *Id.*

132. Comp. ¶11.

133. THE OECD CONVENTION ON BRIBERY: A COMMENTARY 96 (Mark Pieth et al., eds., 2007)[hereinafter PIETH COMMENTARY]at 247.

134. Comp. ¶11.

135. PIETH COMMENTARY, *supra* note 133, at 70.

136. *Id.*

137. Comp. ¶11.

138. Anti-Bribery Convention, *supra* note 129, at art. 9.

139. *Id.*

members of the tribal councils goes beyond that scope. Further, Ardenia law bars access to these documents.[140] While Article 9(3) does not permit noncompliance on the basis of bank secrecy, nothing in the record suggests that is the motivation for the Ardenian law.[141] Finally, Ardenia has not denied the request, but instead has responded as best it can, putting Rigalia on notice of the issues with its domestic law, and explaining that it is attempting to comply in good faith with its international obligations.[142] Therefore, Ardenia's response was not in fact a breach of the OECD Convention.[143]

B. Ardenia's investigation was stopped for permissible reasons of national security.

Article 5 of the OECD Convention grants broad prosecutorial discretion to domestic jurisdictions, limiting that discretion only in instances of national economic interest, foreign relations impacts, and where the identity of the parties influence the decision. Relying on standards of treaty interpretation,[144] this means that it is permissible for a country to halt investigations into bribery allegations for purposes of national security.[145]

1. The Prosecutor's public statement regarding "national security concerns" holds greater validity than statements about national economic interest made in media reports.

In June of 2009 Prosecutor Strong announced that the Ardenian investigation into the bribery allegations was terminated due to national security concerns.[146] Under this Court's jurisprudence in the *Iran Hostages* case, highly placed government officials, such as Prosecutor Strong, may give the "seal of government approval" in their public statements.[147] While Rigalia may try to assert that Prosecutor Strong's public statement must be

---

140. Comp. ¶24.

141. *Id*.

142. *Id*.

143. Comp. ¶¶23,24.

144. VCLT, *supra* note 118, at art. 31.

145. Anti-Bribery Convention, *supra* note 129, at art. 5. *See R (on the application of Corner House Research and others) v. Director of the Serious Frauds Office, [2008] U.K.H.L. 60 (H.L) (appeal taken from Admin.)*; Rose-Ackerman & Billa, *supra* note 104.

146. Comp. ¶25.

147. *Iran Hostages*, *supra* note 39, at ¶73; *see also Nuclear Tests* (N.Z. v. Fr.), 1974 I.C.J. 473, 474-5 (Dec. 20).

subordinated to President Arwen's suggestion that national economic interest may also have played a role in the decision not to prosecute,[148] such an interpretation would be improper. President Arwen's comment to the news outlet was not an official public statement on the investigation and should not be read as such.

2. In state practice, national economic interests necessarily play a role in decisions to pursue investigations into bribery allegations.

Even if the Court were to focus on President Arwen's suggestion that national economic interests played a role in the decision not to prosecute MDI, this should not amount to a violation of Article 5 of the OECD Convention.[149] "National economic interest" should be interpreted in light of state practice.[150] Thirty-two other state parties have either implemented domestic statutory exceptions to Article 5 of the OECD Convention, or consistently fail to prosecute claims where national economic interests would be injured.[151] In light of state practice in Ardenia's favor, and the lack of international case law on the topic,[152] the Court should not enforce the prohibition of relying on "national economic interest" against Ardenia.

C. Facilitation payments are acceptable under OECD standards, and under agreed upon exceptions in state practice.

While the OECD Convention bars bribery of foreign public officials, it left an exception for facilitation payments.[153] These payments are those which induce lawful actions by public officials and do not rely on a discretionary decision of the official. MDI's conduct as it pertains to "small facilitation payments" is not in conflict with the OECD Convention.[154] Consistent with Comment 9, an authoritative interpretation of the OECD Convention, Ardenia has created an exception, within its legislation

---

148. Comp. ¶25.

149. Anti-Bribery Convention, *supra* note 131, at art. 5.

150. VCLT, *supra* note 118, at art. 31.

151. TRANSPARENCY INT'L, FOREIGN BRIBERY AND OECD COUNTRIES: A HOLLOW COMMITMENT? PROGRESS REPORT 2009, available at http://www.transparency.org/news_room/in_focus /2009/oecd_pr_2009 [hereinafter TI REPORT].

152. *Id*.

153. *Id*.(noting that only four states actively prosecute); Anti-Bribery Convention *supra* note 131, at art. 1; PIETH COMMENTARY, *supra* note 131, at xxx (reprinting the OECD Commentary on the Anti-Bribery Convention, ¶9).

154. PIETH COMMENTARY, *supra* note 153, at xxx.

regarding bribery offenses, for "small facilitation payments."[155] There is no violation of Ardenia's OECD obligations in this area, as the payments are designed only to allow passage for coltan reserves from the Moria Mine to Rigaliaville, and requires no discretion from the tribal councils.

Rigalia cannot claim that Ardenia's facilitation payments are incongruous with customary international law. While some states have narrowed exceptions for facilitation payments and the OECD frowns upon the use of these payments, exception still exists in the OECD Convention and the large majority of states in the world continue to permit facilitation payments.[156]

155. Comp. ¶38.

156. TI REPORT, *supra* note 151.

V. PRAYER FOR RELIEF

For the reasons stated above, Ardenia respectfully requests that this Court:

1. **DECLARE** that Rigalia's Predator drone strikes are illegal under international law, ORDER their immediate cessation, and ORDER that Rigalia make reparations for the harm the attacks caused;

2. **DECLARE** that Rigalia's attack on the Bakchar Valley hospital was an unlawful use of force rising to the level of aggression and ORDER Rigalia to make reparations for the harm caused thereby;

3. **DECLARE** that Rigalia's ban of the Mavazi constitutes a violation of international human rights law; and

4. **DECLARE** that Ardenia's discontinuation of its investigation into the payments over the Moria Mine, its refusal to provide Rigalia the requested bank records, and its small facilitation payments did not constitute a violation of its OECD obligations.

Respectfully submitted,

_____

Agent for Applicant

INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE

THE 2011 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

THE CASE CONCERNING THE
ZETIAN PROVINCES

THE STATE OF OF ARDENA
(APPLICANT)

v.

THE STATE OF RIGALIA
(RESPONDENT)

MEMORIAL OF THE RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

TREATIES

UN DOCUMENTS

Security Council

General Assembly

International Law Commission

Human Rights Committee

Other

OECD DOCUMENTS

Reports on the Implementation of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*

National Contact Point Statements Concerning Complaints under the OECD MNE Guidelines

JUDICIAL DECISIONS

International Court of Justice

Permanent Court of International Justice

International Criminal Tribunal for the Former Yugoslavia

European Court of Human Rights

Other International Bodies

Domestic Case Law

DOMESTIC LEGISLATION

TREATISES & DIGESTS

ARTICLES

MISCELLANEOUS

STATEMENT OF JURISDICTION

The State of Rigalia and the State of Ardenia submit the present dispute concerning the Zetian Provinces to the International Court of Justice by Special Agreement, dated 5 May 2010, pursuant to article 40(1) of the *Statute of the International Court of Justice*. The parties have agreed to the contents of the *Compromis* submitted as part of the Special Agreement. Both the State of Rigalia and the State of Ardenia have accepted the compulsory jurisdiction of the Court in accordance with article 36(2) of the *Statute of the International Court of Justice*. The State of Rigalia undertakes to accept the judgment of this Court as final and binding and shall execute it in good faith in its entirety.

QUESTIONS PRESENTED

The State of Rigalia respectfully asks this Honourable Court:

A. whether Rigalia's drone strikes in Rigalia and Ardenia are consistent with international law, including international humanitarian law, international human rights law and the *Charter of the United Nations*, and whether there are any grounds for ordering their cessation;

B. whether the attack on Bakchar Valley Hospital is attributable to Rigalia, whether said attack was an act of aggression or any other violation of international law, whether Rigalia has a substantive or remedial obligation to investigate the attack, and whether Rigalia is required to compensate Ardenia;

C. whether Rigalia's ban of the Mavazi for Zetian women and girls is consistent with its obligations under the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination against Women*; and

D. whether Ardenia's failure to investigate and prosecute the alleged corruption and its failure to provide legal assistance to Rigalia constitute breaches of the *OECD Anti-Bribery Convention*, and whether the failure of the Ardenian NCP to respond to the complaint by the CRBC constitutes a breach of the *OECD Decision on MNE Guidelines*.

STATEMENT OF FACTS

The mountainous and economically underdeveloped Zetian Provinces straddle the Ardenian- Rigalian border. The Zetian Provinces comprise the Southern Provinces of Ardenia and the Northern Provinces of Rigalia. The Northern Provinces are rich in coltan, an important natural resource.

The Zetian Provinces are populated by ethnic Zetians who live according to tribal custom and practise the Masinto religion. Their autonomous communities are governed by tribal leaders.

Ardenia and Rigalia have granted citizenship to all Zetians.

The Masinto religion obliges Zetian women to wear the Mavazi, a headcovering that hampers the wearer's ability to work in the heat. Under tribal council laws, Zetian women are publicly flogged and exiled for not wearing the Mavazi, prohibited from driving and taking paid employment and forced into marriage from as young as eight or nine.

Rigalia's President, Teemu Khutai, has denounced these practices as oppressive. Rigalia has been unable to enforce its laws in the Northern Provinces where the tribal councils enjoy virtually 100 per cent control. Ardenia, a decentralised State, accords Zetian tribal leaders autonomy to govern as they wish.

The Zetian Democratic Party (ZDP) purportedly represents more than 75 per cent of Zetians in the Northern Provinces. It has sponsored efforts of the Zetian separatist movement (ZSM), a ZDP-affiliated group.

On 5 May 2008, the ZDP-dominated meeting of the Joint Tribal Council of the Northern Provinces produced a manifesto demanding a greater share of coltan revenue for Zetians, non-interference in Zetian affairs, and support for a future Zetian State.

President Khutai responded by emphasising national unity and the need to modernise the impoverished Zetian Provinces. He spoke out against tribal leaders imposing the Mavazi on women. Violence followed in the Northern Provinces, necessitating deployment of Rigalian forces. Disorder prompted President Khutai to invoke emergency powers in Rigalia's Constitution. Citing concerns over safety and the rights of Zetian women and girls, President Khutai also introduced a bill to ban the wearing of the Mavazi in public spaces and when receiving public services.

ZSM leaders launched a violent campaign to secure full independence. In December 2008, ZSM members bombed a bridge in Rigaliaville, killing over 130 Rigalians. Over the next two months, ZSM suicide bombings occurred at a Rigalian school and hospital, killing 25 civilians and wounding 112 more. An attack on a public school occurred when a terrorist escaped detection by wearing a Mavazi.

Allegations subsequently surfaced that Rigalian Zetians were meeting in Ardenia to elude Rigalian troops. Rigalian intelligence corroborated this information.

In March, the media reported President Arwen had brokered an agreement with Zetian tribal leaders. It alleged that President Arwen had agreed to support a future Zetian State on Rigalian territory in exchange for the renunciation of secessionist claims against Ardenia. President Arwen has not denied these allegations. Her office confirms the meeting occurred.

On 22 March, as a result of these developments, President Khutai declared war on the ZSM and its supporters. The Mavazi bill was enacted the same day.

Confronted by geographical and cultural barriers to pursuing ZSM attackers, President Khutai appealed to President Sophia Ratko of Morgania to deploy Predator Drones to Fort Raucus, a Morganian base in Rigalia. Against a backdrop of ZSM threats to Morganian interests, President Ratko acceded to the request. Morganian personnel operate the drones from Morganville. They receive targeting information from Rigalian-paid informants, but retain discretion in launching attacks.

From September 2009 to March 2010, drone strikes in Rigalia killed 15 important ZSM leaders. 230 Zetian civilians were killed.

On 15 March 2010, a drone strike took place in Ardenia against Adar Bermal, a key ZSM leader who planned and initiated attacks against Rigalia. A missile struck his house, killing everyone inside. During the attack, an unauthorised phone call from an informant distracted the drone operator and caused her to fire accidentally on Bakchar Valley Hospital. Rigalia's Defence Minister expressed regret at the civilian loss of life.

In early 2009, President Khutai requested an investigation into bribery allegations concerning Mineral Dynamics Incorporated (MDI), an Ardenian State-owned corporation, and Rigalian Refineries Inc. (RRI), a Rigalian State-owned enterprise.

There exist two allegations. First, that MDI secured the renewal of its contract with RRI by offering support and payment on trust to the Zetian Refugee Fund (ZRF) and Clyde Zangara respectively. Zangara is both the nephew of Leo Bikra, RRI's President and Director-General, and founder of the ZRF. The second allegation was that MDI transporters responded to solicitations from tribal council members to pay mandatory undocumented fees to ensure the added security of its mining operation and the smooth delivery of its products. While these allegations were reported in the media in 2002, Ardenia did not investigate until 2009.

In 2009, a former MDI employee involved in the contract renewal further substantiated the first allegation. While he could not confirm the

MDI transporter payment allegations, he stated such payments were common practice when MDI operated in similarly sensitive areas.

Ardenia only investigated these allegations in response to a request from Rigalia for mutual legal assistance (MLA) sent on 30 April 2009. MDI intensely lobbied influential Ardenian government officials to drop the inquiry, hosting lavish receptions for this purpose. On 3 June 2009, Ardenian Public Prosecutor Sam Strong dropped the investigation, citing unexplained security concerns. Twelve days later, however, President Arwen hinted the decision was influenced by national economic concerns.

Rigalia's MLA request sought, *inter alia*: (a) MDI's bank records since 2001, (b) correspondence between, on the one hand, Clyde Zangara or the ZRF and, on the other, Leo Bikra or the President of MDI, and (c) correspondence between the ZRF and tribal council members. Ardenia did not respond to Rigalia's request.

When Rigalia raised the MLA request on 23-24 March 2010, Ardenia cited its bank secrecy legislation as the basis for its delay. Ardenia also refused request (c), claiming it was irrelevant to Rigalia's investigation.

Rigalia and Ardenia are Parties to the *OECD Anti-Bribery Convention* and have criminalised the bribery of a foreign public official. Ardenia is a member of the OECD, while Rigalia is an adherent to all related OECD anti-bribery instruments.

Rigalia and Ardenia have both established National Contact Points in accordance with the OECD Decision on MNE Guidelines, to which they both adhere. On 1 July 2009, the Committee for Responsible Business Conduct (CRBC), a government-funded Rigalian NGO, filed a complaint with Ardenia's NCP, alleging violations of the MNE Guidelines by MDI and RRI.

Two days later, the Ardenian NCP refused to examine the complaint on grounds that, *inter alia*: 1) the complaint should be dealt with by Rigalia's NCP as the alleged misconduct occurred in Rigalia; 2) the MNE Guidelines do not apply to RRI; and 3) investigations were already underway in Ardenia and Rigalia. Ardenia's NCP did not respond to a written request from the CRBC for a meeting between all interested parties, including the Rigalian NCP.

Ardenia and Rigalia have exchanged diplomatic notes. The Zetian situation has also been discussed in the UN Security Council. Following failed negotiations, the Parties have invoked article 36(2) of the Court's Statute. An Application and *Compromis* were filed with the Court on 5 May 2010.

SUMMARY OF PLEADINGS

A.

Ardenia's claims are inadmissible insofar as they relate to drone strikes in Rigalia. As a Party to the *Geneva Conventions* and *International Covenant on Civil and Political Rights* (*ICCPR*), Ardenia has an interest in Rigalia's compliance with these treaties. Absent direct injury, however, this interest does not permit instituting proceedings in this Court.

In any event, Rigalia's strikes comply with international humanitarian law (IHL) and international human rights law (IHRL). IHL applies because a non-international armed conflict has arisen between Rigalia and the Zetian separatist movement (ZSM). Rigalia's use of precision weaponry and informants discharges its IHL obligation to take feasible precautions to verify targets and minimise civilian casualties. The strikes are also proportionate, given the anticipated military advantage of eliminating ZSM aggressors. As the strikes are IHL-compliant, they are not arbitrarily depriving Zetians of life.

Strikes in Ardenia are justified as self-defence. Non-State actors are capable of executing an 'armed attack' triggering the right of self-defence. Cumulatively, ZSM attacks constitute an 'armed attack'. Rigalia's strikes are necessary as Ardenia is unwilling or unable to act against the ZSM. They are proportionate to the purpose of ending ZSM aggression.

The strikes are consistent with Rigalia's obligation to accord the Zetians' internal self-determination as they are directed at suppressing an insurgency.

B.

The Bakchar Valley Hospital attack is not attributable to Rigalia. Those involved in the attack did not exercise Rigalian governmental authority, had not been placed at Rigalia's disposal and were not under Rigalia's effective control. Rigalia has not adopted the attack as its own.

In any event, the strike occurred in the lawful exercise of Rigalia's right of self-defence. Alternatively, it was not sufficiently grave to constitute an act of aggression.

The strike complied with IHL. Rigalia directed its attack against Adar Bermal, a lawful target. As with all the strikes, Rigalia took feasible precautions. The attack was proportionate. As the IHL-compliant strike did not arbitrarily deprive persons of life, Rigalia is not obligated to investigate.

Alternatively, investigation is an inappropriate modality of satisfaction.

C.

The ban on wearing the Mavazi in public spaces and when receiving public services is consistent with the rights of Zetian women and girls under IHRL. Ardenia cannot assert a claim in diplomatic protection in the absence of an affected national whose predominant nationality is Ardenian.

The ban permissibly limits the freedom of Zetian women and girls to manifest religious belief and enjoy minority culture as it is prescribed by law and is necessary to protect public safety, order and the fundamental rights of Zetian women. The Mavazi is violently imposed on women and is a threat to public safety, evidenced by its use in a terrorist attack. Rigalia has a margin of appreciation in determining the necessity of the ban.

The ban does not violate the economic, social and cultural rights of Zetian women and girls as they remain able to access public services by not wearing the Mavazi. The ban is necessary in a democratic society as it has the purpose and effect of increasing equality and improving the realisation of economic, social and cultural rights.

D.

Ardenia breached the *OECD Anti-Bribery Convention* ('*OABC*') and the *OECD Decision on MNE Guidelines* ('*Decision*'), binding instruments to which Ardenia and Rigalia are States Parties. These breaches directly injure Rigalia.

Ardenia breached article 5 of the *OABC*. In responding to allegations that Mineral Dynamics Incorporated (MDI) had bribed foreign public officials, an offence under the *OABC,* Ardenia failed to exercise its prosecutorial discretion in conformity with article 5. For seven years, Ardenia failed to investigate allegations that created a well-founded suspicion of an offence. Ardenia never prosecuted MDI and allowed considerations prohibited by article 5 to influence its decision to suspend an inquiry.

Further, Ardenia has breached its obligation under article 9 of the *OABC* to provide prompt and effective legal assistance to States Parties when requested as Ardenia has failed to satisfy Rigalia's request for mutual legal assistance for over one year, without lawful excuse.

Additionally, in refusing to examine the complaint by the Committee for Responsible Business Conduct, Ardenia's National Contact Point breached its obligation to take due account of the *Decision's* Procedural Guidance.

PLEADINGS

I. RIGALIA'S PREDATOR DRONE STRIKES IN RIGALIA AND ARDENIA ARE CONSISTENT WITH RIGALIA'S RIGHTS UNDER INTERNATIONAL LAW, AND THUS THE COURT HAS NO AUTHORITY TO ORDER CESSATION OF THE DRONE ATTACKS

An armed conflict has arisen between Rigalia and the Zetian separatist movement (ZSM). Customary international humanitarian law (IHL), common article 3 of the *Geneva Conventions* (*GC*s),[1] and international human rights law (IHRL) govern the conflict. Rigalia accepts attribution of the Predator Drone strikes ('the strikes') on the limited basis that it has adopted them in these proceedings.[2] The strikes comply with Rigalia's IHL obligations. Further, they neither arbitrarily deprive Zetians of life, nor deny them self-determination. Strikes in Ardenia are justified as self-defence under article 51 of the *Charter of the United Nations* (*Charter*).[3]

A. Ardenia does not have standing in respect of Rigalia's drone strikes in Rigalia

Ardenia's capacity to enforce fundamental principles of IHL,[4] the right to life[5] and the collective right to self-determination[6] is governed exclusively by the *GCs* and the *International Covenant on Civil and Political Rights* (*ICCPR*).[7] Absent any direct injury, Ardenia's capacity to enforce the *GCs* is limited to diplomatic protest, action through international organisations, and not recognising conduct which breaches Convention obligations.[8] In addition, the *ICCPR* 'concern[s] the

---

1. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth)* [1949] 75 UNTS 287, art 3(1)(a) ['GC-IV'].

2. International Law Commission (ILC), *Articles on the Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (2001) art 11 ['*ASR*'].

3. [1945] 1 UNTS XVI.

4. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 199 ['Israeli Wall'].

5. *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 32.

6. *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102 ['*East Timor*'].

7. [1966] 999 UNTS 171 ['*ICCPR*']; *Vienna Convention on the Law of Treaties* [1969] 1155 UNTS 331, art 32 ['*VCLT*']; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 445.

8. *Israeli Wall*, n4, 200.

endowment of individuals with rights' and does not confer standing on States independently of diplomatic protection.[9]

Ardenia does not have standing in respect of Rigalia's drone strikes in Rigalia, as it cannot point to any identified Ardenian national affected by said strikes over whom it can exercise diplomatic protection.[10]

B. Rigalia is complying with international humanitarian law (IHL) and international human rights law (IHRL) obligations applicable to the non-international armed conflict in the Zetian Provinces

1. An armed conflict has arisen between Rigalia and the Zetian separatist movement (ZSM)

An armed conflict arises where there is 'protracted armed violence between governmental authorities and organized armed groups'.[11] This threshold has been met. Protracted armed violence is evidenced by the seriousness and escalation of ZSM attacks;[12] the deployment of Rigalian forces to the crisis area;[13] Rigalia's recognition of ZSM belligerency;[14] and Security Council recognition of hostilities.[15] The ZSM's organisation is evidenced by its military chain of command;[16] its successful execution of 'large-scale' attacks;[17] its *de facto* control over territory through dominant representation on Zetian tribal councils;[18] its claim to Zetian statehood

---

9. Human Rights Committee ['HRC'], *General Comment 24*, UN Doc CCPR/C/21/Rev.1/Add.6 (1994), [17].

10. *Mavrommatis Palestine Concessions Case (Greece v UK) (Jurisdiction)* [1924] PCIJ (Ser A) No 2, 12.

11. *GC-IV* art 3; *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal)* (ICTY, IT-94-1-AR72, 2 October 1995) [70] ['*Tadić (Interlocutory Appeal)*'].

12. *Compromis*, [29]; *Prosecutor v Boškoski* (ICTY, IT-04-82-T, 10 July 2008) [177] ['*Boškoski*']; *Public Committee Against Torture in Israel v Israel* (2007) 46 ILM 375, 381 ['PCATI'].

13. *Compromis*, [15]-[16], [18]-[19]; *Prosecutor v Haradinaj* (ICTY, IT-04-84-T, 3 April 2008) [49] ['*Haradinaj*']; *Prosecutor v Limaj* (ICTY, IT-03-66-T, 30 November 2009) [169] ['*Limaj*'].

14. *Compromis*, [21]; International Committee of the Red Cross ['ICRC'], *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 1320-21.

15. *Compromis*, [32]; *Boškoski*, n12, [177].

16. *Compromis*, [30]; *Prosecutor v Tadić (Appeal Judgment)* (ICTY, IT-94-1-A, 15 July 1999) [120] ['*Tadić (Appeal)*'].

17. *Limaj*, n13, [129].

18. *Compromis*, [6], [13], [18].

based on this control;[19] and its ability to 'speak with one voice' in negotiations.[20]

2. The conflict is non-international in character

An international armed conflict is one that arises 'between two or more of the High Contracting Parties'.[21] International tribunals have consistently held that international armed conflicts require 'a *resort to armed force* between States'.[22] This criterion is not satisfied because Ardenia has not deployed armed forces against Rigalia and the ZSM is a non-State group.[23] Nor is the ZSM acting on Ardenia's behalf according to the applicable test of 'overall control'[24] as Ardenia is not coordinating 'the general planning of its military activity'.[25] The ZSM's secessionist aims do not internationalise the conflict, because Rigalia is neither 'founded on racist criteria' nor is a colonial or occupying power.[26]

3. Rigalia's strikes are consistent with the law of non-international armed conflict

The non-international armed conflict between Rigalia and the ZSM is governed by the 'minimum rules applicable to international and to non-international conflicts' expressed in common article 3 and customary IHL.[27] As any lacuna in the laws of war is resolved according to custom and 'the

---

19. Pictet (ed), *Commentary to 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (1958) 36.

20. *Limaj*, n13, [129]; *Haradinaj*, n13, [88]; *Compromis*, [6], [18], [21], [30].

21. *GC-IV* art 2.

22. *Tadić (Interlocutory Appeal)*, n15, [70]. Emphasis added. See also *Prosecutor v Delalic (Trial Judgment)* (ICTY, IT-96-21-T, 16 November 1998) [183]; *Haradinaj*, n17, [37]-[49]; *Boškoski*, n16, [175]; *Limaj*, n17, [84].

23. Kreb, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 *Journal of Conflict & Security Law* 245, 255-56.

24. *Tadić (Appeal)*, n20, [131]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* (International Court of Justice, General List No 91, 26 February 2007) [404] ['*Bosnian Genocide*'].

25. Ibid.

26. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* [1977] 1125 UNTS 3, art 1(4); ICRC, n14, 54.

27. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14, 114 ['*Nicaragua*'].

laws of humanity', these rules apply to transnational armed conflicts wherever there is protracted armed violence.[28]

a. The strikes are consistent with customary IHL and common article 3 of the GCs

In non-international armed conflicts, belligerents must: distinguish between civilians and 'persons who are actively participating in hostilities', attacking only the latter;[29] do everything feasible to verify that targets are lawful and that civilian loss of life is minimised; and refrain from launching disproportionate attacks.[30] ZSM members who have assumed a 'continuous combat function' may be targeted at any time.[31]

Rigalia is taking feasible precautions to verify lawful targets and minimise civilian loss of life. Feasibility is determined by what is practicable in the circumstances.[32] Given the mountainous terrain and hostile populace of the Northern Provinces, Rigalia's use of precision weaponry[33] in conjunction with local informants and corroborative UAV surveillance discharges its obligation to verify lawful targets.[34] In any event, Ardenia must adduce 'fully conclusive evidence' to prove that Rigalia is impermissibly attacking civilians, which is an allegation of

---

28. *Hague Convention IV – Laws and Customs of War on Land*, 205 Consol TS 277, Preamble ['*Hague Convention*']; HRC, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, UN Doc E/CN.4/2001/121 (2001) 39; Jinks, 'September 11 and the Laws of War' (2003) 28 *Yale Journal of International Law* 1, 41; Ben-Naftali and Michaeli, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings' (2004) 36 *Cornell International Law Journal* 233, 271; Hamdan v Rumsfeld, 126 S Ct 2749 (2006) 2757.

29. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 257 ['*Nuclear Weapons*']; Fleck (ed), *Handbook of International Humanitarian* Law (2008) 614; Henckaerts and Doswald-Beck (eds), *Customary International Humanitarian Law: Volume 1 (Rules)* (2005) 3-8, 19-24 (Rules 1, 6) ['*CIHL Rules*'].

30. *GC-IV* art 3(1); *Nuclear Weapons*, n29, 257; *CIHL Rules*, n29, 19-24, 55-56 (Rules 6, 16); *Prosecutor v Kupreškić (Trial Judgment)* (ICTY, Case No IT-95-16-T, 14 January 2000) [524] ['*Kupreškić*'].

31. ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009) 34 ['DPH Study'].

32. *Judicial and Similar Proceedings: Eritrea-Ethiopia Claims Commission: Partial Award regarding Ethiopia's Central Front Claim* 2 (2004) 43 ILM 1275, 1295; *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc A/HRC/14/24/Add.6 (2010) 4.

33. O'Connell, 'Lawful Use of Combat Drones', *Testimony Submitted to US House of Representatives Committee on Oversight and Government Reform*, Subcommittee on National Security and Foreign Affairs, Second Hearing on Drone Warfare (28 April 2010) 1.

34. Henckaerts and Doswald-Beck (eds), *Customary International Humanitarian Law: Volume 2 (Practice)* (2005) 357-60 ['*CIHL Practice*'].

'exceptional gravity'.[35] No such evidence exists. The elimination of '15 important Zetian separatist leaders' commends the opposite conclusion.[36]

As the proportionality rule attaches to specific attacks, not military campaigns as a whole,[37] Rigalia's strikes would be disproportionate only if the civilian loss of life expected from each strike would exceed its concrete and direct military advantage.[38] In each operation, the anticipated military advantage of disrupting 'increasingly deadly attacks' by eliminating important separatist leaders outweighed the comparatively low civilian loss of life expected to result from a precision strike.[39]

b. Rigalia's IHL-compliant strikes do not arbitrarily deprive Zetians of life under IHRL

Rigalia's obligation not to arbitrarily deprive Zetians of life under article 6 of the *ICCPR* applies during an armed conflict alongside the *GCs*.[40] Where two treaty provisions are inconsistent, the specific legal rule prevails over a general one.[41] IHL rules are more specific than IHRL because they regulate the more permissive use of lethal force in times of armed conflict, whereas IHRL 'deals with the inherent rights of the person to be protected at all times against abusive power'.[42] Accordingly, IHL rules are determinative of what constitutes arbitrary deprivation of life during hostilities. Rigalia's IHL-compliant strikes cannot, therefore, have breached article 6.

In any event, strikes beyond Rigalia's territory need not comply with article 6. A State owes *ICCPR* obligations only to persons 'within its territory and subject to its jurisdiction'.[43] As States can ensure human rights only where they exercise sovereign control,[44] 'jurisdiction' in this context

---

35. *Bosnian Genocide*, n24, [209].

36. *Compromis,* [29].

37. *CIHL Practice*, n34, 326-27; Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (2nd ed, 2010) 94; ICRC, n14, 2218.

38. *CIHL Rules*, n29, 46-50 (Rule 14).

39. *Compromis,* [28]-[29].

40. *Nuclear Weapons*, n29, 240.

41. *VCLT* art 32; *Nuclear Weapons*, n29, 240; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation) (Provisional Measures)* [2008] ICJ Rep 353, 387.

42. Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel Law Review* 310, 310.

43. *ICCPR* art 2(1).

44. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005) 43-44.

refers to a State's power over territory, not individuals.[45] Rigalia lacks territorial control in Ardenia. Hence, its obligations do not extend there.

C. Rigalia's use of force against the ZSM in Ardenia is justified as self-defence

The strikes in Ardenia are justified as self-defence, being a necessary and proportionate response to the ZSM's armed attack.[46] Rigalia's failure to report its action to the Security Council does not estop it from asserting self-defence. Reporting is merely a procedural mechanism for monitoring compliance with *Charter* commitments.[47]

1. Non-State actors are capable of carrying out armed attacks

Customary law permits States to use force extraterritorially in self-defence against non-State actors. A rule of customary law can emerge rapidly if State practice is 'extensive and virtually uniform' and evinces the international community's recognition that a rule of law is involved.[48] Following 11 September 2001, the near-universal practice of NATO, OAS, ANZUS and EU member States in acknowledging the US-led response against al-Qaeda as lawful self-defence brought about a customary rule permitting self-defence against non-State actors.[49] Security Council Resolutions in response to the 11 September attacks also endorsed self-defence against non-State actors and helped crystallise the customary rule.[50]

---

45. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Merits)* [2005] ICJ Rep 168, 231 ['*Armed Activities*']; *Israeli Wall*, n4, 180; *Bankovic v Belgium* (2007) 44 EHRR SE5, 85-86; *Loizidou v Turkey* (1995) 20 EHRR 99, 130.

46. *Charter* art 51; *Nicaragua*, n27, 93-94.

47. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010) 8-9.

48. *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark v Netherlands) (Judgment)* [1969] ICJ Rep 3, 43.

49. *Statement by the NATO Secretary-General* (2001) 40 ILM 1268; *Resolution of the Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs*, OAS Doc No RC24/RES1/01 (21 September 2001); Council of the EU, '2372nd Council Meeting (General Affairs)' (Press Release, 8-9 October 2001) 7; *Letter dated 7 October 2001 from the Permanent Representative of the USA*, UN Doc S/2001/946 (2001); Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 993, 997.

50. *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN Doc S/RES/1373 (2001); *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1368, UN Doc S/RES/1368 (2001); *Armed Activities*, n45, 172-73 (Judge Simma), 314 (Judge Kooijmans); *Israeli Wall*, n4, 215 (Judge Higgins).

Further, article 51 must be interpreted in accordance with its ordinary meaning and the *Charter*'s object and purpose.[51] Article 51 refers to an 'armed attack' without specifying the attacker. Consistent with the *Charter*'s object of maintaining international security, a purposive interpretation of article 51 must recognise that non-State actors can inflict attacks equally lethal to those executed by States.[52]

2. The accumulation of ZSM attacks constituted an armed attack against Rigalia

ZSM attacks, which this Court may consider as a whole for the purposes of identifying an 'armed attack',[53] are of sufficient scale and gravity to trigger the right of self-defence.[54] They have caused extensive civilian fatalities and are linked together by a 'violent campaign'.[55]

Regardless, the *Charter* does not exclude the customary right of self-defence against an imminent attack by the ZSM.[56]

3. Rigalia is using necessary and proportionate force against legitimate Zetian targets

Self-defensive action must be necessary as a last resort, and proportionate to the purpose of ending the aggression.[57]

Cross-border force is necessary where an aggressor organises attacks from another State which cannot or will not end the aggression.[58] ZSM members plan attacks against Rigalia from Ardenia.[59] Ardenia is either unable to act against them owing to the mountainous terrain and

---

51. *VCLT* art 31(1); *Compromis*, [37].

52. *Charter* art 1(1); Greenwood, 'International Law and the "War Against Terrorism"' (2002) 78 *International Affairs* 301, 307-308.

53. *Nicaragua*, n27, 120; *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [2003] ICJ Rep 161, 192 ['*Oil Platforms*']; *Armed Activities*, n45, 223, 315 (Judge Kooijmans); Brownlie, *International Law and the Use of Force by States* (1963) 279; Dinstein, *War, Aggression and Self-Defence* (2005) 230-31.

54. *Nicaragua*, n27, 101; *Armed Activities*, n45, 338 (Judge Simma), 314-15 (Judge Kooijmans); *Jus ad Bellum (Ethiopia v State of Eritrea)* (2006) 45 ILM 430.

55. *Compromis*, [18], [28].

56. Bowett, *Self-Defence in International Law* (1958) 187-88.

57. Jennings, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82, 82-84; *Nicaragua*, n27, 103; *Nuclear Weapons*, n29, 245; *Oil Platforms*, n53, 187; *Armed Activities*, n45, 223.

58. *Armed Activities*, n45, 334 (Judge Simma), 307 (Judge Kooijmans); Jennings and Watts (eds), *Oppenheim's International Law*, vol 1 (9th ed, 2002) 419.

59. *Compromis*, [19].

uncooperative populace,[60] or is unwilling to do so,[61] as evidenced by its collusion with the ZSM.[62] The Court may infer such collusion from tacit admissions by President Arwen and her spokespeople.[63] Cooperation with Ardenia is evidently not possible.

Proportionate force is limited to targets whose elimination serves the purpose of ending ZSM aggression.[64] Rigalia's strikes are proportionate because its intelligence and precision weaponry ensure they are directed against ZSM members only.[65]

D. Rigalia's use of force against the ZSM does not violate the Zetian people's right of self-determination

As Rigalia has ratified the *ICCPR* and the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*'), it is obligated to respect the Zetian people's right to self-determination.[66] However, self-determination is limited by the territorial integrity of States, the primacy of which entitles Rigalia to quell the ZSM insurgency within its own territory.[67] Rigalia's use of force does not deny Zetians' right of internal self-determination, which only requires that States grant 'peoples' equal access to government.[68] Zetian political autonomy and participation in Rigalian politics prove that Rigalia respects Zetians' right to self-determination.[69]

---

60. *Compromis*, [28].

61. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, GA Res 2625, UN Doc A/8082 (1970) ['*Friendly Relations Declaration*']; *Armed Activities*, n45, 227.

62. *Compromis*, [20].

63. *Compromis*, [19]-[20]; *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 18 ['*Corfu Channel*'].

64. *Oil Platforms*, n53, 196.

65. *Compromis*, [29].

66. *ICCPR* art 1(3); *International Covenant on Economic, Social and Cultural Rights* [1966] 993 UNTS 3, art 1(3) ['*ICESCR*']; *East Timor*, n6, 102.

67. *Charter* art 2(7); *Friendly Relations Declaration*, n61; Marcelo Kohen (ed), *Secession: International Law Perspectives* (2006) 105.

68. *Aaland Islands Question (Merits)*, Report of the Commission of Rapporteurs, League of Nations Council Doc B7 21/68/106 (1921) 4-5; *Reference re Secession of Quebec* [1998] 2 SCR 217, [126].

69. *Compromis*, [6], [9], [21].

II. THE ATTACK ON THE BAKCHAR VALLEY HOSPITAL WAS NOT ATTRIBUTABLE TO RIGALIA AND RIGALIA HAS NO OBLIGATION TO INVESTIGATE THE ATTACK OR TO COMPENSATE ARDENIA; MOREOVER, THE ACT WAS NOT AN ACT OF AGGRESSION BUT PART OF A LEGITIMATE AND PROPORTIONATE OPERATION TO DEFEND AGAINST ZETIAN TERRORISTS

Rigalia is not internationally responsible for the strike on Bakchar Valley Hospital ('the Hospital'). It is not attributable to Rigalia and was, in any event, lawful.[70] Further, Rigalia is not obligated to investigate the attack. Alternatively, this Court should not order an investigation by way of remedy.

A. The Hospital strike is not attributable to Rigalia

Rigalia's connection with Morganian personnel does not satisfy any of the established bases for attribution under the International Law Commission's *Articles on State Responsibility* (*ASR*), which codify customary rules of State responsibility. Further, Rigalia has not subsequently 'adopted and acknowledged' the strike as its own.[71]

1. Morganian personnel involved in the strike did not exercise elements of Rigalian governmental authority

Under article 5, the conduct of persons or entities 'empowered by the law of [the] State to exercise elements of governmental authority' is attributable to that State.[72] Governmental authority connotes acting 'in place of State organs'.[73] It cannot be said that Morganian personnel are acting in place of the Rigalian Defence Force (RDF). They exercise autonomy in launching the strikes and are accountable to Morganian state organs. Moreover, Morgania is motivated by a security interest distinct from that of Rigalia.[74]

---

70. *Phosphates in Morocco (Italy v France) (Preliminary Objections)* [1938] PCIJ (ser A/B) No 74, 28; *ASR* art 2.

71. *ASR* arts 5-8, 11.

72. *ASR* art 5; Shaw, *International Law* (6th ed, 2008) 787.

73. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary* (2002) 100 ['*ASR Commentary*'].

74. *Compromis*, [27].

2. Morganian personnel have not been placed at Rigalia's disposal

Morganian personnel have not been placed at Rigalia's disposal so as to ground attribution under article 6. Article 6 requires that the receiving State exclusively direct the conduct of the sending State's organ.[75] As the RDF is merely 'urging' Morgania to execute the strikes,[76] which remain under Morgania's operational command, Rigalia is not exclusively directing Morganian personnel involved in the strikes.[77]

3. Morganian personnel did not act under Rigalia's effective control

The Hospital strike is not attributable to Rigalia on the basis of 'effective control' as codified in article 8 of the *ASR*.[78] Attribution on this basis requires control of Morganian personnel 'in respect of each operation in which the alleged violations occurred'.[79] The RDF and Defence Minister's non-specific instructions to Morgania do not amount to effective control over Morganian personnel because Morganian personnel retain absolute discretion over target acquisition.[80] In any event, as the drone operator 'clearly went beyond' protocol in directly communicating with an informant while executing the Hospital strike, her actions were *ultra vires* any putative Rigalian instruction and thus not attributable to Rigalia.[81]

4. Rigalia has not subsequently 'adopted and acknowledged' the strike as its own

This Court has only ever recognised adoption as a basis for attribution of private conduct where there was a formal, unambiguous and long-standing endorsement of the conduct in public statements.[82] In contrast, the Rigalian Defence Minister's press statement characterises the Hospital strike as a '*consequence* of Rigalia's fight to defend itself', which stops short of expressly adopting the conduct.[83] As this statement is at best

---

75. *ASR Commentary*, n73, 103; *Behrami v France* (2007) 45 EHRR SE10, 94.

76. *Compromis*, [28].

77. *Compromis*, [30].

78. *Nicaragua*, n27, 65.

79. *Bosnian Genocide*, n24, [400]; *Nicaragua*, n27, 65; *ASR* art 8.

80. *Compromis*, [29].

81. *ASR Commentary*, n73, 113; *Compromis*, [30]-[31].

82. *United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Merits)* [1980] ICJ Rep 3, 33-35; *ASR* art 11.

83. *Compromis*, [31].

ambiguous, this Court should defer to the Rigalian Head of State's official disclaimer of responsibility in a diplomatic note.[84]

B. The Hospital strike was not internationally wrongful

Assuming its attribution to Rigalia, the Hospital strike was nevertheless lawful as it occurred in the exercise of Rigalia's right of self-defence.[85] Further, the Hospital strike was not of sufficient gravity to constitute an act of aggression. The strike was also consistent with Rigalia's customary IHL obligations. As discussed above, Rigalia's IHL compliance also discharges its obligations under article 6 of the *ICCPR*.[86]

1. The Hospital strike was not an act of aggression

Even assuming the Hospital strike cannot be justified as self-defence, it was not an act of aggression. An act of aggression is 'the most serious and dangerous form of the illegal use of force' inconsistent with the *Charter*.[87] It must be of 'sufficient gravity' in light of the 'relevant circumstances'.[88] The Hospital strike does not meet this threshold. In the *Armed Activities* case, this Court declined the Congo's request to make a finding of aggression where Uganda had invaded 'vast areas' of the Congo, occupied the Ituri region, and caused many thousands of casualties over six years.[89] Hence, a significantly less invasive and deadly trespass into Ardenia cannot possibly constitute an act of aggression.

2. The attack complied with Rigalia's IHL and IHRL obligations

The Hospital strike complied with Rigalia's IHL obligations given the military necessity of killing Bermal.[90] The distraction of the Morganian drone operator during the execution of the attack constituted human error and, as such, does not breach the proportionality and discrimination principles. This is because 'errors of targeting' which occur in the context of a lawful attack do not constitute breaches of IHL.[91]

---

84. *Compromis*, [34].

85. *Rigalian Memorial*, 8-11.

86. *Rigalian Memorial*, 7.

87. *Definition of Aggression*, GA Res 3314, UN Doc A/RES/3314 (1974) Preamble, art 6.

88. *Id*, art 2.

89. *Armed Activities*, n45, 224.

90. *Hague Convention*, Preamble.

91. *Partial Award Regarding Western Front, Aerial Bombardment and Related Claims Eritrea's Claims (Judicial and Similar Proceedings)* (2006) 45 ILM 396, 415; Dinstein, n37, 135.

Nor can Ardenia impugn the broader attack on IHL grounds. Bermal, as a 'top separatist commander' and 'major decision-maker in…all military activities in Rigalia',[92] had assumed a continuous combat function and was therefore a lawful target at any time.[93]

Rigalia took feasible precautions to minimise civilian casualties in addition to verifying lawful targets.[94] Rigalia need not have postponed its attack until it could target Bermal without prospect of civilian casualties because it was permitted to take into account his strategic role in the ZSM and the fact that his whereabouts might not have been known again for some time.[95] Moreover, Rigalia need not have warned civilians because the element of surprise was crucial to operational success.[96]

Further, the attack was not disproportionate as expected civilian loss was not excessive in relation to the direct and concrete military advantage anticipated.[97] Killing Bermal had the significant military advantage of curbing 'increasingly deadly'[98] ZSM attacks in Rigalia. The pre-attack expectation of seven civilian casualties was comparatively low.

C. Rigalia is not obligated to investigate the attack under the International Covenant on Civil and Political Rights (ICCPR)

Rigalia's obligation not to deprive individuals of life arbitrarily under article 6 of the *ICCPR* does not extend to Ardenian territory.[99] Even if it did, what is 'arbitrary' for the purposes of article 6 fell to be determined by IHL in accordance with the interpretive principle of *lex specialis*.[100] As the strikes were IHL-compliant they necessarily complied with article 6.[101] The right to an effective remedy arises only upon the breach of a Covenant obligation.[102] As Rigalia has complied with article 6, no remedial obligation of this kind has arisen.

---

92. *Compromis*, [30].

93. *DPH Study*, n31, 34; *Rigalian Memorial*, 5.

94. *Rigalian Memorial*, 5-6.

95. *Compromis*, [28].

96. Fleck, n29, 196-197; *CIHL Rules*, n29, 62-65 (Rule 20).

97. *CIHL Rules*, n29, 46-50 (Rule 14).

98. *Compromis*, [28].

99. *Rigalian Memorial*, 7.

100. *Nuclear Weapons*, n29, 257.

101. *Rigalian Memorial*, 7.

102. *ICCPR* art 2.

D. In any event, an investigation should not be ordered as reparation

If the Court finds that Rigalia is responsible for the Hospital strike, Rigalia is obligated to make full reparation for any injury caused.[103] This Court may award satisfaction only insofar as restitution and compensation cannot make good a State's wrongful act.[104] Investigation is not an 'appropriate modality' of satisfaction for the Hospital strike.[105] The Court's ruling at the preliminary objections phase precludes any order that would determine Morgania's rights and obligations.[106] As any investigation would necessitate inquiry into the conduct of Morganian personnel, the order would be futile.

III. RIGALIA'S BAN OF THE MAVAZI FOR ZETIAN WOMEN AND GIRLS IS CONSISTENT WITH INTERNATIONAL LAW

Rigalia's prohibition on wearing the Mavazi in public spaces and when receiving public services is a permissible limitation on the rights of Zetian women and girls under the *ICCPR*, the *ICESCR*, the *Convention on the Rights of the Child* (*CROC*), and the *Convention on the Elimination of all Forms of Discrimination against Women* (*CEDAW*).

A. Ardenia lacks standing to contest the legality of the ban

Human rights treaties confer rights on individuals, not States.[107] The ban operates exclusively in Rigalia, causing Ardenia no direct injury.

As Zetians are dual Rigalian-Ardenian nationals,[108] Ardenia cannot exercise diplomatic protection on their behalf unless the nationality of Zetians affected by the ban is predominantly Ardenian.[109] Ardenia cannot demonstrate that the 'predominant nationality' of Zetians living in Rigalia is Ardenian, given their 'habitual residence' in Rigalia and the absence of any evidence countervailing this 'important factor'.[110]

---

103. *Factory at Chorzów (Claim for Indemnity)* [1928] PCIJ (Ser A) No 17, 47-48; *ASR* art 31.

104. *ASR* art 37(1).

105. *ASR* art 37(2).

106. *Statute of the International Court of Justice* [1945] 1 UNTS 993, art 59; *Compromis*, [36].

107. HRC, *General Comment 24*, UN Doc CCPR/C/21/Rev.1/Add.6 (1994) [17].

108. *Compromis*, [8].

109. ILC, *Draft Articles on Diplomatic Protection with Commentaries*, UN Doc A/61/10 (2006) art 7 ['*DPA with Commentaries*']; *Case No A/18* (1984) 5 Iran-USCTR 251, 263.

110. *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4, 22; *DPA with Commentaries*, n109, 46.

B. The ban permissibly limits freedom of religion and minority culture under the ICCPR and the CROC

1. The ban permissibly limits religious freedom under article 18(3) of the ICCPR

The ban on the Mavazi, a Masinto headcovering worn by Zetian women, permissibly limits the religious freedom of Zetian women and girls. It is prescribed by law[111] and is necessary to protect public safety and order, and the fundamental rights and freedoms of others.[112] President Khutai's parliamentary speech introducing the ban attests to these legitimate aims.[113]

The scope of *ICCPR* rights may be interpreted in light of subsequent State practice in the treaty's application.[114] Parties to the *ICCPR* and the *European Convention on Human Rights* consider *de facto* bans on wearing the burqa or niqab in public[115] or when receiving a public service[116] to be permissible limitations on religious freedom.[117]

a. Rigalia is afforded a 'margin of appreciation'

The European Court of Human Rights affords States a 'margin of appreciation' when they limit rights, given their better understanding of local conditions.[118] Rigalia's margin of appreciation is determined by reference to the pressing social need to protect the rights of oppressed Zetian women and girls.[119]

---

111. *Maestri v Italy* (2004) 39 EHRR 38, 843; *Compromis*, [16], [21].

112. *ICCPR* art 18(3).

113. *Şahin v Turkey* (2007) 44 EHRR 5, 124 ['*Şahin*']; *Compromis*, [16].

114. *VCLT* art 31(3)(b).

115. Belgian Parliament, *Proposition de Loi n° 5-255/1: Interdiction de se couvrir le visage d'une manière rendant impossible toute identification de la personne* (2010); French National Assembly, *Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public* (2010); Italian Council of Ministers, *Nuove norme per il contrasto del terrorismo internazionale e della criminalità* (2005) art 10; Tunisian Executive Decree, *Circulaire n° 81* (1981).

116. US Department of State, *Annual Report on International Religious Freedom* (2010) (citing, *inter alia*, the practice of Belgium, Canada, Egypt, France, Kosovo, Maldives, Tajikistan, Tunisia and Turkey).

117. Article 9(2) is substantially similar to article 18(3) of the ICCPR: Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (2005) 292-93; *Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] 213 UNTS 222, art 9(2).

118. *Handyside v UK* (1979-80) 1 EHRR 737, 754; *Şahin*, n113, 127; Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 *European Journal of International Law* 907, 919.

119. *Şahin*, n113, 127.

b. The ban is necessary to protect public safety

The freedom to manifest religious belief may be restricted where it endangers lives or property.[120] The Mavazi enables Zetian separatists to conceal their identity when approaching public targets.[121] The ban is proportionate and within Rigalia's 'margin of appreciation'. Less restrictive limitations, such as mandatory identification measures, would be impracticable given how many Zetians wear the Mavazi and Rigalia's inability to effectively control the Northern Provinces.[122]

c. The ban is necessary to protect public order

The prevention of religious or political extremism may justify limitations to protect public order.[123] The ban is necessary on these grounds because the Mavazi perpetuates a culture of systemic violence antithetical to the enjoyment of *ICCPR* rights.[124] The Zetian tribal councils' violent imposition of the Mavazi on women has given rise to a system of extrajudicial punishment, which compromises the integrity of the Rigalian legal system.[125]

d. The ban is necessary to protect the fundamental rights and freedoms of others

Rigalia may restrict the freedom to manifest religious belief in order to protect fundamental rights, as enshrined in the *ICCPR* and *ICESCR*.[126] The ban is necessary to protect gender equality and alleviate pressure on women to wear the Mavazi.[127]

The requirement that women wear the Mavazi is incompatible with gender equality. It applies only to women and impedes their social, cultural and economic lives.[128] The ban is also necessary to relieve pressure on Zetian women and girls to wear the Mavazi, which tribal leaders consider a

---

120. *Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR*, UN Doc E/CN.4/1984/4 (1984) [33].

121. *Compromis*, [18].

122. *Compromis*, [3]-[4].

123. *Şahin*, n113, 127; *Refah Partisi v Turkey* (2003) 37 EHRR 1, 44 ['*Refah Partisi*']; *Karaduman v Turkey* (1993) 74 DR 93, [95].

124. *Dahlab v Switzerland*, ECHR, App No 42393/98 (15 February 2001).

125. *Compromis*, [3]-[4].

126. *ICCPR* art 18(3); Nowak, n44, 385.

127. *Şahin*, n113, 127-28; *Dogru v France* (2009) 49 EHRR 8, 197-98.

128. *Refah Partisi*, n123, 44; *Compromis*, [3]-[4].

'compulsory religious duty'.[129] Prohibiting the wearing of the Mavazi by *all* Zetian women renders it impractical for tribal leaders to inflict inhuman punishment on them.[130] The ban is also required by Rigalia's due diligence obligation under the *CEDAW* to prevent violence against women, given the Mavazi's imposition perpetuates a culture of gender-based violence.[131]

The ban is proportionate to the protection of the rights of Zetian women and girls.[132] Merely criminalising the imposition of the Mavazi is unfeasible, as Rigalia cannot distinguish between women who choose to wear the Mavazi and women who do so out of fear of reprisal. Moreover, Zetians otherwise remain free to practise the Masinto religion.[133]

2. The ban does not violate the rights of Zetian women and girls under article 27 of the ICCPR to enjoy their minority culture and religion

a. The ban permissibly limits article 27 rights

The right of members of a minority to practise their own religion is subject to the same limitations as in article 18(3),[134] which Rigalia has satisfied.[135]

b. Rigalia has lawfully derogated from article 27

Rigalia may derogate from article 27 during officially proclaimed public emergencies threatening 'the life of the nation'.[136] The ZSM campaign constitutes such a threat, as increasing separatist attacks compromise Rigalia's territorial integrity.[137] The ban is 'strictly required by the exigencies of the situation'.[138] It prevents terrorists avoiding detection by wearing the Mavazi during attacks. The ban is not discriminatory as 'it

---

129. *Şahin*, n113, 128.

130. *ICCPR* art 7; Nowak, *Report of the Special Rapporteur on Torture*, UN Doc A/HRC/7/3/Add.7 (2008) [17].

131. *CEDAW* arts 1, 2(a), 2(c)-(f), 3; CEDW, *Yıldırım v Austria*, UN Doc CEDAW/C/39/D/6/2005 (2007) [12.3] ['*Yıldırım*']; *Opuz v Turkey* (2010) 50 EHRR 28, [77]; Committee on the Elimination of Discrimination against Women (CEDW), *General Recommendation 19*, UN Doc A/47/38 (1992) [6], [10]-[11].

132. *Rigalian Memorial*, 21.

133. *Şahin*, n113, 129.

134. Bossuyt, *Guide to the 'travaux préparatoires' of the ICCPR* (1987) 497; VCLT art 32.

135. *Rigalian Memorial*, 19-23.

136. *ICCPR* art 4(1).

137. *Lawless v Ireland* (1979-80) 1 EHRR 15, 31-32.

138. *ICCPR* art 4(1).

applies to all persons without distinction'.[139] The requirement to formally notify other States does not alter the effectiveness of the derogation.[140]

3. The ban permissibly limits the right of Zetian girls to freedom of religion and minority culture under articles 14 and 30 of the CROC

Zetian girls' freedom to enjoy their religion and minority culture under articles 14 and 30 of the *CROC* is subject to the same limitations applying to articles 18 and 27 of the *ICCPR*.[141] For reasons given above, the ban permissibly limits these rights.[142]

Further, the ban is consistent with the 'best interests of the child'.[143] This principle applies collectively to Zetian girls.[144] The religious freedom of children may be restricted if it is in their best interests,[145] consistent with Rigalia's duty to protect minors.[146] The ban is in the best interests of Zetian girls because they cannot freely choose to wear the restrictive Mavazi given their socialisation to patriarchal norms.[147]

C. The prohibition on receiving public services while wearing the Mavazi does not violate the economic, social and cultural rights of Zetian women and girls

1. Ardenia's claim does not give rise to a separate question in relation to economic, social and cultural rights

The scope of permissible limitations on religious and minority rights is the central issue before the Court, and 'no separate question' arises in relation to economic, social and cultural rights.[148] Further, nothing suggests the ban will affect the access to public services of those women wearing the

---

139. *ICCPR* arts 2, 3; HRC, *Bhinder v Canada,* UN Doc CCPR/C/37/D/208/1986 (1989) [6.1] ['*Bhinder*'].

140. HRC, *Silva v Uruguay*, UN Doc CCPR/C/OP/1 at 65 (1984) [8.3].

141. *CROC* arts 14(3), 30; Detrick, *A Commentary on the UNCROC* (1999) 248, 535.

142. *Rigalian Memorial*, 19-24.

143. *CROC* art 3; Detrick, n141, 90.

144. Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child* (2007) 36-37.

145. *X v UK*, EHCR, App No 7992/77 (12 July 1978) 235; *Bhinder*, n139, [6.2].

146. *ICCPR* art 24; *CROC* art 36; Committee on the Rights of the Child (CRC), *Concluding Observations: Jamaica* UN Doc CRC/C/15/Add.210, [33].

147. *C v Manitoba (Director of Child and Family Services)* [2009] 2 SCR 181, [72]-[73].

148. *Şahin*, n113, 138; *Dogru*, n127, 201.

Mavazi, given the Northern Provinces are 'largely governed by the tribal councils'.[149]

2. Alternatively, the ban permissibly limits the economic, social and cultural rights of Zetian women and girls under article 4 of the ICESCR

Rigalia may limit the enjoyment of economic, social and cultural rights if the limitation is 'compatible with the nature of [*ICESCR*] rights and solely for the purpose of promoting the general welfare in a democratic society'.[150]

To be 'compatible with the nature' of *ICESCR* rights, the substance of the limitation cannot jeopardise the essence of the rights.[151] The prohibition on wearing the Mavazi while receiving public services does not compromise the essence of the right of *access* to services, as Zetian women and girls may continue to have access to these services if they comply with the ban.[152]

The ban is also necessary for the 'general welfare' of Rigalian society. As discussed above, the ban enables the functioning of public services by promoting the safety of public buildings.[153] Further, women's oppression contributes to poverty in the Northern Provinces by, for example, preventing women from working.[154] The ban will ultimately facilitate the Zetian community's greater enjoyment of economic, social and cultural rights.[155]

3. The ban is permissible under the CROC

Rigalia is required to 'undertake all appropriate legislative' measures to respect children's right to equal enjoyment of economic, social and cultural rights.[156] The right to access public services under the *CROC* is not absolute since 'its very nature calls for regulation by the State' according to

---

149. *Compromis*, [3].

150. *ICESCR* art 4.

151. *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2000/13 (1986) [56].

152. *Şahin*, n113, 135; *Begum v Denbigh High School* [2007] 1 AC 100, 118 ['*Begum*'].

153. *Rigalian Memorial*, 21.

154. Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: India* UN Doc E/C.12/IND/CO/5 [25], [65].

155. *Masstricht Guidelines on Violations of Economic, Social and Cultural Rights*, UN Doc E/C.12/2000/13 (1997) art 14(d).

156. *CROC* art 4.

community needs.[157] The ban permissibly limits girls' right to education under article 28 of the *CROC*. The ban is reasonable and adheres to the 'best interests of the child' principle,[158] as it protects girls who may be pressured to wear the Mavazi at school.[159] Further, the prohibition preserves security by preventing unidentified people entering schools. The prohibition does not deny the essence of the right – to access education – as students can attend school by not wearing the Mavazi.[160]

D. Rigalia is required to implement the Mavazi ban under the CEDAW

Articles 2(f) and 5(a) of the *CEDAW* create a substantive obligation to eliminate discriminatory cultural patterns.[161] The articles prioritise gender equality over respect for cultural and religious practices.[162] The requirement that Zetian women wear the Mavazi is a discriminatory cultural pattern: forcibly imposing a garment that prevents safe driving and outdoor work is predicated on the assumption that women, by virtue of their gender, cannot or should not do these things.[163] The Mavazi prevents women enjoying equal employment opportunities and safe working conditions, thus violating the *CEDAW*.[164]

---

157. *Şahin*, n113, [154]; *Belgian Linguistic Case (Merits)* (1979-80) 1 EHRR 252 (1968) 281 ['*Belgian Linguistic Case*']; *Fayed v UK* (1994) 18 EHRR 393, 429.

158. Detrick, n141, 92.

159. *Dogru*, n127, 199; *Şahin*, n113, 127-128; *Begum*, n152, 694.

160. *Belgian Linguistic Case*, n157, 28.

161. CEDW, *Vertido v Philippines*, UN Doc CEDAW/C/46/D/18/2008 (2010) [8.4].

162. CEDW, *Concluding Observations: Gabon*, UN Doc CEDAW/C/GAB/CC/2-5 (2005) [30]-[31]; CEDW, *Concluding Observations: Pakistan* UN Doc CEDAW/C/PAK/CO/3 (2007) [28]; *Initial Report: Tajikistan*, UN Doc CEDAW/C/TJK/1-3 (2005) 11.

163. *Compromis*, [4]-[7]; CEDW, *Concluding Observations: Saudi Arabia*, UN Doc CEDAW/C/SAU/CO/2 (2008) [15]-[16].

164. *CEDAW* arts 11(b), 11(f).

IV. ARDENIA'S FAILURE TO INVESTIGATE AND PROSECUTE THE ALLEGED CORRUPTION AND TO PROVIDE LEGAL ASSISTANCE TO RIGALIA CONSTITUTE BREACHES OF THE OECD ANTI-BRIBERY CONVENTION, AND THE FAILURE OF THE ARDENIAN NCP TO RESPOND TO THE COMPLAINT BY THE CRBC CONSTITUTES A BREACH OF THE OECD DECISION ON MNE GUIDELINES

The *OECD Anti-Bribery Convention* ('*OABC*') requires States Parties to criminalise the bribery of a foreign public official ('the offence').[165] The *OECD Decision on MNE Guidelines* ('*Decision*')[166] requires that adherents establish a National Contact Point (NCP) for handling complaints under the *OECD MNE Guidelines* (*Guidelines*), which are non-binding standards of responsible business conduct.[167]

These instruments, to which Ardenia and Rigalia are parties,[168] are binding agreements governed by the *Vienna Convention on the Law of Treaties*.[169] Accordingly, States Parties must interpret their obligations under each instrument in good faith; that is, 'honestly, fairly and reasonably',[170] and in light of the instrument's purpose, subsequent State 'practice in [its] application', and any 'relevant rules of international law.'.[171]

There exist two allegations that, if proven, would constitute the offence: first, that Mineral Dynamics Incorporated (MDI) secured the renewal of its contract with Rigalian Refineries Incorporated (RRI) by offering payments and support to third parties, namely the Zetian Refugee Fund (ZRF) and Clyde Zangara ('the Contract Allegation'); and second, that MDI transporters made payments to members of the tribal councils ('the Transporters Allegation').[172] Ardenia's response to these allegations violated the *OABC*.

In addition, the alleged conduct of MDI and RRI potentially breached the *Guidelines*. As it was the subject of the CRBC's complaint, Ardenia's

---

165. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1998) 37 ILM 4 art 1 ['*OABC*'].

166. OECD, *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, C(2000)96/FINAL (2000) I.1 ['Decision'].

167. OECD, *The OECD Guidelines for Multinational Enterprises* (2000) 9 ['*Guidelines*'].

168. *Compromis*, [38].

169. *VCLT* art 2(a); *Convention on the Organisation for Economic Co-operation and Development* [1960] 888 UNTS 179 art 5 ['*OECD Convention*'].

170. Villiger, n7, 425.

171. *VCLT* art 31.

172. *Compromis*, [12], [22].

obligations under the *Decision* were enlivened. Ardenia's NCP violated the *Decision* in its handling of the complaint.

These violations directly injured Rigalia. Ardenia's obligations were owed to all States Parties and its violations 'specially affected' Rigalia because of their impact on a Rigalian State-owned company and non-governmental organisation.[173]

A. Ardenia's failure to investigate and prosecute the alleged corruption breached article 5 of the OECD Anti-Bribery Convention ('OABC')

1. In responding to alleged offences under the OABC, States Parties must exercise their prosecutorial discretion in conformity with article 5

Article 5 requires that States Parties investigate allegations of the offence.[174] Subsequent State practice in interpreting article 5 confirms that States Parties are bound to investigate any 'well-founded suspicion'[175] of the offence and prosecute where sufficiently 'credible' evidence[176] creates a 'realistic prospect of conviction'.[177] Further, article 5 expressly prohibits States Parties from allowing 'considerations of national economic interest, the potential effect upon relations with another state, or the identity of the natural or legal persons involved' to influence investigations and prosecutions of the offence.[178]

2. In responding to the alleged corruption, Ardenia did not exercise its prosecutorial discretion in conformity with article 5

a. Ardenia failed to investigate the allegations reported in 2002

The 2002 media reports, which first raised the Contract and Transporters Allegations, created a well-founded suspicion of the offence.[179] State practice confirms that article 5 requires States to

---

173. *ASR* art 42(b)(i); *ASR Commentary*, n73, 119.

174. *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1998) 37 ILM 8, [27] ['*OABC Commentary*'].

175. OECD, *Hungary – Phase 1 Implementation Report* (2003) 13 [Hereinafter '*Hungary-Ph.1* (2003) 13']; *UK-Ph.2* (2005) 48; *Luxembourg-Ph.2* (2004) 23.

176. *US-Ph.3* (2010) 19; *Austria-Ph.2* (2006) 29-31.

177. *UK-Ph.2* (2005) 51; *France-Ph.2* (2003) 28; *Canada-Ph.2* (2005) 33.

178. *OABC* art 5.

179. *Compromis*, [12].

proactively seek further evidence in response to such media reports.[180] Ardenia's failure to follow up the reports breached article 5.

b. Ardenia failed to prosecute the allegations

The Contract Allegation triggered Ardenia's obligation to prosecute because it was substantiated by an MDI employee directly involved in the negotiations.[181] His statement established a realistic prospect of conviction. It indicated that MDI had committed the offence by 'intentionally' offering and giving 'undue pecuniary … advantage[s]' to third parties so that Bikra, as the official of a Rigalian public enterprise affiliated with the third parties,[182] would renew MDI's contract.[183]

Further, the employee's statement enlivened Ardenia's obligation to prosecute the Transporters Allegation. It provided credible evidence that MDI transporters had made payments to tribal council members. These members are foreign public officials because they are office-bearers in an 'autonomous' region, the Northern Provinces.[184] The transporters sought an improper advantage as MDI was not 'clearly entitled'[185] to additional security or the 'smooth delivery' of its products.[186] As the fees were undocumented[187] and intended to induce the performance of unofficial, discretionary tasks,[188] they did not fall within the offence's 'small facilitation payments' exception.[189]

---

180. *Bulgaria-Ph.2* (2003) 10; *Japan-Ph.2* (2005) 5; *UK-Ph.2* (2005) 8, 48; *Luxembourg-Ph.2* (2004) 23; *Italy-Ph.2* (2004) 25; *Korea-Ph.2* (2004) 7; OECD Working Group on Bribery, *Annual Report* (2009) 26-31.

181. *Compromis*, [22].

182. *OABC Commentary*, n174, [14]-[15].

183. *OABC* art 1(1).

184 *OABC Commentary*, n174, [18]; Zerbes, 'Article 1: The Offence of Bribery of Foreign Public Officials', in Pieth et al (eds), *The OECD Convention on Bribery: A Commentary* (2007) 73-74; *Compromis*, [6].

185. *OABC Commentary*, n174, [5]; *US v Kay* 359 F.3d 738 (2004).

186. *Compromis*, [22].

187. OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, C(2009)159/REV1/FINAL (2009) art 6; *Australia-Ph.1* (2000) 7.

188. *New Zealand-Ph.1* (2002) 8; *US-Ph.2* (2002) 34, 38; *Switzerland-Ph.1* (2000) 22.

189. *OABC Commentary*, n174, [9].

c. In any event, Ardenia suspended its investigation in violation of article 5

The influence of national security concerns on Ardenia's decision to suspend the investigation breached article 5.[190] Subsequent interpretation of the *OABC* confirms that article 5 prohibits States from allowing national security considerations to influence enforcement of the offence.[191]

In any event, national security has only been recognised as a permissible consideration where continuing an investigation would expose a State to 'multiple loss of life'.[192] No such risk existed in June 2009, as ZSM violence was confined to Rigalia[193] and Ardenia maintained 'friendly ties' with the Zetians.[194]

Further, this Court may infer that other considerations prohibited by article 5 influenced the suspension.[195] President Arwen's contemporaneous statement, against Ardenian interests, that the suspension was 'founded in part on a concern over … the loss of hundreds of jobs and millions of dollars'[196] is 'highly probative'[197] evidence that considerations of 'national economic interest' influenced the suspension. Further, this Court may draw the inference that 'the identity of the … legal person involved' influenced the decision because Ardenia has not proffered evidence, to which it has exclusive access, as to whether the Ardenian Public Prosecutor met with MDI lobbyists[198] or attended MDI functions.[199]

B. Ardenia's failure to provide prompt and effective legal assistance in response to Rigalia's mutual legal assistance (MLA) request breaches article 9 of the OABC

Article 9(1) of the *OABC* requires Parties to 'provide prompt and effective legal assistance' when requested by any Party bringing

---

190. *Compromis*, [25].

191. *VCLT* art 31(1); *Germany-Ph.2* (2003) 37; Cullen, 'Article 5: Enforcement', in Pieth et al (eds), n184, 322; Rose-Ackerman and Billa, 'Treaties and National Security Exceptions' (2008) 40 *New York Journal of International Law and Politics* 441, 458; *UK-Ph.2bis* (2008) 46.

192. *R (On the Application of Corner House Research and Others) v Director of the Serious Fraud Office* [2009] 1 AC 756, 846 (Lord Bingham); Cullen, n191, 325; *France-Ph.2* (2004) 31; *Japan-Ph.2* (2005) 57; *UK-Ph.2* (2005) 55.

193. *UK-Ph.2bis* (2008) 46.

194. *Compromis*, [20]-[21].

195. *Japan-Ph.2* (2005) 57.

196. *Compromis*, [25].

197. *Nicaragua*, n27, 41.

198. *Compromis*, [25]; *UK-Ph.2* (2005) 36.

199. *Corfu Channel*, n63, 18.

investigations and proceedings 'within the scope of the Convention'. Parties cannot decline assistance on bank secrecy grounds.[200] Rigalia's MLA request enlivened these obligations. Though Rigalia made the request on 30 April 2009, Ardenia has not provided assistance. Accordingly, Ardenia breached its obligation to provide prompt assistance.

1. Rigalia's request enlivened Ardenia's article 9 obligations

Rigalia's request was made for the purpose of an investigation 'within the scope of the Convention'. It therefore triggered Ardenia's article 9 obligations. President Khutai's attempt to pressure Ardenia by requesting the investigation did not violate article 5.[201] This is because article 5 is concerned only with attempts by States to *evade* the enforcement of the offence. It does not apply to requests to open investigations. This is consistent with subsequent State practice[202] and the *OABC*'s purpose of promoting vigorous enforcement.[203]

2. Ardenia did not provide prompt assistance in response to Rigalia's request

Consistent with the ordinary meaning of 'prompt' and subsequent State practice, States Parties must provide legal assistance as a matter of priority.[204] In failing to satisfy Rigalia's request for over one year, Ardenia breached article 9.

3. Ardenia's failure to provide prompt assistance is not excused by the reasons it provided

Ardenia's failure to provide prompt assistance to Rigalia is not excused by either of the reasons it gave at the Phase 2 WGB Examination.[205] Ardenia's bank secrecy legislation does not justify its failure to provide prompt assistance as such legislation can only justify short, procedural delays.[206] Further, the irrelevance of ZRF-Council

200. *OABC* art 9(3).

201. *Compromis*, [22].

202. *France-Ph.2* (2004) 29, 31; *UK-Ph.2* (2005) 53; *Denmark-Ph.1* (2000) 17; *Netherlands-Ph.1* (2001) 22; *New Zealand-Ph.1* (2002) 20.

203. *OABC Commentary*, n174, 27.

204. *Luxembourg-Ph.2* (2004) 30; *Poland-Ph.2* (2007) 37; *New Zealand-Ph.2* (2006) 43; *Bulgaria-Ph.2* (2003) 39-40; *Compromis*, [23].

205. *Compromis,* [23].

206. *OABC* art 9(3); *Poland-Ph.2* (2007) 37; *Switzerland–Ph.2* (2004) 28-29; *Israel –Ph.2* (2009) 40-41; *South Africa-Ph.2* (2010) 53-54.

correspondence could not excuse its delay, as defects in a request will only justify delays where those defects have promptly been brought to the requesting party's attention.[207]

In any event, Ardenia provided no reason for its failure to provide the other evidence requested by Rigalia.

C. The failure of the Ardenian NCP to respond to the CRBC's complaint breached the OECD Decision on MNE Guidelines

Ardenia's NCP was obligated to respond to complaints under the *Guidelines* in conformity with the *Decision* and its *Procedural Guidance*.[208] Under the *Procedural Guidance*, NCPs may determine whether any complaint under the *Guidelines* 'merit[s] further consideration'.[209] The criteria for assessing the merit of a complaint, enumerated in the *Procedural Guidance*, are non-specific.[210] Accordingly, subsequent State practice is instructive in determining the lawfulness of an NCP's response.[211] Ardenia breached the *Decision* because its NCP failed to comply with the *Procedural Guidance* in handling the CRBC's complaint.

1. Ardenia's NCP could not refuse to respond to the CRBC's complaint as it merited further consideration

a. Ardenia's NCP was an appropriate forum for the CRBC's complaint

NCPs must respond to complaints where their involvement is essential to resolving the issues raised, irrespective of where the misconduct occurred.[212] As Ardenian assistance was necessary for obtaining crucial evidence, Ardenia's NCP could not reject the complaint on the basis that the CRBC should have contacted Rigalia's NCP.[213] Furthermore, MDI's status as an Ardenian-owned corporation imposed a heightened obligation on Ardenia's NCP to accept thecomplaint.[214]

---

207. *Switzerland-Ph.2* (2004) 27-28; *Estonia-Ph.2* (2008) 33-34; *Portugal-Ph.2* (2007) 38-40.

208. *Decision*, n166.

209. *Decision*, 'Procedural Guidance', n166, C.1.

210. Ibid.

211. *VCLT* art 31(3)(b); OECD, *Annual Report on the OECD Guidelines* (2010) 4.

212. Norway NCP, *Final Statement: Konsberg Automotive* (2009) 4 [Hereinafter 'Norway NCP, *Konsberg* (2009)']; UK NCP, *BTC Oil Pipeline* (2004); Norway NCP, *Cermaq ASA* (2009).

213. *Compromis*, [23].

214. OECD Watch, *Model National Contact Point* (2007) 16; *Compromis*, [10].

b. Ardenia's NCP could not reject the complaint on the basis of parallel legal proceedings

An NCP's discretion to reject a complaint on the basis of 'parallel legal proceedings' is limited to situations where substantively similar issues have been resolved in prior proceedings or where an MNE declines involvement in the NCP process.[215] As investigations into the alleged conduct have not resolved the issues and the relevant MNEs have not declined involvement, Ardenia's NCP could not reject the complaint on this basis.

c. Ardenia's NCP could not reject the complaint on the basis that the OECD MNE Guidelines do not apply to RRI

Ardenia's NCP could not reject the complaint on the ground that the *Guidelines* did not apply to RRI. States Parties have interpreted the *Guidelines*' expansive definition of a multinational enterprise[216] to encompass companies exhibiting sustained dependence on a foreign company's supply of goods.[217] As RRI has depended on MDI-supplied coltan for a decade, it is a multinational enterprise to which the *Guidelines* apply. It breached the *Guidelines* by allegedly demanding bribes.[218] Regardless, Ardenia's NCP was required to examine those parts of the complaint concerning MDI.[219]

2. In any event, Ardenia's NCP breached its obligation to respond to the CRBC's meeting request

The Ardenian NCP's obligation to cooperate with other NCPs required it to contact Rigalia's NCP after determining it was the proper forum for the CRBC's complaint.[220] Accordingly, its decision to ignore the CRBC's joint meeting request and failure to otherwise contact Rigalia's NCP breached the *Decision*.

---

215. UK NCP, *Unilever* (2010) [12]; Netherlands NCP, *PSPC* (2009) 4; Ireland NCP, *Corrib Gas Project* (2008) 5.

216. *Guidelines*, n167, 12.

217. *Guidelines*, n167, 58; UK NCP, *Afrimex* (2008) [29]-[51]; Australia NCP, *ANZ* (2006) [10]; Netherlands NCP, *Chemical Pharmacy Holland* (2004) 3; OECD, *Annual Report on the OECD Guidelines* (2003) 21-22.

218. *Guidelines,* n167, 29.

219. Australia NCP, *GSL* (2006) [4]; UK NCP, *Hindustan Lever* (2008) [10]; France NCP, *Nam Theun 2* (2005).

220. *Decision,* n166, I.2; France NCP, *Aspocomp* (2003); Australia NCP, *ANZ* (2006); Netherlands NCP, *NCP Annual Report* (2009) 5.

PRAYER FOR RELIEF

For the foregoing reasons, the State of Rigalia respectfully requests this Honourable Court to adjudge and declare:

A. that Ardenia does not have standing in this Court in relation to the strikes in Rigalia or, alternatively, that Rigalia's drone strikes in Rigalia and Ardenia comply with international law, and that an order for cessation is therefore unavailable;

B. that the attack on Bakchar Valley Hospital is neither attributable to Rigalia, nor internationally wrongful in any way, and that Rigalia has no obligation to investigate or to compensate Ardenia;

C. that Rigalia's Mavazi ban is consistent with international law; and

D. that Ardenia has breached the *OECD Anti-Bribery Convention* by failing to investigate and prosecute MDI's alleged corruption and to provide legal assistance to Rigalia, and that Ardenia's NCP breached the *OECD Decision on MNE Guidelines* by failing to respond to the CRBC's complaint.